IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

CASE NO. 04-15898-BB

PRIMERA IGLESIA BAUTISTA HISPANA OF BOCA RATON, INC., et al.,

Appellants,

vs.

BROWARD COUNTY, FLORIDA,

Appellee.

On Appeal From the United States District Court
Southern District of Florida

District Court Docket No. 01-6530-CIV-MARTINEZ

BROWARD COUNTY'S ANSWER BRIEF

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PRIMERA IGLESIA, et al. v. BROWARD COUNTY, FLORIDA

CASE NO. 04-15898-BB

CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

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STATEMENT REGARDING ORAL ARGUMENT

This zoning case involving the Religious Land Use and Institutionalized Persons Act ("RLUIPA") presents no novel factual or legal issues. Since this Court has recently issued two extensive published opinions interpreting RLUIPA, *see Konikov v. Orange County*, - - - F.3d - - -, 2005 WL 1313683 (11th Cir. June 3, 2005); *Midrash Sephardi, Inc. v. Town of Surfside*, 366 F.3d 1214, 1232 (11th Cir. 2004), Broward County does not believe oral argument will materially assist the Court in resolving the issues in this matter.

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STATEMENT OF JURISDICTION

Broward County agrees this Court has jurisdiction to review the District Court's Final Judgment pursuant to 28 U.S.C. §1291.

STATEMENT OF THE ISSUES

I. WHETHER THE DISTRICT COURT COMMITTED REVERSIBLE ERROR IN DISMISSING THE CHURCH'S §1983 CONSTITUTIONAL CLAIMS, WHERE RLUIPA PROVIDES FULL STATUTORY RELIEF FOR ANY COGNIZABLE INJURIES ARISING FROM THE COUNTY'S APPLICATION OF ITS ZONING CODE.

II. WHETHER THE DISTRICT COURT COMMITTED CLEAR ERROR BY FINDING THAT THE A-1 DISTANCE SEPARATION REQUIREMENT WAS NOT APPLIED IN A MANNER THAT TREATED THE CHURCH ON LESS THAN EQUAL TERMS WITH THE SCHOOL, IN VIOLATION OF RLUIPA.

STATEMENT OF THE CASE

A. Course of Proceedings Below.

Primera Iglesia Bautista Hispana of Boca Raton, Inc. (the "Church") and Augusto and David Pratts, the Church's Pastor and Director, respectively, filed a Complaint against Broward County (the "County"), contending the County's enforcement of a zoning provision precluding the Church from using its property as a place of worship within 1,000 feet of non-residential, non-agricultural uses (the "A-1 distance separation requirement") violated their constitutional and statutory rights under 42 U.S.C. § 1983, the Religious Land Use and Institutionalized Persons Act ("RLUIPA"), 42 U.S.C. § 2000cc et seq., and Florida's Religious Freedom Restoration Act ("RFRA"), § 761.03 et seq., Florida Statutes. (A 1, 2, 3)[1] (Doc 1, 97). The County counter-claimed, seeking an injunction prohibiting the Church from violating the A-1 distance separation requirement. (Doc 45-Pg 11).

The District Court dismissed the Church's § 1983 claims, as well as the Pastor's and Director's § 1983, RLUIPA and RFRA claims, for lack of standing. (Doc 218) (Doc 262- Pg 14, 15) (Doc 263-Pg 1). Following a bench trial, the District Court entered final judgment in the County's favor on the Church's RLUIPA and

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[1] The pertinent provisions of 42 U.S.C. § 1983, RLUIPA and RFRA are included in the Addendum to the County's Answer Brief, which will be referred to as "A".

RFRA claims, and issued an injunction permanently enjoining the Church from violating the distance separation requirement. (Doc 262- Pg 26, 27) (Doc 263- Pg 1, 2).

The Church appealed, challenging the dismissal of its § 1983 constitutional claims and the entry of final judgment in the County's favor with regard to the RLUIPA claim.[2] (Initial Brief - Pg 2).

B. <u>Statement of the Facts</u>.

1. The Distance Separation Requirement.

Chapter 39 of the Broward County Code of Ordinances (the "Zoning Code") establishes a comprehensive zoning scheme, dividing the County's unincorporated areas into districts and setting forth the restrictions that apply to each district.[3] (A4,

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[2] The Church does not appeal the final judgment entered in favor of Broward County on the RFRA claim, nor have the Pastor and Director appealed the dismissal of their claims for lack of standing.

In response to the Church's Notice of Appeal, Broward County filed a Notice of Cross-Appeal for the limited purpose of challenging the constitutionality of RLUIPA's and RFRA's "substantial burden provisions." *See* 42 U.S.C. §2000cc(a)(1); § 761.03, Fla. Stat. Since those provisions are not implicated in the Church's appeal, the County abandons its cross-appeal. (Doc 267).

