No. 19-12418-HH

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

THAI MEDITATION ASSOCIATION OF ALABAMA, INC.; SIVAPORN NIMITYONGSKUL; VARIN NIMITYONGSKUL; SERENA NIMITYONGSKUL; PRASIT NIMITYONGSKUL,

Plaintiffs-Appellants,

v.

CITY OF MOBILE, ALABAMA,

Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ALABAMA

BRIEF FOR THE UNITED STATES AS *AMICUS CURIAE* IN SUPPORT OF NEITHER PARTY URGING VACATUR AND REMAND

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Thai Meditation Association of Alabama, Inc., et al. v. City of Mobile,
No. 19-12418-HH

CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

In accordance with Eleventh Circuit Rules 26.1-1, 26.1-2., and 26.1-3, the United States as amicus certifies that, in addition to those listed in the certificate filed by plaintiffs-appellants in their corrected opening brief filed on October 17, 2019, it is aware of no persons who have or may have an interest in the outcome of this case.

The following attorneys appear on this brief:

Eric S. Dreiband
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The United States certifies that no public traded company or corporation has an interest in the outcome of this appeal.

s/ Eric W. Treene
ERIC W. TREENE
Attorney

Date: October 23, 2019

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INTEREST OF THE UNITED STATES

The United States files this brief pursuant to Federal Rule of Appellate Procedure 29(a). This appeal implicates the interpretation and application of the substantial-burden and nondiscrimination provisions of the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA), 42 U.S.C. § 2000cc(a) and (b)(2), in the context of religious land use. The Department of Justice is charged

with enforcing RLUIPA, see 42 U.S.C. § 2000cc-2(f), and thus has an interest in the proper resolution of the legal issues raised in this appeal.

The Department has filed briefs in other appeals involving RLUIPA's substantial-burden provisions, including in this Court. See, *e.g.*, *Jesus Christ is the Answer Ministries, Inc. v. Baltimore Cty.*, 915 F.3d 256 (4th Cir. 2019) (No. 18-1450) (July 2, 2018); *Chabad Lubavitch of Litchfield Cty., Inc. v. Litchfield Historic Dist. Comm'n*, 768 F.3d 183 (2d Cir. 2014) (No. 12-1057) (Nov. 14, 2012), *cert. denied*, 135 S. Ct. 1853 (2015); *Bethel World Outreach Ministries v. Montgomery Cty. Council*, 706 F.3d 548 (4th Cir. 2013) (No. 11-2176) (Apr. 12, 2012); *Islamic Ctr. of N. Fulton v. City of Alpharetta* (11th Cir., appeal dismissed December 30, 2013) (No. 12-10940); *Westchester Day Sch. v. Vill. of Mamaroneck*, 504 F.3d 338 (2d Cir. 2007) (No. 06-1464) (Aug. 11, 2006); *Guru Nanak Sikh Soc'y of Yuba City v. Cty. of Sutter*, 456 F.3d 978 (9th Cir. 2006) (No. 03-17343) (May 19, 2004); *Sts. Constantine & Helen Greek Orthodox Church, Inc. v. City of New Berlin*, 396 F.3d 895 (7th Cir. 2005) (No. 04-2326) (Aug. 13, 2004); *Midrash Sephardi, Inc. v. Town of Surfside*, 366 F.3d 1214 (11th Cir. 2004) (No. 03-13858) (Nov. 25, 2003), *cert. denied*, 543 U.S. 1146 (2005).

STATEMENT OF THE ISSUES

The United States addresses the following questions only:

1. Whether the District Court erred in holding that RLUIPA's substantial-burden standard required Plaintiffs to establish that the government had "imposed pressure so significant as to require Plaintiffs to forego their religious beliefs."

2. Whether the District Court should have examined the surrounding facts and context to determine if the Defendant's actions pressured Plaintiffs to modify their religious practices and created "more than an inconvenience on religious exercise."

