Case No. 10-50035

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

THE ELIJAH GROUP, INC.,
Plaintiff-Appellee

v.

THE CITY OF LEON VALLEY,
Defendants-Appellant

On appeal from the United States District Court For the Western District of Texas
The Honorable Orlando L. Garcia, District Judge
Civil Action No. 5:08-CV-907-OLG

AMICUS CURIAE BRIEF IN SUPPORT OF PLAINTIFF-APPELLANT
and arguing in favor of reversing the judgment of the district court

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SUPPLEMENTAL STATEMENT OF INTERESTED PARTIES

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 and the second sentence of Rule 29.2 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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The Becket Fund for Religious Liberty (Law Firm for Plaintiff-Appellant)
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CORPORATE DISCLOSURE STATEMENT PURSUANT TO FED. R. APP. P. 26.1 AND FED. R. APP. P. 29(c)

The Sikh Coalition is a non-profit corporation organized pursuant to New Jersey law. The Sikh Coalition does not have any parent corporations and does not issue any stock which is publicly held by anyone.

The Sikh American Legal Defense and Education Fund (SALDEF) is a 501(c)(3) non-profit corporation organized pursuant to Maryland law. SALDEF does not have any parent corporations and does not issue any stock which is publicly held by anyone.

The Liberty Institute is a 501(c)(3) non-profit corporation organized pursuant to Texas law. The Liberty Institute does not have any parent corporations and does not issue any stock which is publicly held by anyone.

INTEREST OF THE AMICI

The Sikh Coalition was founded on September 11, 2001, to 1) defend civil rights and liberties for all people; 2) promote community empowerment and civic engagement within the Sikh community; 3) create an environment where Sikhs can lead a dignified life unhindered by bias and discrimination; and 4) educate the broader community about Sikhism in order to promote cultural understanding and create bridges across communities. Ensuring religious liberty for all the people is a

cornerstone of the Sikh Coalition's work. The Sikh Coalition files this amicus out of the belief that the rights of religious and expressive association are indispensable safeguards for religious minority communities.

The Sikh American Legal Defense and Education Fund ("SALDEF") is a national civil rights and educational organization. Its mission is to protect the civil rights of Sikh Americans and ensure a fostering environment in the United States for future generations of Sikh Americans. SALDEF seeks to empower Sikh Americans through legal assistance, educational outreach, legislative advocacy, and media relations. SALDEF believes that it can attain these goals by helping to protect the religious liberties of people of all religious backgrounds. SALDEF speaks here for the religious and expressive association rights of all people and guaranteed protections for all religious institutions.

Liberty Institute is a non-profit law firm committed to defending religious freedom for all faiths and eradicating government religious discrimination in violation of the laws and Constitution of the United States. Liberty Institute is deeply concerned that there is a growing trend among cities in Texas to ignore important statutory and constitutional protections for religious institutions. From the Vietnamese Baptist Church in Plano, Texas to the ex-prisoner ministry in Sinton, Texas, religious institutions of all faiths, with little resources, suffer at the hands of

hostile governments with infinite supplies of taxpayer money to fund litigation against religious communities due to the perception that religious institutions provide no economic benefit and are thus worthless to the community. This case is another example of the ongoing battle of religious institutions for equality.

STATEMENT REGARDING CONSENT OF THE PARTIES

Both parties have consented to the filing of *amicus curiae* briefs, including this brief.

STATEMENT OF THE CASE AND STATEMENT OF FACTS

Amici adopt the statement of the case and the statement of facts of the Appellant, The Elijah Group, Inc. (Elijah Br. 7-16.)

SUMMARY OF ARGUMENT

In concluding that the actions of Leon Valley do not violate the terms of the "Equal Terms" provision (42 U.S.C. § 2000cc(b)(1)) of the Religious Land Use and Institutionalized Persons Act (42 U.S.C. §§ 2000cc *et seq.*) ("RLUIPA"), the district court picked an approach that is not consistent with the plain text, structure, purpose, and history of RLUIPA.

