Case No. 10-50035

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

THE ELIJAH GROUP, INCORPORATED
Plaintiff/Appellant

v.

CITY OF LEON VALLEY, TEXAS
Defendant/Appellee

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

APPELLEE, CITY OF LEON VALLEY, TEXAS' PRINCIPAL BRIEF

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ORAL ARGUMENT REQUESTED

SUPPLEMENTAL CERTIFICATE OF INTERESTED PERSONS

In the appeal, Elijah Group, Incorporated, *Plaintiff-Appellant* v. City of Leon Valley, Texas, *Defendant–Appellee* (Appeal No. 10-50035), the undersigned counsel of record certified that the following listed entity as described below, pursuant to Rules 28.2.1 and 29.2 has an interest in the outcome of this case. Counsel of record makes this supplemental representation in order that the judges of this court may evaluate possible disqualification or recusal. All other interested persons have already been identified to the Court by Appellant.

Listed Entity:

Texas Municipal League Intergovernmental Risk Pool

STATEMENT OF ORAL ARGUMENT

The Appellee believes the Court would benefit from oral arguments in this case and hereby requests oral arguments. With a split in the federal courts of appeal this case possesses important issue for this Court to rule upon and Appellee believes oral arguments would be of assistance.

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STATEMENT OF ISSUES PRESENTED FOR REVIEW

Issue One: Under the proper test for similar comparators (whether the Third Circuit's or the Eleventh Circuit's test), did the City treat the Elijah Group on less than Equal Terms with secular comparators in violation of RLUIPA, 42 U.S.C. §2000cc (b) (1), by not permitting assembly use in its Retail Corridor?

Issue Two: Did the City place a substantial burden on the Elijah Group in violation of RLUIPA or TxRFRA by not permitting assembly use in the B-2 Retail Corridor zone as opposed to the B-3 zone as a matter of right? 42 U.S.C. §2000cc (a)(1), Tex. Civ. Prac. & Rem. Code §110.001, *et seq.* (Vernon 2005)

Subissue Two (a): Is denial of a request to rezone by the Bank an "individualized assessment" under RLUIPA to trigger a substantial burden analysis?

Subissue Two (b): Does the Elijah Group's failure to plead Commerce Clause jurisdiction under the substantial burden cause of action under RLUIPA prevent it from raising the issue on appeal?

SUMMARY OF THE ARGUMENT

1. Pastor Crain asserts that if a Taco Cabana or Zorro's Restaurant (which allow assemblies of people in the establishments) are allowed to exist within the City's Bandera Road Retail Corridor, then the City must allow all churches, of any size, nature, or scope to assemble within the same Retail Corridor pursuant to the Religious Land Use and Instutionalized persons Act, 42 U.S.C. §2000cc ("RLUIPA"). C.R. 558-589. The Elijah Group, Bank, and Amici all desire a reading of RLUIPA which ignores any regulatory purpose for comparison under the Equal Term's provision.

2. The mantra of "everywhere any theater goes, so shall all churches" is not the intent, purpose, or effect of RLUIPA. The Equal Terms provision was designed to prevent discrimination of churches through the guise of land use regulations, not to exempt churches from legitimate zoning laws (which is the result of Appellant's interpretation).

3. The City's Bandera Road Retail Corridor is a thin strip of roadway which is the City's primary retail street. Retail development is the regulatory purpose for zoning Bandera Road retail within a 200 foot depth. It is not an economic/tax purpose as all of the retail similar uses (such as day care, counseling, and administration offices) which The Elijah Group is permitted to perform on

Bandera Road are still exempt from taxes. The Elijah Group can operate with those uses on Bandera Road and pay no taxes to the City. However, for assembly use, the Elijah Group must go a few blocks away to the B-3 zone, with numerous alternative locations. In fact, the Elijah Group had a location on Culebra Road in which it could conduct services even AFTER it filed suit but voluntarily relinquished it.

4. The Fifth Circuit has not addressed the test for determining a similarly situated comparator when determining whether a church has been treated on less than equal terms than a secular assembly. The trial court correctly adopted the Third Circuit's test from *Lighthouse,* where a court examines comparators which have a similar effect on the community. *Lighthouse Institute for Evangelism, Inc. v. City of Long Branch,* 510 F.3d 253 (3rd Cir. 2007). The Elijah Group's argument that the plain text of RLUIPA does not allow such an interpretation (citing the Eleventh Circuit's test in *Midrash*), is not supported by the history or intent of RLUIPA. *Midrash Sephardi, Inc. v. Town of Surfside,* 366 F.3d 1214 (11th Cir. 2004). To say that allowing any assembly use (regardless of size, purpose, or regulatory triggers) in a zone automatically triggers the inclusion of all churches (regardless of size, or community impact) goes against decades of First Amendment jurisprudence. The correct test is the regulatory purpose test which

the City met when it treated the Elijah Group the same as all comparators based on the regulatory purpose of the Retail Corridor.

5. Under RLUIPA or The Texas Religious Freedom & Restoration Act ("TxRFRA" or TRFRA"), the Elijah Group has not suffered any substantial burden on the exercise of its religion. It can perform numerous religious activities (those which are retail similar) on Bandera Road and have numerous alternatives available within the City to locate to conduct services. Not a single religious activity of the Elijah Group is prohibited within the City. Pastor Crain's testimony and argument that he needs THIS specific Bandera Road location to conduct all his religious activities in one location due to "the cost factor…plain and simple" does not equate to a substantial burden under the law. C.R. 547 (Crain Depo, p. 243, lines 1-6.) The same analysis applies under TxRFRA.

6. Under RLUIPA's substantial burden analysis, no "individualized assessment" occurred in this case since the Bank's request to rezone property from B-2 to B-3 (a zone it has never been) is not such a qualifying assessment. Finally, the Elijah Group never pleaded the jurisdictional requirement that a substantial burden exists which impacts the interstate commerce trigger under RLUIPA. Even if it had, the zoning regulations do not prevent the sale; they only prevent the assembly use (and allow all other uses). Therefore no impact on commerce required under the Commerce Clause connection exists. The trial court properly

granted summary judgment for the City on all matters and its ruling should be affirmed.

STATEMENT OF FACTS

City History

7. The City of Leon Valley currently has a population of 9,239 and is relatively small in size.[1] C.R. 740-43. It is land locked and has no ability to expand beyond its 3.5 square miles. C.R. 740-43. Very limited growth exists and economic development abilities have been reduced over time.

8. While not always landlocked, the City developed several primary planning principals decades ago; one of which was that Bandera Road, the main roadway leading from inner San Antonio through Leon Valley heading North, would serve as the primary retail corridor. C.R. 740-43, C.R. 1009-11. The Bandera Road Corridor zoning classification has always been a B-2 designation. C.R. 740-43, C.R. 950-57, C.R. 1009-11. While the B-2 designation was designed for retail, the B-3 designation was designed for commercial use with heavier congestion. C.R. 740-43. In the 1990s, Church assembly use was not permitted as a matter of right in any zone, but was permitted in both B-2 and B-3 by obtaining a Special Use Permit ("SUP"). C.R. 740-43, 950-57, 1009-11.

[1] For purposes of this brief, references to the Clerk's Record are noted as "C.R." and the page number.

9. In 1996, a religious organization known as "Church on the Rock" requested a SUP allowing it to construct a church building and administration building on the property located at 6401 Bandera Road, in the City of Leon Valley. C.R. 740-43. On June 18, 1996, the City Council approved Special Use Permit 96-141 for the Church on the Rock and it operated as a church at that location for several decades. C.R. 363 (Crain Depo, p. 59); C.R. 740-43.

