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.

BRIEF OF PLAINTIFFS-APPELLEES
CONGREGATION KOL AMI AND RABBI ELLIOT HOLIN

JEROME MARCUS, ESQ.
JONATHAN AUERBACH, ESQ.
BERGER & MONTAGUE, P.C.
1622 LOCUST STREET
PHILADELPHIA, PA 19103
TELEPHONE: (215) 875-3000
FACSIMILE: (215) 875-5707

ANTHONY R. PICARELLO, JR., ESQ.
ROMAN P. STORZER, ESQ.
THE BECKET FUND FOR RELIGIOUS LIBERTY
1350 CONNECTICUT AVENUE, NW, SUITE 605
WASHINGTON, D.C. 20036
TELEPHONE: (202) 955-0095
FACSIMILE: (202) 955-0090

Attorneys for Plaintiffs-Appellees

TABLE OF CONTENTS

Page

TABLE OF CONTENTS i

TABLE OF AUTHORITIES iv

COUNTERSTATEMENT OF SUBJECT MATTER
AND APPELLATE JURISDICTION 1

COUNTERSTATEMENT OF ISSUES 2

COUNTERSTATEMENT OF THE CASE 4

COUNTERSTATEMENT OF FACTS 6

I. Introduction 6

II. Undisputed Material Facts Regarding the Zoning Ordinance 7

III. Undisputed Material Facts Regarding the Application of the Zoning Ordinance in This Case 10

A. The Property and the neighborhood 10

B. Prior uses of the Property by other religious groups 11

C. Proposed use of the Property by the Congregation 12

D. The Township's denial of the Congregation's proposed use 14

STATEMENT OF RELATED CASES 15

SUMMARY OF ARGUMENT 16

ARGUMENT 19

I. The District Court's Opinion and Order Should Be Affirmed for the Reasons Set Forth in Those Decisions 19

A. Rational basis scrutiny is neither "toothless" nor limited in application to cases involving bad animus 19

B. The District Court faithfully applied the rational basis standard set forth in *Cleburne* and similar zoning cases 25

C. By ordering only a special exception hearing on remand – and not the grant of any permit – the District Court both granted the narrower relief suggested by the Township and respected local control over land-use issues 30

D. This Court should reject all of the asserted grounds for reversal 32

1. Most of the Township's arguments pertain to issues beyond the scope of the District Court's decision 32

2. The District Court's decision does not violate "federalism principles" or the Tenth Amendment 37

3. The District Court's decision does not violate the Establishment Clause 40

4. The District Court's decision does not violate the Due Process Clause 43

II. The District Court's Grant of Summary Judgment May Be Affirmed on Alternative Grounds 49

A. Abington Township's Ordinance is unreasonable on its face because it prohibits houses of worship in all residential zones in the Township 49

B. Abington Township's Ordinance discriminates based on religion in violation of the Free Exercise Clause 61

CONCLUSION 66

CERTIFICATES OF BAR MEMBERSHIP 67

CERTIFICATE OF COMPLIANCE WITH F.R.A.P. 32 70

TABLE OF AUTHORITIES

FEDERAL CASES

ACLU-NJ v. Schundler,
168 F.3d 92 (3d Cir. 1999) 42

Allegheny Pittsburgh Coal Co. v. County Com. of Webster County,
488 U.S. 336 (1989) 22

Belle Terre v. Boraas,
416 U.S. 1 (1974) 38

Boyajian v. Gatzunis,
212 F.3d 1 (1st Cir. 2000), *cert. denied,*
531 U.S. 1070 (2001) 42, 51, 52, 53

Celotex Corp. v. Catrett,
477 U.S. 317 (1986), *cert. denied,* 484 U.S. 1066 (1988) 47

Christian Gospel Church v. San Francisco,
896 F.2d 1221 (9th Cir.), *cert. denied,* 498 U.S. 999 (1990) 25

Church of the Lukumi Babalu Aye v. City of Hialeah,
508 U.S. 520 (1993) 58, 61, 62, 64

City of Cleburne v. Cleburne Living Ctr., Inc.
473 U.S. 432 (1985) . . . . passim

Cohen v. City of Des Plaines,
8 F.3d 484 (7th Cir. 1993), *cert. denied,* 512 U.S. 1236 (1994) 42

Colautti v. Franklin,
439 U.S. 379 (1979) 49

Congregation Kol Ami v. Abington Twp.,
161 F. Supp. 2d 432 (2001) . . . . passim

Congregation Kol Ami v. Abington Twp.,
No. 01-1919 (E.D. Pa. July 20, 2001) 28, 31, 39, 40, 41

Corporation of Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos,
483 U.S. 327 (1987) 42

Ehlers-Renzi v. Connelly Sch. of the Holy Child, Inc.,
224 F.3d 283 (4th Cir. 2000), *cert. denied,* 531 U.S. 1192 (2001) 42

Employment Div. v. Smith,
494 U.S. 872 (1990) 38, 61, 62

Euclid v. Ambler Realty Co.,
272 U.S. 365 (1926) 20, 54

FOP Newark Lodge No. 12 v. City of Newark,
170 F.3d 359 (3d Cir.), *cert. denied,* 528 U.S. 817 (1999) . . . 18, 62, 63, 64

Four Three Oh, Inc. v. B.A.P.S. Northeast, Inc.,
256 F.3d 107 (3d Cir.), *cert. denied,*
151 L. Ed. 2d 565 (2001) 20, 24, 38, 52, 60

Groome Resources, Ltd. v. Parish of Jefferson,
234 F.3d 192 (5th Cir. 2000) 39

Heller v. Doe,
509 U.S. 312 (1993) 23, 29

Hooper v. Bernalillo County Assessor,
472 U.S. 612 (1985) 21, 61

Lemon v. Kurtzman,
403 U.S. 602 (1971) 41, 42

Loftus v. Township of Lawrence Park,
764 F. Supp. 354 (W.D. Pa. 1991) 38

Love Church v. Evanston,
671 F. Supp. 515 (N.D. Ill. 1987), *vacated based on standing*,
896 F.2d 1082 (7th Cir. 1990), *cert. denied,* 498 U.S. 898 (1990) . . . 25, 38

Lynch v. Donnelly,
465 U.S. 668 (1984) 43

Marbury v. Madison,
5 U.S. 137, 1 Cranch 137 (1803) 41

Midnight Sessions, Ltd. v. City of Philadelphia,
945 F.2d 667 (3d Cir. 1991), *cert. denied,* 503 U.S. 984 (1992) 21

Milliken v. Bradley,
433 U.S. 267 (1977) 39

Mitchell v. Helms,
530 U.S. 793 (2000) 42

Nectow v. Cambridge,
277 U.S. 183 (1928) 20, 22, 24

New York v. United States,
505 U.S. 144 (1992) 40

O'Brien v. Skinner,
414 U.S. 524 (1974) 22

Pace Resources, Inc. v. Shrewsbury Township,
808 F.2d 1023 (3d Cir. 1987), *cert. denied,* 482 U.S. 906 (1987) 19, 21

Radich v. Goode,
886 F.2d 1391 (3d Cir. 1989) 47

Romer v. Evans,
517 U.S. 620 (1996) 21

Sameric Corp. v. City of Phila.,
142 F.3d 582 (3d Cir. 1998) 21

Schad v. Mt. Ephraim,
452 U.S. 61 (1981) 36, 37, 38, 46, 58

Schweiker v. Wilson,
450 U.S. 221 (1981) 20

Seattle Title Trust Co. v. Roberge,
278 U.S. 116 (1928) 20, 60

Sullivan v. City of Pittsburgh,
811 F.2d 171 (3d Cir. 1987) 20, 24

U.S. Sound & Service, Inc. v. Township of Brick,
126 F.3d 555 (3d Cir. 1997) 38

Walz v. Tax Commissioner of New York,
397 U.S. 664 (1970) 43, 53

Wolff v. McDonnell,
418 U.S. 539 (1974) 19, 39

Zobel v. Williams,
457 U.S. 55 (1982) 21, 58

Zorach v. Clauson,
343 U.S. 306 (1952) 42, 43, 57, 59

STATE CASES

America Friends of Soc'y of St. Pius v. Schwab,
68 A.D.2d 646, 417 N.Y.S.2d 991 (N.Y. App. Div. 1979) 51

Board of Zoning Appeals v. Schulte,
241 Ind. 339, 172 N.E.2d 39 (Ind. 1961) 49, 51

Board of Zoning Appeals v. Decatur Co. of Jehovah's Witnesses,
233 Ind. 83, 117 N.E.2d 115 (Ind. 1954) 49

Bright Horizon House, Inc. v. Zoning Board of Appeals,
121 Misc.2d 703, 469 N.Y.S.2d 851 (N.Y. Sup. Ct. 1983) 51

Englewood v. Apostolic Christian Church,
362 P.2d 172 (Colo. 1961) 51

Congregation Committee v. City Council of Haltom City,
287 S.W.2d 700 (Tex. 1956) 50, 52

Congregation Temple Israel v. Creve Coeur,
320 S.W.2d 451 (Mo. 1959) 53

Corporation of Presiding Bishop of Church of Jesus Christ of Latter Day Saints
v. City of Porterville,
203 P.2d 823 (Cal. App. 4th 1949) 56

Diocese of Rochester v. Planning Bd. of Brighton,
136 N.E.2d 827 (N.Y. 1956) 49, 51

Ellsworth v. Gercke,
156 P.2d 242 (Ariz. 1945) 25

Franciscan Missionaries of Mary v. Herdman,
184 N.Y.S.2d 104 (N.Y. App. Div. 1959) 25

Jacobi v. Zoning Board of Adjustment,
196 A.2d 742 (Pa. 1964) 53

Jehovah's Witnesses Appeal,
130 A.2d 240 (Pa. Super. Ct. 1957) 51

Miami Beach United Lutheran Church of the Epiphany v. Miami Beach,
82 So.2d 880 (Fla. 1955) 56

Milwaukie Co. of Jehovah's Witnesses v. Mullen,
330 P.2d 5 (Ore. 1958), *cert. denied,* 359 U.S. 436 (1959) 56

North Shore Unitarian Soc'y v. Plandome,
200 Misc. 524, 109 N.Y.S.2d 803 (1951) 25

O'Brien v. City of Chicago,
105 N.E.2d 917 (Ill. 1952) 50, 53

Stark Appeal,
72 Pa. D. &.C. 168 (1950) 50, 53

State ex rel. Lake Drive Baptist Church v. Bayside Bd. of Trustees,
108 N.W.2d 288 (Wis. 1961) 53

State ex rel. Roman Catholic Bishop v. Hill,
90 P.2d 217 (Nev. 1939) 50

State ex rel. Synod of Ohio v. Joseph,
39 N.E.2d 515 (Ohio 1942) 50

State v. Maxwell,
617 P.2d 816 (Haw. 1980) 49

The Church of Our Lord Jesus Christ v. Lower Merion Township,
34 Pa. D. & C. 2d 239 (1964) 56

West Hartford Methodist Church v. Zoning Board of Appeals,
121 A.2d 640 (Conn. 1956) 56

Yanow v. Seven Oaks Park,
94 A.2d 482 (N.J. 1953) 52

Young Israel Organization v. Dworkin,
133 N.E.2d 174 (Ohio 1956) 52, 53

DOCKETED CASES

Finke v. Abington Township Zoning Hearing Board,
No. 01-19006 (Pa. Ct. Comm. Pl. filed Sept. 13, 2001) 15

STATUTES

FED. R. CIV. P. 56(f) 47

28 U.S.C. § 1292(a)(1) 1

28 U.S.C. §§ 1331 and 1334 1

28 U.S.C. § 1367(a) 1

RLUIPA § 2(b)(3)(A), 42 U.S.C.A. § 2000cc(b)(3)(A) 36

MISCELLANEOUS

E. McQuillin, The Law of Municipal Corporations,
§ 25.131.30, at 489 (3d ed. 2000) 24, 50, 52

Rathkopf & D. Rathkopf, The Law of Zoning and Planning,
§ 20.01, at 20-5 (4th ed. 1985) 24, 49, 51

R.P. Davis, Zoning Regulation as Affecting Churches,
74 A.L.R. 2d 377 § 2[a] (1960, Supp. 2000) 50

E.C. Yokley, Zoning Law and Practice
§ 35-14, at 35 (4th ed. 1980, Supp. 1999) 53

K.H. Young, Anderson's American Law of Zoning
§ 12.22, at 578 (4th ed. 1996) 52, 54

COUNTERSTATEMENT OF SUBJECT MATTER AND APPELLATE JURISDICTION

As the Defendants below – Abington Township, its Board of Commissioners, its Zoning Hearing Board ("ZHB"), and its Director of Code Enforcement, Mr. Matteo (collectively the "Township") – acknowledge, the District Court had jurisdiction under 28 U.S.C. §§ 1331 and 1334. Brief of Appellants p.1 (hereinafter "Twp.Br."). The court also had jurisdiction over the Congregation's state claims under § 1367(a).

