No. 11-2176

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BETHEL WORLD OUTREACH MINISTRIES,

Plaintiff-Appellant

v.

MONTGOMERY COUNTY COUNCIL, *et al.*,

Defendants-Appellees

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

BRIEF FOR THE UNITED STATES AS *AMICUS CURIAE* SUPPORTING PLAINTIFF-APPELLANT AND URGING REVERSAL IN PART

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INTEREST OF THE UNITED STATES

This case concerns the proper interpretation of the prohibitions of the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA), 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 Civil Rights Division has previously filed briefs in numerous RLUIPA cases such as this involving land use decisions. See, *e.g.*, *Lighthouse Inst. for Evangelism* v. *City of Long Branch*, 510 F.3d 253 (3d Cir.

2007), cert. denied, 553 U.S. 1065 (2008); *Westchester Day Sch.* v. *Village of Mamaroneck*, 504 F.3d 338 (2d Cir. 2007); *Living Water Church of God* v. *Charter Twp. of Meridian*, 258 F. App'x 729 (6th Cir. 2007), cert. denied, 553 U.S. 1093 (2008); *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). This brief is filed pursuant to Federal Rule of Appellate Procedure 29(a).

STATEMENT OF THE ISSUE

The United States will address the following issue:

Whether the Montgomery County Council's passage of a land use regulation that prohibited Private Institutionalized Facilities, which include churches, from building on certain land in the county burdened Bethel World Outreach Ministries' exercise of religion in violation of the Religious Land Use and Institutionalized Persons Act of 2000, 42 U.S.C. 2000cc(a)(1).

STATEMENT OF THE CASE

1. Factual Background

Bethel World Outreach Ministries (Bethel), a religious organization, operates a Christian church that serves a membership of 2000 parishioners through

religious assembly and instruction. A014.[1] Bethel currently holds its religious services on property it owns on Georgia Avenue in Silver Spring, Maryland. A198. The Georgia Avenue property has a sanctuary that seats 450 people; Bethel's weekly attendance at its Sunday services, however, is approximately 1500 people. A740. Because the Georgia Avenue sanctuary is unable to accommodate all of Bethel's members, many worshippers used to sit in the hallway. A740. Worshippers are now precluded from doing so because of fire safety concerns. A740. The Georgia Avenue location is inadequate to conduct religious education and fellowship activities for youth, adults, and senior citizens, and cannot support its headquarters' efforts in religious outreach and missionary work. A741-A743. Other services the church offers (*e.g.*, counseling services) have limited enrollment, and the church is prevented from offering additional services (*e.g.*, ministering to the needy) because of inadequate space at the Georgia Avenue location. A741-A743. Bethel leases an additional facility in Gaithersburg, Maryland, which has sanctuary seating for 299 people. A198.

In 2004, Bethel purchased 119 acres of undeveloped land in Montgomery County with the intent to build a church large enough to accommodate its needs. A016. The property is located in Montgomery County's Rural Density Transfer

[1] Citations to "A_" refer to the consecutively paginated Appendix filed by the plaintiff-appellant with its opening brief.

zone (RDT zone), which is a low-density zone that permits one dwelling unit per 25 acres of land. A197. Private institutionalized facilities (PIF), which include churches, schools, senior housing, and day care centers, were permitted in the RDT zone at the time Bethel acquired the property. A200; A204.

Consistent with state law, Montgomery County had previously adopted a Ten-Year Comprehensive Water Supply and Sewerage Systems Plan (the Plan), establishing "service area categories" that designate areas within the county to which public water and sewer services will be extended. A201. The property Bethel purchased fell in a category where no public water or sewer services were planned. A019. Applications to amend the Plan and re-categorize property can, however, be submitted and approved. A201-A202. The property's previous owner therefore applied to the County Council (Council) in 2001 for a permit to access public water and sewer services to construct four, 1000-seat sanctuaries. A019; A203. This application, along with two other applications (including one from another church), prompted the Council to review the Plan and its PIF policy. A204. On February 26, 2002, the Council deferred action on the pending application. A731. The Council, meanwhile, considered, but did not act upon, a proposed zoning text amendment (ZTA) that would limit the total impervious surface (*i.e.*, a surface that is impenetrable by water and increases run-off) of a

structure in the RDT zone to 15%. A205. If passed, the ZTA would limit the size of, but not prohibit, new construction of PIFs in the RDT zone.

