No. 10-50035

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

THE ELIJAH GROUP, INC.,

Plaintiff-Appellant,

v.

CITY OF LEON VALLEY, TEXAS,

Defendant-Appellee.

On Appeal from the United States District Court
for the Western District of Texas, San Antonio Division
No. 5:08-CV-0907 – Hon. Orlando Garcia

OPENING BRIEF OF PLAINTIFF-APPELLANT THE ELIJAH GROUP

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CERTIFICATE OF INTERESTED PERSONS

In the appeal Elijah Group, Incorporated, *Plaintiff-Appellant* v. City of Leon Valley, Texas, *Defendant-Appellees* (Appeal No. 10-50035), the undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

The Elijah Group, Inc., d/b/a The Restoration Centre (Plaintiff-Appellant)
The bondholders of Church on the Rock–San Antonio (sellers of property at issue in this litigation)
Happy State Bank, a Texas banking association, d/b/a GoldStar Trust Company (trustee for the benefit of the Bondholders of Church on the Rock–San Antonio)
Happy Bancshares, Inc. (owner of Happy State Bank)
HBI & Company (partial owner of Happy Bancshares, Inc.)
The shareholders of Happy Bancshares, Inc.
Wanda Perdue (Vice President of GoldStar Trust Company)
C. Jared Knight (Attorney for GoldStar Trust Company)
Burdett Morgan Williamson & Boykin, LLP (Law Firm for GoldStar Trust)
City of Leon Valley, Texas (Defendant-Appellee)
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s/ Lori H. Windham
Lori H. Windham
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STATEMENT REGARDING ORAL ARGUMENT

Plaintiff-Appellant the Elijah Group respectfully requests oral argument. This case presents an important question regarding the Equal Terms provision of the Religious Land Use and Institutionalized Persons Act of 2000, 42 U.S.C. §§ 2000cc *et seq*. ("RLUIPA"), upon which the Courts of Appeals disagree. This case also presents important questions under (1) the Substantial Burden provision of RLUIPA and (2) the Texas Religious Freedom Restoration Act—questions which will affect the religious liberty of houses for worship throughout this Circuit. Appellant respectfully submits that oral argument is necessary for a full exposition of the issues inherent in the case.

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STATEMENT OF JURISDICTION

The district court had subject matter jurisdiction under 28 U.S.C. § 1331. The district court's orders of November 30, 2009, granted Defendant-Appellee's motion for summary judgment, denied Plaintiff-Appellant's motion for summary judgment, and entered judgment in favor of Defendant-Appellee on all claims. This Court has jurisdiction over that decision under 28 U.S.C. § 1291. Plaintiff-Appellant timely filed a notice of appeal on December 30, 2009. *See* Fed. R. App. P. 4(a).

STATEMENT OF ISSUES

I. Whether Leon Valley has "treat[ed] a religious assembly or institution on less than equal terms with a nonreligious assembly or institution" by excluding churches from a zoning district where it permits numerous secular assemblies—including auditoriums, convention centers, private clubs, theaters, and schools. 42 U.S.C. § 2000cc(b)(1).

II. Whether Leon Valley has "impose[d] a substantial burden on the religious exercise of [the Church]" by excluding the Church from the vast majority of the land within the city and prohibiting the Church from meeting at its property for worship. 42 U.S.C. § 2000cc(a)(1).

III. Whether Leon Valley has violated the Texas Religious Freedom Restoration Act by excluding the Church from the vast majority of the land within the city and prohibiting the Church from meeting at its property for worship.

INTRODUCTION

The question in this case is whether a city can exclude churches, mosques, and synagogues from areas of the city where it welcomes a wide variety of secular assemblies—including auditoriums, convention centers, private clubs, theaters, and schools. Plaintiff Elijah Group (the "Church") wants to buy a domed chapel (the "Property") and use it as a church. Since it was constructed in 1996, the Property has always been used as a church.

But Defendant Leon Valley doesn't want the Property to be used as a church. In its view, the Property is located in an important retail corridor, and it would be "very undesirable for a large church to displace sales tax generating business/commercial property . . . and have a giant 'hole' in a retail area." R.2240 (Leon Valley's Response to Plaintiff's Objections).[1] Thus, Leon Valley amended its zoning ordinance to exclude churches from the B-2 Retail district—including from the Property at issue here.

The problem is that the amended ordinance now violates the "Equal Terms" provision of RLUIPA, which prohibits the government from implementing any land use regulation 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). Spe-

[1] "R." citations are to the official record. For convenience, these may be followed by an "R.E." citation denoting the tab in the Record Excerpts where the same document is located.

cifically, while Leon Valley prohibits churches from locating in the B-2 zone, it permits a wide variety of secular assemblies—including auditoriums, convention centers, "Other Similar Meeting Facilities," private clubs, theaters, child care facilities, and schools. R.1517-24. Several courts have held that permitting such secular assemblies while excluding churches violates RLUIPA. *See Midrash Sephardi, Inc.* v. *Town of Surfside*, 366 F.3d 1214, 1231 (11th Cir. 2004) (violation of Equal Terms where a town's business district permitted "private clubs and lodges" but not churches); *Digrugilliers* v. *Consolidated City of Indianapolis*, 506 F.3d 612, 614-15 (7th Cir. 2007) (violation of Equal Terms where a city permitted "auditoriums, assembly halls, [and] community centers" as a matter of right, but required churches to obtain a variance).

Instead of acknowledging this Equal Terms violation, the magistrate judge's Report (which the district court adopted without an opinion) recommended summary judgment in favor of Leon Valley. According to the Report, it is not enough for the Church to show that it is treated worse than secular assemblies; it must also show that it was treated worse than secular assemblies "that are similarly situated as *to the [City's] regulatory purpose*." R.2152; Report 16.[2] Here, the Report said, the regulatory purpose was "to create a retail corridor"; and churches would not contribute to a retail corridor in the same way as auditoriums, meeting facilities, or

[2] The Report is cited throughout by both the record page number and a parallel citation to the page number of the original Report.

schools. R.2153; Report 17. Thus, according to the Report, the fact that "other non-religious assemblies [can] locate in zone B-2 is of no consequence." *Id.*

This ruling is wrong for two reasons. First, the Report's "regulatory purpose" test has no basis in the text, purpose, or history of the Equal Terms provision. Although the Third Circuit has used that test, it has rightly been rejected by the Seventh and Eleventh Circuits because RLUIPA says nothing about a "similarly situated" or "regulatory purpose" requirement. The text merely requires a plaintiff to show that "the governmental authority treats a religious assembly or institution differently than a nonreligious assembly or institution." *Midrash*, 366 F.3d at 1230.

Second, even assuming the "regulatory purpose" test were correct, that test is satisfied here. Churches do no more harm to the retail corridor than secular assemblies—like auditoriums, meeting facilities, private clubs, child care facilities, and schools—all of which may be run on a non-profit basis. In fact, undisputed evidence shows that the Church would *support* retail uses by drawing individuals to the retail zone on quieter nights and weekends. Moreover, the Church currently operates a day care, administrative offices, and counseling program at the Property on weekdays (all of which are permitted uses); the only question is whether it can also use the Property for worship on nights and weekends. Leon Valley offers no

conceivable retail purpose that is served by forcing the Property to remain vacant at those hours. Excluding the Church thus violates RLUIPA.

Independently, Leon Valley's zoning ordinance also violates the "Substantial Burden" provisions of RLUIPA and TRFRA, which impose strict scrutiny on any land use regulation that creates "a substantial burden on the religious exercise of a [church]." 42 U.S.C. § 2000cc(a)(1). Here, a substantial burden exists because (a) Leon Valley's zoning ordinance has dramatically reduced the land available for church use, making it difficult for the Church to locate within city limits; and (b) Leon Valley's zoning ordinance has forbidden the Church from conducting religious worship on its own Property. *See Islamic Center of Mississippi* v. *City of Starkville*, 840 F.2d 293 (5th Cir. 1988) (substantial burden where a city made a religious use "relatively inaccessible within the city limits"); *Merced* v. *Kasson*, 577 F.3d 578 (5th Cir. 2009) (substantial burden where a city forbade a Santeria priest from carrying out a core religious exercise—animal sacrifice—in his own home).

STATEMENT OF THE CASE

On October 31, 2008, the Church filed a complaint in Texas state court alleging violations of the Texas Civil Practice and Remedies Code, the Texas Religious Freedom Restoration Act, RLUIPA, and the federal and state constitutions. R.21-35. Leon Valley then removed the case to the United States District Court for the Western District of Texas. R.10-13, 62-64.

After discovery, the parties filed cross-motions for summary judgment. On October 2, 2009, Magistrate Judge Nowak issued a Report recommending summary judgment in favor of Leon Valley. R.2137-65. The Church timely filed objections to the magistrate's Report. R.2177-2207. On November 30, 2009, the court issued a one-page order adopting the magistrate's Report in full and entered judgment in favor of Leon Valley. R.2277-78. On December 30, 2009, the Church timely filed a notice of appeal. R.2279.

STATEMENT OF THE FACTS

A. The Elijah Group

The Elijah Group is a small evangelical Christian church. R.2137; Report 1. In 2007, it was growing steadily and expanding its ministries to the community, including a successful child care ministry and a counseling program for troubled teens. R.373, 379-80; R.2140-41; Report 4-5. But the Church needed a new place to go. It was leasing commercial space in San Antonio next to a bar. Then a tattoo parlor, liquor store, and adult bookstore moved in nearby, creating nuisances for the worshippers and a bad atmosphere for the children and teens in its care. R.22-23, 275. Its landlord was looking for a more profitable commercial tenant and pressuring the church to leave its rented space. *Id.*; R.371-75. Thus, the Church began looking for a new space.

The Church had several criteria for a new space. It needed to locate in the northwest San Antonio/Leon Valley area, where its members lived. R.378-79, 573-74. It needed a space large enough to accommodate its members. R.373-75. As a small congregation with limited finances, it needed to find an existing building suitable for church use, rather than an empty lot or a commercial space requiring major renovations. R.546-51, 572-74. It needed a building suitable to operate its childcare ministry. R.373-75. And because of the deteriorating situation in its current property, it needed to move quickly. R.370-72.

