CASE NO. 03-13858-C

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

MIDRASH SEPHARDI, INC. and YOUNG ISRAEL OF BAL HARBOUR,

Appellants,

vs.

TOWN OF SURFSIDE,

Appellee.

On Appeal from a Rule 54(b) Judgment of the United States District Court for the Southern District of Florida

TOWN OF SURFSIDE'S ANSWER BRIEF

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v.

The Town of Surfside

_____/

CERTIFICATE OF INTERESTED PERSONS

Appellee certifies that the following persons and entities may have an interest in the outcome of this case:

Adorno & Yoss, P.A. (formerly Adorno & Zeder, P.A.)

The Becket Fund for Religious Liberty

Mitchell R. Bloomberg, Esq.

Hon. Stephen T. Brown, U.S. Magistrate Judge (consent case)

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Midrash Sephardi, Inc. Case No. 03-13858-C

v.

The Town of Surfside
_____/

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Town of Surfside

Young Israel of Bal Harbour, Inc.

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STATEMENT REGARDING ORAL ARGUMENT

Appellee requests oral argument because of the novel constitutional issues presented, and because this Court has not addressed the recently-enacted federal Religious Land Use and Institutionalized Persons Act of 2000, 42 U.S.C. § 2000cc, *et seq.* ("RLUIPA"), and whether it may be applied to vitiate municipal zoning codes.

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STATEMENT OF JURISDICTION

Jurisdiction in this Court is based on 28 U.S.C. § 1291, which provides jurisdiction to review final decisions of the district courts. The district court certified its partial final summary judgment as final and appealable under Federal Rule of Civil Procedure 54(b). R9-353; R9-354.

STATEMENT OF THE ISSUES

I. Whether Appellants lack standing to assert that Surfside's Code violates their constitutional rights because they made no effort to find suitable property in the residential district that permits churches and synagogues and failed to apply for appropriate relief under the Code to locate in the desired business and tourist districts that do not permit churches and synagogues

II. Whether Surfside's Code violates the "unequal terms" provision of RLUIPA by not permitting churches and synagogues in its fragile, two-block business and tourist districts, where the undisputed evidence shows that they are not similarly situated and allowing them would impose severe economic hardship on the Town, which is dependent on those districts for revenue.

III. Whether Surfside's Code violates the Free Exercise Clause or the "substantial burden" provisions of RLUIPA or FRFRA where the undisputed facts show that Surfside's ordinances are neutral and of general applicability and only incidentally affect the religious practice of Appellants' members, and there is no evidence that Surfside's ordinances substantially burden the Appellants' free exercise of religion.

IV. Whether Surfside's Code violates Appellant's Freedom of Speech or Assembly or is an unlawful prior restraint on Appellants' First Amendment rights, where the undisputed evidence shows that the ordinances are content neutral and

narrowly tailored to serve the Town's compelling interest to preserve its unique business and tourist districts for retail and tourist establishments that the produce revenue for the Town.

V. Whether RLUIPA and FRFRA are unconstitutional for violating the Establishment Clause, the Tenth Amendment, and exceeding Congress's power under Section 5 of the Fourteenth Amendment where there is no adequate legislative record to support the notion that local land use zoning laws interfere with interstate commerce, and these acts provide a special preference for religion by operating to exempt only religious conduct, not secular conduct, from complying with neutral laws of general applicability.

STATEMENT OF THE CASE

A. Course of proceedings and disposition in the district court

This is a 42 U.S.C. § 1983 civil rights case, and an appeal under Federal Rule of Civil Procedure 54(b), in which Appellants, Young Israel of Bal Harbour ("Young Israel") and Midrash Sephardi, Inc. ("Midrash"), two synagogues, seek review of a summary judgment granted in favor of Appellee, Town of Surfside ("Surfside"), on all seven counts of the Second and Third Amended Complaints which alleged that Surfside violated their rights under the First and Fourteenth Amendment to the Constitution. R5-192; R6-248.[1] Two *amicus curiae* briefs have been filed by the United States and The Becket Fund For Religious Liberty in support of Appellants'

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[1] Young Israel makes an Equal Protection argument based on Surfside allegedly treating houses of worship differently than similarly-situated private clubs and lodge halls (YI br. at 20-28). Although the synagogues alleged such a violation in their initial pleadings (RAF16-33-34), they abandoned that claim when they amended their pleadings to include a "Free Exercise and Equal Protection As Applied" claim in Count V in which the synagogues alleged that Surfside is discriminately enforcing its laws by allowing another synagogue to operate illegally in the Town while not allowing the synagogues to operate. R5-192-31; R6-248-30. The synagogues never presented, and the district court never ruled upon, an Equal Protection challenge under the Fourteenth Amendment. This abandoned argument should be disregarded as the synagogues never preserved the issue. *Walker v. Jones*, 10 F.3d 1569, 1572 (11th Cir. 1994); *Depree v. Thomas*, 946 F.2d 784, 793 (11th Cir. 1991). To the extent that the argument overlaps with the "unequal terms" argument under Section 2(b) of RLUIPA, Surfside responds to that issue, *infra*, when it addresses RLUIPA.

position on RLUIPA.[2] As discussed below, the summary judgment should be affirmed on all counts.

B. Statement of relevant facts

Surfside presents its own statement of the relevant facts because Appellants' statement contains factual errors.

The Town of Surfside

The seaside town of Surfside is very small. It comprises approximately one-square mile and has a population of about 4,300. R4-145-11. The business district ("B-1") encompasses only two blocks of the entire town. R2-70-9. The tourist district ("RT-1") runs along the oceanfront on Collins Avenue. R2-70-31. The Town Code states that the purpose of the business district is "to provide for retail shopping and personal retail service needs of the Town's residents and tourists," and that the purpose of the tourist district is "to provide facilities that will afford convenience for tourists and enable intensive use of the ocean frontage." R2-70-6. Both the business

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[2] The United States' filing of an *amicus curiae* brief is procedurally defective since it was an intervening party in the district court proceedings but did not file a notice of appeal, let alone take the positions below that it now takes. R6-253; R6-256.

The Becket Fund's brief is replete with arguments that were never addressed by the district court, including (1) that houses of worship should be treated similarly with theaters, cinemas, music studios and schools (BF br. at 5-6, 8-10, 20) (the United States' position is the opposite, U.S. br. at 20); (2) that Young Israel should not be excluded from the business district (BF. br. at 8, 18-19) when Young Israel has only sought to locate in the tourist district; and (3) that the Town Code violates the Equal Protection Clause (BF br. at 19-26). The arguments should be disregarded. *Walker*, 10 F.3d at 1572; *Depree,* 946 F.2d at 793.

and tourist districts are located at or near the border between Surfside and the Village of Bal Harbour to the north, and are close to the Town of Bay Harbor Islands to the west of Surfside. R5-215-2.

For over 40 years, the Town Code has not allowed churches or synagogues in the business and tourist districts without a zoning variance. R5-192-16-17. The Code permits churches or synagogues in its centrally located, and much larger, multi-family residential ("RD-1") zoning district, with a conditional use or special use permit. R4-145-6; R5-215-2. Educational and philanthropic institutions, public and governmental buildings, public utilities and off-street parking lots and garages must also apply for a conditional use permit to locate in the RD-1 district. R2-70-7. The RD-1 district for churches and synagogues "is located near the center of geographic Surfside" and is more accessible to Surfside's citizens than either the business or tourist districts. R2-70-11; R5-215-21. The RD-1 district contains single, two-family, and multi-family housing units. R5-145-18. There are currently two churches and two synagogues in the Town other than the synagogues. R2-54-5. There are no private clubs, cinemas or theaters. R5-145-2, 20; R5-191; R6-248-4; RAF1-173-23.

Keeping a very small, fragile business district viable has always been a compelling concern to The Town. R4-124-7; R4-153-5-28. Surfside's 1995-2000 Comprehensive Plan states that its primary goal was to "[e]nsure that the character and location of future land uses directs growth in such a way so as to provide

maximum economic benefit to the Town's residents and businessmen." R2-70-9. It further states that Surfside's objective will be to (1) revitalize the town's existing Harding Avenue business area; (2) concentrate commercial uses in and around the existing business area; (3) develop commercial office space along Collins Avenue between 93rd and 96th streets to provide a greater population for the retail and service shops along Harding Avenue; (4) develop commercial uses along 94th, 95th and 96th streets between Collins and Harding avenues to draw Collins Avenue traffic into the business area; and (5) provide adequate parking to serve the area's visitors and employees by developing a remote parking area for the area's shopkeepers and employees. *Id.* The 2010 Comprehensive Plan states that its objectives will be to (1) encourage private investment in the revitalization of the Harding Avenue business district; (2) maintain and improve zoning regulations which permit the concentration of commercial uses in and around the established business area; and (3) maintain and improve zoning regulations permitting commercial office space along Collins Avenue between 93rd and 96th Streets as part of mixed use developments that provide concentrations of workers and/or residents to support retail and service uses along Harding Avenue. *Id.*

The Town Code mirrors the Plan's objective to invigorate the business district and to create a strong tax base through its retail and tourist districts, "particularly in

light of the sagging retail environment present with the recent loss of an anchor supermarket chain." R5-215-3, 28.

Young Israel and Midrash

Appellants are synagogues that adhere to the tenets of Orthodox Judaism. R5-215-2. Their stated "mission and function" is to serve residents from the towns of Surfside, Bal Harbour and Bay Harbor Islands, which they label as "the integrated Surf-Bal-Bay community." R3-106-2; R4-145-12. The vast majority of their 100-plus members (YI br. at 5; MS br. at 8) reside outside of Surfside, with most of their vital financial support coming from the affluent town of Bal Harbour, where synagogues are not provided for in its zoning code. RAF1-16-7, 8, 38; RAF4-213-26-27; R5-215-4; R6-248-6.[3] A "significant percentage" of these members are not full-year residents of either Surfside or Bal Harbour, but reside principally in New York, New Jersey, Connecticut, Maryland, Canada and throughout Latin America and Israel (MS. br. at 44).[4]

According to the tenets of Orthodox Judaism, congregational worship does not need to be held in a synagogue or in any special structure. R3-105-4; RAF3-55-98.

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[3] "RAF__" refers to the respective numbers of the Accordion Folder assigned by the docketing clerk to the record on appeal in which the pleading can be found.

[4] Midrash interjects new statistics in its brief that 35% of its members who reside in "North" Surfside (an undefined area) are unable to walk to the RD-1 district (MS br. at 10, 32). This evidence is not supported by the record, was not presented to the district court, and should be disregarded as being outside the appellate record. *Coutu v. Martin County Bd. of County Comm'rs*, 47 F.3d 1068 (11th Cir. 1995).

It can be held in a person's home since the placement of a synagogue at any particular location is neither fundamental to, nor a tenet of, the religious beliefs of Orthodox Jews. R2-54-7; R2-54-28, 35; R4-145-31-32. Their faith also dictates that members may not drive to service on Holy Days and on the Sabbath (Friday evenings and Saturdays) to participate in congregational worship. R5-215-2. Members deciding to attend a synagogue for services who are unable to walk due to medical reasons, however, may use transportation, including wheelchairs, to attend services. SR-93;[5] RAF2-55-33-35. Although Orthodox Jewish law does not allow driving on the Holy Days or Sabbath, "each person has their choice" to drive or not, and the synagogues acknowledge that some of their members choose to drive. RAF4-213-26-28; SR-72-75.

In 1997, Midrash began subleasing space from a bank on the second floor of an office building in Surfside's two-block business district. R4-145-11. The first floor of that building is occupied by the bank. *Id.* The office building is located on the border of Surfside and Bal Harbour. *Id.* Midrash applied for a special use permit and a zoning variance with Surfside to operate its synagogue in that location, but the Town Commission denied the applications because the Town Code only accepts applications from the title owner of the property or by a tenant with written permission from the title owner. R2-70-8; R5-215-3. Midrash never obtained the

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[5] "SR" refers to the Supplemental Record in accordance with Surfside's Motion to Supplement the Record that was filed on December 10, 2003.

required written permission from the title owner, did not appeal the denials, and has at all times been operating its synagogue in violation of the Town Code. R2-70-8; R4-145-7, 13; R5-215-3.

