No. 22-11674

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

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

Plaintiffs-Appellants,

v.

CITY OF MOBILE, ALABAMA**,**

Defendants-Appellees.

Appeal from the United States District Court
for the Southern District of Alabama

No. 1:16-cv-00395

BRIEF OF CHRISTIAN LEGAL SOCIETY; THE HINDU AMERICAN FOUNDATION; AND THE COALITION FOR JEWISH VALUES AS AMICI CURIAE IN SUPPORT OF PLAINTIFFS-APPELLANTS SEEKING REVERSAL

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CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

In accordance with Eleventh Circuit Rules 26.1-1, 26.1-2, and 26.1-3, amici certifies that, other than those listed in the certificate filed by plaintiffs-appellants on June 1, 2022, the certificate filed by defendant-appellee on June 16, 2022, Christian Legal Society, the Hindu American Foundation, and the Coalition for Jewish Values, amici are aware of no persons who have or may have an interest in the outcome of this case. The following attorneys appear on this brief: Charles R.A. Morse; Jack L. Millman; and Graziella Pastor.

Each amicus curiae 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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INTERESTS OF AMICI[1]

Amici files this brief pursuant to Federal Rule of Appellate Procedure 29(a)(2).

Christian Legal Society ("CLS") is a nondenominational association of Christian attorneys, law students, and law professors. CLS' legal advocacy division, the Center for Law & Religious Freedom, works to protect all Americans' right to be free to exercise their religious beliefs. CLS was instrumental in securing passage of both the Religious Land Use and Institutionalized Persons Act (RLUIPA) and its sister statute, the Religious Freedom Restoration Act (RFRA). CLS has a longstanding interest in defending RLUIPA's constitutionality and proper application in the courts. In passing RFRA and RLUIPA, Congress honored our nation's historic, bipartisan tradition of respecting religious conscience. Protecting the religious exercise rights of religious minorities accords with that tradition of respecting religious conscience. The district court's interpretation of RLUIPA is at odds with the congressional intent reflected in the statute's plain text and undermines its protection of religious conscience.

The Hindu American Foundation ("HAF") is a 501(c)(3) national advocacy organization for the Hindu American community. The Foundation educates the

[1] Per Federal Rule of Appellate Procedure 29(a)(4)(E), amici certify that (1) no party's counsel authored the brief in whole or in part; (2) no party or party's counsel contributed money that was intended to fund preparing or submitting the brief; and (3) no person—other than the amici, their members, or their counsel—contributed money that was intended to fund preparing or submitting the brief.

public about Hinduism, speaks out about issues affecting Hindus worldwide, and builds bridges with institutions and individuals whose work aligns with HAF's objectives. HAF focuses on human and civil rights, public policy, media, academia, and interfaith relations. Since its inception, the Hindu American Foundation has made legal advocacy one of its main pillars. From issues of religious accommodation and religious discrimination to defending fundamental constitutional rights of free exercise and the separation of church and state, HAF has educated Americans at large and the courts about various aspects of Hindu belief and practice in the context of religious liberty, either as a party to the case or an amici. The Foundation has frequently joined other faith-based and civil rights groups in cases involving RLUIPA. The issues before this Court, therefore, have profound implications for Hindu Americans.

The Coalition for Jewish Values ("CJV") is the largest Rabbinic Public Policy organization in America, representing over 2,000 traditional, Orthodox rabbis. CJV promotes religious liberty, human rights, and classical Jewish ideas in public policy, and does so through education, mobilization, and advocacy, including participating in amici curiae briefs in defense of equality and freedom for religious institutions and individuals.

STATEMENT OF THE ISSUES

1. Did the district court err in granting the City's summary judgment motion by failing to focus its analysis on whether the City's action was akin to significant pressure which directly coerced Plaintiffs to conform their behavior?

2. Did the district court err by deeming the City's denial not final even though the City neither conditionally approved Plaintiffs' application or offered recommendations about how a modified application could succeed?

3. Did the district court err by failing to look at the specific compelling interests advanced by the City's denial of this specific application before ruling the City's denial satisfied strict scrutiny?