This Court, however, lacks jurisdiction under 28 U.S.C. § 1292(a)(1) for the reasons explained in the Congregation's Motion to Dismiss Appeal (Aug. 6, 2001). That motion has been referred to this merits panel. *See* Order (Aug. 7, 2002).

COUNTERSTATEMENT OF ISSUES

1. Did the District Court faithfully apply ***City of Cleburne* v. *Cleburne Living Ctr., Inc.,*** 473 U.S. 432 (1985), by ordering a hearing on the Congregation's special exception application for a place of worship in a residential zone, when the Township allows such hearings for a range of other uses – such as train stations, municipal buildings, police barracks, country clubs, and libraries – that are similarly situated with respect to the asserted government concerns over traffic, noise, and light.

2. Did the Township also fail rational basis scrutiny by categorically prohibiting houses of worship in every residential zone in the Township?

3. Did the Township also violate the Free Exercise Clause by disfavoring religious uses throughout the Township, by gerrymandering Township zoning ordinances over time to target houses of worship for exclusion, and by establishing a system of preferences for longer-established religious groups?

4. Did the District Court violate the Tenth Amendment or unspecified "federalism principles" by finding a violation of a well-established federal constitutional limitation on local zoning power, and then remanding to local authorities for further proceedings within those constitutional parameters?

5. Did the District Court violate the Establishment Clause either by requiring equal treatment of religious and nonreligious assembly and institutional uses, or by restating a long-standing and ubiquitous principle in the law of religious land uses?

6. Did the District Court violate the Due Process Clause by deciding an issue raised by the Township in its own brief, and based in part on additional evidence supplied by the Township?

COUNTERSTATEMENT OF THE CASE

Plaintiffs Congregation Kol Ami and Rabbi Elliot Holin (collectively the "Congregation" or "Kol Ami") substantially agree with the Statement of the Case in the Township's brief. Twp.Br. pp.3-4. However, the Township does not recount its execution of the District Court's July 20 Order. Because that part of the case is necessarily before this Court (at least for purposes of deciding the mootness ground for dismissal), the Congregation adds the following procedural history.

The ZHB conducted the special exception hearing between August 6 and August 9, 2001, including a view of the Property. Opinion and Order of the Board, App. 99-36, Finding of Fact ("FF") ¶¶ 23-24, at 4 (August 15, 2001) ("8/15/01 Bd.Op.") (J.A.3894a-3909a). Though the Township and its Commissioners could have opposed the application, they declined to do so. 8/15/01 Bd.Op. ¶ 8, at 2. On August 15, the ZHB issued its decision granting the special exception. *Id.,* Conclusion of Law ("CL") ¶ 12, at 14 (J.A.3907a). The ZHB acknowledged that the use "will not adversely affect the health, safety and welfare of the community," and that it "is consistent with the spirit, purpose, and intent of the Ordinance." *Id.* CL ¶¶ 10, 11, at 14 (J.A.3907a). Thus, rather than prohibit the use altogether as before, the ZHB allowed the use but imposed

limitations directed at traffic, light pollution, and noise. *Id.* ¶¶ 1-26, at 14-16 (J.A.3907a-3909a). Since then, the Township has also approved the Congregation's land development plan. *See* Letter from Matteo to Friedman, Apr. 12, 2001 ("Matteo Letter") (S.A.1-2, filed Apr. 19, 2001). Nonetheless, the Township persists in this appeal.

<u>**COUNTERSTATEMENT OF FACTS**</u>

I. Introduction

The Congregation initially notes certain irregularities in the Township's Statement of Facts. Twp.Br. pp.5-23. It contains factual assertions unsupported by citations to the record. *Id.* at 16 (reciting numerous facts, including numerical calculations, without record citation). It cites to documents that, as submitted to this Court, have been modified from the form in which they were submitted to the court below. *Id.* at 15-16 (citing "color-coded" version of zoning map). It cites documents that lack foundation or legal relevance. *Id.* at 11 (citing staged photographs by unidentified photographer of unidentified children playing in unidentified street). It contains legal argument, including citations to cases and treatises. *Id.* at 17-18.

This Counterstatement will focus instead on the facts the District Court *actually relied on* in finding the Township applied its ordinance unconstitutionally by not affording the Congregation the same special exception hearing available to various other assembly and institutional uses in the same zone (train stations, municipal office buildings, clubhouses, libraries, and others), even though both sets of uses implicate the same asserted interests (traffic, noise, and light).

II. Undisputed Material Facts Regarding the Zoning Ordinance

Abington Township's current zoning ordinance prohibits houses of worship in all residential districts (R-1, R-2, R-3, and R-4), not even allowing them by special exception. Abington Township Revised Zoning Ordinance, Version 6.0, §§ 301-304 (May 9, 1996) (J.A.1000a-1006a) (hereinafter "1996 Ordinance"); Opinion and Order of the Board, App. 99-36, FF ¶ 38, at 6; CL ¶ 6, at 20 (March 20, 2001) (J.A.302a, 316a) ("3/20/01 Bd.Op.").

By contrast, in the R-1 residential district alone, the 1996 Ordinance allows various nonreligious assembly and institutional uses – such as "Municipal Complexes" (including administration buildings, police barracks, and libraries), "Outdoor Recreation" uses (including country clubs, club houses, pro shops, and snack bars used by patrons of recreational activities "operated on a commercial or membership basis"), "Utility Facilities" (including train stations and bus shelters), and "Riding Academies" – by special exception. 1996 Ordinance §§ 301.2.B.2-4, 706.E.8, 706.G.6, 706.J.3 (J.A.1001a, 1094a, 1098a, 1108a). In the R-4 residential district, day care centers and nursing homes are allowed by special exception, and life care facilities are allowed as conditional uses. *Id.* § 304.B.1-2, C.1. (J.A.1005a). Houses of worship are ineligible for any of these exceptions in any of these districts. *Id.* §§ 301-304.

The 1996 Ordinance also prohibits houses of worship in all but three of the remaining zoning districts in the Township. 1996 Ordinance §§ 400-602 (J.A.1007a-1062a) (defining various zoning districts). In those same zones, various nonreligious assembly and institutional uses – such as clubs, libraries, museums, performing theaters, amusement parks, cultural centers, and country clubs – are permitted, whether by right, by special use, or otherwise. *Id.*

Although houses of worship are permitted in the Apartment/Office District by special exception, nonreligious assembly and institutional uses – such as clubs, community centers, cultural centers, libraries, and museums – are permitted as of right. 1996 Ordinance §§ 403, 500, 501 (J.A.1018a-1032a). Places of worship are permitted as of right only in the Community Service and Mixed Use Districts. *Id.* Combined, these three districts represent a small percentage of the total acreage of the Township. *See* 3/20/01 Bd.Op., Exhibit P-5 ("Zoning Map") (J.A.3095a).[1]

Before 1990, the predecessor of the "R-1" residential district was called the "V" residential district, which permitted single family homes, "tilling of the soil," and public libraries, parks, and recreational areas as of right; as well as livestock

[1]Moreover, as of 1992, cemeteries *alone* occupied 3% to 4% of *all* acreage in Abington, thus excluding about one-third of Community Service zones from even potential use as a synagogue. 1992 Abington Township Comprehensive Plan pp.61, 69 (J.A.880a, 888a). Large hospitals and parks in those zones cut further into the acreage available for purchase for any purpose. Zoning Map (J.A.3095a).

and nursery uses, school and seminary uses, and private nonprofit libraries, parks, and recreational areas by special exception. 3/20/01 Bd.Op.FF ¶¶ 38-39, at 6; Ordinance No. 1469, § 301, at 26-28 (Aug. 10, 1978) (hereinafter "1978 Ordinance") (J.A.302a, 508a-510a). The 1978 Ordinance also allowed by special exception a "Church, rectory, parish house, *convent*, monastery or similar religious *institution*." *Id.* § 301.2.D.3 (emphasis added).

In 1990, the Township amended the "V" zone to prohibit all uses but single family homes; to redefine certain accessory uses and lot requirements; and to impose a new height restriction of thirty-five (35) feet. Ordinance No. 1676 (J.A.804a-809a). In 1996, the Township renamed the "V" district "R-1," and permitted once again – either as of right or by special exception – all the institutional and assembly uses prohibited in 1990 *except* for schools, seminaries, and the other religious institutional uses previously allowed. *Compare* 1978 Ordinance § 301, at 26-28 *with* 1996 Ordinance § 301, at 18-20 (J.A.508a-510a, 1000a-1002a). These changes both create and reflect the discrimination that lies at the heart of this case: the availability in R-1 residential districts of various exceptions for myriad institutional and assembly uses, while no exception is allowed for houses of worship.

III. Undisputed Material Facts Regarding the Application of the Zoning Ordinance in This Case

A. The Property and the neighborhood

The property at issue is located at 1908 Robert Road, Abington Township, Pennsylvania (the "Property"), in the R-1 district. 3/20/01 Bd.Op.FF ¶ 9, at 2 (J.A.298a). The Property consists of approximately 10.9 acres of land, including structures occupying approximately 27,000 square feet. *Id.* FF ¶ 2, at 2. Among these structures is a 3,700 square-foot chapel that can seat approximately 250 worshipers. Opinion and Order of the Board, App. 95-33, FF ¶¶ 7-11, at 2 (May 2, 1996) (J.A.292a) (hereinafter "1996 Bd.Op."). The chapel was built in 1957 with pews, an altar, a sacristy, the stations of the cross, confessionals, and stained glass windows. *Id.* FF ¶¶ 8, 11, at 2; 3/20/01 Bd.Op.FF ¶ 2, 65, at 2, 8 (J.A.298a, 304a, 292a).

The main entrance to the Property is a driveway on Robert Road, which is approximately 400 feet (passing only five residential lots) from Valley Road, a main thoroughfare. *See* Zoning Map (J.A.3095a), and 3/20/01 Bd.Op. Exhibits P-4, P-19 (J.A.3094a, 3140a). Robert Road, which is approximately 30 feet wide, continues for another approximately 300 feet *past* the Property's driveway before widening into a cul-de-sac of approximately 120 feet in diameter. *Id.*

Abington Township contains approximately thirty-seven houses of worship, including approximately twenty-five in residential zoning districts, five in the R-1 zone. 3/20/01 Bd.Op.CL ¶ 39, at 22; Table of Religious Uses (J.A.318a, 3547a). Among those in residential zones – where new ones are banned entirely – none are Jewish. *Id.* Notwithstanding a substantial Jewish population in Abington, there is only one synagogue in the entire Township, located in the "Planned Business" district. *Id.*

B. Prior uses of the Property by other religious groups

In 1951, the Sisters of the Holy Family of Nazareth (the "Sisters") purchased the Property, which then included 38 acres. 1996 Bd.Op.FF ¶ 14, at 2 (J.A.292a). The Sisters dramatically altered their Property in order to convert it from its prior, single family use to their convent use, including by building the chapel described above and adding one story to another building for a dormitory. *Id.* ¶¶ 8-14, at 2.

From 1957 until 1995, the Sisters regularly attended the church on the Property for religious services, meetings, and related activities, such as religious education, sharing meals, recreating, and working. 3/20/01 Bd.Op.FF ¶¶ 72, 75, 76, 86, at 9-10 (J.A.305a-306a); *see* 1996 Ordinance § 706.E.10, at 112. At its peak, the Property accommodated 50 to 80 Sisters engaging in these activities.