[3] At trial, the District Court took judicial notice of the Zoning Code. (Doc 270 - Pg 6).

§ 39-2 & Art. XIV *et seq.*) (Doc 271 - Pg 79). For properties in the "Agricultural Estate A-1 District" (the "A-1 district"), such as the property at issue in this case, the Zoning Code permits, *inter alia,* single-family homes, nonprofit neighborhood social and recreational facilities, community residential facilities, places of worship and accessory schools and day care centers, crop and plant raising, and the breeding, raising and keeping of livestock and poultry. (A4, §§ 39-4, 39-245(5), 39-249) (Doc 271- Pg 82).

During the 1980's and 1990's, the influx of high density non-residential and non-agricultural uses in the A-1 District led to the erosion of the agricultural and residential character of that area. (Doc 271 - Pg 110-11, 119). To prevent further deterioration of the agricultural and residential character of the A-1 district, Broward County, in July 1997, enacted a zoning provision requiring all non-residential, non-agricultural uses, including places of worship, to be separated by at least 1,000 feet from other non-residential, non-agricultural uses (the "A-1 distance separation requirement").[4] (A4, § 39-245(9)(a))(Doc 271 - Pg 84, 85, 110, 111, 119) (Doc 275-

[4] Prior to its enactment, the A-1 distance separation requirement was reviewed by the Local Planning Agency (the "LPA") which, pursuant to Florida law, is responsible for determining whether proposed zoning provisions are consistent with the portion of the Broward County Comprehensive Plan (the "Comprehensive Plan") setting forth the long-range development plan for Broward County's unincorporated areas. (Doc 271 - Pg 82, 83, 86, 112, 113, 142, 143). The LPA determined the distance separation requirement "was not

Pl.'s Ex. 2, Def.'s Ex. T).

2. The Church's Property.

In December 1997, approximately five months after the distance separation requirement went into effect, the Church purchased a .936-acre parcel of land (the "property") in the A-1 district known as Hillsboro Ranches, which is a 99-acre residential and agricultural community consisting of plant nurseries, an equestrian farm and single family homes ranging in size from one to five acres. (Doc 270 - Pg 53) (Doc 271- Pg 112, 183, 184, 185) (Doc 275 - Def.'s Ex. T). The "Statutory Warranty Deed" conveying the property to the Church expressly states the property is subject to "[z]oning ordinances and other restrictions and prohibitions imposed by applicable governmental authorities," including the A-1 distance separation requirement. (Doc 275 - Def.'s Ex. WW).

The Church purchased the property with the intention of converting the existing single-family residence into a place of worship. (Doc 270 - Pg 53). The property, however, is located within 1,000 feet of other non-residential, non-agricultural uses, including the North Broward Preparatory School (the "School"). Unlike the Church, the School is zoned "I-1, Institutional and Educational District" (the "I-1 district), which does not impose any distance separation requirements on

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inconsistent" with the Comprehensive Plan. (Doc 271- Pg 112, 113).

institutional or educational facilities. (Doc 250 - Pg 9, ¶ M) (Doc 271 - Pg 151) (Doc 275 - Def.'s Ex. QQ, pg 2, ¶ 7).

3. The Church's Variance Requests.

In furtherance of its desire to use the property as a place of worship, the Church applied to the Broward County Board of Adjustment[5] for a variance from the A-1 distance separation requirement. (Doc 250 - Pg 11, ¶¶ U). County staff reviewed the variance application and recommended that it be denied because the A-1 distance separation requirement was necessary to maintain and protect the agricultural character of the A-1 district, the Church created its own hardship, and the criteria necessary to justify the issuance of a variance had not been satisfied. (Doc 250 - Pg 11, ¶¶ V) (A4, § 39-40). Consistent with staff's recommendation, the Board of Adjustment denied the Church's variance request after conducting a public hearing in June 1998. (Doc 250 - Pg 11, ¶¶ W) (Doc 270 - pg 58).

Even though the Church failed to obtain a waiver of the distance separation requirement, and even though no certificate of use permitting the property to be operated for any purpose had been issued, the Church proceeded to use the property for church-related activities, including organized worship services. (Doc 275 - Def.'s

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[5] The Board of Adjustment has sole authority to grant or deny a request for a variance from the A-1distance separation requirement. (Doc 271 - Pg 116).

Exs. R, Z) (Doc 270 - Pg 73-77).[6] Nearby residents complained to County code enforcement officials about the Church's use of its property as a place of worship and, in response to those complaints, code enforcement officials investigated the property. (Doc 271 - Pg 27-29) (Doc 275 - Pl.'s Ex. 18). During the investigation, the Church admitted it had used, and was using, the property as a place of worship. (Doc 275 - Def.'s Exs. Z) (Doc 271 - Pg 56). Based on that admission, the County cited the Church for "illegally conducting church services (by admission)" in a residential structure, in violation of the A-1 distance separation requirement. (Doc 275 - Pl.'s Ex. 26) (Doc 271 - Pg 56).

