No. 12-10940-BB

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

ISLAMIC CENTER OF NORTH FULTON,

Plaintiff-Appellant

v.

CITY OF ALPHARETTA, GEORGIA, *et al.*,

Defendants-Appellees

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE IN SUPPORT OF APPELLANT AND URGING VACATUR IN PART

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No. 12-10940-BB, *Islamic Center of North Fulton* v. *City of Alpharetta, Georgia, et al.*

CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1 and 11th Cir. R. 26.1-1, counsel for amicus curiae, the United States, files this Certificate of Interested Persons And Corporate Disclosure Statement. The following persons, law firms, associations, and corporation may have an interest in the outcome of this case:

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No. 12-10940-BB, *Islamic Center of North Fulton* v. *City of Alpharetta, Georgia, et al.*

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STATEMENT OF THE ISSUES

This Brief for the United States as Amicus Curiae is limited to the following issues:

1. Whether the district court applied an incorrect legal standard in granting summary judgment to the City of Alpharetta with respect to the Islamic Center of North Fulton's substantial burden claim under the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA), 42 U.S.C. 2000cc *et seq*.

2. Whether the district court applied an incorrect legal standard in granting summary judgment to the City on the Center's claim that the City discriminated against it on the basis of religion or religious denomination in violation of RLUIPA.

INTEREST OF THE UNITED STATES

This case requires this Court to interpret and apply the Religious Land Use and Institutionalized Persons Act of 2000, 42 U.S.C. 2000cc *et seq*. The Department of Justice is charged with enforcing RLUIPA, see 42 U.S.C. 2000cc-2(f), and therefore has a strong interest in how courts construe the statute. The United States has previously filed briefs in numerous RLUIPA cases in the courts of appeals involving land use decisions. See, *e.g.*, *Bethel World Outreach Ministries* v. *Montgomery Cnty. Council*, No. 11-2176 (4th Cir.); *Centro Familiar Cristiano Buenas Nuevas* v. *City of Yuma*, 651 F.3d 1163 (9th Cir. 2011); *Lighthouse Inst. for Evangelism, Inc.* v. *City of Long Branch*, 510 F.3d 253 (3d Cir. 2007), cert. denied, 553 U.S. 1065, 128 S. Ct. 2503 (2008); *Living Water Church of God* v. *Charter Township of Meridian*, 258 F. App'x 729 (6th Cir. 2007) (unpublished), cert. denied, 553 U.S. 1093, 128 S. Ct. 2503 (2008); *Westchester Day Sch.* v. *Village of Mamaroneck*, 504 F.3d 338 (2d Cir. 2007); *Guru Nanak Sikh Soc'y of Yuba City* v. *County of Sutter*, 456 F.3d 978 (9th Cir. 2006); *Saints Constantine & Helen Greek Orthodox Church, Inc.* v. *City of New Berlin*, 396 F.3d

895 (7th Cir. 2005); and *Midrash Sephardi, Inc.* v. *Town of Surfside*, 366 F.3d 1214 (11th Cir. 2004).

STATEMENT OF THE CASE

1. RLUIPA provides various statutory protections for religious exercise. Section 2(a)(1) of the Act states:

> No government shall impose or implement a land use regulation in a manner that imposes a substantial burden on the religious exercise of a person, including a religious assembly or institution, unless the government demonstrates that imposition of the burden on that person, assembly, or institution * * * is in furtherance of a compelling government interest [and] is the least restrictive means of furthering that compelling government interest.

42 U.S.C. 2000cc(a)(1). The statute defines "religious exercise" broadly to include "any exercise of religion, whether or not compelled by, or central to, a system of religious belief," and specifies that the "use, building, or conversion of real property for the purpose of religious exercise shall be considered to be religious exercise of the person or entity that uses or intends to use the property for that purpose." 42 U.S.C. 2000cc-5(7). RLUIPA also directs that it should be "construed in favor of a broad protection of religious exercise, to the maximum extent permitted by the terms of this chapter and the Constitution." 42 U.S.C. 2000cc-3(g).

This "substantial burden" provision applies when (1) the burden is imposed in a program that receives federal financial assistance; (2) the imposition or

removal of the burden affects interstate commerce; or (3) the burden is imposed in a system in which a government makes individualized assessments about how to apply a land use regulation. 42 U.S.C. 2000cc(a)(2)(A), (B), and (C).

