No. 03-13858-CC

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

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MIDRASH SEPHARDI, INC.,
YOUNG ISRAEL OF BAL HARBOR, INC.,

Plaintiffs-Counter-Defendants-Appellants

v.

TOWN OF SURFSIDE, a Florida Municipal Corporation

Defendant-Counter-Claimant-Appellee

PAUL NOVACK, Individually and in his capacity as
Mayor of Surfside, et al.

Defendants

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

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# BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING APPELLANT

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R. ALEXANDER ACOSTA
Assistant Attorney General

JESSICA DUNSAY SILVER
SARAH E. HARRINGTON
Attorneys
Civil Rights Division
U.S. Department of Justice
950 Pennsylvania Ave. NW, PHB 5020
Washington, DC 20530
(202) 305-7999

*Midrash Sephardi, Inc. & Young Israel of Bal Harbour* v. *Town of Surfside*
No. 03-13858-C

CERTIFICATE OF INTERESTED PERSONS
AND CORPORATE DISCLOSURE STATEMENT

Counsel for Amicus Curiae United States of America hereby certifies, in accordance with F.R.A.P. 26.1 and 11th Cir. R.26.1-1, that the following persons may have an interest in the outcome of this case and were not included in the Appellant's Certificate of Interested Persons:

R. Alexander Acosta, Esq., Counsel for the United States

Laura W. Bonn, Esq., Counsel for the United States in the district court

Stephen Cypen, defendant in the district court

Sarah E. Harrington, Esq., Counsel for the United States

Theodore C. Hirt, Esq., Counsel for the United States in the district court

Mitchell Kinzer, defendant in the district court

Paul Novack, defendant in the district court

Norman Prout, defendant in the district court

Jack R. Reiter, Esq., Counsel for defendant-appellee Surfside

Eduardo Rodriguez, defendant in the district court

Alan Rubin, defendant in the district court

Jessica Dunsay Silver, Esq., Counsel for the United States

Lowell V. Sturgill, Esq., Counsel for the United States

Adam J. Szubin, Esq., Counsel for the United States in the district court

Timothy Will, defendant in the district court

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## INTEREST OF THE UNITED STATES

This case concerns the appropriate interpretation of the prohibitions in 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 an interest in how courts construe the statute's protections. The United States is entitled to participate as amicus curiae pursuant to Federal Rule of Appellate Procedure 29.

## QUESTIONS PRESENTED

The United States will address the following questions:

1. Whether Surfside's zoning scheme treats religious assemblies on less than equal terms with secular assemblies within the meaning of Section 2(b)(1) of RLUIPA by prohibiting churches and synagogues within certain districts, but permitting noncommercial "private clubs" and "lodges" in such districts.

2. Whether, in determining if the zoning regulations of a town violate the rights of a religious institution under Section 2(a)(1) of RLUIPA, a court is permitted to ignore the effect of those regulations on congregants who reside outside the town.

## STATEMENT OF FACTS AND STATEMENT OF THE CASE

The plaintiffs in this case are Midrash Sephardi and Young Israel of Bal Harbour, both of which are small Orthodox Jewish congregations located in the town of Surfside, Florida. R.248, Third Amended Complaint, at ¶¶ 5-6.[1] Following are the facts alleged in the plaintiffs' third amended complaint: Surfside is a small oceanfront community occupying less than one square mile. R.248 at ¶ 9. The Orthodox Jewish residents of Surfside and the neighboring towns of Bal Harbour and Bay Harbor Islands are an integrated Orthodox community whose three principal synagogues are centrally located in Surfside on or near 96th Street (the town's northern border). R.248 at ¶¶ 10-11. As adherents of the tenets of

[1] References to R.___ are to the district court docket entry number of documents filed in the district court in this case.

Orthodox Judaism, members of the plaintiffs' congregations are required to walk to religious services on Holy Days and on Saturdays. Thus, Orthodox synagogues must be located within walking distance of their congregants. R.248 at ¶ 12.

At the commencement of this lawsuit, both plaintiffs were located on or near the border between Surfside and Bal Harbour, and near Bay Harbor Islands, on 96th Street. R.248 at ¶¶ 23, 25. Since 1997, Midrash has been located in several rented rooms on the second floor of a bank in the town's business district – with zoning designation B-1 – in which churches and synagogues are prohibited by Section 90-152 of the Surfside Zoning Code ("Code"). R.248 at ¶¶ 21, 23. At the commencement of the litigation, Young Israel leased its premises in a hotel located in the tourist district – with zoning designation RT-1 – in which churches and synagogues are prohibited by Section 90-151 of the Zoning Code. R.248 at ¶¶ 24-25. Since then, Young Israel has moved and now shares the space used by Midrash Sephardi in the B-1 district. R.296 at 1-2.