INTRODUCTION

Seven years ago, Plaintiffs bought residential property for the purpose of constructing a small Buddhist meditation center on the site. Plaintiffs applied for planning approval, but the City of Mobile completely denied Plaintiffs' application to build the meditation center and said nothing to suggest that a modified application would be approved. Thus began six years of litigation, which, after one trip to this Court and back, led to the district court finally, and correctly, ruling that "the City's decision effectively deprives [Plaintiffs] of *any viable means* by which to engage in protected religious exercise." *Thai Meditation Ass'n of Ala., Inc. v. City of Mobile*, No. 16-CV-395-TFM-MU, 2022 WL 1194066, at *13 (S.D.

Ala. Apr. 21, 2022) ("*Thai II*") (emphasis added). Yet, the district court nonetheless granted summary judgment for the City on Plaintiffs' claim under the Religious Land Use and Institutionalized Persons Act ("RLUIPA") on the ground the City's decision did not "impose[] a substantial burden on the religious exercise of [plaintiffs]." *Id.* at *9, *18 (quoting 42 U.S.C. § 2000cc(a)(1)). This was error and violates three critical principles underlying RLUIPA.

First, it should be the rare RLUIPA case in which a court (1) finds plaintiffs have a genuine need for more space, (2) finds the denial of a zoning application "effectively deprives them of any viable means" of engaging in "protected religious exercise," and (3) finds a meaningful connection between the impeded conduct and plaintiffs' religious exercise exists, and yet rules against plaintiffs on the ground that no substantial burden exists. The district court did not explain why the first three findings do not establish a substantial burden, which this Court said would exist if "the City's denial of the plaintiffs' zoning applications was 'akin to significant pressure which directly coerced the plaintiffs to conform their behavior.'" *Thai Meditation Ass'n of Ala., Inc. v. City of Mobile*, 980 F.3d 821, 831 (11th Cir. 2020) ("*Thai I*") (brackets omitted). Instead, the district court, after concluding that these three *Thai I* factors weighed in Plaintiffs' favor,[2] held that

[2] Although the district court found Plaintiffs had shown the second factor favored them because "the City's decision effectively deprives them of any viable means by which to engage in protected religious exercise," it also stated "the City's Zoning Ordinance generally does not [deprive Plaintiffs of any viable means by

because Plaintiffs had not also shown the three other factors discussed in *Thai I* (animus, finality of denial, and Plaintiffs' reasonable expectations of use) favored them, Plaintiffs should lose. The court appears to have counted up the six non-exclusive factors set out by this Court in *Thai I* and decided that Plaintiffs lose if a majority do not favor them. In so doing, the district court lost sight of the key question Congress posed: did the City's denial substantially burden Plaintiffs' religious exercise rights? This Court should reverse and make clear that the multifactor test set out in *Thai I* is not just a counting exercise and that the factors on Plaintiffs' side of the scale are weightier.

Second, the district court adopted a flawed definition of finality that would gut the statute by almost never allowing plaintiffs to vindicate their statutory rights. The consensus in other circuits is that 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. This ensures an applicant does not have to suffer through the delays and expenses associated with another application that is not likely to succeed. In contrast, the district court here adopted a test that requires plaintiffs to show the zoning

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which to engage in religious exercise] since the meditation center could be located at a commercially zoned property as of right." *Thai II*, 2022 WL 1194066 at *13. However, the court did not explain why this mattered to the analysis given the lack of a "quick, reliable, and financially feasible alternative[]" available to Plaintiffs and the fact the City's application of its zoning laws deprived them of any means to engage in protected religious activity for the indefinite future. *Id.*

authority "would deny a modified application that would address [the issues justifying the denial]." *Thai II*, 2022 WL 1194066, at *16. But the government almost never states it would also deny a modified application, especially a substantially modified application. That leaves applicants facing a no-win choice: they can submit a likely futile modified application despite all the expense and delay such a new application would entail or they can file a lawsuit knowing the finality factor will weigh against them. The Court should reverse the district court on this point and clarify that RLUIPA does not impose such a choice, because a denial is final unless it contains specific guidance about how to get a future application approved. Reversal on this point would also mean a majority of *Thai II* factors favor Plaintiffs, so even if one were inclined to proceed by counting up factors, Plaintiffs would prevail.

Third, the 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. This error doomed Plaintiffs' claim under the Alabama Religious Freedom Amendment ("ARFA"), as to which the district court recognized a "burden" but concluded that the City had proffered a compelling interest that defeats the claim. If left undisturbed, both RLUIPA and ARFA's religious liberty protections will be frustrated.

