

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

CONGREGATION KOL AMI and	:	
RABBI ELLIOT HOLIN;	:	CIVIL ACTION
	:	No.: 01-1919
Plaintiffs,	:	
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.	:	

**MEMORANDUM OF LAW IN SUPPORT OF
PLAINTIFFS' MOTION FOR A PRELIMINARY INJUNCTION**

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INTRODUCTION

Plaintiffs Congregation Kol Ami (“The Congregation” or “Kol Ami”) and Rabbi Elliot Holin submit this memorandum in support of their motion for a preliminary injunction restraining defendants from enforcing the Abington Township Zoning Ordinance (“Zoning Ordinance”) to prohibit plaintiffs from using their Property at 1908 Robert Road as a place of worship, after forty-four years of uninterrupted use as a Catholic convent and Greek Orthodox monastery, and to request that this Court issue an order permitting them to celebrate at their Property the Jewish Festival of *Shavuot*, which begins on May 27, 2001 at sundown, and other events of religious significance, including weekly Sabbath observance, pending final adjudication of plaintiffs’ claims.¹

Abington Township and its co-defendants, through their Zoning Ordinance, have completely banned new places of worship from residential areas within Abington Township. This fact alone is patently unreasonable and violates the First Amendment and the Fourteenth Amendment of the federal Constitution, and corresponding provisions of the Pennsylvania Constitution and the federal Religious Land Use and Institutionalized Persons Act of 2000. Furthermore, defendants’ laws substantially burden plaintiffs’ religious exercise, and deny Plaintiff Rabbi Holin and the Congregation the ability to speak and receive information about matters of religion, as well as their ability to assemble for purposes of religion. Defendants also discriminate against new places of worship and minority religions in favor of established and Christian faiths in the application of their Zoning Ordinance.

¹ Plaintiffs do not request at this time an order permitting them to commence construction of the driveways and parking spaces or make such other permanent alterations to the property, but merely one permitting them to assemble at the Property to hold religious services.

STATEMENT OF FACTS

In August 1999, plaintiffs entered into an agreement with the Sisters of the Holy Family of Nazareth (“the Sisters”) to purchase the property located at 1908 Robert Road, Abington Township, Pennsylvania (the “Property”) for use as a place of worship. Complaint ¶ 36, attached as Exhibit A, hereto. The Property was selected and purchased after an exhaustive search as the only viable property that met the religious needs of the Congregation. Complaint ¶¶ 14-16, 19, 37; Declaration of David Solivter, dated May 10, 2001, ¶¶ 5-10 (hereinafter “Sloviter Decl.”), attached as Exhibit B, hereto. Plaintiffs’ religious mission has been suffering, and continues to suffer without a permanent facility. Complaint ¶ 11-18; Sloviter Decl. ¶¶ 17-27; Declaration of Elliot J. Holin, dated May 10, 2001, ¶¶ 6,7,18-22 (hereinafter “Rabbi Holin Decl.”), attached as Exhibit C, hereto.

Since 1957, the Property, which occupies approximately 10.9 acres, has been in use as a religious institution. Complaint ¶¶ 22, 35. In that year, a Chapel was added to the Property that seats 250 people, and currently includes an altar, a sacristy, the Stations of the Cross, Confessionals, and stained glass windows. Complaint ¶¶ 22, 23. Today, the structures on the Property occupy approximately 27,000 square feet. Complaint ¶ 20.

The Sisters used the Property as a convent and as a place of worship, for educational purposes, for spiritual retreats, and for other institutional uses from 1957 to 1995. Complaint ¶¶ 21-29. Worship services occurred daily in the Chapel, and the Chapel was filled to capacity during services on Catholic holy days. Complaint ¶¶ 24, 28. Other institutional uses of the Property by the Sisters included using the Library for educational and spiritual activities, the Hall for work and recreational activities, and the Dining Room for group meals. Complaint ¶¶ 25-27. The Sister’s religious use of the Property was permitted by special exception in the “V” Residential Zoning

District, pursuant to the zoning ordinance that predates the current Zoning Ordinance. Complaint ¶ 30.

Due to the decline in the population of the Sisters, the Sisters leased the Property to the Greek Orthodox Monks in 1995 for use as a religious institution. Complaint ¶ 31. The Greek Orthodox Monks desired to use the Property as a monastery, for religious services, for family retreats, academic activity and prayer groups. Complaint ¶ 33. The Abington Township Zoning Hearing Board (“Zoning Board” or “ZHB”) permitted such use as an “institutional use” in its Opinion and Order, dated May 2, 1996 (“the 1996 ZHB Opinion”). Complaint ¶ 32; Opinion and Order of the Board, Application No. 95-33, attached as Exhibit D, hereto. That use continued until 1999. Complaint ¶¶ 33-34.

The Property is currently located in a “R-1 Residential District,” which permits agriculture, livestock, single family detached, conservation/recreation preserve, estate dwelling, single family cluster, townhouse, and village house uses as of right, and municipal complexes, outdoor recreation and riding academies by special exception. Complaint ¶ 38; Abington Township Revised Zoning Ordinance, Version 6.0, dated May 9, 1996, § 301, attached as Appendix A, hereto.² . Places of worship are not permitted in the R-1 District, or in any other residential district (R-2, R-3, R-4). Complaint ¶ 39; Appendix A (Zoning Ordinance §§ 302-304). Places of worship are also not permitted in defendants’ Town Commercial, Special Commercial, Planned Business, Suburban Industrial, Recreation/Conservation, Flood Plain, Land Preservation and Steep Slope Districts. Complaint ¶¶ 40-43; Appendix A (Zoning Ordinance §§ 400-602). Several other assembly and

² Those portions of the Abington Township Zoning Ordinance, dated May 9, 1996, (hereinafter “Zoning Ordinance”), and cited in this Memorandum are collected in Appendix A, hereto.

institutional uses such as “clubs,” “libraries,” “museums,” “performing theatres,” “amusement parks,” “cultural centers,” and “country clubs” are permitted uses in some of those districts. *Id.* Places of worship are only permitted in Defendants’ Community Service and Mixed Use Districts as of right, and in its Apartment/Office District by special exception (where “clubs,” “community centers,” “cultural centers,” “libraries,” and “museums” are permitted as of right). Complaint ¶¶ 44-45; Appendix A (Zoning Ordinance §§ 403, 500, 501).

At least twenty-six of the thirty-seven Christian churches currently in Abington Township are located in residential zoning districts. Complaint ¶¶ 48, 50. No Jewish synagogues or other non-Christian places of worship exist in residential districts. *Id.* While the Jewish population constitutes approximately 20% of Abington Township, there is only one synagogue, which happens to be in a district zoned “PB” or “Planned Business”. *Id.*

Plaintiffs’ purchase of the Property is necessary for its religious exercise. Congregation Kol Ami is a new Reform Jewish congregation, founded in 1994. Sloviter Decl. ¶ 2. It currently pursues its mission at various locations, such as holding worship services at Gratz College, holding religious school at Congregation Melrose B’nai Israel Emanuel, Passover *Seder* at the Gymnasium of Abington Friends School, and High Holy Days at the Keswick Theater. Complaint ¶ 12; Rabbi Holin Decl. ¶¶ 6,7; Sloviter Decl. ¶¶ 11-15. The inability of the plaintiffs to use their Property has resulted in a disjointed Congregation, forcing the cancellation of religious events, hindering communication and fellowship among the congregants, and placing the Congregation’s most sacred possession – an ancient *Torah* that has survived the Holocaust – at increased risk of destruction. Complaint ¶ 15; Rabbi Holin Decl. ¶¶ 6-7, 17-19, 22; Sloviter Decl. ¶¶ 11-27. A permanent location is necessary for the Congregation’s religious exercise. Complaint ¶ 13; Rabbi Holin Decl. ¶¶ 4,21;

Sloviter Decl. ¶¶ 7, 25-27. Such a location must contain structures adequate for religious use, some outdoor space for reflection and celebration of religious holidays such as *Sukkot*, access to its members, and must be able to accommodate current members and future growth. Complaint ¶ 14; Rabbi Holin Decl. ¶¶ 4, 21; Sloviter Decl. ¶¶ 7, 25-27. After an exhaustive search, it was determined that the Property at 1908 Robert Road is the only property in Abington Township that fulfilled the Congregation's needs. Sloviter Decl. ¶¶ 5-10; Declaration of Yael Milbert, dated May 9, 2001, ¶¶ 4-7 (hereinafter "Milbert Declaration"), attached as Exhibit G, hereto.

