

CASE No. 01-3077

IN THE
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

CONGREGATION KOL AMI AND RABBI ELLIOT HOLIN
Plaintiffs/Appellees

v.

ABINGTON TOWNSHIP, BOARD OF COMMISSIONERS OF ABINGTON
TOWNSHIP, THE ZONING HEARING BOARD OF ABINGTON TOWNSHIP AND
LAWRENCE T. MATTEO, JR., IN HIS OFFICIAL CAPACITY AS
DIRECTOR OF CODE ENFORCEMENT OF ABINGTON TOWNSHIP,
Defendants/Appellants

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

DISTRICT COURT No. 01-CV-1919
HONORABLE CLARENCE C. NEWCOMER, S.J.

PETITION FOR REHEARING *EN BANC* OF
PLAINTIFFS-APPELLEES CONGREGATION KOL AMI
AND RABBI ELLIOT HOLIN

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I, Jonathan Auerbach, counsel for Plaintiffs/Appellees, express a belief, based on a reasoned and studied professional judgment, that the Panel decision is contrary to the Equal Protection analysis set forth by the Supreme Court of the United States, and that consideration by the full court is therefore necessary to secure and maintain uniformity of the decisions in this court, *i.e.*, the Panel's decision is contrary to the decision of the Supreme Court in *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432 (1985).

In addition, this appeal involves two questions of exceptional importance, *i.e.*, (1) that the Panel's conflict with *Cleburne* also represents a conflict with the decisions of the U.S. Courts of Appeals for the Eighth and Ninth Circuits, which have faithfully applied *Cleburne* to religious land use cases in *Cornerstone Bible Church v. City of Hastings*, 948 F.2d 464 (8th Cir. 1991), and *Christian Gospel Church v. City and County of San Francisco*, 896 F.2d 1221 (9th Cir. 1990); and (2) that the Panel's statements regarding the well-established Due Process Clause ban on the total exclusion of houses of worship from *all* residential zones in a jurisdiction calls directly into question the long-standing, *federal* constitutional rulings of the Supreme Courts of at least five states, as well as one very recent decision of the U.S. Court of Appeals for the First Circuit.¹

¹ See, e.g., *Boyajian v. Gatzunis*, 212 F.3d 1 (1st Cir. 2000); *State v. Maxwell*, 617 P.2d 816 (Haw. 1980); *Board of Zoning Appeals v. Schulte*, 172

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I. THE PANEL OPINION'S EQUAL PROTECTION ANALYSIS CONFLICTS WITH THE SUPREME COURT'S *CLEBURNE* DECISION

The Panel's decision conflicts with the Equal Protection Clause rational basis analysis set forth by the Supreme Court in *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 440 (1985). The central problem with the Panel's opinion is this: how can any court assess whether a house of worship is "similar" to a country club without asking whether the two uses are similar in relation to whatever governmental interest is actually asserted to justify the disparate treatment? In other words, the new standard enunciated by the Panel removes consideration of asserted governmental interests from the "similarly situated" inquiry, and then treats that stripped-down inquiry as a preliminary question, rather than the ultimate question in a means-focused, "rationally related," Equal Protection challenge.

As the Panel appropriately acknowledged, there are two *independently sufficient* ways to establish a violation of the rational basis standard under the Equal Protection Clause:

Land use ordinances will be deemed "irrational" when a plaintiff

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N.E.2d 39 (Ind. 1961); *Diocese of Rochester v. Planning Board of Brighton*, 136 N.E.2d 827 (N.Y. 1956); *Congregation Committee v. City Council of Haltom City*, 287 S.W.2d 700 (Tex. 1956); *O'Brien v. Chicago*, 105 N.E.2d 917 (Ill. 1952). *See also Four Three Oh, Inc. v. BAPS Northeast, Inc.*, 256 F.3d 107, 113 (3d Cir.), *cert. denied*, 151 L. Ed. 2d 565 (2001) (discussing, without any suggestion of constitutional impropriety, New Jersey law that includes houses of worship among "inherently beneficial" uses).

demonstrates *either* that the state interest is illegitimate (an ends-focus) *or* that the chosen classification is not rationally related to the interest (a means-focus).