The Zoning Code of the town of Surfside divides the town into various districts and delineates the permitted uses in each district. R.248 at ¶ 45. Any use not listed as permitted in a particular district is prohibited. R.248 at ¶ 46. Churches and synagogues are permitted to locate in the "RD-1" two-family residential district, but only if they obtain a conditional use permit.[2] Zoning Code § 90-147; R.248 at ¶ 52. Churches and synagogues are prohibited in every other

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[2] Surfside zoning ordinance 90-41 defines a "conditional use" as one which is appropriate if controlled as to number, area, and location.

zoning district. R.248 at ¶ 46. Thus, both plaintiffs are and have been operating in districts in which they are barred: districts B-1 and RT-1.

Section 90-152(a) of the Code governs the business district in which the plaintiffs are located and states that "the purpose of the B-1 business district is to provide for retail shopping and personal service needs of the town's residents and tourists." Section 90-152(b) of the Code allows private clubs and lodge halls to locate above the first floor, which is where Midrash is located, in the B-1 district. The Code defines a "private club" as "a building and facilities or premises, owned and operated by a corporation, association, person or persons for social, educational or recreational purposes, but not primarily for profit and not primarily to render a service which is customarily carried on as a business." Code Section 90-2(20). Section 90-151 of the Code governs the tourist district in which Young Israel was located, the stated purpose of which is to "provide facilities that will afford convenience for tourists and enable intensive use of the ocean frontage." Private clubs are permitted within the RT-1 district as well.

On July 9, 1999, the plaintiffs filed a complaint against Surfside and various Surfside officials alleging that Surfside's zoning scheme violates several of the plaintiffs' rights under the First and Fourteenth Amendments, as well as the Florida Religious Freedom Restoration Act. R.1, Complaint. Surfside moved for summary judgment on all counts, see R.52, and the plaintiffs moved for partial summary judgment on some counts, see R.101. The district court granted summary judgment to Surfside on all but one count. See R.215.

The Religious Land Use and Institutionalized Persons Act (RLUIPA), 42 U.S.C. 2000cc *et seq.*, went into effect in September 2000. With permission of the district court, the plaintiffs filed an amended complaint on August 8, 2001, adding claims under RLUIPA. R.248. The plaintiffs invoked three distinct provisions of RLUIPA: First, the plaintiffs claim that Surfside's Zoning Code violates Section 2(b)(1), 42 U.S.C. 2000cc(b)(1), which makes it unlawful for a government to "impose or implement a land use regulation in a manner that treats a religious assembly or institution on less than equal terms with a nonreligious assembly or institution." Second, the plaintiffs claim that the Zoning Code violates Section 2(b)(3)(B), 42 U.S.C. 2000cc(b)(3), which provides that "[n]o government shall impose or implement a land use regulation that * * * unreasonably limits religious assemblies, institutions, or structures within a jurisdiction." Finally, the plaintiffs allege that the Zoning Code violates Section 2(a)(1), 42 U.S.C. 2000cc(a)(1), because it imposes a substantial burden on their free exercise of religion and is not in furtherance of a compelling government interest or the least restrictive means of furthering that compelling interest.

Both parties again moved for summary judgment on various grounds, R.261, R.271, and the United States sought and received permission to intervene in the case for the limited purpose of defending the constitutionality of RLUIPA, R.253, R.256. The court granted summary judgment to Surfside on the plaintiffs' Section 2(a)(1) claim because the court found that the plaintiffs had failed to demonstrate that Surfside's zoning code imposes a substantial burden on their free exercise of

religion. R.296 at 4-8. In so holding, the court considered only the potential burden on residents of Surfside, refusing to consider the plaintiffs' claims that relocating the synagogue would substantially burden members of its congregation who live in Bal Harbour or Bay Harbor Islands. R.296 at 4-5. The court found that the plaintiffs had only offered evidence of four congregants residing in Surfside itself, which was insufficient to prevail on the substantial burden issue. See R.296 at 5.

With regard to the plaintiffs' "equal terms" claim under Section 2(b)(1), the court initially refused to grant summary judgment because it found genuine issues of material fact as to whether churches and synagogues are similarly situated to entities such as private clubs and lodges that are permitted in tourist and business districts. R.296 at 17-18. On reconsideration, however, the court found that such entities are not similarly situated with churches and synagogues, and thus that Surfside had not violated Section 2(b)(1) of RLUIPA. See R.322 at 7-9.

Finally, the court granted summary judgment to Surfside on the plaintiffs' "unreasonable limitations" claim under Section 2(b)(3) because the plaintiffs had not applied for a conditional use permit and the court noted that there was no evidence that a synagogue's application for a conditional use permit in the two-family residential zone would be denied. R.296 at 18-19. The court also found, R.296 at 19, that the zoning ordinance was the least restrictive means to further Surfside's compelling interest in "implementing a zoning plan designed to further the synergy of a business district," R.215 at 28. Because the court found for the

defendants on the merits of the plaintiffs' RLUIPA claims, it did not address the constitutionality of the statute. R.296 at 19 n.12. The plaintiffs appealed and have obtained a stay pending appeal from this Court. R.357, R.359.