STATEMENT OF THE CASE

A. The Thai Meditation Association of Alabama

This case involves the efforts of a Buddhist religious organization—the Thai Meditation Association of Alabama, Inc. (the "Association")—and four Buddhist individuals to situate a Buddhist meditation center on a property in a residential district in Mobile, Alabama. Order, Doc. 127, at 1-2.[1] The Association is affiliated with the Thailand-based Dhammakaya school of Buddhism. *Id.* at 5. The Association engages in meditation and educational activities led by monks and

[1] "Doc.___, at___" refers to the docket entry number and relevant page number(s) of documents filed in the District Court.

lay leaders. *Id.* at 5. Each week, the Association offers three to four meditation classes and discussions about Buddhist scriptures and morality. *Id.* at 5, 22.

The Association began operating in 2007 at a home on Airport Boulevard, a major road in Mobile. Doc. 127, at 7, 27. After neighbors complained that operating a meditation center was not a permitted use in the zone without "Planning Approval," Plaintiffs filed an application for such approval. *Id.* at 7-8. After Plaintiffs' application was denied, the Association relocated to a shopping center on a busy street near its original location. *Id.* at 8. Plaintiffs assert that the shopping center location created hardships for its religious exercise: the traffic noise interfered with meditation, the physical space was too small, there was no place for visiting monks to sleep on site, and there were safety problems at the location. *Id.* at 8-9, 26; *see also* Brief of Plaintiffs-Appellants ("Association Br.") 5-6, 30-31.[2]

Plaintiffs searched for an alternative property, and ultimately purchased a 6.72-acre residential property. Doc. 127, at 9, 50. In 2015, Plaintiffs submitted applications to the City of Mobile Planning Commission ("Planning Commission") seeking approval to build, in addition to a residence already on the property, a 2,400-square-foot meditation center, a 2,000-square-foot cottage for visiting

[2] Citations are to the corrected brief of the Plaintiffs-Appellants filed with this Court on October 17, 2019.

monks, a 600-square-foot restroom facility, and a parking lot. *Id.* at 3-4, 22. When the applications came before the Planning Commission on October 15, 2015, they were met with strong community opposition based on traffic and environmental concerns. *Id.* at 11, 13-14. Additionally, community members questioned whether the Association's use of the property would be a religious use (which would be permitted in the residential zone with Planning Approval), or whether it would constitute a commercial use similar to a yoga studio (which would not be permitted in the residential zone). *Id.* at 11-12.

On December 3, 2015, the Planning Commission denied approval, citing concerns involving site access, traffic, and compatibility with the neighborhood. *Id.* at 13. The Planning Commission did not cite the concern that the Association might be considered a commercial entity rather than a religious one, though this concern had been expressed in the Planning Staff Report. *Id.* at 13.

Plaintiffs appealed to the City Council, seeking reversal of the Planning Commission's denial. *Id.* at 13. On January 19, 2016, the City Council upheld the Planning Commission's decision by a six-to-one vote after discussing the Association's compatibility with the neighborhood and the nature of Plaintiffs' religious beliefs. *Id.* at 14.[3]

[3] The Department of Justice, through its Civil Rights Division's Housing and Civil Enforcement Section and the U.S. Attorney's Office for the Southern District

B. District Court Proceedings

Plaintiffs filed suit in the U.S. District Court for the Southern District of Alabama on July 26, 2016, alleging that the City of Mobile's ("Mobile") actions constituted: (i) a substantial burden on their religious exercise in violation of RLUIPA Section 2(a); (ii) discrimination based on religion in violation of RLUIPA Section 2(b)(2); (iii) the denial of equal treatment compared to nonreligious assemblies in violation of RLUIPA Section 2(b)(1), based on Mobile's approval of the expansion of a fishing and hunting club's facility two miles away from the subject property in the same zoning district; (iv) a violation of Plaintiffs' Free Exercise rights under the First Amendment of the U.S. Constitution; (v) a violation of Plaintiffs' Equal Protection rights under the Fourteenth Amendment of the U.S. Constitution; (vi) a violation of the Alabama Religious Freedom Amendment, Alabama Constitution Article I, § 3.01; and (vii) negligent misrepresentation under Alabama law. Doc. 1.