Section 2(b) of RLUIPA contains nondiscrimination and nonexclusion provisions that prohibit governments from implementing a land use regulation in a manner that either (1) "treats a religious assembly or institution on less than equal terms with a nonreligious assembly or institution"; (2) "discriminates against any assembly or institution on the basis of religion or religious denomination"; or (3) "totally excludes religious assemblies from a jurisdiction" or "unreasonably limits religious assemblies, institutions, or structures within a jurisdiction." 42 U.S.C. 2000cc(b)(1)-(3).

RLUIPA provides a private cause of action, and authorizes the Attorney General to bring enforcement actions. See 42 U.S.C. 2000cc-2(a) and (f).

2. This case involves the Islamic Center of North Fulton and the City of Alpharetta, Georgia, where the Center is located. The Center wants to build a new mosque and a small fellowship hall, but the City has denied it permission to do so. The Center now has a 2500-square-foot worship facility and a residence for its imam. Doc. 163 at 2-3, 6 (Summary Judgment Opinion).[1] In the first 12 years of

[1] "Doc. __" refers to the number assigned to a document on the district court's docket sheet.

its existence, the Center's congregation grew from 25 to approximately 600 members. Doc. 163 at 6. The Center wants to replace its present worship facility with a 12,032-square-foot mosque and 1910-square-foot fellowship hall. Doc. 163 at 6. The Center needs these new buildings in order to have enough space for worship services, ritual washing before prayer, fast-breaking meals, a religious library, spiritual counseling, and recreation and youth activities. Doc. 163 at 22-23; Doc. 107-3 at 14-22 (Plaintiff's Statement of Material Facts). Additionally, the current facility does not face Mecca, so prayer services must be conducted in a corner of the main room. Doc. 163 at 22. The new mosque will face Mecca. Doc. 107-3 at 14-15.

When it purchased the property in 1998, the Center sought and obtained approval to use the house on the site as a mosque. Doc. 163 at 2-3. Later, in 2004, the Center sought and obtained approval to combine an adjacent property (which the Center had purchased) with the original site and to use the house on the newly purchased site as the imam's residence.[2] Doc. 163 at 3-4. In 2010, the Center sought permission to replace the house on the original site (which had been used as

[2] These approvals came from the Fulton County Board of Commissioners. Doc. 163 at 4-5. In 2005, the Center's property became part of the City of Alpharetta through annexation. Doc. 163 at 5.

a mosque since the Center purchased the property) with a new mosque and fellowship hall. Doc. 163 at 6.

The City's Community Development Department prepared a report that assessed the Center's application on a number of metrics. Doc. 163 at 6-7. That report did not recommend approval or denial of the application, but it was generally favorable. Doc. 163 at 6-7. It concluded that "there are comparable, similarly situated facilities to the applicant's proposal." Doc. 96-3 at 10. The report determined, among other things, that the proposed mosque would not cause traffic problems; would not be out of character in a residential area; would not create any new land use precedent; and would comply with parking regulations. Doc. 96-3 at 8-10; Doc. 163 at 8. After this report was prepared, the Center's application came before the City's Planning Commission. Doc. 163 at 9. The Commission heard from 32 members of the community supporting the Center's application, and 19 opposing it. Doc. 163 at 9. Two weeks later, the Commission recommended denial of the application and, that same day, the City Council denied it. Doc. 163 at 9-10.

3. The Center sued in federal district court. Doc. 163 at 1-2. It asserted violations of RLUIPA, and also of the United States Constitution and State law. Doc. 163 at 2. The Center alleged, *inter alia*, violations of RLUIPA's "substantial burden" provision (Section 2(a)(1)) and nondiscrimination provision (Section

2(b)(2)). Doc. 163 at 12. The City claimed that the Center previously agreed not to expand its facilities or build new ones, thereby waiving its right to challenge the denial of its application. Doc. 163 at 12-13. It also contested the RLUIPA claims and other claims on the merits. Doc. 163 at 12-13. Both parties sought summary judgment. Doc. 163 at 1.

The district court rejected the City's waiver argument, finding no evidence that the Center agreed not to seek permission to expand its facilities. Doc. 163 at 13-17. But the court accepted the City's merits arguments, and accordingly granted the City's motion for summary judgment. Doc. 163 at 18-47.

