NO. 22-11674-JJ

In The

United States Court Of Appeals
For The Eleventh Circuit

THAI MEDITATION ASSOCIATION OF ALABAMA, INC., SIVAPORN NIMITYONGSKUL, VARIN NIMITYONGSKUL, SERENA NIMITYONGSKUL, PRASIT NIMITYONGSKUL,

Plaintiffs - Appellants,

v.

CITY OF MOBILE, ALABAMA,

Defendant – Appellee,

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF ALABAMA
DISTRICT COURT CASE NO.: 1:16-CV-00395-TFM-MU

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CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

A. Pursuant to Eleventh Circuit Rule 26.1, counsel for Appellants hereby certify that the following persons and entities have or may have an interest in the outcome of this case:

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American Civil Liberties Union – Amicus Curiae

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Pursuant to 11th Cir. R. 26.1-3(b), counsel certifies that no publicly traded corporation has an interest in this proceeding.

B. Pursuant to Federal Rule of Appellate Procedure 26.1(a), Plaintiff-Appellant Thai Meditation Association of Alabama, Inc. certifies that it is not publicly traded, that it does not have any parent corporations and that no corporate entity owns 10% or more of its stock.

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ARGUMENT

I. THE CITY'S VARIOUS ARGUMENTS RELY ON TWO FUNDAMENTALLY FLAWED ASSUMPTIONS.

The City of Mobile's principal argument that Plaintiffs' religious exercise is not substantially burdened is that there may be alternative locations[1] for their Buddhist meditation center. As this Court previously held, however, the "completely prevents" standard relied on by the City is but one end of the continuum of possible burdens on religious exercise, with mere "inconveniences" at the other. *Thai Meditation Ass'n of Alabama, Inc. v. City of Mobile*, 980 F.3d 821, 830-31 (11th Cir. 2020) ("*TMAA*"); *see also* OB at 17-23; Brief Amicus Curiae of the Becket Fund for Religious Liberty ("Becket Brief") at 10.

The second major theme in the City's brief is an attempt to recharacterize Plaintiffs' challenge as one to its Zoning Ordinance, and not the individualized denial of a particular zoning approval—in this case, "Planning Approval" for an "encourage[d]" use. *See* Doc. 196-71 at PLTF5689 (quoting Zoning Ordinance § 64-3(C)(1), which states the regulatory purpose of the R-1 district in part as "to

[1] The City admits that the commercial locations where Plaintiffs' use would be permitted by right are unsuitable for their religious worship. *See* DB at 25 ("Burdens of noise with the existing facility . . . stem from its commercial surroundings . . . .").

encourage a suitable neighborhood environment for family life by including among the permitted uses such facilities as schools and churches; . . . .").

Plaintiffs do not seek variances, immunity or to be "exempt[ed]" from zoning regulations or their application requirements, as was the case in the authorities cited by the City. *See generally* Brief of Appellee City of Mobile, Alabama ("DB") (citing *Andon, LLC v. City of Newport News,* 813 F.3d 510, 516 (4th Cir. 2016); *Midrash Sephardi, Inc. v. Town of Surfside*, 366 F.3d 1214, 1225 (11th Cir. 2004);[2] *Konikov v. Orange Cnty.*, 410 F.3d 1317 (11th Cir. 2005); *Petra Presbyterian Church v. Vill. of Northbrook*, 489 F.3d 846, 851 (7th Cir. 2007)). Rather, Plaintiffs argue that being denied discretionary approval for a land use that is *permitted* under the zoning code on the Subject Property (with Planning Approval) substantially burdens its religious exercise, which is important for three reasons.

First, as discussed below, with respect to Plaintiffs' RLUIPA Substantial Burdens claim, courts have analyzed challenges to mere application requirements or zoning codes that *prohibit* such uses (*e.g., Midrash*; *Konikov,* 410 F.3d at 1323 (challenge to requirement of having to apply to the Board of Zoning Adjustment for a special exception in order to operate a "religious organization"); *San Jose Christian Coll. v. City of Morgan Hill*, 360 F.3d 1024, 1035 (9th Cir. 2004) (no

[2] *Midrash* was about a challenge to a zoning ordinance that prohibited places of worship in a particular zoning district, but permitted them elsewhere, unlike here, where the use is *permitted* on the Subject Property.

substantial burden to go through the correct process)) differently than challenges to individualized discretionary denials of zoning approval for uses that are permitted and where applicants complied with application requirements (*e.g.*, *Westchester Day Sch. v. Vill. of Mamaroneck*, 504 F.3d 338 (2d Cir. 2007) ("*WDS*"); *Guru Nanak Sikh Soc. of Yuba City v. Cnty. of Sutter*, 456 F.3d 978 (9th Cir. 2006); *Jesus Christ Is the Answer Ministries, Inc. v. Baltimore Cnty.*, 915 F.3d 256 (4th Cir. 2019), *as amended* (Feb. 25, 2019)). The City's authorities discussed above, along with *Roman Catholic Bishop of Springfield v. City of Springfield*, 724 F.3d 78, 99 (1st Cir. 2013),[3] all involved challenges to the zoning code itself, or the requirement to engage in the zoning process, unlike this case where Plaintiffs went through the zoning process for a use that was permitted on the Subject Property.

