No. 22-11674

In the United States Court of Appeals for the Eleventh Circuit

THAI MEDITATION ASSOCIATION OF ALABAMA, INC., ET AL., *Plaintiffs-Appellants*

v.

CITY OF MOBILE, ALABAMA, *Defendant-Appellee*

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF ALABAMA, NO. 1:16-CV-00395-TFM, HON. TERRY F. MOORER

MOTION OF THE GENERAL CONFERENCE OF SEVENTH-DAY ADVENTISTS, AMERICAN CIVIL LIBERTIES UNION, ANTI-DEFAMATION LEAGUE, MUSLIM ADVOCATES, ORTHODOX UNION, SIKH AMERICAN LEGAL DEFENSE AND EDUCATION FUND, SIKH COALITION, AND THAI AMERICAN BAR ASSOCIATION FOR LEAVE TO FILE AMICI CURIAE BRIEF

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CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Pursuant to Eleventh Circuit Rules 29-2, 26.1-1, 26.1-2, and 26.1-3, the undersigned counsel of record certifies that the following listed persons and entities have an interest in the outcome of this case, and were omitted from the Certificates of Interested Persons in briefs that were previously filed per Eleventh Circuit Rule 26.1-2(b):

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13. Union of Orthodox Jewish Congregations of America, Amicus Curiae

The General Conference of Seventh-day Adventists, American Civil Liberties Union, Anti-Defamation League, Muslim Advocates, Sikh American Legal Defense and Education Fund, Sikh Coalition, Thai American Bar Association, and Union of Orthodox Jewish Congregations of America are each non-profit corporations that have no parent corporations, and no publicly held corporation owns 10 percent or more of their respective stock.

Dated: September 15, 2022

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MOTION FOR LEAVE TO FILE BRIEF FOR RELIGIOUS, PROFESSIONAL, AND CIVIL-RIGHTS ORGANIZATIONS AS AMICI CURIAE IN SUPPORT OF PLAINTIFFS-APPELLANTS

Pursuant to Federal Rule of Appellate Procedure 29(a), proposed amici The General Conference of Seventh-day Adventists, American Civil Liberties Union, Anti-Defamation League, Muslim Advocates, Sikh American Legal Defense and Education Fund, Sikh Coalition, Thai American Bar Association, and Union of Orthodox Jewish Congregations of America move the Court for leave to file the attached Brief Amici Curiae in support of Plaintiffs-Appellants. The proposed brief is attached to this Motion. In support of this Motion, Proposed Amici state as follows:

1. The *General Conference of Seventh-day Adventists* is the highest administrative level of the Seventh-day Adventist Church and represents more than 154,000 congregations with more than 22 million members worldwide, including 6,300 congregations and more than 1.2 million members in the United States. The General Conference of Seventh-day Adventists has a long history of working to protect religious liberty and ensuring that the Free Exercise Clause of the First Amendment fully protects all Americans. It was a founding member of the coalition that advocated for the passage of the Religious Freedom Restoration Act (RFRA) and the Religious Land Use and Institutionalized Persons Act (RLUIPA) and has a strong interest in seeing their protections upheld.

2. The *American Civil Liberties Union* (ACLU) is a nationwide, non-profit, nonpartisan organization with nearly two million members dedicated to defending the principles of liberty and equality embodied in the Constitution and our nation's civil-rights laws. For over a century, the ACLU and its affiliates have been at the forefront of efforts to protect religious liberty for people of all faiths, including the fundamental right to worship without unlawful and capricious interference by the government.

3. The *Anti-Defamation League* (ADL) was organized in 1913 to stop the defamation of the Jewish people and to secure justice and fair treatment to all. Committed to advancing good will and mutual understanding among Americans of all creeds and races, ADL seeks to safeguard the free exercise rights of all Americans and to combat racial, ethnic, and religious prejudice in the United States. ADL opposes discriminatory conduct that violates RLUIPA, which safeguards the religious freedom of houses of worship and other institutions in the land-use context.

4. *Muslim Advocates* is a national legal advocacy and educational organization working on the frontlines of civil rights to guarantee freedom and justice for Americans of all faiths. Muslim Advocates advances these objectives through litigation and other legal advocacy, policy engagement, and civic education. Muslim Advocates also serves as a legal resource for the American Muslim community, promoting the full and meaningful participation of Muslims in American public life.

The issues at stake in this case directly relate to Muslim Advocates' work fighting for civil-rights protections for American Muslim communities.

5. The *Sikh American Legal Defense and Education Fund* (SALDEF) is a national nonprofit, nonpartisan Sikh American civil-rights organization. Its mission is to empower Sikh Americans by building dialogue, deepening understanding, promoting civic and political participation, and upholding social justice and religious freedom for all Americans. Since 1996, SALDEF has worked to combat racial and religious profiling and discrimination against communities of color, informed by its values and the historic experiences of the Sikh community in the United States, including the Bellingham Riots of 1907, anti-immigrant sentiment and exclusion, and post-9/11 backlash.

6. The *Sikh Coalition* is a nonprofit and nonpartisan organization dedicated to ensuring that members of the Sikh community in America are able to practice their faith. The Sikh Coalition defends the civil rights and civil liberties of Sikhs by providing direct legal services and advocating for legislative change, educating the public about Sikhs and diversity, promoting local community empowerment, and fostering civic engagement amongst Sikh Americans. The organization also educates community members about their legally recognized free-exercise rights and works with public agencies and officials to implement policies that accommodate their deeply held beliefs. The Sikh Coalition owes its existence in large part to the

effort to combat uninformed discrimination against Sikh Americans after September 11, 2001.