Young Israel initially opened its synagogue in 1999 in the Coronado Hotel in Surfside's tourist district. R4-145-12; R5-215-3. Young Israel admitted that it knew that placing its synagogue in that district would be in violation of the Code (R2-70-8; R4-145-15), and the district court found that Young Israel "opened flagrantly in violation of the [Code]" by not applying for any permits, variances or conditional uses. R5-215-3. Young Israel acknowledges that it does not cater to tourists or even transients at the Coronado Hotel, but operates primarily for residents in the surrounding community. RAF2-55-29-30. Approximately two years ago, Young Israel moved out of the Coronado Hotel and has since been sharing the business district space occupied by Midrash, also in direct violation of the Code. R13-278-43. Young Israel never attempted to find or lease property in the permitted RD-1 district or obtain a conditional use permit. R5-215-8-9.[6]

According to the synagogues, they did not search for property in the permitted RD-1 district because they believe that the area is generally "run down and shabby," not suitable for their synagogues, and is too far to walk for its members who reside

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[6] The synagogues' assertion (YI br. at 17) that "there is [no] claim that a building site is being put to an undesirable use" is false. Surfside has always claimed that the synagogues are using the office space and the hotel in derogation of its Code.

outside of Surfside; therefore it "would trigger the loss of vital financial support from [their] affluent Bal Harbour residents." RAF1-16-7, 8, 38; R5-192-26; R6-248-6.

District court proceedings

After Surfside initiated Code enforcement actions for the admitted zoning violations, the synagogues filed suit against Surfside alleging the following claims: Free Exercise of Religion (Count I); Free Speech (Count II); Free Assembly and Association (Count III); Unconstitutional Prior Restraint on First Amendment Rights (Count IV); Free Exercise and Equal Protection as Applied (Count V); Free Exercise of Religion – Florida Constitution and Florida Religious Freedom Restoration Act of 1998 ("FRFRA") (Count VI), and the federal Religious Land Use and Institutionalized Persons Act of 2000 ("RLUIPA") (Count VII). R5-192; R6-248. The claims are based on allegations that the Town Code selectively targets and discriminates against houses of worship by precluding them from the small business and tourist districts, yet allowing private clubs to operate there (*id.*), although the synagogues presented no evidence that private clubs even exist in those districts. They claim that being forced to look for property in the RD-1 district, which is a few blocks farther from the business and tourist districts, creates a substantial burden on the religious rights of their members who are unable to walk a longer distance to the synagogues if they were relocated to that district. *Id.* They also claim that, despite the

alleged walking burden, there is no suitably-sized property for their synagogues in the RD-1 district. *Id.*

Surfside answered the Complaints by denying all allegations, and filed a two-count Counterclaim against the synagogues for declaratory judgment (Count I) and injunctive relief, including civil penalties and attorneys' fees pursuant to Section 1-8 of the Town Code for their zoning violations (Count II). R5-195; R6-249. Surfside's position was that its zoning requirements are narrowly-tailored neutral laws that serve compelling governmental purposes, and that enforcing its zoning laws preserves its unique and fragile two-block business district and small oceanfront tourist district in ways that encourage the most productive and beneficial uses of the small geographical areas encompassed by these districts. R5-195; R6-249.

Surfside's evidence in support of summary judgment

All parties filed motions for summary judgment in support of their positions. R2-70; R3-96; R3-101; R4-141; R6-231; R7-261; R7-271; R7-274; R7-280; R7-290. Surfside presented unrebutted evidence from land use experts that the economic viability of the uniquely-small business district, which is the only retail service area in the Town, is critical to the tax base, job base, and retail servicing needs of its residents. R2-70-16. The experts concluded that allowing churches and synagogues in the business district would erode Surfside's tax base, resulting in economic hardship on the residents. *Id.* Surfside presented evidence that it is dependent on its

businesses for revenue (R2-70-16-17), and that since the district is located near the popular Bal Harbour Shops, Surfside's businesses have a difficult time competing. R2-70-17. Surfside also provided unrebutted expert evidence that it lost a major retail supermarket chain in the district and cannot afford to place non-economic establishments, like government buildings, schools, churches and synagogues in the area without risking the economic stability of the Town. *Id.*

As to the tourist district, Surfside presented unrebutted evidence that permitting churches and synagogues there would cause economic injury as well, since Surfside relies on tourism for a large portion of its income. R2-70-17. The tourist district generates substantial revenue for The Town by paying real estate taxes, resort taxes, tourist taxes, and bed taxes. *Id.*

Surfside also provided unrebutted evidence that, traditionally, churches and synagogues are predominately located in multi-family and mixed-use districts, not in commercial or retail districts. R2-70-16. This is because they contribute little, if any, synergy to the nature of retail shopping areas. *Id.* Moreover, because of the variety in size, type and special functions of government buildings, schools, churches, synagogues and medical facilities, it is typical for zoning regulations to classify them together and to permit them through special exception or conditional use procedures, which is exactly how the U.S. Department of Commerce categorizes these land uses. R2-54-44; R2-70-9.

Appellants' lack of evidence

The synagogues "offered no competent evidence, in the way of expert testimony or otherwise," to show any existing club or lodge hall or to rebut Surfside's land use experts and the conclusions in the Comprehensive Plans, dating back 40 years, that certain uses, including houses of worship, do not enhance Surfside's legitimate goals of enhancing the economic base of the business and tourist districts, or its goals of serving its residents' shopping and retail needs. R2-70-6; R8-317-9. Although they presented affidavits from its rabbis as to their opinions on the retail and shopping habits of "most Jewish synagogues," "most Muslim mosques" and "most churches of different Christian denominations" R8-317-6, they lacked any foundation and were unreliable. R8-317-8-9.

Appellants also failed to provide competent evidence to support the allegation that locating in the RD-1 district would create a substantial burden on their members' right to worship. Of approximately 100 persons alleged to be members of the synagogues (YI br. at 5), the synagogues presented affidavits of only three Surfside residents who claim they are unable to walk to the RD-1 district. R4-121; R3-114. All of them testified that they could not walk because of old age and severe medical reasons, such as having open heart surgery and back surgery. R3-114-2; R4-121-2.

The district court entered summary judgment in favor of Surfside on all counts, ruling that the synagogues failed to apply for any variances or conditional use permits

before bringing this action and, therefore, lacked standing (R5-215-6-10), and that the synagogues' constitutional and statutory claims were without merit, unsupported by law or evidence, "speculative and unsupported factually" and "totally inconsistent with the Plaintiffs' other arguments." R5-215-11, 14-16, 21, 27, 29; R7-295-1.[7] The district court also granted summary judgment on Surfside's counterclaim for injunctive and declaratory relief, and entered a permanent injunction against the synagogues, enjoining them from continuing to operate at the present location in violation of the Code. R9-352.

On October 3, 2003, this Court granted Young Israel's request for a stay from the injunction order pending the outcome of this appeal. Midrash failed to request a stay and is currently operating in the business district in violation of the injunction.

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[7] The district court also found that the synagogues never filed an Answer to Surfside's Counterclaims to the Second Amended Complaint (R8-352-1), nor did they respond to Surfside's Motion for Summary Judgment on the counterclaims for injunctive relief. R8-335-2; R8-355-2. Notwithstanding their failure to respond to the merits of the injunction, the district court noted that "plaintiff ignores the admissions in the record and the pleadings themselves when reaching the conclusion that summary judgment [in favor of Surfside] is improper." R8-355-2.

STANDARD OF REVIEW

This Court reviews a district court's legal conclusions relating to the constitutionality of zoning ordinances *de novo,* while underlying factual findings are reviewed for clear error, "with a proviso that zoning decisions, as a general rule, will not usually be found by a federal court to implicate constitutional guarantees and with a disinclination to sit as a zoning board of review." *Greenbriar Village, L.L.C. v. Mountain Brook, City*, 345 F.3d 1258, 1262 (11th Cir. 2003).

SUMMARY OF THE ARGUMENT

Surfside, Florida, is a small, one square-mile town with 4300 residents. The Town's zoned business district comprises two blocks. Its zoned tourist district abuts the ocean. The Surfside Zoning Code has not allowed churches and synagogues in those districts for more than 40 years, but churches and synagogues and other institutional uses are permitted in Surfside's larger multi-family residential zoning district, which is centrally located and easily accessible to the Town's residents.

When one synagogue opened in the tourist district, and another in the business district, in blatant violation of Surfside's zoning laws, the Town sought enforcement of its Code. The synagogues sued, ultimately claiming violations of the First Amendment, the Florida Religious Freedom Restoration Act (FRFRA) and the federal Religious Land Use and Institutionalized Persons Act (RLUIPA). The gravamen of the synagogues' position was that locating in the business and tourist districts placed them closer to the adjoining towns of Bal Harbour and Bay Harbor Islands, making it easier for their congregants from those towns to walk to services, and that because Surfside's Code allowed clubs to operate in the business and tourist districts, precluding synagogues constituted discrimination.

(1) After extensive discovery, summary judgment was entered for Surfside. The court below properly concluded that the synagogues' failure to have sought suitable property in the permissible multi-family residential district, and their failure

to have sought a variance to allow them to operate in the tourist or business districts, precluded them from having standing to challenge the constitutionality of Surfside's Zoning Code. A plaintiff in a zoning case must make a bona-fide effort to secure the right to operate in order to have the necessary injury-in-fact to establish standing to challenge the constitutionality of a zoning ordinance. *Granite State Outdoor Adventuring, Inc., v. City of Clearwater*, 2003 WL 22813792 (11th Cir. Nov. 28, 2003). Having failed to do so, the synagogues lacked standing to challenge the Code.

(2) Surfside's zoning ordinances do not pose a substantial burden on the synagogues or their congregants, therefore the synagogues have no claim for relief under the Free Exercise Clause or FRFRA. The Zoning Code only regulates location and a neutral law does not violate the Free Exercise Clause merely because it regulates the location of synagogues. *Grosz v. City of Miami Beach*, 721 F.2d 729 (11th Cir. 1983). Surfside does not prohibit synagogues, and the fact that congregants choose to live in adjoining towns and prefer not to walk to the Surfside multi-family residential district reflects a self-imposed burden, not a burden imposed by Surfside. Therefore the court below was correct in finding that neither the Free Exercise Clause nor FRFRA provides the synagogues a basis for relief.

(3) Surfside's zoning ordinances do not violate the "unequal terms" provision of RLUIPA because there are no private clubs in the tourist or business districts; furthermore, private clubs are not "similarly situated" with churches and

synagogues; and even if private clubs could be viewed as "similarly situated" there is a rational basis for distinguishing between private clubs and churches and synagogues. The synagogues provided no evidence supporting similarity of uses, and their argumentative hypotheticals are no substitute for affirmative evidence of similarity or evidence to rebut the undisputed testimony that including houses of worship in the tourist and business districts is inconsistent with Surfside's goals of serving the retail needs of its citizens and preserving and enhancing the small economic base provided by the business and tourist districts.

(4) No evidence supported the synagogues' claim that Surfside's neutral, generally applicable zoning ordinances were designed to discriminate against religion generally or against the synagogues, specifically. Therefore, the court below properly granted summary judgment on the synagogues' claims of discrimination, and on their free speech / free exercise hybrid claim.

(5) If RLUIPA or the FRFRA are interpreted to mean that the synagogues can ignore neutral, non-discriminatory zoning laws of general applicability, which do not substantially burden the free exercise of religion, then the Court should declare these statutes to be violative of the Establishment Clause and, as to RLUIPA, a violation of the Tenth Amendment.

ARGUMENT AND CITATIONS OF AUTHORITY

The Court should affirm the summary judgment in favor of Surfside for the following reasons.

I. The synagogues lack standing to assert that the Town Code violates their constitutional rights because they made no effort to find suitable property in the permissible RD-1 district or apply for appropriate relief to locate in the desired business and tourist districts.