Second, with respect to Plaintiffs' Free Exercise claim, while zoning requirements themselves are often seen to be neutral and generally applicable laws, the individualized discretionary denial of a zoning permit is regularly held not to be. *See generally* OB at 37-42; *infra*, § III.

Third, the City attempts to argue that it has a compelling interest "in enforcing its Zoning Ordinance." The relevant question is not whether the City has such an interest in regulating land use generally or enforcing application requirements, but

[3] *Roman Catholic Bishop* also challenged an ordinance itself, in that case a requirement to make an application to modify an historic structure–an application that had not yet been made. *Id.* at 98-100.

rather whether it has a compelling governmental interest in denying this *particular* application. *See infra*, § V.

II. THE CITY FAILS TO REBUT PLAINTIFFS' ARGUMENT THAT THE DISTRICT COURT ERRED IN HOLDING THAT THE DENIAL OF PLANNING APPROVAL FOR PLAINTIFFS' MUCH-NEEDED BUDDHIST MEDITATION CENTER DID NOT SUBSTANTIALLY BURDEN THEIR RELIGIOUS EXERCISE.

A. <u>The City's Substantial Burdens Analysis Is Flawed.</u>

In its opening brief, Plaintiffs argued that the foundational error of the district court's substantial burden analysis was that it focused on the six factors outlined by this Court in *TMAA* as a "checklist," rather than as "tools to guide the court to the ultimate question of whether a zoning denial is 'akin to significant pressure which directly coerce the religious adherent to conform his or her behavior.'" OB at 13 (quoting *TMAA,* 980 F.3d at 831). The City attempts to argue that the district court's analysis was similar to that in *New Harvest Christian Fellowship v. Salinas*, 29 F.4th 596 (9th Cir. 2022). DB at 24. However, in *New Harvest*, the court specifically rejected the argument of the city that failure of a plaintiff to meet particular factors could be fatal to their case. Instead, the court held that a court must focus on the "totality of the circumstances," 29 F.4th at 602, which is consistent with the approach of other Circuits as well as the Supreme Court's approach to evaluating substantial burden claims under the Free Exercise Clause and the Religious Freedom Restoration Act, 42 U.S.C. §§ 2000bb, *et seq*. OB at 13-15. *See also* Brief of

Christian Legal Society, The Hindu American Foundation, and The Coalition for Jewish Values as Amici Curiae ("CLS Brief") at 5; Becket Brief at 14 ("There is also no indication that these 'factors' are meant to be elements, ...'"); Brief of Amicus Curiae Jewish Coalition for Religious Liberty ("Jewish Coalition Brief") at 11 ("[T]he district court lost the forest for the trees, ..."); Brief of Amicus Curiae Notre Dame Law School Religious Liberty Clinic ("Notre Dame Brief") at 11 ("At bottom, no mathematical formula can determine whether a land-use decision substantially impedes a plaintiff's religious exercise.").

B. The City Fails to Rebut Plaintiffs' Argument that a Correct Application of the RLUIPA Factors Demonstrates that the Outright Denial of Their Planning Approval Application Substantially Burdens Their Religious Exercise.

1. *Genuine need for new space.*

The City minimizes the importance of what should be viewed as the *most* significant substantial burden factor. DB at 24. RLUIPA's legislative history demonstrates that this factor describes the principal reason for the legislation. *See, e.g.,* 146 CONG. REC. S7774, S7774 (daily ed. July 27, 2000) ("Churches and synagogues cannot function without a physical space adequate to their needs and consistent with their theological requirements.").

The City also argues that the district court was wrong to find for the Plaintiffs on this factor, minimizing the significance of the religious exercise that Plaintiffs are

either unable to engage in or for which they have inadequate facilities.[4] DB at 24-25; *see generally* OB at 5; *TMAA*, 980 F.3d at 826; Doc. 214 at 21-23. There is no basis for the Court to reverse the lower court's finding on this factor.

2. *The extent to which the denial deprived Plaintiffs of a viable means to engage in religious exercise.*

As discussed and refuted above and in Plaintiffs' Opening Brief, the City's analysis of the second factor focuses completely on its "alternative properties" argument. The City also relies on *Livingston Christian School*, 858 F.3d 996 (6th Cir. 2017); and *New Harvest*, 29 F.4th at 602, but those decisions involved situations where the religious exercise at issue *could* be accommodated at their present locations. 858 F.3d at 1009 (plaintiff "impose[d a] burden upon itself" when it leased its property to another entity, thus making it unavailable for its own religious exercise); 29 F.4th at 602 ("New Harvest could have reconfigured the first floor of the building both to hold religious assemblies . . . .").

[4] Various authorities cited by the City (DB at 20) do not support its position, as they involved findings that no substantial burden existed based on the facts presented. *See Church of Our Savior v. City of Jacksonville Beach*, 69 F. Supp. 3d 1299, 1316 (M.D. Fla. 2014) ("affordability was the primary reason"); *Hollywood Cmty. Synagogue, Inc. v. City of Hollywood*, 430 F. Supp. 2d 1296, 1319 (S.D. Fla. 2006) (plaintiff "merely offered vague and conclusory statements that it has a 'legal right' to be granted a Special Exception"); *Williams Island Synagogue, Inc. v. City of Aventura*, 358 F. Supp. 2d 1207, 1215 (S.D. Fla. 2005) (plaintiff suffered inconveniences that the court found had either already been resolved or could easily be solved).

