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14 **UNITED STATES DISTRICT COURT**  
15 **CENTRAL DISTRICT OF CALIFORNIA**

16 ELSINORE CHRISTIAN CENTER, )  
A CALIFORNIA NONPROFIT )  
17 CORPORATION, and GARY )  
HOLMES, )

18 Plaintiffs, )

19 v. )

20 CITY OF LAKE ELSINORE, A )  
21 MUNICIPAL CORPORATION OF )  
THE STATE OF CALIFORNIA, )  
22 LAKE ELSINORE )  
REDEVELOPMENT AGENCY, A )  
23 MUNICIPAL CORPORATION OF )  
THE STATE OF CALIFORNIA, )  
24 ROBERT A. SCHIFFNER, )  
PAMELA BRINLEY, DANIEL )  
25 METZE, GENIE KELLY, KEVIN )  
PAPE, and DOES 1-10 inclusive, )  
26 Defendants. )

CASE NO. CV 01-4842 SVW (RCX)  
PLAINTIFFS' RESPONSE TO  
TENTATIVE RULING DATED JUNE  
23, 2003, INCLUDING PLAINTIFFS'  
NOTICE OF MOTION AND MOTION  
FOR PARTIAL SUMMARY  
JUDGMENT AND OPPOSITION TO  
DEFENDANTS' MOTION FOR  
SUMMARY JUDGMENT BASED ON  
FRCP 56(F)

Date: August 4, 2003

Time: 12:30 p.m \_\_\_\_\_

Courtroom: 6

Judge Stephen V. Wilson

1 TO EACH PARTY AND THEIR ATTORNEYS OF RECORD:

2 PLEASE TAKE NOTICE that on August 4, 2003 at 12:30 p.m. or as soon  
3 thereafter as this matter can be heard in Courtroom 6 of this Court located at 312  
4 N. Spring St., Los Angeles, California, Plaintiffs, by and through counsel, will and  
5 hereby move this Court, under FED. R. CIV. P. 56, for summary judgment in their  
6 favor and against the City of Lake Elsinore, a municipal corporation of the State of  
7 California (hereinafter "City"), Lake Elsinore Development Agency, a municipal  
8 corporation of the State of California, Robert A. Schiffner, Pamela Brinley, Daniel  
9 Metze, Genie Kelly, Kevin Pape, and DOES 1-10 inclusive, Defendants.

10 Except as indicated in the Rule 56(f) Declaration of Robert H. Tyler, and in  
11 Section III of the Memorandum of Points and Authorities attached hereto,  
12 Plaintiffs assert that this case presents no disputed material facts as to claims  
13 brought under 42 U.S.C. § 1983 for violations of Plaintiffs' right of Free Speech,  
14 Free Exercise, and Equal Protection under the First and Fourteenth Amendments of  
15 the United States Constitution. For the reasons more particularly set forth in the  
16 attached Memorandum of Points and Authority, Plaintiffs are entitled to summary  
17 judgment, as a matter of law, for those claims under 42 U.S.C. § 1983.

18 Except as indicated in the Rule 56(f) Declaration of Robert H. Tyler, and in  
19 Section III of the Memorandum of Points and Authorities attached hereto,  
20 Plaintiffs further assert that this case presents no disputed material facts as to  
21 claims brought under 42 U.S.C. § 2000cc(b) of the Religious Land Use and  
22 Institutionalized Persons Act ("RLUIPA"). For the reasons set forth in the  
23 attached Memorandum of Points and Authority, Plaintiffs are entitled to summary  
24 judgment, as a matter of law, for those claims under 42 U.S.C. § 2000cc(b).

25 Furthermore, Plaintiffs pray that the Court will find and declare, for future  
26 purposes, that Defendants' entire zoning ordinance, including without limitation  
27 provisions defining the C-1 zone, facially and as-applied violate RLUIPA and 42  
28 U.S.C. § 1983 for the reasons set forth herein.

1 The grounds for the Motion are more fully set forth in the Plaintiffs'  
2 Memorandum of Points and Authorities that follows this motion; Plaintiffs'  
3 Statement of Uncontroverted Facts in Support of Partial Summary Judgment;  
4 accompanying declarations and exhibits; and all other pleadings, exhibits,  
5 declarations and other documents previously filed with the Court in this case.  
6 Plaintiffs' hereby respectfully request that this Court take judicial notice of all said  
7 pleadings, exhibits, declarations and other documents previously filed with the  
8 Court pursuant to FED. R. EVID. Rule 201. (Copies of all said exhibits are being  
9 separately and concurrently filed under the cover entitled "Exhibits in Support of  
10 Plaintiffs' Response to Tentative Ruling Dated June 23, 2003, Including Plaintiffs'  
11 Notice of Motion and Motion for Partial Summary Judgment and Opposition to  
12 Defendants' Motion for Summary Judgment Based on F.R.C.P. Rule 56(f).")

13 Plaintiffs' Motion for Partial Summary Judgment is made following the  
14 telephonic conference of counsel pursuant to Local Rule 7-3 which took place on  
15 July 7, 2003 between attorneys Jules S. Zeman (representing Defendants) and  
16 Robert H. Tyler (representing Plaintiffs) and is made in response to the Court's  
17 Order and Tentative Ruling dated June 23, 2003 (filed on June 24, 2003) and the  
18 subsequent Order dated and filed on July 10, 2003.

19 Respectfully submitted,

20  
21 ALLIANCE DEFENSE FUND  
22  
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24

25 Dated: July 18, 2003

25 By: \_\_\_\_\_

26 Robert H. Tyler  
27 Attorney for Plaintiffs  
28

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1 **I. Neither Standing Nor Mootness Bars Any of Plaintiffs' Claims**

2 In response to the Court's request and Tentative Ruling, the Church  
3 addresses the following issues of mootness and standing.

4 **A. At a Minimum, The Case Is Not Moot Because Plaintiffs Have Standing**  
5 **to Pursue Damages and Declaratory Relief for Completed Injuries.**

6 It is undisputed that, but for the City's denial of the CUP, the Church would  
7 have been able to worship at the Subject Property. So long as that situation  
8 persisted, it was similarly undisputed that the Church had standing to challenge the  
9 terms of the ordinance defining the C-1 zone, and the denial of the CUP pursuant  
10 thereto. And, if successful, Plaintiffs would be entitled to damages, a declaration,  
11 and an injunction that would allow religious exercise at the Subject Property. Now  
12 that the church no longer has access to the Subject Property, the Church still has  
13 standing to obtain damages caused by the unconstitutional denial of the CUP for  
14 that Property, pursuant to the requirements of the C-1 zone.<sup>1</sup> And so long as  
15 damages relief is available, so is declaratory relief.

16 **B. Loss of the Subject Property Does Not Eliminate, but Shifts and**  
17 **Intensifies Ongoing Injuries That an Injunction Could Remedy.**

18 Substantial Burden Claims. Even after—indeed, especially after—loss of  
19 the Subject Property, it remains that the Church is prohibited from ministry in the  
20 downtown area, which remains a “substantial burden” on its religious exercise.  
21 And even today, the Church continues to wander in search of a home, both within  
22 and beyond the C-1 zone. The Court may still relieve this ongoing injury by  
23 enjoining the application of any C-1 zone restriction (or any other zone’s  
24 restriction) that would prohibit the Church from locating downtown.

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26  
27 <sup>1</sup> See *Freedom Baptist Church v. Township of Middleton*, 204 F. Supp. 2d 857,  
28 860, (E.D. Pa. 2002) (finding case not moot, even after variance granted, because  
damages claim remained). See also *Buckhannon Bd. and Care Home, Inc. v. W.*  
*Va. Dep’t of Health and Human Res.*, 532 U.S. 598, 121 S. Ct. 1835, 149 L.Ed.2d  
855 (2001) (no mootness where plaintiff “has a cause of action for damages”).

1        Equal Treatment / Discrimination / Irrationality Claims. The Church’s claim  
2 for injunctive relief persists here as well. The Supreme Court has held that “[t]he  
3 ‘injury in fact’ in an equal protection case ... is the denial of equal treatment  
4 resulting from the imposition of the barrier, not the ultimate inability to obtain the  
5 benefit.”<sup>2</sup> The City’s first discriminatory barrier was to prohibit churches  
6 throughout many areas of the City, absent a CUP, while allowing some non-  
7 religious assemblies as of right in at least some zones, including the C-1 zone.  
8 SUF ¶ 16-18, 31. Relief for this injury is “equal footing,” an injunction to  
9 eliminate the statute’s discrimination—not necessarily to grant a CUP. Thus, the  
10 fact that the Court may no longer award a CUP at the original Subject Property is  
11 irrelevant. Instead, the Court should enjoin the application of any permit  
12 requirement against the Church that does not also apply to a nonreligious  
13 assembly. Absent such an injunction, the Church remains susceptible to illegal  
14 disparate treatment in every zone where it seeks property and the disparity exists.

15        The City has also discriminated among religious uses by treating the CUP  
16 application of at least one church—Bread of Life Ministries—on better terms than  
17 the Church’s CUP application. Appropriate relief for this injury is to require the  
18 City to treat any Church CUP application at least as well as that of Bread of Life’s.