## SUMMARY OF ARGUMENT

The district court erred in granting summary judgment to Surfside on the plaintiffs' claims under Section 2(b)(1) and 2(a)(1) of the Religious Land Use and Institutionalized Persons Act (RLUIPA).[3] Section 2(b)(1) of RLUIPA prohibits a municipality's land use regulations from treating a religious institution on less than equal terms with a similarly situated secular institution. Surfside's zoning scheme prohibits churches and synagogues from locating in areas where nonprofit private clubs and lodges are permitted to locate as of right. In light of evidence that such institutions are similarly situated, the district court erred in granting summary judgment to Surfside on that claim.

In evaluating the plaintiffs' claim that Surfside's zoning scheme imposes a substantial burden on their religious exercise in violation of Section 2(a)(1) of RLUIPA, the district court erred in refusing to consider the effect of Surfside's zoning scheme on the plaintiffs' members who reside in neighboring towns.

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[3] The United States will address only the alleged violations of Sections 2(a)(1) and 2(b)(1) of RLUIPA. The United States takes no position on the merits of any of the plaintiffs' other claims under RLUIPA, the United States Constitution, or the Florida Religious Freedom Restoration Act. If the defendant-appellee elects to challenge the constitutionality of RLUIPA before this Court, the United States will respectfully exercise its right, pursuant to 28 U.S.C. 2403(a), to intervene and file a brief defending the constitutionality of RLUIPA.

Nothing in the text or legislative history of RLUIPA indicates that its protections are limited to persons who reside within the limits of the municipality whose zoning laws they challenge. The district court erred in granting summary judgment for Surfside on that claim.

## ARGUMENT

### I. Statutory Background

RLUIPA was signed into law on September 22, 2000. See Pub. L. No. 106-274, 114 Stat. 803-807. The statute addresses, *inter alia*, state and local land use regulations, which Congress determined to be an area in which the actions of state and local governments impose substantial burdens on religious liberty.

#### A. *RLUIPA's Land Use Provisions*

Section 2(a)(1) of RLUIPA provides that no state or local 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 both "in furtherance of a compelling governmental interest" and "is the least restrictive means of furthering that" interest. Section 2(a)(2) provides that this restriction on governmental action applies in any case in which:

> (A) the substantial burden is imposed in a program or activity that receives Federal financial assistance, even if the burden results from a rule of general applicability;

(B) the substantial burden affects, or removal of that substantial burden would affect, commerce with foreign nations, among the several States, or with Indian tribes, even if the burden results from a rule of general applicability; or

(C) the substantial burden is imposed in the implementation of a land use regulation or system of land use regulations, under which a government makes, or has in place formal or informal procedures or practices that permit the government to make, individualized assessments of the proposed uses for the property involved.

With respect to Section 2(a)(2)(A), Congress relied on its authority under the Spending Clause (Art. I, § 8, cl. 1). With respect to Section 2(a)(2)(B), Congress relied on its authority under the Commerce Clause (Art. I, § 8, cl. 3). With respect to Section 2(a)(2)(C), Congress relied on its authority under Section Five of the Fourteenth Amendment.

RLUIPA also contains non-discrimination and non-exclusion provisions that protect religious assemblies or institutions. Specifically, Sections 2(b)(1) and 2(b)(2) provide that no state or local government "shall impose or implement a land use regulation in a manner that treats a religious assembly or institution on less than equal terms with a nonreligious assembly or institution," and that such governments shall not "impose or implement a land use regulation that discriminates against any assembly or institution on the basis of religion or religious denomination." Section 2(b)(3) states that such governments shall not "impose or implement a land use regulation that * * * totally excludes religious assemblies from a jurisdiction; or * * * unreasonably limits religious assemblies, institutions, or structures within a jurisdiction." Congress enacted these provisions

– Sections 2(b)(1), 2(b)(2), and 2(b)(3) – pursuant to its power under Section Five of the Fourteenth Amendment.

RLUIPA both provides for private causes of action to enforce its terms and authorizes the United States to bring actions to enforce the statute. Section 4(a) authorizes any person to "assert a violation of this Act as a claim or defense in a judicial proceeding" and to "obtain appropriate relief against a government." In such suits, if the "plaintiff produces *prima facie* evidence to support a claim alleging violation of the Free Exercise Clause or a violation of section 2," then the government "shall bear the burden of persuasion on any element of the claim, except that the plaintiff shall bear the burden" on whether the law, regulation, or practice at issue "substantially burdens" the plaintiff's exercise of religion. In addition, Section 4(f) provides that "[t]he United States may bring an action for injunctive or declaratory relief to enforce compliance" with the statute.