The approach of the district court relies on a single decision by the Third Circuit[1] that a regulation violates the Equal Terms provision only when it "treats religious assemblies or institutions less well than secular assemblies or institutions that are similarly situated as *to the regulatory purpose*." (Report and Recommendation, Docket Entry No. 40 (Oct. 2, 2009) ("Report") 16 (quoting *Lighthouse Inst. for Evangelism v. City of Long Branch*, 510 F.3d 253, 266 (3d Cir. 2007) (emphasis in original), *cert. denied*, 128 S. Ct. 2503 (2008)).)[2] In articulating this approach, the Third Circuit reasoned that "[a] regulation does not automatically cease being neutral and generally applicable … simply because it allows certain secular behaviors but not certain religious behaviors." *Lighthouse*, 510 F.3d at 265 (citing *Employment Div. v. Smith*, 494 U.S. 872, 878-79 (1990)). Thus, in order to determine whether a regulation violates the Equal Terms provision, the Third Circuit found that a court must discern a regulatory purpose, then determine whether there exists a secular institution that is similarly situated to the religious institution with respect to that regulatory purpose. Only then can the court examine the two uses and determine whether the religious use is treated "less well" than the secular use. *Ligh-*

[1]*Amici* respectfully note that, although the text of the Report refers to the Seventh Circuit, the decision in *Lighthouse* was made by the Third Circuit.

[2] The district court adopted the magistrate's Report in full. Order Adopting Report and Recommendations, Docket Entry No. 50 (Nov. 30, 2009). Thus, the Report represents the reasoning offered by the district court as well.

thouse asks the court to look for "analogous secular conduct that *has a similar impact on the regulation's aims*." *Id.* at 266.

The singular focus on the "regulatory purpose" of the law in question distinguishes the Third Circuit from other courts of appeal. The court below failed to acknowledge that the circuit courts of appeal are divided on the interpretation of the Equal Terms provision. In adopting the Third Circuit's "regulatory purpose" approach, the lower court put itself at odds with the plain text, structure, purpose, and history of RLUIPA, as the Appellant's Brief explains (Elijah Br. 24-34).

The court below has adopted an erroneous Third Circuit precedent that grafts an extra-textual inquiry into regulatory purpose onto the otherwise straightforward Equal Terms provision of RLUIPA. The statute asks, simply put, whether a religious assembly is disadvantaged compared to a secular assembly. The Third Circuit narrowed the inquiry to ask whether the religious assembly is disadvantaged to a secular assembly *with respect to the purpose of the regulation in question*. This interpretation of the statute adds terms that Congress did not enact.

To compound this error, the court below adopted retail development as the primary regulatory purpose against which to compare religious and secular land uses, thereby building an inherent commercial bias against religious uses into the inquiry itself. This inherent disfavoring of religious uses would allow not only co-

vert manipulation of zoning codes to exclude religious institutions, but also overt facial exclusion.

In the end, the Third Circuit's addition of the regulatory purpose inquiry, as applied by the court below, raises constitutional questions by calling into doubt the level of scrutiny imposed and by transforming tax exemptions into a burden rather than a benefit. A plain-text reading such as that adopted by the Eleventh and Seventh Circuits, rather than an inquiry into regulatory purposes, would avoid all of these constitutional questions. Moreover, if RLUIPA were interpreted to include a "similarly situated" requirement, land use would be a more appropriate comparative factor that has at least some grounding in the text of the statute.

ARGUMENT

I. A "REGULATORY PURPOSE" APPROACH INHERENTLY DISFAVORS RELIGIOUS USES.

A particularly troubling aspect of the lower court's decision is that it sanctions economic development, i.e., development of a focused "retail corridor," as an appropriate "regulatory purpose" in this context. This approach would give state and local governments *carte blanche* to evade the Equal Terms provision of RLUIPA, thereby subjecting religious assemblies to exclusion from designated areas where secular assemblies are permitted as a routine matter.