The holding in *Midrash* and similar cases make sense: If the challenge is one to a zoning code that prohibits religious uses within a particular zoning district, it is reasonable to review where such uses *are* permitted within the jurisdiction. This also supports the Court's statement that "zoning policy more generally" in such cases should be reviewed. *TMAA*, 980 F.3d at 832.

This case, however, presents a different scenario: The religious use *is* permitted in the R-1 zoning district. Therefore, since it is the decision to deny that is at issue here, it is the effect of "the City's decision" (*TMAA*, 980 F.3d at 832) that should be scrutinized most closely, rather than the "zoning policy more generally . . . ."

Finally, the City minimizes the relevance of the delay, uncertainty, and expense that would be required to start from scratch, locating another property and beginning the entire process at square one. DB at 28-30.[5] Plaintiffs do not argue that the mere "existence of some expenses" supports a substantial burden claim. They have been attempting to establish an adequate place of worship for fifteen years, at great cost and effort, and "cannot afford to start from the beginning to locate another property and begin the process of seeking approvals again." *See generally* Doc. 202-3 ¶ 11; Doc. 166-7 at 6763-6784; 6793-6824; 6828-6832. Whatever level

[5] The City asserts a supposed appraisal value for a parcel of land that was previously donated to the Center *without any citation to the record* (DB at 29) and can hardly be used to support a claim of "ample" resources of the Plaintiffs.

of substantiality is required, it is certainly met here.[6] *See WDS*, 504 F.3d at 352 (requiring school to "begin the application process anew . . . . would have imposed so great an economic burden as to make the option unworkable.").

The City relies on *Roman Catholic Bishop of Springfield* to argue that requiring some expense is not a substantial burden. DB at 28. But that case, again, involved the expense of merely making an application. 724 F.3d at 99. Here, the burdens are much closer to those in *Sts. Constantine & Helen Greek Orthodox Church, Inc. v. City of New Berlin*, 396 F.3d 895, 901 (7th Cir. 2005), where the church could "have searched around for other parcels of land," which would have created "delay, uncertainty, and expense." *See* CLS Brief at 17.

This factor favors the Plaintiffs.

3. *Nexus between the impeded conduct and Plaintiffs' religious exercise.*

With respect to the third factor, the City once again relies solely on its "alternative properties" argument, DB at 30-32 (arguing that this factor should just be "subsumed into the preceding two factors"), which should be rejected for the reasons stated above.

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[6] Plaintiffs' ownership of other unfeasible properties is irrelevant (*see* OB at 5, 21 n.3), unless the City is astonishingly arguing that the Plaintiffs should sell those properties, locate new properties, and attempt to begin the Planning Approval process for the *third* time. DB at 29-30; OB at 4-8.

Again, the City's position is unsupported. As in *WDS*, Plaintiffs cannot simply "rearrange furniture" or otherwise use their existing property to accommodate their religious exercise. *See* Doc. 214 at 26. This is unlike *Livingston Christian School,* discussed above, and Plaintiffs did not refuse to engage in the correct zoning process as in *San Jose Christian College*, *see supra*. The necessity of housing Buddhist monks on site—contrary to the City's suggestion that they should be warehoused elsewhere, DB at 31 n.9—derives directly from their religious beliefs. *See* Doc. 202-2 ¶¶ 15-27; Jewish Coalition Brief at 13; Notre Dame Brief at 13 ("The district court agreed that the City's decision has a close nexus to those religious needs—and the court found no alternative through which Thai Meditation Association could otherwise satisfy them.").

There is no basis to overturn the district court's finding on this factor.

4. *Arbitrariness demonstrated by City's decision-making process.*

The City argues that this factor either is duplicative with RLUIPA's Nondiscrimination provision or that, because the City merely followed a process, it is immunized from scrutiny of what occurred during that process. DB at 32-35.

To the first point, the City conflates arbitrariness with discrimination. A RLUIPA "Nondiscrimination" claim, 42 U.S.C. § 2000cc(b)(2) requires a showing of discriminatory intent specifically on the basis of religion. *See Roman Cath. Bishop of Springfield*, 724 F.3d at 97 ("Under the substantial burden framework, a

court may block application of a land use regulation under RLUIPA's subsection (a) where the context raises an 'inference' of hostility to a religious organization, even when the evidence does not necessarily show the explicit discrimination 'on the basis of religion' contemplated by subsection (b)." (quoting *Sts. Constantine*, 396 F.3d at 900)); *accord Midrash*, 366 F.3d at 1234 n.16 (discussing lack of need to demonstrate animus in Free Exercise context). In contrast, arbitrariness can be a probative factor in evaluating substantial burden, because it can indicate that pursuit of alternative properties or additional applications for the same property will be futile. *See WDS*, 504 F.3d at 352-53; *Guru Nanak Sikh Soc. of Yuba City*, 456 F.3d at 991-992; *see also* Notre Dame Brief at 15.

