No. 21-2392

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

ALIVE CHURCH OF THE NAZARENE, INC.,

Plaintiff-Appellant,

vs.

PRINCE WILLIAM COUNTY, VIRGINIA,

Defendant-Appellee.

Appeal from the United States District Court for the Eastern District of Virginia, Alexandria Division, Case Action No. 21-cv-891-LMB-JFA

BRIEF OF APPELLANT ALIVE CHURCH OF THE NAZARENE, INC.

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JURISDICTIONAL STATEMENT

Federal subject matter jurisdiction over this case arises from the United States Constitution and federal law — particularly 42 U.S.C. §§ 1983 and 1988 and the Religious Land Use and Institutionalized Persons Act (RLUIPA), 42 U.S.C. § 2000cc, *et seq.*, as well as 28 U.S.C. §§ 1331 and 1343.

This Court possesses appellate jurisdiction over this case pursuant to 28 U.S.C § 1291.

STATEMENT OF ISSUES

Did the District Court err when it granted the County's 12(b)(6) motion to dismiss the Church's entire Complaint?

Did the Church state a claim that the County violated RLUIPA and the First Amendment by denying the Church permission to meet on its Property for religious worship when it would allow secular assemblies and institutions such as farm wineries, breweries, and other agritourism uses to meet and assemble on the Property for secular purposes?

May the County require a Church to obtain a Virginia Alcoholic Beverage Control (ABC) license to sell alcohol, in violation of its sincerely held denominational religious beliefs, in order to worship on its land, or to enjoy the same beneficial land use treatment the County gives to farm wineries and limited license breweries, all on A-1 land, and even where the County knows the Church would not

actually produce or sell alcohol – without violating RLUIPA or the First and Fourteenth Amendments to the United States Constitution?

STATEMENT OF THE CASE

Alive Church is a small Church in Prince William County, Virginia. *See* Joint Appendix "JA" 8–9. The Church purchased a 17.5 acre parcel of Property in November 2018. JA 9. The Property is zoned A-1, Agricultural. *Id*. Alive Church purchased the Property because a previous church that owned the Property had obtained approval for a Special Use Permit ("SUP") to build a church on the Property. JA 10. Alive Church has not begun construction of the church allowed for by the SUP because to comply with the requirements and conditions of the SUP will cost hundreds of thousands of dollars that the Church does not currently have. *Id*. However, the Church intends to fulfill the conditions of the SUP when it is able. *Id*.

Because the Church has not begun construction under the SUP, it cannot meet on its Property for the purpose of religious worship. *Id*. The Church had been meeting in a Prince William County school but was forced to find a new meeting place when the schools were closed due to the COVID-19 pandemic. JA 11. The Church was able to begin meeting in a farm winery/brewery located in the County that contained a building for public gathering purposes. *Id*. Because the Church was meeting in the farm winery/brewery, it questioned why it could not do the same on its own Property. *Id*.

In Prince William County, within the A-1 Agricultural zoning district, the County permits "farm wineries" and "breweries with limited brewery licenses" to meet by right and without the need for a SUP. *See* Prince William County Code §32-301.02. The County permits farm wineries and breweries located on ten acres or more to hold "special events" including "meetings, conferences, banquets, dinners, wedding receptions, private parties and other events conducted for the purpose of marketing wine, mead, cider and similar beverages and/or beer, produced on the premises." *Id*. at §32-300.07(10)(b)(ii). The Code allows "Music, art, or other entertainment and cultural activities" as "accessory activities to a special event." *Id*. at §32-300.07(10)(b)(iii).

Beyond these permitted uses in the A-1 Agricultural district, the Virginia Code requires that "agritourism activities" be permitted without a SUP. *See* Va. Code Ann. §§ 15.2-2288, 15.2-2288.6(A)(1)-(4). An agritourism activity is defined as "any activity carried our on a farm or ranch that allows members of the general public, for recreational, entertainment, or educational purposes, to view or enjoy rural activities, including farming, wineries, ranching horseback riding, historical, cultural, harvest-your-own activities, or natural activities and attractions." *Id*. § 3.2-6400. In addition to the permission to hold public meetings and gatherings, farm wineries and breweries are permitted to build agricultural buildings such as barns and to hold public gatherings in those facilities without the need for a building

permit. JA 14; *see also* §§ 202 & 203 of Virginia Uniform Statewide Building Code. This exemption has been recognized by Prince William County. *See PWC Building Code Exemptions – Farm Buildings*, Prince William County, https://www.pwcva.gov/assets/2021-04/007969.pdf (last visited Feb. 5, 2022).

In contrast to these secular assemblies and institutions that are permitted to hold public gatherings on A-1 Agricultural land without the need for a SUP and to build public gathering spaces without a building permit, the County Code requires "religious institution[s] or place[s] of religious worship" to apply for and obtain a SUP prior to being able to gather for religious worship on A-1 zoned property. *See* Prince William County Code §32.301.04(26).

Given its ability to meet in a farm winery/brewery in the County for religious worship services, the Church approached the County Zoning Administrator in late 2020 to ask whether the Church could apply for the same permission as a farm winery/brewery that would enable it to meet for religious worship on its Property. JA 11. Upon advice from the Zoning Administrator, the Church applied for a zoning determination that it could use its Property as a "bona fide agricultural use" in the interim before it executed on its SUP. JA 12. The Church planned to use its Property to grow fruit trees, make non-alcoholic apple cider, and conduct religious worship services. *Id*.

The Church obtained a zoning determination that its plan for its Property was,

in fact, bona fide agricultural use. JA 69. The Church sought permission to build a barn (specifically, a farm structure exempt under Virginia code) on its agricultural land and use it, *in addition to the agricultural and agritourism purposes*, for religious meetings and other First Amendment and statutorily protected activities until the Church is able to execute on the SUP and build its permanent Church building (which the Church will do as soon as it can afford to). *The County Zoning Administrator proposed this course of action* when the Church's Pastor asked how his Church could enjoy the same beneficial treatment as the limited license breweries and farm wineries receive from the County – i.e., the ability to hold events in farm structures not subject to Temporary Activity Permit (TAP) or SUP restrictions.[1]

The Zoning Administrator approved the Church's application and granted it a

[1] The Church now believes that the County delayed the Church's application process, including informal slow-walking and a formal delay of an additional 30 days by taking 90 days to respond to the Church instead of the requisite 60 days – all while the County responded to other applicants in much shorter times, and with no delay, such as one week. The timing of the County's delay tactics coincides with the County's amendment process and passage of its new Agritourism and Arts Overlay District (AAOD) imposing stricter requirements, including TAP requirements, on A-1 land operators like Alive Church. In other words, the timing of the County's delay tactics support a very reasonable inference that it intentionally delayed Alive Church until the County could amend its ordinances to be harsher and more restrictive. The County clearly does not want churches operating on A-1 land unless they comply with the expensive and cumbersome Special Use Permit processes, even if a church, like Alive Church here, would operate in all relevant respects as a County-favored agricultural operation like a farm winery. The District Court's premature dismissal of the Complaint and termination of the action prevented discovery on these critical facts.

bona fide agricultural use on February 26, 2021. JA 12. However, the Zoning Administrator clarified in her letter that the church must obtain a winery or brewery license from the Virginia Alcoholic Beverage Control (ABC) Board before it would be permitted to hold gatherings and events on the Property. *Id*. The Church initially pursued obtaining an ABC license but quickly realized that obtaining a liquor license would violate a core tenet of the Nazarene denomination that prohibits the sale or promotion of alcohol in any way. JA 12–13. The Church therefore withdrew its request for an ABC license.