On March 10, 2004, Bethel replaced the property's prior owner as the applicant for extended public water and sewer services and submitted a revised construction proposal. A019; A206. Bethel proposed building a 3000-seat church, a school, a day care building, social hall, and offices. A206. The application was again deferred on December 14, 2004. A731. On November 29, 2005, the Council adopted Resolution 15-1234, which revised the PIF policy to prohibit using public water and sewer services to support existing or proposed PIFs in the RDT zone. A210. That same day, the Council adopted Resolution 15-1235, which, in accordance with Resolution 15-1234, denied Bethel's application for an amendment to the Plan to receive public water and sewer services on its property.[2] A210.

In response to Resolution 15-1235, the Council received from Bethel in January 2007 an application for a multi-use system (*i.e.*, a large well and septic system) to support construction of a smaller, 800-seat church. A213; A732. While that application was pending, the Council adopted ZTA 07-07 on October 2, 2007. A212. This amendment prohibited any PIF from developing property that is

[2] Bethel appealed this decision in state court; the decision was upheld by the Maryland Court of Special Appeals. *Bethel World Outreach Church* v. *Montgomery Cnty.*, 967 A.2d 232 (Md. App. 2009).

subject to a Transfer of Development Rights (TDR) easement. A212. A TDR easement is placed on a property in the RDT zone when the owner sells (or "transfers") development rights to a "receiving" property located outside the RDT zone. The transferred rights permit development on the receiving property and compensate property owners in the RDT zone. Bethel's property is subject to a TDR easement (A021; A213); as a result, neither Bethel, nor any subsequent owner, may develop a church (or any other structure falling within the PIF category) on Bethel's property (A021-A022; A212; A732).

The Council thereafter deferred Bethel's application for a multi-use system "pending the applicant's submittal of a proposed use that is consistent with ZTA 07-07." A214; A732. Because the effect of ZTA 07-07 was to prohibit the construction of a church on Bethel's property, Bethel is unable to submit a construction proposal for a church that complies with ZTA 07-07.

2. District Court Proceedings

Bethel filed suit in district court alleging violations of RLUIPA, as well as violations of the federal and state constitutions. With respect to RLUIPA, Bethel alleged that ZTA 07-07: (1) imposed a substantial burden on its religious exercise, in violation of 42 U.S.C. 2000cc(a) (Count 1); (2) discriminated against the church, in violation of 42 U.S.C. 2000cc(b)(2) (Count 2); and (3) imposed an unreasonable limit on its religious exercise, in violation of 42 U.S.C. 2000cc(b)(3)(B) (Count 3).

A025-A026. Bethel sought declaratory and injunctive relief, as well as damages and attorneys' fees. A028-A030. The Council moved for summary judgment (A181-A183), which Bethel opposed (A727-A780).

The district court granted the Council's motion for summary judgment in an oral order. A106-A180. With respect to Count 1, the court defined a substantial burden in the RLUIPA context as occurring "when a state or local government, through act or omission, puts substantial pressure on an adherent to modify his behavior and violate his beliefs." A174. After summarizing the arguments of the parties and acknowledging that there was "an argument that there's financial hardship" to Bethel, the district court held that it was "clear to the court that as a matter of law at this point that there has not been a substantial burden imposed on the church with regard to its desires." A176. The court supported its conclusion by explaining that the church was not "targeted" by the Council's action. A176. The Council, the district court explained, had been considering its land use policy for some time, and Bethel was aware of that ongoing debate when it purchased its property. A176-A177. For this reason, the court concluded that Bethel had no reasonable expectation of gaining approval for its construction "given this ongoing concern about protecting the agricultural area from the encroaching PIFs." A177. The ongoing review of its land use policy, the court concluded, "undercuts any argument that there was targeting of [Bethel] or any applicant." A177. The court

also concluded that the Council's ongoing review of its policies undercut any argument that the Council's actions pressured Bethel "in any way to cause it to modify its program or affect its beliefs in the way that the definition of substantial burden requires."[3] A177. The following day, the court entered a final order of judgment. A1930.