Plaintiffs' agreement with the Sisters to purchase the Property expires in May, 2002. The agreement is contingent upon the Congregation's ability to obtain all necessary approvals. Complaint ¶ 36. Plaintiffs have paid the Sisters \$137,500 in deposits and carrying costs. Complaint ¶ 36. Plaintiffs' costs in carrying the Property continue to accrue at a rate of \$20,000 per year. *Id.*

The proposed regularly scheduled uses of the Property by the plaintiffs are as follows: (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 8:00pm; (3) religious classes for 2 hours on Sunday mornings. Complaint ¶ 57. This comprises less than 8 hours of regularly scheduled activity per week, and none on Mondays, Tuesdays, Thursdays and alternate Fridays and Saturdays. Other uses would include four High Holiday services per year, religious meetings and *Bar* and *Bat Mitzvah* services. Complaint ¶ 58. The facilities of the Property would be used in a similar manner to that of the Sisters: worship services would be held in the Chapel; receptions would be held in the Dining Room; *Oneg Shabbat* gatherings would be held in the Hall; the Congregation would use the Sisters' classrooms and dormitory rooms for its own classrooms and administrative offices. Complaint ¶ 59. Additions to the structure of the property would comprise less than 0.9% of the total area for a

corridor. Complaint ¶ 60. Driveways would be altered and parking areas added to comply with Abington Township standards. *Id.*

Plaintiffs submitted an application to ZHB requesting permission to use the property as a place of worship, either by the ZHB finding that the proposed use is a continuation of a prior nonconforming use of the Property, or by the ZHB granting a variance to allow the proposed use. Complaint ¶ 54. Several neighbors who objected to the location of a synagogue in their neighborhood intervened to protest plaintiffs' application. Complaint ¶ 62. These intervenors objected to the synagogue in their neighborhood regardless of any conditions or restrictions upon the use. *Id.* One of the intervenors stated simply: "I don't want a synagogue in my backyard." *Id.* Plaintiffs repeatedly offered to make any reasonable alterations to minimize whatever impact (or perceived impact) the Congregation may cause, including installing berms, landscaping, and fencing, relocating driveways, hiring traffic monitoring personnel and curtailing evening activities. Complaint ¶ 65. All of these suggestions were rejected by the intervenors. Testifying in support of the plaintiffs' Application were a land planner, civil engineer, traffic engineer, architect, and an attorney. Complaint ¶ 61. After holding 12 hearings on the matter, the ZHB denied the relief requested in the Application. Complaint ¶¶ 55, 63-64; Opinion and Order of the Board, Application No. 99-36, dated March 20, 2001, ("the 2001 Opinion"), attached as Exhibit E, hereto. The ZHB stated that most of the witnesses, including Sister Michaelann Delaney, who testified on the Congregation's behalf were "not credible," and found the testimony offered by the intervenors to be credible. These decisions were made by the ZHB pursuant to a system of individualized assessments. Complaint ¶¶ 67-69.

Most recently, plaintiffs requested that Abington Township permit it to conduct a religious

service in the Chapel on the Property in observance of *Shavuot* on Monday, May 28, 2001. *See* Letter of Jonathan Auerbach, Esq. to Harry Mahoney, Esq., dated May 7, 2001, attached as Exhibit F, hereto. Plaintiffs requested use of the Property for its *Shavuot* service, which also includes the confirmation of four students in the Congregation's religious school, is limited to two to three hours and involves a maximum of 70 persons. *Id.* Notwithstanding the fact that the existing driveway and parking areas of the Property can accommodate the attendees of this religious celebration, defendants denied the request. *Id.*

Plaintiffs also wish to use the Property for *Shabbat* services on alternate Friday evenings and alternate Saturday mornings.

DISCUSSION

Plaintiffs Congregation Kol Ami and Rabbi Elliot Holin must, as a matter of both doctrinal and practical necessity, celebrate religious services and holidays in a permanent facility, and in an environment that is suitable for those activities. Such a facility must permit the gathering of the congregation and quiet reflection, and must be accessible to its members. The only property available in Abington Township that meets plaintiffs' needs is located in a residential zone. The Zoning Ordinance does not permit worship in residential districts. Although many churches are located in the Township's residential zones, no synagogues are and defendants will not permit plaintiffs to introduce a new synagogue to worship in its residential district. This prohibition constitutes a substantial burden on plaintiffs' religious exercise, on their ability to engage in religion expression, and on their ability to associate for purposes of religious worship, in violation of the First Amendment of the United States Constitution, Article I of the Pennsylvania Constitution, and the Religious Land Use and Institutionalized Persons Act of 2000, 42 U.S.C. § 2000 cc *et seq.*

("RLUIPA"). Furthermore, the Abington Township Zoning Ordinance, *which completely prohibits places of worship in residential districts*, is patently unreasonable and arbitrary, as is defendants' discriminatory application of its Zoning Ordinance to plaintiffs. These violations are ongoing, and constitute a continuing denial of plaintiffs' constitutional rights. For these reasons, plaintiffs respectfully request that this Court issue a preliminary injunction enjoining defendants from enforcing its Zoning Ordinance in a manner that prohibits plaintiffs from assembling for purposes of worship activities on the Property, beginning with the *Shavuot* celebration on May 28, and continuing until the Court has issued a final determination on the merits.

The determination of whether to grant a preliminary injunction involves balancing the following factors:

- (1) whether the movant has shown a reasonable probability of success on the merits;
- (2) whether the movant will be irreparably harmed by denial of the relief;
- (3) whether granting preliminary relief will result in even greater harm to the nonmoving party; and
- (4) whether granting the preliminary relief will be in the public interest.

Allegheny Energy, Inc. v. DQE, Inc., 171 F.3d 153, 158 (3d Cir. 1999) (citing *ACLU v. Black Horse Pike Regional Bd. of Educ.*, 84 F.3d 1471, 1477 n.2 (3d Cir. 1996) (en banc)). Under this standard, and upon the evidence that plaintiffs will present at a hearing on the motion, plaintiffs are entitled to a preliminary injunction.

I. PLAINTIFFS ARE LIKELY TO SUCCEED ON THE MERITS

Plaintiffs are clearly likely to succeed on the merits. Abington Township's complete prohibition of places of worship from all residential districts is facially unreasonable, violating plaintiffs' rights under the First and Fourteenth Amendments, equivalent provisions of the

Pennsylvania Constitution and the Religious Land Use and Institutionalized Persons Act of 2000 [“RLUIPA”]. Defendants’ laws and actions, moreover, substantially burden plaintiffs’ ability to freely exercise their religion, to engage in religious expression, and to associate for purposes of religion in violation of the federal and state constitutions and RLUIPA, without any legitimate, much less compelling, justification.

Finally, defendants’ application and enforcement of the Zoning Ordinance discriminates against Congregation Kol Ami in favor of Christian churches that have existed in Abington Township, in violation of the First Amendment, the Equal Protection Clause of the Fourteenth Amendment, and RLUIPA.

A. The Zoning Ordinance Is Unlawful On Its Face Because It Excludes Places Of Worship From All Residential Areas.

Defendants have determined that churches and synagogues do not belong in residential areas. Abington Township therefore completely prohibits places of worship from its four residential zoning districts: R-1, R-2, R-3, and R-4. Zoning Ordinance §§ 301-304.³ None of these districts permit places of worship either by right, special exception, or by conditional use. *Id.* This fact by itself violates the First and Fourteenth Amendments and equivalent provisions of the Pennsylvania Constitution. The majority rule is that “churches cannot be absolutely excluded from residential areas.” 74 A.L.R.2d 377 § 2 (1960). This rule has long been recognized in Pennsylvania:

In listing churches as a permissive use in class C residence areas (the

³ Other than residential uses, other uses in these districts include (as of right, by special exception, or conditionally) “Agriculture,” “Livestock,” “Conservation/Recreation Preserve,” “Kennel,” “Riding Academy,” “Municipal Complex,” “Outdoor Recreation,” “Emergency Services,” “Utility Facility,” “Day Care Center,” “Nursing Home,” and “Life Care Facility” uses. *Id.*

highest residence area established by the ordinance), the framers of the zoning ordinance recognized the primacy of religious freedom. ***If the zoning ordinance would not permit churches in all residence districts, including C districts, it would to that extent be unconstitutional.***

Stark Appeal, 72 Pa. D. & C. 168 (1950) (emphasis added, footnote omitted).⁴

The rule that municipalities cannot completely ban places of worship from residential areas

⁴ See also ***Milharci v. Metropolitan Bd. of Zoning Appeals (Div. II)***, 489 N.E.2d 634, 636 & n.2 (Ind. Ct. App. 1986) (“Irrespective of specific uses permitted or prohibited by a particular zoning ordinance, a religious use is always a permitted use of property in a residentially zoned area. . . . Indiana is in accord with the majority view that churches may not be lawfully excluded from residential districts.”); ***Bright Horizon House, Inc. v. Zoning Bd. of Appeals***, 469 N.Y.S.2d 851, 856 (N.Y. Sup. Ct. 1983) (“Accordingly, the general policy, as applied in this State, is that religious institutions are virtually immune from zoning restrictions.”); ***State v. Maxwell***, 617 P.2d 816 (Haw. 1980) (recognizing that “The wide majority of courts hold that religious uses may not be excluded from residential districts.”); ***Goffinet v. County of Christian***, 333 N.E.2d 731, 736 (Ill. App. Ct. 5th Dist. 1975) (recognizing “special rule regarding the construction of churches in areas zoned residential” (citing ***O’Brien v. City of Chicago***, 105 N.E.2d 917 (Ill. App. Ct. 1952)); ***Jewish Reconstructionist Synagogue v. Incorporated Village of Roslyn Harbor***, 379 N.Y.S.2d 747, 756 (1975) (holding unconstitutional “ordinances [that] authorize the denial of a special use permit for location of religious institutions in a residential district without setting reasonable requirements for adaptations which would mitigate their effects.”); ***Board of Zoning Appeals v. Schulte***, 172 N.E.2d 39 (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)); ***State ex. rel. Lake Drive Baptist Church v. Village of Bayside Bd. of Trustees***, 108 N.W.2d 288, 293-94 (Wis. 1961) (recognizing majority rule); *id.* at 300 (Hallows, J., concurring) (collecting cases); ***ex. rel. Synod of Ohio State v. Joseph***, 39 N.E.2d 515, 524 (Ohio 1942) (“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.”); ***Congregation Committee, etc. v. City Council of Haltom City***, 287 S.W.2d 700, 704 (Tex. Civ. App. 1956) (“[A] city cannot legally exclude a church from a residential district by a zoning ordinance . . .”). Cf. “The Dover Amendment,” Mass. Gen. Laws ch. 40A § 3 (limiting the zoning regulations that can be imposed on religious and other uses); ***Village Lutheran Church v. City of Ladue***, 935 S.W.2d 720, 722 (Mo. App. 1996) (ruling that church did not need a special use permit to construct in a residential district; recognizing that state law “does not give municipalities power over the use of property used for religious purposes by religious organizations whose rights to free exercise of religion are protected by constitutional guaranties.”, (citing ***Congregation Temple Israel v. Creve Coeur***, 320 S.W.2d 451 (Mo. Ct. 1959))).

is predominantly a matter of *federal* law. Some courts have relied on free exercise, substantive due process, and equal protection principles found in federal and state *constitutions* in holding that Ordinances like Abington Township’s are plainly unreasonable.⁵ The rule is also mandated by federal *statutory* law that is designed to restate constitutional principles: “No government shall impose or implement a land use regulation that . . . (B) unreasonably limits religious assemblies, institutions, or structures within a jurisdiction.” RLUIPA § 2(b)(3) (emphasis added).