In a conclusory discussion, the district court held that the City "has a compelling interest in enforcing its Zoning Ordinance" given "the City's interest in transportation and access, traffic, and harmony with the orderly and appropriate development of the R-1 district were implicated by the proposed meditation center." *Id.* at *21. The court then ruled that denial was the least restrictive means of "further[ing] the City's compelling interest in its Zoning Ordinance" because "[t]he City's interest to preserve the character of the property and the surrounding neighborhood could not have been alleviated by conditional approval." *Id.*

But a court cannot just rely on "broadly formulated interests" like a city's general interest in zoning. *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 431 (2006). Instead, it must look to specific interests advanced by the "application of the challenged law . . . [to] the particular claimant whose sincere exercise of religion is being substantially burdened." *Holt v. Hobbs*, 574 U.S. 352, 363 (2015). And even if the government's decision does advance specific compelling interests, the government must "show that it lacks other means of achieving its desired goal without imposing a substantial burden on the exercise of religion by the objecting party." *Id.* at 364–65 (cleaned up). The district court failed to apply any part of the strict scrutiny test properly. Had it done so, it would have held the government is not entitled to summary judgment on the compelling

interest or least restrictive means prongs. This Court should reverse the district court and hold just that.

ARGUMENT

I. THE DISTRICT COURT LOST SIGHT OF THE OVERRIDING INQUIRY IN APPLYING THE FACTORS RELEVANT TO SUBSTANTIAL BURDEN.

This Court reversed the prior district court judgment finding no substantial burden, and in doing so made clear that a plaintiff did not have to show government action "requir[ing] [a plaintiff] to completely surrender her religious beliefs," as "modified behavior, if the result of government coercion or pressure, can be enough." *Thai I*, 980 F.3d at 831–32. This Court then set out a non-exhaustive list of six factors to help the district court determine on remand if the government's denial of Plaintiffs' application crossed the line. *Id.* Those *Thai I* factors included "whether the plaintiffs have demonstrated a genuine need for new or more space," "whether . . . there is a meaningful 'nexus' between the allegedly coerced or impeded conduct and the plaintiffs' religious exercise," and "whether the City's denial of the plaintiffs' zoning applications was final." *Id.* But the Court made clear the factors were not themselves a definitive test, but instead were tools to assist in answering the key question, which was whether a "substantial burden" existed because the City's action "was 'akin to significant pressure which

directly coerce[d the plaintiffs] to conform [their] behavior.'" *Id.* at 831 (noting the court could consider "other[]" factors as needed).

Courts assessing burden do not (and must not) just count up how many factors favor each side—but instead consider some or all of them along with any other relevant evidence. For example, in a Fourth Circuit case, the court asked (1) whether "the impediment to the organization's religious practice [is] substantial[,]" which depends on whether the "use of the property would serve an unmet religious need, the restriction on religious use is absolute rather than conditional, and the organization must acquire a different property as a result" and (2) "who is responsible for the impediment—the government, or the religious organization[.]" *Jesus Christ Is the Answer Ministries, Inc. v. Baltimore Cnty.*, 915 F.3d 256, 261 (4th Cir. 2019), *as amended* (Feb. 25, 2019) (reversing district court's dismissal on substantial burden grounds after finding both factors favor plaintiff). The Seventh Circuit has asked whether the church-plaintiff had to find another parcel of land or otherwise face "delay, uncertainty, and expense." *Sts. Constantine & Helen Greek Orthodox Church, Inc. v. City of New Berlin*, 396 F.3d 895, 901 (7th Cir. 2005). And in *Westchester Day School v. Village of Mamaroneck*, the Second Circuit asked whether (1) the denial was arbitrary; (2) whether the plaintiff had "quick, reliable, and financially feasible alternatives . . . to meet its religious needs absent [obtaining approval to build]"; and (3) "whether the denial was conditional." 504

F.3d 338, 348–53 (2d Cir. 2007) (affirming the existence of a substantial burden because these three factors favored plaintiff).