19        The loss of the Subject Property does not moot this form of relief because  
20 “the defendant’s allegedly unlawful activity is capable of repetition, yet evading  
21 review.” *Friends of the Earth, Inc. v. Laidlaw Envtl. Serv., Inc.*, 528 U.S. 167,  
22 190, 120 S. Ct. 693, 145 L. Ed. 2d 610 (2000). The City’s actions cannot  
23 practically be litigated within the timeframe of property sales and are likely to  
24 continue. Because the Church was denied a CUP, escrow was cancelled and the  
25 property was sold to a third party. The City has denied the Church a CUP on three

26 \_\_\_\_\_  
27 <sup>2</sup> *Gratz v. Bollinger*, -- U.S. --, 123 S. Ct. 2411, 2423 (2003); *see also Bras v.*  
28 *California Pub. Util. Comm’n.*, 59 F.3d 869, (9th Cir. 1995); *Aiken v. Hackett*, 281  
F.3d 516, 519 (6th Cir. 2002) (if plaintiffs allege on-going “constitutional violation  
and seek forward-looking relief to level the playing field, [they] need only show  
that the racial preference hinders their ability to ‘compete on an equal footing.’”).

1 occasions in both commercial and industrial zones. *See* SUF ¶ 58. Such a pattern  
2 creates a reasonable expectation that the City will continue to unlawfully deny the  
3 Church a CUP in a way that makes it possible for the City to continue “evading  
4 review.” An injunction is appropriate and necessary to avoid that evasion.<sup>3</sup>

5 Unbridled Discretion Claim. The Court has tentatively accepted  
6 Defendants’ argument that, because the Church will allegedly only locate in the C-  
7 1 zone, the Church lacks standing to challenge the discretionary CUP process  
8 throughout the jurisdiction. Even if it were true that the Church will not consider  
9 another zone, which it is not, *See* Ex. Y ¶¶2,7, the Supreme Court has rejected this  
10 argument in the context of Free Speech Clause unbridled discretion claims. *See*  
11 *City of Lakewood v. Plain Dealer Pub. Co.*, 486 U.S. 750, 755-56, 108 S. Ct. 2138,  
12 100 L. Ed. 2d 771 (1988) (“[O]ur cases have long held that when a licensing  
13 statute allegedly vests unbridled discretion in a government official over whether  
14 to permit or deny expressive activity, one who is subject to the law may challenge  
15 it facially without the necessity of first applying for, and being denied, a license.”)<sup>4</sup>

16 In other words, it does not matter where the Church has *actually* applied, but  
17 whether it *might* apply in a zone subject to the unconstitutional requirement. And  
18 that has been true at all times covered by this lawsuit. When the Church first  
19 sought a new location, the ordinance required churches to obtain permits to locate  
20 *anywhere* in the City. That the Subject Property happened to be located in the C-1  
21 zone had no effect on whether the Church would be subject to this discretion. Now  
22 that the Church has lost the Subject Property and current property, it has resumed  
23 its search in zones throughout the jurisdiction (not because locating elsewhere  
24

---

25 <sup>3</sup> Disparate treatment across religious lines—whether on the face of an ordinance  
26 or as-applied, whether among religions or between the religious and the secular—  
27 is not just discriminatory, but irrational. *See infra* § II.E. Thus injunctive remedies  
28 still available for the two claims of disparate treatment discussed above are also  
available for the two claims of irrationality based on the same facts.

<sup>4</sup> *See also Forsyth County v. Nationalist Movement*, 505 U.S. 123, 129-30, 112 S.  
Ct. 2395, 2400-01, 120 L. Ed. 2d 101 (1992) (challenging standardless discretion  
in determining fee for parade permit).

1 suddenly imposes no burden on the Church’s ministry, but because the Church  
2 simply has no alternative if it wants to exist at all). *See* SUF ¶ 61-62. And even  
3 after the recent amendment to the ordinance, many of the zones where the Church  
4 seeks to locate require a CUP for churches. Therefore, the Church has been, and  
5 continues to be, injured by the unfettered discretion of the City’s permitting  
6 process, and so has standing to sue for the full span of time covered by this lawsuit.

7 **II. Plaintiffs’ Motion for Partial Summary Judgment Should Be Granted**

8 **A. Plaintiffs Are Entitled to Summary Judgment on Their Claim That the**  
9 **City’s CUP Process Unconstitutionally Confers Unbridled Discretion**

10 Both when the Church applied for a CUP and to this day, the City’s CUP  
11 process is unconstitutional because it grants City officials unbridled discretion to  
12 restrict protected First Amendment expression. The Supreme Court has repeatedly  
13 held that requiring a license to exercise a constitutional right is an unlawful prior  
14 restraint when public officials are granted unbridled discretion. *See, e.g., FW/PBS,*  
15 *Inc. v. City of Dallas*, 493 U.S. 215, 225-226, 110 S. Ct. 596, 107 L. Ed. 2d 603  
16 (1990).<sup>5</sup> The Court summarized its lengthy prior restraint jurisprudence as follows:

17 [A] scheme that places unbridled discretion in the hands of a government  
18 official or agency constitutes a prior restraint and may result in censorship....  
19 It is settled by a long line of recent decisions of this Court that an ordinance  
20 which ... makes the peaceful enjoyment of freedoms which the Constitution  
21

22 <sup>5</sup> It is a truism that “worship in . . . churches and preaching from pulpits” enjoy  
23 “the guarantee[] of freedom of speech” and occupy a “high estate under the First  
24 Amendment.” *Murdock v. Pennsylvania*, 319 U.S. 105, 109, 63 S. Ct. 890, 87 L.  
25 Ed. 2d 1290 (1943). It is equally true that “adult speech” is of lesser value than  
26 other types of speech. *See, e.g., Doran v. Salem Inn, Inc.*, 422 U.S. 922, 932, 95 S.  
27 Ct. 2561, 2568, 45 L. Ed. 2d 648 (1975) (“nude dancing may involve only the  
28 barest minimum of protected expression”). Accordingly, zoning ordinances should  
afford churches’ speech *at least* the same protection afforded adult businesses.  
One First Amendment protection available even to adult businesses is that zoning  
regulations may not make speech contingent on the unbridled discretion of  
decision-makers. *See, e.g., Renton v. Playtime Theaters, Inc.*, 475 U.S. 41, 54, 106  
S. Ct. 925, 89 L. Ed. 2d 29 (1986). But here, the City’s zoning ordinances vest  
unbridled discretion in decision-makers to restrict religious speech of churches to a  
degree that would be impermissible even for the speech of adult businesses.

1 guarantees contingent upon the uncontrolled will of an official – as by  
2 requiring a permit or license which may be granted or withheld in the  
3 discretion of such official – is an unconstitutional censorship or prior  
4 restraint upon the enjoyment of those freedoms.

5 *Id.*<sup>6</sup> The principle that constitutional rights may not be subject to unbridled  
6 discretion applies to free speech and free exercise rights with equal force. *See*  
7 *Niemotko v. Maryland*, 340 U.S. 268, 271, 71 S. Ct. 328, 95 L. Ed. 280 (1951).

8 Here, several provisions of the zoning code that describe the findings  
9 predicate to granting a CUP fail to constitutionally limit the discretion granted City  
10 officials in making that decision. The language of the code is either *identical* or  
11 indistinguishable from language courts have repeatedly struck down in the past.<sup>7</sup>

12 First, § 17.74.060(B) provides that the Commission may deny a church a  
13 CUP, thereby censoring its expression, unless it finds that the church’s “proposed  
14 use will not be detrimental to the general health, safety, comfort, or general welfare  
15 of persons residing or working within the neighborhood of the proposed use or the  
16 City, or injurious to property or improvements in the neighborhood or the City.”  
17 Ex. Q (emphasis added). Such amorphous, malleable language lacks the “narrow,  
18 objective and definite standards” required to satisfy the First Amendment,  
19 *Shuttlesworth*, 394 U.S. 147, 150-51, 89 S. Ct. 935, 22 L. Ed. 2d 162 (1969), and  
20 has been repeatedly held unconstitutional.<sup>8</sup>

21 \_\_\_\_\_  
22 <sup>6</sup> *See also Schad v. Borough of Mount Ephraim*, 452 U.S. 61, 85, 101 S. Ct. 2176,  
23 68 L. Ed. 2d 671 (1981) (Stevens, J., concurring) (municipalities “may not regulate  
24 protected activity when the only standard provided is the unbridled discretion of a  
25 municipal official.”); *City of Lakewood v. Plain Dealer Publishing Co.*, 486 U.S.  
26 750, 760, 108 S. Ct. 2138, 100 L. Ed. 2d 771 (1988) “[W]ithout standards to bind  
27 the licensor, speakers denied a license will have no way of proving that the  
28 decision was unconstitutionally motivated, and, faced with that prospect, they will  
be pressured to conform their speech to the licensor's unreviewable preference.”

<sup>7</sup> In addition, to the problems identified *infra*, the City’s CUP requirements are also  
unconstitutional because they fail to provide any time limits. In *FW/PBS*, 493 U.S.  
at 229, the Court held that an inspection requirement restricting speech wrongfully  
vested unbridled discretion because time limits were not set for officials to decide  
on a permit application. So it is with the ordinance here regarding CUP decisions.