The rule is also based on logic. An ordinance that totally excludes places of worship from residential districts simply “bears no substantial relation to the public health, safety, morals, peace or general welfare of the community.” *Diocese of Rochester v. Planning Bd. of Brighton*, 1 N.Y.2d 508, 154 N.Y.S.2d 849, 136 N.E.2d 827 (1956). The Pennsylvania Supreme Court had little trouble dismissing such a ban, even where a church drew in congregants from other counties:

If we understand this contention, the appellants say that the general welfare is jeopardized when children and churchgoers from Philadelphia County attend school and church in Montgomery County. The mere statement of such proposition constitutes its own refutation.

⁵ See, e.g., *Euclid v. Ambler Realty Co.*, 272 U.S. 365, 395 (1926) (holding that the determination of public officers should not be set aside unless their action “has no foundation in reason and is a mere arbitrary or irrational exercise of power having no substantial relation to the public health, the public morals, the public safety or the public welfare in its proper sense.”); *Stark Appeal*, 72 Pa. D. & C. at 34 (“Zoning ordinance which operates to exclude the erection of church buildings in residence districts is invalid, either as violative of the due process and equal protection clauses of the State and Federal Constitutions, or as being an arbitrary or unreasonable enforcement of the ordinance.”) (quoting 138 A.L.R. 1287, 1288); 74 A.L.R.2d 377 § 2 (such ordinances are “invalid, either as violative of the due process or equal protection clauses of the state or federal constitutions, or as being an arbitrary or unreasonable enforcement of the ordinance,”); *State v. Maxwell*, 617 P.2d 816, 820 (Haw. 1980) (basing rule on freedom of religion grounds); *Milharic v. Metropolitan Bd. of Zoning Appeals*, 489 N.E.2d at 636 (basing rule on First and Fourteenth Amendments and Indiana Constitution); *Jewish Reconstructionist Synagogue v. Incorporated Village of Roslyn Harbor*, 379 N.Y.S.2d 747, 753 (1975) (basing rule on federal free exercise clause).

Jacobi v. Zoning Bd. of Adjustment of Lower Moreland Tp., 196 A.2d 742, 745-46 (Pa. 1964).⁶

Religious institutions, like schools, are an essential part of residential communities; far from harming the health and welfare of those areas, houses of worship actively contribute to those goods, as many courts, including Pennsylvania's have found:

When in 1916 the framers of the Greater New York building zone resolution were discussing what buildings and uses should be excluded from residence districts, it did not occur to them that there was the remotest possibility that churches, schools, and hospitals could properly be excluded from any districts. They considered that these concomitants of civilized residential life had a proper place in the best and most open localities.

Stark Appeal, 72 Pa. D. & C. at 33 n.16 (citation omitted). Wisconsin Supreme Court Justice Hallows' concurrence in *Lake Drive Baptist Church* restates this proposition eloquently:

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. Churches are not supermarkets and should not be restricted to such areas. How can the exclusion of churches from a residential area promote public morals or the general welfare? To so hold is a failure to understand the purpose and the influence of churches.

108 N.W.2d at 301. And in *Young Israel Organization*, an Ohio court expressed the same view:

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. It is an institution to which we look for leadership in furtherance of the brotherhood of man, in molding the moral progress of our children and sustaining and giving strength to

⁶ *Accord State ex. rel. Lake Drive Baptist Church*, 108 N.W.2d at 300 (Hallows, J., concurring); *State ex rel. Wenatchee Congregation of Jehovah's Witnesses v. Wenatchee*, 312 P.2d 195 (Wash. 1957); *Congregation Committee, etc.*, 287 S.W.2d at 704; *ex. rel. Synod of Ohio State v. Joseph*, 39 N.E.2d 515 (Ohio 1942); *Sherman v. Simms*, 183 S.W.2d 415 (Tex. 1944); *Congregation Committee, North Ft. Worth Congregation, Jehovah's Witnesses v. City Council of Haltom City*, 287 S.W.2d 700 (Tex. Civ. App. 1956).

purity of our family life. 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.

133 N.E.2d at 183.⁷

Although not implicated in the present case, but nonetheless underscoring the broad discriminatory effect of defendants' Ordinance locating in residential districts may be of such critical importance that the inability to do so may constitute a complete bar to religious exercise for other Jewish synagogues. See *Orthodox Minyan of Elkins Park v. Cheltenham Township Zoning Hearing Bd.*, 552 A.2d 772, 773 (Pa. Cmwlth. Ct. 1989) ("It is ironic that the Board denied a special exception to convert a property to religious use on the grounds of increased traffic flow to a group whose religion prohibits them from driving automobiles during their day of worship."); *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 are prohibited by the Torah, the Jewish Bible, from using automobiles on their Sabbath. They therefore must live within walking distance of a synagogue."). See also *Stark Appeal*, 72 Pa. D. & C. at 33 n.16 ("It would be unreasonable to force [churches] into business districts where there is noise and where land values

⁷ See also *Bright Horizon House, Inc. v. Zoning Bd. of Appeals*, 469 N.Y.S.2d 851, 856 (N.Y. Sup. Ct. 1983) ("In dealing with zoning restrictions, New York adheres to the majority view that religious institutions, by their very nature, are beneficial to the public welfare."); *American Friends of Soc'y of St. Pius v. Schwab*, 417 N.Y.S.2d at 993 (recognizing the "public benefit and welfare which is itself an attribute of religious worship in a community."); *State ex rel. Anshe Chesed Congregation v. Bruggemeier*, 115 N.E.2d 65 (Ohio Ct. App. 1953); *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."); *Congregation Committee*, 287 S.W.2d at 705 ("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.").

are high, or into dense residence districts (in cities which have established several kinds of such districts”) (citation omitted).

Two additional factors underscore the facial unreasonableness of Defendants’ Ordinance: (1) The fact that other, more intensive uses of land are permitted in Abington’s residential districts; and (2) The fact that many Christian churches exist peacefully, without government interference, in R1 and other residential districts. Since the Property is greater than ten acres, Congregation Kol Ami would be permitted, under the Ordinance, to raise an unlimited number of cattle, horse or fowl *as of right*. Zoning Ordinance §§ 301.2(A)(2); 706.B(3). Being greater than five acres, they could operate a kennel. *Id.* §§ 301.2(B)(1); 706.B(2). In addition to such assemblies of cows, horses, chickens, dogs and cats, human assemblies are also permitted in uses such as “Outdoor Recreation,” “Municipal Complex,” and “Riding Academy.” *Id.* §§ 301.2(B)(2)-(4). “Municipal complexes” include libraries and administration buildings. *Id.* § 706.E(8). “Outdoor Recreation” includes country clubs, club houses, pro shops, and snack bars used by patrons of recreational activities “operated on a commercial or membership basis.” *Id.* § 706.G(6).

Apparently, if Rabbi Holin taught miniature golf or tennis lessons instead of scripture, and operated a snack bar instead of offering *Oneg Shabbat* refreshments, he would be able to do so by special exception.⁸ These uses are all permitted in the R-1 District. In addition to being patently unreasonable, this fact renders the Township’s Ordinance illegal under RLUIPA’s “Equal Terms” provision. RLUIPA § 2(b)(1) (“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 nonreligious

⁸ The Pennsylvania Legislature in providing for special exceptions in zoning ordinances has determined that the impact of such use does not, of itself, adversely affect the public interest to any material extent in normal circumstance.

assembly or institution.”).

Other assembly and institutional uses are permitted in another residential district, the R-4 District. While places of worship are still forbidden, the owner of a property the size of plaintiffs’ would be permitted to operate a day care center for children or adults, a nursery school, or a kindergarten for up to 210 people, Zoning Ordinance §§304.2(B)(1), 706.E(3);⁹ a nursing home with 360 beds, *id.* §§ 304.2(B)(2), 706.E(9); or, by conditional use, a dependent care facility for 360 people including auditoriums, chapels, community centers, administration offices, recreational and social facilities, and retail services such as a beauty shop, coffee shop and gift shop. *Id.* §§ 304.2(C)(1); 706.E(7).

