No. 12-60052

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

OPULENT LIFE CHURCH; TELSA DEBERRY,

Plaintiffs-Appellants

v.

CITY OF HOLLY SPRINGS MISSISSIPPI; BOARD OF ALDERMEN OF THE CITY OF HOLLY SPRINGS, MISSISSIPPI; CITY PLANNING COMMISSION OF THE CITY OF HOLLY SPRINGS, MISSISSIPPI,

Defendants-Appellees

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

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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INTEREST OF THE UNITED STATES

This case concerns the appropriate interpretation of the prohibitions under the Religious Land Use and Institutionalized Persons Act (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 the correct application of the statute's protections.

STATEMENT OF THE ISSUES

The United States will address the following questions:

1. Whether Holly Springs' ordinance requiring only places of worship to obtain the approval of the Mayor, the Board of Aldermen, and 60% of neighboring property owners to qualify for an occupancy permit in a commercial zone violates RLUIPA, 42 U.S.C. 2000cc *et seq.*

2. Whether the district court erred in concluding that the church has not suffered harm and therefore is not entitled to a preliminary injunction because its present location can accommodate its current membership.

STATEMENT OF THE CASE

The Opulent Life Church applied for a permit to renovate and use its newly-leased building in the central business district of Holly Springs, Mississippi, as a place of worship. R. 8-9.[1] The City's Planning Commission tabled the application, citing the church's failure to comply with a list of standards the City's zoning ordinance imposes on places of worship. R. 9. These standards require, among other things, that the church obtain the approval of 60% of neighboring landowners, the Mayor, and the Board of Aldermen before it can renovate and occupy its building. R. 47, 54, 76, 81-82

[1] "R. _" refers to the page number following the Bates stamp "USCA5" in the record on appeal.

The church filed suit in the Northern District of Mississippi, alleging that the City's ordinance violated those provisions in RLUIPA, 42 U.S.C. 2000cc *et seq*., that protect places of worship from discrimination in zoning. The church also filed for a preliminary injunction, claiming it faced ongoing harm and threat of future harm while it was barred from using its newly-leased building. R. 119, 179. The church claimed that its current, small building prevented the congregation from growing, forced the church to hold some activities outside, and prevented those activities when weather prohibited the use of outdoor locations. R. 8, 150-151. The district court denied the church's motion, reasoning that because the current building could accommodate the church's current membership, the church faced no harm or substantial threat of harm. R. 180.

STATEMENT OF FACTS

1. The Opulent Life Church Seeks An Occupancy Permit

The Opulent Life Church is a small congregation in Holly Springs, Mississippi. It has about 18 members and meets in the Marshall Baptist Center, a space that can accommodate 20 to 25 people. R. 179. The church seeks to grow but has apparently had potential new members decline to join the church on account of the church's small building. R. 8, 151. In addition, the church has had to hold some of its community outreach programs, including Bible school, outside during the summer, when weather permits, because of the building's limited indoor

space. R. 150-151. The church invites the public at large, not just its congregants, to these events. R. 150-151. The church would like to be able to hold such events indoors and to be able to schedule them year round. R. 150-151. Accordingly, the church claims that the current space is inadequate even for the existing membership. R. 8, 150.

The church entered into a lease for a larger property in the City's central business district. R. 9, 47, 179. Under its terms, the lease will commence once the church obtains the proper permits. R. 27. The church's pastor, as required by the City's code, submitted to the City a building plan and an application for permission to renovate and occupy the building. R. 8. The Holly Springs City Planning Commission reviewed the request and tabled it, telling the pastor that the church had not fully complied with a list of zoning standards required of churches. R. 9, 179. The Commission gave the pastor a list of code requirements, which included requirements for approval by the Mayor, the Board of Aldermen, and 60% of neighboring landowners before the church could use the new facility. R. 9-10, 33, 179. The Planning Commission did not state which requirements the church failed to meet. R. 179-180.

2. Holly Springs' Zoning Regulations Applicable To Churches

The City's Code allows churches and other places of worship to locate in most residential and commercial zones through an "appeal" process. R. 47, 54, 63.