<sup>8</sup> *See, e.g., Dease v. City of Anaheim*, 826 F. Supp. 336, 343-344 (C.D. Cal. 1993)  
(CUP process unconstitutional by allowing unbridled discretion in assessing

1 Similarly, § 17.74.060(E), vests unconstitutional discretion in City officials  
2 by allowing them to deny CUPs to churches because “there will be no adverse  
3 effect on abutting property or the permitted and normal use thereof.” Ex. Q  
4 (emphasis added). Because this language leaves to the whim of City officials what  
5 is “adverse,” it lacks the objectivity required under the First Amendment and has  
6 been held unconstitutional.<sup>9</sup>

7 Similarly vague language in § 17.74.060(F) and § 17.74.050 also fails  
8 scrutiny. The former gives officials authority to formulate “adequate conditions  
9 and safeguards” pursuant to § 17.74.050 before issuing a CUP; the latter allows  
10 officials discretion to grant CUPs “subject to such conditions as the Commission  
11 may prescribe,” including “such other conditions as the Commission may deem  
12 necessary to ensure compatibility of the use with surrounding development and  
13 preserve the public health, safety, and welfare.” Ex. Q. Because these conditions  
14 represent no meaningful constraint on the City’s ability to prohibit protected  
15 speech, they are unconstitutional.<sup>10</sup>

16  
17 whether proposed land use was “detrimental to the peace, health, safety, and  
18 general welfare” (emphasis added); *3570 E. Foothill Blvd. v. City of Pasadena*,  
19 912 F. Supp. 1268, 1274-1275 (C.D. Cal. 1996) (same); *Shuttlesworth*, 394 U.S. at  
20 150-51 (discretion too great where officials may limit expression based on their  
21 ideas of “public welfare, peace, safety, health, decency, good order . . .”);  
22 *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 557, n. 8, 95 S. Ct. 1239,  
23 43 L. Ed. 2d 448 (1975) (“best interest of the community” too discretionary).  
24 <sup>9</sup> See, e.g., *Santa Fe Springs Realty Corp., v. City of Westminster*, 906 F. Supp.  
25 1341, 1365, 1367 (C.D. Cal. 1995) (striking provisions requiring officials to decide  
26 whether a “proposed location [would] ‘adversely affect’ the use of a church”);  
27 *Dease*, 826 F. Supp. at 343-344 (CUP process unconstitutional because it allowed  
28 officials to deny CUP if use would “adversely affect” a school or church); *TJ’s*  
*South, Inc. v. Town of Lowell*, 895 F. Supp. 1124, 1126 (N.D. Ind. 1995)  
(excessive discretion in ordinance allowing officials to determine whether special  
exception “w[ould] not cause potential injury to the value of other property.”)  
<sup>10</sup> See, e.g., *Lakewood*, 486 U.S. at 769 (unconstitutional discretion vested in  
mayor who could add “any other terms and conditions deemed necessary and  
reasonable”) (emphasis added); *Dease, supra*; *Franken Equities, L.L.C. v. City of*  
*Evanston*, 967 F. Supp. 1233, 1237 (D. Wyo. 1997) (striking down CUP condition  
based on whether proposed land use was “compatible with surrounding land  
uses”).

The City’s ordinances also give the Community Development Director  
(CDD) the unrestricted ability to determine “other uses [that are] in accord with the  
purpose of [the zoning area] and hav[e] characteristics similar to those uses”  
approved for that zone. See §§ 17.40.020(S); 17.44.020(V); 17.48.020(Q);

1 Because the Church was denied its CUP by the City’s application of the  
2 “standards” in §§ 17.74.060(B)(E)and (F) and § 17.74.050, that application was  
3 unconstitutional. Moreover, the City’s CUP process is *facially* unconstitutional, in  
4 whatever zone it has been (or may be) applied.<sup>11</sup>

5 **B. Plaintiffs Are Entitled to Summary Judgment on Their Substantial**  
6 **Burden Claim Under the Free Exercise Clause.**

7 By allowing for individualized assessments in its zoning ordinance, the Free  
8 Exercise Clause requires the City to justify denial of a CUP under strict scrutiny.

9 ***1. The Applicable Standard of Review Is Strict Scrutiny.***

10 The Tentative Order rejects Plaintiffs’ Free Exercise claims for the reasons  
11 stated in the Court’s July 11, 2001 preliminary injunction order. This Court should  
12 reconsider and join the overwhelming weight of authority in holding that the  
13 discretionary denial of a zoning permit, as here, is *not* a neutral law of general  
14 applicability. *See Employment Div. v. Smith*, 494 U.S. 872, 879, 110 S. Ct. 1595,

15  
16  
17 17.52.020(W); 17.54.020(X); 17.56.020(T); 17.60.020(X). These ordinances place  
18 no controls or limits on the CDD’s ability to permit or deny other “similar uses” as  
19 a matter of right within seven different zoning areas in the City, *see* SUF ¶ 21, and  
20 are therefore unconstitutional. *See supra Shuttlesworth; Dease; Niemothko; see also*  
*Gaudiya Vaishnava Soc. v. City and County of San Francisco*, 952 F.2d 1059 (9<sup>th</sup>  
21 Cir. 1990) (“Because the Chief of Police is granted complete discretion in denying  
22 or granting such permits, we hold that the City’s ordinance is not saved from  
23 constitutional infirmity by its commercial peddler’s permit system.”).

24 <sup>11</sup> In addition, when the Church originally applied for a CUP, it was not allowed  
25 *anywhere* in the City without obtaining a permit. It is well-established that such a  
26 requirement of a license in order to exercise a constitutional right violates the First  
27 Amendment. *See Staub*, 355 U.S. at 322 (reiterating that “mak[ing] the peaceful  
28 enjoyment of freedoms which the Constitution guarantees contingent upon the  
uncontrolled will of an official – as by requiring a permit or license which may be  
granted or withheld in the discretion of such official – is an unconstitutional  
censorship or prior restraint upon the enjoyment of those freedoms.”); *Niemothko*,  
*supra*. By forcing churches to go through the unbridled CUP process in *all zones*,  
*see* Ex. Q, the City imposed an unconstitutional prior restraint against the Church’s  
right of free speech. This Court reached exactly that conclusion in a case  
challenging a city’s ordinance requiring adult entertainment businesses to apply for  
a CUP in *all* zones prior to opening. *See Dease*, 826 F.Supp. at 836 (holding that  
ordinance was a prior restraint on speech “because it essentially requires the  
permittee to obtain the government’s permission or approval before engaging in an  
act of speech.”) *Id.* at 342. For the same reasons, the Church is entitled to  
summary judgment on its RLUIPA claim under § 42 U.S.C. 2000cc(2)(b)(3)(A).

1 108 L. Ed. 2d 876 (1990).<sup>12</sup> Although the *Smith* Court narrowed the scope of cases  
2 subject to strict scrutiny, it reaffirmed that where government has “in place a  
3 system of individual exemptions, it may not refuse to extend that system to cases  
4 of ‘religious hardship’ without compelling reason.” *Id.* at 884.<sup>13</sup>

5 This Court’s PI Order ruled that the City’s laws were neutral and generally  
6 applicable. PI Order at 7-9. But that ruling did not reach all of the relevant issues  
7 and claims of the Church, namely the *application* of those laws. The Court found  
8 that “[t]he *requirement* of a CUP in the C-1 zone is imposed not only on churches,  
9 but on a variety of other, purely secular, uses,” and thus the law was “generally  
10 applicable.” PI Order at 8 (emphasis added). Whether or not this finding is  
11 correct—and Plaintiffs respectfully submit it is not, because religious assemblies  
12 must observe it where nonreligious ones need not, *see infra* § IIC—it is distinct  
13 from the question whether the *denial* of a CUP in this particular case is a “law of  
14 general applicability.” This is a subtle, but significant distinction that courts  
15 routinely observe in this area of law.

16 In contrast to the general requirement to apply for a permit, the particular  
17 discretionary decision on such an application is not a “generally applicable” law,  
18 for the law works to prevent constitutionally protected conduct in a *particular* case  
19 while permitting such conduct in other cases. *See, e.g., Freedom Baptist*, 204 F.  
20 Supp. 2d at 868 (“No one contests that zoning ordinances must by their nature  
21 impose individual assessment regimes. . . . They are, therefore, of necessity  
22 different from laws of general applicability which do not admit to exceptions on  
23

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24 <sup>12</sup> The issue of the standard under the Free Exercise Clause to be applied in  
25 religious land use cases is currently before the Ninth Circuit, has been briefed,  
26 argued, and is awaiting a decision. *See* Ex. LL (Docket Report, *San Jose Christian*  
*College v. City of Morgan Hill*, App. No. 02-15693 (appeal filed Apr. 10, 2002)).

27 <sup>13</sup> The Ninth Circuit has recognized the “individualized assessments” doctrine. *See*  
28 *Vernon v. City of Los Angeles*, 27 F.3d 1385, 1393 n.1 (9th Cir. 1994) (holding that  
“*Smith* analysis is inapplicable to Free Exercise claims such as the plaintiff’s”  
challenge to employment investigation); *Amer. Serv. Friends Comm. Corp. v.*  
*Thornburgh*, 961 F.2d 1405, 1408-09 (9th Cir. 1992) (defining “individualized  
governmental assessment” in the context of immigration law).

1 Free Exercise grounds.”). This holding was soon echoed by this Court in  
2 *Cottonwood Christian Ctr. v. Cypress Redevelopment Agency*, 218 F. Supp. 2d  
3 1203, 1222 (C.D. Cal. 2002).

