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

REPLY BRIEF OF PLAINTIFF-APPELLANT THE ELIJAH GROUP

Luke W. Goodrich
Lori H. Windham
Hannah C. Smith
THE BECKET FUND FOR
RELIGIOUS LIBERTY
3000 K St., NW,
Suite 220
Washington, D.C. 20007
T (202) 955-0095
F (202) 955-0090

Counsel for The Elijah Group, Inc.

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)
Eric Rassbach (Attorney for Plaintiff-Appellant)
Lori Windham (Attorney for Plaintiff-Appellant)
Luke Goodrich (Attorney for Plaintiff-Appellant)
The Becket Fund for Religious Liberty (Law Firm for Plaintiff-Appellant)
Daniel P. Whitworth (Attorney for Plaintiff-Appellant)
John G. George (Attorney for Plaintiff-Appellant)
Roger Bresnahan (Attorney for Plaintiff-Appellant)
Farrimond, Castillo, and Bresnahan, P.C. (Law Firm for Plaintiff-Appellant)
Patrick Christensen (Attorney for Plaintiff-Appellant)
Brown & Ortiz, P.C. (Law Firm for Plaintiff-Appellant)
Elizabeth Guerrero Christ (Attorney for Defendant-Appellee)
Lowell F. Denton (Attorney for Defendant-Appellee)
Ryan Henry (Attorney for Defendant-Appellee)

Denton, Navarro, Rocha, & Bernal, P.C. (Law Firm for Defendant-Appellee)
John Frank Onion, III (Attorney for Defendant-Appellee)
William McKamie (Attorney for Defendant-Appellee)
McKamie Krueger, LLP (Law Firm for Defendant-Appellee)
Scott Magers (Mediating Attorney at trial court)
Texas Municipal League Intergovernmental Risk Pool

s/ Luke W. Goodrich
Luke W. Goodrich
Counsel for Plaintiff-Appellant

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases **Page(s)**

Constitutional Provisions

Statutes

Other Authorities

INTRODUCTION

Leon Valley does not dispute that it prohibits churches where it permits a wide variety of secular assemblies—including auditoriums, convention centers, private clubs, theaters, and schools. Nor does it dispute that this violates RLUIPA under the Eleventh Circuit's plain language approach. Instead, it argues that the exclusion of churches is justified under the Third or Seventh Circuit's approaches because churches lack "retail use characteristics." Resp.35.

But Leon Valley never explains what these "retail use characteristics" are. The supposed "retail use characteristics" have nothing to do with the ordinary meaning of "retail"—*i.e.*, the sale of goods to a consumer—because Leon Valley permits numerous non-retail uses in the B-2 zone, such as museums, libraries, and farms. They have nothing to do with tax revenue, because Leon Valley now says tax revenue is irrelevant. Resp.35. The only characteristic Leon Valley even hints at is "congestion"—stating churches are excluded because they produce "increased parking, traffic congestion and occupancy." Resp.8. But Leon Valley permits numerous secular assemblies that produce at least as much congestion as churches—including auditoriums, convention centers, private clubs, theaters, and schools. Leon Valley offers no coherent reason for treating these assemblies better than churches.

But this Court need not wade into the mire of "retail use characteristics." The Equal Terms provision does not permit such an inquiry. Under RLUIPA's plain language, this Court need only decide whether auditoriums, convention centers, private clubs, theaters, or schools are "nonreligious assembl[ies]" under the ordinary meaning of that term. Leon Valley does not even dispute that they are.

Instead, it argues the plain language approach is undesirable (or even unconstitutional) because it gives churches "near complete immunity from zoning" regulations. Resp.20. Not so. Under the plain language approach, cities are free to impose *any* zoning restriction on churches—so long as they impose the *same* restriction on secular assemblies. Thus, size restrictions, traffic restrictions, parking restrictions, aesthetic restrictions—all are permissible under the plain language approach.

Finally, the Church is also entitled to summary judgment under the substantial burden provisions of RLUIPA and TRFRA. Leon Valley admits that it excludes churches from nearly 90% of the city, and unrefuted testimony shows the few remaining properties are either religiously unsuitable or financially unattainable. As numerous courts have held, the absence of any feasible alternatives constitutes a substantial burden.

ARGUMENT

I. The Church prevails under all three approaches to RLUIPA's Equal Terms provision.

Leon Valley's zoning ordinance fails under any existing Equal Terms approach. It fails under the Third Circuit's approach because it lacks a coherent regulatory purpose. It fails under the Seventh Circuit's approach because it is not justified by commonly accepted zoning criteria. And it fails under the Eleventh Circuit's approach because it permits numerous secular assemblies while excluding churches.

A. The Third Circuit's "regulatory purpose" approach.

The *sine qua non* of the Third Circuit's approach is a coherent, "well documented" regulatory purpose. *Lighthouse Inst. for Evangelism* v. *City of Long Branch*, 510 F.3d 253, 270, 272 (3rd Cir. 2007). As Leon Valley admits: "If the city does not have a proper regulatory purpose, does not properly tie the permitted/excluded uses to that purpose, or allows unjustified exceptions, then such a city could run afoul of RLUIPA's Equal Terms provision." Resp.34. That is just what happened here.

Not only does Leon Valley lack a coherent regulatory purpose, it can't even keep its own story straight. Earlier Leon Valley offered two purposes for excluding churches from the B-2 zone: (1) churches generate no sales tax revenue, and (2) churches are relatively empty six days per week. As Leon Valley put it:

> "[I]t 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*." That . . . was the very reason for a new zoning approach to B-2 uses in the retail corridor.

R.2240 (Leon Valley's Resp. to Pl.'s Objections at 11) (emphasis added; citation omitted); *see also* Br.12 (collecting similar statements of zoning commissioners).

In response, we made two obvious points. First, tax revenue does not justify excluding the Church because Leon Valley permits many other uses in the B-2 zone that generate no sales tax revenue—including libraries, schools, and the Church's own child care services. Br.39. Second, lack of traffic "six days a week" does not justify excluding the Church because (a) the Church generates traffic all week long from its counseling, child care, and administrative offices, and (b) Leon Valley permits many uses in the B-2 zone that are relatively empty much of the week—such as auditoriums, convention centers, and indoor theaters. *Id*.