In passing RLUIPA, Congress was well aware that many, if not all, jurisdictions view zoning and other land-use regulations as a way to promote economic development. "Because cities exist in confined geographical spaces, their tax bases usually are determined largely by land use." Nat'l League of Cities, *Land Use Development and Challenges in America's Cities* at ix (2004). *See also id.* at 5 ("All city officials share the goal of promoting economic development in their cities."); 21 ("Property and sales taxes typically are the most important revenue sources for cities and are used to fund general services. This means that, if given the option, cities will seek high revenue-producing sources over low revenue-producing sources."). City governments routinely include an "Office of Economic Development" or some other administrative body that promotes, e.g., the city as a place to locate businesses or other activities that lead to job growth.

RLUIPA's legislative history recognized that the desire of local governments to increase economic development in order to increase tax revenues and to redevelop commercial corridors may be used as a mechanism to unfairly discriminate against religious institutions. Senators Kennedy and Hatch, the sponsors of RLUIPA in the Senate, explained that the Equal Terms provision was needed because "[c]hurches in general, and new, small or unfamiliar churches in particular, are frequently discriminated against on the face of zoning codes.... Zoning codes frequently exclude churches in places where they permit theaters, meeting halls,

and other places where large groups of people assemble for secular purposes." 146 Cong. Rec. S7774, S7774 (daily ed. July 27, 2000) (statement of Sens. Hatch & Kennedy).

Moreover, many of the secular assemblies specifically recognized in the legislative history, including, *e.g.*, theaters and meeting halls, may be characterized as entertainment venues or places where people assemble to engage in commercial activities. To permit state and local governments to rely on a finding that houses of worship are not consistent with a regulatory purpose of economic development would expressly permit them to discriminate against religious assemblies where theaters, meeting halls, and other secular assemblies are permitted. This approach is unsupported in the text of the law and directly contrary to the intent of the law.

According to the regulatory-purpose approach taken by the lower court, a local government would be able to exclude houses of worship from any part of the city, assuming the purpose of the zoning ordinance would be related to economic development, e.g., development of a retail corridor, which is routinely considered to be an objective for land use regulations in many jurisdictions today. Then, based on the "non-profit" or non-commercial character of religious assemblies, the government would be free to declare that the inclusion of a religious assembly would be inconsistent with that purpose. If the regulatory-purpose approach is

confirmed, RLUIPA would provide no relief in such circumstances even though religious institutions would clearly be treated on less equal terms – i.e., they would be excluded from these areas – whereas secular assemblies would be permitted or even encouraged. Rather than the covert form of discrimination employed by the city government in *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993), a retail-focused regulatory purpose is a facial disfavoring of religious uses: religious uses could rarely, if ever, fulfill the regulatory purpose, and will never do so better than a commercial use. By building such an inquiry directly into the reading of RLUIPA, *Lighthouse* makes unequal terms an inherent part of the Equal Terms provision.

Unfortunately, as recognized by Congress during its deliberations on RLUIPA, this type of discrimination has occurred repeatedly. *See, e.g.,* 146 Cong. Rec. E1564, E1566 (daily ed. Sept. 22, 2000) (statement of Rep. Hyde) (citing Wall Street Journal article that many rural southern towns seek to limit or prohibit churches, because "churches … might hinder their economic revitalization plans"). Thus, it should come as no surprise that such a rationale has been at the heart of a number of the cases that have reached the courts.

For example, there was a similar situation in the *Lighthouse* case. In that case, the city of Long Branch, New Jersey adopted a redevelopment plan "'in order

to achieve redevelopment of an underdeveloped and underutilized segment of the City.'" *Lighthouse*, 510 F.3d at 258. The plan did not list churches as a permitted use and, when confronted with a request for a waiver from the Lighthouse Institute, the City Council denied the request because "'the inclusion of a storefront church would jeopardize' the development of the Broadway area, which was envisioned as 'an entertainment/commercial zone with businesses that are for profit.'" *Id.* at 259. It was that simple. The district court found no violation and the Third Circuit, relying on the "regulatory-purpose" approach, affirmed in contradiction to the plain language of RLUIPA and its context.