4 More importantly, although the United States may have “identified only two  
5 pre-RLUIPA decisions . . . applying the compelling interest test of *Sherbert* to  
6 denials of land use permits,” SJ Order at 28 n.5, this does not represent a complete  
7 picture of the jurisprudence, which may prompt the Court to reconsider its  
8 conclusion that “the compelling interest test of *Sherbert* would not normally apply  
9 to a land use permit decision.” SJ Order at 29. In addition to *Keeler* and *Alpine*  
10 (and the Ninth Circuit’s own **controlling** and enduring opinion in *Christian*  
11 *Gospel*, *see infra*), the Court should consider the following First Amendment  
12 cases, decided both before and after RLUIPA was enacted:

- 13 • *W. Presbyterian Church v. Bd. of Zoning Adj.*, 862 F. Supp. 538, 545, 547  
14 (D.D.C. 1994): Recognizing that “[t]he Supreme Court’s decision in [*Smith*], . . .  
15 cut back to a certain level the scope of the compelling interest test,” but  
16 concluding that zoning action prohibiting feeding ministry “substantially  
17 burden[ed] their right to free exercise of religion” under First Amendment.
- 18 • *First Covenant Church v. City of Seattle*, 840 P.2d 174, 181-182 (Wash. 1992):  
19 Finding landmark ordinances “unlike a general tax law because they invite  
20 individualized assessments of the subject property and the owner’s use of such  
21 property, and contain mechanisms for individualized exceptions,” and  
22 concluding that the “City’s preservation ordinances . . . are not neutral and  
23 generally applicable” under the First Amendment.
- 24 • *Korean Buddhist Dae Won Sa Temple of Hawaii v. Sullivan*, 953 P.2d 1315,  
25 1345 n.31 (Haw. 1998): Finding “City’s variance law clearly creates a ‘system  
26 of individualized exemptions’ from the general zoning law,” so that substantial  
27 burden on religious exercise would trigger First Amendment strict scrutiny.
- 28 • *Area Plan Comm’n v. Wilson*, 701 N.E.2d 856, 862 (Ind. Ct. App. 1998):

1 Holding that *requirement to seek* special use was neutral and generally  
2 applicable, but “*denial* of a special permit will be subject to strict review.”

- 3 • *Open Door Baptist Church v. Clark Cy.*, 995 P.2d 33, 48 n.16 (Wash. 2000):

4 Holding that *requiring church to apply* for CUP did not burden religious  
5 exercise, but “*closure* of a church would require a compelling state interest.”

- 6 • *Tran v. Gwinn*, 554 S.E.2d 63, 68 (Va. 2001): Distinguishing between  
7 generally applicable requirement to seek special use permit and “procedure  
8 requiring review by government officials on a case-by-case basis for a grant of  
9 a special use permit,” and holding that latter “may support a challenge based on  
10 a specific application of the special use permit requirement.”

- 11 • *Cottonwood*, 218 F. Supp. 2d at 1222: Holding that City’s “land-use decisions  
12 . . . are not generally applicable laws,” and that refusal to grant church’s “CUP  
13 ‘invite[s] individualized assessments of the subject property and the owner’s  
14 use of such property, and contain mechanisms for individualized exceptions.””

- 15 • *Al-Salam Mosque Fdn. v. Palos Heights*, 2001 WL 204772, at \*2 (N.D. Ill.  
16 2001): Holding “free exercise clause prohibits local governments from making  
17 discretionary (*i.e.*, not neutral, not generally applicable) decisions that burden  
18 the free exercise of religion, absent some compelling governmental interest. . . .  
19 Land use regulation often involves ‘individualized governmental assessment of  
20 the reasons for the relevant conduct,’ thus triggering *City of Hialeah* scrutiny.”

- 21 • *Hale O Kaula v. Maui Plng. Comm’n*, 229 F. Supp. 2d 1056, 1073 (D. Haw.  
22 2002): Holding that special permit “provisions are a system of ‘individualized  
23 exemptions’ to which strict scrutiny applies” under Free Exercise Clause.

- 24 • *Oblates of St. Joseph v. Nichols*, Civ. No. 01-2349, slip op. at 12 n.9 (E.D. Cal.  
25 Apr. 26, 2002) (attached as Ex. MM): Recognizing that, in religious land use  
26 case, “[g]iven the individualized determinations necessary in land use cases, . . .  
27 . it may very well be that plaintiffs’ claim does not concern a generally  
28 applicable law and thus is subject to First Amendment constraints.”

- 1 • *Freedom Baptist*, 204 F. Supp. 2d at 868: Noting that “no one contests” that  
2 land use laws “by their nature impose individualized assessment regimes.”

3 To flout this post-*Smith* precedent would put this Court in a very small minority.

4 Furthermore, subjecting the City’s laws and actions to mere rational basis  
5 review would violate binding Ninth Circuit precedent. *Christian Gospel Church,*  
6 *Inc. v. San Francisco*, 896 F.2d 1221 (9<sup>th</sup> Cir. 1990). This Court has previously  
7 implied that *Christian Gospel* was not applicable because it was decided just  
8 before *Smith*. PI Order at 7 n.3. But many post-*Smith* decisions have cited  
9 *Christian Gospel* as good law,<sup>14</sup> and Plaintiff’s research has not found a single case  
10 concluding that *Smith* abrogated *Christian Gospel*’s application of strict scrutiny.

11 Reviewing the specific context here, it is evident that, as in *Sherbert v.*  
12 *Verner*, 374 U.S. 398, 83 S. Ct. 1790, 10 L. Ed. 2d 965 (1963), *Thomas v. Review*  
13 *Bd. of Indiana Employment Sec. Div.*, 450 U.S. 707, 101 S. Ct. 1425, 67 L. Ed. 2d  
14 624 (1981), and *Hobbie v. Unemployment Appeals Com. of Florida*, 480 U.S. 136,  
15 107 S. Ct. 1046, 94 L. Ed. 2d 190 (1987), the City’s CUP ordinance involves the  
16 “individualized governmental assessment of the reasons for the relevant conduct,”  
17 and therefore, must satisfy strict scrutiny. *Smith*, 494 U.S. at 884. The discretion  
18 inherent in Lake Elsinore’s CUP process is evident. *See, e.g.*, Ex. Q (§ 17.74.060  
19 (A) (allowing grant of CUP only if “proposed use, on its own merits and within the  
20 context of its setting, is in accord with the objectives of the General Plan and the  
21 purpose of the planning district in which the site is located.”) Thus, the Ordinance  
22

23 <sup>14</sup> *See, e.g., Cottonwood*, 218 F. Supp. 2d at 1222 (citing *Christian Gospel* for the  
24 proposition that “[c]ases before and after *Smith* have continued to apply a strict  
25 scrutiny test to such individualized assessment questions.”); *U.S. v. Village of*  
26 *Airmont*, 839 F. Supp. 1054, 1065 (S.D.N.Y. 1993) (citing *Christian Gospel* for the  
27 proposition that zoning schemes cannot “unduly impair the practice of religion.”),  
28 *rev’d on other grounds, LeBlanc-Sternberg v. Fletcher*, 67 F.3d 412 (2nd Cir.  
1995); *Korean Buddhist Dae Won Sa Temple of Hawaii v. Sullivan*, 953 P.2d 1315,  
1347 (Haw. 1998); *Open Door Baptist Church v. Clark Cy.*, 995 P.2d 33, 44  
(Wash. 2000); *Congregation Kol Ami v. Abington Township*, 309 F.3d 120, 133 n.3  
(3d Cir. 2002); *Vineyard Christian Fellowship v. City of Evanston*, 250 F. Supp. 2d  
961, 986 (N.D. Ill. 2003); *Tran v. Gwinn*, 554 S.E.2d at 66; *Boyajian v. Gatzunis*,  
212 F.3d 1, 8 (1<sup>st</sup> Cir. 2000).

1 provides for “individual governmental assessment of the reasons for the relevant  
2 conduct,” so that a CUP denial that substantially burdens religious exercise triggers  
3 strict scrutiny review under the Free Exercise Clause.<sup>15</sup>

## 4 **2. The City Imposed a Substantial Burden on Plaintiffs’ Religious Exercise.**

5 As this Court has held, when a Church is denied a CUP, the “burden on the  
6 Church’s use of land ... is not only substantial, but entire. By denying the  
7 conditional use permit, the City has effectively barred *any* use by the Church of the  
8 real property in question.” SJ Order at 11. But then the Court injects a “centrality”  
9 requirement into the First Amendment substantial burden test. *Id.* at 12.

10 In accordance with binding precedent, this Court must reject a “centrality”  
11 requirement as unworkable and acknowledge the Supreme Court’s admonition that  
12 “[i]t is not within the judicial ken to question the centrality of particular beliefs or  
13 practices to a faith.” *Hernandez v. Comm’r*, 490 U.S. 680, 699, 109 S. Ct. 2136,  
14 104 L. Ed. 2d 766 (1989). In fact, countless courts, including the Ninth Circuit,  
15 have recognized this.<sup>16</sup> Thus, RLUIPA did not “upset this test,” SJ Order at 12, but

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16 <sup>15</sup> Strict scrutiny also applies under the hybrid-rights doctrine. *See American*  
17 *Family Ass’n v. San Francisco*, 277 F.3d 1114, 1124 (9<sup>th</sup> Cir. 2002). Even if  
18 Plaintiffs have not established an *actual* violation of companion rights of free  
19 speech and equal protection, they have certainly made out a *colorable* claim.

