

Appeal No. 06-1319

**IN THE
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT**

THE LIGHTHOUSE INSTITUTE FOR EVANGELISM, INC.,
AND REVEREND KEVIN BROWN,
Plaintiffs/Appellants

v.

THE CITY OF LONG BRANCH,
Defendant/Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY, CIVIL ACTION No. 00-03366
(HONORABLE WILLIAM H. WALLS, U.S.D.J.)

**REPLY BRIEF OF PLAINTIFFS-APPELLANTS
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AND REVEREND KEVIN BROWN**

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INTRODUCTION

In its opening brief, the Church demonstrated that the City's discriminatory zoning ordinances violate both RLUIPA's Equal Terms provision and the Free Exercise Clause. The City's response amounts to sixty pages of obfuscation, omission, and irrelevance. As explained below, the City fills its brief with discussions of irrelevant facts and spends its energy arguing against claims the Church hasn't made. It omits critical, relevant facts—such as its sworn interrogatory responses—and distorts others. It ignores the governing summary judgment standard, consistently describing facts in its favor, rather than in the light most favorable to the Church.¹ It attempts to obfuscate law that is clear by arguing for pages without citation to legal authority, and by attempting to graft new requirements onto any authority which is not in its favor. It fails to distinguish the precedent—whether binding or persuasive—cited by the Church. Whenever the City is faced with an argument it does not know how to counter, it falls back on arguments about the Church's substantial

¹ For this reason, the City's statement of facts is virtually useless to this Court in reviewing the lower court's grant of summary judgment to the City. The Church will not attempt to correct each of the City's omissions and misstatements in the space allotted, but instead respectfully refers the Court to the statement of facts in its initial brief and Apx. 61–80 for a more accurate depiction of the relevant universe of facts on this appeal. In the course of its argument, the Church will also briefly address a few of the City's most egregious errors.

burden—a matter which is not at issue in this appeal. Despite the City’s efforts to confuse and distract, the law and the facts are unambiguous: the City’s discriminatory zoning ordinances violate RLUIPA § 2(b)(1) and the First Amendment.

ARGUMENT

I. THE CITY FAILS TO REBUT THE CHURCH’S SHOWING THAT ITS ORDINANCES, WHICH TREAT CHURCHES LESS FAVORABLY THAN NON-RELIGIOUS ASSEMBLIES, VIOLATE RLUIPA § 2(b)(1).

A. The Record Demonstrates That the Church Has Satisfied All Elements of a RLUIPA Equal Terms Claim.

RLUIPA’s “Equal Terms” provision unambiguously sets forth what a plaintiff must show to make out a violation:

No government shall impose or implement a [1] *land use regulation* in a manner that treats [2] *a religious assembly or institution* on [3] *less than equal terms* with [4] *a nonreligious assembly or institution*.

42 U.S.C. § 2000cc(b)(1) (emphasis added). As discussed below, the City fails to refute the Church’s showing on any of the four elements of an Equal Terms violation. The elements are straightforward and the violation is clear: the City’s ordinances governing the district where the Church’s property is located are land use regulations which treat houses of worship less favorably than several types of non-religious assembly uses.

1. *The City Does Not Dispute That Its Ordinances Fall Within RLUIPA's Definition of "Land Use Regulation."*

As the Church's initial brief explained (p.15), RLUIPA defines "land use regulation" as "a zoning or landmarking law, or the application of such a law, that limits or restricts a claimant's use or development of land." 42 U.S.C. § 2000cc-5(5). Both Long Branch Ordinance § 20-6.13, *see* Apx. 81–83, which was in effect when the Church first sought to establish a church on its property, and the City's October 2002 Redevelopment Guidelines that amended the permitted land uses in Lighthouse's zoning district, *see* Apx. 94–97, are "land use regulations" within the meaning of RLUIPA. The City doesn't dispute this fact.

2. *The City Does Not Dispute That Its Land Use Regulations Do Not Permit Houses of Worship—a "Religious Assembly or Institution"—in the Zoning District Governing Lighthouse's Property.*

Nor does the City dispute the Church's showing (pp. 15-19) that, according to both the plain meaning of the term "assembly" and the intent of Congress, churches and other houses of worship are "religious assembl[ies]" under RLUIPA. Under the plain meaning of the term, "[a]n 'assembly' is 'a company of persons collected together in one place and usually for some common purpose (as deliberation and legislation, worship, or social entertainment.)'" *Midrash*, 366 F.3d at 1230 (quoting WEBSTER'S 3D NEW

INT’L UNABRIDGED DICTIONARY 131 (1993)).² The City doesn’t contest that churches meet this definition.

Likewise, Congress made clear that churches and other houses of worship are the intended beneficiaries of RLUIPA’s equal terms provision. As RLUIPA’s sponsors explained, “Zoning codes frequently exclude *churches* in places where they permit theaters, meeting halls, and other places where large groups of people assemble for secular purposes.” 146 CONG. REC. S7774, S7775 (daily ed. July 27, 2000)(“Senate Sponsors’ Statement”)(emphasis added). As the Church exhaustively detailed in its opening brief (pp. 16–19), the legislative record again and again demonstrates Congress’ desire to protect churches by affording them the same rights afforded to non-religious assemblies and institutions. *See also id* at S7775 (expressing desire that “churches” receive equal treatment with “secular places of assembly”).