Churches are permitted without appeal only when located in agricultural zones. R. 47, 54. Under the appeal process, churches require "special exemptions, and no permit shall be issued for such uses except upon application and approval of the Planning Commission and subject to the requirements of this ordinance and such conditions as said Board may require to preserve and protect the character of the district." R. 63. Many other, similar uses are permitted in commercial zones, and most do not need to satisfy the appeal process. R. 50-63.

In addition to the appeal process, churches must comply with certain "supplemental standards" provided in Section 10.8 of the zoning ordinance. R. 76, 81-82. Some of these regulate traffic, noise, and signage. R. 82. Some of the requirements are tailored to a church's location; for example, signage is regulated in a residential zone, and minimum square footage is required where a church is located in a planned business district. R. 47, 82. There are other requirements imposed on churches, and only on churches, in all zones. Churches must provide a survey of property owners within a 1300 foot radius, and the survey must show that 60% of owners approve of the opening of the church in that location. R. 82. Absent that approval, the church may not open. In addition, churches must obtain "[f]inal approval" from the Mayor and the Board of Aldermen before opening. R. 82.

The ordinance provides "supplemental standards" for a number of other uses, including home occupations (such as a lawyer's office, notary, or dressmaker), junk yards, mini-warehouses, bed-and-breakfast homes, and mobile home parks. R. 42, 76-81. No other use, however, requires polling of neighboring owners, approval of the Mayor, or review by the Board of Aldermen.

The central business district, where the church sought its permit, is "designed to accommodate a wide variety of commercial uses (particularly those that are pedestrian oriented) that will result in the most intensive and attractive use." R. 73. The ordinance permits gas stations, funeral homes, movie theaters, indoor stadiums, libraries, museums, and post offices in this zone without resort to an appeal. R. 54-55, 59, 61-62. Many other uses, such as lodges, union halls, social clubs, bowling alleys, skating rinks, pool halls, restaurants, bars, and nightclubs, are permissible on appeal, but without imposition of any "supplemental standards." R. 54-55, 58-59. The ordinance authorizes various uses generating "low volume traffic," such as wholesalers, and "high volume traffic," such as convenience stores. R. 50-51.

3. Procedural History

The church filed suit, alleging that the City's ordinance violated the Religious Land Use and Institutionalized Persons Act, the First Amendment, the Fourteenth Amendment, and the Mississippi Constitution. R. 4, 18-24, 180. It

challenged the supplemental provisions in Section 10.8 facially, and as applied to the Opulent Life Church. R. 14. Plaintiffs alleged the supplemental standards violated RLUIPA's equal terms requirement, which prohibits "treat[ing] a religious assembly or institution on less than equal terms with a nonreligious assembly or institution." 42 U.S.C. 2000cc(b)(1); R. 14. They also claimed violations of several of RLUIPA's other provisions, including Subsection (a)(1), prohibiting "substantial burden[s]" on "religious exercise;" Subsection (b)(2), prohibiting discrimination against religious institutions; and Subsection (b)(3), prohibiting "unreasonabl[e] limit[ations on] religious assemblies, institutions, or structures within a jurisdiction." 42 U.S.C. 2000cc; R. 15, 17-18.

The church sought a preliminary injunction to stop the City from enforcing the supplemental standards laid out in Section 10.8 of the ordinance. R. 119, 180. In its motion, the church argued that it would likely prevail on its facial and as-applied challenges under RLUIPA's Subsection (b)(1), barring treatment of religious institutions on "less than equal terms" with nonreligious institutions.

4. The District Court's Decision

The district court denied the injunction in a two-page opinion issued seven days after the complaint and motion were filed and before any responses were submitted. R. 179-180. The court found that plaintiffs had not shown any substantial threat of irreparable harm from the application of the ordinance. R.