Similarly, in this case, the rationale of the city was that the church use was not consistent with its purpose to "create a retail corridor along Bandera road" (Report 17). The ease of excluding religious assemblies is underscored by the fact that the magistrate's report simply declares that "[n]o serious question exists about whether church assembly use is inconsistent with the City's goal to create a retail corridor." (*Id.*) Thus, the City is able to easily exclude religious assemblies from an area where it "permits some other non-religious assemblies to locate" (*id.*) even though the identical property was used to conduct church services by the previous tenant for over ten years (*id.* at 2).

If followed, this approach would have dire consequences for religious institutions, essentially permitting local authorities to exclude religious institutions and

houses of worship from major parts of the community, including those areas where their congregation traditionally resides or gathers, all due to a rationale that is often given as a justification for zoning regulations or city planning. As evidenced by the relative proliferation of cases exhibiting similar facts, religious assemblies may be subject to routine exclusion at the will of local governments. There is good reason to expect that such cases would become more routine and result in the type of national problem that Congress sought to correct with RLUIPA. *See* 146 Cong. Rec. S6678, S6688-90 (daily ed. July 13, 2000) (statement of Sen. Kennedy) (describing nationwide difficulties experienced by religious groups). Religious assemblies do not seek to use RLUIPA to be able to locate wherever they choose without any restrictions, contrary to the invidious assumption of the Third Circuit, erroneously followed by the lower court. All they seek is to be made no worse off than secular institutions.

The Third Circuit, in providing the rationale for the regulatory purpose approach adopted by the lower court, claims that

> under the Eleventh Circuit's [plain-text] interpretation, 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, to take examples from the Free Exercise case law, it must permit 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 on the envisioned character of the area.

Lighthouse, 510 F.3d at 268. This summary, however, stands in significant tension with the approach actually taken by the Eleventh Circuit.

As noted in the *Lighthouse* dissent by Judge Jordan, this reasoning does not survive closer scrutiny. "This parade of horribles has the benefit of some … shock value, but I do not read RLUIPA as somehow preventing a city from including in its zoning ordinances rational terms restricting the use of land, as long as those terms apply equally to religious assemblies and non-religious assemblies." *Id.* at 287 (Jordan, J., dissenting). Thus, a government could still impose a cap on occupancy of buildings or reasonable parking restrictions (that could avoid the thousand member church attempting to free-ride on the 10-member book club); or regulations regarding the keeping and killing of live animals (to avoid, e.g., the participation of wild bears in certain activities) may be imposed. It simply has to impose such conditions equally on both secular and religious land users. *See Digrugilliers v. Consol. City of Indianapolis*, 506 F.3d 612, 615 (7th Cir. 2007) ("Whatever restrictions the City imposes on other users of land in [a particular district] it can impose upon [a religious assembly] without violating the 'equal terms' provision"). *See also* 146 Cong. Rec. at S6688 (statement of Sen. Hatch) ("this legislation does not provide a religious assembly with immunity from zoning regulation").

The regulatory purpose approach would provide a "safe harbor" for local governments to openly disfavor religious assemblies, subject to Constitutional requirements, even where they permit secular assemblies, such as theaters and meetings halls. This would essentially render RLUIPA's Equal Terms provisions meaningless. It would be foreseeable that jurisdictions would revert back to the discriminatory practices which were intended to be eliminated by RLUIPA; and, as a result, may force religious assemblies, particular those with small or impoverished congregations, to be put in a position where they are unable to serve their purpose.

II. THE "REGULATORY PURPOSE" INQUIRY UNDERMINES RLUIPA'S PURPOSE.

By adopting the rationale of the Third Circuit, the lower court has abandoned the language of the statute and approved of reasoning that results in subjective assessments that, as shown in the opinion of the court below, can have devastating consequences on religious institutions. This interpretation renders a statute designed to be *more* protective than the Free Exercise Clause of the Constitution into one that actually provides *less* protection, directly contrary to Congress's express purpose in enacting RLUIPA. By diverging from the plain text and building inequity into the inquiry commanded by the statute, the Third Circuit interpreted the Equal Terms provision of RLUIPA in a manner that introduces consti-

tutional doubt, rather than avoiding it. *See United States ex rel. Attorney Gen. v. Del. & Hudson Co.*, 213 U.S. 366, 408 (1909) ("[W]here a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided, our duty is to adopt the latter.")