B. *Legislative History*

The impetus for Congress's passage of Section 2 of RLUIPA was a record of widespread state and local discrimination against religious institutions by means of zoning regulations. 146 Cong. Rec. S7775 (daily ed. July 27, 2000) (joint statement of Sens. Hatch & Kennedy); see also H.R. Rep. No. 219, 106th Cong., 2d Sess. 18 (1999) ("House Report"); *id.* at 24 (concluding that result of various forms of zoning discrimination "is a consistent, widespread pattern of political and governmental resistance to a core feature of religious exercise: the ability to assemble for worship"). Witnesses presented massive evidence of a pattern of

religious discrimination, impinging upon a core aspect of religious exercise – the ability to assemble for worship. 146 Cong. Rec. S7774-S7775; see also House Report at 21, 24. Specifically, the House Report indicates that land use regulations implemented through a system of individualized assessments placed "within the complete discretion of land use regulators whether [religious] individuals had the ability to assemble for worship." House Report at 19. The report further concluded that "[r]egulators typically have virtually unlimited discretion in granting or denying permits for land use and in other aspects of implementing zoning laws," *id.* at 20, and that the "standards in individualized land use decisions are often vague, discretionary, and subjective," *id.* at 24. Congress also received testimony that religious assemblies are subjected to less favorable treatment when compared to secular land uses. Specifically, the House Report found that secular assemblies such as "clubs" and "lodges" "are often permitted as of right where churches require a special use permit, or permitted on special use permit where churches are wholly excluded." House Report at 19-20.

Members of Congress determined that these forms of discrimination are widespread and that individualized land use assessments readily lend themselves to discrimination against religious assemblies, yet make it difficult to prove such discrimination in any particular case. 146 Cong. Rec. S7775; House Report at 18-24. In reaching this conclusion, RLUIPA's sponsors relied on statistical evidence from national surveys and studies of zoning codes, reported land use cases, and the experiences of particular churches, all of which demonstrated unconstitutional

government conduct. See 146 Cong. Rec. S7775; House Report at 19-22. Members of Congress also relied on evidence and testimony regarding numerous specific examples of unconstitutional discrimination from across the country, examples that witnesses with broad expertise and experience testified were representative of unconstitutional discrimination that occurred generally. See 146 Cong. Rec. S7775, House Report at 19-22.

## II. Surfside's Zoning Scheme Violates Section 2(b)(1) Of RLUIPA Because It Treats Religious Assemblies On Less Than Equal Terms With Similarly Situated Secular Assemblies

Section 2(b)(1) of RLUIPA makes it unlawful for a government to "impose or implement a land use regulation in a manner that treats a religious assembly or institution on less than equal terms with a nonreligious assembly or institution." 42 U.S.C. 2000cc(b)(1). The House report accompanying the bill that eventually became RLUIPA noted that the Supreme Court's jurisprudence applies strict scrutiny to laws burdening religious exercise that prohibit or restrict religious activities but "fail[] to regulate secular conduct that implicate[s] the same government interests as the prohibited religious conduct." H.R. Rep. No. 219, 106th Cong., 2d Sess. 6-7 (1999).

The Supreme Court, in *Church of Lukumi Babalu Aye, Inc.* v. *City of Hialeah*, held that a government violates the Free Exercise Clause when it provides secular exemptions to a law but does not afford an exemption for religious exercise, despite the fact that the religious exemption would cause no greater harm to the state's interest than that caused by the secular exemption. 508 U.S. 520,

542-543 (1993) ("The Free Exercise Clause protects religious observers against unequal treatment, and inequality results when a legislature decides that the governmental interests it seeks to advance are worthy of being pursued only against conduct with a religious motivation.") (internal quotation marks and citation omitted). In other words, extending broad exemptions to secular activities while refusing the same to religious activities that would cause analogous harms to the government's interests constitutes unconstitutional discrimination. See *id.* at 545; *McDaniel* v. *Paty*, 435 U.S. 618, 627-629 (1978). The *Lukumi* Court was careful to explain that even situations of unequal treatment involving fewer secular exemptions than were at issue in *Lukumi* could constitute unconstitutional religious discrimination. See 508 U.S. at 543 (declining to "define with precision the standard used to evaluate whether a prohibition is of general application," but noting that the ordinances at issue in that case fell "well below the minimum standard necessary to protect First Amendment rights").

The Third Circuit's decision in *Fraternal Order of Newark Police Lodge No. 12 ["FOP"]* v. *City of Newark*, 170 F.3d 359 (3d Cir.), cert. denied, 528 U.S. 817 (1999), provides additional support for RLUIPA Section 2(b)(1). In that case, the court recognized that a State may violate the Free Exercise Clause by granting even one secular exemption to a law, while denying a religious exemption that poses a similar harm to the state's interest. Specifically, the court of appeals held that a police department's policy that prohibited officers from wearing beards but allowed an exception for health reasons violated the Free Exercise Clause because

it denied a similar exemption to Muslim officers who were required to wear beards for religious reasons. See *id.* at 360-61, 367. Such unequal treatment of otherwise similar activities, the court of appeals explained, "indicates that the [government] has made a value judgment that secular (*i.e.*, medical) motivations for wearing a beard are important enough to overcome its general interest * * * but that religious motivations are not." *Id.* at 366; see also *Lukumi*, 508 U.S. at 542 ("All laws are selective to some extent, but categories of selection are of paramount concern when a law has the incidental effect of burdening religious practice."). RLUIPA Section 2(b)(1)'s prohibition of less than equal treatment for religious assemblies or institutions codifies this line of precedent.