The analysis in these cases, and others, shows that courts have found that some factors bear more directly than others on whether a substantial burden exists. One factor that frequently recurs and goes directly to substantial burden is the cost to the plaintiff if it will have to acquire a different property following a complete denial. *E.g.*, *id.* at 349 (considering this factor); *Jesus Christ Is the Answer*, 915 F.3d at 261 (same); *Sts. Constantine*, 396 F.3d at 898 (same). Another frequently recurring factor is whether the desired use meets an unmet religious need. *E.g.*, *Jesus Christ Is the Answer*, 915 F.3d at 261 (considering this factor); *Thai I*, 980 F.3d at 831–32 (same); *Westchester*, 504 F.3d at 352 (same).

This trend in the case law accords with common sense, the text of RLUIPA, and this Court's decision in *Thai I*. Common sense dictates that the question of whether a plaintiff's religious exercise is burdened turns the most on whether the government has impeded that plaintiff from acting in accordance with its religious beliefs. *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 536–37 (1993) (discussing how "the burden of the ordinance, in practical terms, falls on Santeria adherents" because it prevents them from engaging in ritual animal sacrifice). That is what it means to be a "burden": to render the execution of a task—in this context, the exercise of religious freedom—more difficult than it

would otherwise be. And the particular kind of burden Congress had in mind when it enacted RLUIPA includes burdens on the "building, or conversion of real property for the purpose of religious exercise." 42 U.S.C. § 2000cc-5(7)(B). As this Court stressed in *Thai I*, the ultimate inquiry is "whether the City's denial of the plaintiffs' zoning applications was akin to significant pressure which directly coerced the plaintiffs to conform their behavior." 980 F.3d at 831 (cleaned up). It is to that end that the Court set out its non-exhaustive list of potentially relevant factors, and it is in light of that end that the weighing of the factors must be carried out.

The district court lost sight of the ultimate question and instead just counted how many factors favored each side and then ruled no substantial burden existed without further explanation. The district court did this even though it held that all three factors that directly concerned whether Plaintiffs were impeded from exercising their religious rights pointed to the conclusion that they were impeded. *Thai II*, 2022 WL 1194066, at *11–14 (ruling Plaintiffs showed a genuine need for new space, that the City's decision effectively deprived them of any viable means to engage in protected religious exercise, and that meaningful nexus existed between impeded conduct and plaintiffs' religious exercise). Key to the district court's decision was its determination that the other three factors—arbitrariness or animus in decision, finality, and plaintiffs' reasonable expectation of use—favored

the City. *Id.* at *14–18. But those factors, while not unimportant, do not bear directly on whether the exercise of religious freedom was burdened, but instead function more as indicia of the burden's character or as a means of smoking out hidden discrimination. As such, they are not as weighty as the first three factors are. Despite that, the district court declared that the presence of these three factors on the City's side of the scales meant the Plaintiffs' religious exercise was not substantially burdened. *Id.* at *18. In doing so, it did not explain why the latter three factors outweighed the first three.

The Court should reverse the district court's ruling on substantial burden because it underweighted the first three factors, all of which directly relate to whether a substantial burden exists. The Court should instead hold that a substantial burden exists. *Thai I*, 980 F.3d at 831–32; *see also Int'l Church of Foursquare Gospel v. City of San Leandro*, 673 F.3d 1059, 1068 (9th Cir. 2011) (reversing district court grant of summary judgment to defendants because evidence suggested no other suitable properties met church's religious needs, so substantial burden may exist). The Court should make clear that because the first three factors will ordinarily be assigned greater weight as relating directly to substantial burden, the City imposed a substantial burden on Plaintiffs by denying their application.

II. THE DISTRICT COURT ALSO ERRED BY NOT TREATING THE CITY'S DENIAL AS FINAL.

A. A final denial is one in which the government denies an application and does not provide specific conditions or recommendations to obtain approval.

Although this Court should reverse and enter judgment because Plaintiffs have demonstrated the City's denial imposed a substantial burden on them, it also is important to correct the district court's conclusion that the City's denial was not final. The district court erred as to finality and in the process parted company with several of this Court's sister circuits.

One factor in the substantial-burden analysis is "whether the City's denial of the plaintiffs' zoning applications was final or whether, instead, the plaintiffs had (or have) an opportunity to submit modified applications that might satisfy the City's objections." *Thai I*, 980 F.3d at 832. But this does not mean that the mere possibility of submitting a modified application makes a denial not "final." Instead, as the decisions of other circuits, including decisions cited in *Thai I*, show, courts distinguish between conditional approvals or denials—governmental decisions indicating a party can obtain approval if certain changes are made—and denials like the denial in this case, which fail to give applicants a path to approval.