The synagogues have never attempted to locate suitable property in the RD-1 District. Young Israel never applied for a variance to locate in the desired tourist district and opened its doors knowing that it was violating the Town Code. Midrash never applied for a conditional use permit or obtained the written permission from the title owner to request a special permit to operate in the business district, and has at all times been operating in violation of the Town Code. R2-70-8; R4-145-7, 13; R5-215-3. The synagogues' willful and "flagrant" violation of the Town Code entitles Surfside to the injunctive relief requested. *See Metropolitan Dade County v. O'Brien*, 660 So. 2d 364, 365 (Fla. 3d DCA 1995) (ordering an injunction where the plaintiffs "began a business without complying with the county code, were aware of their violations, and continue to violate county ordinances," noting that, "[u]nder these extreme circumstances . . . the government has a clear legal right to relief").

Moreover, by failing to make any effort afforded by the Town Code to locate their synagogues in Surfside, the synagogues lack standing to assert a constitutional deprivation. *See Love Church v. City of Evanston*, 896 F.2d 1082, 1085 (7th Cir.

1990) (holding that a church that never applied for a special use permit or leased property that would trigger the implementation of the challenged ordinance, lacked standing to challenge the constitutionality of the ordinance); *C.L.U.B. v. City of Chicago*, 157 F. Supp. 2d 903 (N.D. Ill. 2001) (holding that churches that failed to apply for a special use permit lacked standing), *aff'd*, 342 F.3d 752 (7th Cir. 2003). *See also Town v. State ex rel. Reno*, 377 So. 2d 648 (Fla. 1979) (an injunction was warranted where the plaintiff church never sought a zoning exception and did not question the general authority of the city to zone the property); *Central Fla. Invs., Inc. v. Orange County Code Enforcement Bd.*, 26 Fla. L. Weekly D1898 (Fla. 5th DCA 2001);146 Cong. Rec. §§ 7774, 7776 (July 27, 2000) (RLUIPA was not enacted to "provide religious institutions with immunity from land use regulations, nor does it relieve religious institutions from applying for variances, special permits or exceptions, hardship approval, or other relief provisions in land use regulations . . .").

The synagogues cannot rely, as they do (MS br. at 37), on *City of Lakewood v. Plain Dealer Pub'g Co.*, 486 U.S. 750 (1988) on the alleged theory that any constitutional challenge to an ordinance establishes standing notwithstanding the failure to first seek relief with the zoning authority. The synagogues admit that they never applied for a conditional use permit (MS br. at 37) and that they "will not be injured by the conditional use requirement of § 90-41 unless it is enforced or threatened to be enforced . . . ." R7-274-7. As this Court recently held, the plaintiff

in a zoning case must first make a bona-fide effort in the permitting and appeals process, and be denied a permit, to have an "injury-in-fact" necessary to establish standing before challenging the constitutionality of the zoning ordinance. *See Granite*, WL 22813792 at *3 (distinguishing *City of Lakewood* and holding that billboard company did not have standing to challenge constitutionality of particular sign ordinance provisions under which it did not first subject itself to the permitting and appeals process). This rule applies notwithstanding allegations that the permitting procedure contains procedural and constitutional defects because no harm – as required under Article III – has yet to be established. *See id.* at 4.

The synagogues also cannot avoid their lack of standing and injury by claiming that there is no "suitably-sized" land available in the RD-1 district for its synagogue (YI br. at 8; R5-192-26).[8] Although the statement that there is no suitable property is false (MS br. at 43; R2-54-45), "[w]hatever specific difficulties [plaintiff] claims to have encountered, they are the same ones that face all [land users]. The harsh reality of the marketplace sometimes dictates that certain facilities are not available to those who desire them." *Love Church*, 896 F.2d at 1086. Contrary to the synagogues' argument (MS br. at 36-39), the fact that "suitable" property may be available to the synagogues in the future does not save their standing defense by the potential of a

[8] Although Young Israel claims there is no property available, Midrash acknowledges that there is property, only that the land is too deep into the RD-1 district to walk (MS br. at 43). Scarcity of desirable property does not support a substantial burden. *See Love Church*, 896 F.2d at 1086.

repetition of injury either. As the district court recognized, the synagogues were litigating in an effort to avoid the multi-family zoning district, and their standing defense is "totally inconsistent with the Plaintiffs' other arguments" and was too contingent to pass the case or controversy test. R5-215-11. *See Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26, 51 (1976).[9]

II. The undisputed facts show that Surfside's zoning ordinances do not violate the "unequal terms" provision of RLUIPA.

The synagogues argue (YI br. at 29-32; MS br. at 12-21) that the Town Code violates the "unequal terms" provisions under § 2(b)(1) of RLUIPA, which states: "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." They claim that there was no factual basis for the district court to find that Surfside has a rational basis for excluding churches and synagogues from its business and tourist district while allowing "private clubs" in those districts.

To prevail on this claim, the synagogues have to show two things: (1) that private clubs in Surfside are "similarly situated" with churches and synagogues; and (2) if they are similarly situated and being treated differently, that there is no rational reason behind the differential treatment of the similarly situated uses. *See City of*

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[9] It is also questionable whether Young Israel, which, prior to RLUIPA's enactment, voluntarily moved out of the tourist district when its hotel location was sold, has preserved any issue for its appeal. Its entire position and pleading below was based upon its location in the tourist district. *See Granite*, WL 22813792 at *3.

Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 447-50 (1985); *Congregation Kol Ami v. Abington Township*, 309 F.3d 120 (3d Cir. 2002). Summary judgment was proper on this claim because the synagogues failed to present any evidence to prove these elements.

i. Churches and synagogues are not similarly situated with private clubs in Surfside.

Surfside provided expert evidence that in the Town, as well as traditionally elsewhere, private clubs are not similarly situated with churches and synagogues. The expert evidence showed, and the district court found, that "[t]he text of the [Town Code] provides that churches, synagogues, educational or philanthropic institutions (including museums), parking lots and garages, public and governmental buildings and public utility/public service uses are all Conditional Uses . . . [which] . . . fall within Justice Harlan's natural perimeter test,[10] as this would apply to a group of secular and non-secular uses that 'are of a public or semi-public character.'" R4-215-17-18. Although private clubs are permitted in the B-1 business district "despite the ostensible purpose of B-1 to provide for the retail and personal service needs of the Town's residents and tourists," private clubs provide more of a social setting and

[10] *See Walz v. Tax Comm'n of New York City*, 397 U.S. 664, 674 (1970) (Harlan, J.) ("In any particular case the critical question is whether the circumference of legislation encircles a class so broad that it can be fairly concluded that religious institutions could be thought to fall within the natural perimeter").

more synergy for the shopping district in keeping with the purpose of Code § 90-152, than churches and synagogues. R4-215-17-18.[11]

On the other hand, the synagogues did not present any evidence of "similarly-situated" uses, or any competent evidence to rebut Surfside's experts or the conclusions in its Comprehensive Plans that houses of worship do not enhance Surfside's legitimate goals of serving the shopping and retail needs of its residents and enhancing the economic base of the business and tourist districts. R2-70-6; R8-317-9. They merely hypothesized about types of private clubs that Surfside's 40-year-old Town Code might allow, but could not establish any factual base because no clubs exist.[12] The synagogues' failure to provide any competent evidence in this regard is fatal to their constitutional challenges. *See Petra Presbyterian Church v. Village of Northbrook*, U.S. Dist. Lexis 15105, *37 (N.D. Ill. August 28, 2003) (holding that village did not violate RLUIPA's unequal terms provision where church failed to provide any authority that "restaurants and bars are 'similarly situated'

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[11] The Becket Fund's brief ignores this evidence by stating that Surfside has not demonstrated that there is no other way to increase 'economic vitality' without banning synagogues . . . from the B-1 district" (BF br. at 19). The United States' suggestion that the Town Code impermissibly precludes churches and synagogues from the RM-1 district (U.S. br. at 19) ignores the evidence that an Orthodox shul already exists there that takes up an entire block that has a direct, adverse impact and interrupts tourist, pedestrian and commercial flow. R2-70-4; R2-54-46.

[12] The synagogues admit that they are not similarly situated with "communal assembly halls" because they have "[n]ever held a social, communal, public service or other community affair event which is unrelated to its religious and spiritual mission or purpose." R5-208-5, 9.

assembly uses"); *Prater v. City of Burnside, Ky.*, 289 F.3d 417, 429 (6th Cir. 2002) (no free exercise violation where church offered no evidence that it was similarly situated with a masonic lodge).

The synagogues argue that the rabbis' affidavits opining on the retail and shopping habits of their members and members of other religions is sufficient to create a genuine issue of material fact as to being similarly situated to a private club (YI br. at 22-23; MS br. at 46-48).[13] The affidavits are merely argument based on hypothetical sets of facts that lack any foundation. The synagogues have provided no record of a single private club or lodge hall that exists in Surfside, let alone one to which they are similarly situated.[14] There is no factual basis upon which the synagogues can compare themselves to a private club in Surfside. The rabbis also have no personal knowledge as to shopping habits of members of other religions, assuming the issue is even relevant.[15] As the district court found, affidavits based on speculation and that contain unreliable hearsay are not evidence. R8-317-8-9. *See*

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[13] This contradicts the synagogues' affirmation to the district court that only questions of law remain on this issue. R13-278-38; MS br. at 29.

[14] In fact, there are none, and the synagogues have merely seized upon Town Code language from 1960 permitting private clubs. The only "evidence" the synagogues listed in their exhibit list were ordinances from 1951, 1953 and 1965. R5-191.

[15] The suggestion by the synagogues that retail and shopping habits can be categorized by the field of religion one practices – instead of treating all religions equally as one institutional use as Surfside does – is not only contrary to land use law but also suggests discriminatory treatment. RAF5-214-47.

Pace v. Capobianco, 283 F.3d 1275 (11th Cir. 2002); *Hall v. Burger King Corp.*, 912 F. Supp. 1509, 1531 (S.D. Fla. 1995); *Int'l Ship Repair & Marine Servs. v. St. Paul Fire & Marine Ins. Co.*, 906 F. Supp. 645, 648 (M.D. Fla. 1995); Fed. R. Evid. 602; Fed. R. Civ. P. 56(e).[16]

Even taking the rabbis' opinions as true, that their members contribute to the retail nature of the business and tourist districts by shopping and eating at restaurants after attending services, the synagogues "miss the point." RAF5-214-47. Zoning codes must rely on the "central use" of an institution, not ancillary or supplemental activities. RAF5-214-61. As Surfside's land use expert explained:

> The point is, Surfside and its Zoning Code is not addressing the narrow habits and conduct of a particular synagogue or what they do on a particular day. It is addressing the broad nature of religious institutions of which it cannot distinguish or discriminate one against the other. It must be prepared to deal with the typical impacts of all natures of houses of worship, and the broad nature and the typical impact is that they do not have a relationship, certainly nowhere near as strong as the typical retail and services activities that we've already seen at present in Surfside. They react very . . . weakly

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[16] The synagogues also argue that the district court erred in not conducting an evidentiary hearing on the issue of "similarly-situated" because an affidavit provided by the current president of Young Israel in support of Young Israel's motion to stay the injunction filed in this Court "establishes that the presence of the congregations has led to the opening of new retail establishments . . . " (YI br. at 33-34). The affidavit was filed with this Court *after* judgment was entered and should be stricken for attempting to interject new facts into the record that were never presented to the district court. *See Coutu v. Martin County Bd. of County Comm'rs*, 47 F.3d 1068 (11th Cir. 1995) (striking documents in addendum that are not part of the record on appeal).

> with the retail district. There may be exceptions. Those are the exceptions to the rule.

RAF5-214-47. Moreover, merely because houses of worship and private clubs are places of public gathering, that does not make them similar for zoning purposes:

> A football stadium and a cathedral are both places of gathering, both can list religious activities as a use (even if only once or twice), . . . [b]ut no code or plan would attempt to equate them as essentially the same . . . . Likewise one can find similarities in small scale places of gathering. . . but the essential distinctions that motivate their differential treatment in the zoning code remain the same.