Slip Op. 19 (Opinion and Judgment attached as Exhibit A, hereto). In either case, the burden rests upon the plaintiff to offer proof sufficient to overcome the presumption of constitutionality afforded government action that does not trammel fundamental rights or employ suspect classifications. *See Cleburne*, 473 U.S. at 440.

Although the Congregation also contends that the actual, operative governmental *ends* in this case are discriminatory or otherwise “illegitimate,” the focus of both the decision below and the Panel decision was on whether the governmental *means* chosen were “rationally related” to asserted ends that are legitimate.² Such means are not rationally related if they tend to subvert the asserted governmental interest;³ if their relationship to the asserted governmental interest is too remote or attenuated;⁴ *or if they treat differently those who are similarly situated in*

² The Congregation acknowledges that curtailing traffic, noise, and light pollution – as well as other external effects associated with comparably “intense” uses – are legitimate governmental interests. What the Congregation disputes, however, is whether the distinction between houses of worship and the permitted places of public assembly is “rationally related” to those interests, as well as whether those asserted interests are pretextual in this particular case.

³ *See, e.g., Hooper v. Bernalillo County Assessor*, 472 U.S. 612, 619-20 (1985) (finding legislation not rationally related to purpose of encouraging Vietnam veterans to settle in New Mexico where legislation might have discouraged some of those veterans from settling there).

⁴ *See Cleburne Living Ctr. v. City of Cleburne*, 473 U.S. 432, 446-47 (1985) (citing *Zobel v. Williams*, 457 U.S. 55, 61-63 (1982) and *Dept. of Agriculture v. Moreno*,
(continued...)

*relation to the asserted governmental interest.*⁵

The Supreme Court has often characterized the last of these as the core command of the Equal Protection Clause. *See, e.g., Cleburne*, 473 U.S. at 439 (“The Equal Protection Clause ... is essentially a direction that all persons similarly situated should be treated alike”); *Plyler v. Doe*, 457 U.S. 202, 216 (1982) (same); *F. S. Royster Guano Co. v. Virginia*, 253 U.S. 412, 415 (1920) (same). Thus, when a plaintiff attacks governmental *means* because they are not “rationally related” to the asserted ends, the question whether disparately treated entities are similarly situated in relation to those ends is not a *threshold* or *preliminary* question, but the *ultimate* question.⁶ Moreover, in order to show that the disparately treated uses are “similarly situated” – the beginning and end of the analysis – the plaintiff must show similar situation *in relation to the governmental interests* asserted in that case.⁷

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413 U.S. 528, 535 (1973)).

⁵ *See Cleburne*, 473 U.S. at 448 (assessing whether the prohibited uses “would threaten legitimate interests of the city in a way that other permitted uses such as boarding houses and hospitals would not.”); *see, e.g., id.* at 450 (noting that legitimate interests asserted against prohibited use – overpopulation, street crowding, neighborhood serenity, and danger to residents – “obviously fail to explain why [permitted uses] may freely locate in the area without a permit.”)

⁶ *See Christian Gospel Church v. City and County of San Francisco*, 896 F.2d 1221, 1225 (9th Cir. 1990) (“In order to *prevail*, the Church must make a showing that a class that is similarly situated has been treated disparately.”) (emphasis added).

⁷ *See, e.g., Nguyen v. INS*, 533 U.S. 53, 62-63 (2001) (citing *Cleburne* and permitting distinction based on conclusion that “[f]athers and mothers are not similarly situated with regard to the proof of biological parenthood,” previously identified as
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The Supreme Court followed this precise mode of analysis in *Cleburne*, assessing “rational relationship” by examining whether the prohibited and permitted uses were similarly situated in relation to asserted governmental interests, not somehow prior to the identification of those interests. Specifically, the Court inquired whether the prohibited uses “would threaten legitimate interests of the city in a way that other permitted uses such as boarding houses and hospitals would not.” *Id.* at 448; *see id.* (invalidating the ordinance as-applied because “the record does not reveal any rational basis for believing that the [prohibited use] would pose any *special* threat to the city's legitimate interests,....”) (emphasis added). The Court addressed each of the asserted governmental interests one by one – curtailing traffic, noise, congestion, overcrowding, and risks of flooding and legal liability – and found the prohibited and permitted uses similarly situated in relation to those interests. *Id.* at 449-50; *see id.* at 450 (noting that legitimate interests asserted against prohibited use “obviously fail to explain why [permitted uses] may freely locate in the area without a permit.”).