The City challenges neither the plain meaning of the term “assembly,” nor Congress’ intent to ensure that zoning codes treat churches at least as well as non-religious assemblies and institutions. Its equal terms discussion

² “We construe a term not defined in a statute in accordance with its ordinary and natural meaning.” *U.S. v. E.I. Dupont De Nemours*, 432 F.3d 161, 171 (3d Cir. 2005).

urges no reason why the Court should depart from the ordinary meanings of these statutory terms.

Nor does the City dispute that Lighthouse sought to establish a church on its property. Apx. 30 ¶ 24. *See also* Apx. 27 ¶ 10 (describing the Church’s desire to “provid[e] Bible studies, public prayer meetings, evangelistic outreach, and community services to the people of Long Branch.”).³ It is therefore undisputed that, as a church, Lighthouse is an intended beneficiary of RLUIPA and satisfies this element of its Equal Terms claim.

³ The City’s statement (p. 31, n.2) that Lighthouse has never operated as a church at its property on 162 Broadway is beside the point. The reason the Church cannot operate as a church there is because the City’s zoning laws exclude churches from its list of permitted uses in that zoning district. Similarly irrelevant is the City’s unsupported and false assertion (p. 4, 30–31, n.2) that the Church has never operated as a church anywhere, but is merely a secular soup kitchen. The record instead demonstrates that the Church *did* operate and hold worship services in its former temporary, rented location at 159 Broadway. Apx. 27, ¶10; Docket Entry (“Doc. No.”) 122, Ex. D ¶4 (discussing Lighthouse’s “church activities” at 159 Broadway and the City’s knowledge of them). The 159 Broadway property was a temporary, rented location for the Church—precisely the reason it sought a permanent, adequate home for its ministry—and was eventually sold to a commercial developer by its owner. *See* Apx. 27–28, ¶¶12–13 (describing the Church’s need for a larger home on purchased property which could be renovated); Doc. No. 103, Ex. A (congratulatory letter from City’s mayor awarding mini-grant for Church’s expansion at 162 Broadway). When Lighthouse moved into a property large enough to establish a permanent home, the City’s regulations put a stranglehold on the young church. The City attempts to have it both ways—prevent the Church from operating, then justify its action by the fact that the Church is unable to operate.

Moreover, discovery has resolved the vital factual question this Court posed in its earlier opinion. The linchpin of this Court’s earlier equal terms analysis was the unresolved question of whether churches and other houses of worship, though excluded from the list of permitted uses in a C-1 district, could nonetheless locate in that district under the “assembly hall” category. *Lighthouse Institute for Evangelism v. Long Branch*, 100 Fed. Appx. 70, 74 (3d Cir. 2004). Stressing the preliminary nature of its initial decision, the Court requested on remand that the parties clarify whether Lighthouse could have operated as a church if it had applied as an “assembly hall” instead of as a “church.” *Id.* The City has since conceded that the answer to this question is *no*, expressly admitting in its interrogatory responses that houses of worship are *not* included in the definition of “assembly hall.”⁴ Curiously, the City fails even to mention this admission anywhere in its brief, preferring instead to claim falsely (p.29) that “no additional evidence in favor of the [Church] has been proffered as of this appeal.”⁵ But the City cannot wish away the proverbial elephant in the room by failing to

⁴ Apx. 103 (“Interrogatory Request No. 7: Within the meaning of the Ordinance, specifically 20-6.13(a)(3), does the Permitted Use “Assembly hall” include Houses of Worship? Interrogatory Response No. 7: NO.”).

⁵ Given that the Church’s opening brief frequently cites the City’s interrogatory responses (as well as other new evidence not in existence at the time of the Court’s prior opinion) the City’s claim is not just incorrect, but a serious misrepresentation to this Court.

acknowledge its reality. And here that reality is devastating—the City no longer has any basis for suggesting to the Court that houses of worship might be allowed as of right if they apply as an “assembly hall.”

In addition, the City also admits that its new Redevelopment Guidelines (which were not evaluated by this Court in its prior opinion) unambiguously prohibit houses of worship from Lighthouse’s zoning district. City Br. 11. This further removes any doubt (if any remained) that the City does not allow churches in Lighthouse’s district.

In sum, the City fails to rebut the Church’s showing that churches, an unmistakable example of a religious assembly, are *not* permitted uses in the Church’s district under either Ordinance § 20-6.13 or the new Redevelopment Guidelines.

3. *The City Does Not Dispute That Its Land Use Regulations Permit Numerous “Nonreligious Assemblies or Institutions” in the Zoning District Governing Lighthouse’s Property.*

The Church’s initial brief (pp. 19-24) recounts the undisputed fact that the City’s zoning ordinances permit numerous non-religious assembly uses in Lighthouse’s zoning district. Under Ordinance § 20-6.13, the City permits motion picture theaters, assembly halls, health spa/gyms, colleges, and municipal buildings. Apx. 81–83. Under the new Redevelopment

Guidelines, the City permits theaters,⁶ cinemas, performance art venues, clubs showcasing local bands, art and educational institutions, culinary schools, and dance studios. Apx. 97. By definition, each of these land uses is an “assembly”—a place where a group of people come together for a common purpose. *See* Church Br. 20–22 (applying ordinary meaning of “assembly” to each of these uses). The City doesn’t dispute that the plain text of its ordinances permits all of these uses in the Church’s zoning district. Nor does it dispute that each of these uses is a “non-religious assembly or institution.”

