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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CONGREGATION ETZ CHAIM, an unincorporated association and the individual members thereof; CONGREGATION ETZ CHAIM OF HANCOCK PARK, a California non-profit corporation,

Plaintiffs,

v.

CITY OF LOS ANGELES,

Defendant.

CASE NO. CV 10-01587 (CAS) (Ex)

UNITED STATES OF AMERICA'S STATEMENT OF INTEREST IN SUPPORT OF PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT AND IN OPPOSITION TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT OR, IN THE ALTERNATIVE, PARTIAL SUMMARY JUDGMENT

The Hon. Christina A. Snyder
Courtroom: 5
Date: May 2, 2011
Time: 10:00 a.m.

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I. STATEMENT OF INTEREST OF THE UNITED STATES

The United States respectfully submits this Statement of Interest, pursuant to 28 U.S.C § 517, because this litigation implicates the proper interpretation and application of the Religious Land Use and Institutionalized Persons Act, 42 U.S.C. § 2000cc *et. seq.* ("RLUIPA"). The Department of Justice has authority to enforce RLUIPA and to intervene in proceedings involving RLUIPA. 42 U.S.C. § 2000cc-2(f). The United States thus has a strong interest in the issues raised in these motions, and believes that its participation will aid the court in their resolution. The United States previously submitted a statement of interest in this case on November 1, 2010. (ECF No. 39.)

II. BACKGROUND

Because the parties' earlier briefings in the current lawsuit, as well as the parties' respective Uncontroverted Facts and Conclusions of Law ("Def.'s UF," ECF No. 82; "Pls.' UF," ECF No. 84), thoroughly state the factual background of this case, the United States respectfully refers the Court to these documents and will not repeat the detailed facts of the case here.

In the instant Statement of Interest, the United States addresses the proper standards for analyzing claims under the substantial burden and equal terms provisions of RLUIPA.[1] As argued below, the United States asserts that, through its land-use regulations and its actions toward the Congregation, Defendant has violated these provisions of RLUIPA. Accordingly, the United States urges the Court to grant partial summary judgment for Plaintiffs and deny summary judgment for Defendant.

[1] The United States takes no position on Plaintiffs' nondiscrimination claim under Section 2(b)(2) of RLUIPA.

III. SUBSTANTIAL BURDEN

RLUIPA's substantial provision, Section 2(a), provides that

> [n]o 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 (A) is in furtherance of a compelling governmental interest; and (B) is the least restrictive means of furthering that compelling governmental interest.

42 U.S.C. § 2000cc(a)(1). If a plaintiff meets its burden to establish that the defendant's regulation causes a substantial burden, then the burden of proof shifts to the defendant to show that the regulation was narrowly tailored to accomplish a compelling government interest. Id. § 2000cc-2(b).[2]

A. The City's Two Denials of a CUP for the Congregation Constitute a Substantial Burden

For government action to be a substantial burden it "must place more than an inconvenience on religious exercise." Guru Nanak Sikh Soc'y v. County of Sutter, 456 F.3d 978, 988 (9th Cir. 2006) (quoting Midrash Sephardi, Inc. v. Town of Surfside, 366 F.3d 1214, 1227 (11th Cir. 2004)). A land use regulation is a

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[2] RLUIPA applies where "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." 42 U.S.C. § 2000cc(a)(2)(C). The parties do not dispute that RLUIPA is applicable to the instant case, in which the City had the authority to take into account the "particular details" of the Congregation's "proposed use of land" when deciding to deny the Congregation's conditional use permit ("CUP") application. See Guru Nanak Sikh Soc'y v. County of Sutter, 456 F.3d 978, 986 (9th Cir. 2006).

substantial burden on religious exercise under RLUIPA if it "impose[s] a significantly great restriction or onus upon such exercise." Id. at 988 (quoting San Jose Christian College v. City of Morgan Hill, 360 F.3d 1024, 1034 (9th Cir. 2004)). Substantial burden must be evaluated by examining all of the particular surrounding facts, including the procedural history of a congregation's efforts to locate a place of worship. Id. at 989. As the Ninth Circuit held recently, "when the religious institution 'has no ready alternatives, or where the alternatives require substantial 'delay, uncertainty, and expense,' a complete denial of [an] application might be indicative of a substantial burden." Int'l Church of the Foursquare Gospel v. City of San Leandro, 2011 U.S. App. LEXIS 2909, at *24 (9th Cir. Feb. 15, 2011) (quoting Westchester Day Sch. v. Vill. of Mamaroneck, 504 F.3d 338, 349 (2d Cir. 2007)) (citations omitted).

Plaintiffs have demonstrated a substantial burden on their religious exercise. The Congregation has provided ample evidence that many of its congregants would be physically unable to walk farther to another location, as required by their religion. (Pls.' UF ¶¶ 1-9, 77, 85, 124, 137-150.) At this point in the long history of this dispute, many congregants have moved into the neighborhood to live within walking distance to the congregation, in reliance on the (now-defunct) settlement agreement entered into with Defendant City of Los Angeles ("City"). The fact that the Congregation practices a unique Chassidic sect of Judaism, and that the Congregation's rabbi is the only Witznitzer Rebbe in the country, means that the congregants and the rabbi will be particularly burdened if the Congregation is not permitted to continue operating at its current location. (Pls.' UF ¶¶ 125-132.)