On October 16, 2017, Plaintiffs moved for partial summary judgment on their RLUIPA, Free Exercise, Equal Protection, and Alabama Religious Freedom Amendment claims. Doc. 94. Defendant cross-moved for summary judgment on

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of Alabama, opened an investigation in this matter in March 2016 as part of the Department's RLUIPA enforcement program. The Department suspended its investigation on July 12, 2016, and did not participate in this case in the District Court.

all claims. Doc. 89. In an Order issued on September 28, 2018, the District Court granted summary judgment to the Defendant on the RLUIPA Section 2(a) substantial-burden claim, the RLUIPA Section 2(b)(1) equal-treatment claim, and the claims under the Free Exercise Clause and the Alabama Religious Freedom Amendment. Doc. 127. The court denied Defendant's motion for summary judgment on the RLUIPA Section 2(b)(2), Equal Protection Clause, and negligent misrepresentation claims. *Id.*

The District Court first found that the Association had standing to bring suit, reasoning that, although the Association was not named on the zoning application, the Association had acquired a leasehold interest in the property prior to filing suit. *Id.* at 17. The court then found that the suit met the predicates for a RLUIPA claim, since the alleged burden of the denial "arises from the [city's] procedures for making individualized assessments of proposed property use." *Id.* at 19 (citing 42 U.S.C. § 2000cc(a)(2)). The court also held that the Association's instruction in Dhammakaya meditation falls "squarely within RLUIPA's definition of 'religious exercise.'" *Id.* at 23.

The District Court then held that Defendant was entitled to summary judgment on the substantial-burden claim as a matter of law. *Id.* at 37. Citing *Midrash Sephardi, Inc. v. Town of Surfside*, 366 F.3d 1214 (11th Cir. 2004), *cert. denied*, 543 U.S. 1146 (2005), the District Court stated that "the binding Eleventh

Circuit[] standard" that governs substantial-burden claims under RLUIPA "is whether Defendant has imposed pressure so significant as to require Plaintiffs to forego their religious beliefs." Doc. 127, at 36. The District Court acknowledged that Plaintiffs had presented "persuasive authority from other Circuits' interpretation of the Substantial Burden provision," including consideration of whether a plaintiff had a reasonable expectation that it could use a particular property for religious purposes, whether reasons provided by a government decisionmaker for a zoning denial would likely apply to future applications by the same religious organization, and whether the religious organization agreed to measures to mitigate negative impacts on neighbors and the community. *Id.* at 31-33. Nevertheless, applying what it understood to be the Eleventh Circuit standard, the District Court stated that it could not conclude, "as a matter of law, . . . [that] Plaintiffs have been substantially burdened by Defendant's denial of their Applications." *Id.* at 36; *see also id.* at 26-31 (discussing Plaintiffs' arguments).

The District Court also granted summary judgment to Defendant on Plaintiffs' RLUIPA equal-treatment claim, their Free Exercise claim, and their Alabama Religious Freedom Amendment claim. *Id.* at 54-55, 61. The District Court denied Defendant's summary judgment on Plaintiffs' remaining claims, *id.* at 47, 57, 62, and denied Plaintiffs' motion for partial summary judgment. *Id.* at 62. After a bench trial on the remaining claims, the District Court, on May 24,

2019, found for the Defendant on those claims. Doc. 169. The District Court entered final judgment on May 30, 2019. Doc. 170. Plaintiffs filed a timely notice of appeal on June 24, 2019. Doc. 173.

SUMMARY OF THE ARGUMENT

The District Court misread this Court's opinion in *Midrash Sephardi, Inc. v. Town of Surfside*, 366 F.3d 1214 (11th Cir. 2004), *cert. denied*, 543 U.S. 1146 (2005), and, in doing so, misinterpreted this Court's standard for determining what constitutes a substantial burden under RLUIPA. Contrary to the District Court's holding, the standard is *not* whether the government had "imposed pressure so significant as to require Plaintiffs to forego their religious beliefs." Doc. 127, at 36. Rather, *Midrash Sephardi* explains that "a 'substantial burden' is akin to significant pressure which directly coerces the religious adherent to conform his or her behavior accordingly." 366 F.3d at 1227. Similarly, other Circuits considering the substantial-burden section of RLUIPA have held that a substantial burden exists when a government regulation pressures religious adherents to modify their religious behavior, even if that pressure is not so extreme as to require adherents to forgo completely their beliefs.