The City also fails to dispute that these land uses are *precisely* the comparators Congress intended when expressing its mandate that churches be treated on equal terms with non-religious assemblies. Nor could it—the Church’s initial brief (pp. 22-24) extensively details RLUIPA’s legislative history demonstrating Congress’ intent that churches receive the same treatment as assembly uses like theaters, meeting halls, clubs, places of amusement, gyms, and municipal buildings.

⁶ The City has recently approved two theater uses—the New Jersey Repertory Theater and the Cornerstone Theater Company—for the redevelopment area. Apx. 79 ¶¶77–78; Apx. 80 ¶82. The City’s Assistant Planning Director conceded that theaters are places of assembly. Apx. 107–08.

4. *The City Fails to Dispute That Its Land Use Regulations Treat Churches on “Less than Equal Terms” With Numerous Non-Religious Assemblies or Institutions.*

As the Church’s initial brief explains (pgs 24-30), the treatment on less than equal terms is not hard to grasp and appears on the face of the City’s ordinances. Cf. Senate Sponsors’ Statement at S7774 (Equal Terms provision needed because “churches ... are frequently discriminated against *on the face* of zoning codes,” such “zoning codes frequently exclude churches in places where they permit theaters, meeting halls, and other places where large groups of people assemble for secular purposes”). Whereas churches are denied permitted use status in Lighthouse’s zoning district under both Ordinance No. 20-6.13 and the Redevelopment Guidelines, those ordinances allow numerous non-religious assembly and institutions as of right.⁷ The City doesn’t attempt to dispute that allowing non-religious assemblies to locate as of right in a district, but denying that same status to churches and other houses of worship is treatment on less than

⁷ Again, the City can no longer claim, as it did in the prior appeal, that there is some uncertainty as to whether its zoning ordinances permit churches to locate as of right in Lighthouse’s district. With regard to Ordinance No. 20-6.13, the City expressly admitted that the permitted use “assembly hall” does not include churches or other houses of worship like Lighthouse. Apx. 103. And it admits that the new Redevelopment Guidelines don’t allow churches as of right either. City Br. 11.

equal terms.⁸ *See also* H.R. REP. NO. 106-219 at 19 (1999)(explaining that RLUIPA is necessary to remedy situation where such “non-religious assemblies” are “permitted as of right in zones where churches require a special use permit, or permitted [by] special use permit where churches are wholly excluded”). Given these critical factual admissions, the City’s unequal treatment of churches and non-religious assemblies on the face of its ordinances is both un-denied and undeniable.

The City fares no better in attempting to distinguish the Eleventh Circuit’s decisions in *Midrash* and *Konikov*. Church Br. 30-33. In *Midrash Sephardi v. Town of Surfside*, 366 F.3d 1214 (11th Cir. 2004), a synagogue brought an equal terms challenge to the text of the city’s zoning ordinance, which permitted clubs and lodge halls in a commercial district, but not houses of worship. *Id.* at 1230–31. The court, relying upon the dictionary definition of “assembly,” held that clubs, lodge halls, and houses of worship all qualified as “assemblies” as that term is ordinarily defined. Accordingly, the Court held that the city violated RLUIPA’s equal terms provision

⁸ This is precisely why it is irrelevant whether other houses of worship exist in the Church’s district. Unequal treatment is established in the text of the ordinances themselves. Moreover, RLUIPA § 2(b)(1) does not require that religious assemblies be excluded from a district—that is covered in RLUIPA § 2(b)(3)—but merely that “*a* religious assembly” is treated on less than equal terms with “*a* non-religious assembly.” RLUIPA § 2(b)(1).

because its ordinance allowed non-religious assemblies—clubs and lodge halls—but not houses of worship. *Id.*

The City’s attempt to distinguish *Midrash* by arguing that the case turned on the town’s own definition of “assembly” in its ordinances fails. Contrary to the City’s assertion, the *Midrash* court specifically rejected the approach taken by the lower court in that very case of limiting the term “assembly” to whatever definition a municipality happened to give it. *Id.* at 1230. Instead, the court held Congressional intent is effectuated by giving the term “assembly” its ordinary or natural meaning (*e.g.*, by using a dictionary) and then evaluating whether the ordinance treats a non-religious assembly better than a religious assembly. *Id.*⁹

⁹ The City’s suggestion that a municipality’s own definition of “assembly” should govern whether it treats non-religious and religious assemblies unequally has obvious flaws. For starters, it would replace the ordinary meaning of “assembly” with whatever definition a municipality happened to give the term. This would contradict the maxim that the words Congress chooses should be given their ordinary meaning. *See, e.g., E.I. Dupont*, 432 F.3d at 171. In addition, such an interpretation would create an enormous loophole. Any municipality could avoid compliance with RLUIPA simply by defining “assembly” narrowly enough in its ordinance so that whatever the municipality defined as a religious assembly would be treated the same as whatever it defined a non-religious assembly to be.