The Court should follow the majority of courts applying First and Fourteenth Amendment principles (which are also codified in RLUIPA), and hold that Abington Township’s Zoning Ordinance is clearly unreasonable because it, on its face, forbids houses of worship from residential zones.

B. The Zoning Ordinance Is Unlawful, on Its Face and as Applied Against Plaintiffs, Because It Substantially Burdens Plaintiffs’ Fundamental Rights to Freedom of Religious Exercise, Expression, and Association.

Defendants’ laws and actions burden plaintiffs’ fundamental rights to free exercise of religion, expression, and association. As discussed below, the appropriate standard of review for each violation is strict scrutiny. Defendants cannot meet that burden. *Infra*, § I(B)(4).

⁹ Notably, the Ordinance states that these uses are permitted in residential districts “only as an accessory use to a single-family detached residence, *or place of worship.*” *Id.* §706.E(3)(b). Since new places of worship are forbidden in residential districts, assumedly only the Christian “grandfathered” churches are permitted to operate them.

1. Free Exercise of Religion.

Plaintiffs' inability to use the Property for purposes of religious exercise constitutes a substantial burden on their religious exercise. A permanent physical space is critical for the Congregation's religious mission. Rabbi Holin Decl. ¶ 4 (“Let them make Me a sanctuary that I may dwell among them.’ Exodus 25:8”). A synagogue is defined by its home. *Id.* ¶ 5. It also houses the Congregation's ark, Torah scroll and eternal light. *Id.* Not having a permanent home has been a severe disruption in the Congregation's religious activities. *Id.* ¶ 6 (Congregation currently runs the risk that “such services or classes will need to be canceled or rescheduled”); Sloviter Decl. ¶ 20 (Congregation is “unable to properly coordinate and participate in the various social action programs that are so important to the larger community”). Furthermore, the Congregation believes that it must locate in a residential area, not a business or industrial district:

We are eager to have a spiritual home of our own in a residential community because everything that we teach our children and our adults emphasizes the importance of involvement and service to the community. The *Mishna* or Oral Law handed down by our great rabbinic forebearers in the *Pirkei Avot*, or Ethics of the Fathers, commands: “Do not separate yourself from the community,” *Pirkei Avot* 2.4; and warns that “If I am not for myself, who is for me? And if I am only for myself, what am I?” *Pirkei Avot* 1.14. Our worship services consistently reinforce this philosophy of service to the community: “God, You have made each of us unique, and formed us to be united in one family of life.” *Gates of Prayer*, 1975, p. 187.

Synagogues are found in residential communities because of the correlation between what is taught in the sanctuary and what is expressed outside its walls. Synagogues are “anchoring institutions”: they provide stability, inspiration and hope. Their presence confers the unmistakable message that religion can enhance daily life: where we meet, where we work, and especially where we live. Religion should not be invisible in the neighborhoods where children go to school and where people congregate. A congregation that expresses

a willingness to meet with its neighbors, as we have done, can be a tremendous asset to the neighborhood and the larger community.

Rabbi Holin Decl. ¶¶ 8-9.

Other religious exercises of the Congregation are burdened: “Kol Ami does not have a location from which religious books and other religious information or congregational information can be gathered or obtained by its congregants.” Sloviter Decl. ¶ 16. The absence of a permanent physical home, and in particular a permanent sanctuary with a fixed ark for the Congregation’s 350 year old *Torah*, which is used for every holiday observance, the High Holy Day observances, every *Bar/Bat Mitzvah* and Confirmation, further burdens the Congregation in its religious exercises:

Because we do not have a permanent physical home for Kol Ami, and hence, no sanctuary with an ark to keep our *Torah* safe, it is necessary that our *Torah* be kept at either my home, particularly if I am teaching a *Bar/Bat Mitzvah* or Confirmation student to read from the *Torah*, or at David Sloviter’s house. David Sloviter or I must then transport the *Torah* where and when needed. Although we treat the *Torah* with the utmost care and respect, by necessity it must travel, with all the attendant risks of accident and injury.

Should a *Torah* become damaged beyond repair – even if only a small portion remains irreparable – the entire *Torah* must be treated as desecrated and disposed of in accordance with Jewish law and buried. Although I cannot quantify the risk of damage to our *Torah* because we do not have a permanent home, common sense dictates that it is greater than zero. To survive the Holocaust, but not Twenty-first Century American roads, would be among the gravest of ironies and a tragedy.

Rabbi Holin Decl. ¶¶ 18-19. *See also* Sloviter Decl. ¶ 17. The Congregation is also unable to provide grief counseling, adequate access to the Rabbi, to tutors and religious supplies. *Id.* ¶ 17. “[T]here is no central and consistent location where members may routinely obtain information or from where the leadership can promote the congregation’s activities.” *Id.* ¶ 19. Prohibiting the

Congregation from using the Property creates a number of other burdens on their religious exercise.

Id. ¶¶ 21-25.

The Third Circuit has acknowledged that denying individuals the ability to worship together as a congregation-in the manner that their religion dictates-constitutes a substantial burden on religion:

[A]n opportunity to worship as a congregation by a substantial number of prisoners may be a basic religious experience and, therefore, a fundamental exercise of religion by a bona fide religious group.

The exercise of religion commonly involves group worship, and when the only option available for a prisoner is under the guidance of someone whose beliefs are significantly different from or obnoxious to his, the prisoner has been effectively denied the opportunity for group worship and the result may amount to a substantial burden on the exercise of his religion. See *SapaNajin v. Gunter*, 857 F.2d 463, 464-65 (8th Cir. 1988).

Weir v. Nix, 890 F. Supp. 769, 788 (S.D. Iowa 1995) (citations omitted). The failure to provide otherwise available facilities may therefore be, depending on whether it is compelled, as substantial a burden on that right as would the removal of pertinent facilities from actual congregational worship. It may meaningfully bar their ability to express adherence to their faith.

Here, the Inmates claimed to have significant ideological differences with other Muslim sects, and that the prison's insistence on requiring all Muslims to worship collectively places a burden on their free exercise of religion. In particular, they urge that their faith "mandates" that they not be led in worship by a non-Sunni Muslim.

Small v. Lehman, 98 F.3d 762, 767-68 (3d Cir. 1996) (footnote omitted, emphasis added). See also

Brown v. Borough of Mahaffey, 35 F.3d 846 (3d Cir. 1994) (borough impeded church's ability to

hold tent revival meetings in baseball park). As with the plaintiffs in *Small*, Congregation Kol

Ami's ability to engage in congregational worship in a manner that suits their ideological needs is

being denied by defendants. The Congregation's inability to use their Property as a permanent,

centralized, community-based synagogue similarly burdens its religious exercise. *See* Rabbi Holin Decl. ¶¶ 4-6, 8-9, 18-22; Sloviter Decl. ¶¶ 16-27.”

Such a burden on religious exercise must be justified by a compelling governmental interest, and must be the least restrictive means of achieving that interest for four independently sufficient reasons: (1) RLUIPA requires application of the strict scrutiny test; (2) under the First Amendment’s Free Exercise Clause, defendants’ Ordinance is not a neutral law of “general applicability,” but provides a system of individualized exemptions; (3) also under the Free Exercise Clause, the burden implicates free expression and free association rights, thereby falling under *Employment Division v. Smith*’s “hybrid rights” principle; and (4) the Pennsylvania Constitution requires strict scrutiny:

(a) *The “substantial burden” test applies under RLUIPA § 2(a).*

The Religious Land Use and Institutionalized Persons Act prohibits state actors from:

impos[ing] or implement[ing] a land use regulation in a manner that imposes a substantial burden on the religious exercise of a person, including a religious assembly or institution, unless the government demonstrates that imposition of the burden on that person, assembly, or institution:

- (A) is in furtherance of a compelling interest; and
- (B) is the least restrictive means of furthering that compelling interest

RLUIPA § (2)(a)(1). Defendants’ Zoning Ordinance is clearly a “land use regulation.” *See* RLUIPA § 8(5) (“The term ‘land use regulation’ means a zoning or landmarking law, or the application of such a law, that limits or restricts a claimant’s use or development of land (including a structure affixed to land)”). As described above, the Ordinance and its imposition against plaintiffs constitute a substantial burden on the Congregation’s religious exercise. *See* RLUIPA § 8(7) (“RELIGIOUS

EXERCISE-(B) RULE- The use, building, or conversion of real property for the purpose of religious exercise shall be considered to be religious exercise of the person or entity that uses or intends to use the property for that purpose.”). Furthermore, the religious exercise need not be mandated by plaintiffs’ faith to be recognized. RLUIPA § 8(7)(A) (“IN GENERAL- The term ‘religious exercise’ includes any exercise of religion, whether or not compelled by, or central to, a system of religious belief.”). The application of this section applies if the substantial burden affects interstate commerce, or is imposed pursuant to a system of procedures permitting the government to make individualized assessments of the property uses.¹⁰ RLUIPA § 2(a)(2)(B)-(C). Both conditions are met in this case.