Importantly, the Court in *Cleburne* did *not* make a preliminary assessment of whether the distinguished uses were similarly situated before – or otherwise apart from

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governmental interest served by distinction); *Cornerstone Bible Church v. City of Hastings*, 948 F.2d 464, 471 (8th Cir. 1991) (examining preliminarily, but ultimately remanding for “vital inquiry” of, whether distinguished uses were similarly situated in relation to asserted governmental interest of generating tax revenue in commercial zone).

– its examination of the asserted governmental interests. *But see* Slip Op. at 25 (“Notably, the Court’s holding that there was no rational basis for the city’s distinction between the CLC and the other permitted uses followed only after the Court determined that CLC and the other permitted uses were ‘similarly situated.’”). Instead, the Supreme Court addressed each asserted interest, concluding: (1) that those interests based on negative attitudes and fear were not “legitimate” (an ends-focus), *Cleburne* at 448; and (2) that the disparity of treatment was not “rationally related” to the remaining legitimate interests, because the prohibited and permitted uses were similarly situated to those interests (a means-focus). *Id.* at 449-50. The key for present purposes is that *Cleburne*’s “similarly situated” inquiry was made in full view of the governmental interests, and would have been sufficient alone to show that the chosen means were not “rationally related” to legitimate ends, without further “steps” in the analysis.

Notwithstanding the above, the Panel opinion established a novel equal protection analysis that calls for a threshold assessment of “similarity of uses” prior to any discussion of governmental interest, Slip Op. at 31, 35, citing *Cleburne* as its source. *Id.* at 24-25. According to the Panel, government interests enter the analysis only later, in a newly-minted second step of the analysis:

In sum, the first inquiry a court must make in an equal protection challenge to a zoning ordinance is to examine whether the complaining party is similarly situated in relation to other uses that are either

permitted as of right, or by special permit, in a certain zone. If, and only if, the entities are similarly situated, then the city must justify its different treatment of the two, perhaps by citing to the different impact that such entities may have on the asserted goal of the zoning plan.

Slip Op. 26.⁸

The Panel's departure from *Cleburne's* "similarly situated" analysis will have far-reaching adverse consequences in future cases. First, it is simply incoherent to discuss whether uses are "similarly situated" apart from the particular interests *actually asserted* by the government. Unless the "similarity of uses" inquiry remains tied to an actually asserted governmental interest, it will render the standard meaningless. For then, courts will be forced to engage in highly subjective assessment of whether the compared uses are "kind of like" each other. *See, e.g.*, Slip Op. at 33 n.7 (describing Congregation's claim that country club and house of worship are similarly situated as "counterintuitive"). The *only* similarity that should matter for Equal Protection analysis is similarity in relation to the asserted governmental interests; all others are irrelevant. *See Cleburne*, 473 U.S. at 448 (uses relevantly

⁸*See id.* at 25 ("This two-step inquiry properly places the initial burden on the complaining party first to demonstrate that it is 'similarly situated' to an entity that is being treated differently *before* the local municipality must offer a justification for its ordinance.") (emphasis added). *See id.* at 27 (rejecting argument that similar situation should be assessed in relation to the actually asserted justification of curtailing impacts, because it "overlooks the fact that Abington need not justify its exclusion of religious uses if such a use is not similarly situated to, for example, a country club."); *id.* at 35 ("Since we remand for resolution of the similarity of uses issue, we need not reach the ultimate rationality question,....").

similar unless prohibited use “would threaten legitimate interests of the city in a way that other permitted uses ... would not.”).