B. The City Fails to Rebut the Church’s Showing That RLUIPA Should Be Given Its Plain Meaning.

Rather than attempting to challenge the Church’s demonstration that it satisfied all four elements of an Equal Terms claim actually found in RLUIPA’s text, the City attempts to manufacture entirely new elements. For example, the City follows the lead of the district court in suggesting (p.31) that § 2(b)(1) should be re-written to instead provide: “No government shall impose or implement a land use regulation in a manner that treats a religious assembly or institution on less than equal terms with a [*similarly situated*] nonreligious assembly or institution.”

However, the City neither explains why this Court should read in such a requirement, nor discusses, let alone rebuts, the arguments of the Church and *amici* on this point. *See* Church Br. 39–44; Brief of *Amici Curiae* Association of Christian Schools International and the General Conference of Seventh-Day Adventists in Support of Appellants at 10–18 (“ACSI *Amici* Br.”). Instead, the City chooses to completely ignore the fact that grafting this additional requirement into RLUIPA’s text would violate the most elementary canon of statutory construction that, absent an absurd result, statutes must be given their plain meaning.¹⁰ Church Br. 40. The City does

¹⁰ RLUIPA’s plain language simply calls for the Court to ask whether the text of an ordinance treats non-religious assemblies any better than a

not explain what absurd result would follow from reading the statute as written, nor rebut the Church's showing that applying the RLUIPA the way it is actually written produces a test that is objective, easy to apply, and avoids potentially entangling inquires. Church Br. 41-42.

Nor does the City even address the Church's showing that RLUIPA's legislative history reveals that Congress deliberately chose § 2(b)(1)'s language to ensure that religious assemblies would be treated as well as any use falling within the category of a "non-religious assembly or institution." Church Br. 42.

The City also ignores that grafting language into § 2(b)(1) would generate a circuit split, because the Eleventh Circuit's decisions in *Midrash* and *Konikov* expressly rejected imposition of an Equal Protection "similarly situated" requirement as contrary to the text of § 2(b)(1). *See Konikov v.*

religious assembly (including, *inter alia*, houses of worship). Nothing in RLUIPA's text states that courts should undertake the *additional* inquiry into whether the prohibited religious assembly is precisely the same or similarly situated to the better treated non-religious assemblies. Instead, Congress decided that the only criteria to examine when comparing the land use preferred over a religious assembly is whether the preferred use is encompassed within the *category* of an "assembly or institution." Were it otherwise, cities could always point to some differences between a non-religious assembly and a church, precisely because the religious nature of church activities means that their activities will never find an exact counterpart in non-religious assemblies. As *amici* have explained, this would render the Equal Terms provision a "dead letter." ACSI *Amici* Br. at 16-17.

Orange County, 410 F.3d 1317, 1324 (11th Cir. 2005) (explaining that for the “purposes of a RLUIPA equal terms challenge, the standard for determining whether it is proper to compare a religious group to a nonreligious group is *not* whether one is ‘similarly situated’ to the other, as in our familiar equal protection jurisprudence,” rather, “the relevant ‘natural perimeter’ for comparison is the *category* of ‘assemblies and institutions’ as set forth by RLUIPA”)(emphasis added); *Midrash*, 366 F.3d at 1230 (the “express provisions of RLUIPA ... require a direct and narrow focus” on whether “an entity qualifies as an ‘assembly or institution’”).

Finally, the City’s citation to *Primera Iglesia Bautista Hispana v. Broward County*, 2006 WL 1493825 (11th Cir. 2006), also fails to support its argument. First, *Primera* specifically re-iterated the court’s earlier holding in *Midrash* that, where the text of the ordinance on its face treats non-religious assemblies more favorably than religious assemblies, no further evidence is required in order to establish an Equal Terms violation. *Id.* at *9 (describing *Midrash*’s holding on this point). Second, *Primera* involved facts entirely different from those presented here (and in *Midrash*). It involved an as-applied challenge to a county’s application of its ordinances where (unlike here and *Midrash*) no disparate treatment of non-religious and religious assemblies existed on the face of the ordinance. There, a church

applied for *re-zoning* and was denied, but a school in the same zoning district applied for a *variance*, and was approved. *Id.* at *10. Not surprisingly, the court found no equal terms violation where the alleged unequal treatment was based on the outcome of zoning processes with two very different requirements. *Id.* (rejecting Equal Terms claim because “the ‘rezoning’ process is an entirely different form of relief from obtaining a ‘variance.’”).