Moreover, the procedural history of this case and the Congregation's mitigation efforts support a finding of substantial burden under Ninth Circuit precedent. In Guru Nanak, the Ninth Circuit held that a county's complete denial of two successive conditional use permits ("CUPs") constituted a substantial burden, relying on two central factors that are applicable here as well: (1) the

county's reasons for denying the CUPs could easily apply to every future CUP application by the congregation, so it appeared there was little chance that the county would ever approve the congregation's use; and (2) the congregation had agreed to the mitigation measures suggested by the county, yet the county still denied the use. 456 F.3d at 989. See also Grace Church v. City of San Diego, 555 F. Supp. 2d 1126, 1137 (S.D. Cal. 2008) (finding a substantial burden where the city's denial demonstrated "hostility and disapproval regarding [the congregation] receiving any CUP at all").

Similarly, here, the zoning officials rejected the Congregation's first CUP application because the City did not want to allow a precedent for religious uses. (Pls.' UF ¶ 36.) Under the terms of a settlement agreement entered into by the City and the Congregation, the Congregation made expensive and significant changes to the property to comply with the City's requirements, including reducing the number of parking spaces, to make the property fit in with its residential neighbors. (Id. ¶¶ 56, 60-61, 71, 89.) After the neighbors successfully challenged that settlement agreement in court, the City denied the Congregation's second CUP for the same reasons it denied the first application – that it wanted to avoid a precedent for religious uses, that the use would infringe on the historic residential nature of the neighborhood, and that the use raised parking and traffic concerns. (Id. ¶¶ 89-91, 99-100.) The City also found that the property now did not have sufficient parking spaces, despite the fact that the City had required their removal. (Id. ¶¶ 104-05.) As a result, despite the fact that the municipal code expressly provides a way by which churches can locate in the R1 zone – by obtaining a CUP – the City has made abundantly clear that it will not allow a religious use to ever successfully obtain a CUP to locate in the R1 zone of Hancock Park, much like the futility emphasized by the Ninth Circuit in finding a substantial burden in Guru Nanak. RLUIPA was enacted to prevent exactly such actions.

The mitigation efforts undertaken by the Congregation here are also similar

to those of the Sikh congregation in Guru Nanak. When the parties entered the settlement agreement, the Congregation complied with all changes requested by the City, and limited its uses to those agreed to by the terms of the settlement agreement. (Pls.' UF ¶¶ 52-55, 61.) Yet, during the second CUP application process, the City stated the same reasons for denial – traffic, parking, and preserving the residential zone – despite the mitigation measures employed by the Congregation for the past several years. As discussed above, the City even used one mitigation measure – the reduced parking spaces – as a reason for denying the CUP.

The City's attempts to distinguish Guru Nanak are unpersuasive. The fact that the congregation in Guru Nanak sought CUPs at two different locations, whereas the Congregation here twice sought CUPs at the same location is legally inconsequential – the point is that the facts in both cases demonstrate the futility of further applications. 456 F.3d at 989. Second, the undisputed evidence belies the City's contentions that the Congregation did not attempt to mitigate its land-use effects. Third, the argument that the Congregation's compliance with the settlement agreement does not demonstrate a cooperative mitigation effort because the settlement agreement was later struck down is illogical; the good faith of the Congregation to mitigate the City's concerns was manifest regardless of the fate of the settlement.

The Congregation is not required to show that there are no other locations suitable for its use in order to prevail on a substantial burden claim. The Ninth Circuit has held that "to prove a substantial burden under RLUIPA, a religious group need not 'show that there was no other parcel of land on which it could build its church.'" Guru Nanak, 456 F.3d at 989 (quoting Saints Constantine & Helen Greek Orthodox Church, Inc. v. City of New Berlin, 396 F.3d 895, 899-900 (7th

Cir. 2005)).[3]

During the CUP process, the City did not identify any alternative locations, but simply stated that the Congregation should locate in the commercial zone, where churches are permitted by right, without needing a permit. (Pls.' UF ¶ 96.) The fact that the City has now identified what it claims are alternative locations – locations that have not been demonstrated to be suitable for the Congregation's needs – does not defeat the City's substantial burden claim. "RLUIPA does not contemplate that local governments can use broad and discretionary land-use rationales as leverage to select the precise parcel of land where a religious group can worship." Guru Nanak, 456 F.3d at 992 n.20. Under the reasoning in International Church, the existence of alternative locations that would cause the Congregation substantial delay, uncertainty, or expense still constitute a substantial burden. As described above, congregants have moved to be close to the

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[3] The City's reliance on San Jose Christian College v. City of Morgan Hill, 360 F.3d 1024 (9th Cir. 2004), for the proposition that the existence of alternative locations precludes a finding of substantial burden, is misplaced. (See Def.'s Mot. at 6; Def.'s Opp'n to Congregation's Mot. Summ. J. at 7.) In San Jose, the city denied a religious college's two rezoning applications because they were incomplete. 360 F.3d at 1027-28. Although the court noted that there was "no evidence in the record demonstrating that [the] College was precluded from using other sites within the city," id. at 1035, it held that RLUIPA did not exempt the religious college from complying with zoning processes, and that there was no evidence that a completed application would have been denied. Id. Consequently, that case is distinguishable from the instant case, where it is undisputed that the Congregation complied with the relevant zoning processes by submitting two complete CUP applications, which the City denied on their merits.