The district court first determined that the City's denial of the Center's application did not amount to a substantial burden on its religious exercise. Doc. 163 at 18-32. The court recounted the numerous ways in which the Islamic Center alleged that the City's refusal to allow it to build new facilities burdened its religious exercise and that of its members. Doc. 163 at 22-24. It conceded that the City's denial of the Islamic Center's application caused the Center "inconveniences and difficulties." Doc. 163 at 26. It ruled, however, that these inconveniences and difficulties do not amount to a substantial burden, because "there is no contention that worshipers have been forced or coerced into abandoning, modifying or violating their religious beliefs or precepts." Doc. 163 at 26-27. The court further concluded that some of the burdens the Center

identified "are largely self-imposed," because they existed when the Center bought the property. Doc. 163 at 27.[3]

The district court also rejected the Center's RLUIPA discrimination claim. Doc. 163 at 34-39. It held that to prevail on this claim the Center must show that it has been treated less well than another religious assembly or institution that is "prima facie identical in all relevant respects." Doc. 163 at 35 (citation omitted). It concluded that the Center had not proffered evidence sufficient to meet this exacting standard. Doc. 163 at 35-39. The court acknowledged the Center's submission of a City planning staff report that concluded that "the Islamic Center's proposed development plan falls within the mid-range of comparably situated religious facilities [and] [w]hen the size, density and parking are compared, the Islamic Center is neither at the high end nor the low end of any measure." Doc. 163 at 35-36 (citation omitted). It also acknowledged that the Center provided descriptions of other religious institutions "it contends were similarly situated and that received more favorable treatment." Doc. 163 at 36. But the court concluded that this evidence was not significant enough to meet the "prima facie identical"

[3] The court did not address the issues of whether the denial of the Center's application was in furtherance of a compelling governmental interest, and the least restrictive means of furthering that interest. Accordingly, we take no position with respect to those issues in this brief.

test, because it did not reveal all the details about those institutions' applications to expand or build new facilities. Doc. 163 at 37-38 (citation omitted).

The court also rejected the Center's other claims.

SUMMARY OF THE ARGUMENT

1. The district court applied an erroneous legal standard in granting the City's summary judgment motion with respect to the Islamic Center's substantial burden claim under RLUIPA. The court rejected the Center's substantial burden claim on the ground that the Center did not contend that its members "have been forced or coerced into abandoning, modifying or violating their religious beliefs or precepts." That is too high a standard. The court should have asked instead whether the denial of the permit, viewed against the totality of the circumstances, actually and substantially inhibits the Center's religious exercise, rather than merely inconveniencing it.

This standard is consistent with the statutory language, this Court's decision in *Midrash Sephardi, Inc.* v. *Town of Surfside*, 366 F.3d 1214 (11th Cir. 2004), and the decisions of other federal courts, including the Second, Seventh, and Ninth Circuits. The district court's conclusion that religious exercise is substantially burdened only when worshippers are coerced into abandoning, modifying, or violating their religious beliefs or precepts is wrong and flatly inconsistent with these authorities.

In this case, the Islamic Center has presented evidence that the City's denial of its application to expand its facilities significantly impedes its ability to meet the religious needs of its members. Accordingly, the district court erred in granting summary judgment to the City with respect to the Center's substantial burden claim.

2. The district court similarly applied an incorrect legal standard in granting the City's summary judgment motion with respect to the Center's discrimination claim. In so ruling, the court rejected the Center's claim on the ground that it had failed to demonstrate that the City treated it differently from another religious assembly that is "prima facie identical in all relevant respects" to the Center. Although demonstrating that a similarly situated institution received more favorable treatment is one way to establish a prima facie case of discrimination, it is not the only way. And even if it were, the district court's narrow view of what kinds of institutions would be similarly situated is overly restrictive.

In RLUIPA cases involving discrimination claims, such as this one, courts should apply the standard for protected-class discrimination claims set out by the Supreme Court in *Village of Arlington Heights* v. *Metropolitan Housing Development Corp.*, 429 U.S. 252, 97 S. Ct. 555 (1977). When applying the *Arlington Heights* standard, courts perform "a sensitive inquiry into such circumstantial and direct evidence of intent as may be available." *Id.* at 266, 97 S.

Ct. at 564. Potentially relevant factors for such inquiries include substantial disparate impact, procedural and substantive departures from the norms generally followed by the decision-maker, and the administrative history of the decision. *Id.* at 267-268, 97 S. Ct. at 564-565.