A. Affirming The Report Would Invite A Subjective Inquiry Into Legislative Purpose Rather Than An Objective Inquiry Into The Law's Effect.

The manner in which the district court defined the "regulatory purpose" test defeats the intention of Congress to protect religious land uses from less than equal treatment. Moreover, any application of the standard permits a municipality to offer a *post hoc* justification that would allow an end-run around the protections of RLUIPA. Interpreting the statute in this manner also affirmatively creates constitutional questions, rather than avoiding them, by turning a statute intended to give more robust protections than the First Amendment into one that calls for lesser levels of scrutiny.

Crediting subjective statements of regulatory purpose invert the burden imposed by the First Amendment. The Report describes the regulatory purpose succinctly: "The purpose of the exclusion is to create a retail corridor along Bandera Road." (Report 17.) The Report cites to two exhibits attached to the City's motion for summary judgment (*id.* at 17 n.72) which simply state the City's general aim as

a fact. The Report did not look behind the statement, but simply accepts it at face value as the City's justification for the exclusion. Relying on these statements to define the regulatory purpose, the Report granted summary judgment to the City. (*Id.* at 15-18.)

Standing on its own, this method of inquiry inherently creates a constitutional question worth avoiding. Precisely the same sort of subjective justification was at stake in *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993). There, the City of Hialeah attempted to justify its ban on animal sacrifice as a neutral law of general applicability to protect public health and to prevent cruelty to animals. *Id.* at 533-34. But the inquiry did not end there, for "[f]acial neutrality is not determinative," *id.* at 534. The Court looked behind the explanation, instead focusing on "the ordinances' operation," *id.* at 535, i.e., how they actually played out in practice. The Court was not interested in whether the City *had* or was willing to proffer a rational reason for its actions—that would have been a simple rational-basis review—but instead whether the effects of the law were adverse to religious freedom. *See id.* at 534-35. "The principle that government, in pursuit of legitimate interests, cannot in a selective manner impose burdens only on conduct motivated by religious belief is essential to the protection of the rights guaranteed by the Free Exercise Clause." *Id.* at 543. Simply looking to the stated subjective aims claimed by the City, as the regulatory purpose does, would make a

mockery of the objective effects inquiry articulated in *Lukumi*, allowing an end-run around the scrutiny mandated where religious freedoms are genuinely at stake. Had the Hialeah ordinances been analyzed under *Lighthouse* as interpreted by the district court, the "public health" or "animal cruelty" justification would have obviated any further scrutiny, and, without further consideration of their practical effect, the ordinances would have been affirmed. Affirming the district court's shallow consideration of the justification proffered by the City would validate the view that RLUIPA provides narrower protections, by subjecting land use rules to a rational basis analysis, than those given by the First Amendment, which requires further scrutiny. This would be an absurd result.

In fact, RLUIPA was enacted so that religious assemblies would not have to "carry[] the heavy burden of proving that there is an unconstitutional motivation behind a law." 146 Cong. Rec. at S6688 (statement of Sen. Hatch). Instead, RLUIPA requires courts to analyze a law's effects. The examples discussed by Senator Kennedy further reinforced this purpose by describing some regulations that were ostensibly neutral but had invidious and divisive effects. *See id.* at S6689-90 (statement of Sen. Kennedy) (describing the exclusion of a synagogue from a neighborhood after neighbors complained about property values, a fee assessed to a church to obtain a permit that would specifically allow it to feed homeless people, and a parking regulation forcing a synagogue to have a certain number

of parking spaces—and therefore real estate—even though a substantial number of congregants would not ever drive to services). In the House, Representative Henry Hyde specifically mentioned a church that was being assessed a fee that would compensate the city of San Marcos, California, for the loss of tax revenue represented by the church. *Id.* at E1565 (statement of Rep. Hyde). The ills that Congress set out to solve with RLUIPA required the Report to examine the objective effects of the law, not the subjective justifications offered by the City. Affirming the decision below will not only render the Equal Terms provision meaningless, but, moreover, it may lead to a lack of constitutional scrutiny completely where a municipality offers a rational basis for their policy which will not be questioned by the reviewing court.