Also, in contrast to the Ninth Circuit's standard, the Eleventh Circuit has held that in certain circumstances it is not a substantial burden to require a religious entity to find another location in a neighboring zoning district. Midrash Sephardi, 366 F.3d at 1228. Midrash Sephardi is distinguishable from the instant case, however, because the congregation there was not subject to a long history of municipal efforts to block it from the community. See Guru Nanak, 456 F.3d at 989. In any event, in light of the clear Ninth Circuit precedent on this point, there is no reason to look to other circuits.

Congregation, which practices a rare sect of Judaism led by the only rabbi of this type in the United States. These facts demonstrate substantial delay, uncertainty, and expense, and therefore constitute a substantial burden.

B. The City Has Not Shown a Narrowly Tailored Compelling Interest

The City has not met its burden to show that denying two CUPs to the Congregation is in furtherance of a narrowly tailored compelling interest. The City states that its overall interests are public health, safety, and welfare – but more specifically, the City lists parking, traffic, and preservation of Hancock Park's residential community. Def.'s Mot. Summ. J. or, in the Alternative, Partial Summ. J. ("Def.'s Mot.") at 11-12.

Citing such interests in the abstract, however, is not a compelling interest justifying a substantial burden on religious exercise. Westchester Day Sch., 504 F.3d at 353. Rather, the government must show that it has a compelling interest in achieving that interest through the particular restriction at issue, such as safety interests in regulating traffic flow on the particular street at issue. Id. at 353; see also Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal, 546 U.S. 418, 423, 126 S. Ct. 1211, 163 L. Ed. 2d 1017 (2006) (in Religious Freedom Restoration Act challenge to drug laws by religious group using hallucinogenic tea for sacramental use, government could not point to general compelling interest in restricting illegal drugs, but had to show compelling interest in preventing this specific use). The City has not shown that that any traffic or parking concerns actually existed, nor that such concerns could not be mitigated in such a way as to allow the Congregation's use at the subject property.

The City argues that the Congregation has only two parking spaces but that additional spaces are required by the zoning laws, and therefore the City was forced to deny the Congregation's use in its entirety. As discussed above, the

Congregation removed additional parking spaces at the City's prior request; therefore, the City should be precluded from denying the Congregation's use because of its reliance on and compliance with the City's requirements under the now-defunct settlement agreement. Furthermore, the City has not provided any evidence to rebut the Congregation's evidence that it does not need additional parking spaces due to the religious tenets that require its congregants to walk to services on the Sabbath. Nor has the City responded to the Congregation's evidence that 80,000 cars daily drive by the intersection where the Congregation is located, and that therefore the Congregation's limited use does not affect the local traffic. (Pls.' UF ¶ 37.) Plaintiffs have also presented undisputed evidence that the Congregation spent significant money and effort to comply with the aesthetic requirements set by the City in the settlement agreement. (Pls.' UF ¶¶ 52-62.)

It is undisputed that the Congregation has been operating at the subject property since 1995 and that more than a decade passed in between the Congregation's first and second CUP applications. (Id. ¶¶ 26, 39, 70.) Yet, in all that time, the City did not gather any evidence that the Congregation has actually caused any traffic or parking concerns. In its briefing on the motions now before the Court, the City continues to argue these concerns in the abstract, yet fails to present evidence to support them.

The fact that several nonresidential uses are permitted in the R1 zone of Hancock Park contradicts the City's interest in preserving the community's residential character. In Grace Church, the court held that "[o]ne way to evaluate a claim of compelling interest is to consider whether in the past the governmental actor has consistently and vigorously protected that interest." 555 F. Supp. 2d at 1140-41 (citing Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 547, 113 S. Ct. 2217, 124 L. Ed. 2d 472 (1993) ("A law cannot be regarded as protecting an interest of the highest order . . . when it leaves appreciable damage to that supposedly vital interest unprotected.")). Plaintiffs'

numerous examples of nonreligious uses in the area – schools, clubs, and other religious uses – demonstrate that the City has not "consistently and vigorously protected" that interest.