ARGUMENT

I

IN THE LAND USE CONTEXT, A SUBSTANTIAL BURDEN ON RELIGIOUS EXERCISE EXISTS WHERE A LAND USE REGULATION SUBSTANTIALLY INHIBITS, LIMITS, OR INTERFERES WITH AN ORGANIZATION'S RELIGIOUS PRACTICES

Section 2(a)(1) of RLUIPA provides that:

> 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" 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

[3] Having found no substantial burden under RLUIPA, the district court appeared to engage in a compelling interest/narrow tailoring analysis with respect to Bethel's constitutional claims only. A178-A179.

property for the purpose of religious exercise shall be considered 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). The issue in RLUIPA cases involving proposed locations for a house of worship is thus not whether it is religious exercise that is being burdened, but whether the burden is substantial.

RLUIPA itself contains no statutory definition of "substantial burden." Its legislative history, however, instructs that the term is to be defined by reference to the Religious Freedom Restoration Act (RFRA), 42 U.S.C. 2000bb *et seq.*, and First Amendment jurisprudence. See 146 Cong. Rec. 16,698, 16,700 (2000) ("The term 'substantial burden' as used in this Act is not intended to be given any broader interpretation than the Supreme Court's articulation of the concept of substantial burden on religious exercise."). Congress directed that RLUIPA is to 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 Court has previously considered whether a governmental action constitutes a substantial burden on religious exercise, but has done so only in the context of institutionalized persons. See *Lovelace* v. *Lee*, 472 F.3d 174 (4th Cir.

2006) (addressing RLUIPA claim brought under 42 U.S.C. 2000cc-1(a))[4]; see also *Smith* v. *Ozmint*, 578 F.3d 246 (4th Cir. 2009); *Miles* v. *Moore*, 450 F. App'x 318 (4th Cir. 2011); *Al-Amin* v. *Shear*, 325 F. App'x 190 (4th Cir. 2009). Relying upon Supreme Court cases evaluating the Free Exercise Clause, as well as other courts of appeals decisions, this Court explained in *Lovelace* that "a substantial burden on religious exercise occurs when a state or local government, through act or omission, 'put[s] substantial pressure on an adherent to modify his behavior and to violate his beliefs.'" 472 F.3d at 187 (quoting *Thomas* v. *Review Bd. of Ind. Emp't Sec. Div.*, 450 U.S. 707, 718 (1981)). Applying this standard, this Court concluded that an action that prevented a prisoner from participating in religious meals or prayers during Ramadan constituted a substantial burden on the prisoner's religious exercise because it "significantly modif[ied] [the plaintiff's] religious behavior." *Lovelace*, 472 F.3d at 187-189 (citation omitted).

Decisions from other courts of appeals provide useful guidance on how to apply RLUIPA's substantial burden standard in the unique context of land use cases. These decisions recognize that a municipality's decision to deny a religious organization the right to locate, relocate, or expand its place of worship may

[4] 42 U.S.C. 2000cc-1(a) states, in relevant part, that a government shall not "impose a substantial burden on the religious exercise of a person residing in or confined to an institution * * * even if the burden results from a rule of general applicability, unless" the rule is the least restrictive means of furthering a compelling governmental interest.

constitute a substantial burden on a religious organization's religious practices without denying outright the organization's ability to exercise its faith.[5] See 42 U.S.C. 2000cc-5(7)(B) ("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."). Thus, in land use cases, courts have routinely considered whether, given the totality of the circumstances, a municipality's decision substantially inhibits, limits, or interferes with a religious organization's religious practice. Mere inconveniences to the religious organization and its members, however, do not constitute a substantial burden on religious exercise and therefore would not support a claim under RLUIPA.