Now Leon Valley has changed its tune. In its response brief, it completely disavows the tax justification, stating that it regulates "regardless of the ability to tax." Resp.35. Instead, it claims that "[i]ts regulatory purpose is tied only to . . . *retail use characteristics*." *Id.* (emphasis added). Leon Valley also abandons its objection that churches remain "relatively empty six days a week." R.2240. Instead, it now claims churches generate *too much* activity, causing "increased parking, traffic congestion and occupancy." Resp.8. In short, Leon Valley's regulatory purpose has completely transformed.

But this newfound regulatory purpose fares no better than the old one. Take, for instance, "retail use characteristics." Resp.35. Leon Valley never defines what these "retail use characteristics" are. "Retail" is commonly defined as "the sale of commodities or goods in small quantities to ultimate consumers." Merriam-Webster's Collegiate Dictionary 1063 (11th ed. 2003). But many B-2 uses have nothing to do with selling goods to consumers—including, among others, museums, schools, radio or television stations, volleyball parks, and farms. R.1517-24; *see also* Br.43-47.

So Leon Valley retreats again, stating it allows *non*-retail uses that are "*similar in regulatory effect* to revenue generating retail uses." Resp.33 (emphasis added). But again, Leon Valley never defines what "regulatory effect" it is worried about. Similarly, it says child care, counseling, and administrative offices are "more retail in nature" than churches, but it never says how. Resp.35. Leon Valley essentially uses "retail" as a vague, catch-all term that means whatever Leon Valley wants it to mean—except churches.

The only specific "retail use characteristic" Leon Valley ever mentions is "congestion," which it mentions four times. Resp.5, 7-8. Apparently, it believes churches create too much congestion (on Sundays?) for a retail corridor. But if so, why does Leon Valley permit numerous other uses that create similar congestion—including auditoriums, convention centers, "Other Similar Meeting Facilities," pri-

vate clubs, funeral homes, schools, theaters, and museums? *See* R.1517-24. All of these uses are characterized by periodic, high-occupancy gatherings that produce the same type of congestion as a church. Indeed, since the Church has only 50-90 attendees on any given Sunday (R.373-74)—fewer than an average movie theater—many of these secular assemblies produce far more congestion. Thus, vague allegations of "congestion" do not justify treating churches worse.

In short, Leon Valley offers no coherent regulatory purpose. Under the Third Circuit's approach, it must explain—and support with evidence—how a church harms its regulatory goals more than other assemblies, such as auditoriums and convention centers. But Leon Valley's brief never even *mentions* auditoriums or convention centers; and the key portion of its brief discussing regulatory purpose cites the record *not one time*. *See* Resp.34-36 (citing nothing). Thus, this case is much more like the ordinance struck down in *Lighthouse*—where "nothing in the record" established a "well documented" regulatory purpose, and where "it [wa]s not apparent from the allowed uses why a church would cause greater harm to regulatory objectives than an 'assembly hall.'" *Lighthouse*, 510 F.3d at 272. The Church is entitled to summary judgment even under the most deferential Equal Terms approach.[1]

[1] Leon Valley also claims it satisfies RLUIPA because it did not have "discriminatory intent." Resp.32-33. But the point of RLUIPA is to relieve churches of the burden of proving discriminatory intent in the highly discretionary land use con-

B. The Seventh Circuit's "regulatory criteria" approach.

Leon Valley fares no better under the Seventh Circuit's "regulatory criteria" approach. *See River of Life Kingdom Ministries* v. *Village of Hazel Crest*, ---- F.3d ---, 2010 WL 2630602 (7th Cir. July 2, 2010) (en banc). Under that approach, Leon Valley must show that religious and nonreligious assemblies "are treated the same . . . from the standpoint of an accepted zoning criterion." *Id.* at *6. So, for example, if a municipality creates "what purports to be a pure commercial district," but then "allow[s] other [noncommercial] uses, a church would have an easy victory if the municipality kept it out." *Id.* at *6. The Church is entitled to just such an "easy victory" here.

Although Leon Valley never explains what zoning criterion it is relying on, none of the possible candidates support a ruling in its favor. If the relevant zoning criterion is the "retail" nature of the zone, the ordinance fails because it permits numerous uses that have nothing to do with retail—such as libraries, schools, and farms. Indeed, in *River of Life*, the court upheld the city's ordinance because the relevant commercial district excluded "churches *along with* community centers, meeting halls, and libraries because these secular assemblies, like churches, do not generate significant taxable revenue or offer shopping opportunities." *Id.*; Resp.33. But Leon Valley does the opposite. It excludes churches while *permitting* "[con-

---

text. Other provisions of RLUIPA directly address "discriminat[ion]." 42 U.S.C. § 2000cc(2)(b)(2).

vention] centers, meeting [facilities], and libraries"—even though these uses "do not generate significant taxable revenue or offer shopping opportunities." *River of Life*, 2010 WL 2630602, at *6. That is just what the Seventh Circuit's approach forbids.

Nor is the exclusion of churches justified on the ground that they generate "increased parking, traffic congestion and occupancy." Resp.8. As explained above, Leon Valley allows numerous secular assemblies that generate just as much congestion as churches—including auditoriums, convention centers, "Other Similar Meeting Facilities," private clubs, theaters, funeral homes, and schools. R.1517-24. In fact, other portions of Leon Valley's zoning code subject churches to the exact same parking requirements as "Theaters, . . . Convention Halls, Assembly Halls, Stadiums, [and] Funeral Homes"—indicating that Leon Valley itself views these assemblies as generating the same sort of congestion. R.1537-38.