The Islamic Center proffered evidence that, under the *Arlington Heights* standard, creates a reasonable inference that discrimination was a factor in the City's decision not to allow it to build a new mosque. The district court accordingly erred in granting summary judgment for the City on the Center's discrimination claim.

ARGUMENT

I

THE DISTRICT COURT APPLIED AN INCORRECT LEGAL STANDARD IN GRANTING SUMMARY JUDGMENT TO THE CITY WITH RESPECT TO THE CENTER'S SUBSTANTIAL BURDEN CLAIM

a. In rejecting the Center's substantial burden claim, the district court held that a substantial burden in the land use context exists only when the governmental decision forces worshippers to abandon, modify, or violate their religious beliefs or practices. That standard is incorrect.

Assemblies and institutions are substantially burdened for purposes of RLUIPA if, given the totality of the circumstances, a land use regulation or decision actually and substantially inhibits religious exercise, rather than merely

inconveniencing it. The statute's text, this Court's decision in *Midrash Sephardi, Inc.* v. *Town of Surfside*, 366 F.3d 1214 (11th Cir. 2004), and decisions of other federal courts, including at least three other circuit courts of appeals, all support this understanding of RLUIPA's substantial burden standard. Under this correct interpretation of RLUIPA, a land use decision that prevents a religious institution from building facilities necessary to meet its religious needs and those of its members imposes a substantial burden on that institution.

RLUIPA's text supports this result. Though the statute does not define "substantial burden," it does address land use restrictions in the definition of "religious exercise." It states that "[t]he use, building, or conversion of real property for the purpose of religious exercise shall be considered to be religious exercise of the person or entity that uses or intends to use the property for that purpose." 42 U.S.C. 2000cc-5(7)(B). RLUIPA also provides that "'religious exercise' includes any exercise of religion, whether or not compelled by, or central to, a system of religious belief." 42 U.S.C. 2000cc-5(7)(A). Thus, under the statute's plain language, building religious facilities is a form of religious exercise. Accordingly, a government's decision to prevent a religious assembly or institution from constructing facilities adequate to meet the religious needs of its members qualifies as a substantial burden.

That is how this Court interpreted the "substantial burden" provision in *Midrash*. In *Midrash*, this Court considered whether a ban on places of worship in a town's business district imposed a substantial burden on two Orthodox Jewish congregations whose members did not use cars on the Sabbath. The congregations alleged that locating outside the business district would mean that many of their members, including elderly members, would have to walk longer distances. This Court focused on whether the burden was "more than an inconvenience on religious exercise." 366 F.3d at 1227. It concluded that "the relevant inquiry" in applying the substantial burden provision "is whether and to what extent [a] particular [land use regulation] burdens the congregations' religious exercise." *Id.* at 1228. In that case, this Court determined that the burden on religious exercise was too small to meet the standard. The Court found that the town's zoning rules would permit the congregations "to operate only a few blocks from their current location," and concluded that "walking a few extra blocks" was not a substantial burden. *Ibid.*

Other courts of appeals have interpreted RLUIPA's substantial burden standard similarly. In *Westchester Day School* v. *Village of Mamaroneck*, 504 F.3d 338 (2d Cir. 2007), for example, the Second Circuit recognized that the substantial burden test must apply differently in the land use context than in the context of a typical free exercise claim: "[I]n the context of land use, a religious

institution is not ordinarily faced with the same dilemma of choosing between religious precepts and government benefits." *Id.* at 348-349. The court then concluded that a substantial burden exists where there is "a close nexus between the coerced or impeded conduct and the institution's religious exercise." *Id.* at 349. On the other hand, "where the denial of an institution's application to build will have minimal impact on the institution's religious exercise, it does not constitute a substantial burden." *Ibid.*

Similarly, the Seventh Circuit, in *Saints Constantine & Helen Greek Orthodox Church, Inc.* v. *City of New Berlin*, 396 F.3d 895, 898-901 (7th Cir. 2005), reasoned that a municipality's refusal to approve a church's rezoning application because of concerns the land could be sold and used for other purposes – despite the church's willingness to include restrictions on future land use in its application – constituted a substantial burden on religious exercise. The court explained that the organization would experience "delay, uncertainty, and expense" if it had to search for additional land. *Id.* at 901. The court said the fact that "the burden would not be insuperable [does] not make it insubstantial." *Ibid.*