7. The *Thai American Bar Association* (TABA) is the first national non-profit organization for Thai and Thai-American legal professionals in the United States, and their supporters. TABA's mission includes increasing access to legal services for the greater Thai community and fostering relationships with legal organizations and the legal community. The issues before this Court directly affect the Thai community in the U.S. Although not all of TABA's members practice Buddhism, most of its members are of Thai descent, and Buddhism and Thai culture are deeply intertwined given the prevalence of the religion and its longstanding history with Thailand. With the recent rise of anti-Asian sentiment, TABA believes it is now more important than ever for it to stand with those who are protecting the Thai community in the U.S. against discrimination based on religion and to support the fundamental freedom to exercise one's religion as safeguarded by the U.S. Constitution and the U.S. Congress.

8. The *Union of Orthodox Jewish Congregations of America* (Orthodox Union) is the nation's largest Orthodox Jewish synagogue organization, representing nearly 1,000 congregations as well as more than 400 Jewish non-public K-12 schools across the United States. The Orthodox Union, through its OU Advocacy Center, has participated as amicus curiae in many cases that, like this one, raise issues of

importance to the Orthodox Jewish community, including *Carson ex rel. O.C. v. Makin*, 142 S. Ct. 1987 (2022); *Fulton v. City of Philadelphia*, 141 S. Ct. 1868 (2021); *Espinoza v. Montana Department of Revenue*, 140 S. Ct. 2246 (2020); *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012 (2017); *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682 (2014); *Locke v. Davey*, 540 U.S. 712 (2004); and *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002).

9. Proposed Amici are committed to the enforcement of the Religious Land Use and Institutionalized Persons Act of 2000, Pub. L. 106-274, 114 Stat. 803 (codified at 42 U.S.C. §§ 2000cc, *et seq.*). The enactment of RLUIPA in 2000 strengthened the ability of religious individuals and groups to assert their right to the free exercise of religion. Yet, discrimination against religious individuals and groups persist in many towns and cities across our nation, and minority religious groups are disproportionately affected by discriminatory zoning laws and land-use decisions.

10. Plaintiffs-Appellants granted consent to the filing of this amici brief. The Defendant-Appellee denied consent for the filing of this amici brief but represented that it did not intend to file any opposition to this motion.

11. Leave to file a brief as amici curiae should be granted when "the amici have stated an 'interest in the case,' and it appears that their brief is 'relevant' and 'desirable,'" such as when "it alerts the merits panel to possible implications of the

appeal." *Neonatology Assocs., P.A. v. C.I.R.*, 293 F.3d 128, 133 (3d Cir. 2002) (Alito, J.) (quoting Fed. R. App. P. 29(a)(3)); *see also id.* at 132 ("The criterion of desirability set out in Rule 29(b)(2) is open-ended, but a broad reading is prudent.").

12. Proposed Amici submit that their experience combating discriminatory barriers to the free exercise of religion, their longstanding support for robust enforcement of RLUIPA, and/or their connection to the Thai community provide a perspective that may benefit the Court and warrants their participation as amici. Many Proposed Amici have submitted amicus briefs to other courts that have considered similar and related issues.

For these reasons, Amici respectfully request that the Court grant this Motion for Leave to File a Brief as Amici Curiae and accept the attached brief for filing.

Respectfully submitted,

By: */s/ Steffen N. Johnson*

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CERTIFICATE OF COMPLIANCE

This motion complies with the length limits permitted by Fed. R. App. P. 29(a)(5) and 32(a)(7). The motion is 1,286 words, excluding the portions exempted by Fed. R. App. P. 32(f). The motion's type size and type face comply with Fed. R. App. P. 32(a)(5) and (6).

Dated: September 15, 2022

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Eleventh Circuit by using the appellate CM/ECF system on September 15, 2022, which shall send notice to all counsel of record for the parties.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Dated: September 15, 2022

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INTERESTS OF AMICI CURIAE[1]

Amici are the General Conference of Seventh-day Adventists, ACLU, ADL, Muslim Advocates, Orthodox Union, SALDEF, Sikh Coalition, and TABA. Each is a non-profit religious, professional, or civil-rights organization with a history of advocating for the protection of religious liberty for people of all faiths, or with a special interest in advocating for the rights of Thai Americans. Detailed statements of interest are set out in the accompanying motion seeking the Court's leave to file this brief.

INTRODUCTION AND SUMMARY OF ARGUMENT

This appeal is the latest in a series of cases involving community resistance to minority faith groups' attempts to build houses of worship simply because their religions are different or unfamiliar. The litigation exemplifies how local governments can weaponize facially neutral zoning laws to discriminate against disfavored religious practices. The City's actions threaten one of the most fundamental and cherished rights guaranteed by the Constitution and laws of the United States—

[1] Per Federal Rule of Appellate Procedure 29(a)(4)(E), amici states that no party's counsel authored the brief in whole or in part, no party's counsel contributed money that was intended to fund preparing or submitting the brief, and no person other than amici curiae, their members, or their counsel contributed money to fund the preparation or submission of this brief.

the right of *all* people, regardless of faith, to exercise their religion in a suitable house of worship.

The Thai Meditation Center Association of Alabama (TMAA) is a Buddhist religious organization whose purpose is to promote the "growth and development of mind and spirit through meditation and to expand the knowledge of Buddhism." ECF No. 214 ("Op.") at 4. In 2007, TMAA sought approval to offer meditation services at a home in Mobile and was denied. *Id.* at 6-7. It relocated to its current site in 2009, but faced significant hardships related to roadside noise, space constraints, and safety issues. *Id.* For the past seven years, TMAA has sought approval from the City of Mobile to develop a Buddhist meditation center on its 100-acre property (the Eloong property), which is located in a zoning district that encourages religious uses. *Id.* at 3-4. Unlike the overcrowded and bustling roadside shopping center where TMAA currently meets, the proposed meditation center would be situated on a spacious property in a quiet neighborhood conducive to Buddhist meditation. *Id.* at 6-7.

