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No. 08-_____

IN THE
Supreme Court of the United States

THE LIGHTHOUSE INSTITUTE FOR EVANGELISM, INC.
AND REV. KEVIN BROWN,
Petitioners,

v.

THE CITY OF LONG BRANCH,
Respondent.

**On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Third Circuit**

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Equal Terms Provision of the Religious Land Use and Institutionalized Persons Act of 2000, 42 U.S.C. § 2000cc(b)(1), which provides that

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

simply means what it says, or whether the strict scrutiny test must be imported into it, as the Eleventh Circuit holds, or whether a “similarly situated” test must be imported into it, as the Third Circuit now holds?

2. Whether, in a Free Exercise challenge to a government program of categorical and individualized exemptions within the meaning of *Employment Division v. Smith*, a religious plaintiff must show not only the existence of this system but also discriminatory intent?

PARTIES TO THE PROCEEDING

Petitioners The Lighthouse Institute for Evangelism and Rev. Kevin Brown were the plaintiffs-appellants below. Respondent the City of Long Branch was the defendant-appellee below.*

CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29(6), Petitioner The Lighthouse Institute for Evangelism states that it does not have a parent corporation, nor does it issue any stock.

* BCIC Funding Corp., Breen Capital Services, Inc., Abrams, Gratta & Falvo, P.C., Peter S. Falvo, John Does A-Z and Eugene M. Lavergne were defendants in the district court.

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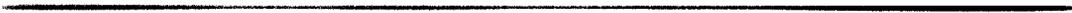
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**On Petition for a Writ of Certiorari to the
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for the Third Circuit**

PETITION FOR A WRIT OF CERTIORARI

The Lighthouse Institute for Evangelism and Reverend Kevin Brown respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit in this case.

OPINIONS BELOW

The opinion of the Third Circuit is reported at 510 F.3d 253. Appendix ("App.") at 1a. The opinion of the United States District Court for the District of

New Jersey is reported at 406 F.Supp.2d 507. App.94a. The prior appellate opinion regarding the motion for preliminary injunction is reported at 100 Fed. Appx. 70. App. 130a. The district court decision denying the preliminary injunction was not reported, but is included in the Appendix. App. 143a.

JURISDICTION

The Third Circuit's judgment was entered on November 27, 2007. App. 93a. Jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the United States Constitution provides in relevant part: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech." U.S. CONST. amend. I. The Fourteenth Amendment to the United States Constitution provides in relevant part: "No state shall ... deny to any person within its jurisdiction the equal protection of the laws." *Id.*, amend. XIV.

The Religious Land Use and Institutionalized Persons Act of 2000, 42 U.S.C. § 2000cc ("RLUIPA"), provides in relevant part:

§ 2000cc. Protection of land use as religious exercise

.....

(b) Discrimination and exclusion

(1) Equal terms

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.

....
Id.

STATEMENT OF THE CASE

I. Factual Background

The Lighthouse Institute for Evangelism is a mission church seeking to minister to the poor and disadvantaged in downtown Long Branch, New Jersey, App. 4a, a city where nearly one quarter of the households earn less than \$15,000 per year. App. 55a. The downtown area reflects this poverty; the City has variously described the downtown area as one of “vacant lots and poorly maintained buildings” and “unused buildings[,] incompatible uses and undesirable conditions.” R. 88, 228.¹

Lighthouse specifically chose this downtown location so that it could minister to the poor “where the needs were most acute.” App. 55a. Lighthouse opened its doors in 1992 at a leased property at 159 Broadway, where it held prayer meetings and Bible studies and served hot meals to those in need. App.

¹ “R.” citations are to the record below, specifically, the joint appendix submitted to the Court of Appeals.

55a. In 1995, Lighthouse was able to purchase its own property—the abandoned building at 162 Broadway, located directly across the street from its first location. App. 55a-56a. It planned to renovate that building so that it could operate a soup kitchen, hold worship services, and conduct religious education, “provid[ing] a variety of benevolent services to the community in which it has operated and seeks to operate.” App. 55a-56a. The then-Mayor of Long Branch wrote Lighthouse congratulating it on its decision to purchase 162 Broadway and awarded it a small grant “for the expansion of [its] soup kitchen.” App. 56a.