1996 Bd.Op.FF ¶ 15, at 2 (J.A.292a). The Sisters also allowed the Property to be used for retreats and special meetings, even as late as 1995 when the Sisters' population had declined. *Id.* ¶¶ 16, 30, at 2, 4 (J.A.292a, 294a).

In 1995, due to that decline, the Sisters leased the Property to a community of Greek Orthodox monks for religious services, family retreats, religious study, and prayer. 1996 Bd.Op.FF ¶¶ 23, 25, 28, at 3 (J.A.293a). In 1996, the ZHB approved that use,[2] allowing those religious activities to continue on the Property through 1999. *Id.*; *see* 1996 Ordinance § 706.E.10, at 112 (J.A.1094a).

C. Proposed use of the Property by the Congregation

In August 1999, the Congregation entered into an agreement with the Sisters to purchase the Property, also for use as a place of worship. 3/20/01 Bd.Op.FF ¶ 62, at 8 (J.A.304a). The Congregation proposed the following regularly scheduled uses: (1) *Shabbat* services on alternate Fridays and Saturdays for up to an hour and a half; (2) Hebrew classes on Wednesdays from 4:00pm to

---

[2] In its 1996 decision, by stark contrast to its March 2001 decision, the ZHB repeatedly described the Sisters' use as "institutional." *Compare* 1996 Bd.Op.FF ¶¶ 8, 10, 14, at 2; CL ¶ 3, at 4, *with* 3/20/01 Bd.Op.CL ¶¶ 7, 11, at 20. In 2001, the ZHB similarly contradicted its prior findings that the Sisters' use was "nonconforming," and that the Sisters did not intend to abandon that use. *Compare* 1996 Bd.Op.FF ¶ 17, at 2; CL ¶¶ 3, 4, at 4, *with* 3/20/01 Bd.Op.CL ¶ 13, at 20.

8:00pm; (3) religious classes for 2 hours on Sunday mornings. *See* Testimony of David Sloviter (January 18, 2000), at 115:12-123:25 (J.A.1360a-1368a) ("Sloviter Testimony"). This totals less than 8 hours of regularly scheduled activity per week, and none on Mondays, Tuesdays, Thursdays, or alternate Fridays and Saturdays. *Id.* at 122:4-17 (J.A.1367a). Other uses would include four High Holy Day services in the fall, religious meetings, and *Bar* and *Bat Mitzvah* services. *Id.* at 124:2-134:5 (J.A.1369a-1379a).

Under this proposal, the facilities of the Property would be used as the Sisters used them: worship services would be held in the Chapel; Sabbath-eve gatherings would be held in the Dining Room; receptions would be held in the Hall; the Congregation would use the Sisters' classrooms and dormitory rooms for its own religious education and administrative offices. Sloviter Testimony at 134:16-139:3 (J.A.1379a-1384a). Driveways on the Property would be altered, parking areas would be added to comply with Abington Township standards, as well as screening and buffering. *See id.* at 143:22-144:8 (J.A.1388a-1389a). *See also* Testimony of Stuart Rosenberg (February 29, 2000), at 140:19-141:7, 172:12-21 (J.A.1541a-1542a, 1573a); Testimony of Charles Guttenplan (March 2, 2000), at 54:11-57:24 (J.A.1635a-1638a).

D. The Township's denial of the Congregation's proposed use

The ZHB rejected all three grounds Kol Ami offered for permitting the above use: as a continuation of a prior, nonconforming, place of worship use; by variance; or by special exception. 3/20/01 Bd.Op.FF ¶¶ 15-18, at 4-5 (J.A.300a-301a). The ZHB addressed the merits of the first two grounds, invoking concerns over increased traffic, light pollution, and noise. *See id.* FF ¶ 182, at 16; CL ¶¶ 25, 28, at 21-22 (J.A.312a, 317a-318a). But the ZHB did not assess whether the use met special exception requirements, noting instead the list of uses that may apply for a special exception (which does not include houses of worship), and concluding that "Places of Worship are not permitted in the R-1 Residential District." *Id.* CL ¶¶ 1, 6, at 20 (J.A.316a).

STATEMENT OF RELATED CASES

The Congregation agrees with the Township that ***Finke* v. *Abington Township Zoning Hearing Board,*** No. 01-19006 (Pa. Ct. Comm. Pl. filed Sept. 13, 2001), is a related case. The Congregation adds that it moved on October 12, 2001, to dismiss that case for lack of jurisdiction. The court has yet to rule on that motion.

SUMMARY OF ARGUMENT

Rather than address the decisions below, the Township mainly attacks rulings the District Court never made, characterizing the District Court's decision as a broad holding that each and every house of worship has an absolute right to locate in a purely residential district, or any other district it may choose. *See, e.g.,* Twp.Br. pp.44, 49. In fact, however, the District Court decision is much more nuanced and turns on the discrimination between houses of worship, which are barred from the R-1 district (and all other residential districts), and other assembly and institutional uses, which are not. In response, the Congregation will set forth and defend the actual decisions of the District Court and propose two alternative grounds for affirmance on this record.

Federal and state constitutions unmistakably limit the otherwise broad power of local zoning officials to regulate land use. Those limits include the bare minimum requirement that zoning power must be exercised reasonably. Though this standard is deferential, zoning authorities may violate it in several ways, not limited to situations involving so-called "bad animus"; zoning decisions based on fear or hatred represent one form of zoning irrationality, but not the only one. As a separate and distinct limitation, zoning authorities may not impose disadvantages based on certain suspect categories or motives, including those based on religion.

Here, the Township has exceeded both limitations on its power, failing rational basis scrutiny in two ways and strict scrutiny in another.

As the court below found, by denying the Congregation a special exception *hearing* under the circumstances of this case, the Township failed rational basis scrutiny under ***City of Cleburne* v. *Cleburne Living Ctr., Inc.,*** 473 U.S. 432 (1985). Specifically, the Township cannot deny Kol Ami the same hearing it allows for a host of assembly and institutional uses in the same zone, because those other uses are similarly situated in relation to the interests asserted by the Township against Kol Ami (*i.e.,* they also generate traffic, light pollution, and noise).

This decision reflects no deprivation of due process. The court made its as-applied determination after the Congregation's summary judgment motion squarely challenged this distinction in the ordinance, and the Township introduced and argued additional evidence regarding the application of that distinction in this case. Nor does the decision disregard federalism or local control. The District Court issued precisely the type of relief the Township requested: a remand, not with orders to *grant* a special exception, but only to conduct a special exception *hearing* whose outcome *the Township itself would decide.* For all its complaint of

judicial usurpation, the Township ultimately granted the special exception *it could have denied*.

The District Court correctly held that the ordinance fails rational basis scrutiny for a second, independent reason: it prohibits houses of worship in all of the Township's residential zones. That ban offends enduring due process reasoning: zoning ordinances must be rationally related to advancing the public welfare; houses of worship generally advance the public welfare in residential zones; therefore, a *blanket* prohibition on houses of worship in *all* residential zones is not rationally related to advancing the public welfare. Merely restating the second step of this syllogism (as the court below did) does not offend the Establishment Clause.

Finally, the ordinance triggers and fails strict scrutiny under the Free Exercise analysis of ***FOP Newark Lodge No. 12* v. *City of Newark*,** 170 F.3d 359 (3d Cir. 1999). Across all zones, Abington's ordinance treats assembly and institutional activities differently and worse when undertaken with a religious motivation. The history of amendments culminating in the current ordinance only reinforces this already-conclusive inference. The ordinance reflects particular hostility to new or unfamiliar religions by freezing the religious landscape in time, thus entrenching the position of longer-established churches.

ARGUMENT

I. THE DISTRICT COURT'S OPINION AND ORDER SHOULD BE AFFIRMED FOR THE REASONS SET FORTH IN THOSE DECISIONS.

A. Rational Basis Scrutiny Is Neither "Toothless" Nor Limited in Application to Cases Involving Bad Animus.

All government action, no matter how local, is subject to the minimal federal constitutional requirement of bare rationality, which is enshrined primarily in the Due Process and Equal Protection Clauses of the Fourteenth Amendment. ***City of Cleburne* v. *Cleburne Living Ctr., Inc.,*** 473 U.S. 432, 440 (1985) (Equal Protection Clause ordinarily requires laws to be "rationally related to a legitimate state interest"); ***Pace Resources, Inc.* v. *Shrewsbury Township,*** 808 F.2d 1023, 1034 (3d Cir. 1987) (noting same rational basis standard under Due Process Clause, including for zoning regulations). *See* ***Wolff* v. *McDonnell,*** 418 U.S. 539, 558 (1974) ("The touchstone of due process is protection of the individual against arbitrary action of government, ***Dent* v. *West Virginia,*** 129 U.S. 114, 123 (1889).").[3]

---

[3] The Congregation invoked other constitutional bases for this requirement of bare rationality, including Pennsylvania's Equal Protection Clause, the Free Exercise and Free Speech Clauses of the federal First Amendment, and corresponding Pennsylvania protections. SJ Mem. pp.5-6 & n.2 (J.A.46a-47a).

From virtually the dawn of zoning law, the Supreme Court has made clear that local zoning laws – no less than other government actions – must have a rational basis. ***Seattle Title Trust Co.* v. *Roberge,*** 278 U.S. 116, 121 (1928) (zoning "'restriction cannot be imposed if it does not bear a substantial relation to the public health, safety, morals, or general welfare.'") (quoting ***Nectow* v. *Cambridge,*** 277 U.S. 183, 188 (1928)); ***Euclid* v. *Ambler Realty Co.,*** 272 U.S. 365, 395 (1926). Indeed, the Supreme Court and this Court have struck down zoning actions for failure to satisfy even this modest demand. *See, e.g.,* **Cleburne,** 473 U.S. at 440; ***Nectow,*** 277 U.S. at 188-89; ***Seattle Title Trust Co.,*** 278 U.S. at 121; ***Sullivan* v. *City of Pittsburgh,*** 811 F.2d 171, 184-85 (3d Cir. 1987). *See also* ***Four Three Oh, Inc.* v. *B.A.P.S. Northeast, Inc.,*** 256 F.3d 107, 115 (3d Cir. 2001) (finding Board denied zoning variance "arbitrarily and unreasonably").

Though deferential, the minimum standard of rationality is "'not a toothless one.'" ***Schweiker* v. *Wilson*,** 450 U.S. 221, 234 (1981) (quoting ***Mathews* v. *Lucas,*** 427 U.S. 495, 510 (1976)). Specifically, laws are not "rationally related to a legitimate state interest" when a plaintiff demonstrates *either* that the state interest is illegitimate, *or* that the chosen classification is not rationally related to the interest. ***Cleburne,*** 473 U.S. at 440, 446-47.

Thus, for example, "'a bare ... desire to harm a politically unpopular group cannot constitute a legitimate governmental interest.'" ***Romer* v. *Evans,*** 517 U.S. 620, 634 (1996) (quoting ***Dept. of Agriculture* v. *Moreno,*** 413 U.S. 528, 534 (1973)); ***Cleburne,*** 473 U.S. at 446-47. Nor can "mere negative attitudes, or fear." *Id.* at 448. Similarly, government action based on "speculation, prejudice, self-interest, or ignorance is arbitrary and irrational," and therefore unconstitutional. ***Midnight Sessions, Ltd.* v. *City of Philadelphia,*** 945 F.2d 667, 685 (3d Cir. 1991). The asserted interest must also be "'plausible.'" ***Sameric Corp. v. City of Phila.,*** 142 F.3d 582, 596 (3d Cir. 1998) (quoting ***Pace Resources,*** 808 F.2d at 1035). More specifically, in at least three cases, the Supreme Court has rejected as illegitimate the government purpose to favor prior residents in a jurisdiction over new ones. ***Zobel* v. *Williams,*** 457 U.S. 55, 63 (1982) (citing ***Shapiro* v. *Thompson,*** 394 U.S. 618 (1969) and ***Vandis* v. *Kline,*** 412 U.S. 441 (1973)).

Unreasonable state *ends*, however, are not the only concern of rational basis scrutiny; the state may not employ *means* "whose relationship to an asserted goal is so attenuated as to render the distinction arbitrary or irrational." ***Cleburne,*** 473 U.S. at 446-47 (citing ***Zobel,*** 457 U.S. at 61-63 and ***Moreno,*** 413 U.S. at 535). *A fortiori,* the state may not employ means that subvert, rather than advance, the asserted goal. *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). *See also* ***Nectow,*** 277 U.S. at 188 (striking down zoning ordinance where "health, safety, convenience, and general welfare ... will not be promoted").