Despite the Eloong property's natural advantages, the City denied TMAA's application to create a meditation center there. The City Planning Commission lacked particularized evidence that the proposed use would threaten its asserted zoning interests, but ultimately bowed to community opposition rooted in religious

intolerance, denying TMAA's application based on unsupported post hoc justifications, such as "compatibility, site access, and traffic increase." *Id.* at 8-12. The City Council upheld the denial. *Id*.

TMAA sued, seeking to vindicate its rights under the First Amendment's Free Exercise Clause, the Religious Land Use and Institutionalized Persons Act (RLUIPA), and the Alabama Religious Freedom Amendment (ARFA). In response, the district court trivialized the City's imposition on TMAA's religious exercise as "nothing more than inconveniences" and granted summary judgment to the City. *Thai Meditation Ass'n of Ala., Inc. v. City of Mobile*, 349 F. Supp. 3d 1165, 1182-95, 1198-1201 (S.D. Ala. 2018).

TMAA appealed to this Court, which reversed the district court's dismissal of some of its claims and remanded the case for further proceedings. In particular, the Court held that the district court erred in analyzing whether a "substantial burden" existed under the Free Exercise Clause and RLUIPA, and whether a "burden" existed under ARFA. *Thai Meditation Ass'n of Ala., Inc. v. City of Mobile*, 980 F.3d 821, 828-33, 837-40 (11th Cir. 2020) (*TMAA*). The Court provided a non-exclusive multifactor balancing test to guide the district court on remand in analyzing whether the City's land-use determination substantially burdened TMAA's religious exercise. *Id.* at 831-32. The Court also expressed concern about a record

"replete with evidence that could reasonably be understood as reflecting local residents' anti-Buddhist sentiment." *Id.* at 835.

Despite this Court's clear instructions, the district court on remand continued to misapply the relevant legal standards and to deny TMAA's religious liberty. For example, the district court failed to examine substantial evidence of arbitrariness in the City's treatment of TMAA's application, which indicated that TMAA has been—in this Court's words—"jerked around." *Id.* at 832. It determined that, even if strict scrutiny applied, the City's denial was narrowly tailored to serving compelling interests—improperly crediting the City's generalized zoning interests as "compelling," even though it provided no evidence that those interests were threatened by *this* development. Finally, the district court assumed without evidence or analysis that outright denying TMAA's application was the least restrictive means of advancing the City's interests. Seven years after this saga began, TMAA is again compelled to seek relief from this Court.

If affirmed, the district court's analytical errors would disproportionately harm all minority religions. Because the decision below effectively nullifies religious minorities' free exercise of religion—which RLUIPA was specifically designed to protect—this Court should reverse the district court and rule for TMAA.

STATEMENT OF THE ISSUE

Whether the district court misapplied this Court's substantial-burden test, effectively nullifying RLUIPA's protections.

ARGUMENT

This case is all too typical. A minority religious group purchases property and seeks permission to build a worship facility; community members oppose the permit explicitly because they do not want the new and unfamiliar religion in their neighborhood; city planners give way to community pressure, invoking easily manipulated, ostensibly neutral justifications. This is *precisely* the situation for which RLUIPA was enacted.

I. The district court nullified RLUIPA by allowing generalized zoning interests to substantially burden religion.

RLUIPA bars the government from implementing land-use regulations in any way that substantially burdens religious exercise, "unless the government demonstrates that imposition of the burden on that person, assembly, or institution" not only furthers "a compelling governmental interest," but is "the least restrictive means" of doing so. 42 U.S.C. § 2000cc(a)(1). That provision backstops later provisions of RLUIPA that forbid discrimination against and unequal treatment of religious groups, *id*. § 2000cc(b)(1)-(2), "much as the disparate-impact theory of employment discrimination backstops the prohibition of intentional discrimination," *Sts. Constantine & Helen Greek Orthodox Church, Inc. v. City of New Berlin*, 396

F.3d 895, 900 (7th Cir. 2005). If a municipality cannot justify burdening religion, then "the inference arises that hostility to religion, or more likely to a particular sect, influenced the decision." *Id.* Thus, "a religious institution [need not] show that it has been targeted on the basis of religion in order to succeed on a substantial burden claim." *Bethel World Outreach Ministries v. Montgomery Cnty. Council*, 706 F.3d 548, 557 (4th Cir. 2013).

To establish a substantial burden, a plaintiff must show that the "denial of the plaintiffs' zoning applications" created "significant pressure" on the plaintiffs "to conform their behavior." *TMAA*, 980 F.3d at 831 (cleaned up). Once a substantial burden is established, courts must proceed to the compelling interest and least restrictive means prongs. *Id.* at 833. In the prior appeal here, this Court set out six factors for courts to consider in assessing whether a land-use decision substantially burdens religious exercise. *Id.* 831-32. Those factors included examining whether the record reflected:

- "any arbitrariness of the sort that might evince animus or otherwise suggests that the plaintiffs have been, are being, or will be (to use a technical term of art) jerked around";
- "whether the plaintiffs have demonstrated a genuine need for new or more space";

- the "extent to which the City's decision" and "application of its zoning policy more generally, effectively deprives the plaintiffs of any viable means by which to engage in protected religious exercise"; and
- "whether there is a meaningful 'nexus' between the allegedly coerced or impeded conduct and the plaintiffs' religious exercise." *Id*.

The court below largely disregarded this Court's instructions. First, it misapplied this Court's substantial-burden standard by failing to address TMAA's evidence of irregularities that indicated arbitrariness in the denial of its application. Second, it contradicted itself as to *three* of the six factors it applied. Third, it credited generalized zoning interests as "compelling" without any evidentiary showing from the City demonstrating that those interests would be thwarted by construction of the proposed meditation center. Finally, the district court found, without evidence or analysis, that outright denying TMAA's application was the least restrictive means of serving those interests. Each of these errors warrants reversal.

A. The district court misapplied this Court's "arbitrariness" factor, ignoring procedural irregularities that showed that the City's denial imposed a substantial burden on TMAA's religious practice.