R2-54-50. The synagogues further miss the point that zoning cannot occur for synagogues to the exclusion of churches, and the latter are frequently empty and unused except for once a week. RAF5-214-64.[17] Indeed, the Becket Fund's argument

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[17] Statements by the Becket Fund that "churches frequently have book stalls that generate commercial sales" (BF br. at 10 n.16), and statements by Young Israel that club members "might gather to exchange social views or engage in political or literary discussion" while its members "gather for religious devotion," and that the two uses are no different in terms of noise and traffic (YI br. at 21) are not evidence, lack any foundation and are outside of the record. It also contradicts the synagogues' concession that their "celebrations are rather boisterous," RAF2-55-17, and this Court's recognition that "[g]atherings for organized religious services produce . . . crowds, noise and disturbances" so that they can be zoned differently than other secular gatherings that may take place in a home. *See Grosz,* 721 F.2d at 738.

Moreover, the argument that the Court should ignore Surfside's expert's opinion that houses of worship, along with schools and government buildings, "have caused enormous disruption" in Surfside on the ground that the opinion relates only to "constructing . . . institutional buildings" and not to itself (YI br. at 23) makes no sense. First, it is taken out of context; the testimony that such uses disrupt retail areas is not limited to constructing buildings. RAF5-214-48. Second, Section 90-41 applies to the intended *use* of a building, not to the construction of the building itself. Finally, its substantial burden argument is based on the fact that it is difficult to

that the First Amendment allows religious organizations to be treated similar to *any* assembly of people (BF br. at 8-10) – regardless of size, purpose, or circumstance – is so contrary to logic and reason that it essentially vitiates the requirement of allowing zoning at all.[18]

Finally, the synagogues argue that *Cornerstone Bible Church v. Hastings,* 948 F.2d 464 (8th Cir. 1991), supports reversal because expert opinions that private clubs are different than houses of worship were rejected in that case (YI br. at 22). The Eighth Circuit in *Cornerstone* held that affidavits presented by a city were insufficient for summary judgment purpose because they were from two city planners who were on the city's payroll that merely stated in a conclusory fashion that excluding churches from a specific zone was consistent with the city's planning process and historical land use. The concerns raised in *Cornerstone* are not present here. Surfside's experts are not town employees, but retained experts who did more than merely produce conclusory affidavits. They conducted surveys and interviews,

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"erect" a house of worship in the RD-1 because of the requirement of assembling multiple lots owned by different owners. YI br. at 5. And even that statement is false because the evidence shows that suitably-sized, single lots with large floor areas are available for the synagogues. R2-54-45.

[18] For the same reasons, statements by the Becket Fund that the Town Code prohibits assemblies for religious purposes but allows "the *same number* of people to gather" for secular purposes (BF br. at 20), including to watch a production of Fiddler on the Roof (BF br. at 21), is inconsistent with the purpose of zoning law that must take into consideration the "wide variations" in the size, types and special functions of churches and synagogues. R2-54-44; R2-70-9. It is also outside of the record – Surfside has no theaters or cinemas. R5-145-2, 20; R6-248-4; RAF1-173-23.

produced expert reports, were deposed extensively, and gave unrebutted opinions based on studies of many years that mixing houses of worship in retail districts in Surfside is incompatible. R4-137; RAF5-214-6, 37, 42, 87.

Since the synagogues' only evidence to rebut Surfside's land use experts consists of "nothing more than a repetition of [their] conclusional allegations, summary judgment for [Surfside] was not only proper but required." *Morris v. Ross*, 663 F.2d 1032, 1034 (11th Cir. 1981).[19]

ii. The synagogues presented no evidence that it is irrational for Surfside to preclude religious institutions from the business and tourist districts.

Even if factual issues exist as to whether private clubs are similarly situated with religious institutions, summary judgment was proper because Surfside had a rational basis to treat them differently in the business and tourist districts because of the town's unique size, its commitment to its Plan's objective to cater to the shopping and retail needs of its residents, and its dependency on tourist and business revenue.

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[19] The synagogues argue (MS br. at 16) that the district court erred in reading into § 2(b)(1) of RLUIPA "a requirement that the religious and non-religious entities referenced which must be treated equally must also be similarly situated in all relevant respects." Their argument is contrary to the legislative history of RLUIPA indicating it codifies existing Equal Protection law, *see, e.g., Ventura County Christian High School v. City of San Buenaventura*, 233 F. Supp. 2d 1241, 1246-47 (C.D. Cal. 2002). It also directly conflicts with the amicus curiae positions (U.S. br. at 14; BF br. at 7), and the United States' own concession that the district court's finding that the two uses must be "similarly situated in all relevant respects" is correct (U.S. br. at 14).

The Supreme Court has held that, in conducting a rational basis review, government action will not be overturned unless "the varying treatment of different groups or persons is so unrelated to the achievement of any combination of legitimate purposes that we can only conclude that the government's actions were irrational." *Kimel v. Florida Bd. of Regents*, 528 U.S. 62, 84, 120 S. Ct. 631 (2000) (citation omitted). As the synagogues admit (MS br. at 17), "[t]his standard permits a court to hypothesize interests that might support legislative distinctions, whereas heightened scrutiny limits the realm of justification to demonstrable reality." *Tuan Anh Nguyen v. I.N.S.*, 533 U.S. 53, 77, 121 S. Ct. 2053, 2068 (2001). *See also National Parks Conservation Ass'n v. Norton*, 324 F.3d 1229, 1245 (11th Cir. 2003) ("The proper inquiry is concerned with the existence of a conceivably rational basis, not whether that basis was actually considered by the legislative body"). *Accord Heller v. Doe*, 509 U.S. 312, 320 (1993); *FCC v. Beach Communications, Inc.*, 508 U.S. 317, 313 (1993) (only rational speculation required).

Precluding houses of worship in the business district is consistent with the clear objective in Surfside's Comprehensive Plan "to provide for retail shopping and personal retail service needs of the Town's residents and tourists." R2-70-6. The unrebutted expert evidence also shows that Surfside is dependent on its businesses and tourists for revenue, and that allowing churches and synagogues in the business district would erode Surfside's tax base, resulting in economic hardship on the

residents. R2-70-16-17. It has no cinema or theater, and since it is located near the Bal Harbour Shops, the Town already has a difficult time competing for business. R2-70-17; R5-145-2, 20; R6-248-4; RAF1-173-23. Moreover, Surfside lost a major retail supermarket chain at the head of the district and could not afford to place non-economic establishments, like government buildings, schools, churches and synagogues in the area without risking the economic stability of the Town. *Id.*; R5-215-3, 28.

Precluding churches and synagogues from the tourist district is also justified. The tourist district generates substantial revenue for the Town by paying real estate taxes, resort taxes, tourist taxes, and bed taxes. R2-70-17. Churches and synagogues will not attract tourists to the Town. Young Israel conceded that it did not cater to tourists or even transients at the Coronado Hotel, but operated primarily for residents in the surrounding community. RAF2-55-29-30.

Courts have consistently held that a local government may treat religious uses in business and commercial district differently than private clubs when it is necessary to further the legitimate interests of the local government. *See Concerned Citizens of Carderock v. Hubbard*, 84 F. Supp. 2d 668, 674-75 (D. Md. 2000); *Int'l Church of the Foursquare Gospel v. City of Chicago Heights*, 955 F. Supp. 878, 881 (N.D. Ill. 1996) (holding that zoning ordinance excluding churches from business districts, but not private banquet halls, was rational and survived equal protection challenge);

C.L.U.B. v. City of Chicago, 157 F. Supp. 2d 903 (N.D. Ill. 2001) (holding that there were "clear economic and social justifications for the City's overall zoning scheme" by allowing churches in the business and commercial district by special use permits only), *aff'd*, 342 F.3d 752 (7th Cir. 2003). *See also Murphy v. Zoning Comm'n of the Town of New Milford,* 2003 WL 22299219 (D. Conn. Sept. 30, 2003) (holding that regularly-scheduled church meetings are not similarly situated to large gatherings of people for general events).

This is so because religious institutions have historically been regarded as being better suited for residential districts, not business and commercial districts. *See Hubbard*, 84 F. Supp. 2d at 674-75 ("It is . . . reasonable to presume that 'churches . . . and other places of worship' . . . belong [in the] category of uses [that are] wholly compatible with single family home life."), citing *E.C. Yokley, Zoning Law & Practice* § 35-14, at 35 (4th ed. supp. 1999) ("Since the advent of zoning, churches have been held proper in residence districts."); *C.L.U.B.*, 157 F. Supp. 2d at 911-12 (holding that the "City recognizes the historical connection between strong and healthy residential communities and churches"), *aff'd* 342 F.3d 752; Kenneth H. Young, *Anderson's American Law of Zoning* § 12.22 at 578 (4th ed. 1996) ("[R]eligious uses contribute to the general welfare of the community, and can contribute most when located in residential districts . . . .").

The synagogues presented no competent evidence that zoning churches and synagogues in the RD-1 district is irrational for Surfside. Instead, they rely on the dissenting opinion in *C.L.U.B. v. City of Chicago*, 342 F.3d 752 (7th Cir. 2003), and the decisions of *Christ Universal Mission Church v. City of Chicago*, 2002 U.S. Dist. LEXIS 22917 (N.D. Ill. 2002) and *Cornerstone Bible Church v. Hastings*, 948 F.2d 464 (8th Cir. 1991) for the proposition that zoning ordinances cannot treat private clubs differently than houses of worship without violating free exercise rights. The cases are easily distinguishable.

First, *C.L.U.B.* and *Christ Universal* involved Chicago zoning ordinances – a large city with millions of residents to which Surfside's fragile 2-block business district cannot be compared.[20] A case raising issues of a zoning ordinance's constitutionality must be decided according to its specific facts and not compared to facts of other governments. *See Christy v. City of Ann Arbor*, 824 F.2d 489, 491 (6th Cir. 1987); *Plonski v. Courtland Tp.*, 1997 WL 33147776, *5 (W.D. Mich. 1997);

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[20] As the land use expert explains:

> The distinctions in this case of Surfside are twofold – 1) this is a traditional main street configuration of merchants that have no central leasing or management entity that can maintain a balance of uses; and 2) this is a relatively small – two block long – collection of retail merchants unlike many other larger so-called "downtowns" where a sizable area allows for adjacency of use without disrupting the heart of the retail center.

R2-54-51.

Grubel v. MacLaughlin, 286 F. Supp. 24, 28 (D. V.I. 1968).[21] Moreover, *C.L.U.B.* does not support the synagogues because the Seventh Circuit in that case affirmed the district court's ruling that the "City reasonably maintains churches are less suited to B and C districts, since the goals of these districts to promote business and commerce may be hurt by such non-commercial uses." 157 F. Supp. 2d at 911-12, *aff'd* 342 F.3d 752.

Second, the Eighth Circuit in *Cornerstone Bible* did not hold that a city's zoning laws that precluded churches in an area zoned for commercial uses which allowed not-for-profit organizations, violated any free exercise rights. It merely remanded the case for an inquiry as to the city's rational basis for treating the two entities differently. 948 F.2d at 471. Surfside has already supported its differential treatment of private clubs and houses of worship through evidence and unrebutted expert testimony. R8-317-8.

As the district court noted, although their may be exceptions to the statement of the experts (R8-322-7), the Supreme Court has reiterated that "[w]here rationality is the test, a State does not violate the Equal Protection Clause merely because the classifications made by its laws are imperfect." *Massachusetts Bd. of Retirement v.*

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[21] "I can cite you a hundred commercial districts that are significantly different than the issues at stake in Surfside," explained Surfside's land use expert. RAF5-214-42. "That's why every comprehensive plan is different, and every set of policies and objectives must address the particular circumstances of each community's needs and issues." *Id.*

Murgia, 427 U.S. 307, 316 (1976). Accordingly, summary judgment in favor of Surfside was proper on this claim.

III. The undisputed facts show that Surfside's zoning ordinances neither violate the Free Exercise Clause nor violate the "substantial burden" provisions of RLUIPA or FRFRA.