City Planning

10. As circumstances changed in the City, with expansion and development limited due to Leon Valley being encircled by San Antonio, the original planning concepts developed in the 1980s and 90s became more obsolete. On November 4, 2003, the City amended its Master Plan indicating its desire to have a more focused retail corridor along Bandera Road. C.R. 1009-11, C.R. 1015. However, that Master Plan was more general in nature and the City began an initiative to promote solutions to infrastructure problems, economic development, and more specific zoning direction. C.R. 1009-11. As part of this initiative, on March 3, 2007, the City Council amended the Leon Valley Zoning Code (Ordinance 07-13) which specifically revised the B-2 use classifications and, among other things, prohibited church assembly use in any B-2 retail district zone. C.R. 862, C.R. 1009-11. Church assembly use was then permitted as a matter of right in any B-3 commercial zone. C.R. 862.

11. The reclassification of church assembly use was not the only change in 2007. C.R. 860-867, C.R. 1009-11. Numerous land uses previously allowed under the prior Zoning Codes were reclassified out of the B-2 zoning district, such as outdoor theaters, ambulance services, cemeteries, suite hotels, air conditioner repair, printing and reproduction services and other assemblies. Additionally, uses previously precluded or restricted in the B-2 zone were allowed as a matter of right such as book stores, grocery stores and convenience stores. C.R. 860-867, C.R. 1009-11. It was a large scale reclassification of numerous uses.

12. Two of the main purposes of the reclassification were (1) to narrow the retail focus in the B-2 zone, and (2) to group larger uses with higher congestion into B-3 areas. C.R. 1009-11. For example, small inns are allowed in B-2, while larger hotels and motels are not. C.R. 860-867. Dance halls are not permitted in a B-2 retail zone. C.R. 860-867. Indoor and outdoor entertainment uses are only allowed with a SUP to ensure compatibility with the retail corridor zoning concept. C.R. 860-867. Such entertainment uses are *not* allowed as a matter of right in any zone, unlike churches allowed by right in B-3. Vocational and university schools are also not permitted in the B-2 retail zone. C.R. 860-867.

13. The uses, both permitted and prohibited, in the B-2 retail zone stem from the retail nature of the use and that determination is not discriminatory in nature. The City has numerous churches within the City limits and found that

church assembly use mirrored larger commercial effects such as increased parking, traffic congestion and occupancy. C.R. 740-43. Church assembly use was therefore grouped in B-3 commercial district zones which were better suited for higher congestion in Leon Valley. C.R. 740-43, C.R. 860-867, C.R. 1009-11. However, day care services, counseling services and administration uses are closer to retail and are therefore permitted regardless of the religious nature.

Church on the Rock History

14. Even though church assembly use was no longer permitted in a B-2 zone, because the Church on the Rock had obtained a SUP, their use was considered legal pre-existing. C.R. 1009-11. However, on July 1, 2007, due to financial difficulties, the Church on the Rock abandoned the church at that location and relocated to another area of San Antonio for more affordable rent. C.R. 740-43, C.R. 1009-11, C.R. 388-89 (Crain Depo pp. 84-85.)

15. On September 4, 2007, through a foreclosure process, Happy State Bank d/b/a Gold Star Trust Company ("the Bank") took ownership of the property. C.R. 740-43. However, the Bank was unable to either sell or lease the property within 120 days to allow the church assembly use to continue. As a result, under Section 30.405 of the City's Zoning Code, on October 1, 2007, one hundred and twenty (120) days after the Church on the Rock abandoned the use, the use lapsed. C.R. 740-43, C.R. 686.

16. The Bank was advised of the lapse in use by the City, which, in turn, sent numerous letters challenging the lapse asserting RLUIPA violations, even when no religious organization with standing to make such a claim was involved. C.R. 740-58. Knowing full well of the lapse in use, the Bank nevertheless put the property up for auction in October of 2007 and specifically targeted churches. C.R. 387, 390-93. Contrary to Elijah Group's assertion, the "voluntary" restrictive covenants regarding church assembly use were already a restriction in place the Bank was having to deal with and had nothing to do with any attempt to mediate an agreement with the City for continued use. The Elijah Group (once it entered the picture) did not provide the proper notice or negotiating process required under TxRFRA prior to bringing suit and their twisting of the facts into an impression that the covenants were a negotiation attempt is simply false. Tex. Civ. Prac. & Rem. Code Ann. §110.006 (Vernon 2005). Further, the argument that the Elijah Group and Bank are entitled to a rezone to B-3, in part, because the City refused to contractually spot zone for them in exchange for already existing covenants is against state and federal zoning law.

17. During the auction, the Bank received several bids ranging from $575,000 from non-religious organizations to $1,330,000 from the Elijah Group. C.R. 958. Months after the lapse in use, on January 4, 2008, the Bank and the founders of the Elijah Group entered into a contract for sale of the property. C.R.

399 (Crain Depo p. 95), C.R. 623-46.[2] The anticipated closing date was forty-five days from the date of acceptance, putting the closing in February 2008. C.R. 399 (Crain Depo p. 95), C.R. 623-46. Pastor Crain testified that, at the time of the contract for sale, the Elijah Group was well aware that zoning regulations prohibited church assembly use at that location. C.R. 393-94 (Crain Depo pp. 90-91). The contract was therefore contingent upon the Bank obtaining a zoning change to permit the Elijah Group to operate a church on the property. C.R. 399, 405-06, 433-436 (Crain Depo p. 95, pp. 101-102, pp. 129-131). If the Bank were unable to obtain the zoning change, the Elijah Group would be relieved of its obligation to purchase the property. C.R. 412-414 (Crain Depo pp.108-110). The Bank desired to maximize profits by selling to a religious organization willing to pay $1,330,000 instead of a non-religious bidder at $575,000, so it adamantly

[2] For the Court's edification and an explanation to some confusion in the exhibits, the Elijah Group Inc. was not incorporated at the time of the contract for sale. C.R. 477 (Crain Depo p. 173). Pastor Crain was the prior director of Redemption Tabernacle Ministries, Inc. which was a denominational branch of the Church of the Nazarene. C.R. 317 (Crain Depo p.13). Pastor Crain and his congregation split from the Nazarene Church and created a non-denominational church, but did not incorporate initially. C.R. 321-23(Crain Depo pp. 17-19). The contract for purchasing the Bandera Road property and the lease afterwards are not in Elijah Group's name, but are in fictitious names with no legal entity connection. C.R. 624-688 (Crain Depo [Exs. 5, 6, 8, 9 to Depo]). When Pastor Crain was informed by the Nazarene Church that his new congregation could not use the name Redemption Tabernacle Ministries, Inc., he and his group went back and forth regarding what name to use, before eventually settling on the Elijah Group. C.R. 324-25 (Crain Depo pp. 20-21). As a result, numerous documents within this lawsuit have multiple names attached, other than the Elijah Group.

pursued the zoning use issue.[3] When the City denied the Bank's rezoning request (explained in more detail further in this brief), the Bank and the Elijah Group entered into a month-to-month lease agreement until the zoning issue could be resolved. C.R. 439-40 (Crain Depo pp.135-36).

Elijah Group History

18. Pastor Daryl Crain served as the director of Redemption Tabernacle Ministries, Inc. which was a denominational branch of the Church of the Nazarene, but he split from the Church in 2005 to form what is now the Elijah Group. C.R. 316-17 (Crain Depo, pp. 12-13). Pastor Crain testified the location his congregation needed for service was within the boundaries of IH-10 to Tx-151, Tx-1604 to IH-410. C.R. 376, C.R. 378-79 (Crain Depo, p. 72, lines 10-21; pp. 74-75). Due to Leon Valley's relatively small size, nearly the entire City fits within those boundaries along with most of its B-2 and B-3 zones and driving distances within the City are relatively short.

19. As part of Pastor Crain's religious message, he performs a large number of religious activities such as providing counseling, providing day-care services, and operating a Texas Christian Athletic League ("TCAL"), which provides religious schools with coordinated extra-curricular activities state wide.

[3] The Bank wishes for the sale to go through in order to maximize on the purchase price. More than likely, this is one of the primary reasons the Bank is paying for the Elijah Group's attorney's fees in this case. C.R. 576 (Crain Depo. p. 272, lines 8-18).

C.R. 333-342 (Crain Depo pp. 29-38.) According to Pastor Crain, all of these activities and functions are integral parts of his religious mission. C.R. 333-342 (Crain Depo pp. 29-38).

