No. 12-60052

IN THE UNITED STATES
COURT OF APPEALS FOR THE FIFTH CIRCUIT

OPULENT LIFE CHURCH; TELSA DEBERRY,
Plaintiffs-Appellants,

v.

CITY OF HOLLY SPRINGS, MISSISSIPPI; BOARD OF ALDERMEN OF THE CITY OF HOLLY SPRINGS, MISSISSIPPI; CITY PLANNING COMMISSION OF THE CITY OF HOLLY SPRINGS, MISSISSIPPI,
Defendants-Appellees.

On Appeal from the United States District Court for the
Northern District of Mississippi (Oxford Division)
No. 3:12-CV-4-MPM-SAA (Hon. Michael P. Mills)

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons or entities as described in the fourth sentence of Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

1. Opulent Life Church, Plaintiff-Appellant. Opulent Life Church is a Mississippi non-profit corporation with no parent corporation. No publicly-held company owns ten percent or more of the Church's stock.

2. Telsa DeBerry, Plaintiff-Appellant.

3. Gibson, Dunn & Crutcher LLP, Counsel for all Plaintiffs-Appellants (Ashley E. Johnson, Lawrence VanDyke, and Prerak Shah representing).

4. Liberty Institute, Counsel for all Plaintiffs-Appellants (Kelly J. Shackelford, Jeffrey C. Mateer, and Hiram S. Sasser III representing).

5. Freeland Shull, PLLC, Counsel for all Plaintiffs-Appellants (M. Reed Martz representing).

6. The City of Holly Springs, Mississippi, Defendant-Appellee.

7. The Board of Aldermen of the City of Holly Springs, Mississippi, Defendant-Appellee. The Board is composed of Andre DeBerry, Russell Johnson, Calvin James, Gary Colhoun, Harvey Payne, Sr., and Johnnie Bagley.

8. The City Planning Commission of the City of Holly Springs, Mississippi, Defendant-Appellee. The Commission is composed of Wonso Hayes, R.C. Anderson, Napoleon Smith, Edwin Calicutt, and Kelly Jordan.

9. Law Office of J. Kizer Jones, Counsel for all Defendants-Appellees (J. Kizer Jones representing).

Respectfully submitted,

/s/ Ashley E. Johnson
Ashley E. Johnson
Counsel of Record for Appellants Opulent Life Church and Telsa DeBerry

STATEMENT REGARDING ORAL ARGUMENT

The Court should grant oral argument. This appeal raises important issues concerning the First Amendment and statutory rights of religious institutions against discriminatory treatment from local governments. Moreover, it provides the Court with an opportunity to clarify the proper application of the preliminary injunction standard to deprivations of these rights. Oral argument would allow counsel to assist the Court in analyzing these significant legal issues and in identifying the legal standard required to enforce the constitutionally and statutorily protected rights violated by the district court's decision.

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JURISDICTIONAL STATEMENT

This interlocutory appeal is from an order denying a motion for preliminary injunction entered by the Honorable Michael P. Mills of the United States District Court for the Northern District of Mississippi on January 17, 2012. R. 179 (R.E. 4).[1] A timely notice of appeal was filed on January 18, 2012. R. 183 (R.E. 6). The district court properly exercised jurisdiction under 28 U.S.C. § 1331. This Court has jurisdiction pursuant to 28 U.S.C. § 1292(a)(1).

ISSUE PRESENTED

Whether the district court erred in denying the motion for preliminary injunction based solely on its conclusion that the Church will not suffer irreparable harm in the absence of an injunction, despite the Church's unrebutted evidence that application of the discriminatory ordinance impairs its religious exercise by preventing it from engaging in religious activities that are not possible in the Church's current, inadequate location.

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[1] Citations to "R. __" refer to the USCA5 record on appeal and citations to "R.E. __" refer to the Record Excerpts.

INTRODUCTION

In the Religious Land Use and Institutionalized Persons Act ("RLUIPA"), 42 U.S.C. § 2000cc *et seq.*, Congress prohibited state and local governments from discriminating against religious assemblies or institutions by treating them less favorably than – that is, "on less than equal terms with" – nonreligious assemblies or institutions. Notwithstanding this clear prohibition, the City of Holly Springs, Mississippi ("Holly Springs" or "the City"), has enacted a zoning ordinance that expressly applies a list of stringent requirements exclusively to "Churches" seeking zoning approval. These requirements are not applicable to any other similarly situated institutions – not even to social clubs, distinguishable from religious organizations only on the basis of their beliefs.

These additional requirements that only churches must meet are far from mere formalities. For example, the zoning ordinance requires churches seeking zoning approval to attain the support of a super-majority of nearby property owners – a requirement that, in many cases, would cause the proposal to be dead on arrival. In short, the Holly Springs zoning ordinance ensures that churches, and only churches, face a series of barriers to zoning approval that effectively prevents the opening of new churches in the City.

Because this ordinance cannot be reconciled with RLUIPA or the U.S. and Mississippi Constitutions, Appellants – Opulent Life Church, which desires to

lease a church building in Holly Springs, and its pastor, Telsa DeBerry (collectively, "Appellants" or the "Church") – filed a complaint seeking a declaration that Section 10.8 of the zoning ordinance, which imposes the discriminatory provisions, is unlawful, unconstitutional, and unenforceable, and sought a permanent injunction against its further enforcement. In light of the City's blatant violation of the law, Appellants are highly likely to succeed in obtaining this relief. But if they are forced to wait until the litigation is fully resolved, the Church and its membership will be irreparably harmed by the denial of their statutorily and constitutionally guaranteed rights to practice their religion, an injury which cannot be remedied by any damages award. Accordingly, to avoid this injury and to serve the public interest in preventing the violation of constitutional rights, the Church requested a preliminary injunction against enforcement of Section 10.8 of the Holly Springs zoning ordinance pending final judgment in the case.

Only a week after the Church sought a preliminary injunction, without submission of any evidence, briefing, or argument in opposition, the district court issued a two-page order denying the Church's motion. The court ignored all aspects of the preliminary injunction standard except for irreparable harm, and concluded that the Church will not suffer irreparable harm if it continues to operate in its existing facility. It reached this conclusion in spite of the uncontested

evidence in the record that the existing facility is wholly inadequate for the Church and its members to engage in the free exercise of their religious beliefs and the explicit congressional recognition that a suitable physical space is critical to religious freedom. In light of the clear impairment of Appellants' statutory and constitutional rights, and the ongoing irreparable harm that this impairment inflicts on Appellants, this Court should reverse the district court's denial of the requested injunction and order that an injunction be entered.

STATEMENT OF THE CASE

On October 18, 2011, the Church sent a letter to the City informing it that the Holly Springs zoning ordinance, and the City's application of that ordinance to the Church, violated RLUIPA and the U.S. Constitution. The City never responded.