In determining whether there was a substantial burden, the District Court should have examined the needs of the congregation to use the property for religious purposes and whether the actions of Mobile unduly burdened Plaintiffs.

Midrash Sephardi, which concerned a straightforward factual scenario, does not set out a comprehensive framework through which to analyze a factually complicated substantial-burden claim like the one at bar. Other Circuit decisions on point are instructive, and may assist this Court in establishing an appropriate analytical framework.

ARGUMENT

I

THE DISTRICT COURT ERRED IN REQUIRING PLAINTIFFS TO SHOW THAT THE DEFENDANT'S ACTIONS REQUIRED THEM TO FORGO THEIR RELIGIOUS BELIEFS

RLUIPA prohibits a government from "impos[ing] or implement[ing] a land use regulation in a manner that imposes a substantial burden on the religious exercise of a person" unless the burden "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" as "any exercise of religion, whether or not compelled by, or central to, a system of religious belief," specifying that "[t]he use, building, or conversion of real property for the purpose of religious exercise shall be considered to be religious exercise." 42 U.S.C. § 2000cc-5(7). Although RLUIPA does not define the term "substantial burden," the Act 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). In describing conduct that satisfies the substantial-burden standard, this Court in *Midrash Sephardi, Inc. v. Town of Surfside*, 366 F.3d 1214 (11th Cir. 2004), *cert. denied*, 543 U.S. 1146 (2005), bookended the standard it announced with descriptions of conduct that does not meet the standard, and conduct that would plainly meet the standard. Initially, this Court noted that mere "inconvenience on religious exercise" does not constitute a substantial burden. *Id.* at 1227 (11th Cir. 2004). On the opposite end of the spectrum, the court explained that "a substantial burden *can* result from pressure that tends to force adherents to forego religious precepts or from pressure that mandates religious conduct." *Id.* (emphasis added). Though this latter form of government conduct is *sufficient* to demonstrate a substantial burden, it is not, contrary to the District Court's interpretation, *necessary* to demonstrate a substantial burden. Rather, this Court explained in *Midrash Sephardi* that "a 'substantial burden' is akin to significant pressure which directly coerces the religious adherent to *conform* his or her behavior accordingly." *Id.* (emphasis added).

That this, and not the District Court's interpretation, was the holding of this Court is borne out by this Court's rejection in *Midrash Sephardi* of an earlier Seventh Circuit RLUIPA case, *Civil Liberties for Urban Believers v. City of Chicago*, 342 F.3d 752 (7th Cir. 2003) ("*CLUB*"), *cert. denied*, 541 U.S. 1096

(2004). In *CLUB*, the Seventh Circuit held that the substantial-burden standard is only met by government conduct "that necessarily bears direct, primary, and fundamental responsibility for rendering religious exercise . . . effectively impracticable," *id.* at 761—a standard not unlike the one adopted by the District Court. This Court, however, expressly "decline[d] to adopt the Seventh Circuit's definition,"[4] on the grounds that it "would render [RLUIPA] § b(3)'s total exclusion prohibition meaningless." *Midrash Sephardi*, 366 F.3d at 1227 & n.10.[5]

Nor does this Court stand alone. Two other Circuits have adopted the substantial-burden standard set out by this Court in *Midrash Sephardi*. In *Westchester Day Sch. v. Vill. of Mamaroneck*, 504 F.3d 338 (2d Cir. 2007), the Second Circuit explained that "when there has been a denial of a religious institution's building application, courts appropriately speak of government action that directly coerces the religious institution to *change* its behavior, rather than government action that forces the religious entity to choose between religious

[4] The Seventh Circuit has since relaxed its formulation of the substantial-burden standard. *See Sts. Constantine & Helen Greek Orthodox Church, Inc. v. City of New Berlin*, 396 F.3d 895, 901 (7th Cir. 2005) ("That the burden would not be insuperable would not make it insubstantial.").