162 Broadway is located in what was then the downtown commercial district, or C-1 zoning district. App. 5a. In the C-1 district, the City permits various secular assemblies—most notably “assembly hall[s]”²—but not religious assemblies like churches or synagogues. *Id.*

After purchasing 162 Broadway, Lighthouse began seeking permission to hold worship services, a soup kitchen, and other ministry-related activities there. App. 56a-57a. The City denied those attempts, despite the fact it had allowed Lighthouse to operate for years across the street. App. 56a-57a. In April 2000, Lighthouse applied for a permit to use 162 Broadway as a church, but the City denied the permit the very next day because Lighthouse was “not a permitted use in the Zone.” App. 6a, 59a.

² Other permitted uses include restaurants, educational services, colleges, film theaters, and municipal buildings. App. 5a.

Other applications for religious use of 162 Broadway were rejected on the grounds that they were incomplete. However, there was summary judgment “evidence to support Lighthouse’s assertion that the City deliberately put the Reverend and his church on the bureaucratic equivalent of an Escher staircase, creating and enforcing an endlessly recursive zoning procedure” App. 72a n.11.

On June 8, 2000, Lighthouse filed suit in state court for constitutional and other violations; the City removed the case to federal court. App. 6a. After RLUIPA was enacted in September 2000, Lighthouse filed an amended complaint adding counts under RLUIPA and the Free Exercise clause. App. 6a, 59a. In March 2001, Lighthouse moved for a preliminary injunction. App. 59a. The motion was denied. *Id.*

II. The First Court of Appeals Opinion

Lighthouse appealed that denial to the Third Circuit. In an unpublished opinion, the Third Circuit upheld the denial on the curious grounds that Lighthouse had not shown that it was actually prohibited from operating in the area, since it might qualify to operate as “an assembly hall.” App. 134a-36a. “Although a number of religious uses are identified in [planning dictionary] definitions of assembly hall, we note that the term ‘church’ may in fact encompass a range of activities which would extend beyond the concept of an ‘assembly hall.’” App. 135a. For this reason, “denial of the Mission’s application as a ‘church’ does not establish whether the Mission’s application would have been approved as an ‘assembly hall.’” App. 135a-36a. Judge Gibson

concurred in the result and judgment only, stating, “The term ‘Assembly Hall’ seems on its face to include a hall where people assemble for religious purposes. In my view the rejection of the church’s application therefore demonstrates approval of secular assemblies and rejection of religious assemblies.” App. 142a. Judge Gibson went on to say, “Nor is the effect of the discrimination mitigated because the church could have operated elsewhere in the city; the church’s mission, to ‘serve the poor and disadvantaged in downtown,’ can only be accomplished downtown.” *Id.* Judge Gibson stated that these issues should be “ventilated in the hearing still to come.” *Id.* The case returned to the district court, where the City promptly took the position that it would not permit Lighthouse to operate as an “assembly hall” but would only allow it to apply as a “church.” R.103.

III. The Redevelopment Guidelines

In 2002, while the case was pending in the district court, the City declared the downtown area (or “Broadway Corridor”) an area in need of redevelopment, and adopted the Redevelopment Guidelines. App. 8a-9a. The Redevelopment Guidelines are a plan for creating a commercial and artistic center full of “rich and varied uses” in the downtown area. App. 8a-9a, 61a. They supplant the former C-1 zoning regulations. App. 8a. The Redevelopment Guidelines, which are far more detailed than the original ordinance, include rigorous procedures for obtaining permission to develop a particular property. App. 8a-9a, 60a-62a & n.25. Potential developers need not be property owners; if

an approved developer is not able to obtain the property he wishes to develop, the City will seize the property through eminent domain and transfer it to the developer. App. 9a.³

The Redevelopment Guidelines, like the C-1 Ordinance before them, permit theaters, cinemas, music instruction, fashion design schools, and culinary schools, among other uses. App. 9a. The Redevelopment Guidelines do not permit churches or religious educational institutions in the Redevelopment Zone. *Id.* Following the new guidelines, Lighthouse submitted an application to become the developer of 162 Broadway, together with a request for a waiver permitting church use of that property. App. 10a. The application was denied. *Id.* The City claims the application was denied as incomplete. *Id.* However, comments by City officials about the church's application indicate that the City would not have granted the application in any case. App. 10a-11a, 62a-63a. City officials stated Lighthouse would have a "detrimental" effect on the zone and would "destroy the ability of the block to be used as a high end entertainment recreation area." App. 10a-11a, 62a-63a. As justification for these fears, the City cited a state law that prohibits liquor licenses within 200 feet of churches, absent a waiver from the church.⁴ App. 10a-11a. Lighthouse had

³ Although not part of the record on appeal, the City is presently attempting to seize 162 Broadway by eminent domain. However, this does not affect any issue in this case, as Petitioners seek damages.