On January 10, 2012, after almost three months of silence and no action on the Church's application for a zoning permit, the Church filed a Complaint in the United States District Court for the Northern District of Mississippi, alleging that the Holly Springs zoning ordinance violated RLUIPA, the federal Constitution, and the Mississippi Constitution. R. 1-118. On the same date, the Church filed a Motion for Preliminary Injunction to enjoin the City from enforcing the discriminatory provisions of the Holly Springs zoning ordinance. R. 119-154. On January 17, 2012 – before the City even filed an Answer to the Complaint, much

less a Response to the Motion for Preliminary Injunction – the district court denied the motion. R. 179-180 (R.E. 4-5). A timely notice of appeal was filed on January 18, 2012. R. 183-85 (R.E. 6-8).

STATEMENT OF FACTS

I. The Religious Land Use and Institutionalized Persons Act

RLUIPA "is the latest of long-running congressional efforts to accord religious exercise heightened protection from government-imposed burdens, consistent with [the Supreme] Court's precedents." *Cutter v. Wilkinson*, 544 U.S. 709, 714 (2005). RLUIPA has its genesis in the Supreme Court's 1990 decision in *Employment Division v. Smith*, where the Court upheld the constitutionality of otherwise valid state laws of general application that incidentally burdened religious conduct. 494 U.S. 872, 878-82 (1990). Amid subsequent public outcry, Congress sought to overturn *Smith* through legislation. It enacted the Religious Freedom Restoration Act of 1993 ("RFRA"), which "prohibit[ed] '[g]overnment' from 'substantially burden[ing]' a person's exercise of religion even if the burden resulted from a rule of general applicability unless the government can demonstrate the burden '(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest.'" *City of Boerne v. Flores*, 521 U.S. 507, 515-16 (1997) (quoting 42 U.S.C. § 2000bb-1) (brackets in original). In 1997, the Supreme Court rejected this

attempt as exceeding Congress's constitutional authority insofar as it reached the conduct of States and their subdivisions. *Id*.

RLUIPA, enacted in 2000, reflects Congress's more measured attempt to ensure that state and local governments protect the rights of religious institutions and adherents in two particular contexts where Congress concluded that constitutional rights were most threatened by laws of general applicability: land-use regulation and religious exercise by institutionalized persons. *Cutter*, 544 U.S. at 715; 42 U.S.C. §§ 2000cc, 2000cc-1. The instant case is a textbook example of the type of discriminatory land-use regulation that Congress targeted in RLUIPA. As Congress recognized, zoning ordinances pose a particularly serious risk to religious freedom because "[t]he right to assemble for worship is at the very core of the free exercise of religion," and "[c]hurches and synagogues cannot function without a physical space *adequate to their needs* and consistent with their theological requirements." 146 Cong. Rec. 16698 (2000) (emphasis added). Importantly, Congress specifically described "[t]he right to build, buy, or rent such a space [a]s an indispensable adjunct of the core First Amendment right to assemble for religious purposes." *Id*.

To protect this right, RLUIPA imposes several limitations on government land-use regulations relevant here. *First*, the "Equal Terms Clause" provides that "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 assembly or institution." 42 U.S.C. § 2000cc(b)(1). *Second*, the "Substantial Burden Clause" provides that no government "shall impose or implement 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 governmental interest; and (B) is the least restrictive means of furthering that compelling governmental interest." § 2000cc(a).[2] *Third*, the "Nondiscrimination Clause" prohibits any government from "impos[ing] or implement[ing] a land use regulation that discriminates against any assembly or institution on the basis of religion or religious denomination." § 2000cc(b)(2). *Finally*, the "Unreasonable Limitation Clause" prohibits governments from "impos[ing] or implement[ing] a land use regulation that . . . unreasonably limits religious assemblies, institutions, or structures within a jurisdiction." § 2000cc(b)(3)(B).

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[2] The term "government" is defined broadly by the statute to include "(i) a State, county, municipality, or other governmental entity created under the authority of a State; (ii) any branch, department, agency, instrumentality, or official of an entity listed in clause (i); and (iii) any other person acting under color of State law." 42 U.S.C. § 2000cc-5(4)(A).

Congress specifically provided that RLUIPA "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." § 2000cc-3(g).

II. Holly Springs's Facially Discriminatory Zoning Ordinance

In April 1970, the City of Holly Springs, Mississippi enacted a comprehensive zoning ordinance, subsequently amended in 1997 and 2008. In its current form, the zoning ordinance establishes districts within the City, identifies permissible uses in those districts, imposes additional standards on certain types or uses of property, and addresses such topics as parking, trees, and signs. R. 34-79.

The zoning ordinance classifies the property on which Appellants seek to operate a church as B-3, Central Business District. The ordinance describes B-3 as "designed to accommodate a wide variety of commercial uses (particularly those that are pedestrian oriented) that will result in the most intensive and attractive use of the city's central business district." R. 73. Accordingly, there is no categorical prohibition on religious facilities (churches, synagogues, mosques, and temples) in B-3; instead, churches, like schools, social clubs, entertainment facilities (including bowling alleys, skating rinks, indoor athletic facilities, movie theaters, and

stadiums), restaurants, train stations, post offices, and gas stations, are permitted within B-3 in at least some circumstances.[3] R. 48-63 (R.E. 9-24).

Unlike these other uses, however, churches are subject to additional, highly restrictive limitations. A separate chapter of the ordinance includes several sections, each of which places supplemental conditions on a category of disfavored uses, including auto repair shops, junk yards, and churches. R. 76-83 (R.E. 26-32). For several uses, these restrictions are relatively minor and closely tied to the use of the property. For example, auto repair shops are simply required to conceal junk cars from surrounding property; construct solid board fences of uniform construction and color; store vehicles only temporarily and not remove parts; and store no more than five vehicles in front of a building at any time. R. 79 (R.E. 29). *See also id*. (requiring that junk yards and salvage yards be enclosed by a solid

[3] Several of these uses, like religious facilities, are labeled as uses that are "permitted on appeal," *i.e.*, permitted only "upon application and approval of the Planning Commission and subject to the requirements of this ordinance and such conditions as said Board may require to preserve and protect the character of the district." R. 54, 63 (R.E. 15, 24); *see also* R. 54 (R.E. 15) (applying same classification to social, fraternal clubs and lodges, union halls, and similar uses); R. 55 (R.E. 16) (applying same classification to "bowling alleys, skating rinks, indoor tennis and squash courts, billiard and pool halls, indoor athletic and exercise facilities, and similar uses"). Other uses are labeled "permitted," including movie theaters, *see* R. 55 (R.E. 16), and libraries in certain types of buildings, *see* R. 54 (R.E. 15). Appellants challenge this classification distinction insofar as it contributes to subjecting churches to the additional requirements of chapter 10, addressed below, or otherwise is intended to confer discretion on the Planning Commission to approve or disapprove applications of churches, but not similarly situated property, within B-3.

wall or fence at least six feet high, that material not be piled any higher than the wall, and that there be no burning of autos, parts, or junk material).