[5] The "total exclusion" provision is a separate provision of RLUIPA barring governments from "impos[ing] or implement[ing] a land use regulation that . . . totally excludes religious assemblies from a jurisdiction." 42 U.S.C. § 2000cc(b)(3)(A).

precepts and government benefits." *Id.* at 349 (citing *Midrash Sephardi*, 366 F.3d at 1227) (emphases added and omitted). And in *Bethel World Outreach Ministries v. Montgomery County Council*, 706 F.3d 548 (4th Cir. 2013), the Fourth Circuit refused to adopt a standard requiring pressure to *violate beliefs* for a burden to be "substantial", instead following "every one of our sister circuits to have considered the question" and holding that "in the land use context, a plaintiff can succeed on a substantial burden claim by establishing that a government regulation puts substantial pressure on it to *modify its behavior*." *Id.* at 556 (citing, *inter alia*, *Midrash Sephardi*, 366 F.3d at 1227) (emphasis added); *see also Livingston Christian Sch. v. Genoa Charter Twp.*, 858 F.3d 996, 1004 (6th Cir. 2017) (declining to establish a specific standard, but noting that "some courts . . . define a substantial burden as something that places significant pressure on an institutional plaintiff to modify its behavior" and proceeding to apply factors similar to those used by these courts in determining if there were such pressure), *cert. denied*, 138 S. Ct. 1696 (2018); *Roman Catholic Bishop of Springfield v. City of Springfield*, 724 F.3d 78, 95 (1st Cir. 2013) (declining to "adopt any abstract test" and instead employing an approach that "recognize[s] different types of burdens and that such burdens may cumulate to become substantial").

This Court's and other Circuits' focus on pressure to "modify religious behavior" in the RLUIPA land-use context rather than on pressure "to forego . . .

religious beliefs" is distinct from the typical analytical approach employed in construing claims brought under the Free Exercise Clause, the Religious Freedom Restoration Act, and RLUIPA's institutionalized persons provision. *See*, *e.g.*, *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2775 (2014) (contraceptive mandate "demand[ed] that [Plaintiffs] engage in conduct that seriously violates their religious beliefs"); *Holt v. Hobbs*, 135 S. Ct. 853, 862 (2015) (putting prisoner to the choice of shaving his beard or facing disciplinary action required the prisoner to "engage in conduct that seriously violate[d] [his] religious beliefs") (brackets in original; citation omitted). Courts have recognized, however, that a different approach is called for in the land-use context.

As the Second Circuit noted in *Westchester Day School*, 504 F.3d at 348-349, it is not entirely accurate to speak of "pressure" to choose between religious precepts and government benefits in the land-use context, since when there is a denial the construction "simply cannot proceed." *Id.* at 349. The Second Circuit therefore held that the proper test is whether a religious institution has been coerced to change its behavior, "thereby impeding its religious exercise." *Id.* Likewise, the Fourth Circuit held in *Bethel World Outreach*, 706 F.3d at 555, that the District Court erred by applying the substantial-burden standard from Free Exercise and RLUIPA-institutionalized-persons cases in a RLUIPA land-use case. Since "government action preventing a religious organization from building a

church will rarely, if ever, force the organization to violate its religious beliefs, because the organization can usually locate its church elsewhere," the court explained, "requiring a religious organization to prove that a land use regulation pressured it to violate its beliefs would be tantamount to eliminating RLUIPA's substantial burden protection in the land use context. It seems very unlikely that Congress intended this." *Id.*; *see also Livingston Christian Sch.*, 858 F.3d at 1003-1004 ("Other circuits have persuasively explained that land-use regulations do not typically compel plaintiffs to 'violate their beliefs' in the way that, for example, prison rules might . . . . But land-use regulations can prohibit a plaintiff from engaging in desired religious behaviors[.]").

In sum, the District Court's holding—that the substantial-burden standard turns on "whether Defendant has imposed pressure so significant as to require Plaintiffs to forego their religious beliefs"—is not consistent with *Midrash Sephardi*. This Court thus should remand the case to the District Court with instructions to apply the correct standard.