Finally, rather than outright denying the CUP applications for the Congregation due to concerns about traffic, parking, historical preservation, or anything else, the City could have suggested measures to mitigate these concerns and effects on land use. The City's zoning bodies have the authority directly to regulate traffic, parking, and property aesthetics – and to do so in a way that does not discriminate against religious entities. However, instead of proposing any such measures, the City simply denied the CUP in its entirety – twice. (Pls.' UF ¶¶ 41-44, 46, 89, 97, 103, 110-112, 116.) For these reasons, the City has not shown a compelling interest, much less one that is narrowly tailored. As such, Plaintiffs are entitled to summary judgment on their RLUIPA substantial burden claim.

IV. EQUAL TERMS

The City has violated Section 2(b)(1) of RLUIPA, known as the "Equal Terms" provision, both through facial discrimination in its zoning code, and in discriminatory application of other aspects of its zoning code. See Compl. ¶¶ 97, 99.

A. General Framework

RLUIPA's Equal Terms provision states that "[n]o government shall impose or implement a land-use regulation in a manner that treats a religious assembly or institution on less than equal terms with a nonreligious assembly or institution." 42 U.S.C. § 2000cc(b)(1). This provision was enacted to address the various discriminatory actions taken by local governments against religious assemblies and

institutions. Congressional testimony from the hearings on RLUIPA observed that "[z]oning codes frequently exclude churches in places where they permit theaters, meeting halls, and other places where large groups of people assemble for secular purposes." 146 Cong. Rec. S7774 (Joint Statement of Sens. Hatch and Kennedy). Congress found that local governments used a myriad of reasons to justify treating religious entities less favorably than secular entities:

> Churches have been excluded from residential zones because they generate too much traffic, and from commercial zones because they don't generate enough traffic. Churches have been denied the right to meet in rented storefronts, in abandoned schools, in converted funeral homes, theaters, and skating rinks – in all sorts of buildings that were permitted when they generated traffic for secular purposes.

Id. at S7775. In response, Congress passed RLUIPA Section 2(b)(1), requiring that religious assemblies and institutions be treated at least as well as their nonreligious counterparts.

The Equal Terms provision was enacted to enforce the Free Exercise, Free Speech, and Establishment Clauses of the Constitution to ensure that religious assemblies and institutions are not disfavored in zoning compared to other types of assemblies and institutions. More specifically, as various courts have recognized, Congress intended this provision to enforce the Supreme Court's holding in Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520. See, e.g., Lighthouse Inst. for Evangelism, Inc. v. City of Long Branch, 510 F.3d 253, 264 (3d Cir. 2007) ("It is undisputed that, when drafting the equal terms provision, Congress intended to codify the existing jurisprudence interpreting the Free Exercise Clause."); Midrash Sephardi, 366 F.3d at 1232 ("RLUIPA's equal terms provision codifies the Smith-Lukumi line of precedent.");[4] 146 Cong. Rec. S7774, at S7776 (the equal terms provision "enforce[s] the Free Exercise rule against laws

[4] The Smith half of Smith-Lukumi refers to Emp't Div. v. Smith, 494 U.S. 872, 110 S. Ct. 1595, 108 L. Ed. 2d 876 (1990).

that burden religion and are not neutral and generally applicable"); 146 Cong. Rec. E1563 (daily ed. Sept. 22, 2000) (statement of Rep. Canady); H.R. Rep. 106-219, at 17 (1999); see also Cottonwood Christian Ctr. v. Cypress Redev. Agency, 218 F. Supp. 2d 1203, 1224 (C.D. Cal. 2002) (holding that the Free Exercise Clause, as interpreted in Lukumi, prohibits discrimination against religion in land-use matters).

In Lukumi, the Supreme Court held that the Free Exercise Clause prohibits the government from providing secular exemptions to an otherwise generally applicable government policy while denying a religious exemption that would cause no greater harm to the government's interests. As the Court explained, "[t]he principle that government, in pursuit of legitimate interests, cannot in a selective manner impose burdens only on conduct motivated by religious belief is essential to the protection of the rights guaranteed by the Free Exercise Clause." 508 U.S. at 543.[5]

RLUIPA also enforces the Free Speech Clause principle that religious speech may not be restricted in places where speech is permitted on secular subjects. See Good News Club v. Milford Cent. Sch., 546 U.S. 418, 126 S. Ct. 1211, 163 L. Ed. 2d 1017 (2001) (school could not exclude religious youth group from using space after school where various other youth and civic organizations

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[5] The ordinances at issue in Lukumi sought to prevent the mistreatment of animals and the improper disposal of carcasses. 508 U.S. at 543-45. Although the ordinances had legitimate ends (protecting public health and preventing animal cruelty), because they excluded from their purview almost all nonreligious animal killing and disposal, they "fail[ed] to prohibit nonreligious conduct that endangers these interests in a similar or greater degree" as the prohibited, religiously-motivated conduct. Id. at 543. Therefore, because the ordinances regulated religious activity but not other categories of activity within the same ambit, the Court applied strict scrutiny and held the ordinances unconstitutional under the Free Exercise Clause. Id. at 521-32. As the Court explained, "[a]ll 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." Id. at 542.