As the Seventh Circuit explained: "[If] maintenance of regular (as opposed to sporadic and concentrated) vehicular traffic were the zoning objective," then "a church is more like a movie theater, which also generates groups of people coming and going at the same time," and "[t]he equal-terms provision would therefore require the zoning authorities to allow the church in the zone with the movie theater . . . ." *River of Life*, 2010 WL 2630602, at *5. Here, Leon Valley permits not only

movie theaters, but numerous other secular assemblies with sporadic and concentrated use. Thus, no "accepted zoning criterion" justifies the exclusion of churches.

C. The Eleventh Circuit's plain language approach.

Finally, as we explained in our opening brief (at 37-43), the Church is entitled to summary judgment under the Eleventh Circuit's plain language approach. Leon Valley offers no response. It has, accordingly, conceded this point.

II. This Court should adopt the plain language approach.

Although the Church prevails under all three approaches to RLUIPA, this Court should adopt the plain language approach.[2] That approach is superior both as a matter of policy and, more importantly, as a matter of statutory interpretation.

[2] Given its duty to "announce and apply principled rules for the guidance of trial courts, lawyers, and litigants," *United States* v. *Cruz*, 581 F.2d 535, 541 (5th Cir. 1978), this Court can and should resolve the confusion over the Equal Terms provision. This Court has not hesitated to resolve questions of statutory interpretation—even when there is a circuit split, and even when the same party would prevail under either standard. *See, e.g.*, *United States* v. *Nix*, 465 F.2d 90, 93 (5th Cir. 1972) (adopting the Second Circuit's standard "[e]ven [though] the more restrictive standards intimated by the Seventh and Eighth Circuits . . . were satisfied"); *Matter of Bruner*, 55 F.3d 195, 200 (5th Cir. 1995) (concluding the Sixth Circuit "expresses the preferable view," even though both the Sixth and Eleventh Circuit's standards were satisfied). If this Court declines to resolve the confusion, litigants will be forced to litigate under three different standards—and courts will be required to apply all three. Thus, adopting the plain language approach will not only promote judicial economy, it will also keep courts from deciding legal issues unnecessarily.

A. The plain language approach does not immunize churches from land use regulations.

Leon Valley's main objection to the plain language approach is not based on the text of RLUIPA, but on a policy argument. According to Leon Valley, the plain language approach is too friendly to churches because it gives them "near complete immunity" from zoning regulations. Resp.20. As Leon Valley puts it: "Under the definition of 'assembly' asserted in [*Midrash*], . . . if any assembly is permitted in a zone, including a Taco Cabana [restaurant], then any and all churches, irrespective of size, configuration, and design, can locate in the same zone." *Id.*

This policy argument fails for three reasons. First, it grossly mischaracterizes the plain language approach. As we explained in our opening brief (at 27-28), under the plain language approach to Equal Terms, Leon Valley remains free to impose *any* land use restriction on religious assemblies—so long as it imposes the *same restriction* on nonreligious assemblies. *See Digrugilliers* v. *Consolidated City of Indianapolis*, 506 F.3d 612, 615 (7th Cir. 2007) ("Whatever restrictions the City imposes on other users of land in [a given district] it can impose on [churches] without violating the 'equal terms' provision."); *Lighthouse*, 510 F.3d at 287 (Jordan, J., dissenting) (same). So, for example, if Leon Valley is concerned about the size of assemblies in zone B-2, it can impose size restrictions—such as "no assembly buildings larger than 15,000 square feet." This would address Leon Valley's alleged concern about theaters and mega churches—permitting "a small theater

less than 10,000 square feet," while excluding "a mega church of 200,000 square feet." Resp.20. Such a regulation is perfectly permissible under the plain language approach. *See, e.g.*, *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 assemblies alike).

Similarly, if Leon Valley is worried about traffic, it can impose traffic restrictions: *e.g.*, limiting the size and capacity of assembly buildings permitted on certain types of roads. If Leon Valley is worried about parking, it can impose parking restrictions: *e.g.*, requiring all assemblies to provide four off-street parking spaces per 1,000 square feet of assembly space. If it is worried about aesthetics, it can impose aesthetic restrictions: *e.g.*, requiring all assemblies to have 100-foot setbacks and landscaping buffers. And if it is worried about unforeseen circumstances, it can even impose a broad, catch-all requirement: *e.g.*, that all assembly uses be "consistent with the characteristics of the neighborhood"—so long as that requirement is applied evenly to religious and non-religious assemblies. All of these requirements are perfectly permissible under the plain language approach.

In fact, cities across the country routinely use just these sorts of requirements to regulate "assemblies" as a class. The examples above are drawn from the "Public Assembly Ordinance" that was upheld in *Vision Church*, 468 F.3d at 993-94, and is attached as Appendix A to this brief. Leon Valley itself uses a similar ap-

proach elsewhere in the zoning code, applying the same setback and landscaping requirements to *all* assemblies (and other uses) in various zones. *See, e.g.*, R.1506, 1508-09. Leon Valley has not even attempted to explain why this sort of approach is insufficient to regulate churches.

Second, Leon Valley's policy argument fails because it mischaracterizes the Eleventh Circuit's definition of "assembly." Leon Valley repeatedly assumes fast food restaurants are "assembl[ies]" under the plain language approach, arguing that the plain language approach is therefore too broad. Resp.2, 19-20, 46 ("If a Taco Cabana goes forth, so shall a mega church."). But our opening brief never suggested that a restaurant is an assembly under the plain language approach.[3] Nor has the Eleventh Circuit.

In fact, there is strong reason to believe that restaurants are *not* "assemblies." The Eleventh Circuit defined "assembly" as "a group of persons *organized and united* for some common purpose." *Midrash Sephardi, Inc.* v. *Town of Surfside*, 366 F.3d 1214, 1230 (11th Cir. 2004) (citing Black's Law Dictionary 1171 (1993)) (emphasis added). Patrons at a restaurant may be a "group of persons" with a "common purpose" (eating and drinking). But they are not, in the ordinary sense, "*organized and united*" for that purpose—any more than a rush-hour crowd of pedestrians in New York City is "organized and united for [a] common purpose." Put

[3] Pastor Crain's deposition testimony on this point (Resp.2, 19-20) is irrelevant. His testimony is not the Church's legal argument.

another way, an "assembly" is different from a "crowd" or a "group." It is not just a collection of separate individuals who happen to be in the same place at the same time; it is a group organized and united for a common purpose.