In *Thai I*, this Court cited decisions that considered a denial final when a religious institution's application to build its intended site was denied outright rather than conditionally approved. *See id.* at 832 n.10 (citing *Westchester*, 504

F.3d at 349, and *Bethel World Outreach Ministries v. Montgomery Cnty. Council*, 706 F.3d 548, 558 (4th Cir. 2013)). In *Westchester*, the court considered the rejection of a school's zoning application "absolute" because, among other things, the zoning board of appeals could have approved the application subject to "conditions intended to mitigate adverse effects on public health, safety, and welfare," but instead decided to "deny [the application] in its entirety." 504 F.3d at 346, 352. In *Bethel*, the court found a zoning denial absolute because "the County ha[d] completely prevented [the institution] from building any church on its property, rather than simply imposing limitations on a new building." 706 F.3d at 558. In neither case did the courts hold the possibility of submitting a modified application meant the denial was not final. To the contrary, the Second Circuit rejected that very proposition. *Westchester*, 504 F.3d at 352 (finding denial was absolute because any new application with a modified proposal would impose high costs and likely fail).

In contrast, denials are not absolute if the zoning authorities issue either specific conditions an applicant can satisfy to obtain approval or specific recommendations for how to obtain approval in a future application. *See, e.g.*, *Canaan Christian Church v. Montgomery Cnty.*, 29 F.4th 182, 193–94 (4th Cir. 2022) (holding denial was not absolute because the county offered to consider applications that met certain specified conditions); *Vision Church v. Vill. of Long*

Grove, 468 F.3d 975, 986 (7th Cir. 2006) (upholding the district court's finding that there was no substantial burden because plaintiff could have complied with the ordinance's size restrictions and still built a church).

Rather than follow this case law that correctly interprets RLUIPA, the district court adopted a test that requires plaintiffs to show the government "would deny a modified application that would address [the issues justifying the denial]." *Thai II*, 2022 WL 1194066, at *16. Of course, almost never does a government's denial make clear there is no chance a future modified application would be approved, especially if significant modifications are made. For that reason, the district court's test leaves applicants between Scylla and Charybdis: (1) applicants can submit a modified application that "could very well be in vain" despite all the expense and delay such a new application would entail, *see Guru Nanak Sikh Soc'y of Yuba City v. Cnty. of Sutter*, 456 F.3d 978, 991–92 (9th Cir. 2006) (finding substantial burden where defendant's "actions have to a significantly great extent lessened the prospect of [plaintiff's] being able to construct a temple"), or (2) applicants can file a lawsuit knowing that the finality factor will weigh against them.

This Court should take the opportunity to clarify that would-be plaintiffs do not face such a choice, because a denial is final unless the government-defendant provides enough guidance in its denial that a plaintiff's path to approval is clear—

either because the denial is actually a conditional approval, *Bethel*, 706 F.3d at 558 (differentiating between a conditional or absolute denial), or because the guidance shows the applicant has "a reasonable opportunity" to submit a modified application that will satisfy the government's concerns. *See Westchester*, 504 F.3d at 349. In this case, the government's denial was unconditional and contained no guidance about how a modified application might be approved. Given this, the Court should make clear that under *Thai I*, the denial here was a final denial.

B. The costs of a new application would far outweigh the benefits.

The district court also erred by failing to consider how much the modified application process itself would burden the applicant.

A flat denial without guidance means more delay, more uncertainty, and more costs compared to a conditional approval or denial with specific recommendations, which is why courts consider the cost of submitting a new application when assessing burden. For example, in *Westchester*, the Second Circuit noted that if the plaintiff had "to prepare a modified proposal, it would have to begin the application process anew," which "would have imposed so great an economic burden as to make the option unworkable." 504 F.3d at 352–53. Similarly, the Seventh Circuit found a substantial burden where the applicant had "either to sell the land that it bought in New Berlin and find a suitable alternative parcel or be subjected to unreasonable delay by having to restart the permit process to satisfy the Planning Commission." *Sts. Constantine*, 396 F.3d at 900.