were permitted to meet); Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist., 508 U.S. 384, 113 S. Ct. 2141, 124 L. Ed. 2d 352 (1993) (group wishing to show Christian film in school after hours could not be excluded where various community groups could use space). The Senate Report for RLUIPA noted that "[t]he land use sections of the bill . . . enforce the Free Exercise and Free Speech Clauses as interpreted by the Supreme Court." 146 Cong. Rec. S7774, at S7775. Likewise, RLUIPA enforces the Equal Protection Clause, see Midrash Sephardi, 366 F.3d at 1239, and the Establishment Clause's requirement of neutrality toward religion. As the Supreme Court stated in Lukumi, "[i]n our Establishment Clause cases we have often stated the principle that the First Amendment forbids an official purpose to disapprove of a particular religion or of religion in general." 508 U.S. at 532 (citations omitted); see Midrash Sephardi, 366 F.3d at 1238-39; Freedom Baptist Church v. Twp. of Middletown, 204 F. Supp. 2d 857, 870 (E.D. Pa. 2002) (concluding that the equal terms provision of RLUIPA is "rooted in Establishment Clause jurisprudence where the Supreme Court has disapproved of unequal treatment of religious activities measured against secular ones").

Thus the equal terms provision of RLUIPA Section 2(b)(1), both textually and in its legislative purpose, stands for a very simple proposition: that the government must not discriminate in zoning actions against activities and expression because of their religious nature, and therefore religious assemblies and institutions must be treated equally. The fact that the assembly activities are being engaged in from a religious perspective, rather than a secular perspective, should be of no moment in government decision-making in land-use matters.[6]

B. Standard for Determining Violations of the Equal Terms Provision

[6] The equal terms provision does not require that the regulation or regulator demonstrate any discriminatory purpose, motive, or bias: unequal treatment, even for a nondiscriminatory reason, is prohibited. See Midrash Sephardi, 366 F.3d at 1234 n.16.

The federal courts of appeal have differed on how equal treatment is achieved through RLUIPA. The Ninth Circuit has not yet had an opportunity to address this issue.[7]

Where a regulation is challenged on its face, the Eleventh Circuit has held that the central question is whether religious assemblies or institutions are treated as well as nonreligious assemblies. Midrash Sephardi, 366 F.3d at 1230-31. In Midrash Sephardi, the court drew on two dictionary definitions of assembly:

> An "assembly" is "a company of persons collected together in one place [usually] and usually for some common purpose (as deliberation and legislation, worship, or social entertainment)," WEBSTER'S 3D NEW INT'L UNABRIDGED DICTIONARY 131 (1993); or "[a] group of persons organized and united for some common purpose." BLACK'S LAW DICTIONARY 111 (7th ed. 1999).

Id. at 1230. The court likewise cited definitions of "institution" as "'an established society or corporation: an establishment or foundation esp. of a public character,' . . . ; or 'an established organization, esp. one of a public character . . . .'" Id. at 1230-31 (quoting Webster's 3d New Int'l Unabridged Dictionary 1171 (1993) and Black's Law Dictionary 801 (7th ed. 1999), respectively).[8]

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[7] As of this filing, a case involving the interpretation of the Equal Terms provision is currently pending before the United States Court of Appeals for the Ninth Circuit (Centro Familiar Cristiano Buenas Nuevas v. City of Yuma, 615 F. Supp. 2d 980 (D. Ariz. 2009), No. 09-15422) (argued April 15, 2010). A case also is pending in the Fifth Circuit (The Elijah Group, Inc. v. City of Leon Valley, 2009 U.S. Dist. LEXIS 92249 (W.D. Tex. Oct. 2, 2009), No. 10-50035) (argued Dec. 8, 2010).

[8] It is important to note that the term "assembly" is not infinitely expandable. For example, the Eleventh Circuit's definition of assembly would not encompass a restaurant, but it would encompass a banquet hall where people gathered for a wedding or fundraising dinner. Although the former involves people gathering, it does not involve them gathering as a group and not for a common purpose, as the latter does. See River of Life Kingdom Ministries v. Vill. of Hazel Crest, 611 F.3d 367, 390 (7th Cir. 2010) (Sykes, J., dissenting) (explaining why restaurants and taverns would not constitute assemblies under the Eleventh Circuit's definition). Moreover, RLUIPA Section 2(b)(1) addresses categories of uses, not magnitudes

Using these common dictionary definitions, the court found that exclusion of a Jewish congregation from gathering in a rental space above a bank in a zone in which gatherings were permitted for "social, educational, or recreational purposes" violated the Equal Terms provision. Id. at 1235.

In analyzing which assemblies and institutions are similarly situated for an as-applied challenge, the Eleventh Circuit has held that the proper standard is whether the religious and nonreligious assemblies have a "comparable community impact." Konikov v. Orange County, 410 F.3d 1317, 1327 (11th Cir. 2005) (finding that the standard was met due to the similar frequency of meetings held at the comparator properties). The Eleventh Circuit affirmed this standard in Primera Iglesia Bautista Hispana of Boca Raton, Inc. v. Broward County, 450 F.3d 1295, 1311 (11th Cir. 2006), in which a county granted a school's request to rezone its property yet denied a church's request for a variance, finding that the compared uses were not similarly situated because "they sought markedly different forms of zoning relief, from different decision-making bodies, under sharply different provisions of local law."