The Church examined many properties to no avail. Some were too large, some were prohibitively expensive to renovate, and others were located across town, far from its members and the community it serves. R.546-51, 572-74.

B. The Property

Eventually, the Church focused on an abandoned church building that is the subject of this litigation ("the Property"). The Property hosts a parking lot, a class-room building, and a large, domed chapel fronted by Greek columns. R.617; R.E.8. It fronts on Bandera Road, a main thoroughfare in the City of Leon Valley, which is itself a small city surrounded by the City of San Antonio. R.1012; R.E.7 (church is large B-2 (red) parcel adjoining large R-3 (orange) parcel at Bandera Road and Rue Francois). To the north is a strip mall; to the south is a funeral home. R.617; R.E.8; R.427-29. To the west (across Bandera Road) are three parcels of land zoned B-3 Commercial. R.1012; R.E.7. And to the east is a residential neighbor-hood. *Id.*

The Property was constructed as a church in 1996 and had been used as a church ever since. R.958. But in September 2007, the church that occupied the Property defaulted on its loans. Happy State Bank, doing business as GoldStar Trust ("the Bank"), then foreclosed on the Property. R.2138; Report 2.

C. The Elijah Group purchases the Property

The Bank began aggressively seeking a new buyer for the property, but found that selling was an uphill battle. R.390-93, 958. Its problems were compounded by the fact that the building, with its large concrete dome, "can really only be used for a church," and if any attempt were made to raze the building, "demolition cost would be astronomical." R.1845. It decided to hold an auction. R.958.

The Church participated in the auction because the Property was, as Pastor Crain put it, "perfect for us"—it had a sanctuary with enough space for its congregation, administrative offices, and a side building suitable for its day care. R.548. After submitting the winning bid of $1.33 million, the Church contracted to purchase the Property. R.2139; Report 3; R.390-91.

D. Leon Valley's Zoning Code

Then the zoning code intervened. The Property is zoned B-2 Retail. R.2138; Report 2. Before 2007, Leon Valley permitted churches to locate in zone B-2 (and any other zone), provided they obtained a special use permit. *Id.*; R.1851. Thus, churches were treated just like auditoriums, convention centers, funeral homes, and private clubs—all were permitted with a special use permit. R.1517-24; R.E.6.

But in 2007, desiring to boost its tax revenues, Leon Valley changed its approach to churches.[3] *See* R.1427-1602 (2007 zoning code). Where it had once permitted churches throughout the city, it now revised its zoning code to exclude churches from all but one of its twelve districts: B-3 Commercial. *See* R.1519; R.E.6; R.1494. In the B-3 zone, which makes up only 11% of the city's total land area, R.1852, Leon Valley grouped churches with industrial uses such as warehouses, storage units, flea markets, lumberyards, and firing ranges. R.1517-24; R.E.6. Many parcels in the B-3 zone are also vacant, meaning that a church would have to build from scratch. R.1852.[4]

Although churches are now completely excluded from the B-2 zone, many secular assemblies are still permitted. Secular assemblies permitted as a matter of right include: "School," "Theater, Indoor," "Recreational Facility, Neighborhood," "Library," "Art Gallery/Museum," "Child Care Facility," and "Gymnasium/Physical Fitness Facility." R.1517-24; R.E.6. Secular assemblies permitted with a special use permit include: "Auditorium," "Convention Center," "Other

[3] The Report incorrectly says the zoning revision took place in 2003. R. 2138; Report 2. Although the City updated its Master Plan in 2003, *see* R.1243, the Master Plan is not the operative law but merely a guide, R.1254, and says nothing about whether churches should be excluded from the B-2 zone. *See* R.1244. Churches were not excluded from the B-2 zone until the zoning code amendments in 2007. *See* R.1427 (no other revisions since 2003 Master Plan); R.741 (city manager's declaration explaining the change took place in 2007).

[4] Also in 2007, Leon Valley removed outdoor theaters, ambulance services, cemeteries, suite hotels, and air conditioner repair from the B-2 zone. R.1010.

Similar Meeting Facilities," "Club or Lodge (private)," and "Funeral Homes/Mortuary." *Id.*

Leon Valley's purpose for reclassifying churches was financial. As zoning commissioner Baird explained, "the reason churches were placed in the B-3 (Commercial) zoning district" was that "non-tax paying entities" were placing Leon Valley in "an economic crisis." R.1982; *see also* R.1824; R.E.9. Other city officials stated that the purpose was to concentrate retail uses on Bandera Road. R.741 (city manager's affidavit); R.1831; R.E.9. And in its district court briefing, Leon Valley stated that "the very reason for a new zoning approach" was that it would be "very undesirable for a large church to displace sales tax generating business/commercial property . . . and have a giant 'hole' in a retail area that is relatively empty six days a week." R.2240; *see also* R.1849-50 (churches were excluded from B-2 because a "[l]arge amount of sales taxes have been lost over the last several years and we felt that it was important to try to maintain the integrity of certain land within the city for economic development purposes") (statement of zoning commission Chairman Guerra).

However, even after the 2007 revisions, the Bandera Road corridor is not limited to retail use. Large swaths are still zoned B-3. *See* R.1012; R.E.7 (B-2 Retail parcels in red, B-3 Commercial parcels in green). And a variety of non-retail uses are still permitted in the B-2 zone—including "Farm," "Radio or Television

Station," "Equestrian Center," "Laboratory, Dental or Medical," "Convalescent Ctr.," and "Volleyball Park." R.1517-24; R.E.6.

E. The application for rezoning

Because the Property had been used as a church for over a decade, the 2007 zoning changes did not affect the Property immediately. Instead, Leon Valley deemed use of the Property as a church to be a continued, non-conforming use. R.2138; Report 2. But after the original church abandoned the Property and the Bank foreclosed, the non-conforming use lapsed. *Id.*; R.744-48. Thus, by the time the Bank put the Property up for an auction, Leon Valley had declared it could no longer be used as a church. R.2138; Report 2.

Accordingly, before auctioning the Property, the Bank applied for rezoning, asking Leon Valley to rezone the Property to B-3 so church use could continue. *Id.*; Report 2. The rezoning application was quite clear that the property would be used as a church, *see* R.1794, and by the time of the zoning commission hearings, the Church had contracted to buy the Property. R.1866. That contract was contingent upon a rezoning. R.2139; Report 3.

Pastor Crain, on behalf of the Church, appeared before the zoning commission to support the rezoning request. R.1816-17. Several neighbors objected to rezoning, with some objecting to any tax-exempt use of the Property, and others expressing concern that, should the church vacate, a more intensive B-3 use like an

auto service station might go in. *See* R.1817-18. To allay this concern, the Church voluntarily entered into restrictive covenants on the Property. Those covenants provided that, if the property were zoned B-3, no B-3 use other than a church would be permitted. R.751-52; R.1811-12; R.1845.

Leon Valley rejected this compromise. R.1847-48. The zoning commission recommended denial, and the city council denied the rezoning request. R.1855.

F. Use of the Property as a child-care facility

After the denial, the Church leased the Property from the Bank. R.2139; Report 3. It requested and received occupancy permits to use the Property for child care and administrative offices—both permitted uses in the B-2 zone. R.1896-97. Thus, the Church may now legally use the Property as a day care and administrative center five days per week. *Id.* But Sunday morning worship is prohibited.

Nevertheless, because the Church needed someplace to worship, it attempted to hold church services at the Property. R.2139; Report 3. Leon Valley obtained a temporary restraining order preventing the Church from holding services until fire code violations were cured. R.93-94. When the Church attempted to gather for worship in its parking lot, a fire marshal entered the Property and, standing in full view of the worshippers, videotaped the worship service while visibly carrying a gun. R.504-08. Since the TRO expired, the Church has resumed services at its

Property, but Leon Valley has declined to cite the Church pending resolution of this lawsuit. R.285.

G. The lawsuit

On October 31, 2008, the Church filed this lawsuit. The Church's claims centered on the Equal Terms and Substantial Burden provisions of RLUIPA. In its Equal Terms claim, the Church argued that the zoning code treats churches "on less than equal terms" with secular assemblies (42 U.S.C. § 2000cc(b)(1)) because it prohibits churches where it allows many secular assemblies—including auditoriums, convention centers, schools, theaters, and private clubs. R.1209-14. In its Substantial Burden claim, the Church argued that the zoning ordinance imposed a substantial burden by significantly restricting the amount of land available to the Church and by prohibiting the Church from using its property for religious worship. R.1217-20.

On cross motions for summary judgment, Magistrate Judge Nowak recommended summary judgment in favor of Leon Valley. R.2164; Report 28. The magistrate's Report reasoned that the Equal Terms provision was not violated because the purpose of the zoning code was to create a retail corridor along Bandera Road, and secular assembly uses, unlike churches, furthered that purpose. R.2151-54; Report 15-18. The Report also rejected the Substantial Burden claim on the ground that (1) the Substantial Burden provision "does not apply to the Church's claim,"

and (2) even if it did apply, the Church had suffered no substantial burden. R.2143-51; Report 7-15. The district court issued a one-page order adopting the Report in full, R.2277-78, and the Church timely appealed, R.2279.

SUMMARY OF THE ARGUMENT

I. Leon Valley's zoning code violates the Equal Terms provision because it prohibits churches where it allows a wide variety of secular assemblies—including auditoriums, convention centers, private clubs, theaters, child care facilities, and schools. In rejecting this claim, the Report made two fundamental errors. First, siding with the Third Circuit's erroneous interpretation of RLIUIPA, the Report adopted a "regulatory purpose" test that is unsupported by the text, purpose, or history of RLUIPA. The Report should have adopted the Eleventh Circuit's plain language approach, under which the Church is entitled to summary judgment.