⁴ It is undisputed that Lighthouse has repeatedly affirmed its willingness to waive this restriction. App. 83a. The dissent

already agreed to issue all necessary waivers. App. 63a.

IV. Summary Judgment

In 2005, the parties submitted cross-motions for summary judgment, and the district court granted summary judgment for the City on all counts. App. 95a. It granted summary judgment on Lighthouse's Equal Terms claims, holding that Lighthouse failed to prove a requisite substantial burden, was not similarly situated to any non-religious assembly, and that the City's ordinances passed strict scrutiny. App. 107a-09a, 111a-12a. It disposed of Lighthouse's Free Exercise claims on similar grounds. App. 115a-18a. Lighthouse appealed only its RLUIPA Equal Terms and Free Exercise claims. App. 12a-13a.

V. The Second Court of Appeals Opinion

On appeal, a divided panel of the Court of Appeals panel vacated in part and affirmed in part. The opinion of Judge Roth, joined by Judge Fisher, began by noting that "the parties substantially agree" that the C-1 Ordinance and the Redevelopment Guidelines "are land use regulations within the meaning of [RLUIPA]," that Lighthouse "is a religious assembly," and that "several of the permitted uses under both ordinances are non-religious assemblies." App. 18a.

suggested, App. 83a n.38, that this statute may be invalid under *Larkin v. Grendel's Den*, 459 U.S. 116 (1982).

The majority then held that the former C-1 Ordinance violated RLUIPA's Equal Terms Provision because it permitted secular, but not religious, assemblies. App. 41a-42a. The old C-1 Ordinance had no statement of purpose, and therefore no discernible reason for permitting secular assemblies but excluding religious ones. *Id.* The majority vacated the district court's opinion on that count. App. 42a. It deemed Lighthouse's claim for injunctive relief based on the C-1 Ordinance moot, but held that its damages claim based on the C-1 Ordinance survives. *Id.*

By contrast, the majority held that the Redevelopment Guidelines did not violate RLUIPA, because Lighthouse had not identified a similarly situated non-religious comparator. App. 36a-41a. The majority held that, to prove a RLUIPA violation, Lighthouse had the burden of demonstrating that permitted secular uses "cause[] no lesser harm to the interests the regulation seeks to advance." App. 36a. The majority noted that this similarly situated requirement was in direct conflict with the Eleventh and Seventh Circuits, which had specifically rejected a similarly situated requirement. App. 31a-34a.

Applying this unique standard, the majority found that Lighthouse's challenge to the Redevelopment Guidelines failed due to a state law that restricts liquor licenses within 200 feet of churches. App. 37a. "[C]hurches are not similarly situated to the other allowed assemblies with respect to the aims of the [Redevelopment] Plan" because "churches would fetter Long Branch's ability to allow establishments with liquor licenses into the

Broadway Corridor.” *Id.* The majority held that this was a legitimate reason for the City to allow secular assemblies under the Redevelopment Plan, but prohibit churches. App. 36a-41a.

The Court explicitly noted its disagreement on this point with the Seventh Circuit’s opinion in *Digrugilliers v. Consolidated City of Indianapolis*, 506 F.3d 612 (7th Cir. 2007) (Posner, J.), which held that a similar liquor license restriction could not be used to restrict the rights of religious institutions. App. 38a n.15.

The majority also ruled that the Redevelopment Guidelines did not violate the Free Exercise clause. App. 42a-53a. The majority based this ruling on its finding that Lighthouse had failed to prove that the Redevelopment Guidelines burdened its religious exercise, and on its finding that the Redevelopment Guidelines were neutral, generally applicable, and did not constitute a system of individualized exemptions. *Id.*

Judge Jordan filed a 41-page dissent. He sharply disputed the majority’s notion that there is a “similarly situated” requirement in RLUIPA § 2(b). App. 66a. Judge Jordan acknowledged “the need for some kind of comparator,” but stated that “unlike the majority, I do not believe the statute requires any greater similarity than is inherent in the broad terminology ‘assembly or institution,’ *i.e.*, the terminology of the statute itself.” App. 66a-67a. Agreeing with the Eleventh Circuit, Judge Jordan opined that the proper comparators are secular “assembl[ies]” and “institution[s],” and that those

terms should be given their “ordinary or natural meaning[s].” App. 69a-71a & n.29.