II

FACTUAL AND CONTEXTUAL FACTORS CONSIDERED BY OTHER CIRCUITS IN DETERMINING THE DEGREE OF BURDEN ON RELIGIOUS LAND-USE PLAINTIFFS MAY BE HELPFUL TO THIS COURT

This Court's 2004 decision in *Midrash Sephardi, Inc. v. Town of Surfside*, 366 F.3d 1214 (11th Cir. 2004), *cert. denied*, 543 U.S. 1146 (2005), was one of the

earliest Circuit decisions interpreting RLUIPA's substantial-burden provision. This Court did not have occasion, due to the facts presented, to elaborate on the numerous criteria that may be relevant in evaluating a substantial-burden claim. *Midrash Sephardi* involved a straightforward factual scenario: a congregation sought to worship in rented space above a bank in a business district that did not permit places of worship. *Id.* at 1220. It sought to do so because the business district was the most convenient location for its congregants to walk to services on their Sabbath. *Id.* at 1221. This Court found that the burden imposed by the zoning code's ban on places of worship in the business district was not substantial because only a few blocks away from the bank was a zone where places of worship were permitted with a conditional-use permit. *Id.* at 1228.[6]

This case presents a more complex range of considerations. The Plaintiffs here sought the new property to alleviate specific inadequacies in their current location, including noise and safety issues, and insufficient space for their religious activities. Doc. 94, at 32-33. They also specifically sought out property in a zone that allowed places of worship on a discretionary basis, and in which zone they claim that religious uses are encouraged. *Id.* at 34. Plaintiffs also argue that: (i) they had a reasonable expectation that they would be able to operate at the target

[6] Ultimately, the court held that the bar on religious assemblies in the business district violated RLUIPA's equal-treatment provision, and ruled for the plaintiffs on that ground. *See Midrash Sephardi*, 366 F.3d at 1228-1235.

property, *id.* at 34-35; (ii) there may not be other locations where they could easily obtain approval for their religious use, *id.* at 35-36; (iii) they agreed to mitigation measures suggested by the Planning Staff, *id.* at 37; and (iv) the Defendant acted in an arbitrary and discriminatory manner, *id.* See also Association Br. 30-33.

Since *Midrash Sephardi* was decided, other Circuits have grappled with multi-faceted factual scenarios in the context of RLUIPA substantial-burden challenges. These courts have coalesced around a totality-of-the-circumstances test, examining whether the government's actions substantially inhibit religious exercise, rather than merely inconveniencing it. *See, e.g.*, *Roman Catholic Bishop of Springfield v. City of Springfield*, 724 F.3d 78, 95 (1st Cir. 2013); *Bethel World Outreach Ministries v. Montgomery Cty. Council*, 706 F.3d 548, 558 (4th Cir. 2013); *Livingston Christian Sch. v. Genoa Charter Twp.*, 858 F.3d 996, 1003-1004 (6th Cir. 2017); *Chabad Lubavitch of Litchfield Cty., Inc. v. Litchfield Historic Dist. Comm'n*, 768 F.3d 183, 195-196 (2d Cir. 2014); *Westchester Day Sch. v. Vill. of Mamaroneck*, 504 F.3d 338, 349-351 (2d Cir. 2007); *Guru Nanak Sikh Soc'y of Yuba City v. Cty. of Sutter*, 456 F.3d 978, 988 (9th Cir. 2006); *Sts. Constantine & Helen Greek Orthodox Church, Inc. v. City of New Berlin*, 396 F.3d 895, 899-901 (7th Cir. 2005). These courts' decisions are instructive.

One factor in determining whether a zoning denial constitutes a substantial burden on religious exercise is the actual need of the congregation for new,

different, or additional space. *See Midrash Sephardi*, 366 F.3d at 1227-1228; *see also Jesus Christ is the Answer Ministries, Inc. v. Baltimore Cty.*, 915 F.3d 256, 261 (4th Cir. 2019). A religious institution's need for a new facility to accommodate a growing congregation is one way to show such an actual need, the denial of which could constitute a substantial burden in violation of RLUIPA. *See Bethel World Outreach*, 706 F.3d at 558; *Chabad Lubavitch*, 768 F.3d at 188; *Sts. Constantine & Helen*, 396 F.3d at 898. So, too, may a congregation's need to modify its existing location to facilitate additional forms of religious exercise, such as expanding the offerings at a religious school, *see Westchester Day Sch.*, 504 F.3d at 347-348, 352, or providing educational programs and counseling at a church, *see Bethel World Outreach*, 706 F.3d at 552, 558.