180. The court reasoned that because the church's current space held 20 to 25 people and the church currently had only 18 congregants, its members could not show they were "currently being deprived of the right to freely exercise their religion." R. 180. In the court's view, the church needed the new building only "in anticipation that [its] membership will grow." R. 180. The court did not address the church's chances of success on the merits. Indeed, it did not mention RLUIPA or lay out any constitutional standard.

SUMMARY OF ARGUMENT

A party seeking a preliminary injunction must show, among other things, that it is substantially likely to succeed on the merits and that it faces a substantial threat of irreparable harm. Plaintiffs have shown both here. The ordinance at issue, as written, appears to violate RLUIPA's requirement that religious institutions and assemblies be treated on equal terms. 42 U.S.C. 2000cc(b)(1). The ordinance imposes special requirements on churches which are unlike any imposed on similar uses – no other use requires approval by neighbors, the Mayor, or the Board of Aldermen. The provisions are particularly troubling because they would allow neighbors or officials to exclude any religious community from virtually any part of the city and for any reason, even if the motive is bias against the group's religious affiliation or racial identity.

Furthermore, the court erred in deciding against the church on the issue of irreparable harm. The church alleged that it is already harmed because (a) the smaller space prevents growth, (b) some potential members have failed to join because the current church building is so small, and (c) the size of the current building requires some meetings be held outside and to be held only when weather permits. Furthermore, the church has shown a substantial threat of harm because, should new members join, they cannot be accommodated in the church's current location. Indeed, given that plaintiffs are very likely to succeed on the merits of their RLUIPA claim, they require a lesser showing on the likelihood of harm and on the other factors necessary to obtain a preliminary injunction. Accordingly, this Court should vacate the district court's decision and remand for further consideration.

ARGUMENT

I

HOLLY SPRINGS' ORDINANCE VIOLATES RLUIPA'S EQUAL TERMS REQUIREMENT

A. Standard Of Review

This Court reviews the denial of a preliminary injunction for abuse of discretion. *Allied Mktg. Grp., Inc.* v. *CDL Mktg., Inc.*, 878 F.2d 806, 809 (5th Cir. 1989). It reviews underlying findings of fact for clear error, *ibid.*, and mixed questions of law and fact de novo, *Speaks* v. *Kruse*, 445 F.3d 396, 399 (5th Cir.

2006) (holding that denial of an injunction restricting First Amendment rights is a mixed question of law and fact where the decision turns on the plaintiff's likelihood of success).

B. Preliminary Injunction Requirements

A party seeking a preliminary injunction must show it "is likely to succeed on the merits, * * * is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in [its] favor, and that an injunction is in the public interest." *Winter* v. *Natural Res. Def. Council*, 555 U.S. 7, 20 (2008). Although each must be shown, the four elements are interdependent and do not have "a fixed quantitative value. Rather, a sliding scale is utilized, which takes into account the intensity of each in a given calculus." *Texas* v. *Seatrain Int'l, S. A.*, 518 F.2d 175, 180 (5th Cir. 1975). The questions of irreparable harm and success on the merits are particularly intertwined, as "harm often cannot logically be considered apart from the question whether the movant is likely to succeed on the merits." *Treasure Salvors, Inc.* v. *Unidentified Wrecked & Abandoned Sailing Vessel*, 640 F.2d 560, 568 (5th Cir. 1981). Where there is a strong possibility of success on the merits, a lesser showing will satisfy the other elements of the preliminary injunction inquiry. See *Florida Med. Ass'n* v. *United States Dep't of Health Educ. & Welfare*, 601 F.2d 199, 203 n.2 (5th Cir. 1979) (noting a court should "balance[e] the hardships associated with the issuance or

denial of a preliminary injunction with the degree of likelihood of success on the merits").

Although the church has the initial burden of presenting evidence on all four elements, the City then "bears the burden * * * to prove its interests are harmed." *Merced* v. *Kasson*, 577 F.3d 578, 593 (5th Cir. 2009) (upholding a preliminary injunction enjoining zoning ordinance after city showed little evidence of harm).