Left with no avenue to begin meeting on its Property, the Church instituted this action that challenged the unequal treatment of the Church with farm wineries and breweries and agritourism uses. In its Complaint, the Church alleged that it met all the requirements and has the necessary approvals to be treated by the County as a bona fide agricultural use and as a farm winery or brewery except for its inability to obtain an ABC license. JA 13. The Church alleged that if its religious beliefs allowed it to obtain an ABC license, the County would allow it to exercise its religion, via agritourism gatherings and functions on the Property. *Id*. The Church also alleged that it was being treated differently than farm wineries, breweries, and agritourism uses who were allowed to hold gatherings, meetings, functions, and the like on A-1 Property whereas in contrast the Church was not permitted to hold religious gatherings, meetings, and the like on its A-1 property. The Complaint

alleged that the Church met the purpose of the A-1 Agricultural district because the Church intended to conduct agricultural activities on its Property. JA 11–12.

This case comes before this Court on appeal of the District Court's Opinion, Order, and final Judgment prematurely granting the County's Rule 12(b)(6) Motion to Dismiss the Church's entire Complaint for failure to state a claim. JA 251–274. The District Court first held that the Church had standing to bring its Complaint because "the Church sufficiently alleges that it has to incur greater expense than farm wineries and breweries to hold similar types of gatherings." JA 258. The Court dismissed the Church's RLUIPA equal terms claim after deciding that the "appropriate comparator" to the Church were not farm wineries, breweries, or agritourism uses, but were the thirty-four other *excluded* non-agricultural entities requiring a SUP to gather on A-1 zoned Property. JA 259–262. The Court held that the "zoning ordinance speaks for itself: the Church's statutory companions—such as child-care facilities and civic clubs—should be the proper comparators." JA 261.

The District Court dismissed the RLUIPA "nondiscrimination" count in the Church's Complaint by holding that the Church "does not allege it was treated differently than similarly situated nonagricultural entities." JA 263.

Likewise, the Court dismissed the RLUIPA "substantial burden" count in the Complaint by holding that the Church's inability to gather on the Property "cannot be attributed to the County. It is a self-imposed hardship." JA 265. The District Court

placed the entire weight of its analysis on this point that "when the Church purchased the Property in 2018, it did so knowing the property was subject to a SUP." *Id*.

The District Court dismissed the Church's Free Exercise challenge by holding that the zoning regulations for the A-1 district "are neutral laws of general applicability," and that the regulations were rationally related to a legitimate government interest of prioritizing "farming and other agricultural pursuits." JA 267–268.

The Court also dismissed the Church's First Amendment peaceable assembly claim by holding that the zoning regulations were content-neutral time, place, and manner restrictions which was narrowly tailored "precisely because it does not bar entities that primarily have a non-agricultural purpose, like the Church, from assembling in the A-1 Zoning District. Instead, it allows such entities to assemble as long as they comply with the SUP." JA 270. The Court held that when the Church complies with the SUP it will have ample channels for the Church to communicate its religious message. *Id*.

Finally, the District Court dismissed the Church's equal protection claim under the rationale that the "prior analysis of the RLUIPA claims doom the equal protection claim." JA 271.

SUMMARY OF ARGUMENT

The District Court dismissed the Church's entire case at the initial pleading

stage by analyzing the Church's claims in a way that placed insurmountable obstacles in the Church's way and that ignored explicit allegations in the Church's Complaint. Under the District Court's rendering of RLUIPA, all claims by churches fail except for the most egregious and explicit violations. The District Court committed the categorical error of comparing churches to *excluded* assemblies and institutions and not *included* assemblies and institutions. In so doing, the Court violated Congress' explicit command to interpret RLUIPA broadly in a manner to protect the free exercise of religion to the broadest extent possible. The Court's analysis cramps RLUIPA to the point where it is an illusory statute that affords no real relief to churches.

The District Court's categorical error of comparing churches to excluded and not to included uses infects its analysis of the other claims brought by the Church as well. In the end, the Church is excluded from using its Property in the same way as agricultural uses like wineries, breweries, and agritourism activities despite the fact that the Church explicitly alleged that it would also conduct agricultural activities. Given this allegation (which was not taken by the District Court as true), the only appreciable difference between the Church here and the uses that are allowed to hold public gatherings on A-1 zoned property is that the Church is religious. This blatant discrimination violates several provisions of RLUIPA and the Constitution. The Church properly pled these claims and the District Court's opinion must be reversed

to allow it to proceed on these claims.

ARGUMENT

I. Standard of Review

This Court views "the district court's dismissal order de novo, accepting as true the facts alleged in the complaint and drawing all reasonable inferences in Plaintiffs' favor, to determine whether the complaint contains facts sufficient to state a claim that is 'plausible on its face.'" *Jesus Christ is the Answer Ministries, Inc. v. Balt. Cty.*, 915 F.3d 256, 260 (4th Cir. 2019) (quoting *Kensington Volunteer Fire Dep't, Inc. v. Montgomery County*, 684 F.3d 462, 467 (4th Cir. 2012) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007))).

"[A]t the motion to dismiss stage 'a plaintiff need not demonstrate that her right to relief is probable or that alternative explanations are less likely; rather, she must merely advance her claim 'across the line from conceivable to plausible.'" *Jesus Christ is the Answer Ministries*, 915 F.3d at 263 (quoting *Houck v. Substitute Tr. Servs., Inc.*, 791 F.3d 473, 484 (4th Cir. 2015) (quoting *Twombly*, 550 U.S. at 570)). A Rule 12(b)(6) motion to dismiss determines only whether a claim is stated; "it does not resolve contests surrounding the facts, the merits of a claim, or the applicability of defenses." *Republican Party v. Martin*, 980 F.2d 943, 952 (4th Cir. 1992). Rather, a complaint clears the hurdle when it contains "sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'"

Ashcroft v. Iqbal, 556 U.S. 662, 677 (2009) (quoting *Twombly*, 550 U.S. at 570).

In this evaluation, "[the] court accepts all well-pled facts as true and construes these facts in the light most favorable to the plaintiff," but does not consider "legal conclusions, elements of a cause of action, . . . bare assertions devoid of further factual enhancement[,] . . . unwarranted inferences, unreasonable conclusions, or arguments." *Nemet Chevrolet, Ltd. v. Consumeraffairs.com, Inc.*, 591 F.3d 250, 255 (4th Cir. 2009) (citations omitted). The plausibility standard simply requires a plaintiff to articulate facts, that, when accepted as true, demonstrate that the plaintiff has stated a claim that makes it plausible he is entitled to relief. *Francis v. Giacomelli*, 588 F.3d 186, 193 (4th Cir. 2009) (quotations omitted).