C. The City Abandons Any Argument That a Substantial Burden Prong Applies to Equal Terms Claims.

Nowhere does the City’s brief even attempt to defend the lower court’s holding that a showing of substantial burden is a required element of an Equal Terms claim. It has good reason to abandon this argument—neither the text of the statute nor existing RLUIPA precedent supports it. *See Church’s Br.* 36–39; *Brief for the United States as Amicus Curiae* 9–22; *ACSI Amici Br.* 18–23. RLUIPA’s text and structure treat “substantial burden” and “equal terms” claims separately; to conflate them would render the whole of RLUIPA § 2(b) superfluous. *See id.* Moreover, every circuit court to address the issue has refused to import the substantial burden requirement of §2(a) into a §2(b) claim. *See Midrash*, 366 F.3d at 1228–31;

Konikov, 410 F.3d at 1323–29; *C.L.U.B. v. Chicago*, 342 F.3d 752, 762 (7th Cir. 2003).¹¹

D. The City Fails to Explain Why This Court Should Add a Strict Scrutiny Prong Not Found in the Text of §2(b)(1).

The City also alleges (p.38) that strict scrutiny applies for violations of RLUIPA’s Equal Terms provision. But as *amici* and the Church explained, no such strict scrutiny “escape hatch” exists for Equal Terms claims. ACSI *Amici* Br. 23-26; Church Br. 27. Instead, RLUIPA’s plain text holds offending municipalities to a strict liability standard. RLUIPA §2(b)(1). Once again, the City does not even attempt to explain why a strict scrutiny provision—which, under RLUIPA, applies only to substantial burden claims under § 2(a) and § 3—should be read into § 2(b)(1), in contrary to its plain text and structure.¹²

¹¹ For whatever reason, the City still spends several pages briefing the substantial burden issue, even though the City has abandoned any argument that “substantial burden” is an element of an Equal Terms claim, and the Church doesn’t raise a RLUIPA substantial burden claim on appeal.

¹² The City also makes an attempt to justify its unequal treatment of churches on the basis of city and state liquor licensing laws. But as the Church pointed out in its initial brief (and the City ignores in its response), the state law in question has been amended to provide for perpetual waivers. Church Br. 44 n.29. Moreover, any alleged city ordinance (*see* City Br. 41) prohibiting liquor licenses near churches is not in evidence, and there is reason to doubt that any such ordinance exists. Apx. 571 (city planner testifying he could not remember the number or details of the ordinance). Moreover, the City concedes it has suspended some (perhaps all) standard

II. THE CITY FAILS TO REBUT THE CHURCH'S SHOWING THAT ITS ORDINANCES VIOLATE THIS COURT'S BINDING FIRST AMENDMENT PRECEDENT.

Rather than attempt to refute the Church's showing (pp. 44-57) that its ordinances violate the Free Exercise Clause, the City attacks a straw man, responding to an argument the Church never made. The City claims (p.53) that the Church "argues that a strict scrutiny analysis is required in *any* church zoning case." To the contrary, the Church explained that this Court's precedent requires application of strict scrutiny in two limited situations: (1) where a city makes categorical exemptions for secular, but not religious, conduct, and (2) where a city employs a system of individualized exemptions. Both of these situations are presented here.

A. The City Fails to Rebut the Church's Showing That Its Ordinances Violate the Free Exercise Clause by Providing Categorical Exemptions for Secular, but Not Religious, Conduct.

This Court's decisions in *Blackhawk v. Commonwealth*, 381 F.3d 202 (3d Cir. 2004)(Alito, J.), and *Fraternal Order of Police v. City of Newark*, 170 F.3d 359 (3d Cir. 1999)(Alito, J.) ("*FOP*"), hold that laws fail the Free Exercise Clause requirement of neutrality and general applicability when

city liquor licensing requirements in the redevelopment zone. City Br. 41. *See also* ACSI *Amici* Br. 17 n.4 (discussing irrelevance of the liquor license issue to Equal Terms claim).

they create categorical exemptions for secular, but not religious, conduct. *See Blackhawk*, 381 F.3d at 211 (law providing categorical exemption from wildlife permit requirement for certain secular purposes—such as maintaining a circus or zoo—but not for those desiring to keep wildlife for religious purposes failed neutrality requirement); *FOP*, 170 F.3d at 365-66 (law providing categorical exemption from police department’s no-beard policy for medical reasons, but not for religious reasons failed neutrality requirement). Here, as detailed in the Church’s initial brief (pp.48–51), Long Branch’s ordinances fail the requirement of neutrality and general applicability by categorically favoring assemblies that gather for secular reasons over those that gather for religious reasons.¹³ The overbreadth of the City’s ordinances and categorical hostility to religious assemblies is especially clear in light of the City’s admission that its prohibition on churches in the redevelopment zone is not “rationally related to a legitimate governmental objective.” Apx. 99, 101 ¶45.

¹³ Under both ordinances, the City prohibits all uses except those specifically listed for exemption. Apx. 81-84 (City ordinance prohibiting all but the listed uses in the C-1 zone); Apx. 84 § 5 (City ordinance stating “[u]ses in the redevelopment area shall be limited to those permitted in the Redevelopment Plan.”). Under both ordinances, the City exempts secular assemblies (e.g., assembly halls, theaters, cinemas, gyms, clubs, performance art venues). Under both ordinances, the City makes no such exemption for religious assemblies (e.g., churches).