Because Section 2(b)(1)'s command that churches not be treated on less than equal terms with "a nonreligious assembly or institution" is based upon the *Lukumi-FOP* line of cases, the phrase "a nonreligious assembly or institution" means an institution that is analogous or similarly situated to churches in the sense that exempting such an institution from a zoning regulation undercuts the justification for the regulation in the same way that exempting churches would. Although the district court correctly interpreted Section 2(b)(1) to require that the referenced religious and non-religious entities "which must be treated equally must also be similarly situated in all relevant respects," R.296 at 10, the court incorrectly held that Surfside's zoning scheme does not treat religious entities on less than equal terms with similarly situated secular entities in violation of Section 2(b)(1) of the statute.

In the districts in which the plaintiffs in this case have located and wish to locate in the future – the B-1 business district and the RT-1 tourist district – Surfside's zoning scheme treats churches and synagogues less well than it treats secular assemblies such as "private clubs"[4] and "lodges" by prohibiting the religious assemblies and allowing private clubs as of right in the RT-1 district and by prohibiting religious assemblies and allowing private clubs and lodges above the first floor in the B-1 district. See Zoning Code §§ 90-151 (RT-1 district), 90-152 (B-1 district). According to the Zoning Code, "[t]he purpose of the B-1 business district is to provide for retail shopping and personal service needs of the town's residents and tourists." Zoning Code § 90-152(a). Similarly, "[t]he purpose of the RT-1 tourist district is to provide facilities that will afford convenience for tourists and enable intensive use of the ocean frontage." Zoning Code § 90-151(a).

Surfside argued in the district court that uses such as private clubs and lodges are consistent with these purposes while churches and synagogues are not.[5] In support of this claim, Surfside relied primarily on the 1999 expert report of Jack Luft, which the district court had previously relied on in granting summary

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[4] The Code defines a "private club" as "a building and facilities or premises, owned and operated by a corporation, association, person or persons for social, educational, or recreational purposes, but not primarily for profit and not primarily to render a service which is customarily carried on as a business." Zoning Code § 90-2(20).

[5] Surfside also argued that Section 2(b)(1) of RLUIPA requires a showing of discriminatory intent. R.305, Defendant's Mot. for Reconsideration, at 3. The district court did not adopt this interpretation of RLUIPA, which is totally unsupported by the text of the statute.

judgment to Surfside on the plaintiffs' claims under the Equal Protection Clause. See R.215 at 22. Specifically, in defending against the plaintiffs' Section 2(b)(1) claim, Surfside relied exclusively on Luft's conclusion that churches and synagogues "contribute little if any synergy to the nature of the retail shopping area," see R.305 Exh. A, Expert Report from Jack Luft (hereinafter "Luft Report"), at 2, and did not point to any specific evidence to counter the deposition and affidavit testimony of the plaintiffs' witnesses. The district court accepted the rationalization of Surfside and its expert, finding that "[p]rivate clubs provid[e] more of a social setting, provide more synergy for the shopping district in keeping with the purpose of" the Zoning Code than do religious institutions. R.322 at 3. Thus, the court concluded that religious institutions are not treated "on less than equal terms" with similarly situated secular entities in violation of Section 2(b)(1). As the following examination of the evidence before the district court demonstrates, the court erred in granting summary judgment to Surfside on the plaintiffs' claim under Section 2(b)(1) of RLUIPA.

Although the Luft Report does not define what it means by "synergy," the report indicates that its primary concern is that religious assemblies will not provide customers for the business and tourist areas because church- and synagogue-goers do not engage in activities such as shopping on days that they attend religious services. See Luft Report at 2. The Report's generalizations are not supported by any empirical evidence specific to Surfside or the larger geographic area in which Surfside is located. In his deposition testimony, Mr. Luft

asserted that there is a "lack of * * * reinforcing shopping patterns" when religious assemblies are permitted in retail and business areas. R.214, Luft Deposition, at 31. He further testified that a church or synagogue is "a single destination use" in the sense that "it would be most unusual" for a person to go shopping or otherwise participate in the business district after attending religious services.[6] R.214 at 43.

However, Luft also testified that, although each municipality's "set of [zoning] policies and objectives must address the particular circumstances of each community's needs and issues," R.214 at 42, the conclusions in Luft's report and testimony were not based on any study of Surfside's business or tourist districts, R.214 at 23, and were not based on the opinions of the town commissioners or the minutes of any town commission meetings, R.214 at 32. Although Luft visited various merchants in the B-1 district, R.214 at 23, he neglected to ask them whether they ever have customers who come after synagogue services, R.214 at 26, 28. Luft also testified that religious assemblies are typically open only one day per week, R.214 at 63, and that religious assemblies are generally used only by local residents, R.214 at 119. Finally, Luft concluded that clubs and lodges should be permitted in business and tourist areas where churches and synagogues are prohibited because, although both types of institutions provide social and

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[6] Surfside's Town Attorney Stephen Cypen also testified that: "The business district is intended to draw people who are going to shop, spend[] money and visit various facilities in the same area, not come for a specific purpose and leave. That's why a synagogue would not be permitted in the business district." R.56, Cypen Deposition, at 29.

communal functions, the nature of the social activity in a club or lodge is entertainment while the nature of the social activity in a church or synagogue is spiritual. R.214 at 58-62.