II. The Church stated a claim under RLUIPA's equal terms provision.

The District Court erred in dismissing the RLUIPA equal terms claim. It committed a categorical error of comparing the Church to entities *excluded* from the A-1 zone instead of comparing the Church to entities *included* in the A-1 zone. The District Court's ruling interpretes RLUIPA's equal terms provision so narrowly that it not only renders it effectively meaningless but it also violates RLUIPA's command that: "[t]his chapter shall 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). Under the District Court's analysis, the Church could never state a claim even though its Complaint clearly alleged

differential treatment.

RLUIPA's equal terms provision states: "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). The plaintiff bears the initial burden to "produce[] prima facie evidence to support a claim" of unequal treatment, after which the "government . . . bear[s] the burden of persuasion on any element of the claim." *Id.* at § 2000cc-2(b).

Generally, the four elements to an equal terms violation are: (1) the plaintiff must be a religious assembly or institution; (2) subject to a land use regulation; and (3) the regulation must treat the religious assembly on less than equal terms than (4) a non-religious assembly or institution. *See Redemption Community Church v. City of Laurel*, 333 F. Supp. 3d 521, 531–32 (D. Md. 2018). The District Court was correct in one respect when it held: "The focus here falls on the third and fourth elements as the Church unquestionably satisfies the first two – i.e., it is a religious assembly subject to a land use regulation." JA 259.

This Court has yet to adopt a test as to the third and fourth elements, but, like in *Redemption Community Church*, "even if the Fourth Circuit were to adopt the more stringent standard for defining 'equal terms,'" the Church has met it. *Id.* at 532; *see also id.* at 532–33 ("The Complaint lists various institutions that are permitted

uses within the [relevant] zone that do not require a special exception, any one of which could constitute a similarly situated comparator.").

The District Court erred below in restrictively analyzing the third and fourth prongs of the RLUIPA equal terms test. The District Court compared the Church to entities listed in the zoning ordinance that were *excluded* from the A-1 district unless they obtained a SUP. Instead, the District Court should have compared the Church to *included* entities in the A-1 zoning district such as farm wineries, breweries, and agritourism activities. These uses unquestionably are permitted without a SUP and may hold public gatherings for various purposes. For example, farm wineries and breweries may hold public gatherings such as:

- Meetings
- Conferences
- Banquets
- Dinners
- Wedding Receptions
- Private Parties
- "Other events"
- Music activities
- Art activities
- Entertainment activities
- Cultural activities

See Prince William Code § 32-300.07(10)(b)(ii) & (iii). These activities are undeniably "assembly" uses of A-1 property. *See* 42 U.S.C. §2000cc(b)(1).

Similarly, agritourism activities may hold public assembly gatherings such as:

- Recreational

- Entertainment
- Educational
- Natural activities and attractions

See Va. Code Ann. 3.2-6400. These activities are also "assembly" activities.

Considering the broad range of activities allowed on A-1 zoned property by wineries, breweries, and agritourism uses, it is difficult to understand how a religious activity differs in any significant respect. Yet this is where the District Court's restrictive analysis stacks the deck against churches in a RLUIPA equal terms case.

The District Court held that the difference between the permitted uses and churches was that the Church is "not agricultural and therefore do[es] not advance the zones purpose." JA 261. The court agreed with the County's argument below that "farm wineries and limited license breweries identified by the plaintiff are not appropriate comparators to religious institutions for the purposes of the equal terms provision because they are agricultural uses." JA 84.

This misses the point of the Church's RLUIPA claim: *It wants to operate agricultural uses on its land that are also religious*. It is, after all, a church, and no law says, nor could it, that churches may only operate in a traditional church building. Further, farm wineries in the County routinely conduct weddings on their premises – weddings which in many, if not most, cases bear religious content, religious expression, and religious practice. Consequently, farm wineries and breweries are appropriate comparators.

While the Church does not take issue with the general interest of a County to preserve the zoned nature of the land, the lower Court erred in applying this justification as it did, especially at the motion to dismiss stage, because the County itself has already determined that the Church's planned use is "bona fide agricultural." JA 69–70. The County did not contend, nor was discovery allowed to adduce evidence to refute or support, that the route the County suggested to the Church (a farm winery/limited license brewery with an ABC license) would impose any more of an affront to the County's interest in preserving the agricultural nature of the A-1 land if the Church did everything to go that route except obtain an ABC license – especially when the County had already determined the Church's proposed use of the land to be "bona fide agricultural."

The District Court's holding that wineries and breweries are "agricultural" and thus are not adequate comparators under RLUIPA would allow government to get a free pass every time there is unequal treatment. Secular assemblies and institutions are always going to be different from religious institutions in some way. They could be commercial, or publicly oriented, or they could generate tax revenue, or any number of other possibilities. But RLUIPA does not require that the Church point to an identical comparator. As one court of appeals noted with regard to the equal terms claim, "[N]o circuit employs such a cramped reading of the equal terms provision." *Tree of Life Christian Sch. v. City of Upper Arlington*, 905 F.3d 357, 368

(6th Cir. 2018) (citing *Lighthouse Inst. for Evangelism, Inc. v. City of Long Branch*, 510 F.3d 253, 266 (3d Cir. 2007) ("There is no need . . . for the religious institution to show that there exists a secular comparator that performs the same functions."); *Vision Church v. Village of Long Grove*, 468 F.3d 975, 1003 (7th Cir. 2006) ("[U]nder RLUIPA['s] [equal terms provision,] a plaintiff need not demonstrate disparate treatment between two institutions similarly situated in all relevant respects, as required under equal protection jurisdiction."); *Midrash Sephardi, Inc. v. Town of Surfside*, 366 F.3d 1214, 1229 (11th Cir. 2004) ("[W]hile [RLUIPA's equal terms provision] has the 'feel' of an equal protection law, it lacks the 'similarly situated' requirement usually found in equal protection analysis.").

This Court should adopt a test for RLUIPA's equal terms provision that is faithful to Congress' command to interpret RLUIPA "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). RLUIPA does not impose a requirement that a church must be compared in light of the "accepted zoning criteria" or anything of the sort. These are extra-textual constructs placed into RLUIPA that violate its basic command to be interpreted broadly. RLUIPA instead calls for a simple analysis: Are there secular assemblies or institutions that are allowed to assemble or exist in a particular zone? If there are, and churches are excluded, then RLUIPA is violated. The District Court's application of RLUIPA's equal terms

provision illustrates why this Court must institute a test that faithfully—and broadly—applies RLUIPA's equal terms provision. After all, if secular uses are allowed to assemble and hold public gatherings for any number of purposes, why would a church not be allowed to do the same, and why would its exclusion not violate RLUIPA?