Churches alone, however, are subjected to a list of nine additional requirements that are both burdensome and disconnected from any apparent connection to the property's use. Section 10.8 provides as follows:

> 10.8 Churches
>
> Churches where permitted in the City of Holly Springs, shall conform to the following standards:
>
> 10.81 The amount of traffic generated and on site parking accommodations by the proposed facility must be located on a through street;
>
> 10.82 Ingress and egress to the property and proposed structures thereon with particular reference to automotive and pedestrian safety and convenience, traffic flow and control, and access in case of fire or catastrophe;
>
> 10.83 Plans must show assurance that noise levels shall not disturb the neighborhood in which the facility is proposed to be located;
>
> 10.84 The proposed scale and context of the associated activities and facilities;
>
> 10.85 A site plan shall be submitted in conformance with the site plan standards of this ordinance;
>
> 10.86 Survey of the property owners within a 1300 foot radius with 60% approval;
>
> 10.87 Sign must be located on building only and have no lighting in residential districts;
>
> 10.88 Must be a minimum of 25,000 square feet in size in the B-4 zones;

> 10.89 Final Approval must be granted by the Mayor and Board of Aldermen.

R. 81-82 (R.E. 31-32).[4]

These provisions do not apply to other classes of businesses or institutions seeking B-3 zoning approval in Holly Springs. For the uses most similar to churches, such as social or fraternal clubs, there is no applicable section imposing additional requirements.

III. Opulent Life Church's Application for a Zoning Permit

Appellant Opulent Life Church, led by its minister, Appellant Pastor Telsa DeBerry, has operated a Christian church in Holly Springs since February 6, 2011. R. 149 (R.E. 33). Since the Church's inception, it has met at the Marshall Baptist Center. R. 150 (R.E. 34). This location can comfortably accommodate only approximately twenty to twenty-five people during the course of customary religious activities. *Id*.

The membership of the Church has grown over the last several months and there are now approximately 18 people who regularly attend worship services. *Id*.

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[4] After Appellants made a request pursuant to the Mississippi Public Records Act, Miss. Code § 25-61-5, the City provided a copy of the entire zoning ordinance, from which the quoted material is drawn. Prior to the formal request, the City characterized the ordinance as a controlled document and flatly refused to provide a copy of the entire zoning ordinance to Appellants. It had previously provided a copy of just the section applicable to churches to Appellants, which was numbered 10.7 and differed in phrasing in several locations. R. 33. The two provisions are substantively identical and their minor variations are not material for purposes of this litigation.

Importantly, Pastor DeBerry explained, and the City has not disputed, that he believed many individuals had visited the Church and not returned, despite a desire to do so, because of the limited ability of the Church's facility to accommodate additional people. R. 151 (R.E. 35). Because the Church's mission includes community outreach and expanding its ministries to additional residents seeking a church home, Pastor DeBerry stated without opposition that "[i]t is of vital importance to the Church's religious mission that it maintain a facility large enough to accommodate a growing congregation." R. 153 (R.E. 37). The worship and fellowship activities that such a facility would enable are a "central aspect of the Church's religious practice." *Id*. *See also* 146 Cong. Rec. 16698 (2000) (describing right to acquire suitable space for ministry as "indispensable adjunct of the core First Amendment right to assemble for religious purposes").

The Church accordingly began a search for a suitable property in Holly Springs on which to hold its services and activities. R. 151 (R.E. 35). After careful review of available property, the Church identified and entered into a lease agreement to rent such property. R. 27-32.

The Church applied for a permit to renovate its newly leased property for use as a church and submitted a comprehensive building plan to the Holly Springs City Planning Commission (the "Planning Commission"), the body responsible for enforcing the zoning ordinance of Holly Springs. On September 16, 2011, the

Planning Commission indefinitely tabled the Church's request for a permit on the grounds that the Church did not meet the Holly Springs zoning ordinance. The Planning Commission declined to specify which requirements the Church failed to meet. At a minimum, however, the Church presumes that it has not satisfied Section 10.86, the "Survey Requirement," which requires that 60 percent of property owners within a 1300 foot radius approve the Church's use, and Section 10.89, the "Approval Requirement," which requires that the Church attain approval from the Mayor and Board of Aldermen. The Church believes that more than 100 landowners fall within the class of "property owners" from which it must attain 60 percent approval under the ordinance, rendering a mandate of compliance with this provision not only discriminatory, but substantially burdensome and impracticable. R. 152 (R.E. 36).

The Planning Commission has refused to reconsider the Church's request for a permit to renovate the property and operate a church until the zoning requirements are met. As a result of the City's decision, the Church has been unable to use its newly leased premises to accommodate its growing congregation and has instead been forced to continue to use its original location, which is inadequate to serve the needs of its members.

IV. The Present Litigation

On October 18, 2011, the Church sent a letter to the City informing it that the Holly Springs zoning ordinance, and its application to the Church, violated RLUIPA and the U.S. Constitution. The City never responded.

On January 10, 2012, after the City failed to take action on the Church's letter or its request for a zoning permit, the Church filed a Complaint against the City and associated officials, seeking a declaration that Section 10.8 of the zoning ordinance is invalid pursuant to RLUIPA, 42 U.S.C. § 2000cc *et seq.*, both facially and as applied. R. 4-26. The Complaint alleged, *inter alia*, that the zoning ordinance is invalid pursuant to the Equal Terms Clause, because Section 10.8 imposes a list of requirements – Sections 10.81 through 10.89 – that are inapplicable to other similarly situated institutions.[5] R. 13-15. Churches – but no other institutions – must either comply with Section 10.8 or seek a variance from the ordinance's requirements. The Complaint also alleged that, by imposing requirements on churches beyond those applicable to similarly situated institutions, the zoning ordinance discriminates against religious institutions in violation of the Nondiscrimination Clause. R. 17-18. This discrimination on the basis of religion violates the U.S. and Mississippi Constitutions by denying equal protection of the

[5] It appears that certain aspects of Section 10.8 – *e.g.*, the requirement that the Church have sufficient ingress and egress – are similar to components that must be included in a site plan. *See* R. 75-76. However, site plans are not generally required for non-church uses.

laws on the basis of religious affiliation, U.S. Const. amend. XIV, and interfering with the free exercise of religion, U.S. Const. amend. I; Miss. Const. Art. 3, §§ 14, 18.

The Complaint also asserted that Section 10.86 is invalid (both facially and as applied) pursuant to the Substantial Burden Clause, because it uniquely requires religious institutions to attain not just majority, but *supermajority* approval of nearby property owners before they may use property within the City. R. 15-17. In addition, the Complaint alleged that the burdens imposed by Section 10.8, which are unwarranted by any legitimate government interest, effectively preclude churches from obtaining zoning approval without seeking a variance and thus violates the Unreasonable Limitation Clause. R. 18-19. Finally, the Complaint contended that the zoning ordinance is unconstitutional on its face because it deprives the Church and its members of their rights to freely speak and assemble and is so vague as to render compliance impracticable. U.S. Const. amend. I, XIV; Miss. Const. Art. 3, §§ 11, 13, 14; *see* R. 21-24.

Concurrent with its Complaint, the Church filed a Motion for Preliminary Injunction to enjoin the City from enforcing the discriminatory provisions of the Holly Springs zoning ordinance. R. 119-154.