RLUIPA: Commerce Clause. The burden that defendants place upon the Congregation’s religious exercise substantially affects interstate commerce. The prohibition of plaintiffs’ use of the Property as a synagogue, as well as the one-time rehabilitation and construction work necessary. Complaint ¶¶ 38, 46, 63. That burden directly stifles the commercial activities necessary to complete the project in the short run: employing construction workers, purchasing and transporting building materials and supplies, raising and transferring funds, entering contracts, and others. Just as surely, the burden precludes smaller-scale but longer-term economic activities associated with mere use of the Property: employment of paid staff such as a janitor or caretaker, as well as ongoing purchase and consumption of supplies and utilities. There can be little doubt that these discriminatory burdens, “taken together with . . . many others similarly situated,” would “substantially affect interstate commerce.” *United States v. Lopez*, 514 U.S. at 556, 559; *see* RLUIPA § 2(a)(2)(B). In

¹⁰ The rule also applies if the burden is imposed in a program that receives federal financial assistance. RLUIPA §2(a)(2)(A). We do not assert the Act’s application under that subsection.

fact, the effect on commerce of the ongoing use of the Property alone – not to mention the necessary construction-is enough to bring this case within the sweep of the commerce power. *See, e.g., United States v. Grassie*, 237 F.3d 1199, 1208-11 & n.7 (10th Cir. 2001) (“Religion and, in particular religious buildings actively *used* as the site and dynamic for a full range of activities, easily falls within”the commerce power.). (Emphasis added). Even if every commercial transaction suppressed in the instant case would have occurred exclusively in the Commonwealth of Pennsylvania – unlikely though that may be – the aggregate effect of similar suppression elsewhere would still implicate the commerce power. *See, e.g., Camps Newfound/Owatonna*, 520 U.S. at 586 (“[A]lthough the [Christian Scientist] summer camp involved in this case may have a relatively insignificant impact on the commerce of the entire Nation, the interstate commercial activities of nonprofit entities as a class are unquestionably significant.”). Thus, the substantial burdens test applies here pursuant to a legitimate exercise of Congress’ Commerce Clause authority, RLUIPA §2(a)(2)(B). Clause subsection of RLUIPA is satisfied.

RLUIPA: Individualized Assessments. By instituting procedures that would permit the ZHB to allow the use of property in residential districts as a place of worship through a variance, or as a continuation of a nonconforming use, Defendants’ Ordinance has in place formal procedures to make individualized assessments of the proposed uses for the property involved. RLUIPA § 2(a)(2)(C); *see* Complaint ¶¶ 68-69 (describing nonconforming use procedures). Similarly, the requirements to obtain a variance, *see* the Complaint ¶ 67, include such open-ended assessments as determining whether the variance is “consistent with the spirit, purpose, and intent of this Ordinance”; examining the “suitability of the particular property for the kind of modification, change, or use requested,” and “the character and type of development in the area surrounding the

location”; and questioning whether “the proposed modification or change is appropriate, will not substantially injury or detract from the use of surrounding property or from the character of the neighborhood, and is consistent with the Comprehensive Plan.” *Id.* In other words, the Zoning Board has complete discretion in ruling upon a continuation of nonconforming use or variance. Therefore, strict scrutiny applies here under RLUIPA for the same reason under the Free Exercise Clause: religious exercise is substantially burdened by a discretionary exception-ridden system of “individualized assessments.” RLUIPA § 2(a)(2)(C).

**(b) *The “substantial burden” Test Applies Under
The Free Exercise Clause***

Free Exercise Clause: Individualized Assessments. The same “individualized assessments” mandate under the Free Exercise Clause. In *Employment Div. v. Smith*, 494 U.S. 872, 883-85 (1990), the Supreme Court reaffirmed application of the strict scrutiny standard – that government action burdening religious exercise¹¹ is permitted only where it furthers a compelling governmental interest and where it is the least restrictive means of achieving that interest-where the law restricting religious exercise is not “neutral”¹² or “generally applicable.” *Id.* at 883-86. The Third Circuit has adopted this principle, holding for instance that a police department order that bans

¹¹ As under RLUIPA, plaintiffs’ beliefs need not be “central” to their religion. “The Supreme Court has never required that a plaintiff bringing a free exercise claim demonstrate the centrality of a religious practice or belief burdened by the government.” *Muslim v. Frame*, 891 F. Supp. 226, 230 (E.D. Pa. 1995).

¹² Defendants’ laws and actions are also not “neutral” within the meaning of *Employment Division v. Smith*. See *infra*, § I(C). Furthermore, since religious institutions are *specifically* included or excluded from various zoning districts by defendants, the general rule of *Employment Div. V. Smith* is not applicable. See *United States v. Board of Educ.*, 911 F.2d 882, 888 n.3 (3d Cir. 1990) (holding that “*Smith* has no bearing on cases” where statute specifically addressed religious practice).

the wearing of beards, but provides a medical exemption necessary to comply with the Americans with Disabilities Act, 42 U.S.C. § 12101, is subject to strict scrutiny review for its failure similarly to provide a religious exemption. *FOP Newark Lodge No. 12 v. City of Newark*, 170 F.3d 359 (3d Cir. 1999), *cert. denied*, 528 U.S. 817 (1999).

As described above, Abington Township’s Zoning Ordinance is not a “law of general applicability” because it provides a “a system of individual exemptions,” and therefore “it may not refuse to extend that system to cases of ‘religious hardship’ without compelling reason.” *Smith*, 110 S. Ct. at 1603; *FOP Newark Lodge No. 12 v. City of Newark*, 170 F.3d at 364-66; *Black Hawk v. Commonwealth of Pennsylvania*, 114 F. Supp. 327, 332 (M.D. Pa. 2000) (holding that regulation that permitted the destruction of animals, but granted government officer the authority to make exceptions, was “system of individualized governmental assessment of the reasons for the relevant conduct”). The defendants have discretion both to grant plaintiffs the right to continue a nonconforming use, and to grant plaintiffs a variance. Complaint ¶¶ 67-70, 82. The system of individualized exemptions is certainly more extensive than that at issue in *FOP Newark Lodge No. 12 v. City of Newark*. As in *Sherbert v. Verner*, 374 U.S. 398 (1963), *Thomas v. Review Bd. of Indiana Employment Sec. Div.*, 450 U.S. 707 (1981), and *Hobbie v. Unemployment Appeals Com. of Florida*, 480 U.S. 136 (1987), the ordinance here involves “individualized governmental assessment of the reasons for the relevant conduct,” and therefore must be judged by the strict scrutiny standard. *Smith*, 494 U.S. at 884.

Free Exercise Clause: Hybrid Rights. Strict scrutiny is also appropriate because this case involves a situation of “hybrid rights”: plaintiffs have asserted a Free Exercise claim in conjunction with other constitutional claims. *See infra* §§ I(B)(2), (3). In *Employment Div. v. Smith*, the

Supreme Court held:

the First Amendment bars application of a neutral, generally applicable law to religiously motivated action [in cases that] have involved not the Free Exercise Clause alone, but the Free Exercise Clause in conjunction with other constitutional protections, such as *freedom of speech* and of the press.... And it is easy to envision a case in which a challenge on *freedom of association* grounds would likewise be reinforced by Free Exercise Clause concerns.

Id. at 881-882 (emphases added).¹³

This doctrine has been recognized by the Third Circuit, *see Salvation Army v. Department of Community Affairs*, 919 F.2d 183, 197 (3d Cir. 1990) (adopting *Smith*'s principle of "'hybrid' claims"); *FOP Newark Lodge No. 12 v. City of Newark*, 170 F.3d at 363 (*citing*, but not deciding, hybrid rights claim), as well as by Pennsylvania courts, *see Zummo v. Zummo*, 574 A.2d 1130 (Pa. Super. Ct. 1990) (adopting the hybrid rights principle in the context of parental authority over children), and by other circuits in the church zoning context. *See Cornerstone Bible Church v. Hastings*, 948 F.2d 464, 473 (8th Cir. 1991) ("Our reversal of the summary judgment orders [on the Church's free speech, freedom of association, and equal protection claims] breathes life back into the Church's 'hybrid rights' claim; thus, the district court should consider this claim on remand"); In *First Covenant Church v. Seattle*, 840 P.2d 174 (Wa. 1992), a land-use case, the Washington Supreme Court determined that a church challenging Seattle's Landmarks Preservation Ordinance

¹³ As in this case, many of the cases cited in *Smith* involved restrictions on the right to freely express religious convictions. *See Cantwell v. Connecticut*, 310 U.S. 296 (1940); *Murdock v. Pennsylvania*, 319 U.S. 105 (1943); *Follett v. McCormick*, 321 U.S. 573 (1944). It would have been no answer in *Follett* to claim that the minister could have sold his religious books outside of McCormick's city limits, or that the evangelists in *Murdock* didn't have to go door-to-door, or that the ministers in *Cantwell* could have played their phonograph record somewhere other than the street corner. Similarly, it is no response to say that Congregation Kol Ami can locate outside of Abington Township, or can be segregated outside of its residential areas.

presented such a hybrid situation. There, the church's claim was "hybrid" because the church building was used to "express Christian belief and message." Plaintiffs' religious mission – which includes its ability to worship, speak, and assemble as a congregation – is burdened by defendants' refusal to permit them the use of the Property. Complaint ¶¶ 71-79; Rabbi Holin Decl. ¶ 22 ("Every day that we go without a permanent spiritual home is a day that our Congregants are unable to fully worship, study and or develop a true sense of the special place that our own sanctuary would offer them: a sense of awe, *the* place which they can point to with pride for themselves and their children as Congregation Kol Ami's spiritual home"); Sloviter Decl. ¶ 17 ("Due to the fact that Kol Ami does not have a permanent home, it is unable to provide certain services to its members that are a standard part of the life of all congregations"); *id.* ¶¶ 18-27. Plaintiffs' claim thus involves "hybrid rights" triggering strict scrutiny.