20. Prior to moving into the Bandera Road property, Pastor Crain and his yet to incorporate congregation had a lease located at 8323 Culebra Road, where they had operated since 2006. C.R. 321 (Crain Depo p. 17). This location is within the congregation area noted by Pastor Crain. Both church assembly use and day care services were being conducted on Culebra Road. C.R. 325-26 (Crain Depo pp. 21-22). When the Elijah Group relocated to the Bandera Road location, it kept the month-to-month lease on Culebra Road and continued to operate its day care service from that location. C.R. 490 (Crain Depo p. 186). However, nothing prevented Pastor Crain from continuing to use the Culebra Road building for church assembly services as he had been doing. C.R. 490 (Crain Depo p. 186). It was not until February 1, 2009 (after suit was filed) that the Elijah Group voluntarily relinquished the Culebra location, despite requests from the landlord to enter into a written lease. C.R. 485-87, 450 (Crain Depo pp.181-183 & p. 186).

21. Pastor Crain attended an open house, so to speak, for the Church on the Rock property on Bandera Road in October of 2007 (i.e., after the church use had lapsed). C.R. 393-94 (Crain Depo pp. 89-90). Pastor Crain was specifically

targeted by the Bank to purchase the property. C.R. 393-94 (Crain Depo pp. 89-90).

22. Pastor Crain testified that he had been fully informed that the current zoning prohibited church assembly use at that location. C.R. 393-94, 408 (Crain Depo pp. 90-91, 104). He knew before ever entering into any purchase agreement that zoning was going to be an issue. C.R. 393-94, C.R. 405-06, C.R. 408 (Crain Depo pp. 90-91, 101-02, 104).[4] However, he felt it was worth the risk.

23. Pastor Crain knew of other locations within Leon Valley which could accommodate his congregation; specifically an old Petco building and a warehouse. C.R. 547, C.R. 551 (Crain Depo p. 243 & p. 247). However, to him, the cost to renovate either building was too expensive. C.R. 551 (Crain Depo p. 247.) Pastor Crain made it clear the primary need for him to have THIS building on Bandera Road and conduct all activities there is simply a matter of dollars. C.R. 551 (Crain Depo, p. 247).

24. His specific testimony is as follows:

> Q. Did you look at any other locations to relocate from Culebra?
> A. Like I said before, we were always looking, but, you know, it's just -- there's so many different variables. Number one, building is something incredibly expensive.

[4] At least one section of the specific testimony from Pastor Crain is as follows: "Q: Okay. So you entered into this agreement knowing that you couldn't -- the property wasn't zoned to use as a church anymore?" "A. Yes." " Q. Okay. And that's why you asked them to have it rezoned?" "A. Right." C.R. 408, (Crain Depo p. 104, lines 8-14).

> Remodeling is incredibly expensive. . . . C.R. 546 (Crain Depo p. 242, lines 13-18).
> . . . So we were really looking. And I have got to tell you and without spiritualizing this in any way, I was praying for a specific thing. **I wanted to buy a church that was already built because the -- because of the cost factor, plain and simple.** (Emphasis added) And, you know, I was praying for something that that would happen. C.R. 547 (Crain Depo p. 243, lines 1-6).
> . . . . So we are looking for a building that's appraised for a lot, selling for a little so we don't have to put money down. And that building on Lockhill-Selma, even if we wanted to do it, it wouldn't fit in those parameters because it's appraised just about what they are asking for, maybe a little bit, but nowhere near 20 percent. When this building came available, the reason I did not want to go look at it is because it absolutely is perfect for us. I mean, it's absolutely everything except for the dome. I wouldn't build a dome. But everything is just absolutely -- it's where we want to be. C.R. 548 (Crain Depo p. 244, lines 6-18).
> …..
> A. There are no other buildings in Leon Valley we could go to.
> Q. Okay. Did you look?
> A. There is a Petco on 410 that was suggested to us that was 11,000 or -- no, no. 23,000 square feet. I can't remember. That would mean we would be paying somewhere in the neighboring of $18,000 per month to be in that building. We can't go there. There is a warehouse off of Reindeer that we looked at that we would be paying -- these are all leased facilities, that we would be paying somewhere in the neighborhood of five to $9,000 a month, but it would take another 250,000 minimum to renovate it to fit our needs.
> … There are no other buildings that will fit our needs because there are no other churches. C.R. 550 (Crain Depo p. 246-47, lines 6-18).

25. Despite having alternative locations in Leon Valley to move, still having the Culebra Road location from which to operate, and knowing full well that church assembly use was prohibited by ordinance in the Bandera Corridor, Pastor Crain nevertheless entered into a contract to purchase the Bandera Road location, contingent upon the Bank obtaining a rezoning. The Bank applied for

rezoning, which requested the Bandera Road location to be rezoned from B-2 to B-3 (a zoning classification never applied to this location). The request was recommended for denial at the Planning and Zoning Commission ("P&Z") and the denial was approved by the City Council. C.R. 432.

26. At the Planning and Zoning Commission, the commissioners explored in detail the reasons for denying the request. The City did not completely ban church use within the City, but made the use as a matter of right in B-3 while precluding it in B-2, the Bandera Road Corridor. Ms. Baird, a P&Z Commissioner, noted in a public hearing, that the City is only made up of two thousand and two hundred acres with two hundred thirty-three acres of the total mass of land inside Leon Valley currently zoned B-3. Of that the City has over twenty-two plus acres of undeveloped B-3 zones available including locations on Grissom, Poss, and Wurzbach roadways near 410. C.R. 1852-53. She noted that someone could build any kind of assembly gathering on those properties, as well as utilize existing buildings which are currently vacant. Suitable buildings existed within the Seawared subdivision, near Lack's. She also noted an available building near the West Loop. The Scaggs Albertson's subdivision also had two vacant buildings zoned B-3 and all allowed assembly uses. C.R. 1852-53. Additionally, Pastor Crain testified he was aware of at least three other locations he could use for

church services. C.R. 547, C.R. 551(Crain Depo p. 243 & p. 247.) In short, there were lots of legal places for the Elijah Group to go to hold services within the City.

27. The Commissioners noted they desired for the purpose of the Master Plan to be honored. Commissioner Burnside stated that they were concerned about the economic viability of the community, which is a legitimate governmental concern and purpose, and that the Bandera Road corridor was an area they wanted to concentrate business for economic development resources. C.R. 1831. With the City being landlocked, it must focus on the areas it already possesses for certain purposes. C.R. 1830. Ms. Baird then moved to recommend that the City Council deny the Bank's request to rezone, not change the law, to leave it as B-2 and not allow commercial "anything" into the corridor. C.R. 1833.

28. Irrespective of the ability to walk away from the purchase agreement, Pastor Crain decided to knowingly disregard the denial of the rezoning and moved into the Bandera Road location to conduct church assembly services. C.R. 412 – 414. Now, to be fair, the not yet incorporated Elijah Group was fully entitled to move into the Bandera Road location (assuming with the permission of the Bank/owner) in order to perform those activities authorized in the B-2 zone. C.R. 322. In that regard, Pastor Crain could (and does) perform a large number of religious activities such as providing counseling and day-care services, and operating his TCAL sporting efforts. Pastor Crain applied for a certificate of

occupancy for a day care service and received a temporary certificate under the City's Codes for day care use. C.R. 524.

29. However, Pastor Crain testified that regardless of the other locations to operate church assembly services, the still existing Culebra location, and the denial of the rezoning request, he testified he fully intended to operate church assembly use as soon as he moved into the Bandera Road location. C.R. 568. (Crain Depo p. 264) The soon to be incorporated Elijah Group moved into the Bandera Road location in late October, 2008, almost eleven months after the denial of the rezoning request and started holding services.