Pointing to decisions by the Eleventh and Seventh Circuits, Judge Jordan argued that the plain-text approach to RLUIPA will not lead to a “parade of horrors.” App. 74a-75a. Churches may still be excluded from zones where secular assemblies are excluded, like the residential zones in *Konikov v. Orange County*, 410 F.3d 1317 (11th Cir. 2005), and may be regulated by evenhanded restrictions, like the building size restriction in *Vision Church v. Village of Long Grove*, 397 F. Supp. 2d 917 (N.D. Ill. 2005), *aff’d*, 468 F.3d 965 (7th Cir. 2006). App. 73a-75a.

Judge Jordan did not reach the Free Exercise claims as such (since he would have resolved the case under RLUIPA), but raised questions about the majority’s First Amendment ruling on these facts. In particular, he focused on the question of neutrality: “On what principled basis can an art workshop or a cooking class be governmentally preferred to a theological or philosophical discussion in Sunday School?” App. 80a. Judge Jordan argued that earlier Free Exercise precedents relied upon by the majority were inapposite because those cases dealt with selective enforcement of facially neutral laws, rather than laws that are non-neutral on their face, like the ordinances here. App. 84a-88a.

REASONS FOR GRANTING THE WRIT

The Courts of Appeals are divided over construction of the Equal Terms Provision of the

Religious Land Use and Institutionalized Persons Act of 2000 (“RLUIPA”), 42 U.S.C. § 2000cc; over construction of the Free Exercise Clause of the First Amendment in the religious land-use context; and over the relationship between those two issues. This case affords the Court an excellent opportunity to mend that division.

A divided panel of the United States Court of Appeals for the Third Circuit has expressly repudiated the Eleventh and Seventh Circuits’ construction of RLUIPA. It has done so, moreover, in order to “limit the statute” and thus make RLUIPA conform to the panel majority’s understanding of *Employment Division v. Smith*, 496 U.S. 913 (1990), App. 29a n.11, and avoid questions about its propriety under Section Five of the Fourteenth Amendment. Ironically, that also seems to have been the motivation for the Eleventh Circuit’s own, different surgery on RLUIPA.

The Equal Terms Provision of RLUIPA, 42 U.S.C. § 2000cc (b)(1), states simply:

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.

Id. Both the Eleventh Circuit and the majority below find that simplicity problematic. They differ over what to do about it.

The majority below chides the Eleventh Circuit for “incorporating additional terms” into RLUIPA

because that court reads a compelling interest standard into the statute instead of the strict liability that follows from its plain language. As the majority points out, Section 2(b)(1), unlike Section 2(a) of RLUIPA, says nothing whatever about strict scrutiny. The Eleventh Circuit simply imports it into that section in an effort to make it more closely resemble *Smith*. As the majority below diagnoses the problem, the Eleventh Circuit was driven to this error by its prior error of giving a broad interpretation to the core Equal Terms language of Section 2(b)(1). App.31a-32a n.13 (rejecting Equal Terms standard in *Midrash Sephardi, Inc. v. Town of Surfside*, 366 F.3d 1214, 1232 (11th Cir.2004)).

The majority below is pleased to report that it has fallen into neither sin. “[U]nlike [that] court, we have come to a constitutionally acceptable interpretation of Section 2(b)(1) without” adding such additional terms. App. 32a n.13.

In spotting the speck in the Eleventh Circuit’s eye, however, the majority below overlooks the plank in its own. The way that the majority below reached its “constitutionally acceptable interpretation” of Section 2(b)(1) was by incorporating into the Equal Terms language—that is, the language the Eleventh Circuit left alone—an additional requirement of its own. That requirement was that “a religious plaintiff under the Equal Terms Provision must identify a better-treated secular comparator that is similarly situated in regard to the *objectives* of the challenged regulation.” App. 33a. (emphasis original).

It is not enough, the majority explains, that a religious plaintiff demonstrate that it is being treated “on less than equal terms with a nonreligious assembly or institution,” which is all that Section 2(b)(1) requires. No, it must also demonstrate that the permitted secular uses “cause[] no lesser harm to the interests the regulation seeks to advance.” App. 36a. Thus, in the present case, the majority found that Lighthouse’s challenge to the Redevelopment Guidelines failed because of another state law that restricts liquor licenses within 200 feet of churches. App. 37a. “[C]hurches are not similarly situated to the other allowed assemblies with respect to the aims of the [Redevelopment] Plan” because “churches would fetter Long Branch’s ability to allow establishments with liquor licenses into the Broadway Corridor.” *Id.* The majority held that this was a legitimate reason for the City to allow secular assemblies under the Redevelopment Plan, but prohibit churches. App. 36a-41a.

