12-1057(L)

12-1495 (con)

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

_____

CHABAD LUBAVITCH OF LITCHFIELD COUNTY INC., and JOSEPH EISENBACH, RABBI,

Plaintiffs-Appellants

UNITED STATES OF AMERICA,

Plaintiff

v.

LITCHFIELD HISTORIC DISTRICT COMMISSION (*See inside cover for continuation of caption*)

_____

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

_____

PROOF BRIEF FOR THE UNITED STATES AS AMICUS CURIAE IN SUPPORT OF PLAINTIFFS-APPELLANTS SEEKING TO VACATE PORTIONS OF THE DISTRICT COURT'S ORDER AND REMAND

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(*Continuation of caption*)

BOROUGH OF LITCHFIELD, CONNECTICUT, WENDY KUHNE, GLENN HILLMAN, and KATHLEEN CRAWFORD,

Defendants-Appellees

TOWN OF LITCHFIELD, CONNECTICUT, DOE, POLICE DOG,

Defendants

TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES

CASES: **PAGE**

CASES (continued): **PAGE**

STATUTES:

LEGISLATIVE HISTORY:

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INTEREST OF THE UNITED STATES

This case concerns the interpretation of the substantial burden and the antidiscrimination provisions of the Religious Land Use and Institutionalized Persons Act (RLUIPA), 42 U.S.C. 2000cc *et seq.* The Department of Justice is charged with enforcing RLUIPA, see 42 U.S.C. 2000cc-2(f), and therefore has an interest in how courts apply the statute's terms.

STATEMENT OF THE ISSUES

The United States' brief is limited to the following issues:

1. Whether defendant Borough's system of individualized exemptions pursuant to a historic preservation scheme is a neutral rule of general applicability that is exempt from RLUIPA's substantial-burden prohibition.

2. Did the district court misconstrue RLUIPA's nondiscrimination provision by requiring plaintiffs to identify another religious institution that was identically situated but treated more favorably?

STATEMENT OF THE CASE

1. Facts

Plaintiffs, the Chabad Lubavitch of Litchfield County (a Jewish congregation) and its rabbi, Joseph Eisenbach, bought a house in a historic district in the Borough of Litchfield. Doc. 169 at 3.[1] The property was zoned commercial, and the congregation planned to expand the house (known as the Deming house) to include worship facilities, an apartment for the rabbi and his family, a guest apartment, classrooms, and a basement swimming pool. Doc. 169 at 3-4 & n.5. The renovations would add a three-story, 17,000 square-foot addition to the 2600 square foot house. Doc. 169 at 3-4.

[1] "Doc. _" refers to documents filed in the district court by docket number.

The house is in Litchfield's historic district, and the congregation sought a "certificate of appropriateness" to permit them to build. Doc. 169 at 4. Connecticut law requires that where a town has established a historic district, new buildings and alterations must be approved for "appropriateness as to exterior architectural features." Doc. 169 at 11 (citing Conn. Gen. Stat. § 7-147d(a) (1989)). In making its decision, a town should consider, "in addition to any other pertinent factors," "the historical and architectural value and significance, architectural style, scale, general design, arrangement, texture and material of the architectural features involved and the relationship thereof to the exterior architectural style and pertinent features of other buildings and structures in the immediate neighborhood." Conn. Gen. Stat. § 7-147f (1989). The Borough's Historic District Commission unanimously denied the Chabad's application, and invited the congregation to resubmit its application with a proposed addition no larger than the original house. Doc. 169 at 4-5. One member of the commission, Chairwoman Wendy Kuhne, did not vote on the proposal. Doc. 169 at 4 & n.6. Chabad had requested she recuse herself. Doc. 169 at 4 & n.6. Plaintiffs brought suit.

2. Procedural History

Plaintiffs brought claims under the Free Exercise clause of the First Amendment, the Fourteenth Amendment Equal Protection clause, 42 U.S.C. 1983,

state law, and RLUIPA. Doc. 54 at 20-29. They alleged that the denial violated RLUIPA by substantially burdening their religious exercise, discriminating against plaintiffs on the basis of their religion, and treating their religious assembly on less than equal terms with nonreligious assemblies. Doc. 54 at 24-26.