The plaintiffs presented evidence that contradicts every contention of Surfside's expert, thereby raising – at the very least – an issue of fact as to the basis of Surfside's differential treatment of clubs and lodges vis-à-vis religious institutions. The plaintiffs presented evidence that they hold services every day, as do religious institutions of other faiths. See R.105, Elnecave Affidavit, at ¶¶ 8, 23; R.106, Casper Affidavit, at ¶ 8; see also R.178, Kwiat Deposition, at 14. The plaintiffs also presented evidence that their congregants meet at the synagogue throughout the week for purposes other than religious services, such as torah classes and group discussions. See R.57, Elnecave Deposition, at 71; R.105, Elnecave Affidavit, at ¶ 8; R.106, Casper Affidavit, at ¶ 8. There was evidence that members who attend daily services frequent the shops in the surrounding areas before and after services, and that, since the Orthodox synagogues first opened in Surfside, two kosher food businesses have opened in the business district. See R.105, Elnecave Affidavit, at ¶¶ 23, 25, 27 (Luft's synergy claim "has no basis in fact and is pure nonsense"); R.106, Casper Affidavit, at ¶ 16.

Moreover, the plaintiffs presented evidence that they themselves purchase food, paper, and other supplies on a weekly basis from the businesses in the area. See R.105, Elnecave Affidavit, at ¶ 26. Young Israel presented evidence that attendance at its services triples during the part of the year when seasonal residents

and tourists frequent the oceanfront tourist areas. R.106, Casper Affidavit, at ¶ 9; see also R.179 & R.180, Dov and Lea Levi Depositions. This evidence indicates that religious institutions may contribute at least as much to the "synergy" of those districts as do non-profit clubs such as fraternal organizations or other noncommercial social organizations.

Surfside also argued in the district court that its zoning scheme does not violate RLUIPA's equal terms provision because secular entities such as schools, museums, and governmental buildings are treated on the same terms as churches and synagogues (although churches and synagogues are prohibited in the multi-family RM-1 zone and the listed secular uses are permitted). R.305 at 3-4. In considering the plaintiffs' claims under the Free Exercise Clause, the court concluded that Surfside's zoning scheme is a generally applicable law in part because religious institutions are treated the same as institutions such as schools, museums, and governmental buildings, all of which "are of a public or semi-public character." R.215 at 17. The court concluded, therefore, that the zoning scheme does not violate the Free Exercise Clause, as understood in *Lukumi*, because the ordinances do not single out religious uses for unfavorable treatment. Although the district court did not believe this argument was relevant to the plaintiffs' RLUIPA claims, this understanding of free exercise jurisprudence is contrary to a correct interpretation of Section 2(b)(1), which codifies the protections in *Lukumi*. See *Lukumi*, 508 U.S. at 542 ("All laws are selective to some extent, but categories of

selection are of paramount concern when a law has the incidental effect of burdening religious practice.").

Whether religious assemblies are analogous to schools, museums, and public buildings is not relevant here. Section 2(b)(1) prohibits treating "*a* religious assembly or institution on less than equal terms with *a* nonreligious assembly or institution." 42 U.S.C. 2000cc(b)(1) (emphasis added). As long as some similarly situated nonreligious assemblies are permitted in the B-1 and RT-1 districts, religious assemblies are also entitled to that treatment. Thus, the fact that Surfside's zoning scheme treats entities such as schools, museums, and government buildings in a manner that is similar to the manner in which it treats religious institutions neither defeats nor diminishes the plaintiffs' claim under Section 2(b)(1) of RLUIPA.

Finally, the defendant put forth no evidence that private clubs and lodges actually do contribute to the business and tourist districts in a way that the plaintiffs do not, other than Mr. Luft's testimony that private clubs and lodges should be treated differently from religious assemblies based on the differing motivations of club-goers compared to synagogue-goers. See R.214 at 58-62. Although zoning codes are based on generalizations, RLUIPA requires a more searching inquiry into the reasons for treating religious assemblies on less than equal terms.[7]

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[7] The district court found that, even if the plaintiffs are similarly situated to permitted uses within the business and tourist district, Surfside's zoning scheme does not violate RLUIPA because Surfside has "demonstrated a rational basis to

(continued...)

The district court's conclusion that, as a matter of law under RLUIPA, churches and synagogues are not similarly situated to private clubs and lodge halls is incorrect. For that reason, and because there are facts in dispute, the district court erred in granting summary judgment to Surfside.