This Court must assess the Church's case, so it must adopt an interpretive framework for RLUIPA's equal terms provision. As is addressed in more detail below, this Court's sister Circuits have adopted various iterations of a test regarding what constitutes a proper comparator. On one end of the spectrum, the Eleventh Circuit's test is the most favorable to RLUIPA plaintiffs. It "treats all land use regulations that facially differentiate between religious and nonreligious institutions as violations of the Clause." *Opulent Life Church v. City of Holly Springs*, 697 F.3d 279, 291 (5th Cir. 2012) (citing *Midrash Sephardi, Inc. v. Town of Surfside*, 366 F.3d 1214, 1231 (11th Cir. 2004)); *see also Konikov v. Orange Cty.*, 410 F.3d 1317, 1324 (11th Cir. 2005) (For purposes of a RLUIPA equal terms challenge, the standard for determining whether it is proper to compare a religious group to a nonreligious group is not whether one is "similarly situated" to the other, . . . [r]ather, the relevant 'natural perimeter' for comparison is the category of 'assemblies and institutions' as set forth by RLUIPA."); *Redemption Cmty. Church*, 333 F. Supp. 3d at 52.

On the other end, the Third Circuit subscribes to a narrower equal treatment

test:

> The second test of equal treatment is narrower and holds that "a violation of the Equal Terms Clause occurs only if a religious institution is treated less well than a similarly situated nonreligious comparator." *Opulent Life Church*, 697 F.3d at 291. The Third Circuit, for example, holds that "similarly situated" comparators are those that are similarly situated "as to the regulatory purpose," *Lighthouse Inst. for Evangelism, Inc. v. City of Long Branch*, 510 F.3d 253, 266 (3d Cir. 2007), while the Seventh Circuit looks to whether secular institutions are "treated the same . . . from the standpoint of an accepted zoning criterion," such as parking, traffic control, or generating municipal revenue. *River of Life Kingdom Ministries v. Vill. of Hazel Crest, Ill.*, 611 F.3d 367, 373 (7th Cir. 2010).

Redemption Cmty. Church, 333 F. Supp. 3d at 532. The Seventh Circuit considers whether secular institutions are "treated the same . . . from the standpoint of an accepted zoning criterion." *River of Life Kingdom Ministries v. Vill. of Hazel Crest*, 611 F.3d 367, 373 (7th Cir. 2010); *see Hunt Valley Baptist Church, Inc. v. Balt. Cty.*, 2020 U.S. Dist. LEXIS 2205, **32–33 (D.Md. Feb. 10, 2020).

But while the Third Circuit rejected a church's challenge of one ordinance, it upheld a challenge to the other ordinance, concluding that "it is not apparent from the allowed uses why a church would cause greater harm to regulatory objectives than an assembly hall," and directing the district court to grant summary judgment in favor of the plaintiff. *Lighthouse Institute for Evangelism, Inc.*, 510 F.3d at 264; *see Hunt Valley Baptist Church, Inc.*, 2020 U.S. Dist. LEXIS 2205, *35 (following and applying this reasoning). While this Court has not yet adopted a test, Alive Church stated a claim under any one of the Circuits' tests. None of the circuit courts,

though, require an identical comparator to a religious assembly or institution as the County urges here and as the District Court functionally held.

1. The Eleventh Circuit's Test

The Eleventh Circuit's test asks whether a religious assembly or institution is subject to a land use regulation that treats it on less than equal terms with a nonreligious assembly or institution. *See Primera Iglesia Bautista Hispana v. Broward County*, 450 F.3d 1295, 1307 (11th Cir. 2006). If a religious assembly meets this test, then "the offending conduct may be upheld if the defendant establishes that the conduct employs a narrowly tailored means of achieving a compelling government interest." *Id*. at 1308.

The Eleventh Circuit has specifically rejected an analysis under RLUIPA's equal terms provision that requires an identical secular comparator. The court stated that while the equal terms provision of RLUIPA "has the 'feel' of an equal protection law, it lacks the 'similarly situated' requirement usually found in equal protection analysis." *Midrash Sephardi, Inc. v. Town of Surfside*, 366 F.3d 1214, 1229 (11th Cir. 2004). In *Midrash Sephardi*, the Eleventh Circuit held that the district court in that case had erred in adopting a similarly situated requirement for a facial RLUIPA equal terms claim. *See id.* at 1230. The court instead looked to the ordinary definition of the terms "assembly" or "institution" and determined that clubs and lodges were valid comparators to churches. The Town of Surfside had attempted to create a

zoning district that provided for "retail shopping and personal service needs of the town's residents and tourists." *Id.* at 1219–20. The court analyzed this stated zoning interest in light of the inclusion of private clubs and lodges and found that clubs and lodges did not "actually contribute to the business district in a way appreciably different than religious institutions. Surfside's goal of retail synergy is pursued only against religious assemblies, but not other noncommercial assemblies, thus devaluing the religious reasons for assembling."*Id.* at 1234.

In a later case, the Eleventh Circuit stated that when a plaintiff brings an as applied RLUIPA equal terms claim, it must point to a similarly situated secular comparator. *See Primera Iglesia*, 450 F.3d at 1311. But even in that case the Eleventh Circuit did not hold that a comparator needed to be identical, only instead that it must be similarly situated. There, the church was claiming that it was treated differently during the zoning process than a school. But the court found that the school was not similarly situated to the church because "they sought markedly different forms of zoning relief, from different decision-making bodies, under sharply different provisions of local law." *Id*. Thus, the two were not similarly situated for purposes of an as applied challenge under RLUIPA.

2. The Third Circuit's Test

The Third Circuit's approach holds that "if a land-use regulation treats religious assemblies or institutions on less than equal terms with nonreligious

assemblies or institutions that are no less harmful to the governmental objectives in enacting the regulation, that regulation – without more – fails under RLUIPA." *Lighthouse Institute for Evangelism*, 510 F.3d at 269. The Third Circuit's approach allows the government to justify unequal treatment by pointing to its objectives in enacting the regulation and proving that the secular assemblies treated more favorably do no damage to those objectives. This is, in different terms, a type of heightened scrutiny such as that employed by the Eleventh Circuit.

In *Lighthouse Institute*, the Third Circuit specifically held that the district court in that case "erred in requiring the religious plaintiff to point to a secular comparator that proposes the same combination of uses." *Id*. at 264. Instead, the Third Circuit looks to a "secular comparator that is similarly situated as to the regulatory purpose of the regulation in question – similar to First Amendment Free Exercise jurisprudence." *Id*. The court noted: "[u]nder Free Exercise cases, the decision whether a regulation violates a plaintiff's constitutional rights hinges on a comparison of how it treats entities or behavior that have the same effect on its objectives." *Id*. Thus, "the impact of the allowed and forbidden behaviors must be examined in light of the purpose of the regulation." *Id*. at 265.

