No. 07-1111

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

REPLY BRIEF FOR PETITIONERS

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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.

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REPLY BRIEF FOR PETITIONERS

The City offers the Court a 32-page blizzard of factual assertions, almost all of them irrelevant. This is hardly a fact-bound case. It has little to do with the City's various quibbles with Rev. Brown, and everything to do with the text of its Redevelopment Guidelines as those have been applied to Petitioners. The Court can evaluate whether those Guidelines' categorical exemptions pass muster under RLUIPA's Equal Terms

provisions and the First Amendment without resorting to anything more than their text.[1]

One of the few relevant facts in the City's brief, however, is telling. The City admits that "theaters, cinemas, culinary schools, dance studios, music instruction, theater workshops, fashion design schools, and art studios and workshops" are permitted uses in the Redevelopment Zone, but "houses of worship" are not. Opp. 16. The distinction, according to the City, is that "performing arts theaters permitted in the area are for commercial entertainment, not assembly venues for the public." *Id.* This is the Equal Terms question in a nutshell—can a city permit theaters while prohibiting churches?

2. As for the law, the City pooh-poohs the split between the Equal Terms standard offered by the majority and the one used in the Eleventh and

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[1] The City persists in its quixotic quest to show that Lighthouse is not a church, although it does admit that Lighthouse has been a "non-secular soup kitchen." Opp. 2. At one point the City must have believed that Lighthouse was a church, since it denied Lighthouse's request to use the property for "church services." App. 57a n.21. And since this is an appeal from a grant of summary judgment against Lighthouse, its version of the facts—not the City's—must be credited. The majority below agreed, App. 13a, and made Lighthouse's identity as a church the basis for its holding that the New Jersey liquor licensing law applies. N.J.S.A. 33:1-76 (1994) (applying only to "church[es]" and "schoolhouse[s]"). In all events, it doesn't really matter whether Lighthouse is a church. RLUIPA and the Constitution extend their protections to all religious institutions, even "non-secular" soup kitchens.

Seventh Circuits, arguing that it represents at best "evolutionary" differences. Opp. 17. But the family resemblance is hard to see. The majority stated that it was creating a Circuit split by "part[ing] ways" (twice!) with the Eleventh Circuit. App. 32a, 34a. That split, engendered by confusion over *Smith*'s relationship to RLUIPA, extends to both the existence and nature of any "similarly situated" requirement, as well as the existence of a "strict scrutiny" affirmative defense. The majority also stated that it was splitting from the Seventh Circuit's standard articulated in *Vision Church* v. *Village of Long Grove*, 468 F.3d 975 (7th Cir. 2006). App. 29a, 31a-32a. The majority thus did not adopt an "evolved" form of the Eleventh Circuit/Seventh Circuit standard—it embraced that standard's opposite, and said so.

The City attempts to paper over the rift by claiming that the Eleventh Circuit now applies a similarly situated requirement not only in selective enforcement cases, but also in challenges to the text of a statute.[2] Opp. 19 (citing *Konikov* v. *Orange*

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[2] The City (like the majority below) confusingly refers to "facial challenges." Opp. 19. This is indeed a challenge to the application of a law that makes facial distinctions between religious and non-religious organizations. But it is not a facial constitutional challenge, that is, a case where "[t]he State has had no opportunity to implement [the law], and its courts have had no occasion to construe the law in the context of actual disputes * * * or to accord the law a limiting construction to avoid constitutional questions." *Washington State Grange* v. *Washington State Republican Party*, 128 S.Ct. 1184, 1190 (2008). Here the law has very much been implemented against Petitioners, making this an as-applied challenge under both RLUIPA and the First Amendment.

County, 410 F.3d 1317, 1325 (11th Cir. 2005)). This assertion not only baldly misstates *Konikov*, which used the *Midrash* "perimeter" standard to determine the comparators. *Konikov*, 410 F.3d at 1324. It also contradicts a more recent Eleventh Circuit decision that states that the *Midrash* standard is applicable to laws, like the Redevelopment Guidelines, "that facially differentiate[ ] between religious and nonreligious assemblies or institutions." *Primera Iglesia Bautista* v. *Broward County*, 450 F.3d 1295, 1308 (11th Cir. 2006).

The City makes no effort at all to explain the split with *Vision Church*. And the City also says nothing about the majority's declaration that it was creating an entirely new standard—"similarly situated in regard to the *objectives* of the challenged regulation"—rather than applying the bare "similarly situated" standard the Eleventh Circuit uses in selective enforcement challenges. App. 33a (emphasis original). The split is not plausibly deniable, nor is it the sort that will evolve itself out of existence.