The Ninth Circuit, in *Guru Nanak Sikh Society of Yuba City* v. *County of Sutter*, 456 F.3d 978 (9th Cir. 2006), also held that a land use regulation or decision qualifies as a substantial burden when it "impose[s] a significantly great restriction or onus upon [religious] exercise," or, stated differently, imposes "more

than an inconvenience on religious exercise." *Id.* at 988 (footnote and citation omitted). The Ninth Circuit recently applied this correct understanding of RLUIPA's substantial burden standard and held that it was met in a case, like this one, that was based on a city's denial of a religious group's application to build a new worship facility. In *International Church of the Foursquare Gospel* v. *City of San Leandro*, 673 F.3d 1059 (9th Cir.), cert. denied, 132 S. Ct. 251 (2011), a church with a large congregation outgrew its worship facility and purchased land to build a new facility. *Id.* at 1061-1062. The church presented evidence that this land was the only site available where it could build a facility big enough to accommodate a Sunday service for its entire congregation, along with Sunday school and other ministries that take place at the same time as the traditional Sunday service. *Id.* at 1069. Specifically, the church planned to build a facility that would "accommodate 1100 people in the sanctuary and an additional 500 people in other activities (such as Sunday school) during each service." *Id.* at 1062. The court of appeals reversed the district court's grant of summary judgment for the city. It held that "the district court in this case erred in determining that the denial of space adequate to house all of the Church's operations was not a substantial burden." *Id.* at 1070.

Other federal courts have similarly concluded that land use decisions pose a substantial burden when they prevent religious assemblies or institutions from

building facilities to meet the religious needs of their congregations. See *Rocky Mountain Christian Church* v. *Board of Cnty. Comm'rs of Boulder Cnty.*, 612 F. Supp. 2d 1163, 1172 (D. Colo. 2009) (finding that the city's refusal to permit the expansion of an existing church was a substantial burden, because the existing structure was usually overcrowded and not suitable for the size of the congregation); *Cottonwood Christian Ctr.* v. *Cypress Redevelopment Agency*, 218 F. Supp. 2d 1203, 1226 (C.D. Cal. 2002) (finding a substantial burden where a church was denied use of property because, at its existing location, it was prevented from "meeting as a single body, as its beliefs counsel").

The district court in this case construed RLUIPA's substantial burden standard in a way that cannot be squared with the statute or with *Midrash* and the majority of federal cases addressing this issue. The court founded its erroneous interpretation of RLUIPA in part on a misreading of *Midrash*. See Doc. 163 at 20-21.

As explained at pp. 12-13, *supra*, this Court's decision in *Midrash* should be read – in harmony with the statute itself and other cases – to mean that a religious assembly or institution is substantially burdened when a land use regulation or decision actually and substantially inhibits religious exercise, rather than merely inconveniencing it. Indeed, this Court's analysis in *Midrash* turned on whether the burden was "more than an inconvenience on religious exercise." 366 F.3d at 1227.

The Court focused on the *degree* of the burden: it held that "the small burden of walking a few extra blocks" was not a substantial burden, necessarily implying that the burden of walking a significantly greater distance could qualify as a substantial burden. *Id.* at 1227-1228. This Court's reasoning in *Midrash* is thus inconsistent with the very restrictive substantial burden standard the district court applied in this case.

The language in *Midrash* that the district court relied on does not support its unduly restrictive substantial burden standard. In *Midrash*, this Court said that "a 'substantial burden' is akin to significant pressure which directly coerces the religious adherent to conform his or her behavior accordingly," and that "a substantial burden can result from pressure that tends to force adherents to forego religious precepts or from pressure that mandates religious conduct." 366 F.3d at 1227-1228. In the second quoted passage, this Court was just recognizing one way the substantial burden standard may be met: "a substantial burden *can result* from [such] pressure." *Ibid.* (emphasis added). Furthermore, this passage speaks merely of pressure that "tends to" force adherents to forego religious precepts. The first quoted passage describes a standard quite different from the one the district court used. A land use regulation or decision might be "akin to" the sort of pressure that would force someone to forego religious precepts, see *Midrash*, 366 F.3d at 1227, without actually "forc[ing] or coerc[ing] [adherents] into abandoning,

modifying or violating their religious beliefs or precepts," see Doc. 163 at 27. In any event, this passage in *Midrash* must be read in light of this Court's analysis of the facts in that case and the statute's text. Thus, even if this passage could be plausibly read in isolation as supportive of the district court's version of the substantial burden standard, it should not be.