A hearing on the citation was held before the Broward County Code Enforcement Board in October 1999, at which the Church again admitted it was using the property for church services in violation of the Zoning Code. (Doc. 271 - Pg 56). As a result, the Code Enforcement Board issued an Order finding the Church guilty of violating the Zoning Code and directing the Church to cease using the property as a place of worship in violation of the A-1 distance separation. (Doc 275 - Def.'s Ex.

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[6] In connection with using the property as a place of worship, the Church applied to the Property Appraiser's Office for a religious ad valorem property taxation exemption. (Doc 275 - Def.'s Ex. Q). The Property Appraiser's Office granted the application based on the Church's representation that the property was being used exclusively for "church services." (Doc 275 - Def.'s Exs. Q, R) (Doc. 272 - Pg 55 - 59). As a result of that exemption, the Church receives a $7,000 annual tax-break. (Doc 270 - Pg 76).

FF).

Thereafter, in December 1999, the Church submitted another application to the Board of Adjustment for a variance from the A-1 distance separation requirement. (Doc 270 - Pg 63-65). This time around, County staff changed its prior position and recommended approval of the variance request on the basis that the Church had developed a site plan designed to mitigate possible negative effects on the surrounding neighborhood[7], the operation of a church at the property would not negatively impact traffic in the area, and the Church's hardship was not self-created, since "new evidence" showed that the Church, at the time of purchasing the property, was unaware of the A-1 distance separation requirement. (Doc 275- Pl.'s Ex. 51, Def.'s Exs. H, I) (Doc 270 - Pg 88-89).

The Board of Adjustment, after conducting a public hearing in January 2000, rejected staff's recommendation and denied the variance request on the basis that the granting of the variance would not be in harmony with the community or the general intent or purpose of the Code. (Doc 250 - Pg 12-13, ¶¶ DD, EE) (Doc 271 - Pg 76)

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[7] Pursuant to the proposed site plan, the Church agreed that, in lieu of putting parking at the rear of the property, it would install an "impenetrable landscape buffer" separating the property from the adjacent residential properties. The Church also agreed it would not use the property for daycare activities or weekend school activities, and it would only conduct worship services on the weekends, Bible study on Wednesday evenings, and special ceremonies, such as weddings and funerals, as necessary. (Doc 275 - Pl.'s Ex. 51

(A4, § 39-40). The Board of Adjustment also determined the increase in traffic resulting from the operation of a church at the property would be injurious to the area involved and detrimental to the public welfare. (Doc 250 - Pg 12-13, ¶¶ EE) (A4, §39-40).

4. Procedural History.

The Church did not appeal the Board of Adjustment's denial of the variance to the state circuit court, nor did it seek to have the property re-zoned at any time. (Doc 271 - Pg 188-89). The Church, instead, continued to use the property for church-related services, and the County again cited the Church for violating the A-1 distance separation requirement. (Doc 250, Pg 13, ¶¶ FF, GG). After receiving that latest citation, the Church and the Church's Pastor and Director sued the County in federal district court, claiming the County's application and enforcement of the A-1 distance separation requirement violated their constitutional and statutory rights under § 1983, RLUIPA and RFRA, including their rights to equal protection, due process, free exercise, and freedom of expression. (Doc 1, 97).

Prior to a bench trial, the District Court dismissed the Pastor's and Director's § 1983, RLUIPA and RFRA claims for lack of standing. (Doc 218). The Church's § 1983, RLUIPA and RFRA claims proceeded to trial, at which the Church argued the County applied the A-1 district distance separation requirement in a manner that

treated the Church on less than equal terms with several other entities, including the School. (Doc 270 - Pg 39). The Church also contended Broward County's enforcement of the A-1 distance separation requirement, which prevented the Church from using its property for religious activities, substantially burdened the Church's rights to free exercise, due process, and freedom of expression . (Doc 272- Pg 87-88).

Following trial, the District Court *sua sponte* dismissed the Church's § 1983 claims for lack of standing on the ground that the Church, as a corporation, "was not a 'citizen' entitled to the privileges and immunities secured by federal law for purposes of § 1983." (Doc 262- Pg 14-15) (Doc 263 - Pg 1). With respect to the Church's RLUIPA and RFRA claims, the District Court found that the Church did not apply the A-1 distance separation requirement in a manner that treated the Church on less than equal terms than the School, given that the 10-acre portion of School remaining in unincorporated Broward County is not located in the A-1 district, but is instead located in the I-1 district, which does not impose any distance separation requirements on institutional or educational facilities. (Doc 262 - Pg 21-22).