3. The Seventh Circuit's Test

The Seventh Circuit's test mimics the Third Circuit's test but substitutes "accepted zoning criteria" instead of the Third Circuit's focus on "governmental

objectives in enacting the regulation." *River of Life Kingdom Ministries v. Village of Hazel Crest*, 611 F.3d 367, 371 (7th Cir. 2010). The Seventh Circuit claims that this allows for a more objective analysis than that of the Third Circuit. Yet, at base, the test allows the government to prove that some accepted zoning criteria justifies the unequal treatment. It is worth noting that some of the judges on the Seventh Circuit felt that there was no appreciable difference between the Third and Seventh Circuit's tests. *See id*. at 374 (Cudahy, J., concurring).

In *Digrugilliers v. Indianapolis*, 506 F.3d 612 (7th Cir. 2007), the Seventh Circuit found that a RLUIPA equal terms claim had great merit when it was alleged that a church was required to obtain a variance to locate in a C-1 commercial district but that several secular uses were allowed as permitted without obtaining a variance. Of note, the Seventh Circuit looked at several secular comparators including assisted living facilities, auditoriums, assembly halls, community centers, nursing homes, funeral homes, radio and television studios, art galleries, civic clubs, libraries, museums, junior colleges, correspondence schools, and nurseries. *Id*. at 614–15. The court remanded the case to the district court after finding that the RLUIPA claim had "at least some, and possibly great, merit." *Id*. at 618.

In *River of Life Kingdom Ministries v. Village of Hazel Crest*, the Seventh Circuit noted: "If a church and a community center, though different in many respects, do not differ with respect to any accepted zoning criterion, then an

ordinance that allows one and forbids the other denies equality and violates the equal terms provision." 611 F.3d 367, 371 (7th Cir. 2010). The court found in that case that there was no equal terms violation because churches were excluded from the commercial district at issue along with community centers, meeting halls, and libraries "because these secular assemblies, like churches, do not generate significant taxable revenue or offer shopping opportunities. Similar assemblies are being treated the same." *Id*. at 373. The Seventh Circuit went on to hold, though, that: "[S]hould a municipality create what purports to be a pure commercial district and then allows other uses, a church would have an easy victory if the municipality kept it out." *Id*. at 374.

4. The Ninth Circuit's Test

The Ninth Circuit adopted the Third Circuit's approach along with the Seventh Circuit's refinement of the test. *Centro Familiar Cristiano Buenas Nevas v. City of Yuma*, 651 F.3d 1163 (9th Cir. 2011). The court held that the "city may be able to justify some distinctions drawn with respect to churches, if it can demonstrate that the less-than-equal-terms are on account of a legitimate regulatory purpose, not the fact that the institution is religious in nature." *Id*. The court realized that "our analysis is about the same as the Third Circuit's" but also recognized that the Seventh Circuit's refinement of this test was appropriate. The court ultimately stated the test to be used as follows:

> The city violates the equal terms provision only when a church is treated on less than equal terms with a secular comparator, similarly situated with respect to an accepted zoning criteria. The burden is not on the church to show a similarly situated secular assembly, but on the city to show that the treatment received by the church should not be deemed unequal, where it appears to be unequal on the face of the ordinance.

Id. at 1173.[2]

In *Centro Familiar*, the Ninth Circuit stated that: "Under the equal terms provision, analysis should focus on what 'equal' means in the context. . . . Equality . . . signifies not equivalence or identity, but proper relation to relevant concerns." *Id*. at 1172. The court held that a church was not treated on equal terms with secular assemblies or institutions. The City attempted to justify the unequal treatment by arguing that it was attempting to create a zoning district for the generation of tax revenue. But the Ninth Circuit noted that the City "allows all sorts of non-taxpayers to operate as of right, such as the United States Postal Service, museums, and zoos." *Id*. at 1173. The court did not look at equivalence of identity to determine a valid comparator but looked instead at the City's proffered zoning interest and then determined if other secular assemblies or institutions undercut that interest to the same extent as churches.

[2] The Ninth Circuit noted that its test departed from that utilized by the Third Circuit in its burden shifting. The Third Circuit placed the burden on the church while the Ninth Circuit placed the burden on the government "once the plaintiff establishes a prima facie case." *Centro Familiar*, 651 F.3d at 1173 n.47.

5. The Fifth Circuit's Test

In *Opulent Life Church*, 697 F.3d 279, 292 (5th Cir. 2012), the Fifth Circuit adopted a test that "differs slightly from the Third Circuit's 'regulatory purpose' test and the Seventh and Ninth Circuit's 'accepted zoning criteria' test." Under the Fifth Circuit's formulation, the "'less than equal terms' must be measured by the ordinance itself and the criteria by which it treats institutions differently." *Id*. Thus, the Fifth Circuit determines

> (1) the regulatory purpose or zoning criterion behind the regulation at issue, as stated explicitly in the text of the ordinance or regulation; and (2) whether the religious assembly or institution is treated as well as every other nonreligious assembly or institution that is "similarly situated" with respect to the stated purpose or criterion.

Id. The Fifth Circuit also contains a burden-shifting in the analysis where once the religious assembly establishes a prima facie case, "the government must affirmatively satisfy this two-part test to bear its burden of persuasion on this element of the plaintiff's Equal Terms Clause claim." *Id*.

In *Opulent Life Church*, the city attempted to create a zoning district that created a commercial district that generated tax revenue. *Id*. at 293. But the zoning ordinance allowed other non-commercial and non-tax generating uses such as museums, libraries, art galleries, exhibitions, and similar facilities. *Id*. at 293–94. Similarly, the city in *Elijah Group, Inc. v. City of Leon Valley*, 643 F.3d 419 (5th Cir. 2011), prohibited churches in a B-2 commercial zoning district but allowed

private clubs and lodges. *Id*. at 424. The court noted that: "[t]he 'less than equal terms' must be measured by the ordinance itself and the criteria by which it treats institutions differently." *Id*. The court invalidated the ordinance because it treated churches on less than equal terms with clubs even though both had similar "non B-2 nature[s]." *Id*.

6. The Sixth Circuit's Test

In *Tree of Life Christian Schools v. City of Upper Arlington*, 905 F.3d 357 (6th Cir. 2018), the court held noted the similarity of the tests between the various circuits. "All of the circuits that have analyzed this issue have therefore taken a broader approach, with most holding that a comparator for an equal terms claim must be similarly situated with regard to the regulation at issue." *Id*. at 368. The Sixth Circuit then held that "the phrase 'legitimate zoning criteria' best captures the idea that the comparison required by RLUIPA's equal terms provision is to be conducted with regard to the legitimate zoning criteria set forth in the municipal ordinance in question." *Id*. at 369.

In sum, the circuits differ in their articulation of the appropriate test to be used for a RLUIPA equal terms case. But none of the circuits hold that the comparator must be identical. And none of the cases addressed the exact situation before this Court — the Church here who wants to further agricultural purposes but also conduct its religious worship. Taking that key fact into account, this case would be more like

River of Life from the Seventh Circuit with a key change in the facts of a church agreeing to pay taxes but still be a church. Even if this Court were to adopt one of the tests set forth by a sister circuit that focused on the "regulatory purpose" or the "accepted zoning criteria," none of the circuits have addressed this set of facts where a church wants to further the regulatory purpose as stated by the zoning code.