## III. The Plaintiffs Presented Sufficient Evidence To Survive Summary Judgment As To Whether Surfside's Zoning Scheme Imposes A Substantial Burden On Their Exercise Of Religion In Violation Of Section 2(a)(1) Of RLUIPA

RLUIPA prohibits a jurisdiction from imposing or implementing "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 jurisdiction can justify the imposition of such burden as "in furtherance of a compelling government interest" and as "the least restrictive means of furthering that compelling government interest." 42 U.S.C. 2000cc(a)(1). Although the statute does not define "substantial burden," it defines "religious exercise" to include "any exercise of religion, whether or not compelled by, or central to, a system of

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[7](...continued)
distinguish between houses of worship and these other uses." R.322 at 4. This conclusion is based on a misunderstanding of the prohibition in Section 2(b)(1). Section 2(b)(1)'s prohibition on treating a religious institution "on less than equal terms with a nonreligious assembly or institution" does not permit a defendant to escape liability by providing a "rational basis" for treating religious institutions on less than equal terms with similarly situated secular institutions.

religious belief," and expressly includes therein the "use, building, or conversion of real property for the purpose of religious exercise." 42 U.S.C. 2000cc-5(7).[8]

The district court erred in holding that the plaintiffs failed to create at least a triable issue of fact about whether Surfside's zoning scheme imposes a substantial burden on them and their members. In their motion for summary judgment on their RLUIPA claims, the plaintiffs asserted that moving to the RD-1 two-family residential district, as required by Surfside's zoning scheme, would impose a substantial burden, which they describe thus:

> Such relocation would significantly impede and impair many of Plaintiffs' Orthodox Jewish members, particularly elderly ones, who reside in the northerly side of Surfside and in neighboring Bal Harbour Islands and Bay Harbor, from walking to synagogue and participating in synagogue worship on Saturdays and Jewish holidays – a mandatory obligation and a central tenet of the Orthodox Jewish faith. It would also devastate the Plaintiff institutions and impair them from fulfilling their religious missions.[9]

R.271 at 15.

In support of their contention that a substantial burden exists, the plaintiffs presented affidavits from several of their members, some of whom are senior citizens, some of whom have small children or grandchildren, many of whom have health problems, and all of whom find walking in the heat of South Florida to be

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[8] The plaintiffs have relied on the Commerce Clause trigger in Section 2(a)(2)(B), 42 U.S.C. 2000cc(a)(2)(B), and the "individualized assessments" trigger in Section 2(a)(2)(C), 42 U.S.C. 2000cc(a)(2)(C), to invoke the protections of Section 2(a)(1).

[9] In order to hold most religious services, an Orthodox synagogue must have a "minyan" assembled. An Orthodox minyan consists of at least ten adult men.

difficult, stating that having to walk the extra distance to a location within the RD-1 district would or might prevent them from attending the plaintiffs' services.[10] The district court and the defendants seemed to accept that having "to walk an inordinately long distance" in order to attend Orthodox Jewish services could burden religious exercise. R.215 at 19. However, the district court found that the plaintiffs had failed to demonstrate that the burden was substantial in this case because the court refused to consider the zoning scheme's effect on members of the plaintiff synagogues residing in neighboring towns.

This conclusion is clearly incorrect. Section 2(a) prohibits the imposition of a substantial burden on the religious exercise of "a person, including a religious assembly or institution" without reference to where such person resides or where such institution is located. A person or entity is entitled to invoke the protections of RLUIPA as long as that person or entity satisfies the standing requirements of Article III in so doing.[11] Thus, the plaintiffs' members who do not reside within

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[10] See R.111, Sadon Affidavit, at ¶ 7; R.112, Behar Affidavit, at ¶ 7; R.113, Dahan Affidavit, at ¶ 7; R.114, Naimer Affidavit, at ¶ 7; R.115, Kwiat Affidavit, at ¶ 7; R.116, Dov Levi Affidavit, at ¶ 7; R.117, Lea Levi Affidavit, at ¶ 7; R.118, Gurvitch Affidavit, at ¶ 7; R.119, Gelman Affidavit, at ¶ 7; R.120, Usatin Affidavit, at ¶ 6; R.121, Schraga Affidavit, at ¶ 6; R.173, Behar Deposition, at 15-16, 20; R.174, Dahan Deposition, at 8; R.175, Gurvitch Deposition, at 8; R.176, Hart Deposition, at 8, 18; R.178, Kwiat Deposition, at 12; R.179, Dov Levi Deposition, at 15, 18, 20; R.180, Lea Levi Deposition, at 13, 15; R.181, Neimar Deposition, at 8; R.183, Sadon Deposition, at 9, 14, 19, 22; R.184, Shaab Deposition, at 10, 13; R.185, Usatin Deposition, at 6, 8; R.209, Azrak Deposition, at 5, 10; R.211, Bublick Deposition, at 13.

[11] Section 4(a) of RLUIPA states that standing to assert a claim under the

(continued...)