This is just what Judge Sykes explained in *River of Life*: "[A restaurant or tavern] is a place where people assemble for a common purpose . . . . But the ordinary understanding of the term 'assembly' requires more; it requires *a degree of group affinity, organization, and unity around a common purpose*." 2010 WL 2630602, at *20 (Sykes, J., dissenting) (emphasis added). Under this understanding, restaurants and taverns are not "assemblies" because "[p]atrons of these establishments share a common purpose only in the loosest sense and are not usually organized or united to the degree required for an assembly." *Id.* at *21. Thus, the plain language approach is far narrower than Leon Valley tries to make it sound.

Finally, Leon Valley's policy argument fails because it has been refuted by experience. If Leon Valley were correct, and the Eleventh Circuit's approach gave churches "near complete immunity" from zoning regulations, Resp.20, one would expect a flood of Equal Terms litigation in the Eleventh Circuit with churches uniformly prevailing. But the Eleventh Circuit's experience has been the opposite. In the six years since the Eleventh Circuit adopted the plain language approach in *Midrash*, there have been a total of six reported federal cases involving an Equal

Terms claim. Three were decided in favor of the government, two in favor of the religious assembly, and one was mixed.[4] This is hardly a plaintiff-friendly flood.

In sum, the sky will not fall if this Court adopts the plain language approach. That approach is much narrower than Leon Valley's straw man; it leaves cities ample room to regulate religious assemblies; and it has proven to be an easily administrable and fair approach in the Eleventh Circuit.

B. The plain language approach is required by RLUIPA's text.

Once Leon Valley's policy objection is swept aside, there is very little left of its argument. As we explained in our opening brief (at 24-34), the plain language approach is compelled by the text, structure, history, and purpose of RLUIPA. No "similarly situated" requirement appears in RLIUPA's text—even though Congress has used that term in the United States Code over 400 times. Br.25-27. In-

[4] *See*:

- *Williams Island Synagogue, Inc.* v. *City of Aventura*, 358 F. Supp. 2d 1207, 1218 (S.D. Fla. 2005) (summary judgment for government);
- *Men of Destiny Ministries, Inc.* v. *Osceola County*, 2006 WL 3219321, at *8 (M.D. Fla. 2006) (bench trial judgment for government);
- *Primera Iglesia Bautista Hispana of Boca Raton, Inc.* v. *Broward County*, 450 F.3d 1295, 1313-14 (11th Cir. 2006) (bench trial judgment for government);
- *Chabad of Nova, Inc.* v. *City of Cooper City*, 533 F. Supp. 2d 1220, 1223 (S.D. Fla. 2008) (summary judgment for religious assembly);
- *Hollywood Community Synagogue, Inc.* v. *City of Hollywood*, 430 F. Supp. 2d 1296, 1319 (S.D. Fla. 2006) (religious assembly survived motion to dismiss);
- *Konikov* v. *Orange County*, 410 F.3d 1317, 1324-29 (11th Cir. 2005) (ruling in favor of government on facial challenge, but in favor of religious assembly on as-applied challenge).

stead, Congress already specified how religious and nonreligious uses must be similar: they must both be an "assembly" or "institution." *Midrash*, 366 F.3d at 1230; *Konikov*, 410 F.3d at 1324; *River of Life*, 2010 WL 2630602, at *19 (Sykes J., dissenting).

In response, Leon Valley (like the Third Circuit) doesn't even try to ground its "similarly situated" requirement in RLUIPA's text. Instead, it cites three other laws—the First Amendment, the Equal Protection Clause, and Title VII—arguing that, even though these laws don't include the words "similarly situated," courts have incorporated "implicit [similarly situated] standards." Resp.21-23. This argument fails for two reasons.

First, the Equal Terms provision is much more specific than these laws. While the Equal Terms provision expressly identifies two categories of things that must be treated equally, these other laws merely codify general prohibitions on any law "prohibiting the free exercise [of religion]" (U.S. Const. amend. I), any denial of "the equal protection of the laws" (U.S. Const. amend XIV, §1), or any "discriminat[ion] against any individual" on certain enumerated bases (42 U.S.C. § 2000e-2(a)(1)). Nowhere do these laws textually designate two categories of individuals and require those categories to be treated alike. In other words, the text of these laws leaves open the question of what comparators to use; the Equal Terms provision does not.

Second, even the laws highlighted by Leon Valley don't *always* include a similarly situated requirement. As the Supreme Court has explained, a free exercise plaintiff need not show he is similarly situated to other persons if a law *facially discriminates* against a religious practice. *Church of the Lukumi Babalu Aye, Inc.* v. *City of Hialeah*, 508 U.S. 520, 532 (1993); Br.33-34. Similarly, an Equal Protection plaintiff need not show he is similarly situated to other persons if a law makes distinctions on the basis of a "suspect class"—such as race, alienage, or religion. *Plyler* v. *Doe*, 457 U.S. 202, 216 (1982); *City of Cleburne* v. *Cleburne Living Center*, 473 U.S. 432, 439-40 (1985). And a Title VII plaintiff need not show she is similarly situated to other employees if she relies on direct evidence of discrimination. *See Jones* v. *Robinson Property Group, L.P.*, 427 F.3d 987, 992 (5th Cir. 2005). In short, in cases of *facial discrimination*, no similarly situated showing is required. The same is true here: Leon Valley's ordinance facially treats religious assemblies worse than a wide variety of nonreligious assemblies. Leon Valley's analogy to other laws is inapposite.

Leon Valley also attempts to rely on the Seventh Circuit's "regulatory criteria" approach, but that approach is no more textually grounded than the Third Circuit's. According to the Seventh Circuit, the word "equal" is "a complex concept," and "[t]he fact that two land uses share a dictionary definition doesn't make them 'equal' within the meaning of a statute." *River of Life*, 2010 WL 2630602, at *4.