Pennsylvania Constitution. Finally, strict scrutiny is appropriate under the Pennsylvania Constitution, Article I section 3. Pennsylvania courts have applied the state constitution to permit infringement upon religious liberty only in the most dire cases. *See also Zummo v. Zummo*, 574 A.2d at 1138-39 ("parental authority in matters of religious upbringing may be encroached upon, only upon a showing of a 'substantial threat' of 'physical or mental harm to the child, or to the public safety, peace, order, or welfare.'" (quoting *Wisconsin v. Yoder*, *supra*, 406 U.S. at 230)); *In re Cabrera*, 552 A.2d 1114, 1118 (Pa. Super. Ct. 1989) ("The right to practice religion freely does not include the liberty to expose the community or the child to communicable disease or the latter to ill health or death.'" (quoting *Prince v. Massachusetts*, 321 U.S. 158, 166-67 (1944)).

Strict Scrutiny. The following analysis applies under the strict scrutiny standard of both RLUIPA and the Free Exercise Clause, the strict scrutiny standard is the same:

A law burdening religious practice that is not neutral or not of general application must undergo the most rigorous of scrutiny. To satisfy the commands of the First Amendment, a law restrictive of religious practice must advance “interests of the highest order” and must be narrowly tailored in pursuit of those interests. The compelling interest standard that we apply once a law fails to meet the Smith requirements is not “water[ed] . . . down” but “really means what it says.”

Church of the Lukumi Babalu Aye, 508 U.S. at 546 (citations omitted) *see* RLUIPA § 2(a)(1).

Here, Defendants have no legitimate governmental interest, much less a compelling one, or one that is narrowly tailored, to prohibit a synagogue in residential districts with several dozen Christian churches. *See infra* § I(B)(4).

2. Freedom Of Expression.

“There is no question that religious discussion and worship are forms of speech and association protected by the first amendment.” *Gregoire v. Centennial School Dist.*, 907 F.2d 1366, 1370 (3d Cir. 1990). Plaintiffs’ activities-worship and other religious expressive activities, which by defendants’ laws and actions prohibit within residential districts-fall within the heart of First Amendment protections. Defendants’ Zoning Ordinance violates the Free Speech Clauses of the federal and Pennsylvania Constitutions.¹⁴

The Supreme Court set forth the appropriate standard of review for zoning restrictions that burden expressive activity in *Schad v. Mt. Ephraim*, 452 U.S. 61, 68 (1981): “[W]hen a zoning law infringes upon a protected liberty, it must be narrowly drawn and must further a sufficiently

¹⁴ The standards applied under Article I, sec.7 of the Pennsylvania Constitution are the same as those of the Free Speech Clause of the First Amendment to the United States Constitution. *Bureau of Prof'l. & Occupational Affairs v. State Bd. of Physical Therapy*, 728 A.2d 340 (Pa. 1999).

substantial government interest.”¹⁵ *Id.* at 68 n.7 (“Even where a challenged regulation restricts freedom of expression only incidentally or only in a small number of cases, we have scrutinized the governmental interest furthered by the regulation and have stated that the regulation must be narrowly drawn to avoid unnecessary intrusion on freedom of expression.”).

The Zoning Ordinance forbids places of worship absolutely from Abington’s residential districts. *See supra*, § I(A). Churches are only permitted in three other districts. Complaint ¶¶ 45. Not only has the Congregation been unable to locate any other suitable property in Abington Township after a nearly four-year search, but the districts where it could theoretically locate are unsuitable for Plaintiffs’ religious purposes. Sloviter Decl. ¶¶ 5-11. *See also* Milbert Decl., ¶¶ 4-7 (“I have not found any properties that are currently available in the [CS, M, and AO] zoning districts in Abington Township that met Congregation Kol Ami’s requirements.”). The First Amendment does not force plaintiffs to alter their message based on a municipality’s view that its residential neighborhoods have enough churches:

The defendants’ argument that these rights would not be burdened by an order restricting the times that the plaintiffs could hold religious services in the church to weekends and Wednesday evenings, because the plaintiffs would be free to congregate and worship elsewhere, misses the mark: “[O]ne is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place.” *Schad v. Borough of Mount Ephraim*, 452 U.S. 61, 76-77 This principle is applied with particular force to places, such as church buildings, which have a special spiritual significance to the persons who wish to worship

¹⁵ It is ironic that in the zoning context, the Congregation must rely on cases involving adult entertainment to support its Free Speech claims. *See Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 767 (1995) (“It will be a sad day when this Court casts piety in with pornography, and finds the First Amendment more hospitable to private expletives, than to private prayers.”)(citation omitted). To clarify that religious speech is entitled to this same protection, Congress enacted § 2(b)(1) of RLUIPA. *See supra* Section II.A.1.(a)

there.

McCurry v. Tesch, 738 F.2d 271, 275 (8th Cir. 1984).

Furthermore, defendants discriminate between religious groups in deciding whether they may exist in residential districts. Numerous Christian churches are located in the four R-Districts. Complaint ¶ 48. Discrimination based on religion is as illicit under Free Speech analysis as under Free Exercise analysis: both are impermissible viewpoint discrimination.

Even if defendants had not discriminated against plaintiffs' religious activity, their actions are not reasonable time, place, and manner restrictions. Instead, such restrictions must "serve significant state interests but also must leave open adequate alternative channels of communication." *Schad*, 452 U.S. at 76. In the context of an adult entertainment zoning case, the Third Circuit held en banc that "regulations that restrict the time, place and manner of expression in order to ameliorate undesirable secondary effects of sexually explicit expression" must satisfy "intermediate scrutiny." *Phillips v. Borough of Keyport*, 107 F.3d 164 (3d Cir. 1997). Time, place and manner restrictions to ameliorate "undesirable secondary effects" of religious expression certainly deserve at least equivalent scrutiny. As discussed below, Defendants cannot assert a "significant state interest," and more importantly, they provide practically no alternative channels of communication for plaintiffs. The Free Speech Clause bars so restrictive a limit on religious property uses. *Schad*, 452 U.S. at 76 ("[T]he Borough totally excludes all live entertainment, . . ."); *Keego Harbor Co.*, 657 F.2d at 96 ("The ordinance ... prohibits adult theatres.").

3. Freedom Of Association.

Defendants' policy of refusing to allow plaintiffs to use the Property for religious purposes also violates its freedom of association rights. The ability of Congregation Kol Ami to worship

together in a permanent home conducive to its religious exercise, as well as to pursue other religious activities falls within the core of this protected activity.

The Supreme Court recognized that the First Amendment implicitly protects an independent right of freedom of association:

Effective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association. . . . It is beyond debate that freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of the "liberty" assured by the Due Process Clause of the Fourteenth Amendment, which embraces freedom of speech. Of course, it is immaterial whether the beliefs sought to be advanced by association pertain to political, economic, *religious* or cultural matters, and state action which may have the effect of curtailing the freedom to associate is subject to the closest scrutiny.

NAACP v. Alabama, 357 U.S. 449, 460-61 (1958) (striking down statute requiring disclosure of group members' names and addresses)(citations omitted, emphasis added). Being able to worship together in the manner plaintiffs view as necessary falls squarely within this protection:

An individual's freedom to speak, *to worship*, and to petition the government for the redress of grievances could not be vigorously protected from interference by the State unless a correlative freedom to engage in group effort toward those ends were not also guaranteed. According protection to collective effort on behalf of shared goals is especially important in preserving political and cultural diversity and in shielding dissident expression from suppression by the majority. Consequently, we have long understood as implicit in the right to engage in activities protected by the First Amendment a corresponding right to associate with others in pursuit of a wide variety of political, social, economic, educational, *religious*, and cultural ends.

Roberts v. United States Jaycees, 468 U.S. 609, 622 (1984) (citations omitted; emphases added).

See also *Doe v. Butler*, 892 F.2d 315, 323 (3d Cir. 1989) (discussing, in the context of a zoning case, "the right to associate for the purpose of engaging in those activities protected by the First

Amendment-speech, assembly, petition for the redress of grievances, *and the exercise of religion.*”) (emphasis added). The Third Circuit has further defined the contours of the right to freely associate for purposes of religious expression:

Roberts also made clear that the government action must not only be “intrusive,” but must have an actual, rather than speculative, impact on the group in its exercise of First Amendment rights of expression. *Id.* at 626-28, 104 S.Ct. at 3254-55. Thus far, courts have recognized two different types of impact: (1) the challenged state action may have a demonstrable effect on the group's message, *e.g.*, *Democratic Party of United States v. Wisconsin*, 450 U.S. 107, 101 S. Ct. 1010, 67 L. Ed. 2d 82 (1981); . . . , or (2) the state action may diminish the organization's effectiveness by discouraging individuals from associating with the organization, *e.g.* *NAACP v. Alabama*.