In the last round of litigation before this Court, one key question that the Court directed the district court to ask on remand was "[w]hether the City's decisionmaking process concerning the plaintiffs' applications reflect[ed] any arbitrariness of the sort that might evince animus or otherwise suggest[] that the plaintiffs have been,

are being, or will be . . . jerked around." *TMAA*, 980 F.3d at 832. This factor is particularly important because of its close connection with Section 2000cc(a)(1)'s role as a backstop against overt discrimination, and its implicit recognition that "government hostility" may be "masked, as well as overt," and may take the form of "covert suppression of particular religious beliefs." *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 534 (1993) (citations omitted).

On remand, the district court surprisingly found no genuine dispute of material fact over whether "the City's decisionmaking process in regard to Plaintiffs' Application . . . reflect[ed] arbitrariness." Op. 28. To reach this conclusion, the court disregarded both this Court's description of the arbitrariness factor and TMAA's evidence of procedural impropriety. The court perfunctorily recited TMAA's evidence that

> the City made false statements to ensure the planning approval was denied, the City violated its own ordinances, false minutes were drafted, failed to provide a results agenda, failed to recognize the religious nature of the use, treated Plaintiffs' Applications differently, refused to consider conditions pursuant to the City's practice, manipulated the reasons that the planning approval was denied, and focused on the religious nature of the use instead of land-use concerns.

Id. at 26 (citing ECF No. 197 at 26-27). But then—without engaging with that evidence—the court cursorily held that the denial was "not based on Plaintiffs' Buddhist faith but [on] objective criteria that would have been applied to any religious

use of the Eloong property that would have altered the single-family residential nature of the surrounding neighborhood." *Id.* at 28.

That ruling is unsupportable: it ignores both that there is *at least* the existence of a genuine dispute of material fact and this Court's admonition to closely examine evidence that the applicant is being "jerked around." This Court need do no more than examine the cases it cited in the first round to see the extent of the district court's error. *See TMAA*, 980 F.3d at 832 n.9 (citing *Westchester Day Sch. v. Vill. of Mamaroneck*, 504 F.3d 338, 352 (2d Cir. 2007), and *Roman Cath. Bishop of Springfield v. City of Springfield*, 724 F.3d 78, 96-97 (1st Cir. 2013)).

In *Roman Catholic Bishop*, for example, the First Circuit held that "a court may block application of a land use regulation under RLUIPA's subsection (a) where the context raises an 'inference' of hostility to a religious organization, even when the evidence does not necessarily show the explicit discrimination 'on the basis of religion' contemplated by subsection (b)." 724 F.3d at 97. It then identified several "troubling circumstances" from which an inference of hostility might be drawn, such as the City of Springfield's rapid adoption of an ordinance in response to news that the church might close, its refusal to consider "constitutional implications," its failure to "wait for the report of its own study committee," and a city councilor's statements that were suggestive of a discriminatory exercise of discretion. *Id.* at 98-99.

Although these circumstances were not dispositive as to whether there was a substantial burden, the First Circuit expressed concern about potential arbitrariness and animus in the decisionmaking process.

Likewise, in *Westchester Day School*, the Second Circuit explained that a substantial burden may be shown "where land use restrictions are imposed on the religious institution arbitrarily, capriciously, or unlawfully"—circumstances that "may reflect bias or discrimination against religion." 504 F.3d at 350. The court thus set aside as arbitrary the denial of a special-use permit to an Orthodox Jewish day school, citing signs that the "religious institution [had] received less than even-handed treatment." *Id.* at 351. The court pointed to several factors indicating that the zoning board had arbitrarily denied the school's application, such as its reliance on "findings not supported by substantial evidence," its "assumptions" about traffic and parking that were "unsupported by [the board's] own experts," its denial of the school's opportunity to respond to "grounds [for denial that] were conceived after the [board] closed its hearing process," and its failure to circulate a resolution prepared by the board's consultants that would have granted conditional approval. *Id.* at 346, 350-51. Given those deficiencies, it was reasonable to infer that "the application was in fact denied because the [board] gave undue deference to the public opposition of the small but influential group of neighbors" who opposed the religious use. *Id.* at 346.

Under the analysis of *Roman Catholic Bishop* and *Westchester Day School*, which this Court endorsed in the first appeal, TMAA's evidence of arbitrary conduct is sufficient to show a substantial burden. TMAA presented evidence that the City had "'inconsistently applied' specific policies to it." *Westchester Day Sch.*, 504 F.3d at 351. Indeed, one City official here *admitted* that TMAA's application was treated "differently than under the general planning approval" process, ECF No. 196-22 at 98, and the Planning Commission Chairman *admitted* that he could not remember the Commission treating any other application as it had treated TMAA's, ECF No. 196-41 at 29. TMAA also presented evidence that

- "the normal procedure includes developing recommended *conditions* on planning approval" and "work[ing] with applicants to address any issues that exist," but the City refused to do either here, ECF No. 197 at 9-11;
- TMAA is the only applicant that has ever been required to "prove" its religious nature, which City officials described as "very odd" and "so unusual," *id.* at 8;
- the Planning Commission violated the City's code in reversing its use decision at the last moment, *id.* at 11;
- the "highly unusual" post hoc creation of reasons for denial was contrary to City practice, *id.* at 11-12; and

- the standard post-meeting "results agenda" was not created for TMAA's application, *id.* at 12-13.

These circumstances alone support a finding of arbitrary decisionmaking or religious animus. *See Westchester Day School*, 504 F.3d at 346, 350-51 (identifying post hoc justifications, failure to follow procedure, and repeated legal errors); *Sts. Constantine & Helen*, 396 F.3d at 899-901 (reversing the district court and finding a substantial burden, due in part to similar "legal errors by the City's officials").