Nor may government employ means that treat differently those who are similarly situated in relation to the government's asserted goal. *See* ***Cleburne,*** 473 U.S. at 439 (Equal Protection Clause directs "that all persons similarly situated should be treated alike"); ***Allegheny Pittsburgh Coal* v. *County Com. 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)."); *see, e.g.,* ***O'Brien* v. *Skinner,*** 414 U.S. 524, 528-30 (1974) (where state provided absentee ballots to those imprisoned outside their county of residence, denying those ballots to those imprisoned in their county of residence reflects "wholly arbitrary" distinction between similarly situated eligible voters).

The Supreme Court's decision in ***Cleburne*,** 473 U.S. 432 (1985), applied precisely this type of analysis to strike down enforcement of a zoning law

requiring special use permits for group homes for the mentally retarded, but not for apartment houses, boarding and lodging houses, dormitories, hospitals, nursing homes, private clubs, and similar places. The Court's analysis focused on whether group homes for the mentally retarded "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.

The City asserted several interests that its permit requirement allegedly served. Where those interests were based on the fear of neighboring property owners, elderly residents, or junior high school students, the Court found the interests themselves illegitimate. *Id.* at 448-49. But where the asserted interests involved risks of flooding, legal liability, overcrowding, and traffic, the Court did not reject the *interests* as irrational; instead, the Court found the chosen *classification* not rationally related to those interests, because the prohibited use and the permitted uses threatened the same asserted interests. *Id.* at 449-50; ***Heller* v. *Doe,*** 509 U.S. 312, 319-20 (1993) (requiring "rational relationship between the *disparity of treatment* and some legitimate governmental purpose").

In analyzing and applying ***Cleburne***, this Court has similarly distinguished between government *ends* that are illegitimate (such as hostility to a group) and government *means* that are not rationally related to a legitimate end (because they

distinguish groups offending the same interest). ***Sullivan,*** 811 F.2d at 184-85 (striking down zoning ordinance under ***Cleburne*** rationale). Neither ***Sullivan*** nor ***Cleburne*** itself stand for the proposition that "bad animus" is a prerequisite for failing rational basis scrutiny, in the zoning context or otherwise. *See, e.g.,* ***Nectow,*** 277 U.S. at 188-89 (striking down zoning law absent hostility). *See also* ***Four Three Oh,*** 256 F.3d at 115 (finding Board "arbitrarily and unreasonably" denied variance absent hostility).[4]

Even before ***Cleburne,*** courts applied similar equal protection reasoning to strike down zoning laws that denied houses of worship zoning rights that similarly intensive uses enjoyed in the same zone, especially in residential zones.[5] The

---

[4]Even if "bad animus" were somehow a prerequisite for an Equal Protection violation, that animus is present in this case, as discussed further below. ***See infra*** Section II.B. (discussing evidence triggering strict scrutiny).

[5]*See* 2 A. RATHKOPF & D. RATHKOPF, THE LAW OF ZONING AND PLANNING, § 20.01, at 20-5 (4th ed. 1985) ("courts have considered the exclusion of churches from particular residence districts to be invalid as a denial of equal protection since other nonresidential uses, equally or even more abrasive, such as schools, colleges, public libraries, museums, clubhouses, and the like existed therein or were permitted therein."); 8 E. MCQUILLIN, THE LAW OF MUNICIPAL CORPORATIONS, § 25.131.30, at 489 (3d ed. 2000) ("a zoning ordinance requiring a special use permit to operate a church when it does not require such permits to operate community centers, meeting halls, and other establishments similarly situated" violates equal protection). In at least one case, a federal district court found that an ordinance treating houses of worship differently and worse than other assembly and institutional uses reflected an impermissible religion-based

(continued...)

types of uses that courts have found similarly situated to houses of worship for purposes of their external effects include, *inter alia*: club houses, meeting halls, libraries, schools, and other assembly uses; as well as municipal buildings, train stations, agriculture, and other institutional uses.[6]

B. The District Court Faithfully Applied the Rational Basis Standard Set Forth in *Cleburne* and Similar Zoning Cases.

The decision of the District Court is nothing more than a straightforward application of these fundamental equal protection principles. Abington Township's ordinance allows numerous assembly and institutional uses – such as libraries, club houses, train stations, municipal administration buildings, and police barracks – to locate in the "R-1" residential zone by special exception.

---

[5](...continued)
classification. ***Love Church* v. *Evanston,*** 671 F. Supp. 515, 518-19 (N.D. Ill. 1987)*, vacated based on standing,* 896 F.2d 1082 (7th Cir. 1990).

[6] *See, e.g.,* ***Franciscan Missionaries of Mary* v. *Herdman,*** 184 N.Y.S.2d 104, 105 (N.Y. App. Div. 1959) (ordinance unreasonably prohibits religious children's shelter while allowing "raising of cattle, sheep and goats"); ***North Shore Unitarian Soc'y* v. *Plandome,*** 109 N.Y.S.2d 803, 804 (N.Y. App. Div. 1951) (ordinance unreasonably prohibits churches while allowing "village and municipal buildings, railroad stations, public schools, and clubhouses"); ***Ellsworth* v. *Gercke,*** 156 P.2d 242, 243 (Ariz. 1945) (ordinance unreasonably prohibits churches "in a zoning district where there is permitted … farming, swimming pools, golf courses, schools, etc."). *See also* ***Christian Gospel Church* v. *San Francisco,*** 896 F.2d 1221, 1226 (9th Cir. 1990) (finding churches comparable to "places of public assembly," but finding no Equal Protection violation because ordinance prohibited all such uses, not just churches).

1996 Ordinance §§ 301.2.B.2-4 (J.A.1001a). By contrast, the ordinance does not allow houses of worship to locate in that zone (or any other residential zone in the Township), by special exception or otherwise. *See id.*

The Congregation requested permission to use the Property on several grounds, including by special exception. But the Township did not determine whether the Congregation met the requirements for a special exception. The Township did, however, address and reject all of the remaining grounds for the permit, citing the intervening neighbors' concerns over traffic, light pollution, and noise. This suit followed.

The Congregation moved for partial summary judgment, primarily on the grounds that the Township's categorical ban on houses of worship in all residential zones, on its face, fails rational basis scrutiny. (J.A.46a-54a.) The Congregation also claimed the ordinance was facially unreasonable under the equal protection analysis of ***Cleburne,*** because the ordinance prohibited houses of worship in a residential zone but allowed similarly intensive uses in the same zone by special exception and, in some cases, by right. SJ Mem. pp.10-12 (J.A.51a-53a.) ("Thus, the very terms of the Ordinance contain not only a *per se* irrational ban on religious uses in residential zones, but the same sort of inconsistency regarding intensity of use that the Supreme Court found irrational in ***Cleburne.***").

In response, the Township defended the ordinance as constitutional both "on Its Face *and As Applied*," SJ Opp. p.6 (emphasis added), and presented evidence in support of the claim that the ordinance was applied constitutionally, specifically because it was applied to address government concerns over traffic, noise, and light. *Id.* at 13-14.

The District Court ruled for the Congregation on the narrowest ground at issue, namely, that the ordinance failed rational basis scrutiny as applied, following ***Cleburne***. After setting forth the undisputed material facts of this case, the court recounted the facts and analysis of ***Cleburne*** and traced out the close parallels between the two cases.

In both cases, a local zoning ordinance treated the plaintiffs' use differently and worse than certain other uses in the same zone. In ***Cleburne,*** the plaintiffs had to seek a special use permit, while the other uses in the same zone did not. ***Congregation Kol Ami v. Abington Township***, 161 F.Supp.2d 432, Slip Op. at 9 (E.D. Pa. 2001) (citing ***Cleburne,*** 473 U.S. at 447) (hereinafter "Opinion at __") . Slip Op. at 9 (J.A.3719a). Here, plaintiffs could not even *apply* for a special exception, while the other uses in the same zone could. Opinion at 10 (J.A.3920a).

In both cases, the zoning authorities justified the differential treatment based on concerns over certain anticipated external effects of the plaintiffs' use.

In ***Cleburne,*** the City claimed that its distinction served certain legitimate interests, including concerns over traffic, overcrowding, and neighborhood serenity. Opinion at 9 (citing ***Cleburne,*** 473 U.S. at 450) (J.A.3919a); July 20 Opinion & Order at 5 (hereinafter "Reconsideration Opinion at ___") (J.A.3928a). Here, although the ZHB decision and the ordinance itself contained no justification for the differential treatment of houses of worship regarding special exceptions, the Township's opposition brief asserted government concerns over traffic, light pollution, and noise. Opinion at 9-10 (J.A. 3919a-3920a); Reconsideration Opinion at 5 (J.A. 3928a); SJ Opp. pp.13-14.

In both cases, the interests allegedly threatened by the disfavored use were also threatened by the favored uses, that is, the uses were similarly situated in relation to the asserted governmental interests. *See* ***Cleburne,*** 473 U.S. at 448 (relevant inquiry is whether disfavored use "would threaten legitimate interests of the city in a way that other permitted uses … would not."); Opinion at 10 (J.A.3920a) ("defendants' traffic, noise and light concerns also exist for the uses currently allowed to request a special exception."); Reconsideration Opinion at 6 (J.A.3929a) ("There can be no doubt that the uses currently allowed to request a special exception under the ordinance cause traffic, noise and light pollution."); Opinion at 9 (J.A. 3919a) (noting conclusion in ***Cleburne*** that City's asserted

interests in overpopulation and traffic "'obviously fail to explain why [the favored uses] may freely locate in the area without a permit.'"). *See also* ***Cleburne,*** 473 U.S. at 449 (rejecting city's asserted interest in overcrowding at group home because "there would be no restrictions on the number of people who could occupy this home as a boarding house" or other favored use). Thus, the court below followed other courts that have found houses of worship similarly situated to various nonreligious assembly and institutional uses – such as club houses, libraries, municipal buildings, and train stations – when it comes to their external effects.

The District Court then concluded, following the Supreme Court in ***Cleburne,*** that if both categories of uses threaten the asserted governmental concerns, those concerns cannot represent a rational basis for distinguishing those uses. Opinion at 10 (J.A.3920a) ("Indeed, there can be no rational reason to allow a train station, bus shelter, municipal administration building, police barrack, library, snack bar, pro shop, club house, country club or other similar use to request a special exception under the 1996 Ordinance, but not Kol Ami."). *See* ***Heller,*** 509 U.S. 312, 319-20 (1993) (requiring "rational relationship between the *disparity of treatment* and some legitimate governmental purpose") (emphasis

added); ***Cleburne,*** 473 U.S. at 439 (noting equal protection requirement "that all persons similarly situated should be treated alike").

C. By Ordering Only a Special Exception Hearing on Remand – and Not the Grant of Any Permit – the Court Below both Granted the Narrower Relief Suggested by the Township and Respected Local Control Over Land-Use Issues.

Based on this ruling, the Congregation moved for entry of an order to enjoin the Township from applying its ordinance in a manner that would prohibit the Congregation from using the Property as a house of worship. (J.A.3787a-3790a.) Rather than simply object to this proposal, the Township suggested an alternative type of order: to remand the Congregation's special exception application for a hearing before the Township's Zoning Hearing Board ("ZHB"). (J.A.3854a-3862a.) On July 20, the District Court chose the route proposed by the Township, remanding to the ZHB for a special exception hearing to begin by August 6, to end by August 10, and to be decided in writing by August 15, 2001. (J.A.3922a-3934a.)

The court cited two main reasons for its decision. First, the court was reluctant to order the Township to allow the Congregation's proposed use when the court's ***Cleburne*** analysis never addressed whether that use should be *permitted*; instead, the court only addressed whether the use should be *considered*

under special exception standards when uses affecting the same government interests were afforded that same right in that same zone. Reconsideration Opinion at 10 (J.A.3933a). Second, the court was "mindful of the Township's interest over the use of land" and that the Township had not contemplated houses of worship as a special exception. *Id.* Thus, far from mandating permission of the proposed use, the court enjoined only *that part* of the ordinance that would prohibit *that use* from *applying* for a special exception.