B. Privileging Retail Uses Undermines Secular Reasons For Tax Exemption.

The specific "retail corridor" justification offered in this case also creates other constitutional questions. By privileging retail uses, the state-granted benefit of tax exemption becomes a burden that justifies exclusion of religious institutions from broad swaths of any city. By privileging the "retail corridor" justification, cities can make a naked grab for tax revenue—exactly what tax exemptions are designed to prevent. By affirming the Report and its justification, this court would be granting cities another way to circumvent constitutional and statutory protections

religious institutions have legitimately been granted, narrowing RLUIPA to offer fewer protections than the First Amendment itself. Such an encroachment on the independence of religious institutions raises constitutional questions better avoided.

The Supreme Court analyzed whether religious tax exemptions violated the Establishment Clause in *Walz v. Tax Commission of New York*, 397 U.S. 664 (1970), finding very strong secular reasons for government to grant them to religious institutions. Religious assemblies are "beneficial and stabilizing influences in community life." *Id.* at 673. Acknowledging the potential for hostility toward religion, the Court noted that "[g]rants of exemption historically reflect the concern of authors of constitutions and statutes as to the latent dangers inherent in the imposition of property taxes." *Id.* The secular purposes served by religious institutions were so strong that the Court upheld tax exemptions against an Establishment Clause challenge. Indeed, the Court believed that *taxing* religious institutions might create more Establishment Clause questions than *exempting* them. *Id.* at 674-75. Consistent with these decisions, all 50 states provide tax exemptions for religious institutions. *Id.* at 676.

Those very tax exemptions lie at the core of the exclusion of many religious institutions from particular zoned areas. Precisely because religious institutions *do*

not pay taxes on retail activity, they cannot support a regulatory purpose that focuses on the revival of a retail district. Such a regulatory purpose requirement turns tax exemptions into a detriment: religious institutions are denied land uses "'because of,' not merely 'in spite of,'" *Personnel Adm'r of Mass. v. Feeney*, 442 U.S. 256, 279 (1979), the tax exemption they earn for being religious in nature. Governments may not place houses of worship into this sort of double bind: "Government cannot, by granting churches special privileges … furnish the premise for excluding churches from otherwise suitable districts." *Digrugilliers*, 506 F.3d at 616. The tax exemption religious groups are granted cannot become a burden impossible to overcome: the protections of the First Amendment would then become a constraint which neither Congress nor the Constitution contemplates.

A retail-focused regulatory purpose therefore has the effect of undermining the purposes that states have for granting tax exemptions to religious groups. Such an effect matters, whether it is intentional or not: "Each value judgment under the Religion Clauses must therefore turn on whether particular acts in question are intended to establish or interfere with religious beliefs and practices *or have the effect of doing so*." *Walz*, 397 U.S. at 669 (emphasis added). A retail-focused regulatory purpose forces religious groups to choose between their tax exemption and their land. Affirming the regulatory-purpose requirement applied by the Report would create constitutional questions that could be avoided with a simple,

plain-text reading of the statute such as that adopted by the Eleventh and Seventh Circuits.

III. COMPARING LAND USES IS MORE GROUNDED IN THE STATUTE THAN REGULATORY PURPOSES.

The text of the Equal Terms provision straightforwardly requires that

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

42 U.S.C. § 2000cc(b)(1). As the wording makes clear, there is absolutely no support in the text of the statute for a "regulatory purpose" test.