Surfside are also entitled to assert injuries they suffer as a result of Surfside's zoning code.[12]

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[11](...continued)
statute "shall be governed by the general rules of standing under article III of the Constitution," 42 U.S.C. 2000cc-2(a), and Section 5(g) states that the statute "shall 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 order to establish Article III standing, a plaintiff must establish the following: (1) that he suffered an "injury in fact" that is concrete and particularized; (2) that there is a "causal connection between the injury and the conduct complained of"; and (3) that the injury will be "redressed by a favorable decision." *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 560 (1992). The plaintiff synagogues clearly meet the standing requirements of Article III in this case. First, they have presented evidence that they are injured by the fact that Surfside will not permit them to remain in their current location within the B-1 district or to locate within the RT-1 tourist district. The plaintiffs have presented evidence that enforcement of Surfside's zoning restrictions would prevent a number of their congregants from attending services, which would, in turn, endanger the continued viability of the plaintiff synagogues. See n.12, *supra*. Those injuries are directly traceable to the prohibition in the Zoning Code on synagogues' locating within the B-1and RT-1 districts, and would be redressed by a court order invalidating those restrictions.

[12] In addition to having standing to seek redress for the injuries they suffer as a result of any substantial burden imposed by the zoning code, the plaintiff synagogues also have representational standing to seek redress for the injuries of their members caused by such a substantial burden. Section 2(a)(1) of RLUIPA clearly protects both religious organizations and individuals. The Supreme Court has held that, "for the purpose of determining the scope of [an association's] rights as a litigant, the association 'and its members are in every practical sense identical.'" *United Food & Commercial Workers Union Local 751* v. *Brown Group, Inc.*, 517 U.S. 544, 551-552 (1996) (quoting *NAACP* v. *Alabama ex rel. Patterson*, 357 U.S. 449, 459 (1958)). The Court has articulated a three-part test that must be satisfied in order to establish "associational standing": (1) an association's members must otherwise have standing to sue in their own right, (2) the interests the association seeks to protect must be germane to the organization's purpose, and (3) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit. *Hunt* v. *Washington State Apple Advertising Comm'n*, 432 U.S. 333, 343 (1977). The plaintiffs in this case

(continued...)

In this case, the plaintiffs presented sufficient evidence to defeat summary judgment by raising a triable issue of fact as to whether the prohibitions in Surfside's zoning scheme impose a substantial burden on their ability to hold religious services for their members on the Sabbath and other holy days.

The plaintiffs argued in their summary judgment motion that "a substantial number of worshipers can not walk to [the RD-1] district on the Sabbath and Jewish holidays and observance of an undisputed central tenet of their religion is inhibited and impaired." R.271 at 17. They presented deposition testimony or affidavits from sixteen of their members stating that having to walk to the RD-1 district for religious services would be a problem. See n.12, *supra*. Moreover, officers of the synagogues presented evidence that the requirement that members walk to synagogue services on Saturdays and holy days makes it imperative that the synagogues locate in the geographic middle of the Orthodox Jewish community, see R.55, Casper Deposition, at 13; R.57, Elnecave Deposition, at 70. Taken together, the evidence presented by the plaintiffs creates at least a question of material fact as to whether having to relocate to the RD-1 district would substantially burden the religious exercise of the plaintiffs and their members. Such evidence should have been sufficient to defeat Surfside's motion for summary

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[12](...continued)
satisfy each element of that test. In addition, the defendants have not challenged the plaintiffs' right to protect the right of its members to religious exercise.

judgment on the question whether its zoning scheme imposes a substantial burden on the plaintiffs' exercise of religion.

## CONCLUSION

This Court should reverse the district court's grant of summary judgment to Surfside on the plaintiffs' claims under Section 2(b)(1) and 2(a)(1) of RLUIPA.

Respectfully submitted,

R. ALEXANDER ACOSTA
Assistant Attorney General

_____
JESSICA DUNSAY SILVER
SARAH E. HARRINGTON
Attorneys
Civil Rights Division
U.S. Department of Justice
950 Pennsylvania Ave. NW, PHB 5020
Washington, DC 20530
(202) 305-7999

CERTIFICATE OF COMPLIANCE

I hereby certify that pursuant to Fed. R. App. P. 32(a)(7)(C), the attached Brief for the United States as Intervenor is proportionally spaced, has a typeface of 14 points, and contains 6,898 words.

November 25, 2003

SARAH E. HARRINGTON
Attorney

CERTIFICATE OF SERVICE

I hereby certify that on November 25, 2003, two copies of the foregoing Brief for the United States as Amicus Curiae were served by overnight mail, postage prepaid, on the following counsel:

Nathan Lewin, Esq.
Lewin & Lewin, LLP
1828 L St. NW, Suite 1000
Washington, DC 20036

Steven Ginsburg, Esq.
Adorno & Zeder, P.A.
Suite 1600
2601 S. Bayshore Drive
Miami, Florida 33133

Simon Schwarz, Esq.
One Brickell Square
801 Brickell Avenue, Suite 900
Miami, Florida 33131

Bruce S. Rogow, Esq.
Suite 1930
Broward Financial Center
500 East Broward Boulevard
Fort Lauderdale, Florida 33394

SARAH E. HARRINGTON
Attorney