For example, the Second Circuit in *Westchester Day School* v. *Village of Mamaroneck*, 504 F.3d 338 (2007), held that a land use regulation prohibiting a Jewish day school from expanding its facilities to provide much-needed additional space for religious education and practice constituted a substantial burden on the organization's religious exercise. The court reasoned that the zoning board's decision to deny a permit, based upon traffic and parking concerns, constituted a substantial burden in part because the school did not have "quick, reliable, and

[5] A separate RLUIPA provision, 42 U.S.C. 2000cc(b)(3)(A), prohibits the imposition of any land use regulation that "totally excludes religious assemblies from a jurisdiction."

financially feasible alternatives" to meet its religious needs. *Id.* at 352. The court also noted that there was an actual denial of the application by the zoning board, in contrast to a situation where a zoning board granted an application subject to conditions. *Ibid.* See also *Vision Church, United Methodist* v. *Village of Long Grove*, 468 F.3d 975, 998-1000 (7th Cir. 2006) (no substantial burden where religious institution could submit modified plans that addressed problems and concerns identified by the zoning board), cert. denied, 552 U.S. 940 (2007); *San Jose Christian Coll.* v. *City of Morgan Hill*, 360 F.3d 1024, 1035 (9th Cir. 2004) (no substantial burden where religious college submitted incomplete application for re-zoning and had opportunity to reapply and receive approval). Moreover, a substantial burden does not exist where the denial of a building application will have only a minimal impact on the organization's religious exercise. *Westchester Day Sch.*, 504 F.3d at 349.

The Ninth Circuit has also articulated a specific "substantial burden" standard to apply in RLUIPA cases arising in the land use context:

> For a land use regulation to impose a substantial burden, it must be oppressive to a significantly great extent. That is, a substantial burden on religious exercise must impose a significantly great restriction or onus upon such exercise.

Guru Nanak Sikh Soc'y of Yuba City v. *County of Sutter*, 456 F.3d 978, 988-989 (9th Cir. 2006) (quoting *San Jose Christian Coll.*, 360 F.3d at 1034) (internal quotation marks omitted; brackets in original). The county in *Guru Nanak* denied

a religious organization's modified application to build a temple on land it purchased in an agricultural zone, after having previously denied its application to build a temple on land it purchased in a residential zone. *Id.* at 981-983. In both zones, churches were conditionally permitted. *Ibid.* The county nonetheless denied the modified application on the basis of preserving agricultural land and promoting orderly growth. *Id.* at 983-984. The Ninth Circuit explained that the county's broad reasons for denying the application could "easily apply" to any future application by the religious organization, and that the organization had already agreed to mitigation measures suggested by the Planning Division. *Id.* at 989. The court further reasoned that it had to consider the "net effect" of the county's two denials, which "to a significantly great extent lessened the prospect of [the religious organization] being able to construct a temple in the future." *Id.* at 992. This net effect, the court held, constituted a substantial burden on the organization's religious exercise. Like the Second Circuit in *Westchester*, the Ninth Circuit noted that the county had not "suggested additional conditions that would render satisfactory Guru Nanak's application," but had simply denied it.[6] *Id.* at 991.

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[6] More recently, the Ninth Circuit reversed the district court's grant of summary judgment to a municipality that had denied a church's application for rezoning and a conditional use permit to build a church on property it had purchased. *International Church of the Foursquare Gospel* v. *City of San*

(continued…)

The Seventh Circuit also recognizes the unique context in which RLUIPA land use cases arise. In *Saints Constantine & Helen Greek Orthodox Church, Inc.* v. *City of New Berlin*, 396 F.3d 895, 898-901 (7th Cir. 2005), the court 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. *Ibid.* The court explained that the organization would experience "delay, uncertainty, and expense" if it had to search for additional land. The court further explained that the fact "the burden would not be insuperable would not make it insubstantial," and therefore held that the municipality was not entitled to summary judgment. *Ibid.*