The City relies heavily on its process and reliance on selective "public comments" to argue that its actions were not arbitrary. *See* DB at 8-10. However, a more complete view of these comments, which the City relies upon, demonstrates the true hostility towards Plaintiffs. For example, the neighbors' attorney's presentation is four transcript pages long. Doc. 196-44 at 29-32. Only six sentences are about access, and three are about traffic. Doc. 196-44 at 31-32. The vast majority of his statements are related to the "religious" issue.[7] Doc. 183 at 9245:23-

[7] This worked on Watkins, who made the motion to deny the 2015 Application. He recalled that "there was a lot more discussion about the commercial aspects of this operation than there were the religious aspects of this operation." Doc. 183 at 176:7-9.

9250:17; Doc. 166-2 at 5363:3-5367:3; Doc. 166-2 at 5366; Doc. 93-34 at 30:12-20; Doc. 92-16; Doc. 183 at 9143:1-4; Doc. 166-1 at 5033-5127; Doc. 166-2 at 5366. The first neighbor-objector exceeded her time speaking, with only one single sentence about traffic/access issues and the remainder about "relocating the [] business." Doc. 196-44 at 23-28. The next mostly opined that "R-1's allowance of churches is being misused as cover for this project's secular and commercial nature." Doc. 196-44 at 41. In four and a half transcript pages, four sentences are devoted to traffic/access issues. Doc. 196-44 at 38-42.

The City's attempt to blame Plaintiffs for causing "confusion" must fail. *See* DB at 35-36.[8] Any "confusion" should have been resolved prior to the December 3, 2015 Planning Commission meeting when Plaintiffs–who had never been told what documentation about their religious status would be sufficient–submitted multiple forms of documentation. Doc. 196-42 at 11:23-12:3; Doc. 196-11 at 52:9-13; Doc. 96-3 at 50:10-51:18; Doc. 196-97 ¶ 29. The City rejected these, despite not knowing itself what would be sufficient. Doc. 196-56; 196-57; Doc. 196-12 at 118:6-11, 119:5-8; Doc. 196-36 at 57:12-58:2; Doc. 196-42 at 15:6-9. Having reviewed the materials, the district court observed, "I don't know why the City attorney and the

[8] The City falsely asserts that Plaintiffs' counsel stated the use was anything other than a religious facility. DB at 12. He did not. Doc. 196-44 at 12 ("[I]t is a religious facility . . . ."). Rather, after hearing the neighbors' attorney, Watkins arbitrarily disregarded the unequivocal statement. DB at 13.

City Council had such difficulty with that. I think they were right to question it in the sense that they saw what was presented. But I think it should have been a very easy thing for them to conclude." Doc. 196-95 at 1422:23-1423:2.

The City's arbitrary and capricious departures from its typical processes harmed Plaintiffs. Conditions provide an avenue by which Applications may be approved, and Plaintiffs were deprived of the benefit of even exploring these prior to the December 3, 2015 meeting because of the arbitrary handling of Plaintiffs' application.

5. *Whether the denial was a final decision.*

The City claims that "Plaintiffs never submitted any application making concessions to concerns over access, increased traffic, frequency of use, or incompatibility." DB at 37. This is absolutely false. Plaintiffs addressed *every single* issue raised by staff, significantly modifying their application to omit one of the originally planned cottages, improve fire department access, and other revisions as requested. Doc. 196-14 at 10115.[9]

The City further argues that no zoning decision is "final" under this factor if any modified application could theoretically be submitted. DB at 37-39. However,

[9] The December 6, 2015 Staff Report does not reflect all of these changes because staff analysis of the revised site plan ended when Anderson changed the zoning classification. Doc. 196-16 at 738:23-740:11, 742:24-743:14.

this would be the case with *any* zoning application, and thus no court could find in favor of a plaintiff on this factor. Notre Dame Brief at 14 ("A party whose zoning application is denied can *always* try again."). The City is incorrect in arguing that only the "opportunity" to submit a new application is relevant. DB at 37. In *WDS*, the issue was whether a modified application would be *granted*. 504 F.3d at 352. At least there, the local zoning board stated that it was willing to consider a modified application, though the court found that statement to be not credible. *Id*. Here, there was *no* such statement at all.

It is undisputed that the Planning Commission, and the City Council could have requested conditions to be placed on the Plaintiffs' use. Doc. 196-41 at 1238:17-1239:5. Neither did so. Further, the City *itself* has taken the position that "the impact [of the Buddhist meditation center] cannot be eliminated by any set of conditions congruent with planning approval objectives." DB at 60 (emphasis added); *see Guru Nanak*, 456 F.3d at 989 ("[T]he reasons given for ultimately denying these applications, to a significantly great extent lessened the possibility that future [] applications would be successful." (citing *Sts. Constantine*, 396 F.3d at 899-900)). "[A] denial is final unless the zoning authorities either give specific conditions an applicant can satisfy to obtain approval or specific recommendations for how to obtain approval in a future application." CLS Brief at 5; *see also id.* at 13.