Another factor in determining whether a burden is substantial is whether the zoning denial was final, or if the plaintiff had been given an opportunity to submit a modified application. *See, e.g.*, *Jesus Christ is the Answer Ministries*, 915 F.3d at 262; *Bethel World Outreach*, 706 F.3d at 558; *Westchester Day Sch.*, 504 F.3d at 349; *Guru Nanak*, 456 F.3d at 989. Because of the evident difference between being completely foreclosed from using a property for religious exercise and having that use conditionally denied subject to certain modifications, courts have given great weight to this factor. *Westchester Day Sch.*, 504 F.3d at 349 ("[W]hether the denial . . . was absolute is important; if there is a reasonable

opportunity for the institution to submit a modified application, the denial does not place substantial pressure on [a plaintiff] to change its behavior."). That said, a substantial burden may be shown even in the absence of such a complete foreclosure. Courts should consider whether the government's decision—including a decision that restricts the size or scope of a proposed use, rather than forbidding religious use altogether—hinders religious functions. *See, e.g.*, *Livingston Christian Sch.*, 858 F.3d at 1006; *Bethel World Outreach*, 706 F.3d at 557-560; *Westchester Day Sch.*, 504 F.3d at 349-351.

A substantial burden also may exist where government action leaves an organization without "quick, reliable, and financially feasible alternatives" to expand or locate facilities as part of their religious exercise, *Westchester Day Sch.*, 504 F.3d at 352, or imposes the "delay, uncertainty, and expense" of either having to identify another suitable property, *e.g.*, *Bethel World Outreach*, 706 F.3d at 557 (citation omitted), or continually having to file potentially futile permit applications, *Sts. Constantine & Helen*, 396 F.3d at 901; *Guru Nanak*, 456 F.3d at 991-992. Additionally, courts consider whether the government's decision (or decision-making process) was arbitrary and capricious or unlawful, such that the institution received "less than even-handed treatment" that frustrates its use of the property for religious exercise and undermines the prospect of success with future applications for the same property or other properties in the jurisdiction.

Westchester Day Sch., 504 F.3d at 351; *see also Roman Catholic Bishop of Springfield*, 724 F.3d at 96; *Sts. Constantine & Helen*, 396 F.3d at 900-901. In such instances, RLUIPA's substantial-burden provision may "backstop[] the explicit prohibition of religious discrimination" in RLUIPA's nondiscrimination provision. *Westchester Day Sch.*, 504 F.3d at 351 (citation omitted); *see also Chabad Lubavitch*, 768 F.3d at 195; *Sts. Constantine & Helen*, 396 F.3d at 899-900.

Finally, courts may assess whether the burden alleged is attributable to the government or whether it is self-imposed. One fact to consider is whether a plaintiff could reasonably expect to use a given property for religious exercise. *See Andon, LLC v. City of Newport News*, 813 F.3d 510, 516 (4th Cir. 2016); *Bethel World Outreach*, 706 F.3d at 557; *Livingston Christian Sch.*, 858 F.3d at 1004; *Petra Presbyterian Church v. Vill. of Northbrook*, 489 F.3d 846, 851 (7th Cir. 2007), *cert. denied*, 552 U.S. 1131 (2008). For example, if a plaintiff did not perform due diligence, then the burden from a zoning denial may be self-imposed. *See Bethel World Outreach*, 706 F.3d at 558 (noting that while "modern zoning practices are such that landowners are rarely *guaranteed* approvals," reasonable expectation is relevant in the substantial-burden inquiry). Relatedly, a plaintiff's willingness to modify its proposed use in order to comply with applicable zoning requirements may also be probative as to whether the burden is attributable to the

government or is self-imposed. *See Guru Nanak*, 456 F.3d at 989-990. At bottom, whether the government's application of its land-use regulations constitutes a substantial burden on the plaintiff's religious exercise is a fact-intensive inquiry that requires a careful weighing of the factors underlying a zoning denial.