Thus, according to the Seventh Circuit, a religious assembly and nonreligious assembly need not be treated alike unless they are "equal" with respect to "accepted zoning criteria." *Id.*

But this supposedly textual argument fails for two reasons. First, the Seventh Circuit confuses the use of the word "equal." In the Equal Terms provision, the word "equal" does *not* modify "religious assembly" or "nonreligious assembly." It modifies the "terms" on which assemblies are "treat[ed]." Thus, the focus is *not* on whether two particular *land uses* are equal, but on whether certain land uses are *treated* on equal *terms*.

Suppose, for example, that Congress prohibited governments from treating "churches" on less than equal terms with "single family homes." In this context, the ordinary meaning of "equal terms" would be that churches and single family homes must be subject to the *same zoning requirements*. Requiring churches to show that they were also "similarly situated" to single family homes would make no sense. So too here: "equal terms" does not mean "equal assemblies."

Second, even assuming the word "equal" requires similar "comparators," the Seventh Circuit offers no textual basis for choosing "regulatory criteria" as the basis for comparison instead of "regulatory purpose" or something else. If there is any textual basis for requiring comparators, it is the comparators *already selected* by Congress: namely, "religious assembly" and "nonreligious assembly."

Nor is it strange Congress would choose these particular comparators. Of course, religious assemblies and nonreligious assemblies will not always have identical land use effects. But no two land uses *ever* have completely identical effects. Congress can certainly make the judgment that, in the vast majority of cases, a religious "assembly," under the common meaning of that term, will have roughly similar land use effects to a nonreligious "assembly." That judgment is far from irrational. It is particularly appropriate in light of the common practice of applying the same size, traffic, and aesthetic restrictions to all assemblies in a zone to ensure that all have similar impacts. *See supra*. Just because Congress chose a fairly broad category of comparators ("assembl[ies]") doesn't mean courts can supply a different category ("assemblies with similar land-use effects") simply because they think it makes the statute work better. *See, e.g.*, *Wilson* v. *Bruks-Klockner, Inc.*, 602 F.3d 363, 371 (5th Cir. 2010) ("[W]e decline to read into the statute a narrowing construction that is not clearly present in its plain language.")

C. The plain language approach is constitutional.

Lacking any serious textual argument, Leon Valley claims the plain language approach is unconstitutional—either because it exceeds Congress's power under the Fourteenth Amendment, or because it violates the Establishment Clause. Resp.28-30. Neither argument has merit.

Leon Valley devotes only one paragraph to its Fourteenth Amendment argument (Resp.28)—and rightly so. Every court to address the issue has held that RLUIPA generally, and the Equal Terms provision in particular, is a valid exercise of Congress's Fourteenth Amendment enforcement power.[5] That power extends broadly to any legislation that "deters or remedies constitutional violations," so long as there is "a congruence and proportionality" between the constitutional injury and the means adopted to remedy it. *City of Boerne* v. *Flores*, 521 U.S. 507, 518-20 (1997).

The plain language of the Equal Terms provision easily satisfies that standard for two reasons. First, as we explained in our opening brief (at 33-34), far from "re-writ[ing]" free exercise jurisprudence, Resp.28, the plain language approach is consistent with the Supreme Court's free exercise cases. *Midrash*, 366 F.3d at 1239-40. Those cases have repeatedly struck down laws—like Leon Valley's—that *facially discriminate* between religious and nonreligious conduct. *See Lukumi*, 508 U.S. at 532 (collecting cases). In such cases, no "similarly situated" showing is required. *Id.*; *Lighthouse*, 510 F.3d at 291 (Jordan, J., dissenting); *see also* Br. for *Amici Curiae* the American Islamic Congress, *et al.* 9-14.

[5] *See, e.g.*, *Guru Nanak Sikh Soc'y of Yuba City* v. *County of Sutter*, 456 F.3d 978, 993 (9th Cir. 2006); *Midrash*, 366 F.3d at 1238. The only court to hold otherwise was promptly reversed on appeal. *See Elsinore Christian Ctr.* v. *City of Lake Elsinore*, 197 F. App'x 718 (9th Cir. 2006).

Second, in multiple hearings over the course of three years, Congress supported RLUIPA with "massive evidence" of widespread discrimination against churches. 146 Cong. Rec. S7774, S7774 (daily ed. July 27, 2000) (joint statement). Specifically, Congress found that churches are "frequently discriminated against on the face of zoning codes" and that such discrimination is easy to mask. *Id.* at S7774–75 (quotation marks omitted). These findings—which Leon Valley does not even attempt to rebut—confirm that the Equal Terms provision is a proportionate response to a serious constitutional problem and thus falls well within Congress's Fourteenth Amendment enforcement power. *Midrash*, 366 F.3d at 1239.

Leon Valley's Establishment Clause argument is even weaker. Most egregiously, Leon Valley fails to mention two obvious, controlling precedents.

First, the Supreme Court already addressed an Establishment Clause challenge to RLUIPA in *Cutter* v. *Wilkinson*, 544 U.S. 709, 715 (2005). There, the government claimed that RLUIPA's prisoner provisions impermissibly advanced religion because they gave "greater protection to [prisoners'] religious rights than to other constitutionally protected rights." *Id.* at 724. But the Supreme Court *unanimously rejected* that argument, instead holding that RLUIPA satisfied the Establishment Clause because it merely "alleviates exceptional government-created burdens on private religious exercise." *Id.* at 720.

The same is true here. If anything, the Equal Terms provision offers even *less* "favoritism" toward religion because, unlike the "substantial burden" provision at issue in *Cutter*, it merely requires religious and nonreligious assemblies to be treated equally. That is simply protection against *dis*favor.

Second, this Court already rejected an Establishment Clause challenge to RFRA, *Flores* v. *City of Boerne*, 73 F.3d 1352, 1364 (5th Cir. 1996), which is far more "sweeping" than RLUIPA. *Cutter*, 544 U.S. at 715. Although *Flores* was reversed on other grounds, *Boerne*, 521 U.S. 507 (1997), the Establishment Clause holding remains binding.