The District Court also determined the Church's free exercise of religion had not been substantially burdened by the A-1 distance separation requirement. In reaching that decision, the District Court noted the Church was responsible for creating its own hardship, given that the A-1 distance separation requirement was

already in effect when the Church purchased the property. (Doc 262 - Pg 17-20). Although the Church claimed it was unaware of the distance separation requirement at the time it purchased the property, the Court ruled that "ignorance of the law is no excuse." (Doc 262 - Pg 20). Based on these findings, the District Court entered final judgment in Broward County's favor with respect to the Church's RLUIPA and RFRA claims, and permanently enjoined the Church from using its property as a place of worship in violation of the A-1 distance separation requirement. (Doc 262 - Pg 26-27) (Doc 263 - Pg 1-2). This appeal ensued. (Doc 266).

3. <u>Standard of Review</u>.

The District Court's bench trial factual findings are reviewed for clear error, while its conclusions of law are reviewed *de novo.* Fed.R.Civ.P. 52(a); *Anderson v. City of Bessemer City*, 470 U.S. 564, 573, 105 S. Ct. 1504, 1511 (1985); *O'Ferrell v. United States*, 253 F.3d 1257, 1265 (11th Cir. 2001).

A finding is not clearly erroneous unless the reviewing court, after examining the record in its entirety, is "left with a definite and firm conviction that a mistake has been committed." *Anderson*, 470 U.S. at 573, 105 S. Ct. at 1511 (citation and internal quotation marks omitted). Pursuant to this standard, if the District Court's findings are plausible, those findings may not be reversed, even if the reviewing court would have decided the case differently. *United States v. Englehard Corp.*, 126 F.3d 1302,

1305 (11th Cir. 1997) (citing *Anderson*, 470 U.S. at 574, 105 S. Ct. at 1511). Along these same lines, the District Court's witness credibility determinations are entitled to "substantial deference." *EEOC v. Joe's Stone Crab, Inc.*, 220 F.3d 1263, 1285-86 (11th Cir. 2000) (citation omitted).

SUMMARY OF ARGUMENT

The Church raises two arguments on appeal, neither of which has merit. This Court should therefore affirm.

The first argument raised by the Church is that the District Court committed reversible error by *sua sponte* dismissing the Church's § 1983 constitutional claims for lack of standing. Assuming *arguendo* the Church had standing to assert violations of constitutional rights under §1983, the dismissal of the Church's constitutional claims was proper because RLUIPA provides full statutory relief for any cognizable injuries arising from Broward County's enforcement of the A-1 distance separation requirement. Both the United States Supreme Court and this Court have repeatedly held that where, as here, a case may be decided on either statutory or constitutional grounds, only the statutory issues should be adjudicated.

The second argument raised by the Church is that the District Court committed clear error by finding the A-1 distance separation requirement was not applied in a manner that treated the Church on less than equal terms with the School in violation

of RLUIPA, which prohibits the government from treating religious assemblies or institutions less favorably than "nonreligious" assemblies or institutions. This contention is unavailing. Not only did the Church fail to show the School was "non-religious" for purposes of RLUIPA, even if it had satisfied that requirement, the evidence demonstrates that, because the Church never sought to re-zone its property from A-1 to I-1, the Church was not treated on less than equal terms than the School.

ARGUMENT

I. THE DISTRICT COURT DID NOT COMMIT REVERSIBLE ERROR IN DISMISSING THE CHURCH'S § 1983 CONSTITUTIONAL CLAIMS, WHERE RLUIPA PROVIDES FULL STATUTORY RELIEF FOR ANY COGNIZABLE INJURIES ARISING FROM THE COUNTY'S APPLICATION OF THE ZONING CODE.

The District Court *sua sponte* dismissed the Church's § 1983 claims alleging the County's application and enforcement of the A-1 distance separation requirement violated its First, Fifth and Fourteenth Amendment rights to equal protection, due process, free exercise, and freedom of expression. That dismissal, which was based on the District Court's determination that the Church, as a corporation, lacked standing to sue under § 1983, should be affirmed, albeit on different grounds. (Doc. 262 - Pg 14-15) (Doc. 263 - Pg 1).

Section 1983 permits "any citizen of the United States or other person" who,

under color of state law, has suffered a deprivation of constitutional rights, privileges or immunities to seek redress in "an action at law, suit in equity, or other proper proceeding." 42 U.S.C. § 1983. While, as the District Court noted, a corporation is not a citizen within the meaning of the Privileges and Immunities Clause of the Fourteenth Amendment, a corporation is a "person" within the meaning of the Equal Protection and Due Process Clauses of the Fourteenth Amendment for purposes of bringing suit under § 1983. *Grosjean v. American Press Co.*, 297 U.S. 233, 244, 56 S. Ct. 444, 446-47 (1936) (citations omitted).