None of the City's arguments in response refute the Church's showing. First, the City spends the bulk of its space arguing that its ordinances are neutral because they are not selectively enforced, as in *Tenafly Eruv Ass'n v. Borough of Tenafly*, 309 F.3d 144 (3d Cir. 2002). But the Church didn't even cite *Tenafly* or attempt to make out a claim of non-neutrality based on selective enforcement. The City ignores the fact that the *text* of the ordinance can also demonstrate a lack of neutrality by favoring secular activities over religious ones. See *Blackhawk*, 381 F.3d at 208 (drawing this distinction between *Tenafly* on the one-hand, and the facts in *FOP* and *Blackhawk* on the other). The city fails to distinguish *Blackhawk* and *FOP* from the facts here.

Next, the City claims that this Court's prior unpublished decision, decided before *Blackhawk*, is dispositive of the Church's Free Exercise claim. However, the City ignores that this decision itself emphasized that it was decided prior to the close of discovery. Now, additional facts are in the record, even though they're ignored by the City in its brief. Among other things, the City now admits that churches are categorically excluded from the list of permitted uses in the C-1 zone, even under the assembly hall category, Apx. 103; that the new Redevelopment Guidelines categorically exclude churches as a permitted use (but do allow many secular varieties of

assembly), Apx. 97, City Br. 11; and that the City lacks even a rational reason for categorically excluding churches from the redevelopment zone. Apx. 99, 101 ¶45.

Finally, the City claims (p. 51) that the Church's claims under the old zoning ordinance are moot because of the amendments in the Redevelopment Guidelines. But as even the lower court recognized, the Church is entitled to damages under § 1983 for the City's Free Exercise Clause violation. It is hornbook law that claims are not moot where damages are available to remedy past wrongs. *Phillips v. Borough of Keyport*, 107 F.3d 164, 177 (3d Cir. 1997) (plaintiffs' First Amendment claims not moot, despite zoning ordinance change, because they had a § 1983 claim for damages under the old ordinance).

B. The City Fails to Rebut the Church's Showing That the Ordinances Impose a System of Individualized, Discretionary Exemptions That Trigger Strict Scrutiny.

The Church's initial brief (pp.53-57) demonstrated that the City, under both the old ordinance and the Redevelopment Guidelines, employs a system of individualized exemptions relying on vague and discretionary criteria indistinguishable from *Blackhawk*. The City does not come forward with either facts or argument to dispute this showing, but instead relies

(p.56) on an unsubstantiated blanket denial. This does not suffice to carry its burden of refuting this claim, much less entitle it to summary judgment.

Equally frivolous is the City's argument (p.54), citing Tenth Circuit precedent, that strict scrutiny doesn't apply in land-use cases involving individualized, discretionary exemptions. However, just two pages later in its brief, the City is forced to expressly concede (p.56) that this Court's controlling precedent in *Blackhawk* requires that systems of individualized exemption involving malleable, discretionary criteria must face strict scrutiny. Although the City suggests that there is some type of heretofore, unidentified carve-out in Third Circuit precedent for applying strict scrutiny when the individualized exemptions appear in a land-use case, the City cannot locate any support for such a proposition in *Blackhawk* or any other precedent of this Court.¹⁴

¹⁴ Nor does the City's citation to *Congregation Kol Ami v. Abington Township*, 309 F.3d 120 (3d Cir. 2002), support its argument. *Kol Ami* did not address a Free Exercise claim; instead it involved a *Cleburne*-style Equal Protection claim, for which the government was entitled to rational basis review, the most deferential in constitutional law. *Id.* at 133.

C. Rather Than Dispute the Church’s Showing, the City Once Again Attempts to Avoid Liability By Introducing Nonexistent Elements, Contrary to this Court’s Binding Precedent.

Unable to refute the Church’s showing on either of its two Free Exercise claims, the City attempts to shoehorn new requirements into Free Exercise jurisprudence, contrary to this Court’s binding precedent.

The City first attempts to graft a substantial burden requirement onto all Free Exercise Clause claims. City Br. 51–53. But no such requirement exists. Both *Blackhawk* and *FOP* found that the laws in question were non-neutral, imposed a discretionary system of individualized exemptions, or both, and proceeded to impose strict scrutiny. Neither decision required any showing of a substantial burden. *See FOP*, 170 F.3d at 365–66; *Blackhawk*, 381 F.3d at 209–10. In doing so, they followed this Court’s earlier ruling in *Brown v. Borough of Mahaffey*, 35 F.3d 846, 849-50 (3d Cir. 1994), which similarly refused to impose a “substantial burden” requirement in all Free Exercise claims, because it “would make petty harassment of religious institutions and exercise immune from the protections of the First Amendment.”

The City similarly offers no justification for its argument (p.58) that the Church must demonstrate actual hostility or animus. Again, this Court’s precedents don’t require such a showing. According to *Blackhawk*,

discretionary systems of individualized exemptions face strict scrutiny “because such a regime creates the *opportunity* for a facially neutral and generally applicable standard to be applied in practice in a way that discriminates against religiously motivated conduct.” *Blackhawk*, 381 F.3d at 209 (emphasis added). The same was true in *FOP*—the categorical exemption for secular, but not religious, conduct was held to trigger strict scrutiny, with no further proof of discriminatory intent. *FOP*, 170 F.3d at 365–66 (holding that text of law that categorically favors secular conduct over religious conduct is “sufficiently suggestive of discriminatory intent so as to trigger heightened scrutiny.”)¹⁵

Because the Church demonstrated violations of the Free Exercise Clause on two theories, the City’s actions must face strict scrutiny.