More importantly, *Flores* is right. The Supreme Court has repeatedly rejected Establishment Clause challenges to laws that merely "accommodate" religion by lifting government-imposed burdens. *See, e.g.*, *Cutter*, *supra*; *Corp. of Presiding Bishop of Church of Jesus Christ of Latter-day Saints* v. *Amos*, 483 U.S. 327 (1987). That is just what the Equal Terms provision does. Not surprisingly, no court has ever struck down the land use provisions of RLUIPA under the Establishment Clause. *See, e.g.*, *Midrash*, 366 F.3d at 1240; *Westchester Day School* v. *Village of Mamaroneck*, 504 F.3d 338, 355–56 (2d Cir. 2007).

D. The plain language approach is superior as a matter of policy.

The plain language approach is not only textually required and constitutionally permissible, it is also superior as a matter of policy. As we explained in our

opening brief (at 34-37), the Third Circuit's "regulatory purpose" approach is highly subjective and makes it easy for local governments to circumvent the statute. Leon Valley has not even attempted to respond to these criticisms; and the Seventh Circuit largely agreed with them, rejecting the regulatory purpose test on the ground that it is "subjective and manipulable," and "give[s] local officials a free hand" to avoid the statute. *River of Life*, 2010 WL 2630602, at *4.

But the Seventh Circuit's "regulatory criteria" approach merely trades one set of problems for another. Where the Third Circuit's approach empowers *local officials*, who can avoid RLUIPA by developing a creative "regulatory purpose," the Seventh Circuit's approach empowers *judges*, who are effectively forced to serve as appellate zoning officials, deciding whether various assemblies "differ with respect to any accepted zoning criterion." *Id.* at *3-*4. Under this approach, it is federal judges who will decide what "accepted zoning criteria" are, and "it is federal judges who will apply the criteria to resolve the issue." *Id.* at *4.

But the Seventh Circuit provides precious little guidance on how federal judges should decide these issues. *See id.* at *4-*6. Is "furthering economic development" an accepted zoning criterion? *See id.* at *6 (suggesting that "generating municipal revenue" is an accepted zoning criterion). If so, how does a federal court decide whether private clubs, auditoriums, schools, and churches are "similarly situated" under that criterion? Expert witnesses would likely be helpful. But then

RLUIPA litigation would look more like a local zoning board meeting than a federal civil rights lawsuit. Federal judges would essentially serve as zoning policymakers.

The text of RLUIPA requires no such thing. Congress made the reasonable judgment, informed by multiple hearings over several years, that a "religious assembly" and a "nonreligious assembly" will generally have similar land use effects and should therefore be treated equally. Thus, federal judges need not serve as zoning policymakers; they need only determine whether, as a matter of statutory interpretation, two particular land uses fall within the ordinary meaning of the term "assembly." As explained above, Leon Valley does not dispute that the Church is entitled to summary judgment under this approach.

III. The Church prevails under the Substantial Burden provisions of RLUIPA and TRFRA.

Because the Church prevails under the Equal Terms provision, this Court need not reach the substantial burden issue. But if it does, the Church still prevails under both RLUIPA and TRFRA. Br.49-53.

A. RLUIPA's jurisdictional requirements are met.

RLUIPA's substantial burden provision applies because the Church satisfies two different jurisdictional tests. First, the denial of rezoning affected interstate commerce—a point Leon Valley does not dispute. Resp.42-43. Instead, Leon Valley claims that this issue was waived because it was raised "for the very first time

. . . in [Plaintiff's] Objections to the Report." Resp.42. This is incorrect. As we already explained (at 50-51), Leon Valley raised this issue in its own Answer, R.63, and both parties briefed it on summary judgment, R.1215-16. That is more than enough to defeat a claim of waiver. *Pasco* v. *Knoblauch*, 566 F.3d 572, 577 (5th Cir. 2009). In any event, the interstate commerce issue is an "affirmative defense" that is Leon Valley's duty to raise. *Cutter* v. *Wilkinson*, 423 F.3d 579, 582 (6th Cir. 2005); *Charles* v. *Verhagen*, 348 F.3d 601, 606 (7th Cir. 2003).

RLUIPA also applies because Leon Valley's denial of rezoning involved an "individualized assessment" of the proposed use of the Property. *See* Br.51-53. According to Leon Valley, the denial of rezoning cannot be an individualized assessment because rezoning "affects the entire community." Resp.41-42. But that is true of nearly every zoning decision, no matter how individualized. The relevant question under RLUIPA is *not* whether a zoning decision affects the entire community, but whether it "take[s] into account the particular details of [the] applicant's proposed use of land." *Guru*, 456 F.3d at 986.

That is just what happened here. Leon Valley took testimony from Pastor Crain about how the Property would be used (R.1814-17); it heard objections from neighbors based on that use (*e.g.*, R.1818-22); and it denied rezoning on the ground that church use was inconsistent with the City's master plan (R.1824-34). *See* Br.52-53. That is a quintessential "individualized assessment."

B. The Church suffered a substantial burden under RLUIPA.

As explained in our opening brief (at 57-61), the Church suffered a substantial burden because: (1) Leon Valley effectively excluded the Church from city limits; (2) Leon Valley rejected the Church's rezoning request on an arbitrary basis; (3) Leon Valley rejected the Church's use of restrictive covenants to mitigate neighborhood concerns; and (4) Leon Valley has forbidden the Church from carrying out its core religious exercise—corporate worship—on its own property.

Leon Valley does not directly respond to these points.[6] Instead, it argues that the Church's burden was insubstantial because (1) the Church could have remained at its Culebra Road location (Resp.39), and (2) any burden on relocating was merely "financial" (Resp.36-38). Neither argument has merit.