The freedoms enshrined in the First and Fifth Amendments, including the rights of free exercise, free expression and due process, fall within the scope of the Due Process Clause, but the United States Supreme Court has held that corporations do not necessarily have the full measure of rights that individuals enjoy under the First and Fifth Amendments. *First Nat'l Bank v. Bellotti*, 435 U.S. 765, 778 n.14, 779, 98 S. Ct. 1407, 1416 n. 14, 1417 (1978). Indeed, as explained in *Bellotti*, "purely personal" constitutional guarantees designed solely for the protection of individuals are unavailable to corporations. *Id.*, 435 U.S at 778 n.14, 98 S. Ct. at 1416 n. 14. Whether a particular constitutional provision is "purely personal" and unavailable to corporations depends on the "nature, history, and purpose" of that particular constitutional provision. *Id.*

Thus, the question of whether the Church may assert rights to free exercise, free expression and due process depends on whether those rights are "purely personal" which, in turn, depends on the historic function of those rights. *Id.*; *Church of Scientology of California v. Cazares*, 638 F. 2d 1272, 1280 n. 7 (5th Cir. 1981) (whether a corporation has a right of free exercise depends on the nature, history and purpose of the free exercise clause).[8] That question need not be answered by this Court because, assuming *arguendo* the Church did have standing to sue under § 1983 for violations of First, Fifth and Fourteenth Amendment rights, the District Court's dismissal of the Church's constitutional claims was appropriate in light of the well-established rule that where, as here, both constitutional and statutory claims arising from the same set of operative facts are asserted, only the statutory issues should be decided. *Ashwander v. Tenn. Valley Auth.*, 297 U.S. 288, 347, 56 S. Ct. 466, 483 (1936) (Brandeis, J., concurring) ("[I]f a case can be decided on either of two grounds, one involving a constitutional question, the other a question of statutory construction or general law, the Court will decide only the latter"). This rule emanates from the principle that courts "ought not to pass on questions of constitutionality ... unless such adjudication is unavoidable." *Spector Motor Serv.,*

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[8] In *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc), this Court adopted as binding precedent all decisions of the former Fifth Circuit handed down prior to October 1, 1981.

Inc. v. McLaughlin, 323 U.S. 101, 105, 65 S. Ct. 152, 154 (1944) (emphasis supplied).

This Court recently applied this principle in *Konikov v. Orange County*, - - - F.3d - - -, 2005 WL 1313683, at * 1 n.1 (11th Cir. June 3, 2005), where, like the Church here, a rabbi alleged a Florida county's application of its zoning code prohibited him from using his property for religious purposes, in violation of his statutory rights under RLUIPA and RFRA. In addition to bringing those statutory claims under RLUIPA and RFRA, the rabbi also contended the county's zoning actions violated his constitutional rights of due process, equal protection, free exercise, and free speech and assembly. *Id.* at *2. The District Court entered summary judgment in the county's favor on all of the rabbi's statutory and constitutional claims. *Id.*

On appeal, this Court reversed the grant of summary judgment with regard to the RLUIPA and due process claims, but declined to reach the rabbi's equal protection, free exercise, freedom of speech and freedom of assembly claims, all of which relied on the same theories underlying the RLUIPA claim. *Id.* at *1 n.1. The Court determined it was unnecessary to adjudicate those various constitutional claims because full statutory relief was available to the rabbi under RLUIPA, which provides greater protection for religious exercise in the land use context beyond what is

constitutionally required. *Id.* at *1 n.1; *Civil Liberties for Urban Believers v. City of Chicago*, 342 F. 3d 752, 760 (7th Cir. 2003) (in enacting RLUIPA, Congress expanded the concept of religious exercise contemplated by the Constitution).

The same logic applies here. Like its RLUIPA claim, all of the Church's §1983 constitutional claims, including its due process claim, are predicated on the theory that the County's application and enforcement of the A-1 distance separation requirement has prevented the Church from using its property for religious expression. (Doc 97). Those constitutional claims need not, and should not, be adjudicated because RLUIPA provides a federal statutory mechanism under which full relief is available for any cognizable injuries arising from the application and enforcement of the A-1 distance separation requirement. *Konikov*, 2005 WL 1313683, at *1 n.1.

Since, as mentioned, RLUIPA is more protective of religious freedom than the Constitution, if the Church's claims cannot succeed under RLUIPA, they surely cannot succeed under the Constitution. Conversely, if the Church's claims are successful under RLUIPA, there is no need to consider whether the Church will also succeed under the lower level of scrutiny afforded by the Constitution. This is especially so given the courts' overarching obligation to avoid the resolution of constitutional questions to the extent possible. *Communist Party of Ind. v. Whitcomb*,

414 U.S. 441, 452, 94 S. Ct. 656 (1974) ("The appropriate exercise of judicial power requires that important constitutional issues not be decided unnecessarily where narrower grounds exist for according relief.").