In another approach, the Third Circuit has held that "a regulation will violate the Equal Terms provision only if it treats religious assemblies or institutions less well than secular assemblies or institutions that are similarly situated *as to the regulatory purpose*." Lighthouse, 510 F.3d at 266 (emphasis in original). The court in Lighthouse thus held that because the city's redevelopment plan was seeking to create a "'vibrant' and 'vital' downtown community centered on an entertainment and retail district," it could favor assemblies that were consistent with that goal and exclude religious assemblies that were not, and that excluding religious assemblies from such a zone did not constitute unequal treatment. Id. at

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of uses. Nothing in RLUIPA prevents municipalities from placing limitations based on size, traffic generated, noise, or other religion-neutral criteria. What it requires is for religious assemblies to be treated equally to their nonreligious counterparts.

270.[9] But see id. at 272 (finding that the city's ordinance violated the Equal Terms provision because it allowed an assembly hall to locate in the zoning district at issue but not a church where there was no evidence that the church would cause greater harm to regulatory objectives than the assembly hall).

Along similar lines to the Third Circuit, the Seventh Circuit in River of Life Kingdom Ministries v. Vill. of Hazel Crest, 611 F.3d 367, 373 (7th Cir. 2010), held that religious assemblies and secular assemblies need only be treated the same "from the standpoint of an accepted zoning criterion." The court in Hazel Crest considered a challenge to an ordinance that excluded churches and other noncommercial uses from a commercial zone. While critical of the Third Circuit's focus on "regulatory purpose," the Seventh Circuit held that religious assemblies can be excluded from a zone where nonreligious assemblies are permitted if the distinction is based on an "accepted zoning criterion, such as 'commercial district,' or residential district' or 'industrial district.'" Id. Thus where a zone excludes all noncommercial activities, the court held, religious assemblies could be excluded even if commercial nonreligious assemblies were permitted.

The courts of appeal also disagree on what level of review to apply to Equal Terms challenges. The Eleventh Circuit in Midrash Sephardi held that because RLUIPA is meant to enforce constitutional standards, strict scrutiny, as applied in Lukumi, is the appropriate level of review. 366 F.3d at 1232. Alternatively, the Third Circuit applies strict liability, Lighthouse, 510 F.3d at 269, and the Seventh Circuit has rejected the Eleventh Circuit's use of strict scrutiny, but has not explicitly state what level of review applies. Hazel Crest, 611 F.3d at 370-71. The

[9] Under New Jersey law, location of alcohol-serving establishments in the zone would be barred within two hundred feet of a church. This, the court found, would make churches less conducive to creating such a district than other assemblies, even though church offered to waive the provision. Id. at 270-71. But see Digrugilliers v. Consol. City of Indianapolis, 506 F.3d. 612 (7th Cir. 2007) (state law barring alcohol serving establishments near churches was invalid justification for denying equal treatment of churches and secular assemblies under RLUIPA Section 2(b)(2)).

United States takes no position here on the appropriate level of review. This Court need not reach this issue in order to rule for Plaintiffs.

C. The City's Has Violated the Equal Terms Provision

1. Facial Discrimination

On their face, the City's land-use regulations treat religious assemblies on less than equal terms with nonreligious assemblies under any of the circuit court approaches discussed above. In its opening brief, Defendant argues that the Los Angeles Municipal Code ("LAMC") is facially neutral because "a church or synagogue is not the only use not allowed by right in an R1 zone," noting that several nonreligious uses are allowed in the R1 zone only by CUP, just like churches. (Def.'s Mot. at 18.) This comparison, however, misconstrues the Equal Terms provision. The purpose of RLUIPA's Equal Terms provision is to determine whether any nonreligious assemblies or institutions are treated better than religious assemblies or institutions; the fact that certain nonreligious uses may be treated equally badly, or worse, is a red herring. The proper comparison is to nonreligious assembly uses permitted by right in the R1 zone without requiring a CUP.

The LAMC expressly states that "parks, playgrounds, or community centers, owned and operated by a governmental agency" are permitted as of right in the R1 zone. LAMC § 12.08(A)(2). As stated above, churches[10] must obtain a CUP to locate in the R1 zone. LAMC §§ 12.08(6), 12.24(W)(9).

The parties do not dispute that the Congregation, at which congregants regularly gather to worship and practice their faith, constitutes an assembly under RLUIPA. The common dictionary definition of "community center" is "a building

[10] This provision mentions only "churches," a term that is not defined in the LAMC. For purposes of this motion, the United States assumes that the term includes other religious assemblies and institutions, including the use requested by the Congregation.

or group of buildings for a community's educational and recreational activities." http://www.merriam-webster.com/dictionary/community%20center (last visited April 27, 2011).[11] Consequently, a government-run community center constitutes a nonreligious assembly because it is a place where people gather for the common purpose of educational and recreational activities. A community center is also similar to the Congregation in terms of impacts on land-use interests because both entities hold events that could affect traffic and parking in the neighborhood. Both entities are noncommercial in nature. Thus, under any of the approaches used by the various circuits discussed above, the Congregation and community centers are comparable uses.