20 <sup>16</sup> *See, e.g., Kreisner v. San Diego*, 1 F.3d 775, 781 (9<sup>th</sup> Cir. 1993) (“[A]n inquiry  
21 into the intensity of a religious symbol essentially asks how ‘central’ that symbol is  
22 to the faith it represents.... The Supreme Court has disapproved this sort of inquiry  
23 in religion cases.”) (citing *Smith* and *Hernandez*); *Church of Scientology v.*  
24 *Clearwater*, 2 F.3d 1514, 1549 (11<sup>th</sup> Cir. 1993) (quoting *Hernandez*); *Salvation*  
25 *Army v. Dept. of Comm’y Affairs*, 919 F.2d 183, 189 n.4 (3d Cir. 1990) (same);  
26 *McBride v. Shawnee Cy., Kansas Court Servs.*, 71 F. Supp. 2d 1098, 1101 (D. Kan.  
27 1999) (same); *Warner v. Boca Raton*, 64 F. Supp. 2d 1272, 1284 (S.D. Fla. 1999)  
28 (quoting *Smith*); *Al-Amin v. City of New York*, 979 F. Supp. 168, 171 (E.D.N.Y.  
1997) (“It is impermissible for the Court to evaluate the centrality of a religious  
practice or belief to a person’s religion.”) (citing *Smith*); *Blanken v. Ohio Dept. of*  
*Rehab.*, 944 F. Supp. 1359, 1365 (S.D. Ohio 1996) (“So long as the motivation is  
religiously oriented, the Court will inquire no further,” and then quoting  
*Hernandez*); *Estep v. Dent*, 914 F. Supp. 1462, 1466-67 (W.D. Ky. 1996) (quoting  
*Hernandez*); *Muslim v. Frame*, 891 F. Supp. 226, 230 (E.D. Pa. 1995) (rejecting  
centrality as element of plaintiff’s showing because it “would unnecessarily place  
judges in a position of determining questions of religious doctrine”); *Religious*  
*Tech. Ctr. v. F.A.C.T.NET, Inc.*, 907 F. Supp. 1468, 1472 (D. Colo. 1995) (“Nor is  
it within my purview to assess the degree of importance to the Scientology religion  
of maintaining the AT materials secret,” then quoting *Smith*); *Luckette v. Lewis*,  
883 F. Supp. 471, 478 (D. Ariz. 1995) (“The Court is mindful of the Supreme

1 simply complied with it, codifying what the Court had stated in *Hernandez, supra*,  
2 and in *Smith*, 494 U.S. at 886-87 (“It is no more appropriate for judges to  
3 determine the ‘centrality’ of religious beliefs before applying a ‘compelling  
4 interest’ test in the free exercise field, than it would be for them to determine the  
5 ‘importance’ of ideas before applying the ‘compelling interest’ test in the free  
6 speech field. What principle of law or logic can be brought to bear to contradict a  
7 believer’s assertion that a particular act is ‘central’ to his personal faith?”).

8         Given that “centrality” cannot be used in judging whether the burden on  
9 Plaintiffs’ religious exercise is “substantial,” this Court should look to controlling  
10 Ninth Circuit precedent. *See Peterson v. Minidoka*, 118 F.3d 1351, 1357 (9<sup>th</sup> Cir.  
11 1997) (“What is mandated by religion, however, is not to be equated with what is  
12 minimally required of adherents of a religion. What is mandated is what the  
13 individual human being perceives to be the requirement of the transhuman Spirit to  
14 whom he or she gives allegiance.”); *EEOC v. Townley Eng’g*, 859 F.2d 610, 620  
15 (9<sup>th</sup> Cir. 1988) (“[I]t is clear that enjoining the services would make it more  
16 difficult for them to impart their religious message to their employees, and  
17 therefore to some extent would adversely affect their religious practices.”); *Scott v.*  
18 *Rosenberg*, 702 F.2d 1263, 1273 (9<sup>th</sup> Cir. 1983) (accepting claims of religious  
19 belief unless they are “so bizarre, so clearly nonreligious in motivation, as not to be  
20 entitled to protection under the Free Exercise Clause.”) (internal quotes omitted).

21         Undisputed facts in the record demonstrate the harm suffered as a result of  
22 Defendants’ prohibiting Plaintiffs from worshipping at the Subject Property, and  
23 Plaintiffs’ having to remain in inadequate facilities because of that prohibition.  
24 Numerous members are elderly and/or handicapped and have difficulty attending

25  
26 Court’s view that” centrality may not be assessed, quoting *Hernandez*); *Phipps v.*  
27 *Parker*, 879 F. Supp. 734, 736 (W.D. Ky. 1995) (“[T]he court is not in a position to  
28 judge the centrality of this religious belief to Phipps’ free exercise of religion,”  
citing *Smith*); *Campos v. Coughlin*, 854 F. Supp. 194, 211 (S.D.N.Y. 1994) (“[I]t  
is not the court’s role to question the centrality of particular beliefs or practices to a  
faith, or the validity of particular litigants’ interpretations of the tenets.”) (citing  
*Hernandez*); *U.S. v. Boyll*, 774 F. Supp. 1333, 1335 n.1 (D.N.M. 1991) (same).

1 worship services for lack of parking and handicapped access. *See* SUF ¶¶ 2, 5-7.  
2 The City has compounded this problem by taking away existing parking. *See* SUF  
3 ¶¶ 8-9. Parking problems, the size and nature of the old buildings, problems with  
4 handicapped access, and now the loss even of its inadequate existing site, all  
5 severely constrain the Church’s growth. *See* SUF ¶¶ 23, 27, 49, 61, 63. There are  
6 no other buildings in the downtown area that the Church could either lease or  
7 purchase that would reasonably satisfy the Church’s needs. *See* SUF ¶¶ 59, 62. As  
8 in *Townley Eng’g*, 859 F.2d at 620, there is no question that prohibiting the Church  
9 from using the Subject Property “ma[de] it more difficult for them to impart their  
10 religious message” to their congregants. When a congregant cannot attend services  
11 to receive religious communications because of inadequate facilities, this is a  
12 substantial burden on religious exercise. The City’s denying the CUP has also  
13 caused the Church to suffer a severe loss in membership. *See* SUF ¶ 7; Ex. Y ¶¶  
14 34-36. Because “a *primary* reason for the existence of [the] church is to minister  
15 to and serve fellow Christians in order to build them up and equip them in their  
16 faith so that they may live lives worthy of that which . . . they have been called to  
17 in Christ and be a positive witness to the power of the Gospel in their community,”  
18 the loss of those members, and the ability to minister to them, is a severe burden on  
19 religious exercise. *See* Ex. Y, ¶¶ 34-36 (emphasis added); Ex. W ¶¶ 2-8. And  
20 even if the Court persists in its view that the “centrality” test remains viable, the  
21 evidence above shows that the burdens are imposed on a central religious practice.

22 As this Court recently held, the City has no compelling government interest  
23 to justify imposing this burden on religious exercise. SJ Order at 18-25. Thus,  
24 summary judgment should be granted for Plaintiffs on their Free Exercise claim.

25 **C. Plaintiffs Are Entitled to Summary Judgment on Their Claims of Facial**  
26 **Disparate Treatment Under RLUIPA’s Equal Terms Provision and**  
27 **Corresponding Constitutional Provisions.**

28 ***1. The City’s Zoning Code Facially Violates the Equal Terms Provision***

1 As this Court has held, RLUIPA’s Equal Terms provision codifies “existing  
2 Supreme Court decisions under the Free Exercise and Establishment Clauses of the  
3 First Amendment as well as under the Equal Protection Clause of the Fourteenth  
4 Amendment.” *Ventura County Christian High School v. City of San*  
5 *Buenaventura*, 233 F. Supp. 2d 1241, 1246 (C.D. Cal. 2002) (quotations  
6 omitted).<sup>17</sup> “The purpose of this section is to forbid governments from prohibiting  
7 religious assembly uses while allowing equivalent, and often more intensive, non-  
8 religious assembly uses.” *Id.* (quotation omitted). The “Equal Terms” provision  
9 unambiguously sets forth what a plaintiff must show to make out a violation:

10 No government shall impose or implement a land use regulation in a manner  
11 that treats a religious assembly or institution on less than equal terms with a  
12 nonreligious assembly or institution.

13 42 U.S.C. § 2000cc(b)(1) (emphasis added). Here, the violation is clear.

14 Land Use Regulation. The City’s zoning laws are “land use regulation[s]”  
15 within the meaning of the Act. *See* 42 U.S.C. § 2000cc-5(5).

16 Religious Assembly or Institution. Those regulations treat Plaintiffs’  
17 proposed church—unmistakably “a religious assembly”—in a manner that requires  
18 the church to obtain a CUP to locate in a C-1 zone (the district where the Subject  
19 Property is located) and other zones (including the C-P, C-O, C-M, C-1 zones) in  
20 which the Church is presently seeking a suitable property for its ministry.

21 Nonreligious Assembly or Institution. Whether a nonreligious assembly is  
22 commercial or non-commercial,<sup>18</sup> profit or non-profit, a City may not afford it

23 \_\_\_\_\_  
24 <sup>17</sup> As set forth below, the Church is also entitled to summary judgment on its  
25 claims of facial disparate treatment under the Equal Protection and Free Exercise  
26 Clauses.

27 <sup>18</sup> Notably, federal courts routinely treat the word “assembly” to include both  
28 commercial and non-commercial uses, *see, e.g., Doran v. Salem Inn, Inc.*, 422 U.S.  
922, 933, 95 S. Ct. 2561, 2568, 45 L. Ed. 648, 660 (1975) (describing “any place  
of assembly” as a “theater, town hall, opera house, as well as a public market  
place.”); *Love Church v. City of Evanston*, 671 F. Supp. 515, 517 (N.D. Ill. 1987)  
(identifying theaters as assembly use). Often municipalities make no distinction  
among “assemblies” based on commercial status. *See, e.g., Alameda County, Cal.,*  
General Ordinance § 17.52.920, (“Places of public assembly” include among

1 better treatment than a religious assembly. What matters is that the uses to be  
2 compared are both “assemblies”; the language of the statute does not further limit  
3 what uses may be compared. *See* 42 U.S.C. § 2000cc(2)(b)(1).