Simply stated, since this case may be resolved purely on statutory grounds, no adjudication of the Church's constitutional claims is necessary. *See Dep't of Commerce v. United State House of Representatives*, 525 U.S. 316, 343-44, 119 S. Ct. 765, 779 (1999) (finding that the proposed used of statistical sampling during the 2000 decennial censes violated the Census Act and declining to reach the question of whether the challenged method of statistical sampling also violated the Census Clause of the Constitution); *New York City Transit Auth. v. Beazer*, 440 U.S. 568, 582-83, 99 S. Ct. 1355 (1979) (it is incumbent on the lower courts to consider whether statutory grounds might be dispositive before deciding the constitutional issues); *White v. State of Ala.,* 74 F.3d 1058, 1071 n. 42 (11th Cir. 1996) (reversing the district court's judgment on that ground that it violated the Voting Rights Act, and declining to reach the question of whether the judgment also violated the Equal Protection Clause); *United States v. $38,000.00 in U.S. Currency*, 816 F.2d 1538, 1547 n. 21 (11th Cir. 1987) (reversing on the basis that the government's forfeiture complaint violated the statutory rules of judicial forfeiture, and declining to reach the Fourth Amendment challenge to the same complaint, even though the statutory

ground was not argued in the initial brief).

Considered in this context, the District Court's dismissal of the Church's §1983 constitutional claims should be affirmed. *See Bonanni Ship Supply, Inc. v. United States*, 959 F.2d 1558, 1561 (11th Cir. 1992) (a decision may be affirmed on grounds other than those relied upon by the district court).

II. THE DISTRICT COURT DID NOT COMMIT CLEAR ERROR BY FINDING THE A-1 DISTANCE SEPARATION REQUIREMENT WAS NOT APPLIED IN A MANNER THAT TREATED THE CHURCH ON LESS THAN EQUAL TERMS WITH THE SCHOOL, IN VIOLATION OF RLUIPA.

The Church contends the District Court committed clear error by finding the A-1 distance separation requirement was not applied in a manner that treated the Church on less than equal terms with the School, in violation RLUIPA's equal terms provision. This contention is unavailing. Not only did the Church fail to establish the School was a "non-religious" assembly for purposes of RLUIPA, even if the Church had met that requirement, the evidence still shows there was no equal terms violation because the Church and the School were not "similarly situated" religious and secular assemblies subject to comparison under RLUIPA.

A. RLUIPA's Equal Terms Provision Is Inapplicable Because There Is No Evidence Demonstrating The School Is A "Nonreligious" Assembly or Institution.

RLUIPA's equal terms provision provides that "[n]o government shall impose

or implement a land use regulation in a manner that treats a religious assembly or institution on less than equal terms with a nonreligious assembly or institution." 42 U.S.C. § 2000cc(b)(1) (emphasis added); *Midrash Sephardi, Inc. v. Town of Surfside*, 366 F.3d 1214, 1232 (11th Cir. 2004) (noting that RLUIPA's equal terms provision was designed to ensure that religious and secular entities are treated alike); 146 Cong. Rec. S7774-01, *S7774 (2000) (RLUIPA's equal terms provision requires the equal treatment of religious and secular assemblies or institutions).

At trial, the Church failed to introduce any evidence showing the School was "nonreligious" in nature. *See* 42 U.S.C. § 2000cc-2(b) (a RLUIPA plaintiff has the initial burden of showing a *prima facie* violation of the equal terms provision). (Doc 271 - Pg 159-198). In the absence of any evidence establishing that essential threshold requirement, the Church's unequal treatment claim fails as a matter of law, and Broward County's treatment of the School, as compared to that of the Church, need not be considered. *Konikov*, 2005 WL 1313683 at *7.

B. The County's Approval Of The School's Request To Re-Zone Its Property From A-1 to I-1 Did Not Result In An Equal Terms Violation Because, Unlike the School, the Church Never Sought To Re-Zone Its Property From A-1 to I-1.

Even if the Church had shown the School was "nonreligious" for purposes of RLUIPA, the evidence demonstrates the Church and the School were not treated

unequally. Section 39-249 of the Zoning Code, which governs the A-1 district, provides that "places of worship and accessory schools and day care centers" are permitted as of right in the A-1 district, as long as they are located at least 1,000 from non-residential, non-agricultural uses. (A4, §§ 39-245(9), 39-249). On the other hand, schools not serving as accessory uses to places of worship are not allowed as of right in the A-1 district. Thus, in terms of RLUIPA, the Zoning Code, on its face, treats the Church more favorably than nonreligious schools. Such preferential treatment certainly does not run afoul of RLUIPA's equal terms provision.