¹⁵ Although it isn’t necessary for the Church to prove actual discrimination, a similar suggestion of discriminatory intent arises here in light of the City’s admission that its prohibition on houses of worship in the redevelopment zone isn’t “rationally related to a legitimate governmental objective.” Apx. 99, 101, ¶ 45.

III. THE CITY UTTERLY FAILS TO BEAR ITS BURDEN ON STRICT SCRUTINY.

A. The City Fails to Prove a Paramount Interest of the Highest Order, and Its Arguments to the Contrary Have No Basis in Law or Fact.

“[T]he burden is placed squarely on the Government” to satisfy strict scrutiny. *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 126 S. Ct. 1211, 1220 (2006). As the Church demonstrated in its opening brief (pp. 57-65), the City utterly fails to bear its burden. The City’s meager response in its own brief only underscores this failure.

1. *The City Fails to Cite Any Law Stating That Its Interest in a Dynamic Commercial Center is Compelling.*

To satisfy the compelling interest standard, a government must demonstrate a paramount interest “of the highest order,” *see Lukumi*, 508 U.S. at 546--an interest of a magnitude that would allow government to discriminate among people of different races, suppress speech, or sterilize people. *See, e.g., Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989); *Texas v. Johnson*, 491 U.S. 397 (1989); *Skinner v. Oklahoma*, 316 U.S. 535 (1942). The City fails to prove any such interest. The only interest it identifies for prohibiting houses of worship in the redevelopment zone is a generalized interest in “creating an artistic and dynamic commercial center.” City Br. 38–39. However, the City is not able to muster a *single* case that

has ever found such an interest to arise to the level of compelling. Indeed, the City's strict scrutiny arguments are noticeable for their lack of reliance on precedent.¹⁶

Nor does the City attempt to distinguish the overwhelming precedent cited by the Church holding that interests in promoting economic development, improving property values, neighborhood character, and aesthetics—interests that are comparable to the one asserted by the City—are universally held *not* to be compelling. Church Br. 59–61. Instead, the City claims all these cases may be summarily dismissed because they “do not involve [sic] amendments to a Redevelopment Plan.” The City offers no support for its surprising conclusion that redevelopment plans are exempt from decades of legal precedent. Nor does it explain its puzzling contention that its redevelopment goal is somehow different from government interests in property values, economic development, neighborhood character, curbing blight, and aesthetics—interests which are less than compelling as a matter of law.

¹⁶ The only case cited by the City in this section is dicta suggesting that a generalized interest in “regulating homeless shelters and food banks” is compelling. *Daytona Rescue Mission v. Daytona Beach*, 885 F. Supp. 1554 (S.D.Fla. 1995) (denying RFRA claim because no substantial burden existed). *Daytona* cites no authority for its anomalous conclusion, and such a generalized interest is insufficient under the Supreme Court's recent pronouncement in *O Centro*. In any event, the City here doesn't even claim that its interest is the one discussed in *Daytona*.

2. *The City Provides No Basis for Disregarding Its Sworn Testimony That It Lacks Any Compelling Government Interest.*

The City's admissions in its sworn interrogatory responses (ignored by the lower court) establish that it cannot prove the existence of a compelling government interest. Specifically, the City admitted that it had "*no* contention" that prohibiting houses of worship in the redevelopment zone was "rationally related to a legitimate governmental objective." Apx. 99, 101, ¶ 45. When asked to provide documentation for any contention that Lighthouse's operation of a church on its property would endanger the health, safety, and general welfare, the City admitted that "[t]here is no such contention." Apx. 99, 101 ¶¶ 42–44. These admissions preclude the City from now claiming that the Church poses some threat to a paramount interest of the highest order.

The City's response (p.42) to these admissions is to claim that they should be disregarded because they were somehow "taken out of context." As a practical matter, it is difficult to understand how a one-sentence interrogatory answer can be "taken out of context." Moreover, interrogatory responses are sworn testimony of the sort specifically contemplated for use on summary judgment by FRCP 56(e). If the City now claims that other evidence contradicts its sworn interrogatory responses, then it has, at most,

identified a genuine issue of material fact. But in any event, there is no basis for the City's argument that the Court should disregard its admissions altogether. That would turn the standard of review on this appeal on its head by requiring that all inferences be drawn in favor of the City, instead of the Church. *See Bartnicki v. Vopper*, 200 F.3d 109, 114 (3d Cir. 1999)(in reviewing grant of summary judgment, this Court is "required...to view inferences to be drawn from the underlying facts in the light most favorable to the party opposing the motion").

Similarly baseless is the City's claim that this Court should disregard the admissions of its own planner, who testified that church activities such as prayer gatherings, religious assemblies, religious training, and handing out food would *not* have a negative impact on the district. Doc. No. 103, Ex. F at 37, 39. Though the City again asserts without explanation that this testimony was "taken out of context" and "pure fantasy," all inferences must be read in favor of the Church, not the City.¹⁷

The City's admissions are particularly important given the Supreme Court's recent holding in *O Centro*, 126 S.Ct. at 1221, that a

¹⁷ What is fanciful is the City's claim (p.45) that there is no longer a need for the Church's ministry to the "poor and downtrodden" because the City's redevelopment plans will suddenly cause such people to disappear. Anyone who has visited Times Square knows that theaters and retail development don't magically eliminate homelessness and poverty.