ARGUMENTS

I. No Equal Terms Violation

a. The Desire of the Church and Amici

30. The Elijah Group and the Amici who have submitted briefing to this Court desire a world where any church can locate anywhere they wish. That is the ultimate result of their desired reading of RLUIPA. They argue that requiring an analysis of the regulatory purpose of any zoning decision is too complicated. Appellant's Opening Brief pp. 36-37. In truth, their reading would be very simple – let any church go where it wants regardless of planning principles. Simple, direct, and to the point. However, that is not the law, not the purpose of RLUIPA, is functionally impractical and contrary to the purpose of zoning.

31. The purpose of zoning is to limit, restrict, and regulate the use of land in the interest of the public welfare, to stabilize the use, conserve the value of property, and to preserve the character of neighborhoods; zoning is used to control and regulate the utilization, growth, and development of land within a certain locality. 101A C.J.S. Zoning & Land Planning §3. Cities must have a legitimate governmental reason for placing certain uses in one zone and excluding other uses. If a city does not have a legitimate reason for a zoning distinction then such action is arbitrary and unenforceable. *Nectow v. City of Cambridge,* 277 U.S. 183 (1928) (holding a zoning ordinance is unenforceable if it "has no foundation in reason and is a mere arbitrary or irrational exercise of power having no substantial relation to the public health, the public morals, the public safety[,] or the public welfare in its proper sense."); *see Mayhew v. Town of Sunnyvale,* 964 S.W.2d 922, 938 (Tex. 1998). However, zoning is intended to allow a city to regulate use and development by grouping like uses together. Residents do not want an auto-repair shop right next to their home. Placing an industrial warehouse with constant large 18 wheelers in the middle of the residential zone with smaller streets is not desirable either. The purposes behind what goes into a particular zone and what is excluded are many; however, all must be legitimate governmental purposes and the included/excluded use must fit that purpose.

32. The principal authors and sponsors of RLUIPA stated numerous times in the legislative record that the purpose of the statute is not to immunize churches from land use regulations. C.R. 2062-64 (congressional record); 146 Cong. Rec. S7774 (July 27, 2000). Specifically, Senator Hatch explicitly stated "*Not land use immunity:* This Act does not provide religious institutions with immunity from land use regulation, nor does it relieve religious institutions from applying for variances, special permits or exceptions, hardship approval, or other relief provisions in land use regulations, where available without discrimination or unfair delay." C.R. 2064; 146 Cong. Rec. S7774 (July 27, 2000). Instead, RLUIPA is aimed at rectifying situations where a city may utilize zoning as a means of discriminating against or precluding churches from areas without establishing that regulatory fit.

33. The Elijah Group and the Amici wish to stretch RLUIPA beyond the boundaries of its intended purpose by arguing that, regardless of regulatory purpose for a zone (i.e., disregard the traffic issues, disregard the noise issues, light issue, congestion issues, property value issues, neighborhood character issues, disregard the purpose of any and all zones entirely), if any form of assembly use is permitted within a zone, so shall churches be permitted. Pastor Crain testified he believes that if the City allows a Taco Cabana or Henry's Puffy Tacos (local fast food restaurants) or a Zorro's Restaurant to exist in a zone, the City should allow

churches to exist because both allow assemblies of people. C.R. 558-59 (Crain Depo pp. 254-55). Under the definition of "assembly" asserted in the Elijah Group's primary case of argument, *Midrash Sephardi, Inc. v. Town of Surfside*, 366 F.3d 1214, 1230-31 (11th Cir. 2004), if a group of family and friends got together at the Taco Cabana for a birthday party, such a gathering for a common purpose could qualify as a non-religious "assembly" thereby requiring the automatic permitting of church use in that same zone. Regardless of the vast regulatory differences between different assembly uses, if any assembly is permitted in a zone, including a Taco Cabana, then any and all churches, irrespective of size, configuration, and design, can locate in the same zone. This result is a near complete immunity from zoning and all land use regulations, but is not the intent of RLUIPA.

34. Based on the Elijah Group's reading, the City would violate RLUIPA if it properly regulated size restrictions even among churches. For example, if the City had a zone which allowed small assembly uses (such as small theaters under 10,000 square feet, small meeting halls, and even small church assemblies under 10,000 square feet) but precluded large mega churches in that zone, the fact that a small theater less than 10,000 square feet is permitted would automatically require the City to allow a mega church of 200,000 square feet into the same zone.

35. Unlike the Substantial Burden provision of RLUIPA, which possesses a balancing test (i.e., compelling interest test) the Equal Terms provision has no such balancing prong. Therefore, under Elijah Group's reading (i.e., no consideration of regulatory purpose at all), even if the City demonstrated it had a compelling reason and narrowly tailored governmental purpose for keeping mega churches out of a small residential zone (but allowing smaller assembly uses like small theaters and smaller churches) the City would still have to allow the mega church in under the Equal Terms provision. The perspective that the underlying regulatory purpose cannot be considered AT ALL under the Equal Terms provision is contrary to the intent of RLUIPA.

b. Similarly Situated Requirements (Text of RLUIPA)

36. The First Amendment to the United States Constitution, if read strictly and literally, makes no reference to similarly situated anti-discrimination comparators. It very clearly says "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." (emphasis added) U.S. Const. Amend I. No law means just that, no law. However, the U.S. Supreme Court recognized that the practical application of such an overly strict reading would be untenable and incorporated various different implicit standards.[5]

[5] The First Amendment's prohibition on the making of a law "prohibiting the free exercise" of religion applies to the states through the Fourteenth Amendment. *See Cantwell v. Connecticut*, 310 U.S. 296, 303, 60 S.Ct. 900, 84 L.Ed. 1213 (1940). The "free exercise of religion means,

Such implicit standards regarding similarly situated or purpose oriented comparators exist in a large variety of federal statutes.

37. The Fourteenth Amendment also has no such language regarding similarly situated, yet such a requirement has been grafted into it by the U.S. Supreme Court. The Fourteenth Amendment merely states "nor shall any State … deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. Amend. XIV. However, the principle of equal protection guarantees that "all persons similarly situated should be treated alike." *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 439, 105 S.Ct. 3249, 3254, 87 L.Ed.2d 313 (1985) (emphasis added); *see Mayhew v. Town of Sunnyvale*, 964 S.W.2d 922, 939 (Tex. 1998). An Equal Protection claim requires that the government treat the claimant different from other similarly-situated landowners without any reasonable basis. *Mayhew*, 964 S.W.2d at 939.

38. The text of Title VII does not say "similarly situated" in the Act. Yet the U.S. Supreme Court has interpreted the anti-discrimination provisions to

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first and foremost, the right to believe and profess whatever religious doctrine one desires." *Cornerstone Christian Schs. v. Univ. Interscholastic League*, 563 F.3d 127, 135 (5th Cir. 2009) (quoting *Employ. Div., Dep't of Human Res. of Ore. v. Smith*, 494 U.S. 872, 877, 110 S.Ct. 1595, 108 L.Ed.2d 876 (1990)). Thus, the First Amendment forbids "all governmental regulation of religious beliefs as such." *Id.* However, the government does not impermissibly regulate religious belief when it promulgates a "neutral, generally applicable" law or rule which happens to result in an incidental burden on the free exercise of a particular religious practice or belief. *Id.; Employment Div.*, 494 U.S. at 879 (holding the Free Exercise Clause "does not relieve an individual of the obligation to comply with a valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes).").

require similarly situated individuals be compared before any violation occurs. In an employment discrimination analysis, the court only compares the treatment of the plaintiff with other employees who were similarly situated to the plaintiff. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973); *Smith v. City of Easton*, No. 6:09-CV-38, 2010 WL 413051 (E.D. Tex. Jan 27, 2010)(citing *Bryant v. Compass Group USA Inc.*, 413 F.3d 471, 478 (5th Cir. 2005)). Employees are similarly situated when they are in "nearly identical" circumstances. *Bryant* at 478.