Plaintiffs claimed that commission members made statements showing anti-Jewish animus. They alleged Chairwoman Kuhne stated that "the Star of David may not comply with the district." Doc. 54 at 16. Kuhne apparently also objected to the synagogue's plans to use stone from Jerusalem and to build a clock tower with a Hebrew-alphabet clock. Doc. 156-10 at 6. Another committee member, James Sansing, felt that Kuhne's statements might be anti-Semitic. Doc. 156-2 at 68. Commission member Judith Acerbi apparently said the design "will turn Litchfield into a factory town." Doc. 54 at 16-17.

Plaintiffs also alleged that their proposed renovations were consistent with other modifications allowed to nearby historic buildings. For example, they stated that the Oliver Wolcott Library within the historic district had a rear addition larger than the historic house itself and that the Rose Haven home "has an extensive rear addition that is much larger than the residential home structure." Doc. 54 at 15. In addition, the Cramer & Anderson law firm building had an addition "nearly doubling the size of the original historic home's structure" and the town hall was

recently expanded from nearly 8000 square feet to nearly 20,000 square feet. Doc. 54 at 15.

Because they cannot renovate the building, the Chabad continues to meet in rented space which, they claim, is inadequate. Doc. 54 at 9. The space is near a loading dock and there are unpleasant odors from nearby dumpsters. Doc. 54 at 10. Because the site is at the rear of a commercial building and not easy to see, some potential congregants have given up on attending after failing to find the meeting space. Doc. 54 at 10. Others have declined to join because of the lack of space. Doc. 54 at 10. The congregation is prevented from conducting certain worship practices, such as having a mikvah for ritual purification. Doc. 54 at 10.

3. The District Court's Decision[2]

The district court granted defendants' motions for summary judgment on all claims against them. The court recognized that RLUIPA's "substantial burden" provision requires that "'[n]o government shall impose or implement a land use regulation in a manner that imposes a substantial burden on * * * a religious assembly or institution,' unless the government demonstrates that the regulation

[2] Prior to this ruling, the court granted defendants' motion to dismiss the rabbi as an individual plaintiff. Doc. 88; Doc. 151 at 5. The court also rejected defendants challenge to the constitutionality of RLUIPA. Doc. 151 at 13. The United States intervened as a plaintiff for the limited purpose of defending the constitutionality of the statute. Doc. 126. The United States did not file a notice of appeal in this case.

furthers a compelling interest and is the least restrictive means of furthering that interest." Doc. 169 at 7 (quoting 42 U.S.C. 2000cc(a)(1)). But the court stated that "generally applicable burdens – imposed neutrally – are not 'substantial.'" Doc. 169 at 8. It concluded that "because the statutory scheme Chabad challenges is neutral and of general applicability, and not imposed arbitrarily, capriciously, or unlawfully" the congregation could not "as a matter of law, * * * establish a substantial burden on the free exercise of its religion." Doc. 169 at 13. It further found that "where the denial of a religious organization's application to build is not absolute and, instead, invites an amended application, it is less likely to constitute a substantial burden." Doc. 169 at 8.

The court also rejected plaintiff's claims that they suffered unequal treatment in violation of RLUIPA's requirements that a city not "treat[] a religious assembly or institution on less than equal terms with a nonreligious assembly or institution." 42 U.S.C. 2000cc(b)(1). The court concluded that the plaintiff had not pointed to any relevant examples where the city treated another institution or assembly more favorably. Doc. 169 at 15, 21-22. The court rejected several proposed comparators because they were authorized under a former preservation scheme or because the Chabad had not submitted appropriate documentation of the comparators' features. Doc. 169 at 17-21.

The court further rejected the Chabad's claims that the Borough violated RLUIPA's requirement that it not "discriminate[] against any assembly or institution on the basis of religion or religious denomination." Doc. 169 at 22 (quoting 42 U.S.C. 2000cc(b)(2)). The court concluded that the Chabad had not pointed to any institution that was similarly situated but treated more favorably and, accordingly, it could not show discrimination. The court relied on a Seventh Circuit Equal Protection decision stating "that 'comparators must be prima facie identical in all relevant respects.'" Doc. 169 at 24 (quoting *Racine Charter One* v. *Racine Unified Sch. Dist*., 424 F.3d 677, 680 (7th Cir. 2005)).