But there is more. TMAA presented evidence that the City both "disregarded relevant findings 'without explanation'" in ways that opposed the testimony of "its own experts," *Westchester Day Sch.*, 504 F.3d at 351, and also "disregard[ed] objective criteria," *Roman Cath. Bishop*, 724 F.3d at 97. For example, the City disregarded the report of its own traffic engineer, who found that "the proposed use would not create any traffic safety issues" and did not "identify any problems with respect to vehicular access issues," "traffic volume," or "traffic safety." ECF No. 197 at 16. She reported that "the traffic generated by the use 'would not be a problem, from a traffic engineering perspective,' that 'there is very light traffic' and 'plenty of capacity' on [the adjoining roads], which 'could easily handle' the proposed use, [and] that the 'levels of service at the relevant intersection would not be impacted by this use.'" *Id.* at 17. The City also disregarded the testimony of its own planner, who

agreed that "there were not concerns about 'traffic' in the final staff report." *Id.* at 16.

Despite its own employees' testimony—and TMAA's "read[y] agree[ment] to every mitigation measure suggested" and "to any reasonable conditions placed on approval"—the City denied the applications. *Id.* at 15, 28; *see also Guru Nanak Sikh Soc'y of Yuba City v. County of Sutter*, 456 F.3d 978, 989 (9th Cir. 2006) (finding substantial burden where applicant "readily agreed to every mitigation measure suggested by the Planning Division, but the County, without explanation, found such cooperation insufficient"). And that is to say nothing of the other evidence of improprieties, such as retroactively altered meeting minutes that attributed post-hoc rationales to statements by a councilman that the meeting transcript reveals were never made, and City employees' false statements to the City Council about TMAA's religious status and the reasons for denial. ECF No. 197 at 13.

The district court's dogged refusal to scrutinize the City's procedural irregularities and differential treatment of TMAA as arbitrary and potentially indicative of animus is all the more troubling in light of intolerant statements toward Buddhism in the application process. For instance, the record showed that "[d]uring one community meeting . . . attendees were 'screaming and yelling,' 'a man was crying, saying that he was Christian [and that] this is unacceptable,' and local residents said things like 'We don't want Buddhism' and 'This is not a church, this is a Buddhist

temple, and we don't need that.'" *TMAA*, 980 F.3d at 826. Similar statements were made during TMAA's earlier application process. Op. 6 (criticizing the possibility of Thai Buddhists joining the community). It is hard to imagine a clearer case for the application of RLUIPA.

The district court nevertheless ignored those comments in analyzing this factor. *Id.* at 28. Instead, it whitewashed the community's "concerns," stating only that residents voiced concerns about "compatibility," "frequency of activities," "traffic," "the substandard road," and "the conversion of a longtime residence for a non-residential use," and briefly commenting that there was "self-inflicted" "confusion as to the religious nature of the meditation center." *Id.* The district court even ignored a City official's explicit statement that the community controversy guided his actions. ECF No. 196-22 at 98.

That is not how RLUIPA analysis works, much less on summary judgment. As the cases that this Court earlier cited confirm, the "arbitrariness" factor weighs in favor of a substantial burden when the zoning board "gave undue deference to the public opposition of the small but influential group of neighbors" who opposed the proposed religious use. *See Westchester Day Sch.*, 504 F.3d at 346; *Roman Cath. Bishop*, 724 F.3d at 97. In *Westchester Day School*, as here, "[t]he stated reasons for the rejection included the effect the project would have on traffic and concerns with respect to parking and the intensity of use." 504 F.3d at 346. But in contrast

to the district court's uncritical acceptance of the City's proffered reasons for denial here—"lack of compatibility, concerns about access to the site, and increased traffic on a substandard road," Op. 28—the Second Circuit recognized that those reasons were pretextual in light of the strong community opposition.

As the United States explained in its amicus brief below, "[i]f such irregularities did occur, they would weigh in favor of Plaintiffs' substantial burden claim." ECF No. 199 at 12. Yet the district court failed to consider the evidence that TMAA presented—as well as indications of arbitrariness that this Court previously highlighted—and instead focused only on the City's general, post hoc reasons for denying TMAA's application. That was reversible error. There is *at least* a genuine issue of material fact about whether the City acted arbitrarily toward TMAA in a way that evinced animus against its proposed religious use, and thus whether the City had imposed a substantial burden on TMAA's religious exercise.

B. The district court's opinion is internally contradictory, showing that it did not properly consider three of the relevant factors.

At first blush, the district court's opinion seemingly found that three factors weighed in favor of granting TMAA's application. The court held that the plaintiffs showed "a genuine need for new or more space to facilitate additional programming" (Op. 23), that "the City's decision effectively deprives them of any viable means by which to engage in protected religious exercise" (*id*. at 25), and that "the denial of planning approval impedes their ability to offer, and participate in, the expanded

religious programming that their proposed meditation center was designed to accommodate" (*id*. at 26). How then could the district court resolve the substantial-burden inquiry against plaintiffs on summary judgment?

The answer is that the district court failed to credit those factors when asking whether TMAA faced a substantial burden. Specifically, in discussing TMAA's free-exercise claim, the court cross-referenced its substantial-burden analysis. *Id.* at 20. And how did it describe its earlier findings? By saying it held that "the burdens Plaintiffs experience are nothing more than inconveniences incidental to Defendant's denial of their Applications," because "Defendant's denial does not restrict Plaintiffs' current religious practice but, rather, prevents a change in their religious practice." *Id*. at 36-37.

The internal contradiction is stark. Gone is this Court's admonition that the district court *must* consider TMAA's need for *expansion* of its religious practice and whether it was impeded by the defendants. Gone, too, are the district court's *own earlier findings* that those factors weighed in favor of TMAA. Instead, the district court replaces them with speculation that a substantial burden is not present when TMAA may continue its "current religious practice." *Id.* at 37. Thus, the court both contradicted itself and ignored RLUIPA, which does not merely preserve a baseline of minimum religious practice, but instead protects religious practice generally. It is

basic common sense that a religious group can be substantially burdened if the law interferes with its ability to expand or grow.