Second, even assuming the "regulatory purpose" test is correct, the Report misapplied that test to this case. Although Leon Valley claims that its "regulatory purpose" is to create a retail corridor along Bandera road, it permits a wide variety of non-retail uses that undermine that supposed purpose. And even assuming its purpose is to create a retail corridor, churches are just as consistent with that purpose as are permitted secular assemblies. The Report offered no reason why forcing the Church to remain empty on nights and weekends would contribute to a retail corridor.

II. Leon Valley's zoning ordinance also violates RLUIPA's Substantial Burden provision because (a) it has made it extraordinarily difficult (if not impossible) for the Church to locate in Leon Valley, and (b) it has prohibited the Church

from carrying out its core religious exercise on its own property. The Report made two errors in rejecting this claim. First, it wrongly concluded that it was not permitted to consider the Substantial Burden provision at all. Second, it concluded that even if it could consider the Substantial Burden provision, there was no substantial burden in this case. But in so concluding, the Report adopted the wrong legal standard.

III. For the same reasons, Leon Valley's zoning ordinance also imposes a substantial burden under TRFRA, and the Report was wrong to grant summary judgment to Leon Valley on that claim.

STANDARD OF REVIEW

This Court reviews the grant or denial of summary judgment "*de novo*, applying the same standard as did the district court." *Mayfield* v. *Texas Dept. of Criminal Justice*, 529 F.3d 599, 603-04 (5th Cir. 2008); *Becker* v. *Tidewater, Inc.*, 586 F.3d 358 (5th Cir. 2009). Summary judgment is appropriate if the record shows "that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." *Mayfield*, 529 F.3d at 603-04 (quoting Fed. R. Civ. P. 56(c)). When the Court makes this determination, it "must resolve disputed facts in favor of the nonmoving party." *Id.* at 604.

ARGUMENT

I. The district court misapplied RLUIPA's Equal Terms provision.

When interpreting the Equal Terms provision, the magistrate judge's Report made two fundamental errors. First, the Report chose the wrong side of a circuit split, adopting the Third Circuit's erroneous "regulatory purpose" test rather than the Eleventh Circuit's plain language approach (Part A, *infra*). If the Report had applied the plain language approach, it would have no choice but to grant summary judgment to the Church (Part B, *infra*). Second, even assuming the Third Circuit's "regulatory purpose" test were correct, the Report misapplied that test to this case (Part C, *infra*). Under either standard, the Church is entitled to summary judgment.

A. The district court chose the wrong side of a circuit split, adopting the Third Circuit's erroneous interpretation of RLUIPA instead of the Eleventh Circuit's correct one.

Federal circuit courts are currently split over how to interpret RLUIPA's Equal Terms provision. As explained below, this Court should reject the Third Circuit's "regulatory purpose" approach in favor of the Eleventh Circuit's plain language approach.

1. Federal circuits are split over the interpretation of the Equal Terms provision.

RLUIPA's Equal Terms provision states as follows:

> No government shall impose or implement [1] a land use regulation in a manner that treats [2] a religious assembly or institution on [3] less than equal terms with [4] a nonreligious assembly or institution.

42 U.S.C. § 2000cc(b)(1). Despite this fairly simple language, federal circuits have split over how it should be interpreted.

Relying on the plain meaning of the statute, the Eleventh Circuit holds that "[t]here are four elements of an Equal Terms violation":

> (1) the plaintiff must be a religious assembly or institution, (2) subject to a land use regulation, that (3) treats the religious assembly on less than equal terms, with (4) a nonreligious assembly or institution.

Primera Iglesia Bautista Hispana of Boca Raton, Inc. v. *Broward County*, 450 F.3d 1295, 1307-08 (11th Cir. 2006). Under this approach, when a plaintiff brings a facial challenge to a zoning ordinance (such as this one), the plaintiff need only identify a religious assembly, identify a secular assembly, and then show that a land use regulation treats the religious assembly less favorably. *Midrash Sephardi, Inc.* v. *Town of Surfside*, 366 F.3d 1214, 1230 (11th Cir. 2004).

In *Midrash*, for example, the Eleventh Circuit found a violation of the Equal Terms provision because the town allowed several types of secular assemblies in its business district (including "private clubs and lodges") but prohibited churches and synagogues. 366 F.3d at 1231. Similarly, in *Digrugilliers* v. *Consolidated City of Indianapolis*, the Seventh Circuit found a likely violation of the Equal Terms provision because the city allowed "auditoriums, assembly halls, [and] community centers" as a matter of right, but required churches to obtain a variance. 506 F.3d 612, 614-15 (7th Cir. 2007) (citing *Midrash*). Under this approach, the basic goal is

to "construe [RLUIPA's] terms in accordance with their ordinary or natural meanings." *Midrash*, 366 F.3d at 1230.

"[N]ot persuaded by the reasoning of the Eleventh Circuit," the Third Circuit has added a *fifth* element to the Equal Terms test:

> [A] plaintiff . . . must show (1) it is a religious assembly or institution, (2) subject to a land use regulation, which regulation (3) treats the religious assembly on less than equal terms with (4) a nonreligious assembly or institution (5) ***that causes no lesser harm to the interests the regulation seeks to advance***.

Lighthouse Institute for Evangelism v. *City of Long Branch*, 510 F.3d 253, 268, 270 (3d Cir. 2007) (emphasis added). Under this approach, it is not enough to show that a land use regulation treats a religious assembly worse than a secular assembly; rather, the plaintiff must also show that the religious assembly and secular assembly "are similarly situated *as to the regulatory purpose*" of the land use regulation. *Id.* at 266 (emphasis in original).

In *Lighthouse*, for example, the city allowed theaters, cinemas, and clubs in a downtown redevelopment corridor, but not churches. *Id.* at 270. According to the Third Circuit, however, this did not violate the Equal Terms provision because the purpose of the redevelopment corridor was to create an "entertainment area . . . full of restaurants, bars, and clubs," and churches would undermine that purpose in a way that secular assembly uses would not. *Id.* at 270-71. (Specifically, state law prohibited issuance of a liquor license within 200 feet of any church; so allowing

churches would have prevented many restaurants, bars, and clubs from locating in the district. *Id.*) Thus, according to the Third Circuit, churches and private clubs were not "similarly situated *as to the regulatory purpose*" of the land use regulation. *Id.* at 266.

The Third Circuit gave two reasons for adding a "regulatory purpose" requirement to RLUIPA. First, it believed that, "when drafting the Equal Terms provision, Congress intended to codify the existing jurisprudence interpreting the Free Exercise Clause." *Id.* at 264. Thus, by adding a "regulatory purpose" requirement, "we are putting the teeth into [the Equal Terms provision] that it needs to follow Free Exercise case law." *Id.* at 269 n.14. Second, the Court believed that a plain language approach would lead to absurd consequences: it would "force local governments to give any and all religious entities"—even "a large church with a thousand members"—"a free pass to locate wherever any secular institution or assembly is allowed." *Id.* at 268.

Federal courts have widely recognized this circuit split over the Equal Terms provision.[5] Nevertheless, without ever mentioning the split, the Report adopted the Third Circuit's "regulatory purpose" test and granted summary judgment to Leon

[5] The Seventh Circuit recently agreed to consider the issue *en banc*. *See River of Life* v. *Village of Hazel Crest*, No. 08-2819 (7th Cir.) (*en banc* argument held February 24, 2010). The Ninth Circuit is also considering the same issue. *Centro Familiar Cristiano Buenas Nuevas* v. *City of Yuma*, No. 09-15422 (9th Cir.) (argued Apr. 15, 2010).

Valley.[6] *See* R.2152-53; Report 16-17. According to the Report, it "is of no consequence" that the zoning ordinance permits a wide variety of secular assemblies where it forbids churches. *Id.* What matters is Leon Valley's "regulatory purpose," which the Report concluded was "to create a retail corridor along Bandera Road." R.2153; Report 17. According to the Report, because "[secular] assemblies further the City's goal of developing a retail corridor along Bandera Road," but churches do not, churches can be excluded. *Id.* This is an erroneous interpretation of RLUIPA.

2. The Third Circuit's "regulatory purpose" test is inconsistent with the text, structure, purpose, and history of RLUIPA.

The Third Circuit's "regulatory purpose" approach is inconsistent with RLUIPA by any measure used in statutory interpretation.

Text. First, and most critically, the "regulatory purpose" approach has no basis in RLUIPA's text. If Congress had intended courts to apply a "regulatory purpose" test, it easily could have written such a test into the statute as follows:

> 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 [***that is similarly situated as to the regulatory purpose of the land use regulation***].

[6] The Report repeatedly refers to *Lighthouse* as a "Seventh Circuit" case. R.2152; Report 16. It is a Third Circuit case.

42 U.S.C. § 2000cc(b)(1) (language in brackets added). Or, Congress could have simply added a "similarly situated" requirement:

> 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.

Id.

Congress did neither. Instead, as the Eleventh Circuit explained, Congress has already specified in what respect religious and nonreligious uses must be comparable: they must both fall within the category of "assembly" or "institution." *Midrash*, 366 F.3d at 1230; *Konikov* v. *Orange County, Fla.*, 410 F.3d 1317, 1324 (11th Cir. 2005). If they do, they must be treated equally. The text of RLUIPA requires nothing more, and under Fifth Circuit precedent, that is the end of the inquiry. *Curr-Spec Partners, L.P.* v. *Comm'r*, 579 F.3d 391, 396 (5th Cir. 2009) ("When the plain language of a statute is unambiguous and does not lead to an absurd result, our inquiry begins and ends with the plain meaning of that language.") (internal quotations omitted).

It is particularly odd to read into RLUIPA a widespread term of art like "similarly situated." Congress has used the term "similarly situated" in the United States Code over 400 times. More than sixty of these uses involve enforcement of equal protection-type laws, including statutes regarding labor and employment

("similarly situated" employees),[7] criminal procedure ("similarly situated" defendants),[8] and the Armed Forces ("similarly situated members of . . . the uniformed services").[9] Numerous instances appear in employment benefits statutes that prohibit discrimination ("similarly situated" employees).[10] Elsewhere in the Code, the phrase is found in sections as diverse as the Internal Revenue Code ("similarly situated beneficiaries"),[11] copyright laws ("similarly situated music users"),[12] environmental laws ("similarly situated" lands),[13] and commerce provisions.[14] In short, "similarly situated" is a pervasive and familiar term. Congress could have chosen, as it has hundreds of times before, to include the term "similarly situated' in RLUIPA.