The A-1 distance separation requirement does not violate RLUIPA's equal terms provision, either.[9] Indeed, that requirement, which mandates that all non-residential, non-agricultural uses, regardless of who owns or operates the property, be separated by at least 1,000 feet, treats religious assemblies on equal terms with nonreligious assemblies. (A4, § 39-245(9)). Although the A-1 distance separation requirement does treat the Church on less than equal terms with residential and agricultural uses, nothing in RLUIPA compels the County to treat religious assemblies or institutions in the same manner as residential and agricultural uses.

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[9] The Church contends the A-1 distance separation requirement was never intended to apply to the 99-acre unincorporated area in which its property is located. That contention is repudiated by the trial testimony of the Broward County Zoning Official, who indicated that the distance separation requirement was intended to apply to all agriculturally-zoned areas. (Doc 271 - Pg 99-122).

Indeed, as the District Court explained, residential and agricultural uses do not qualify as "nonreligious assemblies or institutions" for purposes of comparison under RLUIPA. *See Midrash*, 366 F.3d at 1230-31 (an "assembly" is "a company of persons collected together in one place and usually for some common purpose," whereas an "institution" is "an established society or corporation: an establishment or foundation [especially] of a public character") (internal quotation marks and citations omitted).

Not only is the A-1 distance separation requirement facially neutral and generally applicable, there is no evidence showing the County applied that requirement in a manner that treated the Church on less than equal terms with the School. The School, like the Church, was originally zoned A-1, but in April 1997, three months before the enactment of the A-1 distance separation requirement, the County granted the School's request to re-zone its 50-plus acre property to the I-1 district which, as mentioned, does not impose any distance separation requirements on institutional or education facilities. (Doc 271 - Pg 162, 192-93) (Doc 275 - Def.'s Ex. QQ, pg 2, ¶ 7).

The School subsequently acquired over 17 acres of additional property, which was also re-zoned from A-1 to I-1. (Doc 271 - Pg 164-65). In 1998 and 2000, the School's land, with the exception of a 10-acre parcel, was annexed into the nearby

City of Coconut Creek, a municipality independent of the County, which does not have any distance separation requirements pertaining to non-residential, non-agricultural uses. (Doc. 271 - Pg 159, 193) (Doc 275 - Def.'s Ex. QQ, pg 2, ¶ 7) (Doc 250 - Pg 9, ¶ N). The 10-acre portion of the School's property remaining in unincorporated Broward County is zoned I-1.[10] (Doc 275- Def.'s Ex. QQ, pg 2, ¶ 7).

Unlike the School, the Church never sought to re-zone its property from A-1 to I-1. (Doc 271 - Pg 189). Instead, the Church only applied for and was denied a variance from the A-1 distance separation requirement. (Doc 271 - Pg 189). Because the Church never requested a re-zoning of its property from A-1 to I-1, and because there is no evidence showing the Church was prohibited from doing so, the Church has failed to establish it was treated less favorably than the School in violation of RLUIPA's equal terms provision.

Burns v. City of Des Peres, 534 F. 2d 103, 109 (8th Cir. 1976) is analogous. There, a property owner challenged a city's denial of his application to re-zone his property from the "A" to "B" district on the basis that such denial treated him on less

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[10] The Church contends the School's use of its land for a non-residential, non-agricultural purpose is inconsistent with the intent of the A-1 distance separation requirement to preserve and protect the agricultural and residential character of the A-1 District. (Initial Brief - Pg 24-31). Since the School is zoned I-1, not A-1, whether or not the School's land is used in manner that is consistent with the A-1 distance separation requirement is simply irrelevant.

than equal terms with nearby property owners who had either obtained variances from "A" district restrictions or re-zoned from the "A" to the "AA" district. The district court rejected the property owner's unequal treatment claim and entered judgment in favor of the city. On appeal, the Eighth Circuit affirmed, holding that the property owner failed to establish a cognizable unequal treatment claim because his request for a re-zoning from the "A" to the "B" district was not similarly situated to other properties that had obtained variances from "A" district restrictions or re-zoned from the "A" to the "AA" district. 534 F.2d at 108-109.

Here, as in *Burns*, no cognizable unequal treatment claim has been established because the Church's variance application and the School's re-zoning request are not "similarly situated" circumstances. *See E&T Realty v. Strickland,* 830 F.2d 1107, 1109 (11th Cir. 1987) (the different treatment of dissimilarly situated entities does not give rise to an unequal treatment claim).

The Church's attempt to analogize its variance request to the School's re-zoning request is completely unavailing because, as the Church's own expert witness admitted at trial, a variance and a re-zoning are completely different mechanisms under the Zoning Code. (Doc 271 - Pg 178, 188-89). Whereas a variance is the process by which a property owner seeks relief from a specific zoning requirement on the basis of "unnecessary hardship," a re-zoning is the process by which the entire

zoning classification of a parcel of property is sought to be changed for reasons other than hardship. (Doc. 271 - Pg 178, 188-89) (A.4, § 39-28).