Plaintiffs argued below that they had established a substantial burden based on many of the factors described above. Doc. 94, at 33-37. They argued that they needed a quieter and safer location for their meditation center that could accommodate visiting monks from Thailand. *Id.* at 32-33. They contended that, unlike in *Midrash Sephardi*, religious use was *encouraged* in the residential zone where they sought zoning approval, and they thus had a reasonable expectation that their application would be approved. *Id.* at 34-35. Plaintiffs further contended that there are no other locations where they could obtain approval for their meditation center without delay, uncertainty, and expense. *Id.* at 35-36. They also claimed that they agreed to every mitigation measure suggested by Defendant's Planning Staff, and that Defendant acted in an arbitrary and discriminatory manner. *Id.* at 37; see also Association Br. 30-33. Other Circuits have found these factors relevant to the substantial-burden question, as noted above.

The District Court considered some of these factors, but declined to give them weight. The court declined to consider safety problems with the Association's current location, stating that "safety is not a matter that implicates

religious exercise." Doc. 127, at 30-31. But this elides the point that safety, like other issues attendant to real estate, *can* hinder religious exercise and should be considered in the substantial-burden analysis. *See Int'l Church of the Foursquare Gospel v. City of San Leandro*, 673 F.3d 1059, 1068 (9th Cir. 2011) (safety concern was among valid reasons for church rejecting alternative property); *see also Bethel World Outreach*, 706 F.3d at 558 (noting problems of overcrowding and lack of unity in congregation caused by holding multiple services); *Bikur Cholim, Inc. v. Vill. of Suffern*, 664 F. Supp. 2d 267, 272, 291 (S.D.N.Y. 2009) (fact that there was no alternative location for religious building within safe walking distance of hospital was valid factor in evaluating substantial burden).

The District Court also declined to consider the reasonableness of Plaintiffs' expectation that they would be able to operate on their property, arguing that such a position would "essentially grant an automatic exemption to religious organizations from discretionary land use regulations." Doc. 127, at 32. But the reasonable-expectations argument does not call for an "automatic exemption"; rather a plaintiff's reasonable expectation is just one factor for the court to consider in determining whether a zoning denial was self-imposed by a plaintiff, or whether the denial may fairly be attributable to the Defendant. *Bethel World Outreach*, 706 F.3d at 557; *see also Jesus Christ is the Answer Ministries*, 915 F.3d at 261; *Livingston Christian Sch.*, 858 F.3d at 1004; *Petra Presbyterian Church*, 489 F.3d

at 851. Finally, the District Court essentially disregarded the other factors pressed by Plaintiffs, see *supra*, and considered by other Circuit courts, see pp. 16-20, *supra*, in analyzing other complex RLUIPA substantial-burden cases.

CONCLUSION

For the foregoing reasons, the District Court's decision should be vacated and remanded with instructions to apply the proper standard.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that the attached BRIEF FOR THE UNITED STATES AS *AMICUS CURIAE* IN SUPPORT OF NEITHER PARTY URGING VACATUR AND REMAND:

(1) complies with the type-volume limitation imposed by Federal Rule of Rule of Appellate Procedure 32(a)(7)(B) because it contains 4985 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f); 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 Word 2016, in 14-point Times New Roman font.

s/ Eric W. Treene
ERIC W. TREENE
Attorney

Date: October 23, 2019

CERTIFICATE OF SERVICE

I certify that on October 23, 2019, the foregoing BRIEF FOR THE UNITED STATES AS *AMICUS CURIAE* IN SUPPORT OF NEITHER PARTY URGING VACATUR AND REMAND was filed with the Clerk of the Court by using the Appellate CM/ECF system and that seven hard copies of the same was sent to the Clerk of the Court via certified mail.

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

s/ Eric W. Treene
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