Second, and equally contrary to *Cleburne*, the Panel’s analysis suggests that even if uses are similarly situated, it may nonetheless be rational to treat them disparately. This cannot be right: if one use is similarly situated to another in relation to the government’s asserted interests, then black-letter Equal Protection law commands that such disparate treatment is not “rationally related” to those interests. *See Cleburne*, 473 U.S. at 439 (“The Equal Protection Clause ... is essentially a direction that all persons similarly situated should be treated alike”). Differential treatment of similarly situated entities is the very definition of an Equal Protection violation, not some threshold inquiry to be followed by “the ultimate rationality question.” Slip Op. at 35; *see Allegheny Pittsburgh Coal v. County Comm. of Webster County*, 488 U.S. 336, 346 (1989) (“The equal protection clause ... protects the individual from state action which selects him out for discriminatory treatment by subjecting him to [burdens] not imposed on others of the same class.’ *Hillsborough v. Cromwell*, 326 U.S. 620, 623 (1946).”).

Moreover, taking account of government interests when assessing similar situation – as *Cleburne* requires – imposes no premature or otherwise improper burden on the government, as the Panel suggests. *See* Slip Op. at 27-28. For it is always the plaintiff’s burden to prove that the uses are “similarly situated” in relation to the

asserted governmental interests. By the time the plaintiff is put to its proof, it should have identified – by facts gathered before the complaint, by discovery, by stipulation, or otherwise – what interests the government has asserted and will assert. Of course, the government may attempt to rebut plaintiff’s affirmative showing, for example, by asserting additional legitimate interests that the distinction actually does serve, but that were not addressed by the plaintiffs.⁹ *See, e.g., Cornerstone Bible Church*, 948 F.2d at 472 (noting that, on remand, if district court finds uses similarly situated in relation to interest already asserted, government must provide additional rational basis to survive scrutiny). But there can be no question that examination of the asserted governmental interests is essential for the “similarly situated” inquiry.

For all these reasons, this Court should vacate the opinion of the Panel to avoid a conflict with *Cleburne’s* rational basis equal protection analysis.

⁹ Notably here, the government has *never* proffered any additional government interests. In response to the Congregation’s summary judgment challenge to the distinction between houses of worship and certain public assembly and institutional uses, the Township only reasserted the interest with respect to which the compared uses were similar – all these uses were “intense” uses that generated traffic, noise, and light pollution. *See* 161 F. Supp. 2d at 437(decision below). This is akin to asserting a governmental interest against sports uses to justify a distinction between prohibited tennis clubs and permitted golf clubs. The Township has never deviated from asserting “intensity” as their sole interest. *See* 7/29/02 Argt. Tr. 127:6-19. But that interest *still* fails to rationally distinguish the uses at issue here. Thus, it was appropriate for the District Court to conclude, as a matter of law, that the Township had treated similarly situated uses differently in violation of the Equal Protection Clause.

II. THE PANEL OPINION WOULD DISCARD OVER FIFTY YEARS OF SETTLED FEDERAL DUE PROCESS PRECEDENT PROHIBITING LOCAL GOVERNMENTS FROM BANNING HOUSES OF WORSHIP IN ALL RESIDENTIAL ZONES IN A JURISDICTION.

As an alternative ground for affirmance on appeal, the Congregation’s appellate brief reasserted the Due Process Clause ground that served as the primary basis for its partial summary judgment motion below: that Abington’s ordinance was facially invalid because it banned houses of worship in *all* residential zones in the Township. *See, e.g.*, Kol Ami Br. 18. Rather than addressing this argument, however, the Panel opinion takes up and rejects a far weaker argument that the Congregation did *not* make, thus flouting generations of well-settled Due Process jurisprudence from a variety of jurisdictions, and so generating a “question of exceptional importance.”