39. RLUIPA has three provisions regarding anti-discrimination; 42 U.S.C. §2000cc(b)(1), (2), & (3) under the subheading Discrimination and Exclusion. Subpart (b)(1) 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." This "Equal Terms" provision prohibits a city from treating a secular assembly use less favorably than a non-secular assembly comparator. This subpart is the Appellant's primary focus. Subpart (b)(2) essentially prohibits a city from treating one religious organization better than another (i.e., let the Baptists have a church in a particular zone but not the Muslims). And Subpart (b)(3) prohibits a city from excluding church assembly use entirely (i.e., recognizing the need to limit churches to particular zones, a city still cannot zone them out of the city limits; they have to allow some zone for them to locate.)

40. Subpart (b)(1) must be read in the context of the entire Act. *Sutton v. United States*, 819 F.2d 1289, 1293 (5th Cir. 1987); *Tonkawa Tribe of Oklahoma v. Richards*, 75 F.3d 1039, 1046 (5th Cir. 1996). It must also be read in the context of the purpose and history of RLUIPA. *Sutton* at 1293. Senator Hatch, when explaining the need to reduce discrimination, specifically noted: "Churches have been excluded from residential zones because they generate too much traffic, and from commercial zones because they don't generate enough traffic. Churches have been denied the right to meet in rented storefronts, in abandoned schools, in converted funeral homes, theaters, and skating rinks-in all sorts of buildings *that were permitted when they generated traffic for secular purposes*." (emphasis added). C.R. 2064; 146 Cong. Reg. S7774 (July 27, 2000). If the regulatory purpose offered was to control traffic, but secular assemblies in a zone generate the same traffic as religious organizations, then the City did not properly tie the decision to the regulatory purpose. If, however, the regulatory purpose noted that certain assemblies produced less traffic (such as a 40 occupancy Taco Cabana), compared to a large congregation which generated more traffic, then the tie is proper and the regulatory purpose is fulfilled without discrimination. This is the same analysis of allowing smaller indoor theaters into a zone while excluding larger external theaters. In short, if the comparators are similarly situated to *the regulatory purpose*, the City had better treat them the same.

41. Senator Hatch, essentially the founding father of RLUIPA, was instrumental in the drafting of its predecessor the Religious Freedom and Restoration Act ("RFRA"), 42 U.S.C.A. §2000bb, *et seq*. After RFRA was declared unconstitutional in *City of Boerne v. Flores*, 521 U.S. 507 (1997), Senator Hatch utilized the U.S. Supreme Court's explanations in *Boerne* as a roadmap for RLUIPA to avoid similar problems. He made it very clear that RLUIPA's intent was not to immunize churches from land use regulations but, through remedial measures, address the discrimination concerns. To have unlawful discrimination you must have comparators in similar situations which are treated differently for no good reason. That was the discrimination noted by Senator Hatch and what RLUIPA is addressing. To read RLUIPA to prevent differential treatment regardless of comparator criteria will not avoid the problems noted in *Boerne.*

42. The Church, Bank, and Amici point to a split in the federal circuits regarding the proper test in determining whether an Equal Terms violation exists. The trial court adopted the Third Circuit's test from *Lighthouse Institute for Evangelism, Inc. v. City of Long Branch,* 510 F.3d 253 (3rd Cir. 2007) while the Elijah Group, Bank and Amici wanted the test from the Eleventh Circuit articulated in *Midrash Sephardi, Inc. v. Town of Surfside,* 366 F.3d 1214 (11th Cir. 2004). This court has not yet addressed the standard to be used as far as the City can ascertain. As of July 2, 2008, the Seventh Circuit, in an *en banc* decision,

chimed in with a "regulatory criteria" test which is strikingly similar to the "regulatory purpose" test from *Lighthouse*.

43. The "key point of diversion among the courts is the metric of comparison they employ to determine whether particular religious and non-religious institutions or assemblies are properly measured against one another under the statute." *Third Church of Christ, Scientist, of New York City v. City of New York*, 617 F.Supp.2d 201, 209 (S.D.N.Y. Dec 02, 2008)(explaining the split between the Third and Eleventh Circuits Equal Terms analysis). The Eleventh Circuit adopted a rule which requires only a showing that the non-religious comparator is an "assembly" or "institution" as those terms are commonly understood. *Midrash* 366 F.3d at 1229. The Third Circuit disagreed finding that it "would lead to the conclusion that Congress intended to force local governments to give any and all religious entities a free pass to locate wherever any secular institution or assembly is allowed." *Lighthouse* 510 F.3d at 268. Instead, the Third Circuit reasoned that "a religious plaintiff under the Equal Terms Provision must identify a better-treated secular comparator that is similarly situated in regard to the *objectives* of the challenged regulation." *Id.* (emphasis added). This rule is more consistent with Congressional intent, which was "to codify the existing jurisprudence interpreting the Free Exercise Clause." *Id.* at 264 (*citing* 146 Cong. Rec. S7774 (July 27, 2000) (Senator Hatch's statements)). "Under Free Exercise

cases, the decision whether a regulation violates a plaintiff's constitutional rights hinges on a comparison of how it treats entities or behavior that have the same objectives." *Id.* at 265.

44. The Third Circuit, in *Lighthouse*, relied, in part, on U.S. Supreme Court precedent from *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, in which a church and its congregants practicing the Santeria religion, employed animal sacrifice. 508 U.S. 520, 113 S.Ct. 2217, 124 L.Ed.2d 472 (1993). By the Third Circuit's interpretation, "the reason the ordinance [in *Lukumi*] was suspect was not merely because it allowed secular versions of the religious behavior it prohibited, but because both behaviors impacted the city's declared goals in the same way. The unequal treatment of equally detrimental behaviors is what caused the violation of the Free Exercise clause." *Lighthouse*, 510 F.3d at 265. Therefore, applying RLUIPA, "[t]he impact of the allowed and forbidden behaviors must be examined in light of the purpose of the regulation." *Id.*

45. An Equal Terms' analysis is not as simple as the Elijah Group would like to make it. Simply asserting "anywhere a theater goes, so shall a church" without any regulatory purpose analysis as to individual distinctions equates to a complete immunity for churches from any zoning regulation. Some level of categorizing or comparison is still required and is something courts do every day. To read RLUIPA so broadly as to exclude any regulatory purpose or similarly

situated comparison would subject the Equal Terms provision to constitutional infirmities on two levels.

46. First, while Congress must have a wide berth in devising appropriate remedial and preventative measures for unconstitutional actions, those measures may not work a "substantive change in the governing law." *City of Boerne v. Flores*, 521 U.S. 507, 519 (1997). In *Boerne*, the U.S. Supreme Court set forth the test for distinguishing between permissible remedial legislation and unconstitutional substantive redefinition: Legislation is valid if it exhibits "a congruence and proportionality" between an injury and the means adopted to prevent or remedy it. *Id.*, at 520. This requirement is a principal reason the authors (and interpreting courts afterwards) determined that RLUIPA is merely codifying U.S. Supreme Court precedent under the First Amendment. However, to interpret RLUIPA to require church use anywhere any assembly use is permitted (regardless of regulatory purpose such as traffic, conformity with surrounding uses, and other planning principals), would effectively "re-write" the court's First and Fourteenth Amendment jurisprudence. *Tennessee v. Lane*, 541 U.S. 509, 550 (2004)(explaining the constitutional boundaries of why Title I [unconstitutional] of the ADA and Title II [constitutional] of the ADA yielded different remedial results).

47. Second, such a reading would unconstitutionally and impermissibly favor religious organizations over other groups in violation of the Establishment and Equal Protection Clauses. "A proper respect for both the Free Exercise and the Establishment Clauses compels the State to pursue a course of 'neutrality' toward religion." *Committee for Public Ed. & Religious Liberty v. Nyquist,* 413 U.S. 756, 792-793 (1973). States may not favor one religion over others nor *religious adherents collectively over nonadherents*. *Board of Educ. of Kiryas Joel Village School Dist. v. Grumet*, 512 U.S. 687 (1994); *See Epperson v. Arkansas,* 393 U.S. 97, 104 (1968)(emphasis added). To say that the City can place small indoor theaters into one zone and large outdoor theaters into another zone based on a proper regulatory planning purpose, but must allow a church into either zone regardless of regulatory purpose just because it is a church, favors religious organizations at the expense of all other assemblies in violation of the Establishment Clause and Equal Protection Clause. As noted in *River of Life Kingdom*[6], imagine if the outdoor theater were actually a political rally or convention group. A church's religious activities would then be afforded greater protection under the First Amendment than political assemblies. A constitutional reading dictates that all assemblies should be treated equally, religious or secular,

[6] *River of Life Kingdom Ministries v. Village of Hazel Crest*, No. 08-2819, --- F.3d ----, 2010 WL 2630602 (7th Cir. July 2, 2010).

taking into account the regulatory purpose. There is no free constitutional pass for a church simply because it is a church.