The County contended below that "farm wineries and limited license breweries must be located on a farm, and must engage in production agriculture," JA 85, apparently to justify its treatment of the Church under terms unequal with those farm wineries and limited license breweries. But the Church attempted to operate as a one of those entities, and could do so in every respect save producing, selling, or serving alcohol, or getting a license to do so. The County's response? No ABC license, no equal treatment (even though the Church was not going to produce, sell, or serve alcohol anyway). That is a plain violation of RLUIPA. *The County's asserted interest in the A-1 zone is not to produce alcohol or protect the right of individuals to obtain alcohol. Yet that is the criteria upon which the County draws a distinction here that excludes the Church and treats it on less than equal terms as wineries and breweries*. Under any of the tests previewed above, the Church has sufficiently stated a claim upon which relief can be granted.

Moreover, the County cannot avoid liability under RLUIPA's equal terms provision by pointing to all the other jurisdictions where the Church may locate. The

equal terms provision would be meaningless if a church could be denied protection by simply pointing to a different zoning jurisdiction where it could locate when unequal treatment exists in the zoning jurisdiction where it owns property.

> [T]he focus on other *excluded* assemblies has the analysis backward. A decision method that justifies excluding religious assemblies from a zone because nonreligious assemblies are also excluded turns the equal-terms provision on its head. The equal-terms provision is a remedy against exclusionary zoning; reading it to require equality of treatment with excluded secular assemblies — rather than *included* secular assemblies — gives religious assemblies no remedy at all. The statute plainly requires religious-group equality with *permitted* secular assemblies, not *excluded* secular assemblies.

River of Life Kingdom Ministries., 611 F.3d at 388 (Sykes, J., dissenting).

Here, the County includes wineries and breweries as assembly uses in the A-1 zone but excludes churches – and shockingly, even churches engaging in bona fide agricultural uses. This is plain and undeniable unequal treatment and the District Court erred in dismissing this claim.

III. The Church stated a claim under RLUIPA's nondiscrimination provision.

RLUIPA prohibits the County from imposing or implementing "a land use regulation that discriminates against any assembly or institution on the basis of religion or religious denomination." § 2000cc(b)(2). It is well settled that "[u]nder RLUIPA, a plaintiff need only establish a prima facie claim of religious discrimination, after which the defendant bears the burden of persuasion on all elements of the claim." *See Jesus Christ is the Answer Ministries, Inc. v. Balt. Cty.*,

915 F.3d 256, 263 (4th Cir. 2019) (citing 42 U.S.C. § 2000cc-2(b)). "And as with all claims, at the motion to dismiss stage 'a plaintiff need not demonstrate that her right to relief is probable or that alternative explanations are less likely; rather, she must merely advance her claim across the line from conceivable to plausible.'" *Id*. (citing *Houck v. Substitute Tr. Servs., Inc.*, 791 F.3d 473, 484 (4th Cir. 2015)) (cleaned up).

"So long as a plaintiff alleges a plausible prima facie claim of discrimination, a court may not dismiss that claim—even if the defendant advances a nondiscriminatory alternative explanation for its decision, and even if that alternative appears more probable." *Jesus Christ is the Answer Minsitries*, 915 F.3d at 263 (4th Cir. 2019); *Woods v. City of Greensboro*, 855 F.3d 639, 649 (4th Cir. 2017) ("The question is not whether there are more likely explanations for the City's action . . . but whether the City's impliedly proffered reason . . . is so obviously an irrefutably sound and unambiguously nondiscriminatory and non-pretextual explanation that it renders [the plaintiff's] claim of pretext implausible."). Importantly, "RLUIPA's nondiscrimination provision *doesn't require a comparison to similarly situated entities*," *Jesus Christ is the Answer Ministries*, 915 F.3d at 263 (emphasis added), and where a church alleges a governmental action, like a dismissal or denial, "was motivated by religious discrimination, . . . [t]his is enough to make out a prima facie claim of religious discrimination, provided that the Church can establish discriminatory intent." *Id.*

In this case, contrary to the District Court's holding, the intent may be inferred from the treatment itself the Church received. The County would give the same favorable treatment to the Church as it does other entities if the Church would just serve alcohol and get an ABC license – something prohibited by the Church's denominational religious views. This is inherently hostile for a government to impose upon a church, particularly a church from a denomination well known to be opposed to alcohol. As such, the discriminatory intent is easily inferred.

The County is mistaken when it contends "[t]his claim is supported only by the bald assertion that the SUP requirement for religious institutions 'discriminates against Alive Church on the basis of its religion or religious denomination.'" JA 90 (quoting Complaint, ¶ 107). Indeed, paragraph 107 of the Complaint is preceded by a number of paragraphs, of which paragraphs 102-106 allege:

> 102. Breweries and wineries are allowed by Prince William County to operate agritourism activities for purposes of "recreational, entertainment, or educational purposes" free of the land use discrimination imposed upon Alive Church.
>
> 103. Under Virginia statutes, and as confirmed by the County Zoning Administrator, if Alive Church were to establish itself as a winery or brewery it could begin to meet on its Property immediately and hold public gatherings and functions.
>
> 104. If Alive Church were to establish itself as a winery or brewery, it could build a barn or other public gathering space without the need for a building permit.
>
> 105. If Alive Church were to establish itself as a winery or brewery, it also would not be subject to all the requirements in the 2013 SUP and

> as such, it would not have to expend hundreds of thousands of dollars on stormwater management, curbs and guttering, roads, etc.
>
> 106. The Church requested the County's permission to operate agritourism gatherings and events on its property, and to act according to its mission, including, but not limited to, worship, learning, outreach to the community, etc., but was denied.

JA 20. Further, Count II expressly incorporates paragraphs 1-95. *See* JA 19 at ¶ 96.

The County is also incorrect that because other types of entities face the same requirements, there is no discrimination. *See Jesus Christ is the Answer*, 915 F.3d at 263 (4th Cir. 2019) ("RLUIPA's nondiscrimination provision doesn't require a comparison to similarly situated entities."). This is also where the District Court erred when it dismissed this claim because "although the Church alleges that it was treated differently than farm wineries and limited-license breweries, it does not allege that it was treated differently than similarly situated nonagricultural entities." JA 263. The District Court's holding conflicted directly with this Court's admonition that a nondiscrimination claim does not require a comparison to similarly situated entities.

The District Court held that the Church's claim should be dismissed also because the "Zoning Administrator's letter does not evince religious animus. . . . Viewed in this light, the Church's dispute is . . . with the law itself." JA 264. However, intentional discrimination and hostility may certainly be inferred from a County telling a Church it may receive the full basket of favorable treatment if it

will only serve alcohol or get an ABC license. This is outrageous treatment.

The Church has sufficiently pled a RLUIPA nondiscrimination claim.