Furthermore, in RLUIPA's legislative history, Congress expressly stated that community centers are among the nonreligious uses that are "often permitted as of right in zones where churches require a special use permit, or permitted on special use permit where churches are wholly excluded." H.R. Rep. 106-219, at 19-20 (citations omitted); see 146 Cong. Rec. S7774, at S7777 ("Testimony from across the nation also has demonstrated that nonreligious assemblies are often treated far better by zoning authorities than religious assemblies. For example, *recreation centers*, health clubs, backyard barbecues and banquet halls are frequently the subjects of more favorable treatment than a home Bible study, a church's homeless feeding program or a small gathering of individuals for prayer.") (emphasis added). Thus, because the City's regulation permits community centers as of right, but requires churches to obtain a CUP, Plaintiffs have made out a prima facie case that the City's regulation facially treats religious assemblies on less than equal terms.

At this point, under the strict liability standard used by the Third and Seventh Circuits, Plaintiffs have shown that the City's zoning ordinance facially violates the Equal Terms provision. The City is also liable for facial discrimination under the strict scrutiny standard used by the Eleventh Circuit

[11] The LAMC does not define "community center."

because the City cannot show a compelling governmental interest pursued through the least restrictive means.[12]

The City frames its interests as "preserving its comprehensive zoning plan and the quiet use and enjoyment of its residents" and "protecting the health, safety, and welfare of the residents." (Def.'s Mot. at 8, 12.) Citing such interests in the abstract, however, is insufficient; the government must show that it has a compelling interest in achieving those interests through the particular restriction at issue. See, supra, Section III.B (discussing Westchester Day Sch., 504 F.3d at 353, and Gonzales, 546 U.S. at 423). The City has not put forth any evidence showing that permitting community centers in the R1 zone by right yet requiring churches and other religious assemblies to obtain a CUP furthers the City's interests in the quiet enjoyment, health, safety, and welfare of its residents. Moreover, the City has not shown that its discrimination is the least restrictive means for achieving its objectives. Therefore, Plaintiffs have shown that the City's zoning ordinance violates RLUIPA's Equal Terms provision on its face.

2. As-applied Discrimination

The City also discriminatorily applied its zoning regulations to the Congregation. In cases in which the disparate treatment of assemblies occurs through the application of a neutral zoning ordinance, such as where one assembly is given a conditional use permit and a religious assembly is denied such a permit, a court must examine all of the facts to determine whether the two assembly uses were in fact treated equally or not. See Primera Iglesia, 450 F.3d at 1311

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[12] Defendant erroneously relies on Centro Familiar Cristiano Buenas Nuevas v. City of Yuma, 615 F. Supp. 2d 980, 1000 (D. Ariz. 2009) for its contention that rational basis review applies to Plaintiffs' equal terms claim. (See Def.'s Mot. at 22-24.) First, as stated in footnote 7, supra, that case is currently on appeal. Second, the Yuma court's finding that the challenged law in that case was "neutral and generally applicable" is inapposite here, where the LAMC is discriminatory both on its face and as applied.

(examining various criteria to determine whether assemblies were treated equally, including the type of zoning relief sought, the government decision-making bodies involved, and the provisions of law that were determinative); Konikov, 410 F.3d at 1328 (examining whether permitted home assemblies had comparable community impact to a religious gathering home that faced vigorous code enforcement).

The courts of appeal have applied various standards to determine which uses are comparable. See Hazel Crest, 611 F.3d at 371 (7th Cir. 2010) (requiring that religious and nonreligious assemblies be similarly situated with regard to their "accepted zoning criteria"); Lighthouse, 510 F.3d at 266 (requiring that religious and nonreligious assemblies be similarly situated with regard to their "regulatory purpose"); Konikov, 410 F.3d at 1327 (analyzing whether the religious and nonreligious assemblies have a "comparable community impact"); see also Third Church of Christ, Scientist v. City of New York, 626 F.3d 667, 670 (2d Cir. 2010) (finding that a church was comparable to a hotel because they were both subject to the same city zoning law and that RLUIPA "is less concerned with whether formal differences may be found between religious and nonreligious institutions – they almost always can – than with whether, in practical terms, secular and religious institutions are treated equally.") Under any of these approaches, the City's actions violate RLUIPA's Equal Terms provision.

Plaintiffs have met their burden to show that the City discriminated against them in the application of its CUP process. Specifically, the City twice denied a CUP for the Congregation to hold worship services at the subject property. In contrast to the City's treatment of the Congregation, the City admits that it has allowed, and continues to allow, numerous nonreligious uses to locate in the R1 zone and Hancock Park, with and without CUPs. (Def.'s Mot. at 19-22; Def.'s Opp'n to Congregation's Mot. Summ. J. at 12-15.)