After conducting the special exception hearing on schedule, the ZHB issued its decision on August 15, 2001. Now, fully aware that its decision would be subject to careful public and judicial scrutiny, the ZHB granted the special exception. (J.A.3894a-3909a.) The ZHB found the synagogue and school use "is consistent with the spirit, purpose, and intent of the Ordinance" and "will not adversely affect the health, safety and welfare of the community." *Id.* CL ¶¶ 10, 11, at 14 (J.A.3907a). The Township has also recently approved the Congregation's detailed land development plan. *See* Matteo Letter (S.A.1-2, filed Apr. 19, 2001).

D. This Court Should Reject All of the Asserted Grounds for Reversal.

1. *Most of the Township's arguments pertain to issues beyond the scope of the District Court's decision.*

On appeal, the Township distorts the opinion and order of the court beyond all recognition. *See, e.g.,* Twp.Br. p.28 ("The court placed itself in the position of a community zoning board, micromanaged Abington's zoning plan, and created a per se right for churches to dictate their zoning designation."); *id.* ("The District Court's reasoning, if upheld, would threaten the zoning plans of literally thousands of communities in the Third Circuit."); *id.* at 44 ("Under the court's reasoning, religious buildings would appear to have a per se right to exist in residential neighborhoods."); *id.* ("In effect, the court held that the category 'houses of worship' is facially unconstitutional"); *id.* at 49 (referring to "District Court's holding that Abington Township may not exclude places of worship from residential zoning districts"). Though mischaracterizations and hyperbole abound, the Township's argument contains scant few citations to, or discussions of, the actual opinions below. *See* Twp.Br. pp.36, 55, 57, 60.

Indeed, many of the Township's arguments fall so wide of the mark that one has to wonder whether the Township is appealing the same decision the Congregation is now defending. For example, the Township faults the District

Court for applying "heightened scrutiny," *see* Twp.Br. pp.30, 36, even though the court's decision explicitly tracked the rational basis analysis of ***Cleburne.*** Opinion at 8-9 (J.A.3918a-3919a).

Similarly, the Township repeatedly asserts that "the court decided the issue without factfinding," Twp.Br. 47; *see id.* at 26, 28, 41, 50, even though the opinion below contains several pages of undisputed material facts, including facts regarding application of the ordinance in this case. Opinion at 2-6 (J.A.3912a-3916a); *see id.* at 436 ("In light of these facts, the Court now turns to the plaintiffs' Motion."). Indeed, the undisputed facts regarding application of the ordinance were based on the evidence that *the Township itself* presented and discussed, *see* SJ Opp. pp.13-14, not on the Congregation's limited factual statement, *see* SJ Mem. pp.2-3.

The Township also argues that the Congregation failed to meet its burden on a facial challenge to negate any conceivable state of facts that might provide a rational basis for the classification. *See* Twp.Br. p.41. But that burden simply does not apply to the court's ruling, because it unmistakably found the ordinance unconstitutional *as applied, not on its face*. Opinion at 7-10 (J.A.3917a-3920a). Again, the Township attacks a ruling the court below did not make.

Along the same lines, the Township repeatedly faults the court for considering only the R-1 zone and not the entire zoning scheme in its analysis, noting that houses of worship are permitted as of right in two small nonresidential zones, and by special exception in a third. *See, e.g.,* Twp.Br. pp.38-41, 42-43, 61-62. But these additional facts have no relevance to the equal protection analysis set forth in ***Cleburne,*** which the District Court so faithfully applied: because that analysis calls for comparison of similarly situated uses, the most relevant comparison is with other uses *in the same zone.*

Even if the court had considered other zones under the ***Cleburne*** analysis, it would not have simply considered how houses of worship are treated, but how they are treated *in comparison to other similar uses. See* **Cleburne,** 473 U.S. at 448 (analyzing whether disfavored use "would threaten legitimate interests of the city in a way that other permitted uses … would not."). Indeed, the Congregation urged the court below to make precisely that comparison within other residential zones, because they, too, reflect disparate treatment between houses of worship and other similarly intense uses. SJ Mem. pp.11-12 (noting that "[t]he remaining 'R' districts suffer from the same patent inconsistency," and listing examples) (J.A.52a-53a).

Instead, the court limited its decision to a narrower constitutional flaw in the Township's application of the special exception requirement in the R-1 zone in this case. Specifically, the Township may not preclude the special exception application of this Congregation in the R-1 zone, where the Township allows special exception applications for a range of other uses that unmistakably threaten the same governmental interests asserted to exclude this Congregation. Opinion at 10 (J.A.3920a). Although the Township rails against the alleged intrusiveness of the District Court's decision, the Township appears to prefer even wider-ranging constitutional scrutiny of its ordinance.

Thus, the Township manufactures a "***Cleburne*** factor[]" requiring a court to consider whether houses of worship would be excluded from the entire jurisdiction before finding an Equal Protection violation. Twp.Br. p.38. Of course, this "factor" is wholly absent from the ***Cleburne*** analysis. ***Cleburne,*** 473 U.S. at 447-50. Similarly unsupported by legal authority is the Township's cryptic assertion that "[t]he District Court used the wrong baseline in this case." Twp.Br. p.42.

Finally, the Township dedicates more than five pages to the argument that "The District Court's Reasoning Invalidates Thousands of Zoning Schemes." Twp.Br. pp.43-48. True to form, the Township cites not one of these alleged thousands of invalidated schemes, and neither quotes nor cites whatever reasoning

has such allegedly sweeping effects. Instead, the section appears directed at the Due Process rule (or distortions thereof) that it is unreasonable for zoning authorities to prohibit houses of worship in every residential zone of a jurisdiction. But the court below did not decide the Congregation's motion on that ground, applying instead ***Cleburne's*** equal protection analysis. Opinion at 8-10 (J.A.3918a-3920a).

The only reasonable explanation for these otherwise puzzling arguments is that the Township has confused Equal Protection jurisprudence (which prohibits disparate treatment of relevantly similar uses *in the same zone*), with Due Process jurisprudence (which prohibits exclusion of houses of worship from *all residential zones*), and with Free Speech jurisprudence (which prohibits exclusion of any expressive use from *an entire jurisdiction*). *Compare* ***Schad*** **v.** ***Mt. Ephraim,*** 452 U.S. 61, 75-76 (1981) (invalidating exclusion of live entertainment from jurisdiction under Free Speech Clause for failure to allow alternative avenues of communication), *with* Twp.Br. p.39 (citing Free Speech decisions regarding alternative avenues of communication). *See also* RLUIPA § 2(b)(3)(A), 42 U.S.C.A. § 2000cc(b)(3)(A). Whether or not this confusion is intentional, it fits the Township's consistent pattern of attacking straw-man arguments rather than the actual reasoning of the District Court.

In sum, the Congregation's partial summary judgment motion raised a facial challenge to the Township's ordinance on rational basis grounds, primarily under the Due Process and Equal Protection Clauses. After the Township itself introduced arguments and evidence regarding the application of the ordinance, the District Court found an as-applied violation of the rational basis standard, following the equal protection reasoning of ***Cleburne***. On appeal, the Township opens with the patently false claims that the decision below reflects a facial challenge, without factfinding, under a heightened scrutiny standard. The Township then attacks the lower court's decision for failure to meet standards under a Free Speech rule the parties never raised, and for applying a Due Process rule the court never applied. All of these grounds for reversal should therefore be rejected.

2. *The District Court's decision does not violate "federalism principles" or the Tenth Amendment.*

The Township's federalism argument (pp.49-53) focuses on the pervasive theme of judicial deference to local zoning decisions. But just as local authority over land use is "undoubtedly broad," it is undoubtedly "not infinite and unchallengeable; it must be exercised within constitutional limits." ***Schad,*** 452 U.S. at 68; *see* Twp.Br. p.33.

Neither the Supreme Court nor this Court has *ever* held – or even suggested – that concern for local control calls for any *greater* deference than the rational basis standard otherwise affords. *See, e.g.,* ***Schad,*** 452 U.S. at 68 (land use regulations generally subject to ordinary rational basis scrutiny); ***Belle Terre* v. *Boraas,*** 416 U.S. 1, 8 (1974) (zoning laws must be "reasonable, not arbitrary," and bear "a rational relationship to a permissible state objective") (quotations omitted). Indeed, this Court recently reversed a local zoning determination under the closely analogous "arbitrary and capricious" standard. ***Four Three Oh,*** 256 F.3d at 115 (finding Board denied variance "arbitrarily and unreasonably"). Although certain land-use laws may trigger *stricter* scrutiny if they employ suspect classifications or trammel fundamental rights (such as those involving religious speech or exercise), no circumstances warrant *more deferential* scrutiny than the rational basis standard applied in ***Cleburne*** and elsewhere.[7] The Township's repeated

---

[7] *See* ***Schad,*** 452 U.S. at 68 & n.7 (heightened scrutiny applies to land-use regulations that restrict freedom of expression); *see also* ***Employment Div.* v. *Smith,*** 494 U.S. 872, 886 n.3 (1990) ("Just as we subject to the most exacting scrutiny laws that make classifications based on race, or on the content of speech, we strictly scrutinize governmental classifications based on religion.") (citations omitted); *see, e.g.,* ***U.S. Sound & Service, Inc.* v. *Township of Brick***, 126 F.3d 555 (3d Cir. 1997) (freedom of expression); ***Loftus* v. *Township of Lawrence Park***, 764 F. Supp. 354 (W.D. Pa. 1991) (same); ***Love Church,*** 671 F. Supp. 515, 518-19 (N.D. Ill. 1987) (suspect classification of religion), *vacated based on standing,* 896 F.2d 1082 (7th Cir. 1990).

invocation of "federalism principles" does nothing to vitiate the minimum standard of rationality that applies to all who wield the coercive power of the state.[8]

The Township further argues that the District Court's remand order somehow exceeded the court's authority. *See* Twp.Br. p.51. This complaint rings especially hollow because the Township recommended precisely this type of relief. (J.A.3854a-3862a.)

Courts have broad and flexible equitable authority to fashion injunctive relief. ***Milliken* v. *Bradley,*** 433 U.S. 267, 281 (1977). Still, the court below fashioned an narrow injunction out of concern for "the Township's interest over the use of land." Reconsideration Opinion at 10 (J.A.3933a). *But see* Twp.Br. p.52 (charging "judicial activism"). Far from "revis[ing] the Township's zoning plan" (p.51), the court merely enjoined enforcement of that part of the ordinance that would deny Kol Ami the ability to apply for a special exception in the R-1 zone; in every other respect, the Township's ordinance remains unaffected. Far

---

[8] *See* ***Wolff,*** 418 U.S. at 558 ("The touchstone of due process is protection of the individual against arbitrary action of government"). *See also* ***Groome Resources, Ltd.* v. *Parish of Jefferson,*** 234 F.3d 192, 215 (5th Cir. 2000) (rejecting "incantation of 'local zoning' and 'traditional' authority," because "it does not serve the balance of federalism to allow local communities to discriminate against the disabled").

from "insert[ing] itself as a zoning appeals board" (p.51), the Court *ultimately left in the Township's own hands whether or not to permit the use.* The fact that the Township could have denied Kol Ami's use *entirely* – even *after* the court's order – simply eviscerates any claim that the court "micromanaged" or otherwise deprived the Township of its traditional land use authority. Similarly bizarre is the Township's apparent horror at the potential impacts of this use (pp.19-21), when the Township recently found the same use fully compatible with the general welfare. *See* 8/15/01 Bd.Op. ¶ 11, at 14 (J.A.3907a); Matteo Letter (S.A.1-2, filed Apr. 19, 2001).

Finally, although the Township features the Tenth Amendment in the heading of this section (p.49), it mentions the amendment only once and raises no meaningful argument under it (p.53). In any event, the Tenth Amendment is not implicated where, as here, a court merely enforces an enumerated federal power. Reconsideration Opinion at 8 (J.A.3931a); *see* ***New York* v. *United States,*** 505 U.S. 144, 156-57 (1992).