IV. The Church stated a claim under RLUIPA's substantial burden provision.

"RLUIPA prohibits land use regulations that impose a 'substantial burden' on religious practice, unless they are the least restrictive means of furthering a compelling governmental interest." *Jesus Christ is the Answer Ministries, Inc.*, 915 F.3d at 260 (citing 42 U.S.C. § 2000cc(a)(1)). "A substantial burden exists where a regulation 'puts substantial pressure on [the plaintiff] to modify its behavior.'" *Jesus Christ is the Answer*, 915 F.3d at 263 (quoting *Bethel World Outreach Ministries v. Montgomery Cty. Council*, 706 F.3d 548, 556 (4th Cir. 2013)).

The Church has sufficiently alleged facts that show the burden or pressure placed on it by the County is substantial. *See Jesus Christ is the Answer Ministries, Inc.*, 915 F.3d at 261 ("[I]s the impediment to the organization's religious practice substantial? The answer will usually be 'yes' where use of the property would serve an unmet religious need, the restriction on religious use is absolute rather than conditional."). It cannot conduct religious gatherings and events on its land unless it obtains an ABC license.

The Church has also sufficiently alleged facts showing that it is the County, not the Church, that is responsible for the burden. *See id.* (court considers questions like whether the plaintiff had reasonable expectation of religious land use; or

whether the burden was self-imposed). In contrast to the District Court's holding, the Church did not bring this substantial burden upon itself. JA 265. The District Court focused on the wrong aspect of this case. It held that the Church was not substantially burdened because it bought the Property knowing that it could not worship on the Property without a SUP. However, the proper focus is not on whether the imposition of the SUP causes a substantial burden on the Church. Rather, the proper focus is on whether the County's denial of the Church's use of its Property on the same terms and conditions as wineries, breweries and agritourism uses substantially burdened the Church. Here it plainly did. The County told the Church that it was absolutely prohibited from gathering on its Property for religious purposes unless it got a liquor license. The District Court held that the Church cannot locate on its Property at all because it is not agricultural (even though, again, the Church alleged and in fact the County determined the Church's proposed use is bona fide agricultural, JA 70, and the Church is operating agricultural uses on its land, and confirmed to the District Court at the hearing that it has trees in the ground, JA 241). In both instances, the effect is to completely deny the Church the ability to use its Property for religious purposes or, at the very least, to pressure the Church to modify its conduct and obtain a liquor license or change its character to become agricultural.

The question on a substantial burden claim is not whether the County targeted the Church: "RLUIPA's substantial burden provision says nothing about targeting.

Rather, it simply forbids government from imposing a substantial burden on religious exercise unless the Government demonstrates that it has used the least restrictive means of furthering a compelling governmental interest; that is, unless the governmental action satisfies strict scrutiny." *Bethel World Outreach Ministries*, 706 F.3d at 556–57 (citing 42 U.S.C. § 2000cc(a)(1)). Further, as this Court emphasized, "RLUIPA contains a separate provision forbidding discrimination." *Id.* at 557 (citing U.S.C. § 2000cc(b)(2) (prohibiting government from imposing or implementing "a land use regulation that discriminates against any assembly or institution on the basis of religion or religious denomination"). "Requiring a religious institution to show that it has been targeted on the basis of religion in order to succeed on a substantial burden claim would render the nondiscrimination provision superfluous." *Id.*

> Therefore, it seems clear that the substantial burden provision protects against non-discriminatory, as well as discriminatory, conduct that imposes a substantial burden on religion. Accordingly, a religious organization asserting that a land use regulation has imposed a substantial burden on its religious exercise need not show that the land use regulation targeted it.

Id.

The District Court was incorrect that the Church wanted an "automatic exemption from generally applicable land use regulations." JA 265. The County was also incorrect below in its argument that "[h]aving decided it no longer wants to fulfill the special use permit conditions, Alive Church is seeking the Court's permission to ignore it." JA 92. Of course the Church was fully aware of the SUP. It purposely

paid more for the land *because* it had a SUP. And just like the Church alleged in its Complaint, and which the County even cited in its brief, the Church desires and plans to comply with the SUP and ultimately build a permanent building. The SUP is a distraction. The alleged violations of RLUIPA, including Count III's substantial burden requirement, are that the County will not allow the Church to operate on its land *now* without the burden of getting a liquor license in violation of the Church's religious beliefs – *even while the County agrees the Church's desired use now is bona fide agricultural*.

Contrary to the District Court's holding, the Church's claim is not like *Andon, LLC v. City of Newport News*, 813 F.3d 510 (4th Cir. 2016). The property in *Andon* was commercial, not agricultural, so the church there was found to not have a reasonable expectation to build a church building – and buying the property amounted to a self-imposed hardship. Again, here, the Church bought land with an SUP allowing the building of a church upon compliance with the SUP – but the discrimination the Church complains of is happening *now* by the County not allowing it to conduct religious agritourism on its bona fide A-1 land without getting an ABC license. The Church has a reasonable expectation that it should be allowed to do what it is seeking to do – agritourism events – now (pre-SUP compliance), on its A-1 land, without being made to obtain an ABC license in violation of its religious beliefs.

This case is nothing like *Andon*. The Church here has complied with *every* requirement to accomplish its desired religious land use in the meantime, before it ultimately can afford to comply with the SUP and build a permanent building, *except obtain an ABC license, which it cannot do because of its religious beliefs*. This is a text-book case of "[a] substantial burden exist[ing] where a regulation puts substantial pressure on [the plaintiff] to modify its behavior." *Jesus Christ is the Answer Ministries, Inc.*, 915 F.3d at 263 (internal quotations and citation omitted).

V. The Church has stated a Free Exercise Clause claim.

The District Court erred in its analysis and subsequent dismissal of the Church's Free Exercise Claim. It initially held that the text of the zoning ordinance "is strongly indicative of a facially neutral statute" because "Section 32.301.04 restricts not just religious institutions or places of worship, but thirty-four other uses . . . . In other words, religious entities are lumped in with other non-religious entities in requiring planning approval." JA 266 (internal marks and quotations omitted). Under this formulation, no church could ever state a Free Exercise claim if there was one other non-religious entity that required planning approval. The District Court's analytical framework for deciding Free Exercise claims commits the same categorical error the court committed in its RLUIPA analysis by comparing the Church to *excluded* uses and not to the *included* uses. A comparison solely to those that require a SUP to locate in the A-1 district will ineluctably lead to a finding of

no Free Exercise violation. Yet such an analysis side-steps and ignores the real issue (not to mention the allegations of the Church's Complaint which must be taken as true at this stage). The text of the zoning ordinance allows farm wineries, breweries, and agritourism activities as permitted uses yet excludes churches. This is "strongly indicative" of a zoning ordinance that is not facially neutral. It draws explicit distinctions between churches and non-religious uses.