As comparators, the Chabad pointed to several large Christian churches in the historic district, claiming that they were "substantially larger in visual mass" than its proposed building. Doc. 169 at 22-24. The court noted that "[e]ach of the churches in the historic district was initially built as a church (notably before 1989) and was not remodeled into a church from an existing residential home." Doc. 169 at 25. For some suggested comparators, the court concluded that the Chabad had not presented proper documentation or had relied on changes approved under a prior preservation scheme. Doc. 169 at 23 n.14, 25-26. Ultimately, the court concluded that "the churches were originally built to sizes essentially the same as their current sizes," and that modern alterations (such as additions or a garage)

were not comparable to Chabad's proposed expansion of the Deming house. Doc. 169 at 25-26.

SUMMARY OF ARGUMENT

The district court wrongly applied RLUIPA's substantial burden provision in assessing the synagogue's claims. The Historic District Commission's system of approvals is not a neutral rule of general applicability – it is a system of individualized and subjective decisionmaking that is subject to RLUIPA's substantial burden prohibition. This Court should remand for the district court to evaluate whether the denial of a building permit, considering the totality of the circumstances, substantially burdened the Chabad's religious exercise.

In addition, the district court misconstrued RLUIPA's nondiscrimination provision when it required the synagogue to identify another institution that was identically situated but treated more favorably. Instead, the district court should have inquired more broadly as to whether there was any evidence of discriminatory intent. When evaluating such claims, a court should apply the Supreme Court's standard set out in *Village of Arlington Heights* v. *Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977), to assess potential unlawful discrimination through "a sensitive inquiry into such circumstantial and direct evidence of intent as may be available." *Id.* at 266. A court must determine if discrimination was "a motivating factor" in the land use decision. *Id.* at 266.

ARGUMENT

I

THE DISTRICT COURT WRONGLY RULED THE CHABAD COULD NOT CHALLENGE THE HISTORICAL DISTRICT COMMISSION'S DENIAL OF ITS BUILDING PERMIT UNDER RLUIPA'S SUBSTANTIAL BURDEN PROVISION

RLUIPA provides that a government may not "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 burden is justified by a compelling interest and is the least restrictive means of furthering that interest. 42 U.S.C. 2000cc(a)(1).[3] RLUIPA also directs that it should be "construed in favor of a broad protection of religious exercise, to the maximum extent permitted by the terms of this chapter and the Constitution." 42 U.S.C. 2000cc-3(g). The statute protects the "use, building, or conversion of real property for the purpose of religious exercise." 42 U.S.C. 2000cc-5(7)(B). In the land use context, a substantial burden exists where there is a "close nexus between the coerced or impeded conduct and the institution's religious exercise." *Westchester Day School* v. *Village of Mamaroneck*, 504 F.3d 338, 349 (2d Cir.

[3] A land use regulation includes "a zoning or landmarking law, or the application of such a law, that limits or restricts a claimant's use or development of land." 42 U.S.C. 2000cc-5(5).

2007). Thus "denial of an institution's application to build" must have more than "minimal impact on the institution's religious exercise." *Ibid.*

Here, the court applied the wrong legal standard to decide whether the Borough's zoning decision substantially burdened the Chabad. The court concluded that "as a matter of law, Chabad cannot establish a substantial burden on the free exercise of its religion, because the statutory scheme Chabad challenges is neutral and of general applicability." Doc. 169 at 13. This interpretation of the statute is incorrect.