But Congress did not do so. Instead, it chose a phrase—"equal terms"—used only a handful of times in the Code, most prominently in RLUIPA.[15] Why? Be-

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[7] 29 U.S.C. § 2931(a)(1)(A).

[8] 18 U.S.C. § 5037(c)(1)-(2).

[9] 37 U.S.C. § 403(g)(4).

[10] 29 U.S.C. § 623(i)(10).

[11] 26 U.S.C. § 4980B(f)(2)(A).

[12] 17 U.S.C. § 513(7).

[13] 16 U.S.C. § 1134(b).

[14] 15 U.S.C. § 77k(e)(3).

[15] Only five other sections of the Code use the phrase "equal terms." All five are commercial sections relating to trade, navigation, telecommunications, or shipping. *See* 15 U.S.C. § 13(d)-(e) (trade); 15 U.S.C. § 78II(1)(C) (trade); 33 U.S.C. § 551

cause the Equal Terms provision *already specifies* what comparators are to be used: a "religious assembly or institution" and a "nonreligious assembly or institution." *Midrash*, 366 F.3d at 1230; *Konikov*, 410 F.3d 1317, 1324 (11th Cir. 2005). Where Congress has refused to use a term of art, courts should not read it in.

The Third Circuit added a "similarly situated" requirement largely because it worried that the plain language would produce an absurd result. According to the Third Circuit, under a plain language approach, "if a town allows a local, ten-member book club to meet in the senior center, it must also permit a large church with a thousand members—or . . . a religious assembly with rituals involving sacrificial killings of animals or the participation of wild bears—to locate in the same neighborhood regardless of the impact such a religious entity might have." *Lighthouse*, 510 F.3d at 268.

But this parade of horribles has been thoroughly discredited. As the Seventh Circuit has explained, "[w]hatever restrictions the City imposes on other users of land in [a given district] it can impose on [churches] without violating the 'equal terms' provision." *Digrugilliers*, 506 F.3d at 615; *see also Lighthouse*, 510 F.3d at 287 (Jordan, J., dissenting). In other words, a city can place a maximum size limit on all assembly buildings in the district. It can cap the number of people permitted to occupy those buildings. It can impose parking requirements. It can limit the size

(navigation); 47 U.S.C. § 10 (telecommunications); 46 U.S.C. § 40303(b)(2) (shipping).

or type of buildings permitted on certain types of roads to reduce traffic. It can regulate the keeping and killing of live animals. As far as the Equal Terms provision is concerned, a city can do whatever it wants *as long as it places the same restrictions on both religious and secular assemblies*. *See Vision Church* v. *Village of Long Grove*, 468 F.3d 975, 993-94 (7th Cir. 2006) (upholding maximum square footage restriction applied to secular and religious users alike). Far from producing an "absurd result," this leaves cities broad latitude to achieve their land use goals.

Structure. The structure of RLUIPA confirms the plain language approach. Under the heading "Discrimination," RLUIPA includes two separate provisions. One is the Equal Terms provision. 42 U.S.C. § 2000cc(2)(b)(1). The other, entitled "Nondiscrimination," states: "No government shall impose or implement a land use regulation that discriminates against any assembly or institution on the basis of religion or religious denomination." 42 U.S.C. § 2000cc(2)(b)(2).

These two provisions must be given separate effect. But under the Third Circuit's "regulatory purpose" test, every violation of the Equal Terms provision also violates the Nondiscrimination provision. That is, if a religious assembly proves that it has been treated worse than a "similarly situated" secular assembly, then it has also proven that it has been "discriminate[d] against . . . on the basis of religion." 42 U.S.C. § 2000cc(2)(b)(2). Thus, under the Third Circuit's approach, the

Equal Terms provision is redundant: it provides no more protection than the Non-discrimination provision immediately following.

Elsewhere, RLUIPA also provides that it "shall be construed in favor of a broad protection of religious exercise, to the maximum extent permitted by the terms of this Act and the Constitution." 42 U.S.C. § 2000cc(5)(g). This provision, too, counsels against reading in extra-textual restrictions that would narrow the Equal Terms provision. Thus, the structure of RLUIPA supports the plain language approach.

Purpose and History. The purpose and history of RLUIPA also support the plain language approach. The Third Circuit introduced the "regulatory purpose" test because it believed RLUIPA was merely "intended to codify the existing jurisprudence interpreting the Free Exercise Clause." *Lighthouse*, 510 F.3d at 264. But this assertion is based on two faulty premises: (a) that RLUIPA was merely intended to codify existing free exercise jurisprudence; and (b) that existing free exercise jurisprudence requires a regulatory purpose test. *Id.* at 264, 266. Neither premise is sound.

a. The first premise is based on a single citation to RLUIPA's legislative history. *Id.* at 264 (citing 146 Cong. Rec. S7774-01 (July 27, 2000) (joint statement of Sens. Hatch and Kennedy on the Religious Land Use and Institutionalized Person Act of 2000) (hereinafter "Joint Statement") (noting that the Equal Terms and

Nondiscrimination provisions "enforce the Free Exercise rule against laws that burden religion and are not neutral and generally applicable")). Even that piece of legislative history doesn't say that RLUIPA "*codifies*" free exercise jurisprudence; it says that RLUIPA "*enforce[s]*" the Free Exercise Clause. *Id.* (emphasis added). The two are not synonyms. "Enforce" is a term of art referring to Congress's Fourteenth Amendment enforcement power. As the Supreme Court explained in *Boerne*, Congress' power to enforce the Free Exercise Clause extends beyond merely codifying existing jurisprudence: "Legislation which deters or remedies constitutional violations can fall within the sweep of Congress' enforcement power *even if in the process it prohibits conduct which is not itself unconstitutional*." *City of Boerne* v. *Flores*, 521 U.S. 507, 518 (1997) (emphasis added). Thus, the Third Circuit was wrong to conflate enforcement and codification.

Unlike the Third Circuit, this Court need not determine RLUIPA's purpose based on isolated snippets of legislative history: the events leading to RLUIPA's passage confirm that Congress was doing more than merely codifying free exercise jurisprudence. RLUIPA was passed in response to the now-familiar struggle between Congress and the Supreme Court over the application of the Free Exercise Clause. *See Adkins* v. *Kaspar*, 393 F.3d 559, 566-67 (5th Cir. 2004) (describing history of RLUIPA). Specifically, before 1990, the Supreme Court interpreted the Free Exercise Clause to require strict scrutiny for *any* law that substantially bur-

dened religious practices. *See, e.g.*, *Sherbert* v. *Verner*, 374 U.S. 398 (1963). But in 1990, the Supreme Court cut back on the Free Exercise Clause, concluding that "neutral laws of general applicability" are not subject to strict scrutiny. *Employment Division* v. *Smith*, 494 U.S. 872 (1990).

Disagreeing with *Smith*, Congress enacted the Religious Freedom Restoration Act of 1993 (RFRA), Pub.L. No. 103-141, 107 Stat. 1488 (1993) (codified at 42 U.S.C. §§ 2000bb-2000bb-4), which again required strict scrutiny for *any* law that substantially burdened religious practices. But in 1997, the Supreme Court struck down RFRA as applied to the States, concluding that RFRA exceeded Congress' Fourteenth Amendment enforcement power. *Boerne*, 521 U.S. 507. In response to *Boerne*, Congress set out to do what it had not done with RFRA: create a record documenting pervasive and widespread abuses of free exercise rights, and tailor a statute accordingly. The result was RLUIPA—which Congress passed unanimously in 2000, and which courts have uniformly upheld as constitutional.[16]

This back-and-forth shows that Congress did not enact RLUIPA merely to *codify* the Supreme Court's free exercise jurisprudence; rather, Congress sought to develop a "proportional[]" and "congruen[t]" mechanism for *enforcing* the Free Exercise Clause. *See Boerne*, 521 U.S. at 533. As RLUIPA's sponsors explained, RLUIPA creates "*prophylactic rules* to simplify the *enforcement* of constitutional

[16] *See, e.g.*, *Guru Nanak Sikh Soc'y* v. *County of Sutter*, 456 F.3d 978 (9th Cir. 2006); *Midrash*, 366 F.3d 1214.

standards in land use regulation of churches." Joint Statement, 146 Cong. Rec. S7774-01, *S7775 (July 27, 2000) (emphasis added). Simply put, Congress enacted RLUIPA not merely to codify the Free Exercise Clause, but "as prophylactic legislation" to enforce it. *Lighthouse*, 510 F.3d at 288 n.36 (Jordan, J., dissenting).

RLIUPA's text also refutes the notion that it merely codifies free exercise jurisprudence. Congress specifically chose the phrase "equal terms," which has never been used in *any* free exercise case decided by the Supreme Court. If Congress wanted to codify the Supreme Court's free exercise jurisprudence, it could have used terms from that jurisprudence. For example, it could have prohibited land use regulations that were not "neutral and generally applicable" (the language of *Smith* and *Lukumi*). It could have prohibited land use regulations that "target" religious uses for unfavorable treatment (the language of *Lukumi*). But it chose to require treatment on "equal terms" instead.