3. The City also insists that "the court's specific reliance upon a New Jersey state statute" precludes certiorari. Opp. 28. Nonsense. This Court is not asked to construe state law, but to decide the federal question of whether a state law can "become[] a predicate for [a city] to discriminate against a religious organization in violation of federal law." *Digrugilliers* v. *Consolidated City of Indianapolis*, 506 F.3d 612, 617 (7th Cir. 2007). The Seventh Circuit says no. The majority noted the Seventh

Circuit's position and said yes anyway.[3] Only this Court can decide whether "the meaning of 'religious assembly or institution' in [RLUIPA] is a question of federal rather than state law." *Digrugilliers*, 506 F.3d at 615.

Nor does New Jersey's law create "distinctive facts." Opp. 28. Laws restricting liquor licenses within a set distance from a church or other religious institution are ubiquitous, both at the state and the local level.[4] The question of whether there is a state law defense to an Equal Terms claim has already been addressed by two Courts of Appeals, and is bound to recur. The almost identical liquor license laws at issue in *Digrugilliers* and in this case present this Court with an excellent opportunity to answer that question.

4. The City responds to the Free Exercise question presented by arguing the merits. Opp. 24-28. The merits are of course, of deep interest to us. But what is of immediate concern on this petition, regardless of how the merits are ultimately decided, is whether this case presents a good vehicle to decide the question presented—whether a Free Exercise

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[3] App. 38a n.15.

[4] *See*, *e.g.*, *Larkin* v. *Grendel's Den*, 459 U.S. 116, 124 n.7 (1982) (noting 27 states restrict liquor licenses in this manner); Steven L. Lane, *Liquor and* Lemon*: The Establishment Clause and State Regulation of Alcohol Sales*, 49 VAND. L. REV. 1491, 1492-93 (1996) ("Approximately half of the fifty states and numerous municipalities maintain and enforce legislation that prohibits the sale of alcohol close to churches.").

plaintiff must show that categorical or individualized exemptions were motivated by discriminatory intent in order to prevail. Petitioners respectfully submit that this case is a good vehicle, and that the majority's decision deepens the already sharp division among the Courts of Appeals,[5] not least by moving the Third Circuit from ***not*** requiring discriminatory intent to requiring it. *See Blackhawk* v. *Pennsylvania*, 381 F.3d 202, 209 (3d Cir. 2004) (Alito, J.).

5. What is more, there are no procedural obstacles to reaching the merits. The City suggests that its eminent domain action against Lighthouse somehow muddies the waters. Opp. 31. It doesn't. The Redevelopment Guidelines were enacted in 2002. App. 8a. The City started eminent domain proceedings in late 2007. *See* Lighthouse's Expedited Motion, No. 06-1319 (3rd Cir.) (filed Nov. 13, 2007). Petitioners' claims for damages during the interim period will therefore survive even if the City succeeds

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[5] *Compare Shrum* v. *City of Coweta*, 449 F.3d 1132, 1144-45 (10th Cir. 2006) (McConnell, J.) (no showing of discriminatory intent required); *Midrash Sephardi, Inc.* v. *Town of Surfside*, 366 F.3d 1214, 1234 n.16 (11th Cir. 2004) (same); *Kissinger* v. *Board of Trustees*, 5 F.3d 177, 179 (6th Cir. 1993) (same) *with Strout* v. *Albanese*, 178 F.3d 57, 65 (1st Cir. 1999) (without anti-religious animus, no Free Exercise claim); *KDM ex rel. WJM* v. *Reedsport School District*, 196 F.3d 1046, 1050 (9th Cir. 1999); *Worldwide Street Preachers* v. *Town of Columbia*, 245 Fed. Appx. 336, 344 (5th Cir. 2007) (same); and *St. John's United Church of Christ* v. *City of Chicago*, 502 F.3d 616, 632 (7th Cir. 2007) (*Lukumi* requires court to look to the object of the law). *See also generally*, Petition for a Writ of Certiorari and Reply Brief for Petitioners, *St. John's United Church of Christ* v. *City of Chicago*, No. 07-1127 (petition filed March 3, 2008).

in seizing Lighthouse's property. The eminent domain action does not get in the way.

CONCLUSION

The Courts of Appeals don't know how to fit RLUIPA into the legal constructs created by *Smith* and *Lukumi*. Nor do they know whether *Smith* and *Lukumi* require discriminatory intent. That confusion leads to mistakes and division in both RLUIPA jurisprudence and Free Exercise jurisprudence. This case presents the Court with the ideal vehicle for resolving the confusion. The petition for a writ of certiorari should therefore be granted.

Respectfully submitted,

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