By its terms, RLUIPA applies where a system of land use regulations sets up "formal or informal procedures or practices" for "individualized assessments of the proposed uses for the property involved." 42 U.S.C. 2000cc(a)(2)(C).[4] The Supreme Court has observed, in assessing a similar standard enacted in the Religious Freedom Restoration Act of 1993, 42 U.S.C. 2000bb *et seq.*, that the rule "operates by mandating consideration, under the compelling interest test, of exceptions to rule[s] of general applicability. Congress determined that the legislated test is a workable test for striking sensible balances between religious

[4] While Congress included a proviso that the statute reaches a burden imposed by a land use regulation "even if the burden results from a rule of general applicability" in subsections (a)(2)(A) (substantial burdens on religion in federally funded programs) and (a)(2)(B) (substantial burdens on religion affecting interstate commerce), it had no need to include such a proviso in subsection (a)(2)(C) because a system of individualized assessment is not a rule of general applicability.

liberty and competing prior governmental interests." *Gonzales* v. *O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 436 (2006) (citation and internal quotation marks omitted). Congress enacted RLUIPA to address concerns that discrimination may "lurk[] behind * * * vague and universally applicable reasons" cities routinely give for land use decisions, such "as traffic, aesthetics, or 'not consistent with the city's land use plan.'" 146 Cong. Rec. S7774 (daily ed. July 27, 2000) (joint statement of Sen. Hatch and Kennedy). Congress identified a "widespread practice of individualized decisions to grant or refuse permission to use property for religious purposes," and noted individualized assessments both "readily lend themselves to discrimination" and "make it difficult to prove discrimination in any individual case." *Id*. at S7775.

RLUIPA's substantial burden provision codifies the Free Exercise Clause "individualized assessments" doctrine set forth in *Sherbert* v. *Verner*, 374 U.S. 398 (1963). See *Saints Constantine & Helen Greek Orthodox Church, Inc.* v. *City of New Berlin*, 396 F.3d 895, 897 (7th Cir. 2005) (noting RLUIPA's Section 2000cc(a)(2)(C) "codifies *Sherbert* v. *Verner*"); see also 146 Cong. Rec. S7775 (daily ed. July 27, 2000) (joint statement of Sen. Hatch and Kennedy); H.R. Rep.

No. 219, 106th Cong., 1st Sess. 8, 20-21 (1999).[5] In *Sherbert*, the Court evaluated a state unemployment compensation scheme. Under its rules, employees had to be available for work in order to be eligible for compensation, but there were exceptions for those found, after an administrative proceeding, to be unavailable for good cause. *Sherbert*, 374 U.S. at 400-401. An employee was denied compensation because she would not work on Saturday, her Sabbath. *Id.* at 399-401, 407. The State had set up an individualized system for evaluating eligibility, and the Court concluded that it could not deny benefits that would substantially burden the employee's religious exercise. *Id.* at 404, 410. The law substantially burdened the employee in *Sherbert* by forcing her to choose between observance of her faith and access to benefits. *Id.* at 404.

Here, the district court failed to recognize that RLUIPA applies to the Borough's individualized decisions, even if the landmarking laws under which it operates are facially neutral. As the Ninth Circuit has explained, "when the Zoning Code is applied to grant or deny a certain use to a particular parcel of land, that application is an 'implementation' under 42 U.S.C. § 2000cc(2)(C)." *Guru Nanak Sikh Soc. of Yuba City* v. *County of Sutter*, 456 F.3d 978, 986-987 (9th Cir. 2006); see also 42 U.S.C. 2000cc(2)(C) (stating the statute applies where "the substantial

[5] The bill discussed in the House Report was an initial effort to codify constitutional rights relating to state and local land use decisions and a predecessor to RLUIPA.

burden is imposed in the implementation of a land use regulation or system of land use regulations"). The substantial burden provision protects religious institutions where "a state delegates essentially standardless discretion to nonprofessionals operating without procedural safeguards," as "in the case of the grant or denial of zoning variances." *Saints Constantine & Helen Greek Orthodox Church*, 396 F.3d at 900. "[T]he substantial burden provision backstops the explicit prohibition of religious discrimination in the later section of the Act, much as the disparate-impact theory of employment discrimination backstops the prohibition of intentional discrimination." *Ibid.* (citation and internal quotation marks omitted). Because of the potential for discrimination in individualized determinations, this safeguard is particularly important where a minority religion is denied a permit. *Ibid.*