48. Even though the Seventh Circuit previously adopted the *Midrash* "assembly only" standard out of the Eleventh Circuit, the *en banc* court just recently went into a detailed analysis of the reasons such a reading should be abandoned.[7] *River of Life Kingdom Ministries v. Village of Hazel Crest*, No. 08-2819, --- F.3d ----, 2010 WL 2630602 (7th Cir. July 2, 2010). First, the Court recognized its prior adoption of *Midrash* and held "[o]ur own cases dealing with that provision [test for Equal Terms] had cited *Midrash* without criticism but had not been centrally concerned with the interpretive issue presented in this case." *Id* *3. It then went on to analyze the *Midrash* test, and started out noting "[p]ressed too hard, this approach would give religious land uses favored treatment." *Id* *2.

49. The court explained that it was troubled by the Eleventh Circuit's rule that mere "differential treatment" between a church and some other "company of persons collected together in one place ... usually for some common purpose" (i.e.,

[7] The dissent in *River of Life Kingdom* summarized the Seventh Circuit's history as follows: "Until this case we had followed the Eleventh Circuit's interpretation of the equal-terms provision, first announced in *Midrash Sephardi, Inc. v. Town of Surfside,* 366 F.3d 1214 (11th Cir. 2004), and explained in *Konikov v. Orange County*, 410 F.3d 1317 (11th Cir. 2005), and *Primera Iglesia Bautista Hispana of Boca Raton, Inc. v. Broward County,* 450 F.3d 1295 (11th Cir. 2006). *See Digrugilliers v. Consolidated City of Indianapolis,* 506 F.3d 612, 616 (7th Cir. 2007); *Vision Church v. Vill. of Long Grove,* 468 F.3d 975, 1003 (7th Cir. 2006). The *en banc* court now prefers the Third Circuit's approach, announced in *Lighthouse Institute for Evangelism, Inc. v. City of Long Branch,* 510 F.3d 253 (3d Cir. 2007), though in a slightly modified form."

the definition of assembly) would result in a RLUIPA violation. *Id.* The fact that "two land uses share a dictionary definition doesn't make them 'equal'" under RLUIPA. *Id* *4. In explaining the rejection of the "assembly only" test it just adopted, the court explained:[8]

> "Assembly" so understood would include most secular land uses factories, nightclubs, zoos, parks, malls, soup kitchens, and bowling alleys, to name but a few (visitors to each of these institutions have a "common purpose" in visiting)-even though most of them have different effects on the municipality and its residents from a church; **consider just the difference in municipal services required by different land uses, including differences in the amount of police protection**. The land use that led the Eleventh Circuit in *Midrash* to find a violation of the equal-terms provision was, however, a private club, and it is not obvious that it has different effects on a municipality or its residents from those of a church. Thus our quarrel is not with the result in *Midrash* but with the Eleventh Circuit's test. …
>
> A subtler objection to the test is that it may be *too* friendly to religious land uses, unduly limiting municipal regulation and maybe even violating the First Amendment's prohibition against establishment of religion by discriminating in favor of religious land uses ….
>
> A further objection to the Eleventh Circuit's test is that "equality," except when used for mathematical or scientific relations, signifies not equivalence or identity but proper relation to relevant concerns. It would not promote equality to require that all men wear shirts that have 15-inch collars, or that the number of churches in a state equal the number of casinos, or that all workers should have the same wages. But it does promote equality to require equal pay for equal

[8] Counsel for Appellee does not wish to reprint the *River of Life Kingdom* opinion for its brief; however, the Seventh Circuit's wording and examples are best referenced in the Court's own words and therefore counsel for the Appellee felt in appropriate here to merely refer to the Court's text.

> work, even though workers differ in a variety of respects, such as race and sex.
>
> *Id.* *2-3 (emphasis added).

50. The Seventh Circuit then went through several hypothetical examples of how the "assembly only" test would result in impractical or unconstitutional results, including favoring religious assemblies over political assemblies all in the name of RLUIPA. As a result, the *en banc* court rejected the "assembly only" test and adopted a version of the *Lighthouse* regulatory purpose test which it termed "regulatory criteria."

51. It is important to note that the Seventh Circuit's version notes some criticism of the Third Circuit's "regulatory purpose" test for fear of inviting speculation concerning the reason behind exclusion of churches. *Id* *4. However, as the concurring opinions and dissent note, the "regulatory criteria" test variation, for the most part, may be a difference without a distinction. Especially in this case given the City of Leon Valley's regulatory purpose is one of creating a Retail Corridor and the chronology of events, cannot be said to indicate a discriminatory intent.

52. The City of Leon Valley passed its Master Plan amendments in 2003 and its zoning reclassifications in 2007 while Church on the Rock was still occupying the property. This is not a situation where the City reacted to a church desiring to come into a zone by passing laws targeting the church or specifically

putting up obstacles to the Elijah Group. As a result, the Seventh Circuit's concerns about post-action testimonials are not an issue here. The City's ordinances were passed and in effect before the Elijah Group or the Bank were even in the picture and cannot be said to have a discriminatory intent against the Elijah Group. The City's intent was to create a Retail Corridor and that is what it did.

53. The Seventh Circuit clearly indicated its opinion that it is a legitimate regulatory purpose for a city to be generating "municipal revenue and providing ample and convenient shopping for residents, [which] can be promoted by setting aside some land for commercial uses only, which generate tax revenues. Hazel Crest has therefore created a commercial district that excludes churches *along with* community centers, meeting halls, and libraries because these secular assemblies, like churches, do not generate significant taxable revenue or offer shopping opportunities." *Id* *6.

54. As noted above, the City of Leon Valley has set aside land on one road, Bandera Road, as its Retail Corridor to promote retail activity and uses. Even though it is permissible under *Lighthouse* and *River of Life Kingdom* for the City to focus purely on the revenue generation, Leon Valley did not and allows non-revenue generating uses which are similar in regulatory effect to revenue generating retail uses. Such classifications promote the regulatory purpose/criteria

while treating like uses similarly. As a result, the classifications do not violate RLUIPA and actually treat the Elijah Group equally with all similar uses.

55. The inclusion of a regulatory purpose (or even regulatory criteria) in the Equal Terms analysis does not do what the Church and Amici argue. The City is not free to discriminate against churches or religious organizations under the guise of a regulatory purpose. A city must still have a legitimate regulatory purpose behind any zoning distinction; it must then craft the uses both in and out of the zone and tie them to that regulatory purpose. If the city does not have a proper regulatory purpose, does not properly tie the permitted/excluded uses to that purpose, or allows unjustified exceptions, then such a city could run afoul of RLUIPA's Equal Terms provision. However, if a city does all of the above, then the city should be permitted to regulate those distinctions without violating RLUIPA. As the Seventh Circuit noted: "If a church and a community center, though different in many respects, do not differ with respect to any accepted zoning criterion, then an ordinance that allows one and forbids the other denies equality and violates the equal-terms provision." *Id* *3.

c. Regulatory Purpose Behind 2007 Zoning Changes

56. The City of Leon Valley has legitimate governmental purposes in creating a retail corridor and those uses included and excluded fit the regulatory goal. The 2007 reclassification was designed to adjust the City's current uses and

tighten up the retail corridor. Numerous uses previously excluded from the retail corridor were permitted, while numerous uses the City determined to be inconsistent with the retail goal were removed. Again, this was a change of numerous uses all geared towards the same regulatory purpose which occurred prior to the Elijah Group's interest in the Bandera Road property. The uses permitted versus excluded are tied to that regulatory purpose and no exceptions have been granted.