The synagogues next argue that Surfside's ordinances are facially unconstitutional by discriminating against houses of worship, and that they substantially burden their right to worship in violation of their free exercise rights and the "substantial burden" provisions of RLUIPA and FRFRA (YI br. at 26-28; MS br. at 22-29, 42-48). Surfside's ordinances do not violate RLUIPA, FRFRA or the synagogues' free exercise of religion because (1) they are neutral in applicability, and (2) even if they are not neutral, the synagogues cannot show that the ordinances substantially burden their right to worship.

i. Surfside's ordinances are neutral and of general applicability and only incidentally affect the religious practice of Appellants' members.

The Free Exercise Clause provides that "Congress shall make no law respecting the establishment of religion, or prohibiting the free exercise thereof . . . ." U.S. Const. amend. 1. The right to the free exercise of religion does not relieve an individual of the obligation to comply with valid and neutral laws of general applicability. *See Employment Division, Dep't of Human Resources v. Smith*, 494 U.S. 872, 879 (1990). "A law failing to satisfy the *Smith* requirements of

neutrality and general applicability must be justified by a compelling government interest." *Church of Lukumi Babalu Aye, Inc. v. Hialeah,* 508 U.S. 520, 531, 113 S. Ct. 2217 (1993). But "a law that is neutral and of general applicability need not be justified by a compelling governmental interest even if the law has an incidental effect of burdening a particular religious practice." *Id.*

Surfside's ordinances are neutral and of general applicability because they regulate only the location of churches and synagogues, not religious beliefs. Courts, including this Court, have consistently held that a place of worship on a particular piece of property is not intimately related to the underlying beliefs of a synagogue or church, but merely a "preference" that is not protected under federal law. *See Grosz,* 721 F.2d at 738 (given "zoning's historical function in protecting public health and welfare . . . and the incidental nature of the asserted burden on religion, the essential effect of zoning [churches and synagogues] is clearly secular"); *Ohio Congregation of Jehovah's Witnesses, Inc. v. City of Lakeland,* 699 F.2d 303, 307 (9th Cir. 1983) ("[b]uilding and owning a church is a desirable accessory of worship, not a fundamental tenet of the Congregation's religious beliefs"); *See C.L.U.B.,* 342 F.3d at 766 ("Whatever obstacles that the [zoning code] might present to a church's ability to locate on a specific plot of Chicago land, they in no way regulate the right, let alone interfere with the ability, of an individual to adhere to the central tenets of his religious beliefs"); *Messiah Baptist Church v. County of Jefferson,* 859 F.2d 820, 825

(10th Cir. 1988) (holding that constructing a church in a district not zoned for such use is not intimately related to the religious tenets of the church); *Int'l Church of the Foursquare Gospel,* 955 F. Supp. at 880 ("[T]he impact [on zoning houses of worship] is not upon the content of religious practices but only upon where that religion may be practiced"); *Grace United Methodist Church v. City of Cheyenne,* 235 F. Supp. 2d 1186 (D. Wyo. 2002).

It is undisputed that Orthodox Jewish law does not require congregate prayer to take place in a synagogue. R3-105-4; RAF2-55-98. The synagogues do not dispute that the placement of a synagogue at any particular location is neither fundamental to, nor a tenet of, the religious beliefs of Orthodox Jews (R2-54-28, 35; R4-145-31-32), and admit that Surfside never prohibited them from operating as synagogues, but only from operating synagogues at a particular location. R2-54-30, 39. As they explain, "[a] zoning law which restricts locations of synagogues, of course, is not a governmental regulation of Jewish beliefs as such." R2-54-7. Since the ordinances only regulate the placement of churches and synagogues in certain districts and do not regulate religious belief, they are neutral laws of general applicability with which the synagogues must comply.

ii. Even if the ordinances are not neutral, there is no evidence that Surfside's ordinances substantially burden the synagogues' free exercise of religion in violation of RLUIPA or FRFRA.

Even if this Court deems that the ordinances are not neutral, there is no evidence that Surfside's ordinances substantially burden the synagogues' free exercise rights or violate the "substantial burden" provisions under either RLUIPA[22] or FRFRA.[23] In deciding whether zoning laws unconstitutionally burden a person's right to the free exercise of religion, this Circuit established a three-part balancing test: (1) the law must regulate religious conduct, not belief; (2) the law must have a secular purpose and a secular effect; and (3) once these two thresholds are crossed,

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[22] Section 2(a) of RLUIPA states:

> [N]o government shall impose or implement a land use regulation in a manner that imposes a substantial burden on the religious exercise of a person including a religious assembly or institution, unless the government demonstrates that imposition of the burden on that person, assembly, or institution –
>
> > (A) is in furtherance of a compelling governmental interest; and
> >
> > (B) is the least restrictive means of furthering that compelling governmental interest.

[23] FRFRA provides in pertinent part:

> The government shall not substantially burden a person's exercise of religion, even if the burden results from a rule of general applicability, except that the government may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person:
>
> > (a) is in furtherance of a compelling interest; and
> >
> > (b) is the least restrictive means of furthering that compelling government interest.

Fla. Stat. § 761.03(1) (1999).

the court engages in a balancing of competing governmental and religious interests. *Grosz*, 721 F.2d at 733-35; *First Assembly of God v. Collier County*, 20 F.3d 419, 424 (11th Cir. 1994).

First, it has already been established that Surfside's ordinances do not regulate religious beliefs, but only its conduct by zoning where churches and synagogues may be located. *See, e.g., Ohio Congregation*, 699 F.2d at 307 (noting that "building and owning a church is a desirable accessory of worship, not a fundamental tenet of the Congregation's religious beliefs"). Moreover, it is undisputed that the placement of the synagogue at any particular location is neither fundamental to, nor a tenet of, the religious beliefs of Orthodox Jews. R2-54-28, 35; R4-145-31-32.

Second, the Town's Code and objectives have a secular purpose and secular effect -- to preserve and revitalize the economic vitality of its business and tourist districts, provide for the retail service needs of its residents, convenience for tourists, and the intensive use of its oceanfronts. Given "zoning's historical function in protecting public health and welfare. . . and the incidental nature of the asserted burden on religion, the essential effect of zoning laws is clearly secular." *Grosz*, 721 F.2d at 738.

Finally, Surfside's cost to allow the synagogues to locate in these districts outweighs the cost to the synagogues. "[T]he balance depends upon the cost to the government of altering its activity to allow the religious practice to continue

unimpeded versus the cost to the religious interest imposed by the government activity." *Grosz*, 721 F.2d at 734. "When the burden imposed by the government rests on conduct rooted only in secular philosophy or personal preference, the scale always reads in favor of upholding the government action." *Id.* at 737. In this case, Surfside would have to enact a special ordinance for 100 part-time visitors who vacation in neighboring towns, at the risk of sacrificing the retail needs of its 4,300 citizens and its economic base. RAF2-58-23. This is a "significant" change to the Code. *Id.* The synagogues need only relocate a few blocks farther into the RD-1 district. Surfside's burden in allowing the synagogues to continue to operate and in conforming the zoning laws to accommodate the synagogues' preference, is more than the burden on the synagogues to relocate to the proper district. *See First Assembly of God*, 20 F.3d at 424 (finding church's burden to move its homeless shelter that was prohibited by a zoning ordinance to an appropriately zoned area was less than the burden on the government to allow the zoning).[24]

Indeed, any burden on the synagogues' members to walk a couple of blocks farther to the RD-1 district is "minimal" (R4-215-19-22) and "stands at the lower end of the spectrum." *Grosz*, 721 F.2d at 739. The undisputed evidence reflects that the permitted RD-1 district is in the center of Surfside, only one block from the business

[24] And the burden should not be judged on the particular practices of a synagogue or religion alone, or its unique religious habits. Zoning is based on broad use categories and is not individualized. R2-54-49-51; RAF5-214-37, 47, 129.

district, one block west of the tourist district, and proximate to all residential districts. R4-137-6. Zoning laws that may result in individuals having to walk a couple of blocks farther to attend church or synagogue do not substantially burden their right to the exercise of religion. *See Grosz*, 721 F.2d at 734 (finding burden on homeowner from ordinance that prohibited him from using home as place for religious practice did not outweigh the government's burden to allow such conduct, since he could practice within **four blocks** from his home); *Accord First Assembly of God*, 20 F.3d at 424.

Contrary to the synagogues' arguments, the fact that churches and synagogues are not permitted as of right to locate anywhere in Surfside as they please without first obtaining a conditional use or special permit does not create a *per se* substantial burden. As the land use experts stated, because of the "wide variation in the size, types and special functions of government buildings, schools, churches, synagogues and medical facilities, it is typical for zoning regulations to permit them through special review procedures (special exception or conditional use)...." R2-54-44; R2-70-9. This is how the U.S. Department of Commerce categorizes churches and synagogues. R2-54-44. It is also typical not to review each retail and office use in a commercial or business district because such "uses occur in sizable concentrations of many similar activities." R2-54-44. *See also Daytona Rescue Mission, Inc. v. City of Daytona Beach*, 885 F. Supp. 1554 (M.D. Fla. 1995) (no substantial burden on

religion was found where church failed to show that city code prevented them from running food shelters anywhere in city, even though approval to run shelter was required in all districts); *Vineyard Christian Fellowship of Evanston, Inc. v. City of Evanston*, 250 F. Supp. 2d 961 (N.D. Ill. 2003) (holding that church congregation's right to free exercise of religion was not substantially burdened by zoning ordinance prohibiting religious institutions from conducting worship services within district).

The synagogues argue that the district court erred in discounting the testimony of three elderly and ill members residing outside of Surfside who testified that they are unable to walk to the RD-1 district, claiming it is irrelevant for the substantial burden inquiry that their congregants chose to reside outside of Surfside (YI br. at 30-31; MS br. at 46). No case or logic requires a town to change its zoning laws to accommodate the needs of persons choosing to reside in another town. Those persons are neither "affected residents, citizens or property owners" of Surfside, nor are they taxpaying citizens and do not have standing to challenge Surfside's zoning ordinances. *See Town of Bay Harbor Islands v. Driggs*, 522 So. 2d 912 (Fla. 3d DCA 1988); *Renard v. Dade County*, 261 So. 2d 832 (Fla. 1972). Accordingly, as the district court noted, there is no basis to use a so-called "integrated religious community" that includes areas beyond the borders of the Town being sued when assessing the constitutionality of local zoning ordinances. R5-215-21.

Allowing houses of worship to locate in any district merely because of the residential and individual preferences of their members – in this case, a significant number of them living in other towns, states and countries (MS. br. at 44) – allows them to be immune from zoning altogether. As the district court noted:

> It would be virtually impossible to require a municipality to ensure that every person will not be burdened by the walk to the temple of their choice, particularly with members who live outside the municipality. Arguably, any person in any community surrounding Surfside could take that position which . . . would require Surfside to allow religious buildings in every zone.

R7-296-5. Consistent with that finding, the synagogues acknowledge that it is customary for people to move to where synagogues are located – not for synagogues to move to them (RAF2-55-23-24), a concept accepted by this Court in *Grosz*, 721 F.3d at 739 (noting that people living far from area suitably-zoned for religious use may conduct the religious services "either by securing another site away from their current house or by making their home elsewhere in the city"). Allowing houses of worship to dictate where they will open, while not allowing other organizations to open establishments wherever they desire based on the location or residence of its customers or members, would violate the Establishment Clause by favoring religion over secular uses. *See Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971); *Cutter v. Wilkinson*, 349 F.3d 257 (6th Cir. 2003).[25]

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[25] If this is the standard, than no house of worship can claim to be similarly-situated to any secular place of assembly that is confined by zoning.