Given the unique characteristics of RLUIPA cases arising in the land use context, this Court should apply the substantial burden standard in accord with those currently applied in other courts of appeals. See *Westchester*, *Guru Nanak*, *Saints Constantine*, *supra*. Specifically, this Court should determine whether, considering the totality of the circumstances – including the circumstances

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Leandro, 634 F.3d 1037, 1044-1047 (9th Cir.), opinion amended, No. 09-15163, 2011 WL 1518980 (9th Cir. Apr. 22, 2011), cert. denied, 132 S. Ct. 251 (2011). The Ninth Circuit explained that the district court "erred in determining that the denial of space adequate to house all of [a plaintiff church's] operations was not a substantial burden." *Id.* at 1047.

governing the passage or application of a land use regulation – the regulation substantially inhibits, limits, or interferes with an organization's religious exercise rather than merely inconveniencing it. Under this application, regulations having merely an "incidental effect" on religious exercise would not constitute a substantial burden. *Midrash Sephardi, Inc.* v. *Town of Surfside*, 366 F.3d 1214, 1227 (11th Cir. 2004) (holding that a zoning regulation limiting where a congregation could locate its synagogue was not a substantial burden where congregants would have to walk farther to attend services). But regulations that result in denial of an organization's request to expand or locate facilities and leave organizations without "quick, reliable, and financially feasible alternatives," *Westchester*, 504 F.3d at 352, certainly place a "significantly great restriction or onus" on religious exercise, *Guru Nanak*, 456 F.3d at 988 (citation omitted), and therefore constitute a substantial burden on religious exercise for the purposes of RLUIPA.

II

BETHEL RAISED A TRIABLE ISSUE OF MATERIAL FACT AS TO WHETHER THE COUNCIL'S ZONING TEXT AMENDMENT SUBSTANTIALLY BURDENED ITS RELIGIOUS EXERCISE

The district court erred in concluding, as a matter of law, that ZTA 07-07 did not constitute a substantial burden on Bethel's religious exercise. Citing this Court's *Lovelace* standard, the district court held "that there has not been a

substantial burden imposed on [Bethel] with regard to its desires." A176. See also A177 (explaining that there was not "any pressure put upon the church in any way to cause it to modify its program or affect its beliefs in the way that the definition of substantial burden requires"). The court reasoned that Bethel was not "targeted" because ZTA 07-07 was "generic," and concern over preserving agricultural land "preexisted even the presence of the church in the county." A176. This may be so, but the court's reasoning is flawed for three reasons.

First, as set forth above, other courts of appeals have provided useful guidance about how RLUIPA's substantial burden standard applies in the unique context of land use cases. See Argument I, *supra*. When applying the reasoning of decisions from the Second, Ninth, and Seventh Circuits to the case at hand, Bethel raised a triable issue of material fact as to whether ZTA 07-07 constituted a substantial burden on its religious exercise. ZTA 07-07 was, in effect, an absolute denial of Bethel's efforts to build a new facility on its land. *Westchester Day Sch.* v. *Village of Mamaroneck*, 504 F.3d 338, 352 (2d Cir. 2007). Bethel cannot submit a modified application that complies with ZTA 07-07 because PIFs, like the church Bethel seeks to construct, are no longer permitted on property, like Bethel's, that are subject to TDR easements. Bethel thus presented sufficient evidence to raise a triable issue of whether it is left without any "quick, reliable, and financially feasible alternatives" to meet its religious needs. *Ibid*.