The Congregation’s Due Process argument begins with the proposition that houses of worship – *as a class and in general* – serve the public welfare wherever they may be located, but especially when located in residential zones, because they are an integral component of residential life.¹⁰ It follows that categorically banning

¹⁰ *See Boyajian v. Gatzunis*, 212 F.3d 1, 9-10 (1st Cir. 2000) (noting and recounting “impressive body of case law and scholarly texts and articles” supporting the “secular judgment that religious institutions, by their nature, are compatible with every other type of land use and thus will not detract from the quality of life in any neighborhood.”); Kol Ami Br. 53 n.16 (listing decisions under *federal* law from numerous jurisdictions, *including Pennsylvania*, that describe houses of worship as “concomitants of civilized residential life”). *See, e.g., Walz v. Tax Commissioner*, 397 U.S. 664, 673 (1970) (state permissibly considers houses of worship “beneficial and stabilizing influences in community life”); *Four Three Oh, Inc. v. BAPS* (continued...)

houses of worship – *as a class and in general* – from *all* residential zones in an entire jurisdiction, without regard to the actual intensity of the proposed use, cannot fairly be said to serve the public welfare.

This is importantly distinct from the extreme claim – which the Congregation has explicitly and repeatedly disavowed – that it is impossible for a *particular* house of worship to harm the public welfare, and that it would therefore offend Due Process to exclude *any* house of worship *at all* from *any* residential zone. *See* Kol Ami Br. 56 & n.18, 59-61; 7/29/02 Argt. Tr. 117:23-118:8. Similarly, the Congregation has expressly disavowed the argument that Due Process prohibits a town from excluding houses of worship entirely from a *single* residential zone – unless, of course, it is the only residential zone in that town. *See* Kol Ami Br. 56 & n.17.

Nevertheless, the Panel has addressed these overbroad arguments, while ignoring the far more modest argument actually presented by the Congregation. For example, the Panel opinion emphasizes that at least “in some cases,” houses of worship may be incompatible with residential life. Slip Op. 35. But the Congregation has acknowledged this fact throughout, arguing instead that the Due Process Clause only prohibits a ban that reflects the *categorical* judgment that *any* house of worship in *any* residential zone – without regard to its particular facts and circumstances – would

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Northeast, Inc., 256 F.3d 107, 113 (3d Cir.), *cert. denied*, 151 L. Ed. 2d 565 (2001) (“inherently beneficial” uses under New Jersey law include temple).

harm the public welfare. *See* Kol Ami Br. 55-56.

Similarly, the Panel cites several state cases applying *federal* law as if they contradicted the Congregation’s position. Slip Op. 30 n.5 (citing cases from Alaska, California, Connecticut, Florida and Oregon). But not a single one of these holds or even hints that houses of worship may be excluded from *all* residential zones in a jurisdiction. Instead, they reject challenges either to a ban on houses of worship in a *single* residential zone when they are permitted in other residential zones, or to the denial of a special exception to a *single* house of worship – not the *blanket* exclusion of houses of worship from *all* residential zones in a district at issue here. *See* Kol Ami Br. 56 & nn.17 & 18 (explaining how California, Connecticut, Florida, Oregon, and Pennsylvania cases reject claims that are not the Congregation’s).¹¹

The Panel claims that the Congregation failed to cite any “federal case explicitly upholding this extremely broad proposition.” Slip Op. 30 n.5. If the Panel refers to the “extremely broad” propositions reflected in the arguments it has chosen to address, those are not the Congregation’s arguments and so, of course, the Congregation has

¹¹ The only case cited by the Panel that had not already been addressed by the Congregation was *Seward Chapel, Inc. v. City of Seward*, 655 P.2d 1293 (Alaska 1992). Like the others, that case is not to the contrary, as it involves a situation where religious uses were prohibited in some *but not all* of the residential zones in the City. *Id.* at 1295-96. Similarly, in *Lakewood Jehovah’s Witnesses v. City of Lakewood*, 699 F.2d 303 (6th Cir. 1983), on which the Panel heavily relies elsewhere, Slip Op. 23-24, the court rejected a challenge to an ordinance that excluded houses of worship from some *but not all* residential zones. *Id.* at 303.

not cited a federal case to support them. But if the Panel refers to the Congregation's actual, more modest argument – that houses of worship as a class, even if not in every case, serve the public welfare in residential zones – it *has* offered federal case support which the Panel has overlooked, most notably the recent decision of the First Circuit in *Boyajian*, 212 F.3d at 9-10, which itself contains additional treatise and federal case citations for the same proposition. *See supra* note 8; Kol Ami Br. 49-54 & nn.14-16 (citing federal, Pennsylvania, and other state cases, as well as major land-use treatises, in support of Due Process rule against banning houses of worship in *all* residential zones).