The district court failed to evaluate whether restarting the application process would "entail substantial uncertainty, delay, or expense," *id.*—even though Plaintiffs raised the issue—and instead wrongly focused only on whether a modified application had any chance of success. *Thai II*, 2022 WL 1194066, at *16.[3]

[3] The district court did correctly determine that "Plaintiffs would experience 'delay, uncertainty, and expense' if they decide to sell the Eloong property and search for a suitable alternate location to build a meditation center," but this

Had the district court conducted this analysis, the evidence would have shown that requiring Plaintiffs to submit a modified application would "entail substantial uncertainty, delay, or expense." *First*, all the evidence suggests a new application would have a very low chance of success. Plaintiffs contended "[t]he denial was 'final' and absolute, and the City has not suggested otherwise." Plaintiffs' Memorandum in Support of Plaintiffs' Motion for Partial Summary Judgment (Doc. 197) at 26, *Thai II*, No. 16-CV-395-TFM-MU (S.D. Ala. Apr. 12, 2021) ("Plaintiffs' Summary Judgment Memo"). Not only did the City give *no* indication a modified application would be supported, it "refused to engage in the normal process to address these issues with modifications and conditions." *Id.* Plaintiffs' application was denied even though they "readily agreed to every mitigation measure suggested" by the City and were "willing to agree to any reasonable conditions placed on approval of the Application." *Id.* at 27. *Second*, the Plaintiffs would have to go back to square one of the process, even though they currently lack a viable means of engaging in religious exercise. *See Westchester*, 504 F.3d at 352–53 (discussing burden of restarting application process). *Third*, a new application would result in new costs, both for the application itself and for additional potential litigation if the City denies the new application.

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determination was in the context of analyzing whether the City's decision effectively deprived the Plaintiffs of any viable means by which to engage in protected religious exercise. *Thai II*, 2022 WL 1194066, at *13.

This Court should hold that the "finality" consideration weighs in favor of Plaintiffs when it comes to the question of whether submitting a modified application would be a burden given the low likelihood a modified application would succeed, the lack of recommendations from the City, the many years of delay Plaintiffs have already endured, and the fact Plaintiffs would have no viable means of exercising their religious rights while their new application goes through the review process.

III. THE DISTRICT COURT INCORRECTLY APPLIED STRICT SCRUTINY ANALYSIS.

The district court committed a separate but equally serious error in analyzing whether the City's actions satisfied strict scrutiny: it considered whether strict scrutiny was satisfied at too high a level of generality, rather than looking at the *specific use* and *specific interests* at issue. RLUIPA and ARFA both require a government action to satisfy strict scrutiny if that action burdens a plaintiff's religious exercise rights (RLUIPA requires a substantial burden while ARFA requires only an "incidental" burden, *Thai I*, 980 F.3d at 840). Strict scrutiny requires the government to "demonstrate[] that application of the burden to the person[] (1) [i]s in furtherance of a compelling governmental interest; and (2) [i]s the least restrictive means of furthering that compelling governmental interest." Ala. Const. art. 1, § 3.01(V); *accord* 42 U.S.C. § 2000cc(a)(1). Even though this is "the most demanding test known to constitutional law," *Guru*, 456 F.3d at 994

n.21, the district court found the City's denial satisfied it after only cursory analysis. This Court should reverse, as Plaintiffs have easily shown a genuine dispute of material fact over whether the City's actions satisfy strict scrutiny.

A. The abstract concept of zoning is not a compelling government interest.

Under strict scrutiny, a court must "look[] beyond broadly formulated interests justifying" governmental action, *Gonzales*, 546 U.S. at 431, and instead "demonstrate that the compelling interest test is satisfied through application of the challenged law . . .[to] the particular claimant whose sincere exercise of religion is being substantially burdened." *Holt*, 574 U.S. at 363. Appeals to an important but general government interest such as educating children or prison security do not cut it. *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 726 (2014) (rejecting "broad" interests such as "promoting 'public health' and 'gender equality'" because RFRA requires "'more focus[]'"). The same is true here—the City must cite a specific interest advanced by the application of zoning laws to the case at hand as opposed to just citing the general benefits of zoning. *See Fulton v. City of Phila.*, 141 S. Ct. 1868, 1881 (2021) ("The City states [three alleged compelling interests] at a high level of generality, but the First Amendment demands a more precise analysis.").