Moreover, Bethel presented sufficient evidence to raise a triable issue of whether identifying a suitable, available piece of property for purchase and obtaining the necessary permits and approval to construct a church on a new site would result in considerable "delay, uncertainty, and expense," despite the fact that the burden might not be "insuperable." *Saints Constantine & Helen Greek Orthodox Church, Inc.* v. *City of New Berlin*, 396 F.3d 895, 901 (7th Cir. 2005). And Bethel certainly presented sufficient evidence to suggest that ZTA 07-07's prohibition of PIFs on land similar to Bethel's placed a "significantly great restriction or onus" on Bethel's religious exercise. *Guru Nanak Sikh Soc'y of Yuba City* v. *County of Sutter*, 456 F.3d 978, 988 (9th Cir. 2006). Bethel presented evidence that its current facilities were insufficient for its religious needs, and that its lack of suitable facilities substantially inhibited its religious practices. For example, Bethel presented evidence that: some church members must be physically blocked from entering the church for worship services due to overcrowding (A740); worshippers who used to be able to sit in the hallway to hear services are now precluded from doing so because of fire safety concerns (A740); the church must hold multiple services, and therefore the entire congregation cannot meet as a single body (A740); church members cannot receive communion during church services and instead must receive communion afterwards (A741); the church cannot adequately engage in its "Altar Call"

practice, which allows worshippers to dedicate or recommit their lives to Christ (A741); children are turned away from the Children's Ministry, which means that neither they, nor their parents, may attend services (A742); there is no space for the church's mission programs, counseling, health education, or services for single mothers and seniors (A743); and the church has lost members because of the issues with its facilities (A743).[7]

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[7] In addition to cases from the Second, Ninth, and Seventh Circuits, numerous district court decisions support Bethel's claim that it raised a triable issue of material fact as to whether ZTA 07-07 substantially burdened its religious exercise. See, *e.g.*, *Rocky Mountain Christian Church* v. *Board of Cnty. Comm'rs*, 612 F. Supp. 2d 1163, 1170 (D. Colo. 2009) (denial of church's expansion proposal can constitute a substantial burden even if religious activity continues at the current site); *Albanian Associated Fund* v. *Township of Wayne*, No. 06-cv-3217 (PGS), 2007 WL 2904194, at *10 (D.N.J. Oct. 1, 2007) (fact that plaintiffs may use an inadequate facility and practice some aspects of their religion in that facility does not render any burden on religious exercise insubstantial); *Mintz* v. *Roman Catholic Bishop of Springfield*, 424 F. Supp. 2d 309, 321 (D. Mass. 2006) (inability to build a parish center, which would serve as a meeting place for parish counsel, facilitate church-related gatherings, and alleviate rectory crowding, "would substantially burden all these religious activities"); *Congregation Kol Ami* v. *Abington Twp.*, No. 01-1919, 2004 WL 1837037, at *8-9 (E.D. Pa. Aug. 17, 2004) (denial of variance preventing development and operation of place of worship constitutes substantial burden), amended, No. 01-1919, 2004 WL 2137819 (E.D. Pa. Sept. 21, 2004); *Castle Hills First Baptist Church* v. *City of Castle Hills*, No. 5:01CV01149, 2004 WL 546792, at *10 (W.D. Tex. Mar. 17, 2004) (denial of special use application to expand facility for religious education may substantially burden religious exercise if it limits the "number of children who can be educated and the quality of the educational programs offered"); *Cottonwood Christian Ctr.* v. *Cypress Redevelopment Agency*, 218 F. Supp. 2d 1203, 1212, 1226-1227 (C.D. Cal. 2002) (substantial burden may exist where the physical limitations of church's current facility limited its ability to conduct many of its programs, its outreach efforts, and to meet at one time in a single location). Cf. *Western Presbyterian*

(continued…)

Second, Bethel need not show that it was a "target" of a land use regulation to establish that the regulation substantially burdens its religious exercise in violation of 42 U.S.C. 2000cc(a)(1). A176-A177. Congress enacted RLUIPA in response to the Supreme Court's decision in *Employment Division, Department of Human Resources of Oregon* v. *Smith*, 494 U.S. 872 (1990).[8] *Smith* held that laws of general applicability that incidentally burden religious conduct do not violate the Free Exercise Clause of the First Amendment and are not subject to strict scrutiny. *Id*. at 878-882. The effect of *Smith*, then, is that plaintiffs who raise claims under the Free Exercise Clause must now show some form of government action that is aimed at, or targets, religion. Congress enacted RLUIPA specifically for the purpose of changing that rule – and restoring the substantial burden test that had existed prior to *Smith*, under which a plaintiff did not have to show that the government's action is aimed at religion – as a matter of statutory right in two