Here, the Historical District Commission has broad discretion to apply subjective standards. See *Saints Constantine & Helen Greek Orthodox Church*, 396 F.3d at 900. The commission does not merely apply a general rule or system of rules, it makes an *individualized* assessment based on broad criteria.[6] The commission has wide discretion to reject or grant a permit, and it uses subjective criteria to make its decisions. It broadly considers a building's "historical and

[6] The district court acknowledged that the criteria were "subjective," although it concluded the commission's discretion stopped short of "unbridled discretion." Doc 169 at 32.

architectural value and significance, architectural style, scale, general design, arrangement, texture and material." Conn. Gen. Stat. § 7-147f(a) (1989). Its ultimate standard is "appropriateness as to exterior architectural features." Doc. 169 at 11 (citing Conn. Gen. Stat. § 7-147d(a) (1989)); see also Conn. Gen. Stat. § 7-147a(a) (2011) (defining "appropriate" as "not incongruous with those aspects of the historic district which the historic district commission determines to be historically or architecturally significant"). The commission is empowered to grant a variance in some cases where strict adherence to the preservation requirements would impose hardship. Conn. Gen. Stat. § 7-147g (1989).

In deciding that the substantial burden analysis did not apply to the Historical District Commission's permitting decision, the district court misapplied this Court's precedent. Contrary to the district court's analysis, Doc. 169 at 7-8, this Court's decision in *Westchester Day School* v. *Village of Mamaroneck*, 504 F.3d 338 (2d Cir. 2007), does not exclude zoning decisions from RLUIPA's substantial burden analysis. In reviewing principles of First Amendment law, the *Westchester Day School* opinion stated that "generally applicable burdens, neutrally imposed, are not 'substantial.'" *Id.* at 350 (quoting *Jimmy Swaggart Ministries* v. *Board of Equalization*, 493 U.S. 378, 389-391 (1990)). But in analyzing whether the city had violated RLUIPA by denying a religious school permission to expand, this Court went beyond analysis of the zoning law's

neutrality and examined the zoning decision itself.[7] It applied the substantial burden analysis and assessed the potential impact on the school. It considered whether the individual zoning decision was arbitrary, whether the city's stated reasons for the denial were supported by the evidence, whether the school had "quick, reliable, and financially feasible alternatives" to meet its religious needs, and whether the denial was conditional or absolute. *Id*. at 351-352. Similarly, this Court recently held that RLUIPA applied even where a town relied on neutral and generally applicable environmental regulations to deny a building permit. *Fortress Bible Church* v. *Feiner*, 694 F.3d 208, 216 (2d Cir. 2012). But *cf. Rector, Wardens, and Members of Vestry of St. Bartholomew's Church* v. *City of New York*, 914 F.2d 348, 355 (2d Cir. 1990) (holding that landmarking law was neutral and generally applicable law and that "no First Amendment violation has occurred absent a showing of discriminatory motive, coercion in religious practice or the

[7] *Jimmy Swaggart Ministries*, cited in *Westchester Day School*, 504 F.3d at 350, does not establish a categorical rule that generally applicable laws may never impose a substantial burden under RLUIPA. The case involved application of the First Amendment and, even in that context, the Court did not state that a generally applicable rule could never substantially burden religion. It held that a generally applicable state sales tax did not substantially burden sales of religious literature. The Court did so in part because the tax was "only a small fraction of any retail sale," and left open the possibility that a larger tax, even if generally applicable, might be a substantial burden. *Jimmy Swaggart Ministries*, 493 U.S. at 389, 392 ("[I]t is of course possible to imagine that a more onerous tax rate, even if generally applicable, might effectively choke off an adherent's religious practices.").

Church's inability to carry out its religious mission in its existing facilities"), cert. denied, 499 U.S. 905 (1991). In *Fortress Bible Church*, the city's decision required "discretionary land use approvals from the Town." *Id*. at 213.

The district court in this case should have followed the analysis this Court applied in *Westchester Day School* and *Fortress Bible Church* to assess whether the Borough's decision imposes a substantial burden on the Chabad's religious exercise. Under that standard, a court should examine whether the denial of the permit at issue, viewed against the totality of the circumstances, actually and substantially inhibits religious exercise rather than merely inconveniencing it. As *Fortress Bible Church* explained, "[t]he burden must have more than a minimal impact on religious exercise, and there must be a close nexus between the two." *Fortress Bible Church*, 694 F.3d at 219.