Finally, interpreting RLUIPA to merely codify existing free exercise jurisprudence "renders the statute superfluous." *Lighthouse,* 510 F.3d at 288 (Jordan, J., dissenting). It is a "cardinal principle of statutory construction" that "a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant." *Kaltenbach* v. *Richards*, 464 F.3d 524 (5th Cir. 2006) (internal quotations omitted). But under the "regulatory purpose" approach, the only successful Equal Terms claims are those

that would already succeed under the Free Exercise Clause. Thus the regulatory purpose test renders not just one word, but the entire Equal Terms provision superfluous. The more reasonable interpretation is that Congress meant what it said, and that "RLUIPA offers greater protection to religious exercise than the First Amendment offers." *Smith* v. *Allen*, 502 F.3d 1255, 1264 (11th Cir. 2007).

b. Even assuming RLUIPA merely codifies the Free Exercise Clause, the Third Circuit's second premise—that the Free Exercise Clause always requires a regulatory purpose test—is also wrong. *Lighthouse*, 510 F.3d at 266. *Lighthouse* derived the regulatory purpose test from *Smith* and *Lukumi*, along with several Third Circuit cases interpreting those decisions. *Id.* at 264-266. But as the dissent in *Lighthouse* pointed out, each of those cases involved *facially neutral laws*—that is, laws that did not classify conduct on the basis of religion. *Id.* at 291. Thus, the plaintiffs in those cases had to show that, despite facial neutrality, the laws had a pattern of exemptions that treated secular conduct better than *similarly situated* religious conduct. *Id*. at 292 (Jordan, J., dissenting).

But here, the zoning code is not facially neutral: "[T]he face of the challenged law distinguishes between conduct engaged in for religious reasons" (such as using a building as a "church") "and conduct engaged in for nonreligious reasons" (such as using the same building as a "private club"). *Lighthouse*, 510 F.3d at 291 (Jordan, J., dissenting). In such a case, the Free Exercise Clause requires

heightened scrutiny even *without* an additional showing that the religious and non-religious conduct is "similarly situated as to the regulatory purpose." *Id.*; *see also Church of the Lukumi Babalu Aye, Inc.* v. *City of Hialeah*, 508 U.S. 520, 532 (1993) ("*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."). In short, the Equal Terms provision does not merely codify the Free Exercise Clause; but even if it did, the "regulatory purpose" approach is inappropriate when a law facially discriminates against religious conduct.

c. Finally, although it is unnecessary to consider RLUIPA's legislative history, that history confirms that the statute "was intended to apply in *precisely* the situation presented here." *Midrash*, 366 F.3d at 1231 n.14 (emphasis in original). Specifically, it was enacted because "[z]oning codes frequently exclude churches in places where they permit theaters, meeting halls, and other places where large groups of people assemble for secular purposes." *Id.* (quoting Joint Statement, 146 Cong. Rec. S7774-01, *S7775 (July 27, 2000)). Nothing in the legislative history hints at an additional "regulatory purpose" requirement.

3. The Third Circuit's "regulatory purpose" approach vastly complicates the equal terms analysis and makes it easy to circumvent the statute.

The regulatory purpose test is not just inconsistent with the text, purpose,

and history of RLUIPA; it is also bad for policy reasons. Specifically, it invites inconsistent judicial application and opens an enormous loophole in the statute.

Because it is completely unmoored from RLUIPA's text, the regulatory purpose test creates more questions than it answers. Two big questions are: (1) How does a court determine the "regulatory purpose"? and (2) How does a court determine whether two land uses are "similarly situated" as to that regulatory purpose?

There are at least four possible ways to determine "regulatory purpose." First, the court could defer to statements of regulatory purpose in the zoning code. That is what the Third Circuit did in *Lighthouse*, relying on the statement of purpose in the city's Redevelopment Plan. 510 F.3d at 258. Second, the court could defer to the government's statement of purpose in its litigation papers. That is what the Report did here. Because Leon Valley's zoning code doesn't recite any relevant purpose, the Report accepted the statement of purpose in Leon Valley's summary judgment brief on faith. R.2140; Report 4 (citing R.277).

Third, the court could determine an "objective" regulatory purpose by considering how the zoning code operates and what types of uses it permits. For example, if the zoning code is inconsistent in the types of uses it excludes and permits, the court will not defer to a statement of purpose. *See Lighthouse*, 510 F.3d at 272-73. Fourth, the court could consider extrinsic evidence of the regulatory purpose, such as pre-litigation statements by zoning authorities. This would give the

Plaintiff an opportunity to prove that the government's proffered regulatory purpose is a sham.

Given the many options, how should a court determine the regulatory purpose? Taking the city's assertion of purpose on faith (or letting the city simply insert a recitation of purpose into an ordinance) makes it easy to circumvent RLUIPA. Allowing the plaintiff to prove that the alleged purpose is a sham significantly complicates the Equal Terms inquiry. RLUIPA's text, of course, provides no guidance, because it says nothing about regulatory purpose.

Once a court divines the regulatory purpose, how does it decide whether two land uses are "similarly situated" as to that purpose? Does a secular auditorium contribute more to a "sustainable retail 'main' street" than a church? *Lighthouse*, 510 F.3d at 270. Do private club members patronize nearby shops more frequently than church members? Again, the statute gives no guidance as to how such questions should be answered. Equal Terms cases can become a battle of expert witnesses, each opining on whether a given secular assembly contributes more to the regulatory purpose than a given religious assembly. Or, more likely, courts will decide these cases based on intuition—like the magistrate judge did here—opining that "gift shops, hobby shops, hardware stores, music stores, day care facilities and counseling facilities" are consistent with retail use, while "Church assembly use" (along with "dance halls, kennels, hotels, motels, and manufacturing") is not.

R.2153; Report 17. Nothing in the text or history of RLUIPA authorizes courts to substitute this complex, standardless inquiry in place of an easily administrable, bright-line rule.

With the increased complexity of the Third Circuit's approach come increased opportunities for circumventing the statute. As the dissent in *Lighthouse* predicted—and as subsequent cases have shown—the regulatory purpose test provides local governments with "a ready tool for rendering [the Equal Terms provision] practically meaningless." *Lighthouse*, 510 F.3d at 293. In order to avoid RLUIPA under the magistrate judge's approach, a city need only articulate some plausible commercial purpose for excluding churches. Here, the Report simply accepted Leon Valley's alleged retail purpose on faith, then by its own lights concluded that churches were more inconsistent with that purpose than a variety of secular assemblies. If this rationale is sufficient to exclude churches, then churches can always be excluded. This Court should reject such reasoning because "[a]n economic rationale is not a license to ignore the lawful will of Congress." *Lighthouse*, 510 F.3d at 291 (Jordan, J., dissenting).

B. Under the Eleventh Circuit's correct interpretation of RLUIPA, the Church is entitled to summary judgment.

Under the proper, plain-language interpretation of RLUIPA, the Church is entitled to summary judgment.

Because RLUIPA does not define "assembly" or "institution," those terms must be given "their ordinary or natural meanings." *Midrash*, 366 F.3d at 1230; *accord United States* v. *Ferguson*, 369 F.3d 847 (5th Cir. 2004) (relying on dictionary definition because "[i]t is well-settled that 'we should give the words of statutes their plain meaning'"). "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.),'" or "'[a] group of persons organized and united for some common purpose.'" *Midrash*, 366 F.3d at 1230 (quoting WEBSTER'S 3D NEW INT'L UNABRIDGED DICTIONARY 131 (1993); BLACK'S LAW DICTIONARY 111 (7th ed. 1999)). 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)).

In light of the ordinary meaning of these terms, Leon Valley's land use regulations treat religious assemblies or institutions worse than many nonreligious assemblies or institutions. The following Table shows the treatment of assembly uses in the relevant zoning district (B-2). Many secular assemblies are permitted with a special use permit or as a matter of right, but churches are strictly prohibited:

Table 1—Treatment of Assembly Uses in Zone B-2

Type of use	Allowed as of right (no permit required)	Allowed with a special use permit	Completely Prohibited
"Church"			X
"Auditorium"		X	
"Convention Center"		X	
"Other Similar Meeting Facilities"		X	
"Club or Lodge (private)"		X	
"Funeral Homes/ Mortuary"		X	
"School"	X		
"Theater, Indoor"	X		
"Recreational Facility, Neighborhood"	X		
"Library"	X		
"Art Gallery/Museum"	X		
"Child Care Facility"	X		
"Gymnasium/Physical Fitness Facility"	X		

See R.1517-24; R.E.6.

All of these uses are "assemblies" under the plain meaning of that term: places where people gather in one place for a common purpose. All are venues for communal activities—including classes, lectures, conventions, and even (in some

cases) religious observances. Several of them, including schools, theaters, auditoriums, and funeral homes, exist largely for the purpose of holding corporate assemblies.

For example, the ordinance permits schools, which are basically educational assemblies: just like churches, they host regular classes and large gatherings. The ordinance permits theaters, which can host large assemblies for any number of reasons. (Indeed, outside Leon Valley, many churches meet in theaters.) The ordinance permits libraries, art galleries, and gymnasiums, all of which may hold regular classes or lectures where people gather to learn. All of those uses are permitted as of right, with no review process by the city.

More importantly, with a special use permit, the ordinance permits auditoriums and convention centers—uses that are indistinguishable from churches. (Again, outside Leon Valley, churches routinely meet in auditoriums.) The ordinance also permits private clubs and lodges. Thus, the Boy Scouts or Moose Lodge can host regular meetings in the B-2 zone, but churches cannot. Finally, the ordinance permits funeral homes; in fact, there is a funeral home right next door to the Church's Property. R.617; R.E.8 (aerial photos). Thus, the funeral home can host large, regular gatherings for viewings or funeral services—possibly even religious services—but the Church cannot conduct religious services in its building next door. This is a classic Equal Terms violation.

Other circuits have found Equal Terms violations on indistinguishable facts. In *Midrash*, the Eleventh Circuit found an Equal Terms violation where the zoning code permitted "private clubs and lodges" in the business district, but not churches. 366 F.3d at 1219-20, 1230-31. It reasoned that, "[l]ike churches and synagogues, private clubs are places in which groups or individuals dedicated to similar purposes—whether social, educational, recreational, or otherwise—can meet together to pursue their interests." *Id.* at 1231. Here, Leon Valley allows not only private "Club[s] or Lodge[s]" to locate in the retail district, but eleven other types of secular assemblies—while strictly forbidding churches. This case is thus far stronger than *Midrash.*

Similarly, in *Digrugilliers*, the Seventh Circuit found a likely equal terms violation because a church was excluded from a commercial district that permitted secular assemblies such as "auditoriums, assembly halls, community centers, senior citizens' centers, day-care centers, nursing homes, funeral homes . . . art galleries, civic clubs, libraries, [and] museums." 506 F.3d at 614-15. Leon Valley permits an almost identical laundry list of secular assemblies in its B-2 zone, including "Auditorium[s]," "Convention Center[s]," "Recreational Facilit[ies]," "Child Care Facilit[ies]," "Funeral Homes," "Art Galler[ies]," private "Club[s]," "Librar[ies]," and "Museum[s]." R.1517-24.