Salvation Army, 919 F.2d at 200-01. It is beyond doubt that plaintiffs meet this standard. Defendants’ Ordinance, and the application of that Ordinance, is “intrusive”: plaintiffs have been denied their request to use the Property even once for two to three hours for the observance of *Shavuot* ceremony. *See* Exhibit F, hereto. Defendants’ actions do “have a demonstrable effect on the group's message.” The Congregation desires to “provide stability, inspiration and hope” to the residential community. Rabbi Holin Decl. ¶ 9. “A synagogue is known by its place of worship.” *Id.* ¶ 5. Kol Ami is “eager to have a spiritual home of [its] own in a residential community because everything that we teach our children and our adults emphasizes the importance of involvement and service to the community.” ‘Do not separate yourself from the community,’ [Ethics of the Fathers], *Pirkei Avot* 2.4.” *Id.* ¶ 8. *See also* Sloviter Decl. ¶¶ 16-25. Defendants’ actions also “diminish the organization's effectiveness by discouraging individuals from associating with the organization.” Sloviter Decl. ¶ 18 (“Due to the fact that Kol Ami does not have a permanent home, a number of its members have resigned to join congregations with a permanent physical home or synagogue.”); *Id.*

¶ 24 (“Because of the Abington Zoning Hearing Board’s decision to reject Kol Ami’s application, a few members have rescinded their commitments to contribute to our capital campaign”). Thus, Abington Township’s Zoning Ordinance operates to “have the effect of curtailing” the Congregation’s “freedom to associate,” and, as *Salvation Army* requires, there is an “actual, rather than speculative impact on the group in its exercise of First Amendment rights of expression.”

Therefore, as under the RLUIPA, the Free Exercise Clause, the Free Speech Clause, and the Pennsylvania Constitution, strict scrutiny must be applied. *Salvation Army*, 919 F.2d at 201 (requiring law to be “narrowly tailored to a compelling interest.”).

4. Burdening the Congregation’s Religious Exercise Is Not The “Least Restrictive Means” To Further A “Compelling Governmental Interest”

Abington Township has not proven – and will not be able to prove – that its prohibiting the Congregation’s religious use of the Property is the “least restrictive means” to further a “compelling governmental interest.” RLUIPA § 2(a)(1)(A), (B); *Church of the Lukumi Babalu Aye*, 508 U.S. at 546; *Salvation Army*, 919 F.2d at 201. The various interests defendants have asserted – traffic and aesthetics – fall short of “compelling” as a matter of law. In any event, there are various means to further those interests that are less restrictive of religious exercise, including means that the Congregation had previously suggested, but which the Neighbors refused to entertain. *See* Complaint ¶¶65.

The Supreme Court has described the “compelling government interests” that may justify burdens on religious exercise as “paramount interests,” *Sherbert*, 374 U.S. at 406, those ““of the highest order,”” *Lukumi*, 508 U.S. at 546. In the land use context, these interests have been described as those in preventing “a clear and present, grave and immediate danger to public health,

peace and welfare,” such as fire safety and occupancy limits. *See, e.g., Antrim Faith Baptist Church v. Commonwealth Dep’t of Labor & Industry*, 460 A.2d 1228, 1230 (Pa. Cmwlth. 1983) (“[J]ust as the state is entitled to prevent church buildings from being constructed too flimsily over the heads of the worshipers, the state is entitled to see to it that fire-safety precautions are taken for the protection of a group which is primarily juvenile in its composition, whether that group meets in a public school building or an equally combustible church building.”).

More specifically, courts routinely reject the claim that “compelling governmental interests” include the interest in avoiding increases in traffic and parking in residential areas. *See* 2001 Opinion, Findings of Fact, ¶¶ 182, 188, 191, Exhibit E, hereto; *see, e.g., Love Church v. Evanston*, 671 F. Supp. 515, 519 (N.D. Ill. 1987), vacated based on standing, 896 F.2d 1082 (7th Cir. 1990) (“While traffic concerns are legitimate, we could hardly call them compelling.”); *American Friends of Soc’y of St. Pius v. Schwab*, 417 N.Y.S.2d 991, 993 (N.Y.A.D. 1979) (“[C]onsiderations of the surrounding area and potential traffic hazards ... are outweighed by the constitutional prohibition against the abridgement of the free exercise of religion and by the public benefit and welfare which is itself an attribute of religious worship in a community.”); *State ex rel. Tampa Company of Jehovah’s Witnesses, etc. v. Tampa*, 48 So. 2d 78, 78 (Fla. 1950) (“The contention that people congregating for religious purposes cause such congestion as to create a traffic hazard has very little in substance to support it. Religious services are normally for brief periods two or three days in the week and this at hours when traffic is at its lightest.”). Indeed, creation of an abnormal traffic pattern does not even justify denial of a special exception under Pennsylvania zoning law, unless that traffic “will pose a substantial threat to the health and safety of the community.” *Orthodox Minyan of Elkins Park v. Cheltenham Twp. Zoning Hearing Bd.*, 552 A.2d 772, 774 (Pa. Cmwlth. 1989).

Nor are aesthetic considerations – such as avoiding any increase in noise and light or reduction of “residential character” – compelling interests. *See* 2001 Opinion, Findings of Fact ¶¶ 182, 189, 190, Exhibit E, hereto; *see, e.g., Open Door Baptist Church v. Clark County*, 995 P.2d 33, 40-41 (Wash. 2000) (furthering “aesthetic and cultural interests” is not a compelling interest); *Alpine Christian Fellowship v. County Comm’rs*, 870 F. Supp. 991, 994 (D. Colo. 1994) (rejecting asserted interest in avoiding additional “noise impacts” of religious school); *Society of Jesus v. Boston Landmarks Comm.*, 564 N.E. 2d 571 (Mass. 1990) (“The government interest in historic preservation, though worthy, is not sufficiently compelling to justify restraints on the free exercise of religion, a right of primary importance.”). *See also Congregation Comm., etc. v. City Council of Haltom City*, 287 S.W.2d 700, 704-05 (Tex. Civ. App. 1956) (“Neither is mere inconvenience to neighbors ... a valid reason to deny a church the right to exist in a residential district. It is hard to visualize a church being constructed in a residential district without inconveniencing someone. To restrict churches to areas where no one will be inconvenienced would be, in effect, excluding churches from residential districts.”). Again, these interests are not even strong enough to support the denial of a special exception under statutory law. *Berlant v. Zoning Hearing Board*, 279 A.2d 400, 402 (Pa. Cmwlth. 1971) (rejecting asserted interest in avoiding “greatly increased traffic congestion” and destruction of “the character of their neighborhood by increasing the presence of what [neighbors] refer to as ‘creeping institutionalism.’”)

Nor is the maintenance of property values. *See* 2001 Opinion, Findings of Fact, ¶¶ 183-85, Exhibit E, hereto. In a case involving proposed land use for religious worship and instruction in an exclusive residential neighborhood, the Supreme Court of Indiana found insufficient the “private interest in protecting property from depreciation . . . and a desire to keep a neighborhood as exclusive

as possible,” holding that “the general public interest in the moral and intellectual education of the young far outweighs the private interest affected by any depreciation in neighboring property values.” *Board of Zoning Appeals v. Schulte*, 172 N.E.2d 39, 44 (Ind. 1961); see *Greentree at Murray Hill Condo. v. Good Shepherd Episcopal Church*, 550 N.Y.S.2d 981, 989 (1989).

Finally, defendants cannot plausibly claim that its interest in prohibiting these external effects is “compelling” unless it prohibits them throughout the Township. *Lukumi*, 508 U.S. at 546-47 (“[A] law cannot be regarded as protecting an interest ‘of the highest order’ ... when it leaves appreciable damage to that supposedly vital interest unprohibited.”) (internal quotations and omitted); see *FOP Newark Lodge No. 12 v. City of Newark*, 170 F.3d 359, 366-67 (3d Cir 1999); *Gregoire v. Centennial School Dist.*, 907 F.2d 1366, 1379 (3d Cir. 1990). In fact, Abington Township does not prohibit these external effects completely even within the residential district where the Property is located. See 2001 Opinion, Conclusions of Law, ¶ 1, at 20, Exhibit E, hereto (concluding that zoning ordinance covering Property allows municipal complex and emergency service facilities by special exception); § I(A), *supra* (describing other permitted uses in residential districts). If these problems posed such an immediate threat to public health and safety, Defendants would not tolerate them anywhere. Thus none of these interests is compelling. See *State ex rel. Lake Drive Baptist Church v. Village of Bayside Bd. Of Trustees*, 108 N.W. 2d 288, 300-01 (Wis. 1961) (concurring opinion) (“These factors, including traffic problems, traffic conditions and effect of depreciating property values, loss of tax revenue, noise and other inconveniences, and that churches are detrimental and do not further public morals, have been considered and rejected in the previously cited cases.”).

Even if defendants’ asserted interests were “compelling,” the Township cannot prove that forbidding the Congregation from using the Property for worship is the “least restrictive means” to further that interest. RLUIPA § 2(a)(1)(B); *see, State ex re. Lake Drive Baptist Church v. Village of Bayside Bd. Of Trustees*, 108 N.W. 2d 288, 301 (Wis. 1961) (concurring opinion) (“The exclusion of churches from residential districts *has no substantial relationship* to the promotion of public health, safety, morals or general welfare.”) (emphasis added); *FOP Newark Lodge No. 12 v. City of Newark*, 170 F.3d at 366 (finding city’s no-beard policy not narrowly tailored to government interest of safety); *Black Hawk v. Commonwealth of Penn.*, 114 F. Supp. 327, 333 (M.D. Pa. 2000) (finding state’s proposed killing of religiously significant bear not narrowly tailored to government interest of avoiding spread of rabies). Indeed, although it is not their burden, plaintiffs can readily show that there are various ways to address the government and neighborhood interests without significantly restricting religious exercise. For example, the Congregation long ago offered voluntarily to undertake various measures – all of which were rejected – to address the expressed concerns. Complaint ¶ 65. Of course, this is not an exhaustive list of ways both to address the asserted interests and to allow the Congregation to have a home for worship; one can easily imagine more. But these examples serve to illustrate, at the very least, that a flat-out prohibition on the proposed religious use of the Property is not the “least restrictive means” to serve any of the interests expressed.¹⁶

¹⁶ The Neighbors’ complete refusal to engage in a discussion with the Congregation about the Neighbors’ concerns, including a reasonable accommodation for the proposed use of the Property by Kol Ami, and the corresponding insistence by the Neighbors on excluding the Congregation from their neighborhood, also suggests that the asserted interests may not be the only ones at work here. *See, e.g., American Friends Soc’y of St. Pius v. Schwab*, 417 N.Y.S.2d 991, 994 (N.Y.A.D. 1979) (“Human experience teaches us that public officials, when faced with pressure
(continued...)”)