In support of its motion, the Church filed an affidavit from its Pastor, Appellant Telsa DeBerry, explaining the harms currently facing the Church and its

congregation. R. 149-53 (R.E. 33-38). Pastor DeBerry explained that the current location of the Church is inadequate to meet the religious needs of its current members, as the Church is unable to hold events in its current facility or engage its current membership in outreach to new members because of the small size of the facility. R. 150 (R.E. 34). Likewise, the location is not big enough for the congregation to conduct the community outreach and service events that are key aspects of the Church's religious mission. R. 150-51 (R.E. 34-35).

Pastor DeBerry also explained that the size of the existing facility has prevented the Church from expanding its membership or reaching out to non-members in the community. R. 151 (R.E. 35). Moreover, many individuals who have attended Church services have not been able to return, likely deterred by the fact that the Church lacks a facility large enough to accommodate them. *Id*.

Only seven days later, in a two page order, the district court – before the City had even appeared before the court, let alone filed an Answer to the Complaint or Opposition to the Motion for Preliminary Injunction – denied the Church's request for a preliminary injunction. R. 179-80 (R.E. 4-5). The entirety of the district court's legal analysis was contained in one paragraph:

> The court finds that plaintiffs have not shown that there is a substantial threat of irreparable harm if the injunction is not granted. It appears that the plaintiffs are still able to meet at their current location, Marshall Baptist Center. They seek to use the rented building in anticipation that their membership will grow. As the plaintiffs are not currently being deprived of the right to freely

> exercise their religion, the court fails to see irreparable harm if the injunction is not granted. The motion for preliminary injunction is DENIED.

R. 180 (R.E. 5). The court did not address Pastor DeBerry's uncontested affidavit.

STANDARD OF REVIEW

A plaintiff is not required to prove its case in full to merit a preliminary injunction. *See Univ. of Tex. v. Camenisch*, 451 U.S. 390, 395 (1981). Rather, a preliminary injunction is warranted when the plaintiff demonstrates (1) a substantial likelihood of success on the merits; (2) a substantial threat that plaintiff will suffer irreparable injury if the injunction is not granted; (3) that the threatened injury outweighs any damage that the injunction might cause the defendants; and (4) that the injunction will not disserve the public interest. *Planned Parenthood of Houston & Se. Tex. v. Sanchez*, 403 F.3d 324, 329 (5th Cir. 2005).

On appeal, a district court's denial of a preliminary injunction is reviewed for an abuse of discretion. *Women's Med. Ctr. v. Bell*, 248 F.3d 411, 418-19 (5th Cir. 2001). Each of the four requirements for a preliminary injunction presents a mixed question of law and fact, and while the district court's *factual* findings are reviewed only for clear error, any *legal* conclusions are subject to *de novo* review. *Id*. Importantly, "[a]lthough the ultimate decision whether to grant or deny a preliminary injunction is reviewed only for abuse of discretion, a decision grounded in erroneous legal principles is reviewed *de novo*." *Id*.

Here, the district court had before it no basis to make factual findings adverse to Appellants. Instead, it denied the Church's request for a preliminary injunction based on a legal error. Specifically, the district court erroneously concluded that its evaluation of what the Church's exercise of its religious rights should require could trump (1) the established principle that discrimination against an institution based on its religious beliefs is irreparable harm as a matter of law, and (2) the uncontested evidence in the record showed that the Church's existing facility is inadequate to serve the religious needs of its congregation and prevents it from expanding its membership. This erroneous conclusion is reviewed *de novo*.

SUMMARY OF ARGUMENT

The Church has clearly met the four requirements for issuance of a preliminary injunction. Unrebutted evidence demonstrates that the Church faces a substantial risk of irreparable harm absent injunctive relief. RLUIPA protects the First Amendment rights of religious institutions, *see* 42 U.S.C. § 2000cc-3(g); 146 Cong. Rec. 16698 (2000), and "[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373 (1976). The district court's conclusion that it may disregard the uncontested evidence in the record to conclude that Appellants' First Amendment and RLUIPA rights are not *currently* being violated is erroneous.

Appellants are unable to fully engage in activities central to their religious mission, including worship and fellowship activities, in the existing inadequate facility.

The Church has also met the other requirements for a preliminary injunction. The Holly Springs zoning ordinance blatantly violates the Equal Terms Clause of RLUIPA, because it imposes on churches an array of unique requirements that are not applicable to anyone else, much less other similarly-situated non-religious institutions. On this basis alone, the Church has demonstrated an overwhelming likelihood of success on the merits.[6]

The balance of harms also supports granting a preliminary injunction. Without an injunction, Appellants will continue to suffer irreparable injury to their First Amendment rights. In contrast, the City will suffer no harm if the Church is allowed to operate in the desired location pending resolution of this litigation. In fact, the Mayor of Holly Springs, who is also a member of Appellee Board of Aldermen of Holly Springs, has suggested that the Church would prevail if it sought a variance from the zoning requirements (which itself is a burden no equally situated non-religious institution must undertake), revealing that any claims of substantial injury made by the City are manufactured.

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[6] While this Equal Terms Clause claim is more than sufficient to warrant granting preliminary injunctive relief, the Church is also substantially likely to succeed on the merits of its other claims.

Finally, an injunction would serve the congressionally recognized public interest in preventing government entities from unconstitutionally and facially discriminating against an institution based on its religious exercise.

Accordingly, this Court should reverse the district court and remand with instructions to enter a preliminary injunction against the City enjoining enforcement of Section 10.8 of the Holly Springs zoning ordinance. *See, e.g., Speaks v. Kruse*, 445 F.3d 396 (5th Cir. 2006) (reversing and remanding with instructions to enter preliminary injunction); *Shamloo v. Miss. State Bd. of Trustees*, 620 F.2d 516 (5th Cir. 1980) (same); *see also FMC Corp. v. Varco Int'l, Inc.*, 677 F.2d 500 (5th Cir. 1982) (reversing district court and granting a preliminary injunction on appeal).

ARGUMENT

I. There Is a Substantial Threat of Irreparable Injury If an Injunction Is Not Granted.

Suffering discrimination on the basis of religion is irreparable harm as a matter of law. Thus, it is not surprising that our research has uncovered *no court* that has ever denied a preliminary injunction in an RLUIPA Equal Terms Clause claim based solely on a finding that the plaintiff had failed to demonstrate a substantial threat of irreparable harm. To the contrary, it is well-established that the "[l]oss of First Amendment freedoms, even for minimal periods of time, constitute[s] irreparable injury" that justifies the grant of a preliminary injunction.

Ingebretsen v. Jackson Pub. Sch. Dist., 88 F.3d 274, 280 (5th Cir. 1996); *see also Elrod*, 427 U.S. at 373. RLUIPA exists to enforce those First Amendment rights, *see* 42 U.S.C. § 2000cc-3(g), which is why "the infringement of one's rights under RLUIPA constitute[s] irreparable injury." *Reaching Hearts Int'l, Inc. v. Prince George's County*, 584 F. Supp. 2d 766, 795 (D. Md. 2008). RLUIPA is merely the statutory mechanism through which Appellants are enforcing their First Amendment right against discriminatory treatment based on their religious beliefs.[7] Hence, as a matter of law, a violation of the Equal Terms Clause of RLUIPA constitutes irreparable harm. For this reason, and despite the district court's contrary view, the Church need not demonstrate that this irreparable harm – the impairment of its protected rights – has concrete or measurable effects on activities of the Church.