These uses are not only "assemblies" under the plain language of RLUIPA, they are also precisely the type of nonreligious assemblies that Congress had in mind when it drafted the Equal Terms provision. As RLUIPA's sponsors explained, the Equal Terms provision was included because "[z]oning codes frequently exclude churches in places where they permit ***theaters***, ***meeting halls***, and other places where large groups of people assemble for secular purposes." Joint Statement, 146 Cong. Rec. S7774-01, *S7775 (July 27, 2000) (emphasis added) (quoted in *Midrash*, 366 F.3d at 1231 n.14; *Lighthouse*, 510 F.3d at 285, 287 (Jordan, J., dissenting)). Elsewhere, the legislative history identifies "uses 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***,"[17] as well as "meeting halls, community centers, ***theaters***, ***schools***, or arenas," as receiving better treatment than religious assemblies.[18] In short, this sort of case is precisely why Congress enacted the Equal Terms provision.

[17] H.R. REP. NO. 106-219 at 19 (1999) (emphasis added).

[18] *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).

Because Leon Valley has treated the Church less favorably than these nonreligious assemblies, the Church is entitled to summary judgment. *Midrash*, 366 F.3d at 1231; *Digrugilliers*, 506 F.3d at 614-15.

C. Even under the Third Circuit's erroneous interpretation of RLUIPA, the Church is entitled to summary judgment.

Even if the Third Circuit's "regulatory purpose" standard were correct, the Church is still entitled to summary judgment. The Report's analysis under that standard—all of which is contained in a single paragraph—is based on two premises. First, the Report says that the purpose of excluding churches from the B-2 zone "is to create a retail corridor along Bandera Road." R.2153; Report 17. Second, the Report says that all of the secular assemblies permitted in zone B-2 "further the City's goal," while churches do not. *Id.* On that basis, the Report concluded that uneven treatment of religious assemblies "is of no consequence." *Id.* But both of the Report's premises are incorrect.

1. Leon Valley's regulatory purpose is not well defined.

First, the alleged regulatory purpose—"to create a retail corridor along Bandera Road"—is a disputed question of fact, which the Report inexplicably resolved in Leon Valley's favor. In support of its regulatory purpose claim, the Report cites only two pieces of evidence. R.2153; Report 17 & n.72 (citing Dkt. 34, exhs. B & J) (R.740 & R.1009). Both are affidavits of Leon Valley officials submitted in summary judgment briefing *after* the start of litigation. R.740; R.1009.

By contrast, abundant pre-litigation evidence indicates that Leon Valley has no "well documented" regulatory purpose. *Lighthouse*, 510 F.3d at 272. The text of the zoning code, for example, permits numerous non-retail uses in the B-2 zone along Bandera Road—including farms, equestrian centers, radio/television stations, dental and medical laboratories, convalescent centers, and volleyball parks. R.1517-24. Neither the Report nor Leon Valley has explained how a convalescent center or a farm contribute more to a retail corridor than a church. *See Lighthouse*, 510 F.3d at 272 (finding that the regulatory purpose was not "well documented" where an ordinance permitted "a range of different uses").

Nor is Bandera Road limited to B-2 properties. Many properties—including large parcels across the street from the Church—are zoned B-3. R.1012. And, of course, the B-3 zone permits many non-retail uses, including churches. Thus, if the goal of removing churches from B-2 was to create a retail corridor along Bandera Road, Leon Valley is pursuing that goal apathetically and inconsistently. If the goal was to make it difficult for tax-exempt churches to locate along Bandera Road, Leon Valley is succeeding admirably.

2. The Church does not undermine the regulatory purpose any more than various secular assemblies.

Even assuming the regulatory purpose is to create a retail corridor, there is no evidence—much less undisputed evidence—that the Church would undermine Leon Valley's regulatory purpose more than permitted secular assemblies. Indeed,

the Property has been used as a church continuously for over a decade, and neither Leon Valley nor the Report cited any evidence that such use has interfered with Leon Valley's goals. *See* R.2153; Report 17 (citing nothing).

Most importantly, the Report ignored the fact that the church ***can already use the property as a counseling, day care, and administration center five days per week***. It is undisputed that these uses are permitted as a matter of right, R.1517-24, and that Leon Valley views them as "consistent with a retail use and retail corridor." *See* R.2020. Thus, the Church is only seeking to ***add*** to its existing use of the Property, extending the hours the Property is in use and drawing members to the Property on the weekend. If the Church can use the Property five days a week as a counseling, day care, and administrative center, what conceivable retail purpose is served by forcing the building to remain empty on nights and weekends? The Report offers none.

Nor is there any evidence that the Church is different from permitted secular assemblies. For example, with a special use permit, Leon Valley allows "Auditorium[s]," "Funeral Home[s]," "Club[s] or Lodge[s]," and "Other Similar Meeting Facilities." *Id.* The Report offers no reason for concluding that a private Moose Lodge, Veterans of Foreign Wars post, or Boy Scout Council headquarters—all of which could locate in the B-2 zone on Bandera Road—would generate "retail activity" in a way that churches would not. "Funeral Homes" are also permitted (and

one is located next to the church); there is no evidence that funeral homes contribute more to a retail district than do churches. Perhaps out of oversight, the Report completely ignored each of these uses. *See* R.2153; Report 17.

Other secular assemblies are also permitted in the B-2 zone as a matter of right—regardless of whether they contribute to retail. "Museums" are permitted whether or not they generate retail activity. "Child Care Facilit[ies]" are also permitted "*whether or not [operated] for compensation*." R.1517-24; R.1440 (definition of "child care facility") (emphasis added). Both "School[s]" and "Librar[ies]" are permitted, and it is undisputed that schools and libraries frequently generate no retail activity. *See* R.1517-24. The Report did not even attempt to explain how these uses are consistent with a retail corridor when a church is not. R.2153; Report 17.

In fact, undisputed evidence indicates that allowing the Church to meet would actually *support* retail uses by drawing individuals from other neighborhoods to visit Bandera Road on nights and weekends, when the Property would otherwise sit empty. *See* R.378-79 (members live in the Northwest San Antonio and Leon Valley areas). Some types of retail—like restaurants—would benefit from increased traffic on nights and weekends. And surely Sunday churchgoers (or Friday mosque attendees, or Wednesday Bible study participants) are more likely to patronize nearby restaurants and shops than mourners at a "Funeral Home."

Given these facts, there is no basis for concluding that auditoriums, private clubs, and funeral homes advance the regulatory purpose in ways that churches do not. Thus, there is no basis for upholding Leon Valley's ordinance, even under the erroneous regulatory purpose test.

3. Leon Valley's zoning ordinance is like the ordinance struck down in *Lighthouse*.

Indeed, Leon Valley's zoning ordinance is much like the ordinance the Third Circuit *struck down* in *Lighthouse*. There, the Third Circuit actually considered two different land use regulations: a Redevelopment Plan, which the court upheld, *id.* at 271-72, and a Zoning Ordinance, which the court struck down, 510 F.3d at 272-73.

The Redevelopment Plan was designed to encourage "a 'vibrant' and 'vital' downtown community centered on an entertainment and retail district"—one "full of restaurants, bars, and clubs." *Id.* at 270-71. The court concluded that churches were inconsistent with that Plan *not* because they were inconsistent with retail use, but because a state law prohibited the issuance of liquor licenses within 200 feet of a church. *Id.* Thus, permitting churches to locate in the redevelopment zone would have prevented restaurants, bars, and clubs from locating nearby. *Id.* In that sense, churches were unique among assembly uses. *Id.*

By contrast, the court struck down the Zoning Ordinance because it permitted "assembly halls" in the Central Commercial District but excluded churches. *Id.* at 272. As the court explained, there was "nothing in the record describing [the

City's] objectives for the Central Commercial District under the Ordinance," and it was "not apparent from the allowed uses why a church would cause greater harm to the regulatory objectives than an 'assembly hall' that could be used for unspecified meetings." *Id.*

Leon Valley's ordinance is far more like the Ordinance that *Lighthouse* struck down. (Not surprisingly, the Report doesn't even cite, much less try to distinguish, that portion of *Lighthouse*.) Like the Ordinance in *Lighthouse*, the purpose of Leon Valley's ordinance is "not well documented." *Id.* at 272. It allows "a range of different uses," many of them non-commercial. *Cf. id*. And, like the Ordinance in *Lighthouse*, Leon Valley permits assembly uses that undermine its ill-defined regulatory purpose. Indeed, Leon Valley permits not only assembly halls (the basis for the Equal Terms violation in *Lighthouse*), but a wide variety of other secular assemblies, such as convention centers, private clubs, lodges, and schools. R.1517-24. And there is certainly nothing like the liquor licensing law in *Lighthouse* that would prohibit other retail uses from locating near the Property. This case thus presents a far stronger Equal Terms violation than *Lighthouse*—even under the regulatory purpose test.

II. The District Court misapplied RLUIPA's Substantial Burden provision.

The district court also erred in granting summary judgment to Leon Valley under RLUIPA's Substantial Burden provision. That provision states:

> No government shall impose or implement a land use regulation in a manner that imposes a substantial burden on the religious exercise of a person, including a religious assembly or institution, unless the government demonstrates that imposition of the burden on that person, assembly, or institution . . . (A) is in furtherance of a compelling governmental interest; and (B) is the least restrictive means of furthering that compelling governmental interest.

42 U.S.C. § 2000cc(a)(1).

According to the Report, the Substantial Burden claim failed for two reasons: (a) the court lacked jurisdiction over the Substantial Burden claim (R.2142-48; Report 6-12); and (b) even if the court had jurisdiction, the Substantial Burden claim failed as a matter of law (R.2148-51; Report 12-15). Both conclusions are incorrect.