6. *Whether Plaintiffs had a reasonable expectation of approval.*

With respect to the final factor, every authority relied upon by the City involved circumstances where the use was not permitted on the property under the relevant land use regulations. *See Andon*, 813 F.3d at 515 ("the property was not a permitted site for a community facility such as a church"); *Petra Presbyterian Church*, 489 F.3d at 847 (churches were not permitted in the relevant industrial zone). And, as the City itself admits, "in *Canaan Christian, supra*, where the Fourth Circuit affirmed that '[a] burden is self-imposed, for example, where a religious organization knowingly entered into a contingent lease [or purchase] agreement for a non-conforming property.'" DB at 40 (emphasis added).[10]

The difference between the authorities relied on and this case could not be starker. There, the uses were prohibited. Here, it is permitted. The fact that it was permitted with Planning Approval is of no moment. The City's witness, who was previously designated as its 30(b)(6) witness, testified at trial that the relevant zoning provision means that religious uses are "favored" uses in the R-1 zone, and the Planning Commission's review should "err more on the side of positivity . . . ." Doc. 196-22 at 887:16-888:6.

[10] In *Livingston Christian School*, there was no holding regarding whether the plaintiff's expectations of approval were reasonable.

The City attempts to distinguish the churches that received Planning Approval in the past but avoids the fact that all other applications have been approved.[11] OB at 34. They misstate the record when they argue that there have been "no church applications granted on substandard streets in 20 to 30 years." DB at 42. Again, this is untrue. *See* Doc. 93-6 at 101:13-21, 102:11-17; Doc. 93-3 at 63:6-18 & 70:1-11; Doc. 93-70. The City also granted Planning Approval to the Gates of Praise Missionary Baptist Church, which was situated on property similar like the Subject Property, located on the Dog River in the R-1 district, very similar to Plaintiffs' situation. Doc. 93-3 at 90:20-93:13; Doc. 93-58 at 6050 (Staff Report). Of course, there will always be "differences"[12] between any other application and the Plaintiffs', but other churches have been approved in the R-1 district, in residential neighborhoods, and on substandard roads.

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[11] It is unsurprising that the only other applicant that was faced with similar hostility was a Muslim group, and the City only relented after an investigation by the United States Department of Justice. Doc. 196-51 Nos. 22-28; Doc. 196-36 at 40:20-41:5; Doc. 196-2 at 23:18-20.

[12] The relied-upon "obvious differences" (that the proposed Buddhist meditation center would use a converted home, and that there would be multiple buildings) played no part in the Planning Commission and City Council's decision. Doc. 196-64; Doc. 169 ¶ 53.

Finally, the City argues that the burden was "self-imposed" because Plaintiffs removed the contingency[13] on the purchase of the Subject Property. DB at 42. The mechanics of the sale have nothing to do with whether a plaintiff "had a reasonable expectation of using its property for religious exercise" and are irrelevant to the resolution of this factor.

III. THE CITY MISAPPREHENDS THE NATURE OF PLAINTIFFS' FREE EXERCISE CLAIM, WHICH IS SUBJECT TO STRICT SCRUTINY REVIEW.

A subjective zoning process such as the City's "Planning Approval" system constitutes a system of individualized exemptions that is the antithesis of a "generally applicable" law, and thus subject to strict scrutiny under the Free Exercise Clause. OB at 37-42. Plaintiffs cited numerous decisions that held that subjective zoning denials fall within this individualized exemption principle and are subject to strict scrutiny as not being the imposition of generally applicable laws. *Id.* at 40-41.[14] *See also* Report on the Religious Liberty Protection Act of 1999, H.R. REP.

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[13] The contingencies were removed so that Plaintiffs could close on the property "[b]ecause we knew that we could meet all the things that we had been told there were as far as objections." Doc. 180 at 8562:10-25.

[14] *See also Int'l Church of the Foursquare Gospel v. City of San Leandro*, 673 F. 3d 1059, 1066 (9th Cir. 2011) ("[W]hile the zoning scheme itself may be facially neutral and generally applicable, the individualized assessment that the City made to determine that the Church's rezoning and CUP request should be denied is not."); *Roman Cath. Bishop of Springfield*, 724 F.3d at 98 ("we do not view the [historic

NO. 106-219, at 29 (1999) (Act "directly enforces that part of *Employment Division v. Smith*, 494 U.S. 872 (1990), that applies the compelling interest test to cases in which the regulated conduct is subject to individualized assessment."); Statement of Senate sponsors Kennedy and Hatch, 106th Cong., 146 CONG. REC. S.7774 (2000).

In response, the City cites several cases where zoning laws themselves (as opposed to individualized denials) were found to be generally applicable. DB at 52-53. But these cases are all distinguishable, as none involved subjective analysis of a discretionary permit for a use that is permitted in the zoning district. *Id.*

IV. DEFENDANTS' RADICAL INTERPRETATION OF THE ALABAMA RELIGIOUS FREEDOM AMENDMENT SHOULD BE REJECTED.

With respect to Plaintiffs' claim pursuant to the Alabama Religious Freedom Amendment ("ARFA"), ALA. CONST. Art. I, § 3.01, the City makes the new and unprecedented argument that the "free exercise of religion," *id.* § 3.01(IV)(2), somehow does not include Plaintiffs' exercise of religion. DB at 61-68. However, this argument that "ARFA has a very limited field of operation" (DB at 61) is directly contrary to ARFA's text,[15] which states in part:

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preservation] Ordinance as a 'neutral law of general applicability' in the sense that the Supreme Court used the term in *Smith*").