First, the record is clear that the Culebra Road location was grossly inadequate for the Church's religious needs. Br.8. The space was too small (R.374-75); the day care was at full capacity with no space to expand (R.374); a bar, liquor store, tattoo parlor, and adult bookstore created a bad environment for the children and teens in its care (R.375); and the landlord was seeking more profitable com-

[6] In its only direct response, Leon Valley claims the restrictive covenants were not a compromise attempt because they were "already a restriction in place" before the rezoning request. Resp.9. Leon Valley cites nothing in the record, nor can it (*see id.*): this assertion is blatantly false. As the record makes clear, the restrictive covenants were created in direct response to neighbors' concerns at rezoning hearings and were offered to mitigate those concerns. R.751-52; R.1811-12; R.1840-41.

mercial tenants and pressuring the Church to leave (R.371). Leon Valley does not dispute any of these facts. It simply asserts, without support, that "nothing prevented [the Church] from continuing to use the Culebra Road building for church assembly services." Resp.12; *id.* at 36, 39, 44.

Numerous cases confirm, however, that confining a church to religiously inadequate facilities constitutes a substantial burden. *See, e.g.*, *World Outreach Conference Ctr.* v. *City of Chicago*, 591 F.3d 531, 535-38 (7th Cir. 2009) (finding substantial burden where city denied permission to add additional use to existing building); *Westchester Day*, 504 F.3d at 352-53 (finding substantial burden where city denied permits to renovate existing facilities and school had "no quick, reliable, or economically feasible alternatives"); *Sts. Constantine and Helen Greek Orthodox Church, Inc.* v. *City of New Berlin*, 396 F.3d 895, 898 (7th Cir. 2005) (finding substantial burden where city denied a permit "to build a church . . . that would replace its existing church in [a] nearby city"). Unless the Culebra Road location satisfied the Church's religious needs—and it is undisputed that it did not—its existence does not defeat a claim of substantial burden.

Second, the prohibitive cost of alternative properties is evidence *for*, not against, a substantial burden. As several courts have noted, the absence of "economically feasible alternatives" is evidence of a substantial burden. *Westchester Day*, 504 F.3d at 352-53; *see also Constantine*, 396 F.3d at 901 ("delay, uncer-

tainty, and expense" are elements of substantial burden). If a church cannot afford a suitable alternative, it is effectively confined to religiously inadequate facilities—itself a substantial burden.

Economic feasibility is particularly important in cases involving small congregations like Elijah Group, since "burden is relative to the weakness of the burdened." *World Outreach*, 591 F.3d at 537. In passing RLUIPA, Congress was concerned about burdens on "new, small, or unfamiliar churches in particular." 146 Cong. Rec. S7774, S7774 (daily ed. July 27, 2000) (joint statement). Here, Pastor Crain testified at length about the Church's inability to pay its rent at Culebra Road (R.371-72) and the tight restrictions on its financing to purchase a building (R.547-48). When 90% of the city is off limits, and the remaining 10% is either religiously unsuitable or completely out of financial reach, the Church has suffered a substantial burden.[7]

Finally, the two substantial burden cases Leon Valley relies upon—*CLUB* and *Midrash*—are inapposite. Resp.38-40. *CLUB* held that a burden is not substantial unless it renders religious exercise "effectively impracticable." *Civil Liberties for Urban Believers* v. *City of Chicago*, 342 F.3d 752 (7th Cir. 2003) ("*CLUB*").

[7] Leon Valley claims that Pastor Crain "knew of other locations within Leon Valley which could accommodate his congregation; specifically an old Petco building and a warehouse." Resp.13-14. But the testimony it quotes says just the opposite. Pastor Crain explains why those locations *cannot* accommodate the Church, concluding "*[t]here are no other buildings in Leon Valley we could go to*." R.547-51 (emphasis added).

But the "effectively impracticable" standard has been rejected as erroneous by several courts, including this one. *See Adkins* v. *Kaspar*, 393 F.3d 559, 568-70 (5th Cir. 2004) (declining to adopt *CLUB* standard); *Guru*, 456 F.3d at 988 & n.12 (rejecting *CLUB*); *Midrash*, 366 F.3d at 1227 (same). *Midrash* is easily distinguishable because there, the synagogue could have obtained suitable property "only a few blocks away," and there was no evidence that the property was religiously inadequate or financially infeasible. *Midrash*, 366 F.3d at 1227-28. In short, Leon Valley offers no serious precedential support for its narrow reading of "substantial burden."

C. The Church suffered a substantial burden under TRFRA.

The Church also suffered a substantial burden under TRFRA.[8] Br.63. As this Court recently explained, the substantial burden inquiries under TRFRA and RLUIPA are not identical. *A.A. ex rel Betenbaugh* v. *Needville Independent School Dist.*, --- F.3d ----, 2010 WL 2696846, at *10 n.55 (5th Cir. July 9, 2010). Under the "more skeletal framework" of TRFRA, *id.*, even a partial restriction on religious conduct is substantial if "it curtails religious conduct and impacts religious

[8] Leon Valley claims the Church did not give required notice under TRFRA. Resp.9; Tex. Civ. Prac. & Rem. Code § 110.006(c)-(d). This is incorrect. Plaintiff sent a notice letter under its pre-incorporation name, Redemption Tabernacle. *See* R.753-56 (notice letter); R.2220-24 (assignment of Redemption Tabernacle's property interest to Elijah Group). Leon Valley responded to this letter, R.757-58, proving it had both notice and an opportunity to cure.

expression to a 'significant' and 'real' degree." *Id.* (quoting *Barr* v. *City of Sinton*, 295 S.W.3d 287, 305 (Tex. 2009)).

In *Betenbaugh*, for example, this Court found a substantial burden where a school district required a Native American boy to keep his long hair tucked into his shirt. This Court held that this "less-than-complete ban" on religious conduct still imposed a substantial burden because it "deprive[d] [the child] of religious exercise during the school day." *Id.* at *10.