C. The Zoning Ordinance Was Applied To Plaintiffs In A Discriminatory And Unreasonable Manner.

Defendants' prohibition of the Congregation from the R-1 District while permitting other established and Christian churches to exist and expand in its residential districts violates RLUIPA, the Free Exercise Clause, the Free Speech Clause, the Equal Protection Clause, and their Pennsylvania counterparts. Two Christian denominations were permitted to use the Property for religious assembly and instruction for forty-four years prior to the Congregation's purchase. Complaint ¶ 21. At least twenty-six Christian churches exist in residential districts in Abington Township. Complaint ¶ 48 (listing churches). No Jewish synagogues or other non-Christian places of worship exist in Abington Township's residential districts. *Id.* Abington Township's population is approximately 20% Jewish. Complaint ¶ 50.

RLUIPA commands that "No government shall impose or implement a land use regulation that discriminates against any assembly or institution on the basis of religion or religious denomination. RLUIPA § 2(b)(2). This statutory requirement codifies the First Amendment's absolute prohibition of governmental sect preferences, a prohibition that also applies independently here. *Larson v. Valente*, 456 U.S. 228, 244 (1982) ("[T]he clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another."). Therefore, even if the Township had a legitimate governmental interest for discriminating against plaintiffs – and it does not – it would still be forbidden from such discrimination.

¹⁶(...continued)

to bar church uses by those residing in a residential neighborhood, tend to avoid any appearance of an antireligious stance and temper their decision by carefully couching their grounds for refusal to permit such use in terms of traffic dangers, fire hazards and noise and disturbance, rather than on such crasser grounds as lessening of property values or loss of open space or entry of strangers into the neighborhood or undue crowding of the area.")

Defendants' actions are also prohibited by the Federal and Pennsylvania Equal Protection Clauses. The result is the same. "Equal protection . . . is essentially a direction that all persons similarly situated should be treated alike."¹⁷ *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432 (1985) (excluding group home for the mentally retarded as a permitted use in zoning district violated the Equal Protection clause). This Circuit has held that, to state a claim for religious discrimination under the Equal Protection Clause, the claimant must be "similarly situated" as other individuals or groups. For example, in *Johnson v. Horn*, 150 F.3d 276 (3d Cir. 1998)¹⁸ the Third Circuit held that Jewish prisoners were not sufficiently similarly situated to Muslim prisoners to receive hot kosher meals:

Even assuming that the pork alternative is offered to accommodate Muslims, Muslim and Jewish inmates are not similarly situated. . . Moreover, the pork substitutes are provided from items already in the Prison kitchen, but the proposed hot kosher diet would require the Prison to undertake the extra effort to obtain frozen meals from a new vendor and specially heat them in a conventional or microwave oven. Under these circumstances, Muslim and Jewish inmates are not similarly situated, because the accommodation of Jewish inmates would require substantially greater effort than the accommodation of Muslim inmates.

150 F.3d at 284-85. However, in the present case, plaintiffs' Congregation is similarly situated to the established Christian churches already existing in residential neighborhoods. Accommodation of the plaintiffs' religious needs in the same manner would take no effort at all: defendants would

¹⁷ Article I, sec.26 of the Pennsylvania Constitution is analyzed under the same standards as the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. *Love v. Borough of Stroudsburg*, 597 A.2d 1137 (Pa. 1991).

¹⁸ *Johnson* was overruled in part by the Third Circuit in *DeHart v. Horn*, 227 F.3d 47 (3d Cir. 2000), based on the Supreme Court's creation of the test in *O'Lone v. Estate of Shabazz*, 482 U.S. 342 (1987). However, the *O'Lone* test applies only in the context of free exercise rights for prisoners, and the reasoning of *Johnson* continues to apply with force in the present case.

simply not fine or otherwise sanction plaintiffs for assembling for purposes of religious activity.

The Equal Protection Clause also mandates strict scrutiny because interference with a fundamental right is involved:

A government action is subject to "strict scrutiny" under the Equal Protection Clause of the Fourteenth Amendment if it discriminates against a "suspect class," or if it interferes with a "fundamental right." *Kadmas v. Dickinson Pub. Sch.*, 487 U.S. 450, 457-58 (1988). The plaintiffs argue that the violation of their fundamental right to free exercise of religion constitutes an equal protection violation. However, in order to maintain an equal protection claim with any significance independent of the free exercise count which has already been raised, the plaintiffs must also allege and prove that they received different treatment from other similarly situated individuals or groups. *City of Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432 (1985); *Andrews v. Philadelphia*, 895 F.2d 1469, 1478 (3d Cir.1990); *Jordan by Jordan v. Jackson*, 15 F.3d 333, 355 (4th Cir.1994).

Brown v. Board of Mahaffey, Pa., 35 F.3d 846, 850 (3d Cir. 1994). As described above, the Congregation has "received different treatment from other similarly situated individuals or groups." In a township whose Jewish population is about one-fifth of the total population, many Christian churches exist in Abington's residential districts while there is not one single synagogue. Since this discrimination infringes on a "fundamental right," and employs a "suspect classification," the Equal Protection Clause again mandates strict scrutiny. See *City of New Orleans v. Dukes*, 427 U.S. 297, 303 (1976); *Johnson v. Robison*, 415 U.S. 361, 375 n.14 (1974).

To justify this discriminatory treatment, defendants must prove that they have a narrowly tailored compelling interest. As set forth above, they have none.

II. WITHOUT THIS COURT'S INTERVENTION, PLAINTIFFS WILL SUFFER SEVERE AND IRREPARABLE INJURY.

Plaintiffs clearly will suffer irreparable injury in the absence of injunctive relief. When the loss of First Amendment freedoms are at stake, the finding of irreparable injury is satisfied by a showing of any such loss, even for minimal periods of time. *Elrod v. Burns*, 427 U.S. 347, 373 (1976) (plurality opinion) ("The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury."); *see also* 11 Wright & Miller, Federal Practice and Procedure § 2948, at 440 (1992) ("When an alleged deprivation of a constitutional right is involved, most courts hold that no further showing of irreparable injury is necessary."). *Cf. Western Presbyterian Church v. Board of Zoning Adjustment*, 849 F. Supp. 77 (D.D.C. 1994) (finding likelihood of success of claim that church's feeding of the poor is protected under Religious Freedom Restoration Act), *appeal dismissed*, 1995 U.S. App. LEXIS 5085 (D.C. Cir. 1995). In the present case the harm is palpable. *See* Rabbi Holin Decl. ¶ 22 ("Every day that we go without a permanent spiritual home is a day that our Congregants are unable to fully worship, study or develop a true sense of the special place that our own sanctuary would offer them."). Future monetary damages will not be sufficient to redress the irreparable harm faced by plaintiffs. *See ACS Enters. v. Comcast Cablevision L.P.*, 857 F. Supp. 1105 (E.D. Pa. 1994).¹⁹

¹⁹ Compare with *Trinity Resources, Inc. v. Twp. of Delanco*, 842 F. Supp. 782, 800 (D.N.J. 1994) (Holding that hardship would not exist for church since religious services continued to take place at the location, and therefore, "no immediate threat of any governmental interference with plaintiffs' religious use of the property" existed.).

III. NO HARM WOULD OCCUR TO THE NON-MOVING PARTIES BY GRANTING THIS INJUNCTION.

The potential harm plaintiffs would suffer from a denial of this motion far outweighs any harm defendants could allege. As discussed above, the harm to plaintiffs from the deprivation of their First Amendment rights is severe. By contrast, the harm to defendants is virtually no-existent. Plaintiffs request only that the government not interfere, temporarily, with plaintiffs use of their Property for religious exercise, starting with a two-to-three hour ceremony on *Shavuot* – the Confirmation ceremony, May 28, 2001. It would be an odd judicial determination indeed to find that allowing a *Shavuot* ceremony harms anyone at all, much less the Township where it occurs.

IV. THE PUBLIC INTEREST WOULD BE SERVED BY GRANTING THIS INJUNCTION.

Finally, the fourth criterion for a preliminary injunction is satisfied as well: the public interest will be served by the granting of the injunction. By passing and applying the Ordinance at issue, this local government has arrogated to itself the decision that its residential areas have “enough” houses of worship – never mind that none are synagogues – and that, if any of them should close its doors, it should not be replaced. The public interest can *only* be served by promptly enjoining this repugnant and unlawful rule. See *American Civil Liberties Union*, 929 F. Supp. at 849 (holding that “the public interest will be served by granting the preliminary injunction” of an unconstitutional law).

CONCLUSION

For the foregoing reasons, Plaintiffs' Motion for a Preliminary Injunction should be granted.

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