A "regulatory purpose" approach is entirely untethered to the statutory language. *Lighthouse* offers no suggestion as to what guiding principles exist—if any—and where they will be drawn from in future cases. *See Lighthouse*, 510 F.3d at 289 (Jordan, J., dissenting) ("On what principled basis can an art workshop or a cooking class be governmentally preferred to a theological or philosophical discussion in Sunday School?"). Rather than leaving the lower courts with firm guidance as to how to interpret the law, *Lighthouse* sets the district courts free to roam without even standards or a multipart balancing test for guidance. If, as occurred in the case below, the court were simply to refer to the face of the zoning code, it allows for the possibility that such codes may be drafted in a manner that facially disfavors, and actually excludes, churches or other religious assemblies from wide

swaths of the city's territory. *See id.* at 288 (Jordan, J., dissenting). Similarly, if the court relies on *post hoc* rationalizations offered by the City, a similar problem exists: taking such rationalizations at face value would allow pretextual ordinances to disadvantage religious institutions. *Id.* at 293 (Jordan, J., dissenting). *Lighthouse* gives no guidance for ferreting out such pretextual explanations. In light of the text and history of RLUIPA, it is illogical to conclude that Congress intended to enact such a vague, confusing, and subjective inquiry. *See id.* at 291-94 (Jordan, J., dissenting).

In contrast, the Eleventh Circuit has taken a plain-language approach to this interpretation, finding that a violation of the Equal Terms provisions requires proof of four elements: (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 non-religious assembly or institution. *Primera Iglesia Bautista Hispana of Boca Raton, Inc., v. Broward County*, 450 F. 3d 1295, 1307-08 (11th Cir. 2006).[3] The plain language of the statute clearly addresses the relevant

[3] The Seventh Circuit has also adopted a similar approach that does not require proving the existence of a substantial burden. *Digrugilliers*, 506 F.3d at 616 ("The equal-terms section is violated whenever religious land uses are treated worse than comparable nonreligious ones, whether or not the discrimination imposes a substantial burden on the religious uses."). Because of a later conflicting panel decision, the Seventh Circuit has reheard the case *en banc*. *River of Life v. Village of Hazel Crest*, No. 08-2819 (7th Cir.) (argued Feb. 24, 2010).

questions to ask, and the lower courts should stop there rather than graft an extra-textual inquiry onto the statute as the Third Circuit did in *Lighthouse*.[4]

Even assuming RLUIPA included a "similarly situated" requirement, it is not clear why "regulatory purpose" is an appropriate basis for comparison. The Third Circuit borrowed from Free Exercise jurisprudence the concept of "religious conduct and analogous secular conduct that *has a similar impact on the regulation's aims*." *Lighthouse*, 510 F.3d at 266 (emphasis in original). But in RLUIPA, such an approach has been rejected. RLUIPA is limited on its own terms to "land-use" regulations. Thus, if any "similarly situated" requirement is to be read into the statute, land uses would be a more appropriate basis for comparison.

A more reasonable approach would be to examine whether the religious assembly is similarly situated in respect of specific land use effects. For example, religious assemblies, like secular assemblies, will have effects on traffic, noise, development density, and other issues of concern to local governments. This would be an objective basis for comparison, avoiding the unnecessary subjective analyses and complications of the "regulatory purpose" approach. *See*, *e.g.*, *id.* at 287 (Jor-

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[4] The text of the law is the first touchstone for its interpretation. *See Cmty. for Creative Non-Violence v. Reid*, 490 U.S. 730, 739 (1989) ("The starting point for our interpretation of a statute is always its language."). *Lighthouse* requires an examination of a municipality's motivations where the statute does not mention them at all.

dan, J., dissenting) (discussing relevant ways that a church could be excluded from a zone). In short, there is neither a textual nor practical reason for creating a "regulatory purpose" test.

CONCLUSION

For the foregoing reasons, this Court should reverse the decision below.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(C), the attached brief is proportionately spaced, uses Times New Roman 14-point typeface, and contains 5,087 words of text, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii). Counsel for *Amici* used Microsoft Word 2007 to prepare this brief.

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I hereby certify that on May 14, 2010, I caused the foregoing brief to be filed electronically with the Court via the CM/ECF system, pursuant to this Court's Order of March 10, 2010. The resulting Notice of Docket Activity generated by the ECF system constitutes service on counsel for parties with active ECF filing status. In addition, I have served two paper copies and one electronic copy on the following parties via U.S. Mail:

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