Amici can attest to the dangers of the district court's reasoning. When minority religious groups enter a community, they frequently lack the resources to immediately practice their faiths in full. Often, members of minority faiths need time to build up the resources needed to purchase and develop appropriate worship spaces. In the interim, those believers might practice their faiths the best they can—making do with the practical constraints that their numbers and resources impose. Over time, however, as the group integrates into the community, it may obtain the means to build an adequate worship space—just as other faiths have done in generations past. But the fact that the group has managed to survive under less-than-ideal conditions does not mean it has forfeited the right to pursue appropriate facilities when it grows.

The district court turned that idea on its head. Minority religions that gain a foothold in a community—such as by meeting in a space that, though clearly inadequate, is at least *a* space—are ever limited to their initial, sub-standard religious practice. *Cf.* Op. 37 (denial does not restrict "current religious practice," however inadequate; it merely "prevents a change in their religious practice"). That is not the land-use rule mandated by RLUIPA. Nor is it consistent with the district court's own earlier "findings." This Court should not tolerate the district court's contradictions, or its failure to properly apply this Court's substantial-burden test.

C. The City's generalized zoning interests, which frequently mask hostility to religion, are not sufficiently compelling to justify the substantial burden on TMAA's religious exercise.

The district court determined that, even if strict scrutiny applied to TMAA's free exercise and RLUIPA claims (as it did under ARFA), "[t]he City has a compelling interest in enforcing its Zoning Ordinance." Op. 38. But under RLUIPA, generalized zoning interests cannot justify substantially burdening TMAA's religious exercise. As the statute itself explains, the government must show a "compelling governmental interest" in applying the law at issue "on that person, assembly, or institution" asserting a RLUIPA claim. 42 U.S.C. § 2000cc(a)(1). After all, "if the general government interest in zoning satisfied the first prong of the strict scrutiny test in every case, then this prong of the analysis would be eviscerated in RLUIPA cases." *Covenant Christian Ministries, Inc. v. City of Marietta*, 2008 WL 8866408, *14 n.9 (N.D. Ga. Mar. 31, 2008).

The City thus needed to "show a compelling interest in imposing the burden on religious exercise *in the particular case at hand, not a compelling interest in general*." *Westchester Day Sch.*, 504 F.3d at 353 (emphasis added). As the Supreme Court put it in *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, courts must "look beyond broadly formulated interests justifying the general applicability of government mandates and scrutinize the asserted harm of granting specific exemptions to particular religious claimants"—"strict scrutiny at least requires a case-

by-case determination of the question, sensitive to the facts of each particular claim." 546 U.S. 418, 431 (2006) (internal quotation marks omitted).

Granted, the City has a *legitimate* interest in zoning to regulate "transportation and access," reduce "traffic congestion" and "traffic hazard," and promote "orderly and appropriate development." Op. 38-39. But these considerations do not amount to a *compelling* interest without particularized evidence of grave risks specific to this case. "Compelling state interests are 'interests of the highest order,'" *Westchester Day Sch.*, 504 F.3d at 353 (quoting *Lukumi*, 508 U.S. at 546), and "only the gravest abuses, endangering paramount interests, give occasion for permissible limitation," *Sherbert v. Verner*, 374 U.S. 398, 406 (1963). In the land-use context, compelling interests are those involving "a 'clear and present, grave and immediate' danger to public health, peace, and welfare." *First Covenant Church of Seattle v. City of Seattle*, 840 P.2d 174, 187 (Wash. 1992).

The district court failed to apply that searching standard. It found that the City had satisfied strict scrutiny, despite a complete lack of evidence that the City's zoning interests would be threatened by *this* proposed use. *See* Op. 38-39 (finding, without any citation of record evidence, that "the City's interest in transportation and access, traffic, and harmony with the orderly and appropriate development of the R-1 district were implicated by the proposed meditation center"); *see also Soc'y of Am. Bosnians & Herzegovinians v. City of Des Plaines*, 2017 WL 748528, at *8

(N.D. Ill. Feb. 26, 2017) (denying summary judgment where the city failed to "identify anything specific about AIC's proposed use that posed a unique safety concern").

Regarding traffic, the City relied only on (1) the text of the zoning ordinance itself, and (2) a councilman's comment relating hearsay "complaints about speeders running up and down Riverside Drive" and the lack of sidewalks. *See* ECF No. 200, at 27 (citing ECF No. 92-39 at 14:23-17:9). But the City's ordinance says nothing about whether any proposed use—let alone this one—would generate traffic problems. And as to the cited hearsay, the City failed to provide *any* traffic studies or empirical evidence indicating that TMAA's proposed use would pose any safety risk. *See id*. On the contrary, the City's own experts agreed that TMAA's meditation center "would *not* create any traffic safety issues" and there were no such concerns in the final staff report. ECF No. 197 at 16 (emphasis added).

Regarding aesthetics, the City acknowledged that a municipality's generalized interest in preserving neighborhood character is only "substantial," not compelling. ECF No. 200 at 26.[2] Considering aesthetics is an inherently abstract and subjective

[2] *See also Dimmitt v. City of Clearwater*, 985 F.2d 1565, 1570 (11th Cit. 1993) ("aesthetics and traffic safety" are not compelling); *Int'l Church of the Foursquare Gospel v. City of San Leandro*, 673 F.3d 1059, 1071 (9th Cir. 2011) (preserving neighborhood's industrial character not compelling); *Congregation Rabbinical Coll. of Tartikov, Inc. v. Vill. of Pomona*, 138 F. Supp. 3d 352, 418 (S.D.N.Y. 2015) ("[C]ourts have held that 'aesthetics,' traffic, and 'community character' are normally not compelling interests."), *aff'd*, 945 F.3d 83 (2d Cir. 2019); *Cottonwood*

inquiry rife with opportunity for capricious evaluation—precisely the arbitrariness that this Court instructed the district court to scrutinize. *See TMAA*, 980 F.3d at 832. Such judgments cannot be empirically verified or objectively disproven. Indeed, if the tastes and aesthetic preferences of city planners were sufficiently compelling to trump substantial burdens on religious use, then RLUIPA would be a dead letter. Here, the only specific complaints about the impact on the neighborhood's character were based on its being a Buddhist facility in a majority Christian neighborhood. But a municipal determination that a particular religion's worship facility is contrary to a neighborhood's "character," without specifics grounded in some neutral rationale, is not even a legitimate interest, let alone a compelling one.