C. The City's Ordinance Improperly Singles Out Places Of Worship

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)(l).[2] The Fifth Circuit has stated that the clause "prohibit[s] the government from 'imposing,' i.e., enacting, a facially discriminatory ordinance or 'implementing,' i.e., enforcing a facially neutral ordinance in a discriminatory manner." *Elijah Grp., Inc.* v. *City of Leon Valley*, 643 F.3d 419, 422 (5th Cir. 2011).

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[2] Because this ordinance on its face appears to violate the equal terms provision, this brief will not address possible violations of RLUIPA's Subsection (a) and Subsections (b)(2) and (b)(3). See *Centro Familiar Cristiano Buenas Nuevas* v. *City of Yuma*, 651 F.3d 1163, 1169 & n.24 (9th Cir. 2011) (noting, in reviewing a similar claim that an ordinance imposes special requirements on churches, that the court need not look beyond Subsection (b)(1)); *Elijah Grp., Inc.* v. *City of Leon Valley*, 643 F.3d 419, 424 n.20 (5th Cir. 2011) (declining to reach church's claim that an ordinance substantially burdens religious exercise once it demonstrated violation of the equal terms provision).

1. RLUIPA Requires A Comparison Between The Ordinance's Treatment Of Religious Uses And Comparable Secular Uses

The equal terms provision "by its nature requires that the religious institution in question be compared to a nonreligious counterpart, or 'comparator'" when determining whether there is discrimination. *Elijah Grp., Inc.*, 643 F.3d at 422. That is, evaluating whether a religious use is treated on "less than equal terms" requires some degree of comparison of the characteristics of the religious assembly uses and nonreligious assembly uses at issue. As the Seventh Circuit explained: "The equal-terms section is violated whenever religious land uses are treated worse than comparable nonreligious ones." *Digrugilliers* v. *Consolidated City of Indianapolis*, 506 F.3d 612, 616 (7th Cir. 2007).

Courts disagree, to some extent, about how this comparison is done. The Eleventh Circuit has concluded that the proper comparators are any other permitted "assemblies or institutions." *Midrash Sephardi, Inc.* v. *Town of Surfside*, 366 F.3d 1214, 1230 (11th Cir. 2004) (quoting 42 U.S.C. 2000cc(b)(1)), cert. denied, 543 U.S. 1146 (2005). If such uses are treated more favorably than religious uses, the court concluded, restrictions on religious uses must pass strict scrutiny. *Id.* at 1235.

The Third Circuit, on the other hand, has stated that a plaintiff must point to an assembly or institution that has an effect on the municipality's regulatory goals similar to that of a church building. The plaintiff must "do something more than

identify *any* nonreligious assembly or institution that enjoys better terms under the land-use regulation." *Lighthouse Inst. for Evangelism, Inc.* v. *City of Long Branch*, 510 F.3d 253, 264 (3d Cir. 2007), cert. denied, 553 U.S. 1065 (2008). "Heightened scrutiny [is] warranted only when a principled distinction could not be made between the prohibited religious behavior and its secular comparator in terms of their effects on the regulatory objectives." *Id.* at 266.

The Seventh Circuit has adopted a test similar to the Third Circuit's. In *River of Life Kingdom Ministries* v. *Village of Hazel Crest*, 611 F.3d 367, 371-373 (7th Cir. 2010) (en banc), the court held that religious assemblies may be excluded from a zone where other assemblies are permitted if there are "objective" and "accepted" zoning criteria for distinguishing them, such as traffic control, provision of parking, or appropriate differentiation of commercial and non-commercial zones.

In *Centro Familiar Cristiano Buenas Nuevas* v. *City of Yuma*, 651 F.3d 1163, 1172 (9th Cir. 2011), the Ninth Circuit employed a rule comparable to those of the Third and Seventh Circuits. The Court explained that analysis of the equal terms provision "should focus on what 'equal' means in the context." *Id.* at 1172. A city may justify differential treatment "if it can demonstrate that the less-than-equal-terms are on account of a legitimate regulatory purpose, not the fact that the institution is religious in nature." *Ibid.* Accordingly, a city violates the equal

terms provision "only when a church is treated on a less than equal basis with a secular comparator, similarly situated with respect to an accepted zoning criteria." *Id.* at 1173. In addition, the Ninth Circuit held that where a church challenges an ordinance that explicitly singles out churches, "[t]he burden is not on the church to show a similarly situated secular assembly, but on the city to show that the treatment received by the church should not be deemed unequal." *Ibid.*[3]