In short, *Midrash* should not be read to mean that land use decisions that make religious exercise substantially more difficult are permissible, as long as they do not coerce worshippers into abandoning, modifying, or violating their religious beliefs or precepts. Such a reading would put *Midrash* at odds with the statute itself and the majority of federal courts that have applied RLUIPA's substantial burden standard in the land use context.[4]

b. In this case, the Center presented evidence that the City's denial of its application to expand its facilities significantly impedes its ability to meet the

[4] The district court also relied significantly on *Living Water Church of God* v. *Charter Township of Meridian*, 258 F. App'x 729 (6th Cir. 2007) (unpublished), cert. denied, 553 U.S. 1093, 128 S. Ct. 2903 (2008). But *Living Water Church of God* actually supports the Center's substantial burden claim. In that case, the church wanted to expand from approximately 10,000 square feet to approximately 35,000 square feet, but the zoning rules only allowed the church to expand to 25,000 square feet. *Id.* at 731. The court concluded that the church had not shown that it would be unable to meet the religious needs of its members in a 25,000-square-foot facility. Indeed, the court seemed to leave open the possibility that the 25,000-square-foot limit *could* impose a substantial burden in the future, if the church could show it needed more space to meet the needs of its congregation. See *id.* at 738.

religious needs of its members. It showed, among other problems, that many congregants cannot see the imam during services; the congregants have to pray in a corner of the main room because the mosque does not face Mecca; women must pray in a separate room while listening to an audio feed; and there is insufficient space for ritual washing before prayer, fast-breaking meals during Ramadan, spiritual counseling, a religious library, or recreational activities. Doc. 163 at 22-23; Doc. 107-3 at 14-22. These impediments to the religious exercise of the Center and its members are a far more significant burden on religious exercise than the "few extra blocks" walk this Court found to be insubstantial in *Midrash*. 366 F.3d at 1228.

Moreover, the district court's substantial burden analysis turned in part on its conclusion that some of the burdens on the Center's religious exercise were "largely self-imposed," because they existed when the property was first purchased. See Doc. 163 at 27. This point relates mainly to the fact that the current building does not face Mecca and, as a result, the Center must use a corner of the main room for prayer services. The district court seems essentially to have concluded that the Center forfeited its ability to complain about this issue because it chose to make do with the current facility until now. There is no basis for this conclusion. To begin with, it has plainly become more burdensome for the Center to hold prayer services in a corner of the room as its congregation has grown

dramatically from 25 to 600 members. More importantly, religious communities (particularly small, less-established ones)[5] sometimes must live with inadequate facilities for a period of time. This fact cannot form the basis for denying those communities the right to build adequate permanent facilities. See *International Church of the Foursquare Gospel*, 673 F.3d at 1069 (church's theological preference for having a single Sunday worship service and religious ministries operating on the same grounds cannot be questioned by the courts merely because the congregation had previously split up services due to space constraints).

Viewed under the correct legal standard, the Center at the very least presented sufficient evidence to raise a triable issue of fact as to whether the City's denial of its application to expand its facilities substantially burdened its religious exercise within the meaning of RLUIPA. Accordingly, the district court erred in granting summary judgment to the City on the Islamic Center's substantial burden claim. See, *e.g.*, *Smith* v. *Lockheed-Martin Corp.*, 644 F.3d 1321, 1327 & n.23 (11th Cir. 2011) (vacating grant of summary judgment for defendant, where record contained sufficient circumstantial evidence to create a triable issue of material fact).

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[5] See Joint Statement of Senator Hatch and Senator Kennedy on the Religious Land Use and Institutionalized Persons Act of 2000, 146 Cong. Rec. 16,698 (2000) (expressing particular concern for "new, small, or unfamiliar churches").