The City's purported reliance on aesthetic concerns are also belied by its denial of TMAA's 2007 application for a meditation center at another location. At that time, the Planning Commission's Staff Report found that TMAA's use would be "very conducive to a single family residential area," ECF No. 196-12 at 77:12-78:1, and that the meditation center would be a "relatively 'quiet' neighbor and might generally be conducive to location in a residential area," ECF No. 196-21 at 3. Now, however, the City says locating the proposed meditation center on the Eloong property would disrupt the character of just such a residential neighborhood, even though

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Christian Ctr. v. Cypress Redevelopment Agency, 218 F. Supp. 2d 1203, 1227-28 (C.D. Cal. 2002) ("aesthetic harm" is not "compelling").

other faiths—such as the Church of the Nazarene, located just one half-mile away—call that neighborhood home. *See* ECF No. 197 at 14. TMAA's applications for a suitable house of worship in Mobile have "turn[ed] into a game of gotcha, in which the available site is always some other site, but never the site the church has actually purchased." Douglas Laycock & Luke W. Goodrich, *RLUIPA: Necessary, Modest, and Under-enforced*, 39 Fordham Urb. L.J. 1021, 1047 (2012); *see also Guru Nanak*, 456 F.3d at 992-93 (finding a substantial burden when the city denied applications to build a temple at two locations, inconsistently applying concerns about leapfrog development).

This case cannot be viewed in isolation. It is representative of a recurring problem, where local governments routinely cite anodyne reasons to justify their denials of religious land uses for disfavored minority groups, without a substantial evidentiary basis. That is why Congress gave courts the duty to scrutinize the government's reasons with care. *See Holt v. Hobbs*, 574 U.S. 352, 364 (2015) (RLUIPA does not permit "unquestioning deference."). The district court's determination that the City's generalized zoning interests trumped the substantial burden imposed on TMAA—without any specific evidentiary showing that those generalized interests would be thwarted in this particular case—was a paradigmatic violation of RLUIPA's plain text as well as binding precedent.

D. Outright denying TMAA's application was not the least restrictive means of advancing the City's zoning interests.

The district court also concluded—without meaningful analysis—that "even if Plaintiffs' religious exercise was substantially burdened . . . the [City's] decision was the least restrictive means to further the City's compelling interest in its Zoning Ordinance." Op. 34. This was so, the court summarily announced, because "[t]he City's interest to preserve the character of the property and the surrounding neighborhood could not have been alleviated by conditional approval." *Id.* at 39.

Here, again, the court's reasoning was unsupported by any record evidence. During the application process, TMAA "readily agreed to every mitigation measure suggested" and was "willing to agree to any reasonable conditions placed on approval." ECF No. 197 at 15, 28. Below, however, the City simply asserted that, due to the project's scale, "[m]ere conditions could not negate impacts on the City's compelling governmental interest in enforcing its zoning as to the application." ECF No. 203 at 15. No testimony before the City Planning Commission or City Council supports this assertion—even though RLUIPA defendants shoulder the burden to "*demonstrate*, and not just assert, that the rule at issue is the least restrictive means of achieving a compelling governmental interest." *O'Bryan v. Bureau of Prisons*, 349 F.3d 399, 401 (7th Cir. 2003); *see also Holt*, 574 U.S. at 364. But that did not prevent the district court from swallowing it—hook, line, and sinker.

An RLUIPA defendant "cannot meet its burden to prove least restrictive means unless it demonstrates that it has actually considered and rejected the efficacy of less restrictive measures before adopting the challenged practice." *Spratt v. R.I. Dep't of Corr.*, 482 F.3d 33, 41 (1st Cir. 2007) (quoting *Warsoldier v. Woodford*, 418 F.3d 989, 999 (9th Cir. 2005)); *see also Holt*, 574 U.S. at 369 (a government official's "mere say-so" is not enough). In *Westchester Day School*, for example, the Second Circuit held that "the Village did not use the least restrictive means to achieve" its zoning interests because its zoning board "had the opportunity to approve the application subject to conditions, but refused to consider doing so." 504 F.3d at 353. The City had the same opportunity here, and TMAA was ready to accept reasonable conditions. But the City did not even argue, let alone show, that it actually considered alternatives.

Where, as here, the City "could have granted the use variance subject to various restrictions," "a reasonable factfinder could find that there are less restrictive alternatives to further the [city's] interests." *Bikur Cholim, Inc. v. Vill. of Suffern*, 664 F. Supp. 2d 267, 292 (S.D.N.Y. 2009). Indeed, as the Ninth Circuit held under nearly identical circumstances, "[t]he district court abused its discretion when it concluded, without analysis, that a complete denial of the conditional use permit was the least restrictive means by which the City could further its compelling interest."

Harbor Missionary Church Corp. v. City of San Buenaventura, 642 F. App'x 726, 730 (9th Cir. 2016).