4 The legislative history confirms this clear legislative mandate by listing  
5 myriad nonreligious assemblies to be compared with religious ones: “banquet  
6 halls, clubs, community centers, funeral parlors, fraternal organizations, *health*  
7 *clubs*, gyms, places of amusement, recreation centers, lodges, libraries, museums,  
8 municipal buildings, meeting halls, and theaters,” H. REP. 106-219, 106<sup>th</sup> Cong., 1<sup>st</sup>  
9 Sess. 19 (1999) (emphasis added); and “recreation centers [and] *health clubs*...,”  
10 146 CONG. REC. S7774-01 at S7777 (daily ed. July 27, 2000) (emphasis added).  
11 RLUIPA’s sponsors similarly emphasized the need for the Equal Terms provision:  
12 “Zoning codes frequently exclude churches in places where they permit theaters,  
13 meeting halls, and other places where large groups of people assemble for secular  
14 purposes.” *id.* at S7775.<sup>19</sup>

15 Here, the City’s laws treat several non-religious assembly uses in a manner  
16 that exempts them from the Conditional Use Permit requirement in both (1) the C-  
17 1 zone where the Subject Property is located, and (2) other zones within the City  
18 where the Church is currently seeking to locate a suitable property.

19  
20 others restaurants, auditoriums, churches, arenas, theaters, dance halls, and  
21 bowling alleys) available at <http://www.co.alameda.ca.us/admin/admincode>.  
22 <sup>19</sup> Zoning laws like Lake Elsinore’s that treat commercial and other secular  
23 assembly uses better than religious ones were emphasized at the RLUIPA hearings:  
24 The details vary, but uses such as banquet halls, clubs, community centers,  
25 funeral parlors, fraternal organizations, health clubs, gyms, recreation  
26 centers, lodges, libraries, museums, municipal buildings, meeting halls, and  
27 theaters are often permitted as of right in zones where churches require a  
28 special use permit, or permitted on special use permit where churches are  
wholly excluded.  
*Religious Liberty Protection Act: Hearings on H.R. 4019*, 105<sup>th</sup> Cong., 2<sup>nd</sup> Sess.  
(1998) (testimony of Prof. Laycock). *See also id.* (testimony of Steven T.  
McFarland) (“Wherever a community allows places of assembly, like meeting  
halls, community centers, theaters, schools, or arenas, it must allow churches as a  
permitted use. Government must not discriminate on the basis of the nature of the  
assembly.”); *Senate Hearing on Legislation to Protect Religious Liberty*, 106<sup>th</sup>  
Cong., 1<sup>st</sup> Sess. (1999) (testimony of Prof. Laycock) (“[T]his Committee and the  
House Subcommittee on the Constitution have compiled a massive record...of  
discrimination against churches as compared to secular places of assembly....”).

1 First, regarding the C-1 zone, the City’s zoning code has always allowed the  
2 following nonreligious assembly uses to locate as of right: health and exercise  
3 clubs, dance schools, music schools, and restaurants. *See* Exs. Q (LEMC, Title 17)  
4 and T (amendments to LEMC Title 17). These assembly uses are *precisely* the  
5 ones that Congress intended should be treated no better than religious assemblies.  
6 146 CONG. REC. at S7777 (identifying health clubs and gyms as examples of  
7 comparable nonreligious assemblies under the Equal Terms provision); H. REP.  
8 106-219, 106<sup>th</sup> Cong., 1<sup>st</sup> Sess. 19 (1999) (same).

9 Second, regarding other zones where the Church is currently seeking to  
10 locate a suitable property, the City’s zoning code allows the following nonreligious  
11 assembly uses to locate as of right: conference centers (C-P zone), indoor sports  
12 arenas (C-P zone), art galleries (C-P and C-O zones), bowling alleys (C-P zone),  
13 museums (C-P zone), motels and hotels (C-P zone), restaurants (C-1 and C-P);  
14 auction galleries (C-M); bus depot and transit stations (C-M), art schools (C-O  
15 zone), craft schools (C-O zone), photography schools (C-O zone), health and  
16 exercise clubs (C-1 zone), music schools (C-1 and C-O zones) dance schools (C-1  
17 and C-O zones),. *See* Exs. Q and T.<sup>20</sup> Again, these assembly uses are exactly the  
18 ones Congress intended should be treated no better than religious assemblies. *See*,  
19 *e.g.*, H. REP. 106-219, 106<sup>th</sup> Cong., 1<sup>st</sup> Sess. 19 (1999) (identifying “banquet halls,  
20 clubs, community centers, funeral parlors, fraternal organizations, health clubs,  
21 gyms, places of amusement, recreation centers, lodges, libraries, museums,  
22

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23 <sup>20</sup> In addition, before the City recently amended its zoning code, and at the time of  
24 the complaint, Churches were not permitted as of right *anywhere* in the City, even  
25 though the following non-religious assembly uses were permitted as of right:  
26 theaters (C-2 zone), community centers (R-R, R-E, R-H, R-1, R-2, and R-3 zones),  
27 elementary, junior high, and high schools (R-E, R-H, R-1, R-2, R-3 zones), indoor  
28 sports arenas (C-P zone), museums (C-P zone), art schools (C-O zone), craft  
schools (C-O zone), photography schools (C-O zone), motels and hotels (C-P and  
C-2 zones), skating rinks (C-2 zone), bowling alleys (C-P and C-2 zones), bus  
depot and transit stations (C-M and C-2 zones), restaurants (C-1, C-O, and C-P  
zones), music school (C-1 and C-O zones) dance schools (C-1 and C-O zones),  
auction galleries (C-M zone), health and exercise clubs (C-1 zone). *See* Ex. Q  
(LEMC Title 17). This disparity also violated RLUIPA.

1 municipal buildings, meeting halls, and theaters” as examples of comparable  
2 nonreligious assemblies).

3 Disparate Treatment. The Church was treated “on less than equal terms”  
4 than health clubs, dance schools, music schools, and restaurants because it had to  
5 seek a CUP to locate in a C-1 zone, while the others could locate there as of right.  
6 Similarly, the Church continues to be treated on less than equal terms than several  
7 non-religious assemblies during its present search for a suitable property in the  
8 City, including in the C-P, C-O, C-M, and C-1 zones. As discussed *supra*,  
9 nonreligious assemblies such as conference centers, indoor sports arenas, art  
10 galleries, bowling alleys, museums, motels, hotels, restaurants, auction galleries,  
11 bus depots, transit stations, art, craft, music, dance, and photography schools, and  
12 health and exercise clubs, are permitted as of right in those zones. Churches are  
13 either not allowed at all (C-P), or are allowed only by CUP (C-O, C-M, C-1).<sup>21</sup>

14 **2. *The City’s Zoning Code Facially Violates the Free Exercise Clause.***

15 The facially disparate treatment visited upon the Church and other religious  
16 assemblies compared to nonreligious assemblies also entitles the Church to  
17 summary judgment under the Free Exercise Clause. Land use laws, like all other  
18 laws, must be “neutral” with respect to religion.<sup>22</sup> This neutrality requirement

19 \_\_\_\_\_  
20 <sup>21</sup> The fact that a few nonreligious assemblies are treated as badly as churches by  
21 having to seek a CUP in the C-1, C-P, C-O, and C-M zones does not avoid an  
22 Equal Terms violation. That fact might matter if the Act prohibited land-use  
23 regulations that “treat[ed] a religious assembly or institution on less than equal  
24 terms with [*every other*] nonreligious assembly or institution.” Instead, RLUIPA’s  
25 plain language prohibits treatment “on less than equal terms with *a* nonreligious  
26 assembly or institution.” 42 U.S.C. § 2000cc(b)(1) (emphasis added). Allowing  
27 cities to avoid liability simply by treating *one* nonreligious assembly as badly as  
28 churches would render the Equal Terms provision meaningless. The letter and  
spirit of the law both recommend interpreting it to require local governments to  
treat religious assemblies and institutions as well as *any* nonreligious assembly or  
institution. *See also* 42 U.S.C. 2000cc-3(g) (“This Act shall be construed in favor  
of a broad protection of religious exercise, to the maximum extent permitted by the  
terms of this Act and the Constitution.”).