II

THE DISTRICT COURT APPLIED AN INCORRECT LEGAL STANDARD IN GRANTING SUMMARY JUDGMENT TO THE CITY ON THE CENTER'S DISCRIMINATION CLAIM

a. The district court also applied an incorrect legal standard to the Islamic Center's RLUIPA discrimination claim, 42 U.S.C. 2000cc(b)(2). It held that the Center could establish its discrimination claim only by showing that it was treated differently from another religious assembly that is "prima facie identical in all relevant respects." Doc. 163 at 35 (citations omitted). This same erroneous standard was also applied in two other recent district court decisions.[6]

While showing that a similarly situated institution received more favorable treatment is one way to establish a prima facie case of discrimination, it is not the only way. And even if it were, the district court's narrow view of what kinds of institutions would be similarly situated – *i.e.*, those that are "prima facie identical in all relevant respects" – is overly restrictive.

The Supreme Court's decision in *Village of Arlington Heights* v. *Metropolitan Housing Development Corp.*, 429 U.S. 252, 97 S. Ct. 555 (1977), which dealt with protected-class discrimination, is clearly applicable in RLUIPA

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[6] See *Church of Scientology of Georgia, Inc.* v. *City of Sandy Springs*, No. 1:10-cv-82, 2012 WL 500263, at *25 (N.D. Ga. Feb. 10, 2012); *Chabad Lubavitch of Litchfield Cnty., Inc.* v. *Borough of Litchfield*, No. 3:09-cv-1419, 2012 WL 527851, at *11 (D. Conn. Feb. 17, 2012).

discrimination cases such as this one involving land use decisions. Under *Arlington Heights*, courts perform "a sensitive inquiry into such circumstantial and direct evidence of intent as may be available." *Id.* at 266, 97 S. Ct. at 564. The Court also gave a non-exclusive list of potentially relevant factors. *Id.* at 267-268, 97 S. Ct. at 564-565. As this Court observed in *Burton* v. *City of Belle Glade*, 178 F.3d 1175, 1189 (11th Cir. 1999), the "relevant evidentiary factors include substantial disparate impact, a history of discriminatory official actions, procedural and substantive departures from the norms generally followed by the decision-maker, and the legislative and administrative history of the decision."

The RLUIPA nondiscrimination provision's structure and purpose make *Arlington Heights*' applicability plain. The statute provides: "[n]o government shall impose or implement a land use regulation that discriminates against any assembly or institution on the basis of religion or religious denomination." 42 U.S.C. 2000cc(b)(2). This provision, like RLUIPA's "equal terms" provision, codifies nondiscrimination principles present in the Free Exercise Clause, the Establishment Clause, and the Fourteenth Amendment's Equal Protection Clause.[7]

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[7] See *Midrash Sephardi, Inc.* v. *Town of Surfside*, 366 F.3d 1214, 1238-1240 (11th Cir. 2004) (concluding that RLUIPA's equal terms provision enforces the nondiscrimination principles embodied in these Clauses); *Freedom Baptist Church of Delaware Cnty.* v. *Township of Middletown*, 204 F. Supp. 2d 857, 869 (E.D. Pa. 2002) (concluding that both the equal terms and nondiscrimination provisions codify Supreme Court decisions under these Clauses).

The case that perhaps most clearly embodies these principles (and which Congress relied on explicitly when enacting RLUIPA's nondiscrimination and equal terms provisions) is *Church of the Lukumi Babalu Aye, Inc.* v. *City of Hialeah*, 508 U.S. 520, 113 S. Ct. 2217 (1993).[8] In *Lukumi*, the Court applied the *Arlington Heights* framework to determine whether a law that purported to neutrally regulate animal slaughter was adopted for a discriminatory purpose. *Id.* at 540, 113 S. Ct. at 2230 ("Here, as in equal protection cases, we may determine the city council's object from both direct and circumstantial evidence.") (citing *Arlington Heights* and listing and applying relevant factors). Thus, a claim based on RLUIPA's nondiscrimination clause – which codifies the principles articulated in *Lukumi* – can be proved using the *Arlington Heights* framework.

b. The Islamic Center proffered evidence that is relevant to the *Arlington Heights* inquiry, and sufficient to require a trial on the question of discriminatory intent. For example, the Center produced evidence that churches in the area have effects on traffic, density, neighbors, etc., similar to the anticipated effect of the new mosque. This evidence is probative of discrimination under *Arlington Heights*. See 429 U.S. at 266, 97 S. Ct. at 564 (explaining that determining

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[8] See Joint Statement of Senator Hatch and Senator Kennedy on the Religious Land Use and Institutionalized Persons Act of 2000, 146 Cong. Rec. 16,699 (2000) (citing *Lukumi*); see also *Freedom Baptist Church*, 204 F. Supp. 2d at 869 ("On the face of these two subsections [the Equal Terms and Nondiscrimination provisions], the echoes of *Lukumi* * * * are unmistakable.").

whether official action bears more heavily on one group than another provides an important starting point for assessing discriminatory motive, and can be determinative in cases where "a clear pattern, unexplainable on grounds other than race [or, in this case, religion], emerges from the effect of the state action").