In short, both the majority below on the one hand, and the Eleventh and Seventh Circuits on the other, were nervous about RLUIPA’s relationship to *Smith*.⁵ The majority below thinks it’s rescuing

⁵ The Seventh Circuit has adopted the Eleventh Circuit’s Equal Terms standard. See *Vision Church v. Village of Long Grove*, 468 F.3d 975, 1002 (7th Cir. 2006), *cert denied*, 128 S. Ct. 77 (2007) (quoting *Konikov v. Orange County*, 410 F.3d 1317, 1324 (11th Cir. 2005)) (“the standard for determining whether it is proper to compare a religious group to a nonreligious group is not whether one is ‘similarly situated.’”); *Petra Presbyterian Church v. Village of Northbrook*, 489 F.3d 846, 849 (7th Cir. 2007), *cert. denied*, 128 S.Ct. 914 (2008) (citing *Midrash* for proposition that RLUIPA’s Equal Terms Provision incorporates the *Lukumi* standard).

RLUIPA by narrowing the Equal Terms language and leaving the liability standard alone,⁶ whereas the Eleventh Circuit thinks it is rescuing RLUIPA by leaving the Equal Terms language alone and narrowing the liability standard.⁷ Neither is willing to allow the language of Section 2(b)(1) to mean simply what it says.

This is not just an abstract disagreement. The differing approaches yield strikingly different results. In *Digrugilliers v. Consolidated City of Indianapolis*, 506 F.3d 612 (7th Cir. 2007), the Seventh Circuit was faced with facts similar to those in this case. There, as here, a state law prohibited liquor licenses within 200 feet of churches. *Id.* at 616. And there, as here, the city relied upon this state law as its justification for prohibiting churches but permitting secular assemblies in the zone. *Id.* But there, unlike here, the Court held that the state law could not justify treating religious organizations on worse terms, and so violated RLUIPA. In an opinion by Judge Posner, the court held that secular and religious land uses could be comparable for Equal Terms purposes even if a state law treats

⁶ The majority below identified an additional virtue of this approach. “Because we limit the statute in this way,” it explained, it needn’t reach the question of “Congress’s authority under Section 5 [of the Fourteenth Amendment] to impose what amounts to a strict liability standard for regulations that violate the terms of the Equal Terms provision.” App. 29a n.11.

⁷ As the majority below noted, a subsequent panel of the Eleventh Circuit read its own version of a similarly situated requirement into as-applied challenges. App. 32a (citing *Konikov*). This only furthers the confusion.

them differently. *Id.* at 616-7. "Government cannot, by granting churches special privileges . . . furnish the premise for excluding churches from otherwise suitable districts." *Id.* By contrast, no church in the Third Circuit (or at the very least in New Jersey) will ever be similarly situated to a secular assembly unless that secular assembly also restricts the location of liquor licenses. Indeed this logic has no obvious stopping point. It would seem that no church anywhere in the Third Circuit could ever be similarly situated to any for-profit assemblies, because the church is tax-exempt and they are not.

As we noted above, the divergence between the Eleventh Circuit and the majority below is premised upon its confusion about the Free Exercise Clause. That confusion, it turns out, runs deep. In its analysis directly under the Free Exercise Clause, the majority struggles with both *Smith* and *Church of the Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520 (1993). App. 25a, 34a, 48a-52a. The majority holds that non-religious assemblies aren't really "categorically exempted" from restrictions that apply to religious assemblies, as long as "the local government pursued its aims evenhandedly[.]" App. 49a. Second, it holds that a *Smith*-style "system of individualized exemptions" exists only where it is tied to a finding of discriminatory intent. App. 50a-52a.

Both notions are wrong, and for the same reason. Greater scrutiny of categorical exemptions and "systems of individualized exemptions" under *Smith* and *Lukumi* is meant to be a form of *structural* protection. Like the unbridled discretion doctrine in

the Free Speech context, this doctrine protects religious organizations from covert discrimination that would otherwise be too difficult for plaintiffs to prove. Forcing plaintiffs to show discriminatory intent ignores the entire purpose of this protection and turns it into a mere reiteration of the separate requirement that governments remain neutral towards religion. *Cf. Blackhawk v. Pennsylvania*, 381 F.3d 202, 209 (3d Cir. 2004) (Alito, J.) (“[A] law must satisfy strict scrutiny if it permits individualized, discretionary exemptions because such a regime **creates the opportunity** for a facially neutral and generally applicable standard to be applied in practice in a way that discriminates against religiously motivated conduct.”) (emphasis added, citation omitted).

In sum, this case demonstrates well the lower courts’ confusion about both the statutory and constitutional bases for Free Exercise in the land use context. It is therefore an excellent vehicle for resolving that confusion.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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