27 <sup>22</sup> *See Lukumi*, 508 U.S. at 532 (“[T]he First Amendment forbids an official  
purpose to disapprove . . . of religion in general.”); *Smith*, 494 U.S. at 877  
28 (“government may not...impose special disabilities on the basis of  
*religious...status*”); *Orin v. Barclay*, 272 F.3d 1207, 1215-16 (9th Cir. 2001)  
(finding treatment of secular demonstrators more favorably than religious

1 cannot be squared with the City’s laws, which disfavor churches and other  
2 religious assemblies by requiring them to obtain a CUP, but permits as of right  
3 secular assemblies such as health clubs, dance or music schools, and restaurants.  
4 *See supra* § II(C)(1) (identifying numerous secular assemblies treated more  
5 favorably than churches in the C-1 zone and other zones). Although a few secular  
6 assemblies are treated as badly as churches, the City’s laws still fail neutrality by  
7 treating those who gather together for religious instruction worse than those who  
8 gather together for other reasons (e.g., aerobic instruction at a health club).<sup>23</sup>

### 9 **3. The City’s Zoning Code Facially Violates the Equal Protection Clause**

10 The Equal Protection Clause also prohibits unequal treatment of land uses  
11 based on religion. Classifications based on religion or that limit fundamental rights  
12 are invalid unless they satisfy strict scrutiny. *See New Orleans v. Dukes*, 427 U.S.  
13 297, 96 S. Ct. 2513, 49 L. Ed.2d 511 (1976) (religious classifications trigger Equal  
14 Protection strict scrutiny); *Ball v. Massanari*, 254 F.3d 817, 823 (9<sup>th</sup> Cir. 2001)  
15 (same); *Johnson v. Robinson*, 415 U.S. 361, 375 n. 14 (1974) (“Unquestionably,  
16 the free exercise of religion is a fundamental right.”); *see also Smith*, 494 U.S. at  
17 886 n.3 (“we strictly scrutinize governmental classifications based on religion”).  
18 Although the Court previously suggested that a zoning law distinguishing churches  
19 from non-religious assembly uses does not classify on the basis of religion, *see* PI

20 demonstrators was not neutral).

21 <sup>23</sup> The *Lukumi* Court made clear that a law fails neutrality so long as it favors *some*  
22 non-religious entities over religious entities; the fact that the same law may also  
23 disfavor some non-religious entities is irrelevant. The Court found a law lacked  
24 neutrality because it permitted killing animals for secular purposes (e.g., food  
25 consumption), but prohibited killing animals for religious purposes. *Lukumi*, 508  
26 U.S. at 542, 553. Significantly, the unlawful ordinance also disadvantaged those  
27 who wanted to “sacrifice” animals for certain nonreligious reasons. *See id.* at 553  
28 (text of ordinance 87-71). Thus, the fact that some secular activity was *also*  
disadvantaged did not distract the Court from the fact that the law still disfavored  
killing animals for religious reasons. *See also F.O.P. Newark Lodge No. 12 v. City*  
*of Newark*, 170 F.3d 359, 363 (3d Cir. 1999) (finding Free Exercise violation  
where government employer prohibited beards, and allowed medical exception, but  
refused religious exception, even where all secular reasons for exception (except  
medical) were treated as badly as religious exception). Here, as in *Lukumi* and  
*F.O.P.*, exempting some secular assemblies, but not religious assemblies, from  
having to obtain a CUP violates the guarantee of neutrality.

1 Order at 13, other courts have held to the contrary and applied strict scrutiny. *See,*  
2 *e.g., Vineyard Christian*, 250 F. Supp. 2d at 976 (ordinance distinguishing between  
3 religious and non-religious assembly uses impermissibly “classifies on the basis of  
4 religion”); *Love Church v. City of Evanston*, 671 F. Supp. 508, 514, 515 (N.D. Ill.  
5 1987) (applying strict scrutiny to ordinance treating music schools, auction rooms,  
6 arenas, and theatres more favorably than churches).

7 The City’s zoning law similarly classifies on the basis of religion. *See supra*  
8 § IIC(1) (identifying numerous secular assembly uses treated more favorably than  
9 churches under City zoning law). Laws that allow people to gather for music  
10 school, but not Sunday school – or for aerobic instruction, but not Biblical  
11 instruction – must trigger strict scrutiny under the Equal Protection Clause.

12 **4. The City’s Zoning Is Content-Based, Violating the Free Speech Clause.**

13 Zoning laws must be content-neutral, which means avoiding *both*  
14 prohibiting expression because of its subject-matter, *and* prohibiting expression  
15 because of its viewpoint on a subject-matter. With regard to viewpoint  
16 discrimination, the Supreme Court has repeatedly held that allowing secular  
17 assembly in facilities for secular speech on permitted subjects, but excluding  
18 religious speech, is viewpoint discrimination.<sup>24</sup>

19 The ordinance here, by its very terms, regulates assembly uses differently  
20 based on the content of the expression at those assemblies. In particular, they draw  
21 a distinction along religious lines. *See supra* § II(C)(1) (identifying numerous  
22 secular assemblies treated more favorably than churches under City zoning law).  
23 For example, people may permissibly assemble to speak about health from a  
24 secular perspective at a health club, but may not assemble to speak about health

25 \_\_\_\_\_  
26 <sup>24</sup> *See Consolidated Edison Co. of New York, Inc. v. Public Serv. Comm’n of New*  
27 *York*, 447 U.S. 530, 537, 100 S. Ct. 2326, 65 L. Ed. 2d 319 (1980) (“The First  
28 Amendment’s hostility to content-based regulation extends not only to restrictions  
on particular *viewpoints*, but also to prohibition of public discussion of an *entire*  
*topic.*”) (emphasis added); *See Good News Club v. Milford Cent. Sch.*, 533 U.S. 98,  
108-10, 121 S. Ct. 2093, 150 L. Ed. 2d 151 (2001) (allowing secular assemblies  
but prohibiting religious assemblies in public facility violates Free Speech Clause).

1 from a religious perspective at a church. Similarly, they may permissibly assemble  
2 for secular purposes at a music school, but may not assemble to sing religious  
3 hymns at a church. These zoning laws impose greater burdens on religious speech  
4 because (at a minimum) it addresses the general *subject-matter* of religion, and  
5 (more likely) because of the particular religious *viewpoint* it expresses. Because  
6 such laws cannot withstand the strict scrutiny that applies to censorship of speech  
7 based on content, Plaintiffs are entitled to summary judgment on this claim as well.  
8 Even if the regulations are somehow not deemed content-based, but only  
9 incidentally burden First Amendment activity, they still must “further a sufficiently  
10 substantial government interest”, and must be “narrowly drawn to avoid  
11 unnecessary intrusion on freedom of expression.” *Schad*, 452 U.S. at 68.

12 Defendants will not be able to meet their burden to show that this standard is met.<sup>25</sup>

13 **D. Plaintiffs Are Entitled to Summary Judgment on Their Claims of As-**  
14 **Applied, Disparate Treatment Among Religious Uses Under RLUIPA**  
15 **§ 2(b)(2) and Corresponding Constitutional Protections.**

16 The undisputed facts establish that the City has violated the prohibition  
17 against religious discrimination in RLUIPA § 2(b)(2) and the constitutional  
18 provisions it codifies.<sup>26</sup> In particular, the City has discriminated against the Church

19 \_\_\_\_\_  
20 <sup>25</sup> Similarly, if the Court analyzes the restrictions on the Church’s expression as a  
21 “time, place and manner” restriction, such “restrictions are valid only if they are  
22 content-neutral, narrowly tailored to serve a significant government interest, and  
23 retain ample alternative channels of communication.” *Gaudiya Vaishnava Soc.*,  
24 952 F.2d at 1065; *City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425, 122 S.  
25 Ct. 1728, 152 L. Ed. 2d 670 (2002) (content-neutral regulation will be upheld so  
26 long as the municipality shows that regulation was designed to serve a substantial  
27 government interest and that reasonable alternative avenues of communication  
28 remained available). Here there is no evidence that the denial of the Church’s  
CUP, or the former requirement that churches obtain a CUP for every zone,  
advanced a significant governmental interest. Nor is there any competent evidence  
that alternative channels of communication exist for the Church to assemble for  
religious expression in the downtown area of the City. *Tollis Inc. v. San  
Bernardino County*, 827 F.2d 1329, 1333 (9<sup>th</sup> Cir. 1987) (municipality “must  
show” that in enacting particular limitations on expression, it relied upon evidence  
permitting inference of harmful secondary effects absent such limitations).

<sup>26</sup> See 42 U.S.C. § 2000cc(2)(b)(2) (prohibiting “land use regulation that  
discriminates against any assembly or institution on the basis of religion or  
religious denomination,”). See also *Freedom Baptist*, 204 F. Supp. 2d at 870

1 on the basis of its *denomination or particular faith*. Although the City refused to  
2 issue the Church a CUP to locate in its downtown commercial zones, the City did  
3 grant the Bread of Life Fellowship, a church of a different faith, a CUP in 1997 to  
4 locate on a property immediately adjacent to, and on the same block as, the Subject  
5 Property. *See* SUF ¶37. Moreover, the City made findings that Bread of Life’s use  
6 satisfied the General Plan, was not detrimental to health, safety and welfare, and  
7 that there would be no adverse effect on abutting property – the same findings it  
8 made for the Church’s CUP application. *See* SUF ¶¶ 40-41. Nonetheless, Bread of  
9 Life received a CUP, but the Church did not. Such denominational discrimination  
10 is prohibited under RLUIPA and the Constitution.<sup>27</sup>

11 **E. Plaintiffs Are Entitled to Summary Judgment on Their Claims of**  
12 **Unreasonable Regulation, Facially and As-Applied, Under RLUIPA**  
13 **Section 2(b)(3)(B) and Corresponding Constitutional Protections.**

14 On its face, the City’s law fails the twin requirements of reasonableness  
15 under RLUIPA § 2(b)(3)(B) and the Equal Protection Clause. *See Freedom*  
16 *Baptist Church*, 204 F. Supp. 2d at 871 (§ 2(b)(3)(B) “codifies existing Supreme  
17 Court Equal Protection jurisprudence” of *City of Cleburne v. Cleburne Living*  
18 *Center*, 473 U.S. 432, 113 S. Ct. 3249, 87 L.Ed.2d 313 (1985)). *Cleburne* lays out  
19 the inquiry courts should undertake in assessing whether a zoning regulation  
20 “unreasonably limits” religious land uses under the Equal Protection Clause and  
21 § 2(b)(3)(B). *See id.* Specifically, courts should examine whether the non-  
22 permitted use—here churches—under the regulation ““would threaten legitimate  
23 interests of the [government] in a way that other permitted uses...would not.””