The Panel similarly ignored the Congregation's citation to two Pennsylvania decisions that support its argument, *see* Kol Ami Br. 50-51 (discussing *Jehovah's Witnesses Appeal*, 130 A.2d 240, 243 (Pa. Super. Ct. 1957) and *Stark Appeal*, 72 Pa. D. & C. 168 (Ct. Comm. Pleas 1950)), citing instead one Pennsylvania decision that, once again, contradicts an argument the Congregation does *not* make. Slip Op. 30-31 n.5 (citing *Church of Our Lord Jesus Christ v. Lower Merion Tp.*, 34 Pa. D. & C.2d 239, 245-46 (Ct. Comm. Pleas 1964) (rejecting Free Exercise challenge to denial of *particular* house of worship's special exception application, not Due Process challenge to ordinance that *precludes* even special exception application in *all* residential zones of township)). The Panel also ignored the brief *amicus curiae* of the

Commonwealth of Pennsylvania on this same question.¹²

The Panel also takes the novel position that the Due Process rule asserted here conflicts with the Supreme Court's seminal Free Exercise decision, *Employment Division v. Smith*, 494 U.S. 872 (1990). Slip Op. 30 n.5. But the modest protection that the Due Process Clause specially affords religious assembly uses – from being categorically banned in *all* residential zones of a jurisdiction – is at least consistent with, if not required by, the Religion Clauses. First, the Due Process rule that the Congregation *actually asserts* prohibits the Township's unmistakable governmental preference for locally established houses of worship (notably here, all churches) over newly arriving and minority religious groups – a preference also offensive to the Free Exercise and Establishment Clauses. Kol Ami Br. 58-59, 64. Second, an ordinance that excludes houses of worship *entirely* from the very zones to which they historically and continually gravitate – a fact that courts have legitimately recognized over and over again, *see id.* at 53 n.16 – at least suggests religion-based hostility forbidden by *Smith*. This inference of hostility to religion is only exacerbated where, as here, the ordinance simultaneously permits uses that are similarly intense to a house of worship,

¹²The Panel opinion suggests that the conflict between Kol Ami and the Township resolves to a conflict between federal constitutional and state land-use law in which federalism principles weigh solely in favor of the Township's position. That is incorrect because the Commonwealth of Pennsylvania's brief in this proceeding before this Court supports the Congregation's position on both the federal constitutional and state law issues.

and where the Township justifies the distinction *only* based on intensity. *Id.* at 54-55.

Finally, the Panel threatens to “turn zoning law on its head” by suggesting that the comparison of disparately treated uses according to impacts “would turn zoning law on its head.” Slip Op. 29. The focus on similarly intensity is well-precedented. *See* Kol Ami Br. 24-25 & nn.5-6 (citing state and federal cases and never addressed by the Panel). Moreover, the exclusive focus on intensity is appropriate, first and foremost, because of the *Township’s exclusive focus* on that interest. *See, e.g.,* 7/29/02 Argt. Tr. 97:13-98:9; 127:6-19. But even if the Township could, at this late date, and assert interests *other than* intensity of use, it could never justify excluding this (or any) use from this (or any) zone because the religious character of the use somehow does not “fit” with the character of that zone. In other words, when zoning religious uses, governmental interest *other than* impacts almost always relate to the religious character of the use – constitutionally forbidden territory. *See* 7/29/02 Argt. Tr. 98:14-99:23; *Smith*, 494 U.S. at 877 (Free Exercise Clause prohibits laws that “impose special disabilities on the basis of ... religious status”). *But see* Slip Op. at 30 n.5 (emphasizing local discretion to exclude religious uses based on “whether or not such a use is suited for a residential district”).

CONCLUSION

For the foregoing reasons, Plaintiffs/Appellees respectfully request that this Court order rehearing *en banc*.

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