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[7] *See also Rocky Mt. Christian Church v. Bd. of Cnty. Comm'rs*, 612 F. Supp. 2d 1157 (D. Col. 2009) ("The fact that the [plaintiff's] free exercise rights in this case are based on statutory claims under the RLUIPA rather than on constitutional provisions does not alter the irreparable harm analysis."); *Murphy v. Zoning Comm'n*, 148 F. Supp. 2d 173, 180-81 (D. Conn 2001) ("Since the statute was enacted for the express purpose of protecting the First Amendment rights of individuals, the allegation that defendants have violated this statute also triggers the same concerns that led the courts to hold that these violations result in a presumption of irreparable harm."). *Cf. Kikumura v. Hurley*, 242 F.3d 950, 963 (10th Cir. 2001) ("[C]ourts have held that a plaintiff satisfies the irreparable harm analysis by alleging a violation of RFRA [RLUIPA's precursor]."); *Jolly v. Coughlin*, 76 F.3d 468, 482 (2nd Cir. 1996) (finding irreparable harm in a claim under RFRA and stating that "although plaintiff's free exercise claim is statutory rather than constitutional, the denial of the plaintiff's right to the free exercise of his religious beliefs is a harm that cannot be adequately compensated monetarily").

Moreover, even ignoring the Church's RLUIPA claims, it has also alleged and demonstrated a likelihood of success on an independent claim that the zoning ordinance violates the First Amendment itself. R. 140-142; *see also infra* Part II-B. The district court simply ignored this claim in its order denying a preliminary injunction, even though the loss of First Amendment rights "unquestionably constitutes irreparable injury." *See Elrod*, 427 U.S. at 373. And as a "new, small" church, the Church falls within the group of religious institutions about which Congress recognized that there is "massive evidence" of unconstitutional discrimination. 146 Cong. Rec. 7774 (2000). As a matter of law, therefore, the district court plainly erred in concluding that the Church will not suffer irreparable harm if an injunction does not issue.

Even if a finding of irreparable harm depended on a showing of an actual effect on visible practices of the Church, Appellants have produced ample, *uncontested* evidence demonstrating the specific and irreparable harm they will suffer if an injunction does not issue. It is uncontested that the existing premises are too small to adequately meet Appellants' religious needs. R. 150-51 (R.E. 34-35). It is also uncontested that the current facility cannot accommodate all the worship activities, community outreach, and service events the Church wishes to hold in furtherance of its religious mission. *Id*. For example, the Church holds a Movies in the Park event for members of the community, but is only able to hold it

when weather permits it to proceed outdoors, because the Church's current facility cannot accommodate such an event. Moreover, it is uncontested that Church will be unable to expand its membership or engage in outreach to non-members because its current facility is already at capacity. R. 151 (R.E. 35). Indeed, Pastor DeBerry explained that certain individuals who have attended the Church on occasion have been deterred from doing so again because of the limitations of the Church's facility. *Id.*

In the face of all this uncontested evidence, the district court held that the Church will not suffer irreparable harm because "[i]t appears that the plaintiffs are still able to meet at their current location" and the Church only "seek[s] to use the rented building in anticipation that their membership will grow." R. 180 (R.E. 5).

First, it is not the role of the courts to second-guess whether a religious institution's sincerely held beliefs that certain activities are central to or required by its religion are correct. *See Merced v. Kasson*, 577 F.3d 578, 590 (5th Cir. 2009) ("The judiciary is ill-suited to opine on theological matters, and should avoid doing so." (*citing Emp't Div. v. Smith*, 494 U.S. at 887); *see also Hobbie v. Unemployment Appeals Comm.*, 480 U.S. 136, 144 n.9 (1987) ("In applying the Free Exercise Clause, courts may not inquire into the truth, validity, or reasonableness of a claimant's religious beliefs.") (citing *United States v. Ballard*, 322 U.S. 78, 87 (1944)); *A.A. v. Needville Indep. Sch. Dist.*, 611 F.3d 248, 261 (5th

Cir. 2010) ("Sincere religious belief cannot be subjected to a judicial sorting of the heretical from the mainstream . . ."). The sincerity of Pastor DeBerry's belief that the religious services, activities, and outreach that the Church would like to undertake – including the community events that do not fit in the current facility and that are not addressed by the district court's consideration of regular attendees – "are central aspects of the Church's religious practice" is unquestioned. R. 153 (R.E. 37). Accordingly, denying relief on the basis of disputing the correctness of Pastor DeBerry's belief is improper.

Second, the court below was simply wrong to conclude, in effect, that because the number of regular attendees at the Church is slightly less than the number of individuals the facility could physically accommodate, the Church is currently suffering no harm. It is well-recognized that a church requires space to grow. *See* Nelson Searcy, *5 Barriers to Church Growth*, Outreach Magazine (March 5, 2010), available at http://www.outreachmagazine.com/features/3501-Nelson-Searcy-Barriers-Church-Growth.html (noting that space is the number one barrier to church growth and that "when a room reaches 70 percent of its seating capacity, it's full. Period."); *see also* ALICE MANN, RAISING THE ROOF: THE PASTORAL-TO-PROGRAM SIZE TRANSITION 20 (2001) (when a Church reaches 80% capacity "you are discouraging frequent attendance by current members and presenting a 'no vacancy' sign to newcomers"); Tim Smith, *The Impact of Church*

Facilities on Church Growth, Sunday School Leader (May 16, 2011), available at http://www.sundayschoolleader.com/the-impact-of-church-facilities-on-church-growth/ (same). Pastor DeBerry made precisely this point in his affidavit, when he noted that individuals had been deterred from attending due to the size of the facility. R. 150-51 (R.E. 4-5). And that is just those who have previously attended; the Church's ability to draw new members to its congregation is likewise impaired. *Id*. The Church cannot even accommodate additional attendance by the family and friends of current members, let alone reach out to the local community to encourage attendance at services and other special events.

Finally, the district court simply ignored the uncontested evidence in the record that the Church *currently* cannot engage in the activities central to its religious mission, including worship and fellowship activities, due to the inadequacy of its existing facility, instead focusing exclusively on the number of regular attendees. *Id*. As Congress recognized when passing RLUIPA, "[c]hurches and synagogues cannot function without a physical space adequate to their needs and consistent with their theological requirements." 146 Cong. Rec. 7774 (2000); *see also Reaching Hearts*, 584 F. Supp. 2d at 795 (finding irreparable harm where a Church's "religious exercise has been impaired" because its existing facility "is insufficient to meet [the Church's] religious mission of teaching, worship, and other activities"). This principle is not limited to the circumstance

where the impaired activity is accommodation of current, regular attendees at worship services. Thus, even a temporary limitation on the Church's ability to carry out its religious function is an irreparable harm.