Leon Valley's actions constitute a substantial burden under this standard. They ban a particular religious practice—corporate worship—on the Property, while severely restricting the alternative locations available for such worship. *See* Br.54-61. As *Betenbaugh* makes clear, when the "alternatives for the religious exercise are severely restricted"—such as a ban on churches in 90% of the city, and no feasible alternatives in the other 10%—the burden is substantial. *Betenbaugh*, 2010 WL 2696846, at *10; *see also Barr*, 295 S.W.3d at 302-05 (substantial burden on a religious halfway house where "alternate locations were 'probably . . . minimal'").

D. Leon Valley cannot satisfy strict scrutiny.

Under both TRFRA and RLUIPA, Leon Valley must satisfy strict scrutiny. Br.61-63. But Leon Valley has offered no argument on this point. It is therefore waived.

CONCLUSION

The judgment of the district court should be reversed.

Respectfully submitted,

s/ Luke W. Goodrich

Luke W. Goodrich
Lori H. Windham
Hannah C. Smith
THE BECKET FUND FOR RELIGIOUS LIBERTY
3000 K St., NW,
Suite 220
Washington, D.C. 20007
T (202) 955-0095
F (202) 955-0090

Counsel for The Elijah Group, Inc.

APPENDIX A

Long Grove, Ill., Village Code § 5-9-12 (2007), *available at* http://www.longgrove.net/Village%20and%20Zoning%20Code.htm and http://www.sterlingcodifiers.com/codebook/index.php?book_id=363

5-9-12: PUBLIC ASSEMBLIES:

A special use permit shall be required for any public assembly use, including any religious facility, library, museum, private school, and other similar use, and shall conform to, in addition to all other applicable village code provisions, the following:

	Neighborhood Facility	**Community Facility**	**Regional Facility**
Minimum lot area	3 acres	15 acres	20 acres
Where located	Front on any public street	Front on county or state highway	Front on state highway
Maximum square feet of buildings	11,000	1 building - 35,000 2 buildings - 45,000 3 buildings - 55,000	1 building - 60,000 2 buildings - 80,000 3 buildings - 100,000
Maximum cubic feet of buildings	433,600	1 building - 1,034,000 2 buildings - 1,231,600 3 buildings - 1,472,000	1 building - 1,708,000 2 buildings - 2,191,000 3 buildings - 2,674,000
Minimum floor area of each building		5,000	5,000
Parking	Adequate off street parking shall be provided. All parking areas shall have interior landscaping of 1 canopy tree per 12 parking spaces. Parking shall be: a) $^1/_3$ space per assembly space and b) 3.5 spaces per 1,000 square feet of nonassembly space. These standards shall be applied to the primary use only except where a simultaneous incidental use would draw a separate set of users in which case both standards a) and b) of this paragraph shall apply and be calculated separately and then aggregated. No more than 115 percent of the required parking shall be provided. No parking shall be permitted in setback areas and parking must be screened from adjacent properties.		

Parking for accessory residential use	Such residential uses are allowed a maximum of 2 parking spaces.		
Maximum impervious surface coverage	40 percent	25 percent	20 percent
Setbacks from road	100 feet	200 feet	250 feet
Side yard setback	2 side yards, each of which shall be not less than 50 feet wide, and a side yard adjoining a street shall not be less than 100 feet wide.		
Rear yard setback	50 feet	50 feet	50 feet
Landscaping	Adequate landscaping must be provided to ensure that the use melds into the neighborhood. In addition to parking buffers, all property lines shall include a buffer for collector zoning boundaries. Where scenic easements are required, they shall be planted at twice the normal rate.		
Illumination systems	Illumination systems must not shine upon other properties and must conform with section 5-9-9 of this chapter. All lighting shall be cutoff fixtures with a maximum illumination of 25 foot-candles and 0.1 foot-candle at the perimeter of the lot line or at the inside perimeter of any required buffer. All lighting shall be designed to reduce illumination when the public assembly activities have been ended for each day.		
Commercial status	All public assembly uses shall be noncommercial operations which are operated on a not for profit basis.		
Traffic	Traffic flows shall be designed to ensure the least possible impact on neighboring properties and residential streets. The owner of the proposed assembly use shall be responsible for all needed improvements to ensure safe traffic conditions are maintained. A traffic study shall be required to demonstrate that these conditions have been met. Traffic management, such as police officers, shall be provided by the owner during peak traffic flows when the village finds it necessary to ensure safe ingress and egress.		
Ingress/egress	Whenever practicable, primary ingress and egress to and from the lot shall be via the highest service level adjacent road.		
Other standards	Other reasonable standards which may emanate from the public hearing process may be required consistent with the particular characteristics of the specific use which serve to meld the use into the neighborhood but which are the least burdensome to the assemblage use, when required by law.		

CERTIFICATE OF SERVICE

Pursuant to Fed. R. App. P. 25(d), I hereby certify that service of the foregoing brief was made on July 29, 2010 to the following counsel for parties to the appeal by means of the Court's CM/ECF system:

Elizabeth Guerrero Christ
Ryan S. Henry
Lowell Frank Denton
Denton, Navarro, Rocha & Bernal, P.C.
2517 N. Main Avenue
San Antonio, TX 78212
Email: ryan.henry@rampage-sa.com
Fax: 210-225-4481
Phone: 210-227-3243

John Frank Onion, III
McKamie Krueger, LLP
941 Proton Road
San Antonio, TX 78258
Email: frank@mckamiekrueger.com
Fax: 210-546-2130
Phone: 210-546-2122

Counsel for Defendant

Dated: July 29, 2010

s/ Luke W. Goodrich

Luke W. Goodrich
Counsel for Plaintiff-Appellant

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 6,912 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: July 29, 2010

s/ Luke W. Goodrich

Luke W. Goodrich
Counsel for Plaintiff-Appellant

COURT FILING STANDARDS CERTIFICATIONS

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

1. Required privacy redactions have been made to the foregoing document;

2. The electronic submission is an exact copy of the paper document;

3. The document has been scanned for viruses with the most recent version of a commercial virus scanning program and is free of viruses.

Dated: July 29, 2010

s/ Luke W. Goodrich

Luke W. Goodrich
Counsel for Plaintiff-Appellant