This Court has declined to adopt any of these tests in full. *Elijah Grp., Inc.*, 643 F.3d at 424 n.19. It has stated that "'less than equal terms' must be measured by the ordinance itself and the criteria by which it treats institutions differently." *Id.* at 424. In *Elijah Group, Inc.*, the city had enacted its ordinance as a means of creating a "retail corridor," but nevertheless permitted "many nonreligious, *nonretail* buildings," including private clubs or lodges. *Ibid.* This Court concluded it could not "reconcile the ordinance's facial treatment of a church differently than a private club in light of the way that [the] zones are defined." *Ibid.*

[3] The Second Circuit has declined to identify a comprehensive test for evaluating equal terms claims under RLUIPA, but did find a violation where a church and nonreligious institutions were "similarly situated for all functional intents and purposes." *Third Church of Christ, Scientist* v. *City of New York*, 626 F.3d 667, 668 (2d Cir. 2010).

2. Churches Are Treated Less Favorably Than Nonreligious Institutions With Similar Effects On The City's Commercial Zone

Where, as here, a city treats churches differently, such restrictions must be "reasonably well adapted to the zoning criteria it is purported to serve." *Centro Familiar Cristiano*, 651 F.3d at 1175. In this case, churches are similarly situated to many permitted uses with respect to the City's goals that the central business district "accommodate a wide variety of commercial uses (particularly those that are pedestrian oriented) that will result in the most intensive and attractive use." R. 73.

Despite the City's purported preference for commercial uses, it permits several non-profit or non-taxable uses. As in *Elijah Group, Inc.*, Holly Springs purported to create a commercial zone but nevertheless permitted social and fraternal clubs and lodges, which serve as appropriate comparators to a church.[4] Churches, social clubs, and lodges similarly hold regular meetings for members and guests. See R. 42, 44. The City's ordinance defines "social clubs," in particular, as "non-profit association[s]." R. 44. Such uses do not comport with Holly Springs' requirements that the central business district promote "commercial

[4] Holly Springs permits "[s]ocial, fraternal clubs and lodges, union halls, and similar uses" in the central business district through the appeal process, without the imposition of any supplemental standards. R. 54.

uses" (R. 73), just as they did not promote the "retail corridor" the city sought in *Elijah Group, Inc.*, 643 F.3d at 424.

Beyond social clubs, which are likely the most comparable use, the City permits a variety of other typically non-profit or non-taxable entities, including post offices, libraries, museums, and union halls (while union halls require an appeal, none of these uses require any supplementary standards). These uses undermine the commercial character of the district as much as a church might, but they are not subject to the restrictions placed on churches. Accordingly, the City cannot justify its treatment of churches with any argument that it seeks to bar noncommercial uses, or that it wishes to limit this zone to taxable uses.

Indeed, Holly Springs' ordinance presents a more obvious violation than the one this Court struck down in *Elijah Group, Inc.*; here, the requirements for approval by neighbors, the Mayor, and the Board of Aldermen are not applied to *any* other uses permitted in the central business district or elsewhere. Regardless of what uses one considers comparable, the City's ordinance disfavors religious uses.

The City's other purported zoning criteria also fail to justify its special requirements for churches. Nothing about a church interferes with the City's goal of a "pedestrian oriented" zone. R. 73. Indeed, a church is more likely to be pedestrian-oriented than several other uses permitted without any supplemental

standards, such as gas stations, wholesalers, drive-in bank tellers, and parking garages. R. 50-52, 59-60. A city's zoning criteria cannot excuse unequal treatment of churches when nonreligious uses receive more favorable treatment. See *Centro Familiar Cristiano*, 651 F.3d at 1065, 1171 (rejecting the city's arguments that churches did not belong in a "lively pedestrian-oriented district" where it permitted "several uses that would seem to put a damper on entertainment, such as 'correction centers'").