The district court treated the enforcement of zoning laws in general as a compelling government interest. *See Thai II*, 2022 WL 1194066, at *21 (discussing "the City's compelling interest in its Zoning Ordinance"). Short of something like "the public interest," enforcing the zoning laws is about as broad an interest as can be imagined. It is not the level at which the analysis should proceed, because it sweeps in too many disparate interests (e.g., traffic safety) that vary in terms of just how compelling they are. However, the district court did not ask whether every interest conceivably advanced by zoning laws is a *compelling interest*, but instead just assumed every interest connected to zoning is compelling and thus enforcing zoning laws themselves is always compelling. *Id.* This was error—the government does not, for example, have a compelling interest in something as vague and subjective as "the character of the property and the surrounding neighborhood," *Thai II*, 2022 WL 1194066 at *21. *See Solantic, LLC v. City of Neptune Beach*, 410 F.3d 1250, 1267 (11th Cir. 2005) (holding that City's asserted interest in aesthetics is not a compelling governmental interest to restrict speech); *Westchester Day Sch. v. Vill. of Mamaroneck*, 417 F. Supp. 2d 477, 554 (S.D.N.Y. 2006) (collecting cases holding the aesthetics of a proposed use "does not implicate a compelling government interest"), *aff'd*, 504 F.3d 338.

B. The City failed to show that any specific compelling interest was furthered by denying Plaintiffs' application.

The district court also erred by not properly determining that applying the zoning laws to deny Plaintiffs' application actually advanced specific and concrete compelling government interests. Instead, the district court just concluded, without analysis, that "[h]ere, the City's interest in transportation and access, traffic, and harmony with the orderly and appropriate development of the R-1 district were implicated by the proposed meditation center." *Thai II*, 2022 WL 1194066, at *21. But an interest being implicated is not the right standard.

Rather, the Supreme Court has required lower courts to scrutinize the particular action at issue and to examine how it *furthers* a specific and compelling government interest; otherwise courts could easily transform strict scrutiny into rational basis review. Cases involving prisons demonstrate this danger. Everyone agrees the government has a compelling interest in the orderly operation of prisons. *See, e.g.*, *Holt*, 574 U.S. at 363 (preventing smuggling of contraband); *Ramirez v. Collier*, 142 S. Ct. 1264, 1280 (2022) ("security in the execution chamber"). But if courts just accepted any government justification rationally connected to prison safety and security, prisoners would almost never prevail. To avoid this outcome, courts instead "take cases one at a time" and ask whether burdening plaintiff's religious exercise in the particular case at hand *really* furthers the government's stated interest. *Id.* at 1281 (finding government has an interest in maintaining

solemnity in execution chamber but that prohibiting "respectful[] touch[ing]" by pastor would not further that interest).

Zoning is another area where courts must carefully consider whether a burden on religious exercise actually advances the specific government interest. A government actor can always point to arguably important interests associated with zoning to justify its decision. *See Thai II*, 2022 WL 1194066, at *21 (discussing interests zoning laws advance such as "water supply, waste disposal, [and] fire and police protection"). But just pointing to interests implicated by zoning does not satisfy strict scrutiny. *E.g.*, *Westchester*, 504 F.3d 353 (rejecting defendant's argument about "ensuring residents' safety through traffic regulations" because the record did not support this assertion). Instead, a court has to provide evidence that permitting the particular use would undermine the actual interest. *Id.*

The Second Circuit's *Westchester* decision illustrates this principle. In that case, the zoning authority denied an Orthodox Jewish Day School's application for a permit to expand. *Id.* at 344. The court found the school's religious exercise was substantially burdened and conducted strict scrutiny analysis. *Id.* at 353. Similar to here, the defendant attempted to "claim[] that it has a compelling interest in enforcing zoning regulations and ensuring residents' safety through traffic regulations." *Id.* But in *Westchester*, the court made clear the defendant "must show a compelling interest in imposing the burden on religious exercise in the

particular case at hand, not a compelling interest in general." *Id.* The court then affirmed the district court's searching factual inquiry, which found the defendant's "reasons for denying the application were not substantiated by evidence in the record before it." *Id.*; *see Westchester*, 417 F. Supp. 2d at 551–55 (conducting a detailed analysis of the defendant's alleged interest in traffic, property values, aesthetics and drainage, and parking and concluding that the record does not show "that the denial is the least restrictive means of furthering any compelling governmental interest").