Even when taking into account all the affidavits from the members residing outside of Surfside, any burden is self-created by the members' choice to live outside of Surfside and beyond their capable walking requirements. R4-215-19-22. It is axiomatic that self-imposed hardships cannot be argued as substantially burdening First Amendment rights. *See Int'l Church of the Foursquare Gospel*, 955 F. Supp. 878 (applying federal RFRA's "substantial burden" test to find that city's refusal to grant a special use permit to a church to buy certain commercial property did not substantially burden church when it could purchase any lot in a residential area that comprised 60 percent of the city lands); *City of Miami Beach v. Greater Miami Hebrew Academy*, 108 So. 2d 50, 53 (Fla. 3d DCA 1958) (since "plaintiff purchased the land in face of existing zoning restrictions, any claimed hardship would be unactionable because self-imposed"); *Miami Beach United Lutheran Church of the Epiphany v. City of Miami Beach*, 82 So. 2d 880, 882 (Fla. 1955) (where a plaintiff buys property with the knowledge of zoning restrictions prohibiting churches, when sites for churches were available in other parts of a city, the plaintiff has an "extraordinary" burden to prove ordinance was invalid).[26]

The case of *Lerman v. Board of Elections in City of New York*, 232 F.3d 135 (2d Cir. 2000) does not support the synagogues' argument that "constitutional harm

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[26] The United States' statement that "defendants seemed to accept that having 'to walk an inordinately long distance' in order to attend Orthodox Jewish services could burden religious exercise" (U.S. br. at 23) is false.

does not stop" at Surfside's border (YI br. at 32; MS br. at 47). In that case, the Second Circuit held that a resident of New York was not precluded from challenging the residence requirements for a particular electoral district merely because she resided in a different district. Here, Surfside is not claiming that Surfside residents cannot challenge the Town Code's local zoning requirements relating to a particular district in which they do not reside – only that non-resident, non-taxpayers of Surfside who have no adverse property interests in the Town cannot challenge the Town's local zoning ordinances. *See Driggs*, 522 So. 2d 912; *Renard*, 261 So. 2d 832.

Moreover, the affidavits do not support a substantial burden based on the requirement of Orthodox Jews having to walk to services on the Holy Days and the Sabbath. The affiants testified that they could not walk to the RD-1 district because of either age or severe medical reasons. R3-114-2; R4-121-2. Jewish law permits the elderly and persons with medical conditions who are unable to walk to use transportation to attend services. SR-93; RAF2-55-33-35. Walking is also an individual choice, not a *per se* requirement. RAF4-213-26-28; SR-72-75. The alleged substantial burden also differs daily based on variable contingencies. Some don't walk because it is too hot (RAF1-176-10; RAF1-174-12; RAF1-180-14-15; RAF1-183-17, 19-20; RAF1-185-5-7, 9; RAF1-179-18-19; RAF4-211-26) or raining (RAF1-176-9), or their health that day does not lend itself to walking (RAF1-176-9). Such variable contingencies are impossible to accommodate.

Finally, the synagogues argue that because there is no "suitably-sized" land available in the RD-1 district for their synagogue, and that "erection of a moderately sized house of worship [is] dependent on the assemblage of multiple adjoining lots. . . ," this creates a substantial burden on their right to worship. YI br. at 8; R5-192-26. This is an incorrect statement. The evidence shows that the synagogues found suitably-sized land available immediately adjacent to the business and tourist districts, but they merely chose not to move there. R7-272-2-3; R7-273-2. Even if there is no suitable land, the scarcity of land, costs, procedural requirements and the inherent political aspects of the conditional approval processes "are incidental to any high-density urban land use [and] do not amount to a substantial burden on religious exercise." *C.L.U.B. v. City of Chicago*, 157 F. Supp. 2d 903 (N.D. Ill. 2001), *aff'd*, 342 F.3d 752 (7th Cir. 2003). *See also Love Church,* 896 F.2d at 1086 ("Whatever specific difficulties [plaintiff church] claims to have encountered, they are the same ones that face all [land users]. The harsh reality of the marketplace sometimes dictates that certain facilities are not available to those who desire them").

Surfside's laws have, at most, only an incidental effect upon the synagogues' religious practices and do not substantially burden their First Amendment rights. The summary judgment in favor of Surfside should be affirmed.

IV. The undisputed evidence establishes that the Town Code does not violate the synagogues' Freedom of Speech or Assembly, or that it is an unlawful prior restraint on First Amendment rights.

The synagogues' free speech, assembly and unlawful prior restraint claims fail as a matter of law because Surfside's ordinances are content neutral and narrowly tailored.[27] Because churches and synagogues can locate by conditional use permit in the RD-1 district, the Town's Code is properly analyzed as a time, place and manner restriction on freedom of speech and assembly. *See City of Renton v. Playtime Theaters, Inc.*, 475 U.S. 41, 46 (1986). The state may enforce regulations of the time, place, and manner of expression which are: (1) content-neutral; (2) narrowly tailored to serve a significant government interest; and (3) leave open ample alternative channels for communication. *Crowder v. Housing Auth. of Atlanta*, 990 F.2d 586, 590 (11th Cir. 1993).

Surfside's ordinances are content neutral. They regulate only the location of churches and synagogues, and not the synagogues' (or their congregants') religious beliefs. *See Int'l Soc. For Krishna Consciousness v. Lee*, 505 U.S. 672, 679 (1992) (noting that a regulation is content or viewpoint neutral as long as it is "not an effort to suppress the speaker's activity due to disagreement with the speaker's views"). As

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[27] For purposes of whether an ordinance can withstand constitutional muster, First Amendment claims for freedom of assembly, freedom of speech, and prior restraint may be treated alike. *See New York State Club Ass'n, Inc. v. City of New York*, 487 U.S. 1, 13 (1988); *Coalition for the Abolition of Marijuana Prohibition v. City of Atlanta*, 219 F.3d 1301 (11th Cir. 2000).

previously established, a place of worship on a particular piece of property is not intimately related to the underlying beliefs of a synagogue or church, but merely a "preference" that is not protected under federal law. *See Grosz*, 721 F.2d at 738; *Ohio Congregation,* 699 F.2d at 307; *Messiah Baptist Church*, 859 F.2d at 825; *Int'l Church of the Foursquare Gospel*, 955 F. Supp. at 880. Since the ordinances only regulate the placement of churches and synagogues in certain districts, they are content neutral laws.

The present code is narrowly tailored to serve the Town's significant interest of revitalizing and preserving the economic stability of the business and tourist districts. Zoning in general is a legitimate municipal tool, and a revitalization plan, as the Comprehensive Plans and the Town Code's policy objectives provide, is unquestionably a permissible municipal objective. *See Renton*, 475 U.S. at 50.

The narrowly-tailored test is satisfied as long as the governmental action "promotes a substantial government interest that would be achieved less effectively absent the regulation." *Ward v. Rock Against Racism*, 491 U.S. 781, 788-89 (1989). The means chosen here are not substantially broader than necessary to meet the government's interests; indeed, they meet the interests of Surfside's residents in the most compelling way, by placing religious institutions in the most accessible zoning district. Thus, the alternative means to congregate and communicate are open and

available and Surfside's zoning laws comport with applicable First Amendment principles.

The synagogues also argue that Surfside's zoning scheme is an unlawful prior restraint on First Amendment rights because the Town Code imposes "vague" and "open-ended" conditional use requirements which grants unbridled discretion to the Town Commission (MS. br. at 35). They never availed themselves of the remedies provided under the Town Code to establish standing in this regard. *See Granite*, WL 22813792 at *3. The argument also contradicts the synagogues' concession that the standards under the Town Code for conditional use requirements are "detailed and precise." RAF1-15-26. Indeed, under the Town Code, Surfside must comply with objective guidelines found under § 90-41 for conditional use, in addition to the procedural requirements found under § 90-94 for special use permits, which § 90-41(d) expressly adopts.[28] Thus, these two sections provide objective procedural safeguards for the synagogues, and do not vest unlimited or subjective discretion on the Town Commission.[29]

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[28] The statement that "there is no uniform national zoning code" (MS. br. at 41, n.14) is of no consequence. There are numerous uniform codes and guides by the federal government and private authors. R2-54-44; R8-318-20-21.

[29] For the same reasons, the case of *City of Lakewood v. Plain Dealer Pub'g Co.*, 486 U.S. 750 (1988) is inapplicable to establish the synagogues' standing because the synagogues concede that the ordinances in this case are not vague or grant unbridled discretion to the Town, but are detailed and precise.

V. Strict scrutiny is not applicable to either the "substantial burden" analyses under RLUIPA or FRFRA because no burden has been established; nor is the heightened standard applicable to either the Free Exercise or RLUIPA's "unequal terms" analyses because there is no historical evidence that Surfside selectively targeted houses of worship.

Contrary to the synagogues' assertions (YI br. at 27; MS br. at 12-29, 48-55), Surfside's ordinances do not need to pass a "strict scrutiny" test to withstand the alleged violations of the "substantial burden" provisions under either § 2(a) of RLUIPA or FRFRA. Under both statutes, the government need only meet that standard after the plaintiff establishes a substantial burden on its free exercise of religion. *See* Fla. Stat. § 761.03(1), § 2(a) of RLUIPA. The synagogues have failed to establish any burden – much less a substantial burden.

Neither do Surfside's ordinances need to meet the heightened standard under the Free Exercise claim and the "unequal terms" provision under § 2(b) of RLUIPA[30] merely because its ordinances incidentally affect religion. *See Lukumi*, 508 U.S. at 531; *Grosz*, 721 F.2d at 738. Strict scrutiny of a facially-neutral statute is required

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[30] As the synagogues point out (MS br. at 15), there is no express requirement in the "unequal terms" provision under § 2(b) of RLUIPA for the government to justify any alleged unequal treatment of religious institutions with a rational or compelling government interest. As written in the statute, any unequal treatment – regardless of the justification – is a *per se* violation. This has been subject to much criticism, leading courts to declare RLUIPA unconstitutional for violating, among other things, the Establishment Clause. *See, e.g., Elsinore Christian Ctr. v. City of Lake,* 270 F. Supp. 2d 1163, *as modified,* 2003 WL 22724539 (C.D. Cal. 2003); *Cutter*, 349 F.3d 257. Surfside made the same argument as to RLUIPA's constitutionality in this case. R7-261-8-21; R7-312-1-10.

only when evidence of "a clear pattern [of discrimination] emerges from the effect of the state action." *Lukumi*, 508 U.S. at 531. As the Supreme Court noted, "[s]uch cases are rare." *Village of Arlington Heights v. Metropolitan Hous. Dev. Corp.*, 429 U.S. 252, 268 (1977). The two cases upon which the synagogues rely to support a heightened scrutiny, *Lukumi,* 508 U.S. 520 (1993) and *Tenafly Eruv Ass'n, Inc. v. Borough of Tenafly*, 309 F.3d 144 (3d Cir. 2002), *cert. denied*, 123 S. Ct. 2609 (2003), are cases in which such rare instances of discriminatory intent were found.

In *Lukumi*, the Court found that a series of ordinances prohibiting the killing or sacrifice of animals selectively targeted the Santeria religion by exempting all forms of animal killings not for ritual purposes, including killing animals for food, hunting, sport, and kosher slaughter, thereby leaving the Santeria Church as the only group affected by the ordinance. *Id.* at 536. The transcripts of the meetings showed city councilmen vehemently speaking against Santeria practices, commenting that the Bible didn't allow sacrificing animals and that they would do anything to prevent Santeria from establishing in this country. *Id.* at 541-42. The Court held that this was a direct attack on the Santeria religion and found that "the ordinances had as their object the suppression of religion." *Id.* at 542.