3. *The District Court's decision does not violate the Establishment Clause.*

The Township argues that the District Court's decision *itself* violates the Establishment Clause. Twp.Br. pp.53-56. The Township does not discuss the

District Court's ***Cleburne*** analysis here, *see* Reconsideration Opinion at 9 (J.A.3932a), focusing instead on a single phrase in the District Court's opinion: "a house of worship inherently further[s] the public welfare…." Opinion at 10 (J.A.3920a); *see* Twp.Br. pp.54, 55. Notably, the Township cites no case where a judicial decision was reversed because its language somehow violated the Establishment Clause.

The three-part test under ***Lemon* v. *Kurtzman,*** 403 U.S. 602, 612-13 (1971), requires, first, that the government action have a secular purpose. The Township suggests the District Court opinion has the impermissible purpose of "transform[ing] a neutral zoning scheme into a regime advancing religion." Twp.Br. p.54. Assuming it is proper to assess under the ***Lemon*** test whether a federal judge has a secular purpose in crafting the language of opinions, this Court should impute to Judge Newcomer the core purpose of the judiciary: to declare what the law is. ***Marbury* v. *Madison,*** 1 Cranch 137, 177 (1803). And, as explained below, the law is exactly as he declares it. *See infra* note 14.

The Township then claims (pp.54-55) the District Court's language has the effect of advancing religion by making "churches in the Third Circuit ... privileged members of each community in the land use context." Courts have repeatedly found, however, that the Establishment Clause permits zoning laws to grant

religious land uses preferred status to avoid church-state entanglement. *See, e.g.,* ***Ehlers-Renzi*** **v.** ***Connelly Sch. of the Holy Child, Inc.,*** 224 F.3d 283 (4th Cir. 2000); ***Boyajian*** **v.** ***Gatzunis,*** 212 F.3d 1 (1st Cir. 2000); ***Cohen*** **v.** ***City of Des Plaines,*** 8 F.3d 484 (7th Cir. 1993). Indeed, such an accommodation of religious exercise "follows the best of our traditions. For it then respects the religious nature of our people and accommodates the public service to their spiritual needs." ***Zorach*** **v.** ***Clauson,*** 343 U.S. 306, 314 (1952).

Thus it becomes clear why the Township omits the final part of the ***Lemon*** test, whether the government action fosters an "excessive government entanglement with religion."[9] Where, as here, government action deregulates religion, "[i]t cannot be seriously contended that [the action] impermissibly entangles church and state," because the action "effectuates a more complete separation of the two." ***Corporation of Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints*** **v.** ***Amos,*** 483 U.S. 327, 339 (1987).

The Township also claims (p.55) that the decision below impermissibly endorses religion. But satisfying the ***Lemon*** test typically defeats a claim of endorsement. ***Mitchell*** **v.** ***Helms,*** 530 U.S. 793, 835 (2000) (quoting ***Agostini*** **v.**

---

[9]The fact "that *Lemon's* entanglement prong is best understood and treated as an aspect of the inquiry into a statute's effect" does not justify ignoring it. ***ACLU-NJ*** **v.** ***Schundler***, 168 F.3d 92, 97 (3d Cir. 1999).

Felton, 521 U.S. 203, 235 (1997)). Moreover, as the Supreme Court has repeatedly affirmed – and illustrated by the language of its own opinions – government does not endorse religion simply by acknowledging that religious institutions do some good or otherwise play a special role in society. *See, e.g.,* ***Walz* v. *Tax Commissioner of New York,*** 397 U.S. 664, 673 (1970) (state permissibly considers houses of worship "beneficial and stabilizing influences in community life"); *id.* at 689 (state permissibly affirms that religious institutions "uniquely contribute to the pluralism of American society by their religious activities"). *See also* ***Lynch* v. *Donnelly,*** 465 U.S. 668, 676 (1984); ***Zorach,*** 343 U.S. at 313-14. Thus, the Township's Establishment Clause arguments should fail.[10]

4. *The District Court's decision does not violate the Due Process Clause.*

The Township argues that the court violated the Due Process Clause by finding the ordinance failed rational basis scrutiny as-applied, rather than on its face. But the Congregation's motion unmistakably challenged the Township's distinction between houses of worship and the various assembly and institutional

[10] The Township also argues (p.56) that the court was simply wrong in affirming that houses of worship further the public welfare. Because this argument is irrelevant under the Establishment Clause, the Congregation addresses it along with the Due Process rule to which it pertains. *See infra,* Section II.A.

uses allowed to seek special exceptions in the same zone, citing ***Cleburne.*** SJ Mem. pp.10-12 (J.A.51a-53a).

Moreover, the Township's opposition to the Congregation's motion below demonstrates that the Township had notice that the District Court might consider application of the ordinance in assessing its constitutionality. Indeed, defendants invited the Court to engage in precisely that inquiry. The first heading of the Township's legal argument was: "A. The Abington Township Ordinance is Constitutional on Its Face *and As Applied*." SJ Opp. p.6 (emphasis added). The Township then urged the District Court to consider the particular facts of this case – based on the Township's own evidentiary exhibits – when ruling on the constitutionality of the ordinance. *Id.* at 12-14. Under these circumstances, the Township cannot now be heard to complain that "the court decided to address the as-applied constitutional issue *sua sponte,*" and that the Township was "not provided any opportunity to address the issue of an as-applied challenge." Twp.Br. pp.57, 58.

Although the Township asserts that the "opinions rest on unproven 'facts' and unsupported presuppositions," Twp.Br. p.60, the Township's opposition below did not dispute any of the Congregation's factual claims or evidence from its initial brief, *see* SJ Mem. pp.2-3, and the District Court incorporated into its

decision some of the additional facts that the Township advanced and supported with exhibits in its opposition brief. *See* Opinion at 2-6 (J.A.3912a-3916a); SJ Opp. pp.12-14.

Even now, the Township fails to raise any genuine issue of material fact based on competent evidence. The only material facts on this motion are the facts that were material in ***Cleburne,*** and none of those facts are in dispute:

(1) the ordinance was applied to deny the Congregation a special exception hearing, but the ordinance allows special exception hearings for train stations, bus shelters, municipal administration buildings, police barracks, libraries, snack bars, pro shops, club houses, country clubs, and other similar uses;

(2) to the extent this distinction has been justified at all, it has been based on concerns over certain anticipated external effects, namely, traffic, light pollution, and noise; and

(3) train stations, bus shelters, municipal administration buildings, police barracks, libraries, snack bars, pro shops, club houses, country clubs, and other similar uses also generate traffic, light pollution, and noise.

See Opinion at 9-10 (J.A.3919a-3920a). In light of these undisputed facts regarding the application of the ordinance here, the court appropriately concluded that traffic, light pollution, and noise are not rational bases for distinguishing between the Congregation's use and the uses that may apply for special exceptions. Thus, the court below joined other courts in finding a house of worship similarly situated to club houses, libraries, and other assembly uses (as

well as municipal buildings, train stations, and other institutional uses) in relation to their anticipated external effects.

Now for the very first time, the Township claims that "the facts are in dispute." Twp.Br. p.60. But any such disputes are immaterial, untimely generated, or both. Although the Township refers yet again to facts regarding zoning patterns within the Township as a whole, these facts were already presented to the court below, *see* SJ Opp. p.13, and are, in any event, irrelevant to the present motion. *See supra* Section I.D.1. (discussing ***Schad*** rule).

Worst of all, the Township claims that it "had no opportunity to provide the court" certain evidence regarding traffic flow at other houses of worship. *See* Twp.Br. p.61. But as explained above, the Township had ample notice and opportunity to defend its disparate treatment of houses of worship, and even cited as-applied evidence in its brief below. In reality, upon reading the court's July 11 opinion, the Township simply decided that it wanted *still another* opportunity to defend the distinction on a new theory and proceeded to manufacture corresponding evidence on that same day. (J.A.3815a) (affidavit dated July 11, 2001).

If the Township were somehow denied timely access to this evidence – or genuinely believed that some sort of "fact finding conference should have been

held," Twp.Br. p.58 – the Township's remedy was to file an affidavit under FED. R. CIV. P. 56(f). ***Celotex Corp.* v. *Catrett,*** 477 U.S. 317, 326 & n.6 (1986). Having failed to do that, the Township cannot challenge the decision below for failure to consider evidence not timely presented. ***Radich* v. *Goode,*** 886 F.2d 1391, 1393-95 (3d Cir. 1989) (upholding grant of summary judgment against claim that judgment was premature where defendant failed to file adequate Rule 56(f) affidavit). Due Process does not require the court to afford the Township endless opportunities to revise its asserted interests using eleventh-hour affidavits. Finality and basic fairness require the opposite. Therefore, this Court should not even consider this additional evidence.[11]

When all is said and done, the constitutional problem identified by the court below may be summarized by describing a not-so-hypothetical situation: a use is proposed in an exclusive residential neighborhood that would serve anywhere from 200 to 350 families located in or near that neighborhood. Opinion at 1-5

[11] If the Court nonetheless decides to consider this evidence, the Court should find it immaterial. The affidavit does absolutely nothing to challenge the still-undisputed fact that houses of worship, train stations, municipal office buildings, club houses, country clubs, etc., all cause traffic, noise, and light impacts. By contrast, the Township's recent decisions to grant the Congregation a special exception and approve its land development plan further undermine any claim that the Township may rationally single out houses of worship from among these uses and preclude them from even *seeking* a special exception. (J.A.3894a-3909a, S.A.1-2).

(J.A.3911a-3916a). A subset of people from those nearby families would gather regularly at the property at appointed times to engage in the activities that define the use. *Id.* The gatherings may occur a few times a week, and perhaps even daily, with some gatherings attracting more people than others. *Id.* Neighbors and local government officials anticipate some external effects of these gatherings, including traffic, light pollution, and noise. *Id.*

If the use described above is a train station (coming and going *en masse* according to a train schedule) or a municipal government workplace (coming and going *en masse* according to a work schedule), it may apply for a special exception. It may be denied the exception but may at least apply for it. But if the use is a house of worship, *it may not even apply*. Thus, the court below appropriately found that the Township applied its ordinance in a manner that treated similarly situated uses differently in violation of the Equal Protection Clause.[12]

---

[12] Finally, the Congregation has never conceded that there would be issues of material fact if the District Court decided the rational basis challenge on as-applied grounds. *See* Twp.Br. pp.57, 58. Instead, the Congregation explained that there would *certainly not* be any issues of fact on a facial challenge, but there *may or may not* be issues of fact on an as-applied challenge or on other claims. SJ Mem. p.4 (J.A.45a).

For all these reasons, this Court should reject the Township's arguments on appeal and affirm the decision of the District Court as a faithful application of ***Cleburne's*** rational basis analysis under the Equal Protection Clause.

II. THE DISTRICT COURT'S GRANT OF SUMMARY JUDGMENT MAY BE AFFIRMED ON ALTERNATIVE GROUNDS.

Even if this Court does not affirm based on ***Cleburne***, the Court should affirm on at least one of two alternative grounds, which may also be decided as a matter of law. ***Colautti* v. *Franklin,*** 439 U.S. 379, 397 n.16 (1979).

A. Abington Township's Ordinance Is Unreasonable on Its Face Because It Prohibits Places of Worship in All Residential Zones in the Township.

As explained above, several constitutional provisions require zoning laws to satisfy the minimum demand of reasonableness. *See supra* Section I.A. & n.3. In applying this requirement, most courts addressing the question have held it unconstitutional, because unreasonable, to prohibit houses of worship in residential zones.[13] 2 A. RATHKOPF & D. RATHKOPF, THE LAW OF ZONING AND

[13] *See, e.g.,* ***State* v. *Maxwell,*** 617 P.2d 816, 820 (Haw. 1980) ("The wide majority of courts hold that religious uses may not be excluded from residential districts."); ***Board of Zoning Appeals* v. *Schulte,*** 172 N.E.2d 39, 44 (Ind. 1961) ("'The law is well settled that the building of a church may not be prohibited in a residential district.'") (quoting ***Board of Zoning Appeals* v. *Decatur Co. of Jehovah's Witnesses,*** 117 N.E.2d 115, 119 (Ind. 1954)); ***Diocese of Rochester* v. *Planning Bd. of Brighton,*** 136 N.E.2d 827, 834 (N.Y. 1956) ("It is well

(continued...)