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Church v. *Board of Zoning Adjustment*, 862 F. Supp. 538, 546 (D.D.C. 1994) (church's inability to offer food to homeless on its premises was substantial burden under Free Exercise Clause); *The Jesus Ctr*. v. *Farmington Hills Zoning Bd. of Appeals*, 544 N.W.2d 698, 703-704 (Mich. Ct. App. 1996) (finding substantial burden under RFRA where zoning board denied congregation permission to operate shelter for the poor in its church).

[8] Congress first enacted the Religious Freedom and Restoration Act (RFRA) in response to *Smith*; RFRA, however, was held unconstitutional as applied to the states. *City of Boerne* v. *Flores*, 521 U.S. 507, 533 (1997).

specific areas (*i.e.*, land use and institutionalized persons). See 42 U.S.C. 2000cc(a)(2)(A), (B) and (C). As noted above, under RLUIPA, the government is prohibited from imposing substantial burdens on religious exercise without compelling justification, so long as one of three jurisdictional bases is satisfied: (1) that the burden is imposed in a program or activity receiving federal assistance; (2) that the burden or its removal affects interstate commerce; or (3) codifying an exception articulated in *Smith* and subsequent Supreme Court decisions,[9] that the burden is "imposed in the implementation of a land use regulation or system of land use regulations," under which individualized assessments are made. See 42 U.S.C. 2000cc(a)(2). Thus, the fact that the Council did not "target" Bethel when passing ZTA 07-07 is irrelevant; whether Bethel was a "target" of ZTA 07-07 has absolutely no bearing on whether ZTA 07-07 constituted a substantial burden on Bethel's religious exercise under 42 U.S.C. 2000cc(a)(1).

Third, the Council's preexisting intent to preserve its agricultural land (see A176-A177) may be relevant to a subsequent compelling interest analysis, but it is not at all relevant to whether ZTA 07-07 substantially burdened Bethel's religious

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[9] See *Church of the Lukumi Babalu Aye, Inc.* v. *City of Hialeah*, 508 U.S. 520, 537 (1993) (when government has in place a "system of 'individualized government assessment of the reasons for the relevant conduct' * * * the government 'may not refuse to extend that system to cases of religious hardship without compelling reason'") (quoting *Smith*, 494 U.S. at 884) (internal quotation marks omitted).

exercise.[10] Rather, the issue is whether the Council's action in passing ZTA 07-07, which prevents Bethel from building a church on its own land, constitutes a substantial burden on its religious exercise, particularly where Bethel cannot accommodate its parishioners and religious practices in its existing facility.

The facts of the present case are similar to those in *Reaching Hearts Int'l, Inc.* v. *Prince George's Cnty.*, 584 F. Supp. 2d 766 (D. Md. 2008). The district court in that case upheld a jury's finding that the county council substantially burdened the religious exercise of an organization when the county's land use decisions had the practical effect of preventing the organization from building a church or church school anywhere on its property. Reaching Hearts International (RHI) had outgrown its leased space, which severely limited its religious activities. *Id.* at 771-772. Like Bethel, RHI bought property in an area that was zoned to permit churches to build as of right. *Id.* at 772. RHI's property included two parcels zoned separately for water and sewer services. *Id.* at 772, 774. RHI sought an extension of public water and sewer services to its larger parcel of land; this application was denied. *Id.* at 774-775. Like Bethel, RHI sued in state court and lost. *Id.* at 776. RHI then proposed constructing a church on its smaller portion of land, which was zoned for public water and sewer services. *Id.* at 776. The

[10] As this Court recognized in *Lovelace* v. *Lee*, 472 F.3d 174 (4th Cir. 2006), "a policy can have a laudable purpose, * * * and still impose a substantial burden on religious exercise." *Id.* at 189.