The City's ordinance also permits several uses which likely generate traffic and parking issues similar to those a church might create. The ordinance allows movie theaters, indoor stadiums, and funeral homes in the central business district without resort to an appeal. R. 55, 62. These likely draw large groups of people who, like a religious congregation, gather for and then depart from a scheduled event. See *River of Life Kingdom Ministries*, 611 F.3d at 373 (noting a church is like a movie theater, "which also generates groups of people coming and going at the same time").

As for encouraging "the most intensive and attractive use" of the area, there is no basis for the City to argue that a church would not help accomplish this goal. R. 73. Most would likely consider a church a more "attractive" use than a gas station or wholesaler, which the City allows. And in this case, the church's lease

provided that the church would undertake repairs and improvements to the building. R. 28-29.

D. The Ordinance's Requirements For Approval By Neighbors And City Officials Would Encourage Improper Bias In Land Use Decisions

Finally, and critically in our view, it is hard to imagine what legitimate zoning purpose the rules for requiring approval of neighbors, and then approval by the Mayor and Board of Aldermen serve. There is no guarantee that these City officials or neighbors will consider the "variety of commercial uses" or "pedestrian orient[ation]" when they approve or veto a church. R. 73. Genuine concerns about traffic, parking, architecture, or noise are better served by requirements that address these problems directly. Neighbors, in particular, are under no obligation to consider legitimate zoning criteria.

A requirement for approval by City officials, and particularly by neighbors, is susceptible to arbitrary action and, worse, the implementation through the City Code of outright bias. Neighbors and officials need not give any reason for vetoing a religious institution, and may freely do so in order to exclude an unpopular minority. "Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect." *Palmore* v. *Sidoti*, 466 U.S. 429, 433 (1984). Indeed, the Supreme Court has addressed an issue similar to Holly Springs' polling requirement in the context of disability. In *City of Cleburne* v. *Cleburne Living Center*, 473 U.S. 432, 448 (1985), the district court upheld the

city's refusal to permit a group home in part because of "concern[] with the negative attitude of the majority of property owners located within 200 feet * * * as well as with the fears of elderly residents of the neighborhood." The Court rejected this reasoning, stating that under an Equal Protection analysis "mere negative attitudes, or fear, unsubstantiated by factors which are properly cognizable in a zoning proceeding, are not permissible bases for treating a home for the mentally retarded differently from apartment houses, multiple dwellings, and the like." *Ibid.*

Implementation of bias through city zoning is one of the principal evils that RLUIPA was enacted to prevent. When Congress passed the statute, it heard testimony of substantial discrimination in zoning decisions, including evidence that "new, small, or unfamiliar churches" were more likely to face discrimination than larger, established churches. See 146 Cong. Rec. 16,698 (2000) (Joint Statement of Senator Hatch and Senator Kennedy); see also H.R. Rep. No. 219, 106th Cong., 1st Sess. 18-24 (1999) (summarizing testimony). Congress also heard evidence of racial and religious animus in zoning decisions, "especially in cases of black churches and Jewish shuls and synagogues." 146 Cong. Rec. at 16,698 (Joint Statement of Senator Hatch and Senator Kennedy). RLUIPA was Congress's response to combat the implementation of such bias.

II

IN APPLYING THE PRELIMINARY INJUNCTION STANDARD, THE DISTRICT COURT IMPROPERLY EVALUATED THE THREAT OF IRREPARABLE INJURY

In addition to a likelihood of success on the merits, a party seeking a preliminary injunction must show "substantial threat of irreparable injury if the injunction is not issued." *Janvey* v. *Alguire*, 647 F.3d 585, 595 (5th Cir. 2011) (citation omitted); see also *Ingebretsen* v. *Jackson Pub. Sch. Dist*., 88 F.3d 274, 278 (5th Cir.), cert. denied, 519 U.S. 965 (1996).