57. Contrary to the arguments of the Elijah Group, the regulatory purpose is not to generate retail revenue. While preservation of taxing abilities and city revenues is a legitimate government purpose, the City did not extend its regulation that far. Its regulatory purpose is tied only to the retail use characteristics, regardless of the ability to tax. This is pointedly illustrated in the types of religious uses permitted in the B-2 zone.

58. Regardless of taxing liability, the Elijah Group can still perform all of its other religious activities at the Bandera Road location, including counseling services, administrative offices, and day care services. All of these services are more retail in nature and fit within the regulatory purpose of the corridor, even though the City receives no taxes from those activities. While this case is about money (the Bank's and Elijah Group's), revenues are not built into the City's regulatory purpose in this case.

59. In this case, the trial court properly adopted the Third Circuit's balanced interpretation. A plaintiff has to establish more than simply different treatment with *any* secular assembly use, such as a fast food restaurant. This interpretation makes sense given First Amendment jurisprudence, RLUIPA's intended purpose, and the practicalities of zoning. The City is still required to have a good reason behind its zoning regulations and to properly tie its inclusion/exclusion to those purposes.

II. No Substantial Burden

a. Financial inconvenience is not a substantial burden

60. The Elijah Group can still conduct numerous religious activities which are part of its religious purpose (i.e., day care, counseling, and TCAL administration) at the Bandera Road location. There are several alternative locations in order to conduct church services besides the Bandera Road location which are located in a B-3 zone. In fact, the Elijah Group maintained a lease on Culebra Road even *after* filing this lawsuit which could have been used for church services. However, the Elijah Group chose not to continue on Culebra as it wanted a one-stop location. That was its own choice. According to Pastor Crain, this was due to the "cost factor. . . plain and simple". C.R. 547 (Crain Depo, p. 243, lines 1-6).

61. Under the Substantial Burden prohibition of RLUIPA, setting aside the applicability of federal funds, commerce, or individualized assessments for a minute, a plaintiff must still establish its religious practices are substantially burdened by a city's land use regulation. Mere inconvenience or cost is not enough. *Braunfeld v. Brown,* 366 U.S. 599, 605 (1961); *see also Vineyard Christian Fellowship of Evanston, Inc. v. City of Evanston,* 250 F.Supp.2d 961, 987 (N.D. Ill. 2003) (holding that "monetary and logistical burdens do not rise to the level of a substantial burden"); *Vision Church v. Village of Long Grove,* 468 F.3d 975, 999 (7th Cir. 2006).

62. The "substantial burden" hurdle is high and determining its existence is fact intensive. *Living Water Church of God v. Charter Tp. of Meridian*, No. 05-2309, 06-1210, 258 Fed. Appx. 729, 734, 2007 WL 4322157 *5 (6th Cir. 2007). Government action that forces an individual to "choose between following the precepts of her religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of her religion in order to accept work, on the other hand" imposes a substantial burden on that individual's free exercise of religion. *Sherbert v. Verner,* 374 U.S. 398, 404, 83 S.Ct. 1790, 10 L.Ed.2d 965 (1963). Mere inconvenience or expense in performing its religious mission does not amount to a substantial burden. *Id* at 761.

63. In *Civil Liberties for Urban Believers v. City of Chicago,* 342 F.3d 752 (7th Cir. 2003), the Seventh Circuit applied RLUIPA's "substantial burden" provision in the context of requests by Chicago area churches for special use permits. The churches claimed that the City's zoning ordinance violated RLUIPA's "substantial burden" provision because of the scarcity of affordable land available for development in R zones, along with the costs, procedural requirements, and inherent political aspects of the approval processes for special use permits, which, they argued, were too burdensome and complicated. *Id.* at 761. But while the court acknowledged that the conditions cited may have made the religious exercise of their members more difficult, it rejected the claim that the burden created by the City's zoning code was substantial. *Id.*

64. Based upon this definition of "substantial burden," the *Civil Liberties* court concluded that the plaintiff's claim failed stating:

> [W]e find that these conditions—which are incidental to any high-density urban land use—do not amount to a substantial burden on religious exercise. While they may contribute to the ordinary difficulties associated with location (by any person or entity, religious or nonreligious) in a large city, they do not render impracticable the use of real property in Chicago for religious exercise, much less discourage churches from locating or attempting to locate in Chicago. *Id.*

65. Even under the substantial burden analysis articulated in *Adkins v. Kaspar* (an institutionalized person's case) which utilized a "truly pressures" test, the Elijah Group is still suffering only from a financial inconvenience. *Adkins v.*

Kaspar, 393 F.3d 559, 570 (5th Cir. 2004). This court, in *Adkins*, specifically held that "a government action or regulation does not rise to the level of a substantial burden on religious exercise if it merely prevents the adherent from either enjoying some benefit that is not otherwise generally available or acting in a way that is not otherwise generally allowed." *Id*. at 570. Pastor Crain and his group can still perform their religious activities on Bandera Road (absent services) and can go a few blocks away to hold any gatherings for services. They placed themselves in the position of not having a place for services when they did not have to by voluntarily relinquishing the Culebra Road location months after they filed suit. All activities can still occur in the City and within their service area; just not all at the Bandera Road location. Free Exercise jurisprudence does not guarantee a perfect fit between available land and proposed religious purposes. *Congregation Kol Ami v. Abington Tp.*, No. Civ. A. 01-1919, 2004 WL 1837037 (E.D. Pa. Aug 17, 2004) (citing *Love Church v. City of Evanston*, 896 F.2d 1082, 1086 (7th Cir.1990) ("the harsh reality of the marketplace sometimes dictates that certain facilities are not available to those who desire them.")). No substantial burden exists in this case.

66. Even the Elijah Group's own seminal case, *Midrash*, dictates that no substantial burden would exist in this case. In its substantial burden analysis, the Eleventh Circuit noted "[a]lthough they [the churches] are not permitted to locate

in the business district, the congregations have the alternative of applying for a permit to operate only a few blocks from their current location." *Midrash* at 1228. The court noted that a small distance of travel does not place a substantial burden on the church and so upheld the City's ordinance under the substantial burden prong. *Midrash* at 1228. It was only the fact the court utilized an "assembly only" comparator which caused it to rule against the City under the Equal Terms analysis.

b. No individualized assessment

67. No substantial burden exists, regardless of whether the Elijah Group has demonstrated it satisfied the jurisdictional requirements of that cause of action. However, this court need not even get to the substantial burden analysis because no individualized assessment existed to trigger the analysis. RLUIPA specifically states the substantial burden prohibition only applies when "the substantial burden is imposed in the implementation of a land use regulation or system of land use regulations, under which a government makes, or has in place formal or informal procedures or practices that permit the government to make, *individualized assessments* of the proposed uses for the property involved." 42 U.S.C. 2000cc(a)(2)(c)(emphasis added). The failure to rezone property is not an individualized assessment.

68. No special use permit or conditional use permit is present in this case. No assessment of whether or not to individually grant zoning permission for the Elijah Group to hold church services on Bandera Road exists. The only fact which the Bank and Elijah Group are relying upon is the Bank's request to rezone the property from B-2 to B-3 (a zone it has never been). The Bank's request was prior to the Elijah Group purchase/lease and almost ten months before they moved in under a month-to-month lease.