PLANNING § 20.01[2][a], at 20-3 (4th ed. 1985) ("The majority view is that facilities for religious or educational uses … may not be excluded from a residence district in which location of such use is sought."); R.P. DAVIS, ZONING REGULATION AS AFFECTING CHURCHES, 74 A.L.R.2d 377 § 2[a] (1960, Supp. 2000) ("[C]hurches may not … validly be excluded from residential areas as an absolute and invariable rule;"); 8 E. MCQUILLIN, MUNICIPAL CORPORATIONS § 25.131.30, at 485-86 (3rd ed. 2000) ("Although there is some conflict of opinion as to whether churches or other places of public worship may be excluded from residential zones, most of the judicial decisions have concluded that such an exclusion is both improper and illegal.").

Although this Court has not specifically addressed the question, Pennsylvania courts applying federal constitutional law have followed the majority rule. *See, e.g,* ***Stark Appeal*,** 72 Pa.D.&C. 168 (1950) ("If the zoning

---

[13](...continued)
established in this country that a zoning ordinance may not *wholly exclude* a church or synagogue from any residential district."); ***Congregation Committee* v. *City Council of Haltom City*,** 287 S.W.2d 700, 704 (Tex. 1956) ("a city cannot legally exclude a church from a residential district by a zoning ordinance"); ***O'Brien* v. *City of Chicago*,** 105 N.E.2d 917, 921 (Ill. 1952) ("'We do not believe it is a proper function of government to interfere in the name of the public to exclude churches from residential districts for the purpose of securing to adjacent landowners the benefits of exclusive residential restrictions.'") (quoting ***State ex rel. Synod of Ohio* v. *Joseph*,** 39 N.E.2d 515, 524 (Ohio 1942); ***State ex rel. Roman Catholic Bishop* v. *Hill*,** 90 P.2d 217 (Nev. 1939).

ordinance would not permit churches in all residential districts, including C districts [the most exclusive residential district], it would to that extent be unconstitutional."). *See also* ***Jehovah's Witnesses Appeal,*** 130 A.2d 240, 243 (Pa. Super. Ct. 1957) (noting that if ordinance prohibited churches in residential neighborhoods "we would give great consideration to the question of striking it down as unreasonable and arbitrary").

Courts have advanced three main reasons in support of this widely-recognized limit on the broad power of local governments to regulate land use. *First*, it is unreasonable for government to exclude a type of use as *harmful* to the public welfare when that type of use *serves* the public welfare as a matter of law, as courts have uniformly recognized regarding houses of worship in residential areas.[14] RATHKOPF & RATHKOPF, *supra,* at 20-4 ("[C]hurches and other religious

---

[14] *See, e.g.,* ***Boyajian,*** 212 F.3d 1, 9 (1st Cir. 2000) (Coffin, J.) (quoting with approval statement "'that religious and educational institutions are, by their very nature, beneficial to the public welfare'"); ***Bright Horizon House, Inc.* v. *Zoning Bd. of Appeals,*** 469 N.Y.S.2d 851, 856 (N.Y. Sup. Ct. 1983) (affirming that "religious institutions, by their very nature, are beneficial to the public welfare."); ***America Friends of Soc'y of St. Pius* v. *Schwab,*** 417 N.Y.S.2d 991, 993 (N.Y. App. Div. 1979) (recognizing the "public benefit and welfare which is itself an attribute of religious worship in a community."); ***Board of Zoning Appeals* v. *Schulte,*** 172 N.E.2d 39, 43 (Ind. 1961) ("We judicially know that churches and schools promote the common welfare and the general public interest."); ***Diocese of Rochester,*** 136 N.E.2d 827, 836 (N.Y. 1956) (religious uses are "clearly in furtherance of the public morals and general welfare"); ***Englewood* v. *Apostolic***
(continued...)

institutions are in furtherance of morals and the public welfare as a matter of law"); MCQUILLIN, *supra,* at 486 ("[S]uch institutions tend to promote the public health, comfort, and general welfare, and also, so far as zoning laws are concerned, … the exclusion of such places is unrelated to the public welfare."); K.H. YOUNG, ANDERSON'S AMERICAN LAW OF ZONING § 12.22, at 578 (4th ed. 1996) ("[A]n ordinance which excludes [religious] uses from residential zones does not further the public health, safety, morals, or general welfare" because "religious uses contribute to the general welfare of the community"). Federal and

---

[14](...continued)
Christian Church, 362 P.2d 172, 380 (Colo. 1961) ("We hold that the blanket exclusion of churches from single and double family residence districts … was not in furtherance of the health, safety, morals or general welfare of the community."); ***Congregation Committee,*** 287 S.W.2d 700, 705 (Tex. 1956) ("The church in our American community has traditionally occupied the role of both teacher and guardian of morals. Restrictions against churches could therefore scarcely be predicated upon a purpose to protect public morals."); ***Young Israel Organization* v. *Dworkin,*** 133 N.E.2d 174, 183 (Ohio 1956) ("To hold that a church is detrimental to the welfare of the people is in direct contradiction of historical truths and evidences a failure to recognize basic fundamentals of a democratic society."); ***Yanow* v. *Seven Oaks Park,*** 94 A.2d 482, 491 (N.J. 1953) ("the welfare of the residential community demands the[] inclusion [of houses of worship] in that area"). *See also* ***Four Three Oh,*** 256 F.2d at 113 (parties agree that "inherently beneficial" uses under New Jersey law include temple); ***Boyajian,*** 212 F.3d at 9 (noting "[a]n impressive body of case law and scholarly texts and articles supports th[e] conclusion" 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.*") (emphasis added).

state legislatures have uniformly exempted houses of worship from taxation based on the same blanket determination that they advance the general welfare.[15]

Second, it is unreasonable for government categorically to exclude houses or worship from a residential area, because they are an integral part of residential life.[16] *See* E.C. YOKLEY, ZONING LAW AND PRACTICE § 35-14, at 35 (4th ed. 1980,

---

[15] *See* ***Walz,****,* 397 U.S. 664, 673 (1970) (houses of worship permissibly exempted from taxation because state considers them "beneficial and stabilizing influences in community life and finds this classification useful, desirable, and in the public interest."). *See also* ***Jacobi* v. *Zoning Board of Adjustment*,** 196 A.2d 742, 745 (Pa. 1964) (rejecting claim that presence of church harms "general welfare" by not providing tax revenues, because universal tax exemption of churches would also have to be deemed adverse to general welfare).

[16] *See, e.g.,* ***Stark Appeal*,** 72 Pa.D.&C. 168, at n.16 (describing churches as "concomitants of civilized residential life" and noting that "[i]t would be unreasonable to force them into business districts") (internal quotations omitted); ***State ex rel. Lake Drive Baptist Church* v. *Bayside Bd. of Trustees*,** 108 N.W.2d 288, 301 (Wis. 1961) (Hallows, J., concurring) ("The church in our society has long been identified with family and residential life. Churches traditionally have been and should be located in that part of the community where people live. They should be easily and conveniently located to the home."); ***Young Israel Organization,*** 133 N.E.2d 174, 183 (Ohio 1956) ("The place of the church is to be found in that part of the community where the people live. It is associated with the home. Its influence is concerned with family life."); ***Congregation Temple Israel* v. *Creve Coeur,*** 320 S.W.2d 451, 455 (Mo. 1959) (noting "usual and customary location of churches in residence districts" for proximity to members and quiet open spaces, and for "intimate connection with home life"); ***O'Brien* v. *City of Chicago,*** 105 N.E.2d 917, 920 (Ill. 1952) ("wherever the souls of men are found, there the house of God belongs"). *See also* ***Boyajian,*** 212 F.3d at 10 ("[P]roximity to their houses of worship is for some groups a significant component of their religious practice. Orthodox Jews, for example, believe they

(continued...)

Supp. 1999) ("Since the advent of zoning, churches have been held proper in residence districts."); YOUNG, *supra,* at 578 ("Religious uses serve people best when they are accessible to homes."). Because religious uses are inherently appropriate to residential areas, a zoning ordinance must leave at least some room for them there. Thus, it is simply unreasonable for local government to conclude, by a categorical ban, that houses of worship are *always* "like a pig in the parlor" when located among homes. ***Euclid,*** 272 U.S. 365, 388 (1926).

Third, it is unreasonable for an ordinance to exclude houses of worship from residential zones when the ordinance allows similarly intensive uses in those same zones. This rule derives from the broader rational basis principle, discussed at length above, that religious land uses must receive equal treatment with similarly situated nonreligious land uses. *See supra* Section I.A. & nn.5, 6.

In sum, zoning houses of worship out of residential districts for whatever reason (including the traffic, light, and noise interests asserted here) is like zoning all kitchens out of homes to reduce vermin: the law would prohibit a structure that categorically does far more good than bad, and that cannot reasonably be

---

[16](...continued)
are prohibited by the Torah, the Jewish Bible, from using automobiles on their Sabbath. They therefore must live within walking distance of a synagogue.").

separated from residential life. Prohibiting kitchens while allowing pantries would only exacerbate the irrationality.

So it is in Abington Township, where the ordinance does not permit religious assembly or institutional uses – even by special exception – in *any* of the four residential zones it establishes (R-1, R-2, R-3, and R-4). This suffices alone to establish a violation of the majority rule. But Abington's ordinance is even more unreasonable because it allows various other assembly and institutional uses to apply for a special exception even though they also threaten the Township's asserted concerns over traffic, light pollution, and noise.

Although the court below did not decide the Congregation's motion on this ground, the Township dedicates much of its brief to it. *See, e.g.,* Twp.Br. pp.43-48, 53-56. In addition to the Establishment Clause concerns already addressed, *see supra* Section I.D.2., the Township raises several arguments.

First, true to form, the Township attacks the rule by distorting what it says. *See, e.g.,* Twp.Br. p.44 ("religious buildings would appear to have a per se right to exist in residential neighborhoods"); *id.* ("the category of 'houses of worship' is facially unconstitutional"). Ironically, the Township appears to fault the majority rule because it somehow fails to take account of the facts of each case. *Id.* at 46-

47. But that is precisely the problem with the ordinance here – it prohibits houses of worship in *every* residential zone, even if they bear *no* adverse external effects.

The Congregation does *not* argue that houses of worship *must always be permitted* in residential zones, but instead that they *must not always be prohibited* in those zones. Even so-called "minority rule" jurisdictions have not authorized banning houses of worship from *all* residential zones. Courts have permitted either banning churches in a *single residential zone* when churches are permitted in other residential zones,[17] or excluding a *single church* by special exception.[18]

The Township similarly mischaracterizes the majority rule as anachronistic, but cannot decide whether it is "novel," or from a "previous era." Twp.Br. pp.44, 47. It is, of course, neither, but instead well-established and enduring. *See supra* pp.49-53 & nn.13-16 (citing cases and treatises). On the Township's view, houses of worship in bygone days never had attached halls for fellowship or for receptions associated with weddings, funerals, or other religious ceremonies.

---

[17]***Miami Beach United Lutheran Church of the Epiphany* v. *Miami Beach,*** 82 So.2d 880, 881-82 (Fla. 1955); ***Corporation of Presiding Bishop of Church of Jesus Christ of Latter Day Saints* v. *City of Porterville,*** 203 P.2d 823, 824 (Cal. App. 4th 1949).

[18] ***The Church of Our Lord Jesus Christ* v. *Lower Merion Township,*** 34 Pa.D.&C. 2d 239, 245-46 (1964); ***Milwaukie Co. of Jehovah's Witnesses* v. *Mullen,*** 330 P.2d 5, 8 & n.2 (Ore. 1958); ***West Hartford Methodist Church* v. *Zoning Board of Appeals,*** 121 A.2d 640, 642 & n.2 (Conn. 1956).

Twp.Br. pp.47-48. Nor did they have religious schools, offer pastoral counseling, or provide service to the poor. *Id.* This is simply preposterous, and should be rejected as a basis for ignoring the continuing vitality of the majority rule. Indeed, it reflects precisely the insensitivity (or worse) to the religious beliefs and practices of Township residents that characterizes the ordinance and the initial ZHB decision. *See* ***Zorach,*** 343 U.S. at 313-14 (commending "respect[for] the religious nature of our people and accommodat[ion of] the public service to their spiritual needs," and decrying "callous indifference to religious groups").