A. The Court misapplied RLUIPA's jurisdictional requirements.

RLUIPA's Substantial Burden provision applies only if plaintiffs meet one of three jurisdictional tests. 42 U.S.C. § 2000cc(2)(a)(2). Two of those tests are relevant here. The first—called the "interstate commerce" test—says the Substantial Burden provision applies whenever a substantial burden "would affect . . . commerce . . . among the several States." 42 U.S.C. § 2000cc(2)(a)(2)(B). The second—called the "individualized assessment" test—says the Substantial Burden provision applies to any land use regulation under which a government is permitted to make "individualized assessments of the proposed uses for the property involved." 42 U.S.C. § 2000cc(2)(a)(2)(C). The Substantial Burden provision applies

when *either* of these tests is satisfied. *Id.*; *Westchester Day School* v. *Village of Mamaroneck*, 504 F.3d 338, 354 (2d Cir. 2007). Both are satisfied here.

1. The denial of rezoning affects interstate commerce.

Inexplicably, the Report fails even to mention the interstate commerce test—despite the fact it was briefed by both parties. *See* R.1215-16 (plaintiff's motion for summary judgment); R.2030-33 (defendant's response). Drawn from the Supreme Court's commerce clause jurisprudence, the interstate commerce test is satisfied any time a land use regulation "substantially affect[s] interstate commerce." *United States* v. *Lopez*, 514 U.S. 549, 559 (1995); *Gonzales* v. *Raich*, 545 U.S. 1 (2005). This standard is easy to meet: "the evidence need only demonstrate a minimal effect on commerce to satisfy the jurisdictional element." *Westchester*, 504 F.3d at 354.

Here, the denial of rezoning unquestionably affected interstate commerce. The purchase agreement for the Church's property is contingent upon rezoning; if rezoning is denied, the agreement falls through. R.1782; R.2220. That agreement is itself a part of interstate commerce, since it involves over a million dollars paid by the Elijah Group (based in Texas) to Happy State Bank (based in Arizona). R.1767-8. Moreover, Pastor Crain testified that the church plans to spend $400,000 to upgrade and beautify the property. R.1816-17. These transactions are more than enough to demonstrate the "minimal effect on commerce" necessary to invoke

RLUIPA. *Westchester*, 504 F.3d at 354 (construction of religious school satisfied RLUIPA's jurisdictional requirement).

Although Leon Valley may try to argue that commerce clause jurisdiction was waived, it has been at issue throughout this case. The Church included its intention to rely upon RLUIPA's Substantial Burden provision in the Complaint, R.32, and Leon Valley raised lack of commerce clause jurisdiction as an affirmative defense in its Answer. R.63. It was briefed on summary judgment. R.1215-16; R.2030-33. It was briefed again in Plaintiff's objections to the magistrate's Report. R.2196 (Objections at 14); R.2246-48 (Response at 17-19). Despite all this, the district court never once mentioned the interstate commerce provision. Nor did it offer any explanation for its failure to do so. That was an obvious error.

2. The denial of rezoning involves an individualized assessment.

Because commerce clause jurisdiction is so clear, the Court need not even reach the "individualized assessments" requirement. But that requirement is satisfied, too.

Several courts have treated the denial of rezoning as an individualized assessment under RLUIPA. In *Civil Liberties for Urban Believers* v. *City of Chicago*, the Seventh Circuit considered a Free Exercise challenge to a Map Amendment, a procedure described as "effectively rezoning the targeted parcel." 342 F.3d 752, 756 (7th Cir. 2003). The court treated this procedure as creating "a system of indi-

vidualized exemptions" under *Lukumi* (which is the basis for RLUIPA's "individualized assessments" requirement). *Id.* at 763-64. Other courts have also treated the denial of rezoning as subject to RLUIPA's Substantial Burden provision. *See, e.g.*, *Sts. Helen and Constantine* v. *City of New Berlin*, 396 F.3d 895 (7th Cir. 2005); *San Jose Christian College* v. *City of Morgan Hill*, 360 F.3d 1024 (9th Cir. 2004). The reason is simple: A targeted rezoning—like the one requested here—requires the city to "take into account the particular details of an applicant's proposed use of land when deciding whether to permit or deny that use." *Guru Nanak Sikh Soc'y* v. *County of Sutter*, 456 F.3d 978, 986 (9th Cir. 2006).

Without citing any of these cases, the Report relied exclusively on the only precedent to the contrary—a Michigan state court decision. *See* R.2146-47; Report 10-11 (citing *Greater Bible Way Temple of Jackson* v. *City of Jackson*, 733 N.W.2d 734 (Mich. 2007)). According to the Report, rezoning in this case did not involve an individualized assessment because, at the time of the rezoning application, "the Property was unoccupied . . . [and] [t]here was no religious assembly or institution to consider." R.2147; Report 11.

This is simply wrong. As the record shows, not only did the rezoning application "permit" Leon Valley to consider "the proposed uses for the property involved," 42 U.S.C. § 2000cc(2)(a)(2)(C), but the city did so extensively:

- As the magistrate judge acknowledged, because the "stated purpose for the zone change was to allow for the continued use of the Property as a

church," Leon Valley had "to evaluate whether religious activity fell within the City's Master Plan for the Bandera Road corridor." R.2147; Report 11.

- The zoning ordinance allows rezoning only for limited purposes, such as "changed or changing conditions or circumstances in a particular locality or area"—thus emphasizing the need for an individualized assessment. R.1459 (Leon Valley Zoning Code § 30.309).

- While Leon Valley was considering the rezoning request, Pastor Crain testified before the city council regarding his intent to purchase, remodel, and use the Property as a church, school, and community education center. *See* R.1814-17 (transcript of Leon Valley Zoning and Land Use Commission Meeting of Feb. 26, 2008).

- As the transcript of the city council hearing shows, Leon Valley considered the Church's intended use for the property and rejected it out of fear that other churches might try to move into the area. R.1205 (citing R.1824-25).

- Leon Valley based its rejection of rezoning upon the planned church use, citing "economic concerns" and the need for "sales taxes" as the reason for its refusal. *See id.* (citing R.1824-25; R.1830-31).

In short, there is no question that Leon Valley made an "individualized assessment" of the proposed use of the property.

B. The Church suffered a substantial burden.

The district court also erred in concluding that the Church has suffered no substantial burden. R.2148-51; Report 12-15. The Report gave three reasons for finding no substantial burden: (1) the Church suffered no financial burden "because the Church's purchase agreement is conditioned on the Property being rezoned" (R.2150; Report 14); (2) the Church could locate elsewhere in Leon Valley or the greater San Antonio area (R.2149-50; Report 13-14); and (3) "the Church is

not prohibited from conducting all religious activity at the Property" (R.2151-51; Report 14-15). All three arguments are foreclosed by existing precedent, RLUIPA's text, or both.

First, it is irrelevant that the Church's purchase contract is conditioned on rezoning. RLUIPA expressly provides that it applies not only to outright ownership interests, but also to "a contract or option to acquire such an interest." 42 U.S.C. § 2000cc-5(5) (emphasis added). Where Congress has specifically contemplated that RLUIPA will apply to options and other types of purchase contacts, the existence of such a contract should not be used as proof that no burden exists. *See also Petra Presbyterian Church* v. *Village of Northbrook*, 489 F.3d 846, 850 (7th Cir. 2007) (cost of contingency contract is a proper measure of damages under RLUIPA).

Second, courts have repeatedly rejected the notion that there is no substantial burden simply because a church might be able to move elsewhere. In *Islamic Center of Mississippi* v. *City of Starkville*, 840 F.2d 293, 299 (5th Cir. 1988), for example, which involved a free exercise challenge to a zoning ordinance, this Court found a substantial burden where the zoning ordinance excluded a mosque from the neighborhoods near a university: "By making a mosque relatively inaccessible within the city limits," the Court said, "the City burdens their exercise of their religion." *Id.* at 299. The Court rejected the argument—identical to the Report's rea-

soning here—that that the mosque was not burdened because it could simply locate elsewhere in the city, or in an area just outside city limits. *Id.* at 299-300, 302. Other courts have done the same. *See, e.g.*, *Barr* v. *City of Sinton*, 295 S.W.3d 287, 301, 305 (Tex. 2009) (rejecting argument that a religious halfway house suffered no substantial burden because it could move elsewhere); *Wisconsin* v. *Yoder*, 406 U.S. 205, 218 & n.9 (1972) (burden on religious exercise was "severe" even though plaintiffs might "be able, at considerable sacrifice, to relocate in some more tolerant State or country").

Third, courts have consistently rejected the notion that there is no substantial burden simply because the Church can engage in *some* religious activity on its property. As this Court has explained, the relevant question is "not whether governmental regulations substantially burden a person's religious free exercise *broadly defined*, but whether the regulations substantially burden *a specific religious practice*." *Merced* v. *Kasson*, 577 F.3d 578, 591 (5th Cir. 2009) (emphasis added). Here, Leon Valley's actions have banned a specific religious practice: the use of the Church's property to gather for worship. The fact that other religious practices may be permitted does not defeat a claim of substantial burden.

Once the Report's erroneous reasons are swept aside, it is evident that the Church has suffered a substantial burden. This Court has not yet applied RLUIPA's Substantial Burden provision in the land use context. But in the pris-

oner context, this Court has said that a "substantial burden" exists if a regulation "truly pressures the adherent to significantly modify his religious behavior and significantly violate his religious beliefs." *Adkins*, 393 F.3d at 570. This Court also considered the meaning of substantial burden in *Merced*, in which a Santeria priest challenged a city's ban on killing livestock in a residential area. There, the Court explained that, "*at a minimum*, the government's *ban* of conduct sincerely motivated by religious belief substantially burdens an adherent's free exercise of that religion." 577 F.3d at 590-91 (first emphasis added). And in *Islamic Center*, this Court held that a city imposed a substantial burden on a group of Muslim students "[b]y making a mosque relatively inaccessible within the city limits." 840 F.2d at 299.