24  
25 (RLUIPA § 2(b)(2) codifies Free Exercise, Equal Protection, and Establishment  
26 Clause law); *Lukumi*, 508 U.S. at 532 (“[T]he First Amendment forbids an official  
27 purpose to disapprove of a particular religion....”); *Epperson v. Arkansas*, 393 U.S.  
28 97, 104, 89 S. Ct. 266, 21 L.Ed.2d 228 (1968) (“The First Amendment mandates  
governmental neutrality between religion and religion....”); *Dukes, supra* p.32.  
27 <sup>27</sup> The undisputed fact that churches such as Elsinore Valley Friends, Calvary  
Chapel New Song, Living Waters Bible College, United Methodist Church and the  
Power House were all permitted to locate in the City’s commercial zones further  
demonstrates the City’s denominational discrimination. *See* SUF ¶39.

1 *Cornerstone Bible Church v. City of Hastings*, 948 F.2d 464, 471 (8<sup>th</sup> Cir.  
2 1991)(quoting *Cleburne*).<sup>28</sup> Here, the Church would not threaten any conceivable  
3 legitimate interest of the City in a way that the legion secular assembly uses  
4 permitted in the C-1, C-O, C-P, and C-M zones, *see supra* § II(C)(1), would not.

5 As applied, the zoning law also violated RLUIPA § 2(b)(3)(B) and the Equal  
6 Protection Clause. No evidence in the record suggests that permitting the Church  
7 to locate at the C-1 property (or in any other downtown zone) would threaten any  
8 interests of the City in a way that the Bread of Life Fellowship (or any of the five  
9 other churches permitted to locate in downtown commercial zones) would not. *See*  
10 SUF ¶¶ 37, 39, 40, 41. This is particularly true of Bread of Life, which is located  
11 immediately adjacent to the Subject Property. *See* SUF ¶ 37.

12 **III. For Plaintiffs’ Remaining Claims, Defendants’ Summary Judgment**  
13 **Motion Should Be Continued or Denied Pursuant to Rule 56(f).**

14 A district court should deny or postpone decision on a motion for summary  
15 judgment where the non-moving party “cannot for reasons stated present by  
16 affidavit facts essential to justify the party’s opposition.” FED. R. CIV. P. 56(f).<sup>29</sup>  
17 Plaintiffs refer the Court to the Tyler Decl. ¶¶ 2-5 for an explanation of (1) why  
18 discovery was unavailable when the record closed on Defendants’ pending  
19 summary judgment motion; and (2) what particular evidence Plaintiffs expect to  
20 gather once discovery begins. Plaintiffs explain further below how this missing  
21 evidence would preclude summary judgment on certain claims.

22  
23  
24 <sup>28</sup> *Cf. Cam v. Marion County*, 987 F. Supp 854, 859 (D. Or. 1997) (no “legitimate  
25 or rational . . . state interest” advanced for prohibiting regular use of building on  
26 agricultural land for religious worship, but allowing other secular assemblies on  
27 agricultural land).

28 <sup>29</sup> To obtain the benefit of Rule 56(f), a party must submit a sworn statement to  
explain: “(1) why the party opposing summary judgment cannot respond; (2) the  
particular facts that the party reasonably expects to obtain in further discovery; and  
(3) how the information reasonably expected from its proposed discovery requests  
could be expected to create a genuine issue of material fact that would defeat the  
summary judgment motion.” *Adams v. Allstate Ins. Co.*, 187 F. Supp. 2d 1207,  
1212-13 (C.D. Cal. 2003) (citation omitted).

1 **A. Summary Judgment Is Premature for Claims Based on Discriminatory**  
2 **or Otherwise Irrational Animus Under RLUIPA Section 2(b) and**  
3 **Corresponding Constitutional Protections.**

4 Because discovery has not begun, Plaintiffs have had no opportunity to  
5 gather evidence of any hostility that motivated the Defendants' challenged actions.  
6 See Tyler Decl. ¶ 6.a.-b. Testimony or documents containing statements or other  
7 evidence that the passage or application of the ordinance was motivated by  
8 animosity to *religious assemblies generally* would suffice alone to support distinct  
9 claims under the Free Speech, Free Exercise, and Equal Protection Clauses, and  
10 RLUIPA § 2(b)(1).<sup>30</sup> Similarly, evidence reflecting animosity to the Plaintiffs'  
11 *denomination or particular faith* would defeat summary judgment for another set  
12 of distinct claims under the Free Speech, Free Exercise, and Equal Protection  
13 Clauses and RLUIPA § 2(b)(2).<sup>31</sup> Finally, evidence reflecting government hostility  
14 that is irrational (but not religion based) would support independent claims under  
15 the Equal Protection Clause and RLUIPA § 2(b)(3)(B).<sup>32</sup> Thus, because animus is  
16 essential to these claims, summary judgment on them should be postponed or  
17 denied until Plaintiffs have fair opportunity to uncover such animus.<sup>33</sup>

18  
19 <sup>30</sup> See *Good News Club*, 533 U.S. at 108-10 (allowing secular assemblies but  
20 prohibiting religious assemblies in public facility violates Free Speech Clause);  
21 *Lukumi*, 508 U.S. at 532 (“[T]he First Amendment forbids an official purpose to  
22 disapprove of ...religion in general”); *Dukes*, 427 U.S. at 303 (religious  
23 classification is “inherently suspect”).

24 <sup>31</sup> *Lukumi*, *supra*; *Dukes*, *supra*; *Good News Club*, *supra*; *Epperson*, *supra*.

25 <sup>32</sup> See *Romer v. Evans*, 517 U.S. 620, 116 S. Ct. 1620, 134 L.Ed.2d 855 (1996);  
26 *City of Cleburne*, 473 U.S. at 440; *Marks v. City of Chesapeake*, 883 F.2d 308, 312  
27 (4<sup>th</sup> Cir. 1989) (if city denied plaintiff's “permit application solely in an effort to  
28 placate those members of the public who expressed “religious” objections to the  
plaintiff's proposed use of his property, it thereby acted “arbitrarily” and  
“capriciously.”); *Islamic Center of Mississippi v. City of Starkville*, 840 F.2d 293,  
302 (5<sup>th</sup> Cir. 1988) (“negative attitudes” toward mosque were impermissible  
“justification for differentiating between familiar and unfamiliar religions”).

<sup>33</sup> Evidence of religiously discriminatory or otherwise unreasonable motivation is

1 **B. Summary Judgment Is Premature on Plaintiffs' Claims of As-Applied,**  
2 **Disparate Treatment Between Religious and Secular Assemblies Under**  
3 **RLUIPA Section 2(b)(1) and Corresponding Constitutional Protections.**

4 Plaintiffs have not yet had the opportunity to discover evidence of a  
5 government preference for *secular over religious* assemblies in the *application* of  
6 the ordinance, *i.e.*, evidence of government decisions (and their surrounding  
7 circumstances) granting CUPs to nonreligious assembly uses in the C-1 zone and  
8 other zones where Plaintiffs seek to assemble.<sup>34</sup> See Tyler Decl. ¶ 6.c. This  
9 evidence is essential to Plaintiffs' *as-applied* equal terms claims under RLUIPA  
10 § 2(b)(1) and overlapping claims under the Free Exercise, Equal Protection, and  
11 Free Speech Clauses – claims that are otherwise unsupported.

12 **IV. Conclusion**

13 Plaintiffs request that their motion be granted and Defendants' denied.  
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17 not only *essential* to the claims discussed summarily here, it is *helpful* for related  
18 claims discussed *supra*, for which direct evidence of animus is not strictly  
19 necessary, and for which other sufficient evidence is available. For example, the  
20 disparate treatment of religious and nonreligious assembly uses reflected in the  
21 terms of the City's ordinance may suffice to support summary judgment on  
22 Plaintiffs' *facial* equal terms challenges, *see supra* § II.C, but evidence containing  
23 statements of religion-based or otherwise irrational animus as motivating the  
24 passage of the ordinance would strengthen the claim. The same may be said for  
25 Plaintiffs' claims of differential treatment among religious uses in CUP decisions,  
26 *see* § II.D., and of differential treatment among similarly situated CUP applicants,  
27 and among categories of assembly uses, without rational basis, *see* § II.E.

28 <sup>34</sup> Plaintiffs *have* managed to gather sufficient evidence of a City preference for  
*secular over religious* assemblies on the *face* of the ordinance, *see supra* § II.C.,  
and for *particular churches or denominations* other than Plaintiffs' in the  
*application* of the ordinance, *see* § II.D. If the Court considers Plaintiffs' evidence  
regarding the Bread of Life CUP decision somehow insufficient evidence of the  
latter, as-applied form of discrimination, the Court should not enter judgment for  
Defendants, but instead allow additional discovery. See Tyler Decl. ¶ 6.d.

1 Respectfully submitted,

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ALLIANCE DEFENSE FUND

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7 Dated: July 18, 2003

By: \_\_\_\_\_

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Robert H. Tyler

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Attorney for Plaintiffs

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