In light of these differences, the requirements for a variance under the Zoning Code are completely separate and distinct from the requirements for a re-zoning. For example, a variance petition is heard and decided by the Broward County Board of Adjustment, which considers nine specific factors, including whether the alleged zoning hardship is self-created, whether there are unique and special circumstances applying to the property in question that do not apply to other properties in the same district, whether the application of the zoning provision at issue will deprive the owner of the reasonable use of the property, and whether the granting of a variance will be in harmony with the intent and purpose of the Code and will not be detrimental to the public welfare or the area involved. (A.4, §§ 39-4, 39-35, 39-36, 39-37, 39-38, 39-39, and 39-40, 39-42, 39-43). While a variance excuses the property owner from complying with a particular zoning requirement, it does not change the overall zoning category to which the property is assigned. (A.4, § 39-4) (Doc 271 - Pg 178, 188-89).

A re-zoning request, in contrast, is submitted to the Broward County Zoning Board, which considers factors different from those taken into account by the Board of Adjustment in variance proceedings. (A.4, §§ 39-24, 39-25, 39-26, 39-27, 39-28,

39-29). Such factors include whether a re-zoning is necessary to correct an error or ambiguity, whether there exist changed conditions making approval of the re-zoning request appropriate, whether the re-zoning request is consistent with the Broward County Comprehensive Plan, and whether a re-zoning will place an undue burden on existing infrastructure. (A.4, § 39-28). After considering these factors, the Zoning Board recommends approval or denial of the re-zoning request to the Broward County Board of Commissioners, which has final decision-making authority in re-zoning matters. (A.4, §§ 39-29, 39-30). If a re-zoning is approved, the re-zoned property becomes subject to the zoning restrictions and regulations applying to the newly assigned zoning category. (Doc. 271 - Pg 188-89).

Given the material differences between a variance and a re-zoning, there is simply no basis in law or fact to treat the Church and the School as "similarly situated" entities for purposes of comparison under RLUIPA's equal terms provision. *See Midrash*, 366 F.3d at 1232 (RLUIPA's equal terms provision, which codifies the *Smith-Lukumi* line of precedent, only requires a zoning law to treat "similarly situated secular and religious assemblies" equally); *id.* at 1231 (finding that, because private clubs and lodges were "similarly situated" to churches and synagogues, the Zoning Code's exclusion of churches and synagogues from the same district in which private clubs and businesses were permitted violated RLUIPA's equal terms provision);

Konikov, 2005 WL 1313683, at *8 (finding that because family daycare homes were "similarly situated" to religious organizations for purposes of RLUIPA, the differential treatment of those uses must satisfy strict scrutiny).

To hold otherwise would obliterate the distinction between variances and re-zonings and exempt the Church from complying with the County's land use regulations. Congress, in enacting RLUIPA, intended no such result. Indeed, as explained in the legislative history, RLUIPA does not "provide religious institutions with immunity from land use regulation, nor does it relieve religious institutions from applying for variances, special permits or exemptions, hardship approval, or other relief provisions in land use regulations, where available without discrimination or unfair delay." *See* 146 Cong. Rec. at *S7776.

CONCLUSION

The A-1 distance separation requirement, which was already in effect at the time the Church purchased its property, is facially neutral and was not applied in a manner that treated the Church on less than equal terms with the School or any other entity. The Church violated the A-1 distance separation requirement by using its property as a place of worship within 1,000 feet of non-residential, non-agricultural uses.

For the reasons stated above, the Final Judgment should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing was furnished by U.S. Mail to Deborah L. Martohue, Esq., Hayes & Martohue, P.A., 5959 Central Avenue, Suite 104, St. Petersburg, Florida 33710; Sidney Calloway, Esq. and Temple Kearns, Esq., Shutts & Bowen LLP, 200 East Broward Boulevard, Suite 2000, Fort Lauderdale, Florida 33301; David J. Glantz, Esq., Office of the Attorney General, 110 S.E. 6th Street, 10th Floor, Fort Lauderdale, Florida 33301; Lowell Sturgill, Esq., United States Department of Justice Civil Division, Federal Programs Branch, 950 Pennsylvania Avenue, N.W., Room 7241, Washington, DC 20530; Elliot B. Kula, Esq., Greenberg Traurig, P.A., 1221 Brickell Avenue, Miami, Florida 33131; Anthony R. Picarello, Jr., Esq. and Roman P. Storzer, Esq. The Becket Fund for Religious Liberty, 1350 Connecticut Avenue, N.W., Suite 605, Washington, D.C. 20036, on June 29, 2005.

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