In any event, it is not clear how *any* church could ever meet the impossible standard applied by the district court. To satisfy the district court's test for irreparable harm, a church would need to already have more regular attendees than its existing facility could accommodate. That does not happen. As explained above, churches rarely grow beyond 70-80% seating capacity; by definition, they do not exceed 100%.[8]

II. The Church Is Overwhelmingly Likely to Prevail on Its Challenge to the Holly Springs Zoning Ordinance.

Because Section 10.8 of the Holly Springs zoning ordinance imposes on churches an array of requirements that are not applicable to any other institutions, it plainly violates RLUIPA's Equal Terms Clause. For that reason alone, the Church is likely to succeed in obtaining a declaration that Section 10.8 is unenforceable and an injunction against its continued enforcement. Additionally,

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[8] Even beyond Appellants' interests in religious freedom, Appellants risk irreparable harm if they are unable to commence the lease in a timely fashion. If Appellants were to lose their rights in the leased property because of their failure to get zoning approval, that loss would be a "deprivation of an interest in real property," which "constitutes irreparable harm." *Third Church of Christ v. City of New York*, 617 F. Supp. 2d 201, 215 (S.D.N.Y. 2008); *see also Cottonwood Christian Ctr. v. Cypress Redevelopment Agency*, 218 F. Supp. 2d 1203, 1230 (C.D. Cal. 2002) (finding irreparable harm from RLUIPA violation because "[e]very piece of property is unique and thus damages are an insufficient remedy to the denial of property rights").

although the Church need not rely on the other counts of the Complaint to show a likelihood of success, those claims are similarly meritorious.

A. Section 10.8 of the Holly Springs Zoning Ordinance Violates the Equal Terms Clause of RLUIPA Both Facially and As-Applied.

The Equal Terms Clause prohibits a City from "treat[ing] the Church on terms that are less than equal to the terms on which it treats similarly situated nonreligious institutions." *The Elijah Grp. v. City of Leon Valley, Tex.*, 643 F.3d 419, 424 (5th Cir. 2011). The test is one of strict liability: if a zoning ordinance treats a church on less than equal terms than a similarly situated nonreligious institution, the governmental body has no opportunity to offer a justification for the disparity. *See, e.g., id.* (finding a violation of RLUIPA's Equal Terms Clause after determining that a church was treated on less than equal terms with a nonreligious institution, without any analysis of possible government justification); *Lighthouse Inst. for Evangelism, Inc. v. City of Long Branch*, 510 F.3d 253, 269 (3d Cir. 2007) (same). Moreover, the practical significance of the disparate terms and the substantiality of the burden the distinction imposes on religious institutions are entirely irrelevant. *Centro Familiar Cristiano Buenas Nuevas v. City of Yuma*, 651 F.3d 1163, 1172 (9th Cir. 2011). The only concern of the Equal Terms Clause is whether "secular and religious institutions are treated equally." *Third Church of Christ, Scientist v. City of New York*, 626 F.3d 667, 671 (2d Cir. 2010); *see also Centro*, 651 F.3d at 1172 ("Both because the language of the equal terms provision

does not allow for it, and because it would violate the 'broad construction' provision, we cannot accept the notion that a 'compelling governmental interest' is an exception to the equal terms provision, or that the church has the burden of proving a 'substantial burden' under the equal terms provision.").

On its face, the Holly Springs zoning ordinance treats churches on unequal terms. Most notably, no other usage of property requires *any* approval by neighboring property owners. But pursuant to the Survey Requirement, churches must obtain *supermajority* approval – 60% – of all property owners within a 1300-foot radius. R. 82 (R.E. 32).

The 60% approval provision is not the only unequal term, however. Churches must also comply with an array of vague provisions, the ambiguity of which leaves churches no practical ability to ensure they are in compliance. *See, e.g.*, *id.* (Section 10.84: "Churches where permitted in the City of Holly Springs, shall conform to the following standards . . . The proposed scale and context of the associated activities and facilities"). Section 10.89 even grants an unbounded power to approve or disapprove churches on the Mayor and Board of Alderman, a power that does not exist with respect to similar facilities such as social clubs or recreational groups. R. 82 (R.E. 32). Just as "[i]t is hard to see how an express exclusion of 'religious organizations' from uses permitted as of right by other 'membership organizations' could be other than 'less than equal terms' for

religious organizations," *Centro*, 651 F.3d at 1171, it is equally "hard to see" how a list of express limitations that applies *only* to churches "could be other than 'less than equal terms.'"

The courts of appeals have disagreed over how to determine what nonreligious institutions are sufficiently similarly situated to serve as "comparators" against which the treatment of a religious institution must be measured. *Elijah Grp.*, 643 F.3d at 422-23 (describing various approaches and engaging in an analysis consistent with both the Third Circuit test and the approach taken by the Seventh and Ninth Circuits). This Court has not yet definitively adopted a specific standard, *id*. at 424 n.19, but under either potentially applicable test the Holly Springs zoning ordinance clearly fails.

While the Third Circuit inquires whether the prospective comparator "is similarly situated as to the regulatory purpose of the regulation in question," *Lighthouse Inst.*, 510 F.3d at 264, the Seventh and Ninth Circuit's test "shift[s] . . . focus from regulatory *purpose* to accepted zoning *criteria*," *River of Life Kingdom Ministries v. Vill. of Hazel Crest*, 611 F.3d 367, 371 (7th Cir. 2010) (emphases in original).[9] But no conceivable purpose or accepted zoning criterion could justify

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[9] The *Elijah* court rejected the Eleventh Circuit's alternate approach. *See Elijah Grp.*, 643 F.3d at 422-24. The Second Circuit's approach, which focuses on whether the religious and nonreligious institutions are similarly situated under the law, is not helpful where, as here,
[Footnote continued on next page]

subjecting churches, and *only* churches, to the stringent requirements of Section 10.8.

To be sure, several of the provisions of Section 10.8 could, were they applied evenhandedly, be described as tangentially related to protecting various interests of neighboring property owners. But they are not applied evenhandedly. If Holly Springs legitimately sought to further property and safety interests evenhandedly, it would impose Section 10.8's limitations on movie theaters, gyms, and social clubs – indeed, on *any* use of property. *See Elijah Grp.*, 643 F.3d at 424 (comparing churches to "nonreligious private club[s]"). Because churches and any subset of identifiable non-religious institutions are "similarly situated . . . with respect to" any legitimate goal of the zoning ordinance, regulating churches and *not* similarly regulating social clubs, businesses, or entertainment facilities of similar sizes and community impact cannot be defended "on account of a legitimate regulatory purpose." *Centro*, 651 F.3d at 1169, 1172.