“[g]overnment’s mere invocation” of broadly defined interests “cannot carry the day.” Rather, it must demonstrate that an interest of the highest order is endangered *in this particular case*. *Id.* at 1219–1221. Here, the City’s admissions preclude that showing: in addition to its admission that excluding churches doesn’t serve any rational interest, the City’s planner also conceded that the Church’s activities would not have a negative impact upon the district. Doc. No. 103, Ex. F at 37, 39. The planner also admitted that the City had not conducted *any* studies of the actual impact that churches would have on properties in the redevelopment area. Apx. 109–10.¹⁸ Accordingly, the City failed to prove that an interest of the highest order is endangered by allowing the Church to operate on its property.

B. The City Fails to Prove That It Used the Least Restrictive Means of Serving Its Asserted (Non-Compelling) Interest, and Its Arguments to the Contrary Have No Basis in Law or Fact.

The lower court failed to address the least restrictive means prong, and the City doesn’t offer any evidence or argument to carry its burden of proof on this point. As the Church’s initial brief explained (pp.63–65), “it is

¹⁸ In light of the lack of studies, the planner was reduced to claiming that allowing a church in the redevelopment zone would harm, not the other property uses, but the *church*. However, he could not identify any specific negative impact on the church, because that would be up to “the church to determine that.” Doc. No. 103, Ex. F at 35.

the *Government's obligation* to prove that the [less restrictive] alternative will be ineffective to achieve its goals.” *U.S. v. Playboy*, 529 U.S. 803, 816 (2000)(emphasis added). To make this showing, the City must “demonstrate[] that it has actually considered and rejected the efficacy of less restrictive measures before adopting the challenged practice.” *Warsoldier*, 418 F.3d at 999. It cannot rely on sweeping generalizations, but must demonstrate it has used the least restrictive means *in this particular case*. *O Centro*, 126 S. Ct. at 1219–21.

The City does not begin to satisfy this heavy burden here. Instead of proving that prohibiting churches in Lighthouse’s district is the least restrictive means of advancing a compelling government interest, the City argues that the Church didn’t show that the prohibition substantially burdened its religious exercise, a complete *non-sequiter*.¹⁹

¹⁹ Although the whole issue is irrelevant to the “least restrictive means” issue, it is worth pointing out that the City distorts Rev. Brown’s statements. While Rev. Brown expressed willingness to consider other options, if the City “approached [him] with an alternative,” Apx. 606, his statements were not, as the City asserts, an admission that the Church could locate anywhere. Instead, they expressed a willingness to entertain solutions to allow the Church to operate and “admirably resolve[]” the litigation. *Id.* Moreover, the record is clear that the Church seeks to serve Long Branch’s poor and needy, and a move away from that population would harm that mission. Apx. 27 ¶10 (Church’s mission of serving the needy); Apx. 462 (move of just four blocks, while possible, would be difficult on some of the homeless the Church seeks to serve). And while the City optimistically declares (p.45) that the poor and needy will no longer exist in downtown Long

Similarly irrelevant is the fact, trumpeted by the City, that it allows churches in other districts. Availability of property for churches in other zones in the City has nothing to do with whether the government considered, let alone used, the least restrictive means of serving its asserted (non-compelling) interest with regard to its discriminatory distinctions in the zoning district at issue.

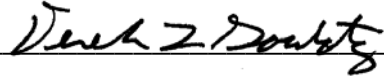
CONCLUSION

For the reasons stated above and in the Church's initial brief, the lower court's judgment in favor of the City on the Church's Equal Terms and Free Exercise claims should be VACATED and judgment entered in favor of Lighthouse. In the alternative, these claims should be remanded for trial.

Branch because of redevelopment, it produces *no* evidence to support this speculation.

Respectfully submitted,

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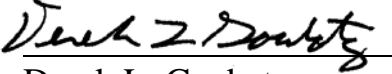
Dated: July 13, 2006

Attorneys for Plaintiffs-Appellants

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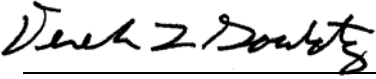
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Derek L. Gaubatz

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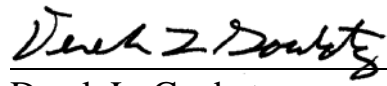
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I, Derek L. Gaubatz, attorney for Plaintiffs-Appellants, hereby certify that I am duly authorized to make this certification - that on the 13th day of July, 2006, I did cause two (2) true and correct copies of Reply Brief of Plaintiffs-Appellants to be delivered by overnight delivery service to the following:

Howard B. Mankoff
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I also certify that on this 13th day of July, 2006, an electronic copy of the brief was sent via e-mail to Howard B. Mankoff at hbmankoff@mdwecg.com.

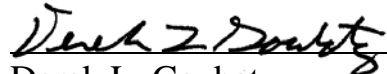
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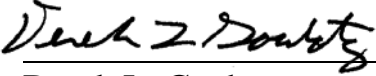
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