But facial neutrality is only one way an ordinance like the one here can violate the Free Exercise Clause. "Facial neutrality is not determinative." *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 534 (1993). A zoning ordinance that is neutral on its face is not neutral if "the object of a law is to infringe upon or restrict practices because of their religious motivation." *Id*. at 533. The District Court erred here when it held that the Complaint did not allege that the County enacted the zoning regulation with the purpose of infringing upon or restricting religious practices. JA 267. Yet the Supreme Court has explicitly held: "Apart from the text, the effect of a law in its real operation is strong evidence of its object." *Id*. at 535. In *Church of the Lukumi*, the laws at issue created a "religious gerrymander" such that religious conduct was targeted for disfavored treatment. *Id*. The same is true here when considering how the zoning ordinance treats churches generally and this Church in particular. Churches generally may not take advantage of the same types of activities as farm wineries, breweries, and agritourism activities

because, in the District Court's opinion, churches are not agricultural while these other uses are. But that is akin to saying that Santeria animal sacrifice is religious while other killings of animals are not and that therefore justifies treating the Santeria killings differently. *See generally id.* Such an analysis is just a covert way of allowing a law that is not neutral or generally applicable to remain.

Moreover, how the law treats this Church particularly is "strong evidence of its object" and lack of neutrality. Here, the Church is prohibited solely because it cannot obtain a liquor license due to its sincerely held religious beliefs. If the Church did not have this belief, it presumably could locate on its Property for religious purposes. In this way, the Church is treated differently from every other use that is able to obtain a liquor license.

Laws that are not neutral or generally applicable are subject to strict scrutiny and must be justified by a compelling governmental interest that is advanced in the least restrictive means available. *See Church of the Lukumi Babalu Aye*, 508 U.S. at 531; *Emp't Div. v. Smith*, 494 U.S. 872 (1990). In *Redemption Community Church v. City of Laurel*, 333 F. Supp. 3d 521, 537 (D. Md. 2018), the District Court held that the church had stated a claim upon which relief could be granted under the Free Exercise Clause because it had alleged that the church was treated differently than secular assemblies and institutions and because the government in that case had provided little to no evidence or argument on why the church was treated differently.

Id. The same is true in this case. The sole reason that Alive Church is treated differently here is because of its denominational religious beliefs that preclude it from obtaining an ABC license. The County has put forth absolutely no rational reason for treating a church differently simply because it cannot obtain an alcohol license. Neither has it shown that it is entitled to dismissal of this claim under the Rule 12(b)(6) standards. And, for the same reasons as stated above in the RLUIPA substantial burden argument, the Church has sufficiently stated a claim for relief under the Free Exercise Clause.

VI. The Church has stated a Freedom of Assembly claim.

At this stage of the litigation, the Church presumes that the County's zoning code is a content neutral time, place, and manner restriction that is subject to intermediate scrutiny. *See Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989). However, the Church has sufficiently stated a claim even under the intermediate scrutiny standard. "Although a time, place and manner regulation need not be the least-restrictive means of accomplishing the [government's] stated objective, it 'may not regulate expression in such a manner that a substantial portion of the burden on speech does not serve to advance its goals.'" *Chabad of Nova, Inc. v. City of Cooper City*, 575 F. Supp. 2d 1280, 1295 (S.D. Fla. 2008) (quoting *Ward*, 491 U.S. at 799). In *Chabad of Nova*, the court denied the City's Motion to Dismiss because, although the City had asserted a content-neutral justification for the exclusion of churches

from the business district, at the summary judgment stage, "it has failed to submit any evidence demonstrating how the prohibition of religious assemblies actually advances the asserted goals." *Id*.

The same is true in this case, demonstrating that the Church has stated a claim under the First Amendment's Freedom of Assembly Clause. The County may have a content-neutral justification for excluding Alive Church from the A-1 zoning district (although that conclusion should be open for discovery), but it has identified no evidence or argument demonstrating how the exclusion of churches from the A-1 zone on the basis that they cannot obtain a liquor license due to their sincerely held religious beliefs furthers the goal of preserving agricultural land, especially where the Church has met all the criteria to grow agricultural products. There is simply no justification for the exclusion here and the District Court erred in dismissing this claim.

VII. The Church has stated an Equal Protection Clause claim.

The Equal Protection Clause provides in pertinent part, "No State shall make or enforce any law which shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1. This is "essentially a direction that all persons similarly situated should be treated alike." *City of Cleburne v. Cleburne Living Ctr., Inc*., 473 U.S. 432, 439 (1985) (citing *Plyler v. Doe*, 457 U.S. 202, 216 (1982)). As demonstrated above, the County's Zoning Code treated

churches differently than nonreligious assemblies and institutions. When a government creates classifications based upon a fundamental right, such as freedom of speech or free exercise of religion, the classifications are subject to the strict scrutiny of the compelling interest test. *See Regan v. Taxation With Representation*, 461 U.S. 540, 546–47 (1983); *Cleburne*, 473 U.S. at 440.

The District Court dismissed this claim for the same reasons it dismissed the RLUIPA equal terms claim—because, in its view "the Church has not alleged that the County has treated it differently than a similarly situated institution." JA 271. Yet again this categorical error allowed the District Court to hold in a way that denied explicit allegations in the Church's Complaint that it was treated differently than similarly situated entities such as wineries, breweries, and agritourism activities. The District Court's error is even starker when considering the Church's allegations that it was similarly situated to these entities because it wanted to do agricultural activities on its Property. Indeed, when accepting the Church's allegations as true, the only appreciable difference between the Church and wineries, breweries, and agritourism activities is that the Church is religious. Yet making a distinction on this basis is making a distinction on the basis of a fundamental right that triggers strict scrutiny.

As discussed above, the County fails both requirements of the compelling interest test. It had no compelling interest in treating churches less favorably than

nonreligious assemblies and institutions on the basis of being able to obtain an ABC license. Even if it did have such an interest, the complete exclusion from the Church as being able to operate in the A-1 district on the same terms and conditions as wineries and breweries is not narrowly tailored to further that interest because the Zoning Code did not apply these constraints to secular assemblies and institutions that have the same impact on land and neighboring uses as churches.

The County also lacks even a rational basis for discriminating among assemblies in its Zoning Code. Rational basis review requires the court to examine whether permitting the Church to operate on its property as a church "would threaten legitimate interests of the [county] in a way that other permitted uses . . . would not." *Cleburne*, 473 U.S. at 448. The County had no rational basis for prohibiting churches from meeting on A-1 property simply because it does not have an ABC license. The County's discriminatory treatment of churches is unconstitutional and the District Court erred in dismissing the Equal Protection claim.

CONCLUSION

If the District Court's decision is allowed to stand, the promise of RLUIPA will be nothing more than a shadow and churches will be back in the same place they were before the statute was enacted. Taking the Church's allegations as true, the District Court should not have dismissed the Church's claims. The unequal treatment the Church faced here is real and substantial and is conduct for which the law

provides a remedy. For these reasons, Alive Church respectfully urges this Court to reverse the District Court's premature and errant decision granting the County's Motion to Dismiss and to allow the Church to pursue the remedy RLUIPA and the Constitution afford.

REQUEST FOR ORAL ARGUMENT

The Appellant, Alive Church, respectfully requests oral argument.

February 7, 2022

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 7th day of February, 2022, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system, which will then send a notification of such filing (NEF) to the attorneys of record.

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