69. While no Fifth Circuit case or Texas case has addressed this exact issue, other courts have. In *Greater Bible Way Temple of Jackson v. City of Jackson*, 733 N.W.2d 734 (Mich. 2007), the Michigan Supreme Court went through a detailed analysis of various federal cases and decided that a rezoning request is not an individualized assessment for RLUIPA purposes. The logic and reasoning adopted by the Michigan court is so well founded and articulate, the trial court mirrored the analysis in this case. Zoning, by definition, applies to the entire community, not just a particular property owner. *Id.* A request to rezone a particular piece of property may be differentiated on the basis that such a determination is narrowly confined to a particular piece of property; however, it still applies to the "entire community." *Id* at 744 fn. 12. That is, the "entire community" would be bound by the city's decision to rezone or not rezone the property. An "individualized assessment" is an assessment based on one's

particular circumstances, not one which affects the entire community. *Id*. at 743. The court, citing to the Ninth Circuit, noted that, "RLUIPA applies when the government may take into account the particular details of an applicant's proposed use of land when deciding to permit or deny that use." *Guru Nanak Sikh Society of Yuba City v. Sutter Co.*, 456 F.3d 978, 986 (9th Cir. 2006). Rezoning applications are not individualized assessments for RLUIPA purposes.

70. Rezoning the Bandera Road property to B-3 commercial was not only against the Master Plan from 2003, but raised several concerns from citizens and the P&Z Commission regarding what would happen if a church moved from that location. The rezoning request was not a request limited only to use by a religious organization, but would have applied to anyone who purchased the property afterwards. A change in zoning to B-3 would open the property to any B-3 use, not just church use, including refineries and topless strip clubs. Even Pastor Crain admitted that was a concern expressed during the Zoning Commission meetings. C.R. 431-32 (Crain Depo pp. 127-128). It is not an individualized assessment to deny a change in the zoning law to something it has never been before.

c. No other plead jurisdictional basis

71. After the U.S. Magistrate Judge issued her Report and Recommendation, the Elijah Group, for the very first time, raised a new issue in its Objections to the Report; specifically claiming that under the substantial burden

prong, interstate commerce jurisdiction was present. However, the Elijah Group's Complaints never pleaded interstate commerce as a jurisdictional trigger.

72. Further, Elijah Group's argument concerning the scope of the Commerce Clause would completely displace the 10th Amendment. Every zoning case would affect commerce under their reasoning. Every contract contingent on zoning would result in a different standard of review for churches than for all other users. Nothing in the City's Zoning Ordinance prevents the Bank from selling the property on Bandera Road to the Elijah Group. The Elijah Group can still utilize the property for B-2 uses. The Commerce Clause cannot be read so broadly as to include all contracts which cross state lines, especially where the contract recognizes the law at the time of execution prevented one specific use. To hold otherwise would subject RLUIPA to the same types of overreaching defects the U.S. Supreme Court determined existed in *City of Boerne v. Flores*, 521 U.S. 507 (U.S. 1997).

III. No TxRFRA Violation

73. The Elijah Group brings claims under the Texas Religious Freedom and Restoration Act ("TxRFRA"); however, it makes no additional allegations separate and apart from its "substantial burden" claims under RLUIPA. As already indicated, the City has not violated RLUIPA and therefore has not imposed a substantial burden upon the Elijah Group under TxRFRA.

74. In the Texas Supreme Court case of *Barr v. City of Sinton*, 295 S.W.3d 287 (Tex. 2009), the Court noted that "TRFRA does not immunize religious conduct from government regulation; it requires the government to tread carefully and lightly when its actions substantially burden religious exercise." *Id* at 289. The proper test under TxRFRA was to focus on the "degree to which a person's religious conduct is curtailed and the resulting impact on his religious expression." *Id* at 301. The Court noted the burden on religious exercise are "practical matters to be determined based on the specific circumstances of a particular case." *Id*. The Court noted "TRFRA, like its federal cousins, 'requires a case-by-case, fact-specific inquiry.'" *Id* at 302 (citing *Adkins)*.

75. In this case, the Elijah Group can conduct all religious activities except holding services at the Bandera Road location. The Elijah Group had the Culebra location to conduct services even after it filed this lawsuit but voluntarily relinquished it because the group did not want to sign a lease. Numerous other locations exist within the City (within the B-3 zones) to have a church and conduct services.[9] All of the B-3 locations meet the Elijah Group's location requirements.

[9] Unlike the City of Sinton, where the city manager testified that it was "a fair statement" that alternate locations were "probably ... minimal" and "possibly" "pretty close to nonexistent" the City of Leon Valley examined numerous alternative locations to ensure the Elijah Group had someplace to go other than the B-2 zone in order to conduct services. The City did not know at the time the Elijah Group already had a location. The fact that ten percent of the entire City is zoned to allow church use is not a significant restriction given the small size of the City and its location to the City of San Antonio. Numerous locations are noted in the record which allow the Elijah Group to locate and conduct services as they choose. Additionally, relatively speaking,

Even though the Elijah Group is spending $1.3 Million on the Bandera Road location (which it knew was not zoned for church assembly use prior to ever negotiating with the Bank) it felt the alternative locations were too expensive "plain and simple." Expense alone is not sufficient to impose a substantial burden. The City's zoning regulations do not "truly pressure" the Elijah Group to "modify its religious behavior" by any means. The regulations simply require the Elijah Group to go a few blocks outside the Retail Corridor for services. The Group can still remain in the Retail Corridor for all other activities (for which the City receives no taxes). Due to the denial of the rezoning the Elijah Group can walk away from the sale and not be burdened with a mortgage. No substantial burden exists upon the Elijah Group; although a significant financial impact does occur for the Bank.

GOALS - CONCLUSION

76. The Elijah Group, Bank and Amici have aligned goals in asking for this Court to interpret RLUIPA and TxRFRA as outlined in their briefs. The Bank has the objective of solidifying a $1.3 Million dollar purchase instead of a $575,000 one from a non-religious purchaser. The Amici, religious assistance groups, desire to have an interpretation that allows churches to locate anywhere they wish within a City, regardless of the planning and categorizing efforts of the

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adding B-2 to the area of available locations does not increase the land mass to a large extent. It basically only increases the mass by one street, i.e., Bandera Road.

community. If a Taco Cabana goes forth, so shall a mega church. The Elijah Group simply wants to be exempted from all regulations entirely.[10]

77. The purpose of RLUIPA and TxRFRA is NOT to immunize religious organizations from reasonable city regulations. The City of Leon Valley has a focused and supported regulatory purpose in keeping retail uses (and retail similar uses) in the Bandera Road Corridor and keeping non-retail uses out. No exceptions have been granted and the zoning distinctions are directly tied to the City's regulatory purpose. No unequal terms have been extended to non-religious assemblies. In fact, several non-religious assemblies noted cannot enter either B-2 or B-3 without a SUP, while the Elijah Group can enter any B-3 as a matter of right. The Elijah Group, especially considering its own conduct and decisions, has not suffered any substantial burden under First Amendment jurisprudence. As a result, the trial court properly granted the City's Motion for Summary Judgment and denied the Elijah Group's summary judgment motion. Its rulings should be upheld.

[10] While more of an aside to the primary arguments here, the Elijah Group's attempted assertions for RLUIPA and TxRFRA at the trial court illustrate their desire for complete immunity. They attempted to utilize RLUIPA, TxRFRA and the First Amendment to justify not abiding by the City's Fire Code or Building Codes (which are clearly not a land use regulation). It subjected its congregation to unsafe conditions by not having a monitored fire system or required sprinkler system, then attempted to utilize RLUIPA and TxRFRA as an excuse. After the U.S. District Court issued an order prohibiting services pending Fire Code compliance, Pastor Crain and the Elijah Group held services anyway (even in spite of representations made by its attorney). C.R. at 100. When the Fire Marshal appeared and investigated, the Elijah Group felt it was a violation of their First Amendment rights to have him there in full uniform (which included an authorized fire arm).

PRAYER

78. Wherefore, premises considered, the Appellee requests this Court affirm the trial court's rulings in favor of the City, dismissing all of Appellant's causes of action, and for such further relief, in law and in equity, the City may justly show it is entitled.

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CERTIFICATE OF SERVICE

Pursuant to Fed. R. App. P. 25(d), I hereby certify that service of *Appellee City of Leon Valley, Texas' Brief* was made on July 9, 2010 to the following counsel for parties to the appeal by means of the Court's CM/ECF system:

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Dated: July 9, 2010