Courts consider a religious institution's specific circumstances, such as whether a religious institution can easily find another location, whether denial of a building permit will require them to turn away potential members, and whether the denial imposes significant expense. See *Fortress Bible Church*, 694 F.3d at 219 (noting church could not expand its membership at its current location); *World Outreach Conference Ctr.* v. *City of Chi.*, 591 F.3d 531, 539 (7th Cir. 2009) (holding church was not substantially burdened by the city's denial of a permit to demolish a landmarked building, as the church could build its planned family life

center elsewhere on its campus); *Guru Nanak Sikh Society of Yuba*, 456 F.3d at 988-990 (holding Sikh temple faced a substantial burden after the city repeatedly denied an application – first in a residential zone and again in an agricultural zone); *Saints Constantine & Helen Greek Orthodox Church*, 396 F.3d at 900-901 (noting church faced uncertainty and expense when city refused variance). In *Westchester Day School*, for example, this Court looked at whether there were other "quick, reliable, and financially feasible alternatives" to renovations (such as reorganization of the existing classrooms) and whether the city's conditions "would impose so great an economic burden" that the conditions were essentially "unworkable." *Westchester Day School*, 504 F.3d at 349, 352. The district court here should have considered such factors, including whether the Chabad could easily find another suitable location or whether it could comply with the Borough's limitations on the size of its new structure.

In rejecting plaintiffs' claims, the district court also found that the Borough's regulations were "not imposed arbitrarily, capriciously, or unlawfully." Doc. 169 at 13. This finding, however, does not excuse the court from considering all relevant factors and making findings about a substantial burden. An arbitrary, capricious, or unlawful decision likely does violate RLUIPA. But so may an otherwise lawful and rational decision. In *Westchester Day School*, this Court considered whether the city's denial was improper under state law and it concluded

that "the arbitrary and unlawful nature of the * * * denial" supported a finding of a substantial burden. *Westchester Day Sch.*, 504 F.3d at 352. Nevertheless, this Court recognized that "other factors * * * must be considered" as well, and accordingly evaluated the burden placed on the religious school. *Ibid.*; see also *Fortress Bible Church*, 694 F.3d at 219 ("Our conclusion that the Church was substantially burdened *is bolstered by* the arbitrary, capricious, and discriminatory nature of the Town's actions.") (emphasis added).[8] Indeed, in *Westchester Day School*, this Court explained the findings of arbitrary treatment were "relevant to the evaluation of [the school's] particular substantial burden claim" and did not announce that such findings were typically required. *Westchester Day Sch.*, 504 F.3d at 351.

[8] Even a neutral rule can substantially burden religion. Indeed, if RLUIPA's substantial burden provisions applied only where a law singles out religion, there would be no need for the statute's provisions barring discrimination against religious institutions and requiring treatment on equal terms with nonreligious institutions. 42 U.S.C. 2000cc(b)(1) & (2) (barring regulations that "treat[] a religious assembly or institution on less than equal terms with a nonreligious assembly or institution" or "that discriminate[] against any assembly or institution on the basis of religion"). The Seventh Circuit has relied on this aspect of RLUIPA to reject a narrow application of the substantial burden provision. *Saints Constantine & Helen Greek Orthodox Church*, 396 F.3d at 900. Pointing to the antidiscrimination and equal terms provisions, the court concluded that "[t]he 'substantial burden' provision must thus mean something different from 'greater burden than imposed on secular institutions.'" *Ibid.*

II

THE DISTRICT COURT INCORRECTLY APPLIED RLUIPA'S NONDISCRIMINATION PROVISION WHEN IT REQUIRED PLAINTIFFS TO IDENTIFY AN IDENTICAL INSTITUTION WHICH HAD BEEN TREATED MORE FAVORABLY

RLUIPA bars governments 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." 42 U.S.C. 2000cc(b)(2). This provision codifies nondiscrimination principles of the First and the Fourteenth Amendments. See *Midrash Sephardi, Inc.* v. *Town of Surfside*, 366 F.3d 1214, 1238-1240 (11th Cir. 2004), cert. denied, 543 U.S. 1146.