In *Tenafly*, a borough's ordinance prohibited the affixing of any sign or advertisement on any public pole, tree curbstone, sidewalk or elsewhere without an exemption from the borough. 309 F.3d at 150. Although the ordinance was neutral

on its face, the evidence showed that the town granted exemptions to secular uses and non-Jewish uses (*e.g.*, crosses and Christmas decorations), and that any request by Orthodox Jews for a similar exemption to place items that were religiously motivated (e.g., *lechis* to indicate boundaries of an *eruv* that symbolize the ceremonial demarcation of an area) was denied. *Id.* at 167-68. The evidence showed that the borough's council and many residents of the town "expressed vehement objections" to allowing Jews to affix the *lechis* "prompted by their fear that an *eruv* would encourage Orthodox Jews to move" there; that a council member identified "a concern that the Orthodoxy would take over;" and that another council member voiced his "serious concern" that Jews might "stone cars that drive down the streets on the Sabbath." *Id.* at 152-53. The Third Circuit held that such evidence of "selective, discriminatory application of Ordinance 691 against the *lechis* violates the neutrality principle of *Lukumi* . . . because it 'devalues" Orthodox Jewish reasons for posting items on utility poles . . . and 'singles out' the plaintiff's religiously motivated conduct for discriminatory treatment." *Id.* at 168.[31]

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[31] The synagogues' reliance on *Fraternal Order of Police v. City of Newark*, 170 F.3d 359 (3d Cir. 1999), which involved a police department's enforcement of a facially-neutral rule prohibiting beards to promote a uniform appearance, is misplaced. In that case, the department granted exceptions to wear beards for secular reasons, such as health, but not to Muslim officers in accordance with their religious beliefs. The Court held that the department's "value judgment" that secular motivations for wearing a beard were more important than religious motivations "was suggestive of discriminatory intent so as to trigger heightened scrutiny." 170 F.3d at 366. There is no evidence that Surfside made a similar, subjective "value judgment" between secular and religious motivations in enacting its ordinances. The land use

Lukumi and *Tenafly* are inapposite. Here, the synagogues presented no evidence of "selective, discriminatory intent" against Orthodox Jews or that Surfside had a pattern of any hostility or discriminatory animus towards them. R4-215-14-16.[32] On the contrary, the synagogues' own members testified that no such evidence exists (RAF1-176-30-32; RAF1-184-42-43; RAF2-62-16; RAF2-59-154-55; RAF4-209-7-8), and Surfside's historical background does not support the notion that the Town Commission specifically enacted its zoning ordinances to oust Orthodox Jews from the Town. R5-215-14-16. Rather, Surfside's official minutes focused exclusively on zoning aspects and compliance with the objective standards under the Code. R5-215-14-18.[33] Zoning the location of churches and synagogues, alone, does not diffuse the ordinances' neutrality. Thus, no heightened or strict scrutiny analysis is appropriate.

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categories here are consistent with the U.S. Department of Commerce classifications and were based on objective reasons of economic viability of the Town.

[32] Although the synagogues alleged in the initial pleadings that members of Surfside's Town Commission (who are Jewish) had made insidious comments about Jews at various meetings, those allegations were proven inaccurate (R2-70-9-10; R4-215-14-16), and the synagogues have long abandoned the argument. Indeed, the synagogues inconsistently accused Surfside of *favoring* two other Orthodox Jewish synagogues over them. R5-192-31; RAF1-16-15-18. Moreover, as the district court found, even if taking their statements as true, it is not an official action by Surfside, *see Beck v. Littlefield,* 68 So. 2d 889, 892 (Fla. 1953) ("A municipal corporation speaks only through its records, not through opinions of individual officers."), and it is too remote to be probative of the synagogues' claims in this case. *See Burton v. City of Belle Glade,* 178 F.3d 1175, 1195 (11th Cir. 1999). R5-215-14-15

[33] Contrary to the synagogues' argument (MS br. at 26), *Walz v. Tax Comm'n of New York City*, 397 U.S. 664, 674 (1970) supports Surfside's neutral categorization of land uses by aligning religious organizations with the same institutional uses under Surfside's conditional use provisions in § 90-41.

See C.L.U.B., 342 F.3d at 766 (7th Cir. 2003) (declining to apply a heightened scrutiny because "[w]hatever obstacles that the [zoning code] might present to a church's ability to locate on a specific plot of Chicago land, they in no way regulate the right, let alone interfere with the ability, of an individual to adhere to the central tenets of his religious beliefs").[34]

The synagogues' so-called "hybrid rights" claim based on the alleged free exercise and free speech violations (MS br. at 33, 35) does not support a heightened scrutiny either. *See Smith*, 494 U.S. at 881-82 (noting that a law implicating both "the Free Exercise Clause in conjunction with other constitutional protections" earns a heightened scrutiny). To establish hybrid rights deserving of a heightened standard, a plaintiff must first make out a "colorable claim" that a companion right has been violated. *See Miller v. Reed*, 176 F.3d 1202, 1207-08 (9th Cir. 1999); *Swanson v. Guthrie Independent School District*, 135 F.3d 694, 700 (10th Cir. 1998); *Brown v. Hot, Sexy & Safer Prods., Inc.*, 68 F.3d 525, 539 (1st Cir. 1995). A plaintiff is not entitled to strict scrutiny analysis "merely by combining a free exercise claim with an utterly meritless claim of the violation of another alleged fundamental right." *C.L.U.B.*, 342 F.3d at 765, *citing Miller,* 176 F.3d at 1207-08. Since the synagogues

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[34] The district court did not misapply *Lukumi* by merely distinguishing that case on the ground that no proof of invidious motivation against Orthodox Jews is present here (MS br. at 28). The court applied *Lukumi* to also find that the Town Code is based on objective criteria and is, therefore, neutral and of general applicability. R5-215-13, 17-18.

have failed to make any colorable claim under either their free exercise or free speech claims, despite a "broad mission" (MS. br. at 35), strict scrutiny is inapplicable. *See C.L.U.B.*, 342 F.3d at 764-65.[35]

Finally, merely because the synagogues allege discrimination based on religion – a suspect class – does not automatically entitle them to a strict scrutiny analysis (MS br. at 16, n.11). The synagogues must first establish that Surfside's ordinances discriminate against religion or substantially burden their free exercise rights to trigger the heightened standard – which they have failed to do. *See, e.g., C.L.U.B.*, 157 F. Supp. 2d at 911 (where zoning ordinance was found not to regulate religious beliefs, but only placement of church, strict scrutiny was not triggered), *aff'd* 342 F.3d 752 (7th Cir. 2003); *N.A.A.C.P., Los Angeles Branch v. Jones*, 131 F.3d 1317 (9th Cir. 1997) (plaintiffs alleging racial discrimination were not entitled to strict scrutiny review where they failed to prove discriminatory intent or substantial burden). Without such evidence, a rational basis review applies. *See id.*

Even if the Court entertains a strict scrutiny analysis, Surfside presented unrebutted evidence – and the district court found (R4-215-28) – that its ordinances serve an important and "compelling" government interest. As discussed above, Surfside's Comprehensive Plans show that its zoning plan was designed to invigorate the business district and to create a strong tax base through its retail and tourist

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[35] There is no basis to suggest that local government must legislate according to how each separate religious group defines its "mission."

districts. In Surfside, the economic viability of the two-block business district, which is the only retail service area in the Town, is critical to this tax base, job base, and retail servicing needs of its residents. R2-70-16. Allowing churches and synagogues in the business district would erode Surfside's tax base, resulting in economic hardship on the residents. *Id.* Surfside is dependent on its businesses for revenue. R2-70-16-17. See discussion *supra*, at 11-12. It cannot afford to place non-economic establishments, like government buildings, schools, churches and synagogues in the area without a "tremendous risk" to the economic stability of the Town. *Id.*; R5-215-3, 28; RAF5-214-67. As one of Surfside's land use experts opined:

> If you're prepared to drop any church of any size that operates at any particular time into the middle of Harding Avenue and bet that it won't have an impact, then you're playing with the viability and economics stability of that district, and you're doing so unnecessarily because there's an adjacent area that can fulfill that purpose quite well, without running the risk of destroying or disrupting significantly that very fragile and very tenuous commercial experience that we're trying to sustain on Harding.

RAF5-214-67.

Precluding churches and synagogues from the tourist district is also justified. Surfside relies on tourism for a large portion of its income. R2-70-17. The tourist district generates substantial revenue for the Town by paying real estate taxes, resort taxes, tourist taxes, and bed taxes. R2-70-17. Indeed, the Orthodox synagogue that currently operates on 95th Street, the Shul of Bal Harbour, has proven to be "in direct contrast to [Surfside's] economic development and community revitalization

strategies by preempting a substantial portion of this strategic Collins [ocean] frontage for a non-retail, non-office use that serves as an even greater barrier to this desired connection." R2-54-46. Young Israel concedes that it does not cater to tourists or even transients at the Coronado Hotel, but operates primarily for residents in the surrounding community. RAF2-55-29-30. Even a substantial burden on the free exercise of religion is justified by the broad public interest in maintaining a sound economic and tax system. *See Hernandez v. Comm'r of IRS*, 490 U.S. 680, 699-700 (1989); *City of Chicago Heights v. Living Word Outreach Full Gospel Church & Ministries, Inc.*, 707 N.E.2d 53, 59 (Ill. App. Ct. 1999) (as modified).

Lastly, the present Town Code is the least restrictive means possible of achieving its zoning objective. Zoning churches and synagogues in the RD-1 district is the best possible solution for Surfside and its residents. The district is centrally located within Surfside's boundaries, in between the business and tourist districts, and the other residential districts. The evidence makes it clear that the RD-1 district best serves Surfside's citizens by making religious facilities accessible to them. R2-54-52.

The synagogues' new argument that a more narrowly-tailored solution would be to "authorize[ ] access in the business district for only those churches and synagogues that assemble several times a week" or for only those churches and synagogues that demonstrate "that their congregants would increase patronage at

neighboring retail establishments" (YI br. at 28) was never presented below. It is, nevertheless, unreasonable. Adding a subjective criteria for only certain houses of worship would undoubtedly implicate the First Amendment by creating a burden that no other use would be required to comply with, as well as creating discrimination claims from houses of worship which are excluded by the synagogues' definition.

The synagogues and the United States attack the expert opinion of Mr. Luft, one of Surfside's land use experts, as to Surfside's compelling need to keep churches and synagogues out of the business and tourist districts as unsubstantiated and not supported by any studies (MS br. at 21, 48-54; U.S. br. at 17).[36] Their attack is belied by the record (and the United States never objected below). Mr. Luft conducted personal studies, surveys and interviews in Surfside (as well as in other cities) on the effects of mixing houses of worship in the retail districts. R4-137; RAF5-214-6-14, 67. He has years of experience on the impact of religious institutions on commercial districts, has studied the Town Code extensively, and the land available in Surfside's districts. R4-137-9-11; RAF5-214-22-23, 31, 37, 42, 47, 95-103. He has attended over 10,000 zoning board hearings on land use issues. RAF5-214-87. His opinion is based on the recognized Standard Land Use Coding Manual by the U.S. Department

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[36] The synagogues argument that "Congress rejected the unfounded speculation advanced by [Mr. Luft] . . . that churches and synagogues do not contribute to retail synergy" (MS. br. at 21) is specious. The argument extrapolates Mr. Luft's specific fact-based conclusions with general, unspecified legislative findings that have been criticized by many courts. *See, e.g., Cutter*, 349 F.3d 257, and cases cited therein.

of Commerce. R2-54-44. To suggest that Mr. Luft's opinion is not qualified or credible in this case is specious.[37]

There is no genuine issue of material fact as to whether Surfside's ordinances substantially burden Young Israel's First Amendment rights, and thus, as a matter of law, the summary judgment on these claims should be affirmed.

VI. FRFRA and RLUIPA are unconstitutional for violating the Establishment Clause, the Tenth Amendment, and exceeding Congress's power under Section 5 of the Fourteenth Amendment.

If the Court were to find that the synagogues presented sufficient evidence to create a genuine issue of material fact as to whether the Town Code violated RLUIPA or FRFRA, it should not remand the case for further proceedings because both RLUIPA and FRFRA are unconstitutional for violating the Establishment Clause, the Tenth Amendment, and for exceeding Congress's authority. *See Cutter*, 349 F.3d 257; *Elsinore Christian Ctr. v. City of Lake,* 270 F. Supp. 2d 1163, *as modified,* 2003 WL 22724539 (C.D. Cal. 2003); *Tayr Kilaab Al Ghashiyah v. Dep't of Corrections of State of Wisconsin*, 2003 WL 1089526 (E.D. Wis. March 4, 2003).