council, however, passed legislation limiting the amount of development on land near a reservoir, which covered RHI's smaller parcel. *Id.* at 776. RHI subsequently submitted a revised proposal, which was also denied. *Id.* at 778. RHI filed suit again, and a jury found that the council's actions substantially burdened RHI's religious exercise. *Id.* at 780. The district court agreed with the jury, noting that RHI's space was insufficient to accommodate RHI's congregation, prevented RHI from building a religious school to teach the precepts of its religion, and prevented RHI from holding numerous religious activities like baptisms and weddings. *Id.* at 786-787. To be sure, the district court found compelling the fact that RHI was leasing a facility and did not have a space for worship of its own. *Id.* at 786. Bethel owns its Silver Spring property, but the burdens on its religious exercise that result from its space limitations are nearly identical to those of RHI's. See *id.* at 786-787.

Moreover, the district court erred in reasoning that no substantial burden existed because Bethel did not have a reasonable expectation of obtaining approval to build a church given the fact that the Council's PIF policy was under review when Bethel purchased the property. Courts may – and should – consider the totality of circumstances governing the passage of a land use regulation when evaluating whether the regulation constitutes a substantial burden on religious exercise. See, *e.g.*, *Guru Nanak*, 456 F.3d at 989-992. Here, PIFs were permitted

as of right in the RDT zone when Bethel purchased its property, and churches could be built there as long as the necessary permits for water and sewer services were obtained. Even *after* the Council changed its PIF policy with respect to public water and sewer services, a church could *still* be built in the RDT zone provided it received approval for well and septic services. At the very least, Bethel had a reasonable expectation of obtaining well and septic services to construct a church of a size consistent with those services when it purchased its property and before the Council passed ZTA 07-07. "[O]nce the organization has bought property reasonably expecting to obtain a permit, the denial of the permit may inflict a hardship upon it." *Petra Presbyterian Church* v. *Village of Northbrook*, 489 F.3d 846, 851 (7th Cir. 2007), cert. denied, 552 U.S. 1131 (2008); see also *Saints Constantine*, 396 F.3d at 898-900. Such was the case here.

Because a reasonable jury could have found, based upon the evidence Bethel provided, that ZTA 07-07 constituted a substantial burden on Bethel's religious exercise, the district court erred in granting the Council's motion for summary judgment. See, *e.g.*, *Halpern* v. *Wake Forest Univ. Health Sciences*, 669 F.3d 454, 460 (4th Cir. 2012) (summary judgment appropriate only where, viewing the evidence and drawing all reasonable inferences in favor of the non-moving party, there are no disputed material facts); *Boitnott* v. *Corning Inc.*, 669 F.3d 172, 175 (4th Cir. 2012) ("For purposes of reviewing the grant of summary judgment, [t]he

evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor.").

CONCLUSION

For the reasons stated, this Court should reverse the decision of the district court granting the Council's motion for summary judgment on Count 1, which was based upon the district court's finding that Bethel failed to show that ZTA 07-07 constituted a substantial burden on Bethel's religious exercise.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify, pursuant to Federal Rule of Appellate Procedure, that the attached BRIEF FOR THE UNITED STATES AS *AMICUS CURIAE* SUPPORTING PLAINTIFF-APPELLANT AND URGING REVERSAL IN PART:

(1) complies with Federal Rules of Appellate Procedure 29(d) and 32(a)(7)(B) because it contains 5599 words; and

(2) complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2007, in 14-point Times New Roman font.

s/Angela M. Miller
ANGELA M. MILLER
Attorney

Dated: April 12, 2012

CERTIFICATE OF SERVICE

I certify that I electronically filed the foregoing BRIEF FOR THE UNITED STATES AS *AMICUS CURIAE* SUPPORTING PLAINTIFF-APPELLANT AND URGING REVERSAL IN PART with the Clerk of the Court using the appellate CM/ECF system on April 12, 2012.

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

I further certify that eight paper copies of the electronically-filed brief were sent to the Clerk of the Court by first class mail.

s/Angela M. Miller
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