Second, the Township suggests that the majority rule does not apply in Pennsylvania because it reflects only New York law. Twp.Br. pp.44-45. As discussed above, the rule applies in Pennsylvania and numerous other states. *See supra* pp.50-53 & nn.14, 16.

Third, the Township claims the majority rule does not apply because the Township allows houses of worship, by right or conditionally, in three other zones. Twp.Br. p.47 (houses of worship "are permitted … in the CS, M, and AO districts"). But this is irrelevant because, as a matter of law, none of those other zones are residential. 1996 Ordinance § 300.1 *et seq.* (establishing four "residential districts," R-1 through R-4); *id.* § 400.1 *et seq.* (establishing four "commercial zoning districts," including AO). Although permission in those

zones may be relevant under the Free Speech prohibition on excluding expressive uses from *an entire jurisdiction*, *see* ***Schad,*** 452 U.S. at 75-76, it is irrelevant under the Due Process prohibition on excluding houses of worship from *all residential zones*.

Fourth, the Township argues that the majority rule does not apply because the Township has not actively uprooted pre-existing houses of worship. *See* Twp.Br. p.47. Not a single case or treatise on the majority rule even hints that local government may violate the rule only after purging all prior nonconforming church uses. Certainly, that purge would trigger additional constitutional protections against religious persecution. *See* ***Church of the Lukumi Babalu Aye*** **v.** ***City of Hialeah,*** 508 U.S. 520, 546 (1993). But the majority rule prohibits the categorical ban on houses of worship *itself*, regardless of how many churches happen to exist when the ban is first established.

Even if the Court were inclined to consider prior nonconforming uses on this facial challenge, the presence of grandfathered churches only worsens the irrationality. *See* ***Schad,*** 452 U.S. at 73 n.14 ("The Borough's decision to permit live entertainment as a nonconforming use only undermines the Borough's contention that live entertainment poses inherent problems that justify its exclusion."). *See also* ***Zobel,*** 457 U.S. at 63 (rejecting as illegitimate government

purpose to favor prior residents in a jurisdiction over new ones). Indeed, this fact only renders more explicit that the ordinance entrenches established churches and imposes severe disadvantages on new and minority religious groups. This, in turn, would deter religious outsiders from moving to Abington, because they could not worship where they live. The majority rule precludes this religious ossification. A house of worship should only "flourish according to the zeal of its adherents and the appeal of its dogma," not based on governmental exclusion of the competition. ***Zorach,*** 343 U.S. at 313.

Finally, the Township claims government may not recognize that houses of worship generally serve the public welfare, based on the unremarkable observation that some external effects of some houses of worship sometimes harm some neighbors. Twp.Br. pp.55-56. It is truly beyond reasonable dispute that the activities characteristic of houses of worship (including meditation or prayer, reflection on ultimate questions, moral education, social fellowship, mutual aid, and public service) serve the public welfare, especially in residential areas. *See supra* note 14. It is equally undisputable that some external effects (including unregulated lighting, drainage, or traffic, Twp.Br. p.56) of some assembly and institutional uses (including some train stations, municipal office buildings, country clubs, club houses, houses of worship, and others) may cause some harm

to some neighbors. "Common sense and general knowledge," Twp.Br. p.55, allow and indeed require affirmation of *both* propositions; there is no contradiction. *See, e.g.,* ***Four Three Oh,*** 256 F.3d at 113-14 (noting that "inherently beneficial" uses, such as temple, may be prohibited in particular cases). But while prohibiting particular *effects* in a particular case (*e.g.,* by allowing a use subject to conditions) may serve the public good, prohibiting the *entire use* in every case (*e.g.,* by categorical ban) may not. Thus, the majority rule allows the former prohibition, but not the latter. *See, e.g.,* 8/15/01 Bd.Op. at 14-16 (on remand, permitting use as special exception but imposing conditions to address potential external effects) (J.A.3907a).

Implicit in the Township's criticism is a now familiar caricature of the majority rule, namely, that it requires all houses of worship to be permitted in every case; if they are not permitted as of right, they must be granted every special exception or conditional use permit they request. *See* Twp.Br. p.44. But that is not the rule reflected in most cases, the treatises, or the Congregation's argument. *See supra* pp.49-53 & nn.13-16 (citing cases and treatises). Instead, because houses of worship *as a class* serve the public welfare in residential districts, prohibiting them *as a class* in those districts harms the public welfare, and is therefore unreasonable. *See* ***Seattle Title Trust Co.,*** 278 U.S. 116, 121 (1928)

(zoning laws must "bear a substantial relation to the public health, safety, morals, or general welfare"). *See also* ***Hooper,*** 472 U.S. 612, 619-20 (1985) (finding legislation not rationally related to government purpose where legislation may subvert government purpose). Therefore, this Court should apply the majority rule to strike down the Township's blanket prohibition of houses of worship in all residential zones.

B. Abington Township's Ordinance Discriminates Based on Religion in Violation of the Free Exercise Clause.

The District Court's grant of summary judgment may also be affirmed on the ground that the ordinance violates the Free Exercise Clause of the First Amendment because it discriminates based on religion.[19] In ***Lukumi,*** 508 U.S. 520 (1993), the Supreme Court set forth the general standard for evaluating state action under that Clause:

> "[I]f the object of a law is to infringe upon or restrict practices because of their religious motivation, the law is not neutral, ***see Employment Division v. Smith,*** 494 U.S. 872, 878-79 (1990), and it is invalid unless it is justified by a compelling interest and is narrowly tailored to advance that interest."

Lukumi, 508 U.S. at 533.

---

[19]The Congregation's complaint also contemplates a "substantial burden" claim under the Free Exercise Clause, but the Congregation does not assert it here.

This Court's decision in ***FOP Newark,*** 170 F.3d 359 (3d Cir. 1999), provides the controlling interpretation of the ***Lukumi / Smith*** standard. That case presented the question whether a government employer's prohibition on beards that makes exceptions for medical reasons triggered heightened scrutiny for failure to make exceptions for religious reasons. *Id.* at 365-66. The court did *not* find that the case present a circumstance of "individualized assessments," such that the pre-***Smith*** "substantial burden" test would apply. *Id.* at 365. Instead, the court applied strict scrutiny because it found the law to target conduct based on its religious motivation:

> "[I]t is clear from [***Smith*** and ***Lukumi***] that the Court's concern was the prospect of the government's deciding that *secular motivations are more important than religious motivations.* If anything, this concern is only further implicated when the government does not merely create a mechanism for individualized exemptions, but instead, actually creates a categorical exemption for individuals with a secular objection but not for individuals with a religious objection. … Therefore, we conclude that the Department's decision to provide medical exemptions while refusing religious exemptions is sufficiently suggestive of discriminatory intent so as to trigger heightened scrutiny under ***Smith*** and ***Lukumi.***"

Id. (emphasis added).

Thus, the Free Exercise Clause protects not only against the persecution of religious minorities or other forms of "sect discrimination," but against targeting religiously motivated conduct for worse treatment than secular conduct. ***Lukumi,***

508 U.S. at 532 ("At a minimum, the protections of the Free Exercise Clause pertain if the law at issue discriminates against some or all religious beliefs or regulates or prohibits conduct because it is undertaken for religious reasons."). Here, both forms of anti-religious animus are implicated.

First, as in ***FOP Newark,*** the ordinance generally prohibits assembly and institutional land-uses in the R-1 zone and allows various nonreligious ones, but not religious ones, to seek a special exception. *See* 1996 Ordinance §§ 301.2.B.1-6. Similarly, all other residential zones forbid houses of worship, but allow other institutional and assembly uses in some cases. *See, e.g.,* §§ 304.B.1-2, C.1 (allowing in R-4 zone day care centers and nursing homes by special exception, and life care facilities as conditional uses). Indeed, the pattern of differential treatment across religious lines pervades the ordinance. In most other zones, where houses of worship are also banned, nonreligious assembly and institutional uses are allowed by special exception. *See, e.g.,* §§ 400-602 (prohibiting houses of worship, but allowing clubs, libraries, museums, performing theaters, amusement parks, cultural centers, and country clubs by right, by special use, or otherwise). Where houses of worship are allowed by special exception, nonreligious assembly and institutional uses are allowed as of right. *See, e.g.,* §§ 403, 500, 501 (defining Apartment / Office district).

As if this were not "sufficiently suggestive of discriminatory intent so as to trigger heightened scrutiny," 170 F.3d at 365, the circumstances of the amendments to the ordinance – in which all nonreligious assembly uses were restored to R-1 neighborhoods but churches were not – eliminates any doubt. *Compare* 1978 Ordinance § 301 *with* 1996 Ordinance § 301.

Second, the ordinance institutes a system of sect preferences. By prohibiting houses of worship in the residential districts to which they gravitate – as well as by drastically limiting elsewhere the pool of real estate even potentially available for that use – the ordinance unmistakably targets minority and less well-established religions for exclusion from Abington Township. For both these reasons, the ordinance triggers strict scrutiny.

The ordinance also fails that scrutiny. As a matter of law, the discriminatory prohibitions in the ordinance are not "narrowly tailored" to the concerns over traffic, noise, and light asserted here, or any other external effects, "compelling" or otherwise. *See* ***Lukumi,*** 508 U.S. at 533; ***FOP Newark,*** 170 F.3d at 366-67 (finding no-beard policy not "narrowly tailored"). For example, the ordinance could have addressed any external effects of houses of worship in residential zones – with far less impact on religious exercise – simply by allowing those uses subject to conditions related to the external effects. Instead, the

ordinance reflects a preference to ban all such uses. Indeed, the most recent decision of the ZHB – allowing Kol Ami's use subject to limitations specifically directed at traffic, noise, and light – should remove any doubt whether the ordinance could have been more "narrowly tailored" to its asserted purposes. *See* 8/15/01 Bd.Op. (J.A.3894a-3909a). Thus, the 1996 Ordinance triggers and fails strict scrutiny under the Free Exercise Clause.

CONCLUSION

For all of the foregoing reasons, the decision of the District Court granting partial summary judgment and ordering a special exception hearing should be affirmed.

DATED: April 19, 2002 Respectfully submitted,

____

Jerome M. Marcus, Esq.
Jonathan Auerbach, Esq.
BERGER & MONTAGUE, P.C.
1622 Locust Street
Philadelphia, PA 19103
Telephone: (215) 875-3000
Facsimile: (215) 875-5707

Anthony R. Picarello, Jr., Esq.
Roman P. Storzer, Esq.
THE BECKET FUND FOR RELIGIOUS LIBERTY
1350 Connecticut Ave., N.W., Suite 605
Washington, D.C. 20036
Telephone: (202) 955-0095
Facsimile: (202) 955-0090

CERTIFICATE OF BAR MEMBERSHIP

JONATHAN AUERBACH certifies as follows:

1. I am a member in good standing of the bar of the United States Court of Appeals for the Third Circuit.

2. Pursuant to 28 U.S.C. § 1746, I certify under penalty of perjury that the foregoing is true and correct.

____
JONATHAN AUERBACH

Date: April 19, 2002

CERTIFICATE OF BAR MEMBERSHIP

JEROME M. MARCUS certifies as follows:

1. I am a member in good standing of the bar of the United States Court of Appeals for the Third Circuit.

2. Pursuant to 28 U.S.C. § 1746, I certify under penalty of perjury that the foregoing is true and correct.

____

JEROME M. MARCUS

Date: April 19, 2002

CERTIFICATE OF BAR MEMBERSHIP

ANTHONY R. PICARELLO, JR. certifies as follows:

1. I am a member in good standing of the bar of the United States Court of Appeals for the Third Circuit.

2. Pursuant to 28 U.S.C. § 1746, I certify under penalty of perjury that the foregoing is true and correct.

____
ANTHONY R. PICARELLO, JR.

Date: April 19, 2002

CERTIFICATE OF COMPLIANCE WITH F.R.A.P. 32

Pursuant to Rule 32(a)(7)(C) of the Federal Rules of Appellate Procedure, I certify that, according to the word-count feature of Corel WordPerfect 8 word processing program, this brief contains 13,977 words and therefore is in compliance with the type-volume limitations set forth in Rule 32(a)(7)(B).

____

JONATHAN AUERBACH

Date: April 19, 2002