The City argues that some of these nonreligious uses are not similarly situated to the Congregation because the existing nonreligious uses were approved

years ago (in some cases, as far back as the 1920s). However, one of the stated purposes of RLUIPA was to prevent discriminating against new religious entities in favor of already established religious and nonreligious entities. In fact, the Congressional testimony leading up to RLUIPA specifically credited evidence that some municipalities' unequal treatment of religious and nonreligious uses prevented new religious uses from moving into a neighborhood:

> Other testimony revealed that some land use regulations deliberately exclude all new churches from an entire city. . . . [I]t is not uncommon for ordinances to establish standards for houses of worship differing from those applicable to other places of assembly, such as where they are conditional uses or not permitted in any zone. The result of these zoning patterns is to foreclose or limit new religious groups from moving into a municipality. Established houses of worship are protected and new houses of worship and their worshipers are kept out.

H.R. Rep. 106-219 at 19 (internal citations and quotation marks omitted).

Despite the City's contentions otherwise, many of the nonreligious uses allowed in the R1 zone constitute assemblies and institutions that have been treated more favorably than the Congregation. For example,[13] the Los Angeles Tennis Club ("LATC"), which is located in the residential zone approximately 1.6 miles from the Congregation, describes itself as a private "dynamic sporting and social nexus," which offers "a wide array of first-class athletic and social amenities." http://www.latennisclub.com (last visited April 27, 2011). By this description, the Los Angeles Tennis Club is a nonreligious assembly – a group gathered for a common purpose. The LATC's restaurant "serves breakfast, lunch and snacks seven days a week," its bar is open every afternoon, and its website boasts that members often gather to hang out, eat, or watch sporting events together. http://www.latennisclub.com/about (last visited April 27, 2011). In addition to the

[13] Due to space constraints, the United States cannot analyze each nonreligious use separately.

"impromptu socializing between friends who happen onto each other in our Great Room, lounges or coming off the courts," the LATC hosts "a full slate of holiday parties throughout the year, dances, tennis team dinners, [] the occasional night of comedy or live music," as well as a "Fourth of July gala" and opportunities for members' children "to meet Santa or the Easter Bunny." Id. As such, this nonreligious use has the potential to cause much more significant traffic and parking concerns than the Congregation, which averages 40 members for Sabbath services (to which attendees walk, as required by their faith) and 10 to 15 attendees for weekday services. (Pls.' UF ¶ 28.) The land-use impacts on the community, therefore, are similar. Defendant has failed to identify any zoning criteria or regulatory purpose under which treating the Congregation one way and assemblies like the Los Angeles Tennis Club another would not constitute unequal treatment under RLUIPA Section 2(b)(1). Thus, under any of the tests used to compare assemblies under the Equal Terms provision, Plaintiffs have established a prima facie case. The same is true for the other assemblies detailed in the Congregation's filings.

At this point, if strict liability were the standard, Plaintiffs have shown that the City has discriminatorily applied its zoning provisions to the Congregation. Likewise, under strict scrutiny, the City has not shown that its denial of a CUP for the Congregation is narrowly tailored to achieve a compelling state interest. With regard to the City's stated traffic and parking concerns (see discussion, supra, at 4, citing Pls.' UF ¶¶ 89-91, 99-100), the City allows nonreligious assemblies and institutions (for example, the Los Angeles Tennis Club) in the R1 zone and Hancock Park – with and without CUPs – that have a similar, or greater, effect on traffic and parking. Despite the neighbors' and the City's concerns, the City has not proffered any evidence that the Congregation has actually caused any traffic or parking problems at any time during its existence. Even if parking and traffic constituted compelling interests, the City has other, less onerous alternatives to

achieve these interests. The City can, for example, directly regulate traffic and parking through a code provision that treats religious and nonreligious assemblies neutrally. With regard to the City's stated interest in maintaining the historic, residential nature of Hancock Park, the City here too can – and has – imposed aesthetic restrictions to achieve this interest. As discussed earlier, the Congregation remodeled the property to conform to the City's specific demands in the now-defunct settlement agreement. (Pls.' UF ¶¶ 59-60.) Consequently, whether its stated interests are compelling or not, the City has not shown that it has narrowly tailored its regulation to achieve those interests.

Therefore, under any of the various approaches taken by the courts of appeal, Plaintiffs have shown that the City discriminatorily applied its zoning regulations to the Congregation in violation of RLUIPA's Equal Terms provision.

V. CONCLUSION

For the foregoing reasons, the Court should grant Plaintiffs' Motion for Partial Summary Judgment and deny Defendant's Motion for Summary Judgment or, in the Alternative, Partial Summary Judgment.

Dated: April 28, 2011

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on April 28, 2011, I caused to be served a copy of the foregoing document entitled *United States of America's Statement of Interest in Support of Plaintiffs' Motion for Partial Summary Judgment and in Opposition to Defendant's Motion for Summary Judgment or, in the Alternative, Partial Summary Judgment*, by both e-mail and first-class mail, upon the following counsel of record:

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