In this case, the court relied entirely on the threat of irreparable injury and erred in evaluating that threat. The court concluded that there was no injury simply because the church's members were not "currently being deprived of the right to freely exercise their religion." R. 180. The court's reasoning was flawed. It should have evaluated whether the church faced a substantial *threat* of injury by being barred from its new building. *Janvey*, 647 F.3d at 595.

Moreover, the court's analysis on the issue of growth is circular and leaves the church trapped. The court reasoned the church suffers no harm until it grows, and the church alleges that it cannot grow until it acquires a larger building. Contrary to the court's holding that the delay of the lease is not currently causing harm, the church claims that the limits on space have *already prevented* its growth. The pastor affirmed some would-be members have failed to return on account of

the small space. As there was no hearing or response from the City, the church's evidence is unrefuted and should have been viewed in its favor. Under the court's reasoning, no religious community would be able to obtain a preliminary injunction under RLUIPA, so long as it has a meeting space and has not yet exceeded its capacity.

Furthermore, the court erred in finding that the church sought the new building only in *anticipation* of growth and, accordingly, has suffered no harm. R. 180. In fact, the church alleges that the current space is inadequate for *current* members because they cannot hold certain outreach programs, which are open to the whole community, in such a small space.

Because the district court found that the church suffered *no* harm, it did not address the issue of whether the delay in using the new building, and thus a delay in growth and in holding certain outreach programs, would amount to *irreparable* harm. But courts have held that denial of First Amendment rights "for even minimal periods of time" can cause irreparable injury. *Elrod* v. *Burns*, 427 U.S. 347, 373 (1976); see also *Ingebretsen*, 88 F.3d at 280 (citing *Elrod* and upholding the grant of a preliminary injunction against enforcement of a statute allowing school prayer); *Warsoldier* v. *Woodford*, 418 F.3d 989, 1002 (9th Cir. 2005) (holding preliminary injunction should be granted in an inmate's RLUIPA claim where he would be released in 18 days). A preliminary injunction is appropriate

where "the relief available to Plaintiff after trial would not adequately compensate him for the alleged violations of his religious rights." *Kikumura* v. *Hurley*, 242 F.3d 950, 963 (10th Cir. 2001).[5]

CONCLUSION

This Court should vacate the district court's decision and remand for further proceedings.

Respectfully submitted,

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[5] Here, the defendant did not have the chance to address the issues of what damage it may face if an injunction is imposed, or any public interest the injunction may disserve. See *Ingebretsen*, 88 F.3d at 278. A remand is appropriate on these issues. See *Allied Mktg. Grp., Inc.* v. *CDL Mktg., Inc*., 878 F.2d 806, 810 (5th Cir. 1989) (noting the district court's failure to address defenses to a preliminary injunction impedes review). This Court, however, has stated that where a law violates the First Amendment "the public interest was not disserved by an injunction preventing its implementation." *Ingebretsen*, 88 F.3d at 280.

CERTIFICATE OF SERVICE

I hereby certify that on March 14, 2012, I electronically filed the foregoing BRIEF FOR THE UNITED STATES AS AMICUS CURIAE with the United States Court of Appeals for the Fifth Circuit by using the CM/ECF system. Participants in this case who are registered CM/ECF users will be served by the appellate CM/ECF system.

I further certify that on March 14, 2012, I served a copy of the foregoing document on the following counsel of record by First Class Mail:

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CERTIFICATE REGARDING PRIVACY REDACTIONS AND VIRUS SCANNING

I certify (1) that all required privacy redactions have been made in this brief, in compliance with 5th Cir. Rule 25.2.13; (2) that the electronic submission is an exact copy of the paper document, in compliance with 5th Cir. R. 25.2.1; and (3) that the document has been scanned for viruses with the most recent version of a commercial virus scanning program and is free of viruses.

s/April J. Anderson
APRIL J. ANDERSON
Attorney

Date: March 14, 2012

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitations of Federal Rules of Appellate Procedure 29(d) and 32(a)(7)(B), because:

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s/April J. Anderson
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Date: March 14, 2012