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[37] The synagogues raise for the first time on appeal that the opinions of both of Surfside's experts should be disregarded as "post-enactment testimony" (MS. br. at 53-54). The experts were not retained to opine on the Town's motivation or purpose for enacting the Town Code, since it is well established that local governments speak only through their records. *See Beck,* 68 So. 2d at 892. They opined on the reasonableness of Surfside's zoning scheme as enacted; that is acceptable testimony. Luft's 1999 Report and Surfside's 1960 zoning of private clubs also predated RLUIPA's enactment. The zoning ordinances can be amended, if necessary, under RLUIPA by merely deleting private clubs as a permitted use, thereby rendering the issues in this case moot. *See* § 5(e) of RLUIPA, S. 2869.

This Court already certified questions to the Florida Supreme Court on whether FRFRA unconstitutionally broadened the definition of what constitutes religiously motivated conduct protected by law "beyond the conduct considered protected by the decisions of the United States Supreme Court." *See Warner v. City of Boca Raton*, 267 F.3d 1223, 1227 (11th Cir. 2001). The following, therefore, addresses only RLUIPA's deficiencies.

i. Congress Lacked Power to Enact RLUIPA.

RLUIPA results in the federalization of a uniquely local government function: local land use. Congress' power to intrude into this distinctly local function must be based on either section 5 of the Fourteenth Amendment or the Commerce Clause. There is no adequate legislative record which supports the notion that local land use zoning laws, *which, like here, permit religious institutions to be constructed and operate*, interfere with interstate commerce, or that in this case there is any substantial burden affecting interstate commerce.[38] Therefore the only *raison d'etre* for RLUIPA is section 5 of the Fourteenth Amendment, which provides: "The Congress shall have power to enforce by appropriate legislation, the provisions of this article."

The legislative history leaves no doubt that this is the statute's real source:

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[38] The legislative history contains a brief reference to a Commerce Clause basis for legislative action "in each case" where it is shown "that the burden prevents a specific economic transaction in commerce, such as a construction project, purchase or rental of a building . . . ." There is no dispute that the synagogues can construct, purchase and/or rent in Surfside, therefore there is no economic burden caused by Surfside's zoning laws.

> Fourteenth Amendment. The land use sections of the bill have a third constitutional base: they enforce the Free Exercise and Free Speech Clauses as interpreted by the Supreme Court. Congress may act to enforce the Constitution when it has "reason to believe that many of the laws affected by the congressional enactment have a significant likelihood of being unconstitutional." *City of Boerne v. Flores*, 521 U.S. 507, 532 (1997).

146 Cong. Rec. S7774-01, S7775. Despite Congress' self-serving statement that "the General Rules in § 2(a)(1), and the specific provisions in § (2)(b), are proportionate and congruent responses to the problems documented in this factual record" (*id.*), that "factual record" does not carry the weight demanded by the Supreme Court.

The Supreme Court's criticism of Congress' enactment of RFRA, 42 U.S.C. § 2000bb, applies with the same force to RLUIPA; RLUIPA, like RFRA, is an Act which goes too far:

> This is a considerable congressional intrusion into the State's traditional prerogatives and general authority to regulate for the health and welfare of their citizens.
>
> The substantial costs RFRA exacts, both in terms of imposing a heavy litigation burden on the States and in terms of curtailing their traditional general regulatory power, far exceed any pattern or practice of unconstitutional conduct under the Free Exercise clause as interpreted in Smith. Simply put, RFRA is not designed to identify and counteract state laws likely to be unconstitutional because of their treatment of religion. In most cases, the state laws to which RFRA applies are not ones which will have been motivated by religious bigotry.

City of Boerne, 521 U.S. at 534-35. The Court found RFRA to have contradicted "vital principles necessary to maintain separation of powers and the federal balance," and declared it to be unconstitutional. *Id.* at 536.

The Supreme Court's decision in *Board of Trustees of the University of Alabama v. Garrett*, 531 U.S. 356, 121 S. Ct. 955 (2001), adds substantial force to the argument that RLUIPA is unconstitutional too. The question in *Garrett* was whether Congress acted within its constitutional authority by subjecting the States to suits in federal court for money damages under the [Americans with Disabilities Act of 1990]. Congress had authorized such suits, but unless § 5 of the Fourteenth Amendment empowered Congress to abrogate the States' Eleventh Amendment immunity, the authorization was unconstitutional. The Supreme Court wrote:

> *City of Boerne* also confirmed, however, the long-settled principle that it is the responsibility of this Court, not Congress, to define the substance of constitutional guarantees. 521 U.S., at 519-524, 117 S. Ct. 2157. Accordingly, § 5 legislation reaching beyond the scope of § 1's actual guarantees must exhibit "congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end." *Id.*, at 520, 117 S. Ct. 2157.

Garrett, 121 S. Ct. at 963.

The Court examined "whether Congress identified a history and pattern of unconstitutional . . . discrimination by the States against the disabled," and concluded

that the legislative record "fails to show that Congress did in fact identify" such a pattern. *Id.* at 964-965.

> Even were it possible to squeeze out of these examples a pattern of unconstitutional discrimination by the States, the rights and remedies created by the ADA against the States would raise the same sort of concerns as to congruence and proportionality as were found in *City of Boerne, supra.*

Id. at 966.

The Court's example of the proper exercise of § 5 power was the Voting Rights Act of 1965, in which Congress, "documented a marked pattern of unconstitutional action by the States," and "Congress' response was to promulgate in the Voting Rights Act a detailed but limited remedial scheme designed to guarantee meaningful enforcement of the Fifteenth Amendment in these areas of the nation where abundant evidence of States' systematic denial of those rights was identified." 121 S. Ct. at 959, 967.

Here, RLUIPA and its land use provisions are the product of an anecdotal record that does not establish a history or pattern of local zoning discrimination against religious organizations, nor is there a record of "extensive litigation and discussion of the constitutional violations," which "one would have expected to find in decisions of the courts of the States and also the Courts of the United States" if such discrimination had persisted throughout the country. *Garrett*, 121 S. Ct. at 968 (Kennedy J., concurring).

The Supreme Court has found the same deficiency in the history and pattern of religious discrimination by the states. In striking down RFRA, the Supreme Court held that "that the legislative record contained very little evidence of the unconstitutional conduct purportedly targeted by RFRA's substantive provisions. Rather, Congress had uncovered only anecdotal evidence that, standing alone, did not reveal a widespread pattern of religious discrimination in this country." *Kimel v. Florida Bd. of Regents*, 528 U.S. 62, 82 (2000) (quotations omitted), citing *City of Boerne v. Flores*, 521 U.S. 507 (1997). It also "found that RFRA is so out of proportion to a supposed remedial or preventive object that it cannot be understood as responsive to, or designed to prevent, unconstitutional behavior." *Id.*

The federal usurpation of local land use and zoning law, an area traditionally left to local government, is a tectonic shift in federal-state relations and a gross usurpation of the judicial function to decide whether there has been violation of constitutional rights. *City of Boerne* uses language that fits this case:

> Regardless of the state of the legislative record, RFRA cannot be considered remedial, preventive legislation, if those terms are to have any meaning. RFRA is so out of proportion to a supposed remedial or preventive object that it cannot be understood as responsive to, or designed to prevent, unconstitutional behavior. It appears, instead, to attempt a substantive change in constitutional protections.

City of Boerne, 521 U.S. at 532, 117 S. Ct. at 2170.

If RLUIPA's favoring of religion does not require proof of discriminatory effect or disparate impact, then RLUIPA, like RFRA, is not remedial, preventive legislation. If local land use laws intentionally discriminated against religious institutions, judicial relief is available under established constitutional theories. *See Lukumi*, 508 U.S. 520 (1993). In the context of zoning, RLUIPA, like RFRA, is legislation "broader than is appropriate if the goal is to prevent and remedy constitutional violations." *City of Boerne,* 521 U.S. at 532, 117 S. Ct. at 2171. The Court said:

> It is a reality of the modern regulatory state that numerous state laws, such as the zoning regulations at issue here, impose a substantial burden on a large class of individuals. When the exercise of religion has been burdened in an incidental way by a law of general application, it does not follow that the persons affected have been burdened any more than other citizens, let alone burdened because of their religious beliefs.

Id. at 535, 117 S. Ct. at 2171.

ii. RLUIPA violates the Establishment Clause.

RLUIPA's special deference to religious land uses which provide "a federal statutory entitlement to an exemption from a generally applicable, neutral civil law," provide religious organizations "with a legal weapon that no atheist or agnostic can obtain. This governmental preference for religion, as opposed to irreligion, is forbidden by the First Amendment." *City of Boerne,* 521 U.S. at 537, 117 S. Ct. at 2172 (Stevens, J., concurring) (*citing Wallace v. Jaffree*, 472 U.S. 38, 52-55, 105 S.

Ct. 2479, 2487-2489, 86 L. Ed. 2d 29 (1985)). *See also Texas Monthly v. Bullock*, 489 U.S. 1, 14-15, 109 S. Ct. 890 (1989) (Brennan, J.) (suggesting that if there was not a burden on free exercise, even conscientious religious claims would not have to be protected if accommodation would significantly burden others).

RLUIPA's unequal terms provision makes no pretense about its special preference for, and deference to, religion. Equal terms are not required for nonreligious assemblies or other institutional interests. Thus, a large religious edifice can demand entry into a carefully zoned area simply because any small ballet school, club, or similar nonreligious assembly or institution lawfully operates within the zoned district. In a one square mile town like Surfside, with a very small 2-block business district, the presence of a single business district café would require that a town allow the balance of its commercial district to be used by religious assemblies or institutions upon their demand. That cannot be the law.

Not only is RLUIPA facially unconstitutional by directly stating that it is "An Act To protect religious liberty," Pub. L. No. 106-274, 114 Stat. (2000), but it evidences preferences for religion by operating to exempt only religious conduct, not secular conduct, from complying with neutral laws of general applicability.

RLUIPA's apparent preferential treatment of religion violates the Establishment Clause by allowing those assemblies and institutions to avoid participation in the zoning process, conferring upon religion a benefit that secular

applicants do not receive.[39] If Congress sought to achieve that result, the effort gives rise to another constitutional basis for invalidating RLUIPA: the Tenth Amendment.

iii. RLUIPA violates the Tenth Amendment.

The Tenth Amendment ("The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people") protects the Framers' commitment to dual sovereignty. *Printz v. United States*, 521 U.S. 898, 918-19 (1997); *New York v. United States*, 505 U.S. 144, 162 (1992) ("the Constitution has never been understood to confer upon Congress the ability to require the States to govern according to Congress' instructions.").

No one disputes the supremacy of the Constitution *vis a vis* state and local officials, and that it is the judiciary that interprets that law. *Marbury v. Madison*, 1 Cranch 137, 138, 177 (1803) ("It is emphatically the province and duty of the judicial department to say what the law is."); *Legal Servs. Corp. v. Velazquez*, 531 U.S. 533 (2000). Congress' attempt to go beyond the Constitution – to commandeer local governments to surrender their land use laws to a federal statutory standard – violates the Tenth Amendment. *See Petersburg Cellular P'ship v. Bd. of Supervisors of Nottoway County*, 205 F.3d 688, 700, 705 (4th Cir. 2000) (Niemeyer, J., concurring). Those principles apply to RLUIPA. By commandeering local zoning, Congress has crossed the Tenth Amendment boundary.

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[39] *See* Michael W. McConnell & Richard A. Posner, *An Economic Approach to Issues of Religious Freedom*, 56 U. CHI. L. REV. 1, 7-8 (1989).

CONCLUSION

For the reasons stated, the summary judgment in favor of Surfside should be affirmed.

CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the type-volume limitation set forth in FRAP 32(a)(7)(B), this Court's Order granting a 3,000 word enlargement, and that the brief contains less than 17,000 words as calculated by the WordPerfect word processing program.

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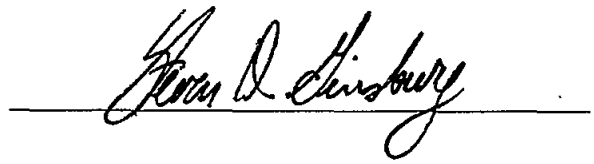

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