The City also cannot justify its discrimination as consistent with a more general regulatory purpose to favor, and promote, tax-generating uses of land, while discouraging uses that do not give rise to revenue. As in *Centro*, where the Ninth Circuit rejected a similar argument, the zoning ordinance "allows all sorts of

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[Footnote continued from previous page]

the classification in the ordinance itself is challenged as a violation of the Equal Terms Clause. *See Third Church of Christ, Scientist*, 626 F.3d at 671-72.

non-taxpayers to operate [without the restrictions placed on churches], such as the United States Postal Service, museums, and zoos." *Centro*, 651 F.3d at 1173; *see also* R. 54 (R.E. 14) (social clubs, fraternal clubs, lodges, and union halls permitted in B3 zone); R. 60 (R.E. 20) (emergency services permitted in B3); R. 61 (R.E. 21) (post office permitted in B3).

Because Section 10.8 draws an "express distinction" between similarly situated religious and nonreligious institutions, the Church has established a *prima facie* case of an Equal Terms Clause violation. *Centro*, 651 F.3d at 1171. "If a plaintiff produces prima facie evidence to support a claim alleging a violation of the Free Exercise Clause or a violation of section 2000cc of this title, the government shall bear the burden of persuasion on any element of the claim . . . ." § 2000cc-2(b). Because there is no conceivable regulatory purpose or accepted zoning criterion under which this discriminatory limitation could be considered "equal terms," the City cannot meet this burden and the Church has shown a strong likelihood of success on its equal terms claim.[10]

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[10] For the same reasons that the ordinance denies equal terms, it violates the Nondiscrimination Clause of RLUIPA. *See, e.g., Sts. Constantine & Helen Greek Orthodox Church, Inc. v. City of New Berlin*, 396 F.3d 895, 900 (7th Cir. 2005); *Church of Scientology of Ga., Inc. v. City of Sandy Springs*, 2011 U.S. Dist. LEXIS 116945, *72 (N.D. Ga. Sept. 30, 2011).

B. The Church Is Also Likely to Succeed on Its Other Claims.

Though this Court need not look beyond the Equal Terms Clause to find a likelihood of success on the merits, the Church is also likely to succeed on its other claims. For example, Section 10.8 violates the Substantial Burden Clause of RLUIPA, which applies strict scrutiny to any land use regulation that "imposes a substantial burden on the religious exercise of . . . a religious assembly or institution."[11] 42 U.S.C. §§ 2000cc(a)(1). Mandating that a church obtain the approval of a supermajority of nearby property owners substantially impairs its ability to attain zoning approval and runs counter to the Supreme Court's unequivocal guarantee that "[o]ne's right to life, liberty, and property, to free speech, a free press, *freedom of worship and assembly*, and other fundamental rights *may not be submitted to vote*; they depend on the outcome of no elections."

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[11] RLUIPA specifically provides that "[t]he use, building, or conversion of real property for the purpose of religious exercise shall be considered to be religious exercise." 42 U.S.C. § 2000cc-5(7)(B). The Substantial Burden Clause only applies when "(A) the substantial burden is imposed in a program or activity that receives Federal financial assistance, even if the burden results from a rule of general applicability; (B) the substantial burden affects, or removal of that substantial burden would affect, commerce with foreign nations, among the several States, or with Indian tribes, even if the burden results from a rule of general applicability; or (C) the substantial burden is imposed in the implementation of a land use regulation or system of land use regulations, under which a government makes, or has in place formal or informal procedures or practices that permit the government to make, individualized assessments of the proposed uses for the property involved." § 2000cc(a)(2). Subsections (B) and (C) are both implicated here. *See Freedom Baptist Church of Delaware County v. Twp. of Middletown*, 204 F. Supp. 2d 857, 868-69 (E.D. Pa. 2002) ("No one contests that zoning ordinances must by their nature impose individual assessment regimes. That is to say, land use regulations through zoning codes necessarily involve case-by-case evaluations of the propriety of proposed activity against extant land use regulations.").

W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 638 (1943) (emphasis added). Because the discriminatory ordinance is not narrowly tailored to serve any compelling interest, it violates the Substantial Burden Clause of RLUIPA.[12]

The Church is also likely to succeed on its constitutional challenges. Because Section 10.8 is not "neutral and of general applicability," it violates the First Amendment's protection of the free exercise of religion unless it is narrowly tailored to serve a compelling governmental interest – a test it cannot meet. *Church of the Lukumi Babalu Aye,* 508 U.S. 520, 531-32 (1993). In addition, many of Section 10.8's provisions are so vague as to make compliance impossible or improperly vest unfettered discretion in the hands of the City. *See Women's Med. Ctr.*, 248 F.3d at 421. As a result, under the "more stringent vagueness test" that governs laws which "threaten[] to inhibit the exercise of constitutionally protected rights," Section 10.8 violates due process. *Vill. of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 499 (1982). Moreover, Section 10.8 treats churches differently from non-religious institutions (and possibly from non-church religious institutions) based on their religious affiliation, which violates the

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[12] Although the Church does not rely on this argument at this stage of the proceedings, the evidence at trial will also show that the remaining requirements of Section 10.8 likewise inflict a substantial burden on the Church. *See, e.g., Westchester Day Sch. v. Village of Mamaroneck*, 504 F.3d 338, 351-53 (2d Cir. 2007) (substantial burden exists where land use approval is conditioned on satisfaction of requirements that were difficult or impossible to satisfy); *Guru Nanak Sikh Society v. Cnty. of Sutter*, 465 F.3d 978, 988-89 (9th Cir. 2006).

Equal Protection Clause. *See Plyler v. Doe*, 457 U.S. 202, 216-17 (1982); *City of New Orleans v. Dukes*, 427 U.S. 297, 303 (1976) (per curiam). Finally, Section 10.8 unconstitutionally burdens the Church and Pastor DeBerry's First Amendment rights to freely speak and assemble. *Turner Broad. Sys., Inc. v. F.C.C.*, 512 U.S. 622, 642 (1994); *Bd. of Directors of Rotary Intern. v. Rotary Club of Duarte*, 481 U.S. 537 (1987).[13]

III. The Balance of Harms Favors Granting a Preliminary Injunction.

A preliminary injunction is also warranted because the "threatened injury to [Plaintiffs] . . . outweighs the potential harm the injunction causes the [Defendants]." *Deerfield Med. Ctr. v. City of Deerfield Beach*, 661 F.2d 328, 332 (5th Cir. 1981).[14] As noted above, courts commonly find that an impairment of a religious institution's ability to operate is irreparable; thus, even if the Church prevails at the end of the trial and a permanent injunction is entered, that injunction will not compensate the Church and Pastor DeBerry for the intervening interference with their First Amendment rights. *See Digrugilliers v. Consol. City*

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[13] For the same reasons, Section 10.8 violates the corresponding provisions of the Mississippi Constitution. Miss. Const. Art. 3, §§ 11, 13, 14.