[15] The City's rule of construction argument fails, because "[a] constitutional provision, as far as possible, should be construed as a whole and in the light of entire instrument and to harmonize with other provisions, that every expression in such a solemn pronouncement of the people is given the important meaning that was

> This amendment shall be liberally construed to effectuate its remedial and deterrent purposes.

ALA. CONST. Art. I, § 3.01(VII)(a). The purposes and findings are found in sections II and III and state in part:

> SECTION II. . . .
>
> (1) The framers of the United States Constitution, recognizing free exercise of religion as an unalienable right, secured its protection in the First Amendment to the Constitution, ...
>
> (2) Federal and state laws "neutral" toward religion may burden religious exercise as surely as laws intended to interfere with religious exercise.
>
> . . . .
>
> (4) In Employment Division v. Smith, 494 U.S. 872 (1990), the United States Supreme Court virtually eliminated the requirement that the government justify burdens on religious exercise imposed by laws neutral toward religion.
>
> (5) The compelling interest test as set forth in prior court rulings is a workable test for striking sensible balances between religious liberty and competing governmental interests in areas ranging from public education . . . to national defense . . . .
>
> . . . .
>
> SECTION III. The purpose of [ARFA] is to guarantee that the freedom of religion is not burdened by state and local law; . . . .

The City's argument is contrary to ARFA's liberal construction provision in several ways.

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intended in such context and such part thereof." *State Docks Comm'n v. State ex rel. Cummings*, 227 Ala. 414, 417, 150 So. 345, 346 (1933).

First, the Alabama Legislature viewed the right to free exercise of religion as the same right protected by both the federal and State Constitutions. *See id.* § 3.01(II)(1),(2),(4). Thus, Defendant's argument that ARFA's protections apply only to "a very limited field of operation" (DB at 61) is fundamentally incorrect. *See* Thomas C. Berg & Frank Myers, *The Alabama Religious Freedom Amendment: An Interpretive Guide*, 31 CUMB. L. REV. 47, 62 (2000) ("ARFA merely protects the religious exercise of private citizens and groups, often of religious minorities whose unfamiliar practices are inadvertently restricted by generally applicable secular laws." (emphasis added)).

Second, the purpose of the law is to target "neutral" laws as much as "laws intended to interfere with religious exercise." ALA. CONST. Art. I, § 3.01(II)(2).

Third, Section V(a) of ARFA establishes its application to "rule[s] of general applicability," not merely the targeted circumstances suggested by the City. *See also* Berg & Meyers, *supra*, at 70 (noting that, "for the most part, ARFA was modeled after RFRA").

Fourth, ARFA applies to all "state and local law," without limitation, ALA. CONST. Art. I, § 3.01(III), and the application of the City's zoning ordinance is "local law." Section VI(a) also states that "This amendment applies to all government rules and implementations thereof, whether statutory or otherwise, ..." (Emphasis added.) *See* Berg & Meyers, *supra*, at 72 ("[I]f a zoning rule bars a church or shelter

from a neighborhood, the result is certainly a serious restriction on religious activity.”).

Fifth, Section II(5) itself lists specific examples of laws addressed by the Legislature, including “public education” and “conscientious objection,” neither of which fall within the City’s claimed “very limited field of operation.”

Sixth, even under the City’s cramped analysis of AFRA, Article I, section 3 of the Alabama Constitution in fact does discuss “building . . . any place of worship” and “maintaining any . . . ministry,” which are examples of religious exercise. ALA. CONST. Art. I, § 3.

Finally, under the City’s view, none of the burdens on religious exercise already reviewed by the courts under ARFA would have qualified as implicating that provision. *See, e.g., Ex parte Snider*, 929 So. 2d 447, 466 (Ala. 2005) (child custody); *Presley v. Scott*, No. 4:13-CV-02067-LSC, 2014 WL 7146837 (N.D. Ala. Dec. 15, 2014) (prisoner); *Doggrell v. City of Anniston*, 277 F. Supp. 3d 1239 (N.D. Ala. 2017) (anti-harassment policy); *Smith v. Dunn*, 516 F. Supp. 3d 1310, 1337 (M.D. Ala.), *rev'd*, 844 F. App’x 286 (11th Cir. 2021) (execution regulations).

The City also argues that it is immune from an ARFA challenge to its zoning ordinance because it “as enacted in 1967 is presumed to have been constitutionally valid against Article I, § 3 of the 1901 state constitution . . . .” DB at 67. However, ARFA applies to “all government rules and implementations thereof, . . . whether

adopted before or after the effective date of this amendment." ALA. CONST. Art. I, § 3.01(VI)(a).

The City's suggestion that ARFA be cabined narrowly should be rejected.

V. THE CITY FAILS TO REBUT PLAINTIFFS' ARGUMENT THAT THE DENIAL OF PLANNING APPROVAL FOR THEIR BUDDHIST MEDITATION CENTER CANNOT SURVIVE STRICT SCRUTINY REVIEW.