In determining whether the city's actions were motivated by discriminatory intent, courts should look to the several factors outlined by the Supreme Court in *Village of Arlington Heights* v. *Metropolitan Housing Development Corp*., 429 U.S. 252 (1977), including the decision's context, the decisionmakers' contemporaneous statements, and any departures from the usual procedures. *Id.* at 267. The district court in this case improperly restricted its review to whether the Chabad had pointed to a similarly situated comparator. To be sure, a court should consider whether a city has treated other religious institutions comparably; such a comparison may expose discrimination. But in this case, the court's exclusive focus on the comparative analysis was improper. See *Pyke* v. *Cuomo*, 258 F.3d 107, 110 (2d Cir. 2001) (holding, in the Equal Protection context, that a plaintiff

who claims a facially neutral policy was discriminatorily motivated "is not obligated to show a better treated, similarly situated group of individuals of a different race"). Nor by its narrow inquiry did the district court meet its obligation to "resolv[e] all ambiguities and draw[] all permissible factual inferences in favor of the party against whom summary judgment is sought." *Loeffler* v. *Staten Island Univ. Hosp.*, 582 F.3d 268, 274 (2d Cir. 2009) (citation and internal quotation marks omitted).

The district court should have considered whether the totality of the Chabad's evidence raised genuine issues about the Historical District Committee's motives for denying the application and carried out "a sensitive inquiry into such circumstantial and direct evidence of intent as may be available." *Village of Arlington Heights*, 429 U.S. at 266. In deciding the Chabad's antidiscrimination claim, the court did not assess any other relevant evidence and apparently concluded there was no discrimination simply because Chabad had not identified an identical comparator. The Chabad presented evidence of possible anti-Jewish feeling, but the court did not even mention that evidence when it ruled on plaintiff's antidiscrimination claim.[9] The court should have acknowledged the

[9] One commission member recused herself after the Chabad objected to her remarks about the Star of David. The district court acknowledged that her comment might raise an inference that she was motivated by religious animus. Doc. 169 at 38. In assessing conspiracy claims against individual plaintiffs under

(continued...)

broad inquiry required under *Arlington Heights* and assessed the evidence in determining whether the Historical District Commission rendered its decision with a discriminatory motive.

The Supreme Court has established that the *Arlington Heights* standard applies to claims of religious discrimination in land regulation. In *Church of the Lukumi Babalu Aye, Inc.* v. *City of Hialeah*, 508 U.S. 520 (1993), the Court applied the standard to zoning laws targeting Santeria worship and noted that "[h]ere, as in equal protection cases, we may determine the city council's object from both direct and circumstantial evidence." *Id.* at 540 (citing *Arlington Heights* and listing relevant factors). See also *United States* v. *Yonkers Bd. of Educ.*, 837 F.2d 1181, 1216-1217 (2d Cir. 1987) (applying *Arlington Heights* to claims brought under the Fair Housing Act), cert. denied, 486 U.S. 1055 (1988).

Potentially relevant factors include substantial disparate impact, such as "a clear pattern, unexplainable on grounds other than" religion. *Village of Arlington Heights*, 429 U.S. at 266. The *Lukumi* Court found a "pattern * * * disclos[ing]

(...continued)
42 U.S.C. 1985, the court found that the comment was not sufficient "to raise a reasonable inference of a tacit agreement" among the committee members or show "religious animus was a significant influence on" them. Doc. 169 at 38. Nevertheless, for purposes of assessing the Chabad's RLUIPA claim, the court must determine whether, given the comment and all the other circumstances, discrimination was "a motivating factor" in the decision. *Village of Arlington Heights*, 429 U.S. at 265, 271 & n.21; see also Doc. 54 at 18; Doc. 169 at 37-38.

animosity to Santeria adherents and their religious practices" where city ordinances were "gerrymandered" to proscribe Santeria rituals and "function[ed] * * * to suppress Santeria religious worship." *Lukumi Babalu Aye, Inc.*, 508 U.S. at 540, 542.