[14] The four preliminary injunction factors are weighed on a sliding scale; where, as here, the likelihood of success is high, proof that the balance of hardships favors the plaintiff is correspondingly less important. *See Fla. Med. Ass'n v. U.S. Dep't of HEW*, 601 F.2d 199, 203 n.2 (5th Cir. 1979); *see also Novartis Consumer Health, Inc. v. Johnson & Johnson-Merck Consumer Pharms. Co.*, 290 F.3d 578, 597 (3d Cir. 2002) ("the more likely the plaintiff is to win, the less heavily need the balance of harms weigh in his favor"); *Ponce v. Socorro Indep. Sch. Dist.*, 432 F. Supp. 2d 682, 704-05 (W.D. Tex. 2006) (summarizing test), *vacated on other grounds*, 2007 U.S. App. LEXIS 26862 (5th Cir. Nov. 20, 2007).

of Indianapolis, 506 F.3d 612, 618 (7th Cir. 2007) ("If [plaintiff's] church must vacate its premises while his case wends its way to completion, the church's religious activities will be hampered."). On the other hand, "it is hard to see what difference it can make to the City" if the Church is permitted to operate in its leased premises for the duration of this case. *Id*. Indeed, the City's mayor has told Pastor DeBerry that if the Church applies for a variance – a complex and time-consuming burden that equally situated non-church facilities are not required to undertake – such a variance would likely be granted, making any claim of substantial hardship to the City untenable. R. 152 (R.E. 36).[15]

Where a plaintiff shows a likelihood of success on a RLUIPA claim, courts routinely conclude that the balance of hardships favors the plaintiff. In *Guatay Christian Fellowship v. County of San Diego*, the court observed that "Congress has determined that the balance of equities and public interest should weigh in favor of free exercise of religion and that this balance should only be disrupted when the government is able to prove, by specific evidence, that its interests are compelling and its burdening of religious freedom is as limited as possible." 2008

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[15] In addition to being a burden that is not placed on non-religious institutions, the Mayor's suggestion that the Church should seek a variance is inconsistent with the zoning ordinance. Under the express terms of the zoning ordinance, seeking a variance would require the Church to file a complex and burdensome written application contending that special conditions and circumstances exist which are peculiar to the *land, structure, or building involved*. R. 115. Seeking a variance is not a valid method of contending that a provision of the zoning ordinance is invalid in *all* applications.

U.S. Dist. LEXIS 93872, at *10 (S.D. Cal. Nov. 18, 2008), *aff'd* No. 09-5654, 2011 U.S. App. LEXIS 25581 (9th Cir. Dec. 23, 2011). *See also Reaching Hearts Int'l*, 584 F. Supp. 2d at 796 ("The balance of hardships tips heavily in favor of [plaintiff.] While [plaintiff] has had its fundamental right to free exercise of religion burdened by Defendant's actions over the past six years and has suffered various financial harm, there is no evidence in the record that Defendant [county] will suffer any hardship.").

IV. The Public Interest in Protecting the Free Exercise of Religion Requires Entry of a Preliminary Injunction.

Finally, the public interest is well served by a preliminary injunction that prevents the City from discriminating against an institution based on its religious exercise. Courts have repeatedly emphasized that there is a "public interest of furthering the exercise and protection of the constitutional right to the free exercise of religion." *Reaching Hearts Int'l,* 584 F. Supp. 2d at 796; *see also Ingebretsen*, 88 F.3d at 280 ("The School Prayer Statute is unconstitutional so the public interest was not disserved by an injunction preventing its implementation."). And "[b]y passing RLUIPA, Congress conclusively determined the national public policy that religious land uses are to be guarded from interference with local governments to the maximum extent permitted by the Constitution." *Reaching Hearts Int'l*, 584 F. Supp. 2d at 796 (quoting *Cottonwood Christian Ctr. v. Cypress Redevelopment Agency*, 218 F. Supp. 2d 1203, 1230-31 (C.D. Cal. 2002)).

As described above, the continued enforcement of the Holly Springs zoning ordinance against Appellants, in violation of RLUIPA and the First Amendment, inhibits their religious exercise. Accordingly, a preliminary injunction preventing this continued injury would serve the public interest because "injunctions protecting First Amendment freedoms are always in the public interest." *See, e.g., Christian Legal Soc'y v. Walker*, 453 F.3d 853, 859 (7th Cir. 2006).[16] This public interest in the First Amendment is "greater [and] more fundamental" than any "public interest in enforcement of zoning ordinances by the City." *Doctor John's, Inc. v. City of Sioux City*, 305 F. Supp. 2d 1022, 1042 (N.D. Iowa 2004).

Additionally, the Church is an active participant in the Holly Springs community, where it holds numerous community outreach and service events, such as Sunday Morning Worship and Bible Study, Mid-week Prayer and Bible Study, Vacation Bible School, Friends in the Park, and Movies in the Park. R. 150 (R.E. 34). Allowing the Church to operate in the larger property that it has leased will only increase the positive impact that the Church has already had and will continue

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16 *See also Newsom v. Albermarle County Sch. Bd.*, 354 F.3d 249, 261 (4th Cir. 2003) ("Surely, upholding constitutional rights serves the public interest."); *Homans v. Albuquerque*, 264 F.3d 1240, 1244 (10th Cir. 2001) ("We believe that the public interest is better served by . . . protecting core First Amendment rights."); *Iowa Right to Life Comm., Inc. v. Williams*, 187 F.3d 963, 970 (8th Cir. 1999) ("public interest favors protecting core First Amendment freedoms"); *G & V Lounge, Inc. v. Mich. Liquor Control Comm'n*, 23 F.3d 1071, 1079 (6th Cir. 1994) ("it is always in the public interest to prevent the violation of a party's constitutional rights"); *Cate v. Oldham*, 707 F.2d 1176, 1190 (11th Cir. 1983) (the "strong public interest in protecting First Amendment values" favors preliminary injunctive relief).

to have in the Holly Springs community. *See Galper v. United States Shoe Corp.*, 815 F. Supp. 1037, 1044 (E.D. Mich. 1983) (public interest favors entry of an injunction where denial of the request for an injunction would "disrupt the service [plaintiff] provides . . . to local residents"); *Marilyn Manson v. N.J. Sports & Exposition Auth.*, 971 F. Supp. 875, 890-91 (D.N.J. 1997) (public interest supports injunctive relief to allow concert that "a substantial number of community citizens would like to attend").

CONCLUSION

The City has enacted, administered, and enforced a zoning ordinance that plainly violates the Religious Land Use and Institutionalized Persons Act and the U.S. Constitution. If the City is allowed to continue to enforce this blatantly discriminatory ordinance to deny the Church a permit to operate a church on its newly leased property, the Church will continue to be irreparably harmed.

Accordingly, and for the reasons stated above, the Court should reverse the district court. Because the propriety of injunctive relief can be decided more efficiently by this Court in the first instance than by awaiting further judgment of the district court, Appellants respectfully request that the Court remand with instructions that the district court enter a preliminary injunction enjoining Appellees from enforcing Section 10.8 of the Holly Springs zoning ordinance pending final judgment in this case.

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CERTIFICATE OF COMPLIANCE WITH RULE 32(A)

The undersigned counsel certifies that this brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in Times New Roman, 14-point. The brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 9476 words, excluding the parts exempted from brief requirements under Fed. R. App. P. 32(a)(7)(B)(iii).

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CERTIFICATE OF SERVICE

I hereby certify that on March 7, 2012, a true and correct copy of the foregoing was served via electronic mail on the following counsel for Appellees:

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