A. The City Lacks a Compelling Interest in Prohibiting Plaintiffs' Use on the Subject Property.

The City's recharacterization of this lawsuit as a challenge to its Zoning Ordinance (as in *Konikov* and *Grosz v. City of Miami Beach*, 721 F.2d 729, 731-32 (11th Cir. 1983) (challenge to a zoning provision that prohibited religious congregations in "RS-4" zones)) is an attempt to reframe the strict scrutiny analysis as defending its ability to generally enforce its zoning laws. DB at 55-56. Here, however, the Plaintiffs take no issue with the Zoning Ordinance's classification of religious uses or its requirement to seek Planning Approval. Rather, the issue presented is whether the City has a compelling[16] interest in specifically prohibiting Plaintiffs' use on the Subject Property. *See* OB at 45-47; *Holt v. Hobbs*, 574 U.S. 352, 363 (2015); *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546

[16] The City's reference to two decisions of this Court regarding "aesthetic" interests (DB at 59) is telling as those decisions merely held that aesthetics is a "substantial," and not compelling, governmental interest. *See* OB at 47-49.

U.S. 418, 431 (2006). *See* Brief of General Conference of Seventh-day Adventists et al. ("Seventh-Day Adventists Brief") at 18 ("[U]nder RLUIPA, generalized zoning interests cannot justify substantially burdening TMAA's religious exercise."); CLS Brief at 6 ("[T]he district court disregarded repeated Supreme Court warnings not to allow the government to satisfy strict scrutiny review by asserting its course of action was the only way to advance a vague and abstract compelling interest."); *id.* at 20.

As argued in Plaintiffs' Opening Brief, there is no justification, legitimate or compelling, to prevent the tiny Buddhist meditation center use for a maximum of 30 people on Plaintiffs' seven-acre property.[17] OB at 45-53. The sole non-generalized justification offered is "traffic." DB at 56-59. But the City cites nothing in the record that supports a holding of an actual threat to traffic interests. They refer merely to the Planning Approval standard and anecdotal statements. It refers to the existence of a "substandard" road (DB at 57), but Principal Planner Hoffman admitted that its substandard width was *not* a basis to deny the application. Doc. 196-22 at 814:21-816:11. There is no prohibition against a church from locating on such a road, and it is undisputed that the City has previously permitted churches to

[17] When the City sent someone to spy on Plaintiffs' meditation activities at the Subject Property, they reported that they "did not observe an increase in traffic flow," and the traffic impact was "nonexistent." Doc. 196-78; Doc. 196-22 at 987:25-990:9; *see also* Doc. 196-36 at 84:6-7.

locate on such roads. Doc. 196-11 at 91:8-11, 101:6-11; Doc. 196-36 at 50:1-4, 51:16-22; Doc. 196-28 at 85:2-11; Doc. 196-16 at 661:12-19; Doc. 196-22 at 814:14-20, 990:21-23; Doc. 1 ¶¶ 282-283; Doc. 32 ¶¶ 282-283; Doc. 196-11 at 101:13-21, 102:11-17; Doc. 196-2 at 65:8-13, 66:6-11, 77:2-10, 78:14-18; Doc. 196-82. The City admitted that the width of Eloong Drive may create an "inconvenience," but also that by itself it was not "a reasonable basis to deny the application." Doc. 196-11 at 124:20-126:7; Doc. 196-83 at 3-4 (photos of cars passing on Eloong Drive); Doc. 196-4 at 464:24-465:24.

The City also repeatedly refers to the inadmissible hearsay statements of hostile local residents guessing about potential impacts. DB at 16, 57-58. *See, e.g., Westchester Day Sch. v. Vill. of Mamaroneck*, 417 F. Supp. 2d 477, 552 n.83 (S.D.N.Y. 2006), *aff'd,* 504 F.3d 338 (2d Cir. 2007). The City's own professionals admitted that the impact was minimal. OB at 51-53. There were only "typical" comments about traffic. Doc. 196-16 at 593:12-23; Doc. 196-22 at 816:22-24; Doc. 196-76; Doc. 196-37 at 3; Doc. 196-28 at 41:13-14; Doc. 196-32 at 33:1-11. *See WDS*, 417 F. Supp. 2d at 554; *Fortress Bible Church v. Feiner*, 734 F. Supp. 2d 409, 505-506 (S.D.N.Y. 2010), *aff'd,* 694 F.3d 208 (2d Cir. 2012) (Town's own officials contradicted its argument with respect to traffic safety).

City traffic engineer Mary Beth Bergin *never* testified that the increase in traffic "would be a substantial impact on those living in the neighborhood." DB at

58 n.18 (citing Doc. 101-18 at 3245:6-22). She testified: "Based strictly on numbers, it is not a substantial impact." Doc. 101-18 at 73:3-11. She testified that *percentage-wise* there would be a "substantial increase," which may be true but is irrelevant. *Id.*; *see also* Doc. 181 at 8738:21-8739:23 (confirming percentage increase would not indicate a road capacity problem). The record demonstrates that both Eloong Drive and Riverside Drive could easily handle the additional volume of traffic of the proposed Buddhist meditation center. Doc. 196-28 at 28:8-17, 74:9-20; *see also* Doc. 196-16 at 656:15-657:5, 658:9-659:11; Doc. 196-22 at 809:22-811:8; Doc. 196-11 at 127:2-4.