A court should also consider "[t]he historical background of the [city's] decision" because "[t]he specific sequence of events leading up [to] the challenged decision also may shed some light on the decisionmaker's purposes." *Village of Arlington Heights*, 429 U.S. at 267; *Lukumi Babalu Aye, Inc.*, 508 U.S. at 540. "Departures from the normal, procedural sequence might afford evidence that improper purposes are playing a role." *Village of Arlington Heights*, 429 U.S. at 267. "[R]epeated legal errors by the City's officials," as this Court has acknowledged, may "cast[] doubt" on their good faith. *Westchester Day School* v. *Village of Mamaroneck*, 504 F.3d 338, 350-351 (2d Cir. 2007) (quoting *Saints Constantine & Helen Greek Orthodox Church, Inc.* v. *City of New Berlin*, 396 F.3d 895, 899-901 (7th Cir. 2005)).

Administrative history and "contempora[ry] statements made by members of the decisionmaking body" are also relevant, *Lukumi Babalu Aye, Inc.*, 508 U.S. at 540, as is an analysis of whether "factors usually considered important" disfavor the decisionmakers' ultimate choice, *Village of Arlington Heights*, 429 U.S. at 266-

267. Courts should consider any other relevant factors. *Id.* at 268 (noting that the Court's summary is not "exhaustive").

A plaintiff does not need to "prove that the challenged action rested solely on racially discriminatory purposes." *Village of Arlington Heights*, 429 U.S. at 265. Most decisions, as the Supreme Court observed in *Arlington Heights*, involve several reasons. *Ibid.* Once a plaintiff shows that the defendant's decision was motivated at least in part by discriminatory intent, the burden shifts to the defendant to prove that "the same decision would have resulted even had the impermissible purpose not been considered." *Id.* at 271 n.21.

The court not only erred in limiting its analysis to one form of evidence, a comparison with other religious institutions in the area, it also applied an overly-restrictive analysis when assessing that evidence. The court suggested that only an "identical" comparator would do. Doc. 169 at 24. The court said that "[d]emonstrating that two entities are similarly situated generally requires some specificity," Doc. 169 at 24, and quoted a Seventh Circuit case requiring "that 'comparators must be prima facie identical in all relevant respects,'" Doc. 169 at 24 (quoting *Racine Charter One* v. *Racine Unified Sch. Dist.*, 424 F.3d 677, 680 (7th Cir. 2005)). *Racine* did not involve discrimination on the basis of religion – or, indeed, any discrimination claim subject to heightened scrutiny. It decided charter school students' claims that they be offered the same transportation given

public school students. *Ibid.*[10] On remand, the court should inquire, more broadly, into "such circumstantial and direct evidence of intent as may be available." *Village of Arlington Heights*, 429 U.S. at 266.

CONCLUSION

This Court should vacate the district court's decision and remand for further proceedings.

Respectfully submitted,

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[10] In considering an Equal Protection "class-of-one" claim, asserted along with a RLUIPA claim, this Court has stated that "evidence of several other [land use] projects treated differently with regard to discrete issues is sufficient," even where a plaintiff did not point to an identical comparator. *Fortress Bible Church* v. *Feiner*, 694 F.3d 208, 222-223 (2d Cir. 2012).

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), I hereby certify that this brief complies with the type-volume limitation imposed by Rules 29(d) and 32(a)(7)(B). The brief was prepared using Microsoft Word 2007 and contains 5300 words of proportionally-spaced text. The type face is Times New Roman, 14-point font.

s/ April J. Anderson
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Dated: November 14, 2012

CERTIFICATE OF SERVICE

I hereby certify that on November 14, 2012, I electronically filed the foregoing Proof Brief For The United States As Amicus Curiae In Support Of Plaintiffs-Appellants Seeking To Vacate Portions Of The District Court's Order And Remand with the Clerk of the Court for the United States Court of Appeals for the Second Circuit by using the appellate CM/ECF system. I further certify that all participants in this case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system. Finally, I certify that six (6) hard copies of the foregoing were sent via certified mail to the Clerk of the Court.

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