Other circuits also offer insight on the meaning of "substantial burden." Several have found it relevant when the government acts in an arbitrary fashion, rejects proposed compromises, or bases its decision on findings that are "not supported by substantial evidence." *Westchester*, 504 F.3d at 351. In *Westchester*, for example, the Second Circuit found a substantial burden where the village denied a permit to a religious school arbitrarily, noting that the village "based its decision on speculation . . . without a basis in fact." *Id.* at 351.

Similarly, in *World Outreach Conference Center* v. *City of Chicago*, 591 F.3d 531 (7th Cir. 2009), the Seventh Circuit found a substantial burden where a

church was subjected to unfair dealing by city officials. As in this case, the city prevented a church from continuing a non-conforming use of newly purchased property, eventually rezoning the property so that the church had no opportunity to apply for a special use permit. *Id.* at 535-538. In finding the burden substantial, the court emphasized that there was "no possible justification" for the city's decision. *Id.* at 538.

Finally, in *Constantine*, the Seventh Circuit found a substantial burden based on the "delay, uncertainty, and expense" resulting from multiple zoning applications, together with the "whiff of bad faith arising from the [city's] rejection of a [compromise] solution." 396 F.3d at 901. Specifically, when the city worried that rezoning might permit undesirable uses if the church ever left, the church offered to rezone in a way that would "limit the parcel to church-related uses." *Id.* at 898. But the city rejected that compromise, and the court thus found a substantial burden. *Id.* at 901; *see also Guru Nanak*, 456 F.3d at 989 (county imposed a substantial burden where it rejected an application despite the fact that the plaintiff "readily agreed to every mitigation measure suggested").

Under these precedents, the Church has, at a minimum, created a material factual dispute over whether it has suffered a substantial burden. *See World Outreach*, 591 F.3d at 539 ("[D]etermining whether a burden is substantial . . . is ordinarily an issue of fact."). Specifically, a substantial burden exists based on four

considerations: (1) Leon Valley has dramatically reduced the land available for church use, making it difficult for the Church to locate within city limits; (2) Leon Valley rejected the Church's rezoning request on an arbitrary basis; (3) Leon Valley has refused the Church's offers of compromise; and (4) Leon Valley has forbidden the Church from carrying out its core religious exercise—corporate worship—on its property.

First, Leon Valley has severely restricted the Church's ability to locate within the city. Leon Valley amended its zoning ordinance with the specific intent of restricting the land available to churches and thus increasing its tax base. *See supra at* 12 (summarizing the economic motivation for the zoning amendments). The new zoning scheme permits churches in only one of Leon Valley's twelve zones, confining them to roughly 10% of the city. Much of that land is undeveloped, meaning churches must build from scratch. And if they can find any property, churches are grouped with industrial uses such as warehouses, storage units, flea markets, lumberyards and firing ranges. Thus, like the city in *Islamic Center*, Leon Valley has made church uses "relatively inaccessible within the city limits," 840 F.2d at 299; like the county in *Guru Nanak*, Leon Valley has, "to a significantly great extent[,] lessened the prospect of [the Church] being able to [locate in the city] in the future," 456 F.3d at 992; and, like the city in *World Outreach Center*, Leon Valley has conducted a targeted zoning revision that prevented churches

from using property previously zoned for church use, 591 F.3d at 535-38. *See also Barr*, 295 S.W.3d at 302-05 (substantial burden on religious halfway house where "alternatives for the religious exercise [we]re severely restricted").

Second, a substantial burden exists because Leon Valley rejected the rezoning request on arbitrary grounds. As noted above, Leon Valley claims that church use is inconsistent with the goal of creating a retail corridor. R.2153; Report 17. But the Church *already* uses the property as a counseling, day care, and administration center on weekdays, and those uses are permissible under the zoning code. The Church simply wants to add an *additional* use of the property (worship and Bible study) on nights and weekends. Leon Valley has offered no explanation for why forcing the Church to remain vacant on nights and weekends contributes to a retail corridor. The arbitrary nature of the decision thus supports a finding of substantial burden. *Accord Westchester*, 504 F.3d at 350-52 (arbitrary nature of zoning denial supported a finding of substantial burden); *Guru Nanak*, 456 F3d at 990-91 ("inconsistent decision-making" supported a finding of substantial burden).

Third, a substantial burden exists because Leon Valley has refused to compromise. In order to ease concerns over an undesirable use taking over the property in the future, the church voluntarily obtained and recorded restrictive covenants, which prohibit the property from being used as any B-3 use other than a church. R.1840-41. Enforcement for such covenants lies with the church's residential

neighbors, and the neighbors' active participation in zoning meetings confirms that those covenants would be actively enforced. R.1841. But Leon Valley rejected this compromise out-of-hand. *Id.* Thus, like the city in *Constantine,* Leon Valley rejected a proposed mitigation measure that would "limit the parcel to church-related uses." 396 F.3d at 898. And like the county in *Guru*, it has "disregarded, without explanation, . . . various mitigation conditions" proposed by the Church. 456 F.3d at 991.

Finally, the Church suffers a substantial burden because it is strictly prohibited from using its own property for its core religious exercise—gathering for corporate worship. Several cases have held that this sort of restriction constitutes a substantial burden. In *Islamic Center,* this Court emphasized that "[t]he assembly of a community of believers is an integral part of most religious faiths," and the government must satisfy heightened scrutiny when it "exercises its power to affect group worship." 840 F.2d at 300. The Court found a substantial burden because the zoning ordinance "forb[ade] the use of property [the students] already own for worship services." *Id.* at 302. Similarly, in *Merced,* the city prohibited the keeping of livestock in residential areas, effectively banning certain animal sacrifices that were central to Santeria worship. 577 F.3d at 591. Although the plaintiff might have been able to conduct sacrifices if he had obtained a three-acre lot, this Court held that "compelling a person to acquire a house on such a lot in a suburban envi-

ronment to keep a few animals for a matter of hours is a substantial burden." *Id.* at 591 n.15. So too here: compelling the Church to purchase a new lot and build from scratch just so it can add worship services to its existing activities is a substantial burden.

Many other cases agree that forcing a church to relocate or make do with inadequate facilities constitutes a substantial burden. *See Barr*, 295 S.W.3d at 302; *Westchester*, 504 F.3d at 345-46 (existing school facilities inadequate); *Constantine*, 396 F.3d at 898 (church was outgrowing existing facilities in nearby town). The Church has, accordingly, suffered a substantial burden. At a minimum, when the facts are viewed in the light most favorable to the Church, summary judgment for Leon Valley is inappropriate.

C. Leon Valley cannot satisfy strict scrutiny.

Because the Church has suffered a substantial burden, Leon Valley's actions are subject to strict scrutiny. Specifically, Leon Valley must prove that its actions further "a compelling governmental interest" and are "the least restrictive means of furthering that compelling governmental interest." 42 U.S.C. § 2000cc(a)(1). This is "the most demanding test known to constitutional law." *Boerne*, 521 U.S. at 534.

Leon Valley doesn't even come close to satisfying this test. In its summary judgment briefing, Leon Valley identified two allegedly "compelling" interests: (1) a generalized interest in "managing the overall plan and growth of the City through

zoning regulations" (R.301-02); and (2) an interest in "keeping like uses in the same zone" (R.292). Though such interests are certainly legitimate, they are not so "paramount" that they justify a restriction of First Amendment rights. *Yoder*, 406 U.S. at 219-36 (interest in compulsory secondary education did not justify restrictions on rights of Amish); *Lukumi*, 508 U.S. at 546-47 (interest in protecting public health did not justify restrictions on religious animal sacrifice); *Merced*, 577 F.3d at 592 (same).

In any event, Leon Valley itself has not treated those interests as compelling. Leon Valley permits numerous uses that undermine its alleged retail interest in the B-2 zone—including farms, radio stations, equestrian centers, convalescent centers, and volleyball parks. R.1517-24; R.E.6. It has also applied its ordinance to the Church in a way that undermines its alleged interest—allowing the Church to operate a day care and counseling center five days per week, but forcing it to keep the property empty on nights and weekends. This confirms that the alleged interest is not compelling. *Cf. Merced*, 577 F.3d at 594 (city's alleged interest in protecting public health was weakened by the fact that it made exceptions for some conduct undermining that interest); *Lukumi*, 508 U.S. at 546-47.

Even if the interest were compelling, Leon Valley cannot show that it has used the least restrictive means of furthering that interest. Leon Valley has never advanced an argument on this point, R.274-304 (Leon Valley's motion for sum-

mary judgment), and has offered no evidence showing that a limited exception for the Property—which has been used continuously as a church for over a decade—would thwart its plans for a retail corridor. *Merced*, 577 F.3d at 594-95. It therefore cannot satisfy strict scrutiny.

III. The District Court misapplied TRFRA's Substantial Burden provision.

For the same reasons, the district court erred in granting summary judgment on the church's TRFRA claim. TRFRA, like RLUIPA, prohibits a governmental entity from imposing a "substantial burden" on religious exercise unless the government satisfies strict scrutiny. Tex. Civ. Prac. & Rem. Code § 110.003 (Vernon 2005). But unlike RLUIPA, TRFRA has no "commerce clause" or "individualized assessment" test for jurisdiction.

Only two cases of note have been decided under TRFRA: *Barr* and *Merced*. *See supra*. As explained above, the Church established a substantial burden under both, and Leon Valley cannot satisfy strict scrutiny. The district court therefore erred by granting summary judgment to Leon Valley.

CONCLUSION

For the foregoing reasons, the judgment of the district court should be reversed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

Pursuant to Fed. R. App. P. 25(d), I hereby certify that service of the foregoing brief was made on May 7, 2010 to the following counsel for parties to the appeal by means of the Court's CM/ECF system:

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 13,713 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface (Times New Roman, 14-point) using Microsoft Word 2003.

Dated: May 7, 2010

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COURT FILING STANDARDS CERTIFICATIONS

In accordance with the Court's filing standards for ECF filing, I hereby certify the following:

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