While the Planning Commissioners consider comments from local residents and take them "very seriously," even though they sometimes are based on improper bias and prejudice and not legitimate in terms of land use issues, Doc. 196-22 at 1026:22-24, 893:19-24, City traffic engineer Bergin testified that "neighbor[s'] feelings" don't impact the capacity of a roadway, and also that neighbors sometimes "exaggerate traffic concerns during a land use application." Doc. 196-16 at 686:2-7. *See WDS,* 417 F. Supp. 2d at 565-66 (unsupported opinions of hostile local residents cannot replace the requirement to demonstrate proof of an actual threat to public safety); *Fortress Bible Church*, 734 F. Supp. 2d at 508 ("The complaints of residents who are not fully informed do not themselves constitute compelling governmental interests.").

The City also references a generalized interest in "harmony" (not a compelling interest at a matter of law, OB at 47-48), but provides no evidence that there was any actual threat. The Buddhist meditation center would encompass only *2%* of the nearly seven-acre Subject Property. Doc. 180 at 8513:7-24. The City's own Planner stated that "[a]side from the religious use, . . . [she] wouldn't see anything else that would be cause for denial . . . ." Doc. 196-16 at 589:18-21; *see also id.* at 570:20-23, 580:5-581:20; Doc. 196-37; Doc. 196-22 at 965:3-10.

B. Even if the City Had a Compelling Interest, an Outright Denial Was Not the Least Restrictive Means of Achieving It.

The City misunderstands the nature of the strict scrutiny analysis. It does not require that any and all "concerns" or "impacts" (the terms used repeatedly by the City, DB at 59-60) be "negate[d]" or "eliminate[d]." *Id.* It requires the government to identify a *compelling interest*, and then to demonstrate that its outright denial was "the least restrictive means of furthering that compelling governmental interest." 42 U.S.C. § 2000cc(a)(1)(B). It has not done so.

Additionally, the City argues that the Plaintiffs "have never presented any modified planning application for consideration." DB at 60. The City has it backward, as *it* has the burden of persuasion to prove that no other means exists that would satisfy compelling interests, not the other way around. 42 U.S.C. § 2000cc-2(b); ALA. CONST. Art. I, § 3.01(V)(B).

Further, Plaintiffs addressed the legitimate concerns raised by the City when they modified their application for consideration at the second Planning Commission hearing (the City falsely states that there was no modified application, DB at 60). Their modified application moved the facility closer to Eloong Drive, eliminated one of the planned cottages, and dedicated a right-of-way along Eloong Drive. Doc. 180 at 454:22-456:9. The City's astonishing complaint about a lack of further modifications rings especially hollow when it was *the City* that refused to provide any further comments or inform Plaintiffs of any additional legitimate concerns about the proposed use, because of the "religious" issue. Doc. 196-16 at 738:23-740:11; 742:24-743:14.

The City ignores possible less restrictive means, which include conditions on Planning Approval that are regularly placed on religious applicants where traffic or "harmony" issues may be present. Doc. 196-12 at 36:19-22, 37:6-7 (compatibility issues can be resolved with conditions). These include imposing conditions such as limiting the hours of operation, road access, buffering and privacy fences, and building scale. Doc. 196-2 at 42:8-21, 55:17-56:19, 59:8-16, 61:20-62:21, 71:3-16, 83:2-85:7, 89:10-18, 90:2-14, 94:15-95:3, 95:12-19, 96:20-97:21, 99:15-100:18, 100:19-101:19, 103:15-23, 104:1-7; Doc. 196-22 at 995:14-999:15, 1004:5-1006:19, 1009:1-1010:7, 1011:23-1013:6, 1013:7-1015:3; Doc. 196-84; Doc. 196-85; Doc. 196-86 at COM012111-12112; Doc. 196-87 at 2-7,

Doc. 196-88 at 12-13; Doc. 196-89, Doc. 196-90, Doc. 196-91; *see* DB at 60 (ignoring same). Such means "actually exist," *Knight v. Thompson*, 797 F.3d 934, 946-47 (11th Cir. 2015), but the City refused to recommend or consider them in the context of Plaintiffs' application.

City staff agreed that road access and driveway issues can be addressed by conditions on approval, such as stating that development must comply with AASHTO standards and the International Fire Code. Doc. 196-32 at 33:1-11; Doc. 196-12 at 25:6-9, 37:6-7; Doc. 1 ¶ 203; Doc. 32 ¶ 203. Plaintiffs were willing to agree to any reasonable conditions placed on approval of the Application. OB at 8; Doc. 196-97 ¶ 38.

Ultimately, the City does not address its own staff's admissions that any issues could easily be resolved, but relies merely on its view of "common-sense" for its assertion that an outright denial was the least restrictive means of achieving a compelling governmental interest. This does not meet the "most demanding test known to constitutional law." *City of Boerne v. Flores*, 521 U.S. 507, 534 (1997).

CONCLUSION

The district court's decision should be reversed, and Judgment entered for Plaintiffs-Appellants as to Counts I, IV and VI of the Complaint.

Respectfully submitted,

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CERTIFICATE OF FILING AND SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Eleventh Circuit by using the appellate CM/ECF system on November 30, 2022.

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