The City's Community Development Director testified that "the [Center's] proposal as requested is really not dissimilar to other religious facilities that are similarly situated." Doc. 163 at 8 (citation omitted). Community Development staff also prepared a report that included a comparison of the proposed expansion of the Islamic Center to churches in the area. The report finds that "the Islamic Center's proposed development plan falls within the mid-range of comparably situated religious facilities," and that "[w]hen the size, density and parking are compared, the Islamic Center is neither at the high end or the low end of any measure." Doc. 96-3 at 8-9. The report states that "[c]hurches have historically been located in residential areas" in Alpharetta, and "[i]t is not out of character for a residential area to include a religious facility and, in fact, there are two existing churches further west of the applicant's location on [the same road]." Doc. 96-3 at 10. The report concluded: "After reviewing this application, Staff has determined that there are comparable, similarly situated facilities to the applicant's proposal." Doc. 96-3 at 10.

Other evidence supports the same conclusion. The Islamic Center's expert, a real estate appraiser and land use planner, concluded that the Center's application met all objective requirements of the City's Unified Development Code; that the proposed mosque compares favorably in terms of effect on the surrounding area with church facilities that have been approved; and that the proposed mosque compares favorably in terms of size and effect to the two churches located on the same road. Doc. 107-3 at 28-31. The Center presented evidence that these two churches located on the same road have "been allowed to expand multiple times." Doc. 163 at 36.

The district court disregarded this evidence. It determined that there was not enough information about the process the City Council followed in allowing other places of worship to be built or to expand. See Doc. 163 at 36-38. But this evidence is relevant under *Arlington Heights*. The fact that the City's own Community Development staff found that the proposed mosque will have no greater effect on the surrounding area than many churches located nearby – including churches on the same road that have been allowed to expand – is sufficient to raise a reasonable inference of discrimination. The district court accordingly erred in granting summary judgment for the City on the Center's discrimination claim. See, *e.g.*, *Smith* v. *Lockheed-Martin Corp.*, 644 F.3d 1321, 1327 & n.23 (11th Cir. 2011). On remand, the district court should be required to

conduct the "sensitive inquiry" into all circumstantial evidence of intent in the record, as *Arlington Heights* mandates. See 429 U.S. at 266, 97 S. Ct. at 564.

CONCLUSION

This Court should vacate the district court's grant of summary judgment to the City on the Islamic Center's substantial burden and discrimination claims, and remand the case to the district court for further proceedings under the correct legal standards.

Respectfully submitted,

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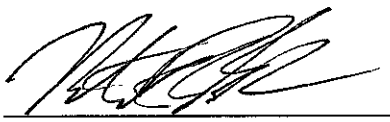
CERTIFICATE OF COMPLIANCE

I certify, pursuant to Federal Rule of Appellate Procedure 32(a), that this BRIEF FOR THE UNITED STATES AS AMICUS CURIAE IN SUPPORT OF APPELLANT AND URGING VACATUR IN PART was prepared using Word 2007 and Times New Roman, 14-point font. This brief contains 5867 words of proportionately spaced text.

I also certify that the copy of this brief that has been electronically filed is an exact copy of what has been submitted to the Court in hard copy. I further certify that the electronic copy has been scanned with the most recent version of Trend Micro Office Scan Corporate Edition (version 8.0) and is virus-free.



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Dated: June 12, 2012

CERTIFICATE OF SERVICE

I certify that on June 12, 2012, an electronic copy of the BRIEF FOR THE UNITED STATES AS AMICUS CURIAE IN SUPPORT OF APPELLANT AND URGING VACATUR IN PART was transmitted to the Court by means of the appellate CM/ECF system, and that an original and six paper copies identical to the brief filed electronically were sent to the Clerk of the Court by first class mail.

I further certify that copies of the brief will be the following counsel of record via first class mail:

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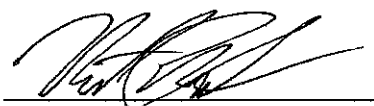

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