II. The district court's reasoning would harm religious minorities.

The district court's failure to apply RLUIPA and governing precedent faithfully threatens grave harm to religious minorities. The generalized zoning interests proffered by the City here are frequently deployed to mask hostility toward religious land-use—which makes it even more troubling that the district court rubberstamped those interests as "compelling" without further inquiry. As leading commentators have explained, "[r]eligious hostility is especially problematic in the zoning process because it is easy to mask." Laycock & Goodrich, 39 Fordham Urb. L.J. at 1029. "[H]ostile officials can reject churches based on unsubstantiated concerns about traffic, parking, noise, or property values. Or they can reject churches based on vague concerns about the 'character of the neighborhood,' or 'general welfare.'" *Id.* at 1030.

Minority faiths are particularly at risk because of their relative lack of political influence and exposure to hostility from majority groups within the community. *Cf. Emp't Div. v. Smith*, 494 U.S. 872, 890 (1990) ("[L]eaving accommodation to the political process will place at a relative disadvantage those religious practices that are not widely engaged in."). Indeed, Congress drafted RLUIPA with religious mi-

norities like Buddhists specifically in mind. Citing "massive evidence" of "frequent[] discriminat[ion]" in "the highly individualized and discretionary process of land use regulation," Congress observed that veiled discrimination disproportionately affects "new, small, or unfamiliar" religious groups. 146 Cong. Rec. 16698, 16698 (2000) (joint statement of Sens. Hatch and Kennedy).

Congress's conclusion on that point was amply supported by the legislative record, which contained extensive statistical analysis as well as representative data showing discrimination against religious minorities in the land-use context. *See Religious Liberty Protection Act: Hearings Before the Subcomm. on the Constitution of the Comm. on the Judiciary on H.R. 4019*, 105th Cong. 131-53 (1998) (statement of W. Cole Durham); *id.* at 202-07 (statement of Elenora Giddings Ivory); *id.* at 91-130 (statement of John Mauck); *id.* at 199-202 (statement of Bruce D. Shoulson). Summarizing the evidence, the House Committee on the Judiciary reported that "[s]maller and less mainstream denominations are over-represented in reported land use disputes," and that "[l]and use regulation has a disparate impact on churches and especially on small faiths." H.R. Rep. No. 106-219, at 24 (1999). RLUIPA's Senate sponsors likewise discerned "a widespread pattern" of "discrimination against small and unfamiliar denominations as compared to larger and more familiar ones." 146 Cong. Rec. at 16698-99 (joint statement).

Federal courts—including this one—have consistently recognized that RLUIPA's broad land-use protections were crafted with special solicitude for religious minorities. *See, e.g.*, *Midrash Sephardi, Inc. v. Town of Surfside*, 366 F.3d 1214, 1236 (11th Cir. 2004) (quoting 146 Cong. Rec. at 16698). "By enacting RLUIPA," the Sixth Circuit has explained, "Congress directed federal courts to scrutinize municipal land-use regulations that function to exclude disfavored religious groups." *Tree of Life Christian Sch. v. City of Upper Arlington*, 823 F.3d 365, 369 (6th Cir. 2016). This is because "RLUIPA's purpose was to address what Congress perceived as inappropriate restrictions on religious land uses, especially by 'unwanted' and 'newcomer' religious groups.'" *Centro Familiar Cristiano Buenas Nuevas v. City of Yuma*, 651 F.3d 1163, 1170 (9th Cir. 2011) (quoting *Guru Nanak*, 456 F.3d at 994).

Nevertheless, minority religious groups like TMAA continue to be "more likely to be unlawfully denied land use permits" and "forced to litigate far more often" than larger religions. Douglas Laycock, *State RFRAs and Land Use Regulation*, 32 U.C. Davis L. Rev. 755, 771 (1999). A recent Department of Justice report indicates that, despite RLUIPA, "minority groups have faced a disproportionate level of discrimination in zoning matters, reflected in the disproportionate number of suits and investigations involving minority groups undertaken by the Department." U.S. Dep't of Justice, *Update on the Justice Department's Enforcement of*

the Religious Land Use and Institutionalized Persons Act: 2010-2016, at 4 (July 2016).[3] "Minority religions may have practices viewed as unfamiliar or distasteful by the general public," which generate more opposition than familiar modes of religious practice. Roman P. Storzer & Anthony R. Picarello, Jr., *The Religious Land Use and Institutionalized Persons Act of 2000: A Constitutional Response to Unconstitutional Zoning Practices*, 9 Geo. Mason L. Rev. 929, 941 (2001).

This case is no exception. Unfamiliarity with Buddhist religious beliefs and practices motivated community opposition to TMAA's proposed land-use. *See supra* at 13-14. Small and relatively homogenous local decisionmaking bodies, such as city planning committees, are susceptible to influence by popular prejudice or unease with the unfamiliar. *See* Ashira Pelman Ostrow, *Judicial Review of Local Land Use Decisions: Lessons from RLUIPA*, 31 Harv. J.L. & Pub. Pol'y 717, 736-37 (2008). Accordingly, municipal officials equipped with wide discretion and imprecise standards "have little trouble finding seemingly plausible grounds for delaying or denying most any project." Von G. Keetch & Matthew K. Richards, *The Need for Legislation to Enshrine the Free Exercise Clause in the Land Use Context*, 32 U.C. Davis L. Rev. 725, 728 (1999). Without recourse to the searching judicial review mandated by RLUIPA and this Court's precedent, such fig leaves will be

[3] *Available at* https://www.justice.gov/crt/file/877931/download.

used to systematically deny religious land-use rights to vulnerable religious minorities.

If affirmed, the decision below would render RLUIPA a dead letter for minority religions, allowing arbitrary land-use determinations to substantially burden religious exercise throughout the Circuit. This Court should not countenance that result.

CONCLUSION

The judgment of the district court should be reversed.

Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the length limits permitted by Fed. R. App. P. 29(a)(5) and 32(a)(7). The brief is 6,500 words, excluding the portions exempted by Fed. R. App. P. 32(f). The brief's type size and type face comply with Fed. R. App. P. 32(a)(5) and (6).

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Eleventh Circuit by using the appellate CM/ECF system on September 15, 2022.

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