Here, the district court undertook nothing resembling a searching factual inquiry. After finding "[t]he City has a compelling interest in enforcing its Zoning Ordinance," the court stated: "[T]he City's interest in transportation and access, traffic, and harmony with the orderly and appropriate development of the R-1 district were implicated by the proposed meditation center." *Thai II*, 2022 WL 1194066, at *21. But the fact that an interest is "implicated" does not mean it is furthered. *See Ramirez*, 142 S. Ct. at 1281 (finding ban on touch did not further interest in "maintaining solemnity and decorum in the execution chamber" because government's "real concern seems to be with other, potentially more problematic requests down the line"); *accord Fulton*, 141 S. Ct. at 1882. The district court should have instead investigated and reviewed the specific facts of this case.

Had the court done so, it would have come across plenty of record evidence showing that the City did not adequately demonstrate how denying Plaintiffs' application advanced its stated compelling interests. *E.g.*, Plaintiffs' Summary Judgment Memo at 15–17 (discussing how "[t]he City's traffic engineer . . . testified that the proposed use would not create any traffic safety issues" and how the City had permitted other churches to be built despite similar conditions); Plaintiffs' Memorandum in Support of Plaintiffs' Motion for Partial Summary Judgment (Doc. 94) at 25, *Thai II*, No. 16-CV-395-TFM-MU (S.D. Ala. Oct. 16, 2017) (stating the City never asked the traffic department "to do a traffic study").

The Court should reverse the district court and hold that, given the demanding nature of the strict scrutiny test, there is at least a question of fact as to whether the City actually acted to further a compelling governmental interest.

C. Whether a government's enforcement of the law is the least restrictive means of furthering its compelling interest turns on the particular harm of granting an exemption.

The district court also erred by not seriously analyzing whether the City had used the least restrictive means available. The least-restrictive-means standard is "exceptionally demanding[] and it requires the government to show that it lacks other means of achieving its desired goal without imposing a substantial burden on the exercise of religion by the objecting party." *Holt*, 574 U.S. at 364–65 (cleaned up). Put differently, the test requires that "there be no conceivable alternative" to the government's present policy. *Bd. of Trs. of State Univ. of N.Y. v. Fox*, 492 U.S. 469, 478 (1989). The City did not come close to meeting its burden, especially at *summary judgment*.

Courts have consistently (and correctly) held that a conditional approval is the least restrictive means of furthering a government's interest in zoning unless the government shows no alternatives are feasible. *See*, *e.g.*, *Redeemed Christian Church of God (Victory Temple) Bowie v. Prince George's Cnty.*, 17 F.4th 497, 511 (4th Cir. 2021). In *Redeemed Christian Church*, the district court found—after a trial—that the evidence showed the defendant had not meaningfully considered alternatives to a complete denial. *Id.* ("The absence of a traffic study—or any evidence showing that the County considered other ways of achieving its interest in traffic safety—underscores the County's lack of consideration of alternatives.").

And because the government had not met its evidentiary burden, the Fourth Circuit affirmed the district court's ruling that the defendant had not satisfied strict scrutiny. *Id.* at 512; *see also Westchester*, 504 F.3d at 353 ("[T]he Village did not use the least restrictive means available to achieve that interest . . . [because it] had the opportunity to approve the application subject to conditions, but refused to consider doing so.").

This requirement that the defendant show no feasible alternative existed is important, because RLUIPA is concerned with "subtle forms of discrimination" by land use authorities that may occur when "a state delegates essentially standardless discretion to nonprofessionals operating without procedural safeguards." *Sts. Constantine*, 396 F.3d at 900. When a governmental entity conducts a "case-by-case evaluation" of a land use application, carrying as it does "the concomitant risk of idiosyncratic application" of land use standards that may permit (and conceal) "potentially discriminatory" denials, RLUIPA applies. *Midrash Sephardi, Inc. v. Town of Surfside*, 366 F.3d 1214, 1225 (11th Cir. 2004). And for that reason, the defendant must produce evidence showing it actually considered and rejected alternatives based on objective criteria. *See Redeemed Christian Church*, 17 F.4th at 511–12.

In their brief, as discussed above, Plaintiffs set out evidence showing the City did not meaningfully consider other alternatives, let alone show alternatives

were not possible. *E.g.*, Plaintiffs' Summary Judgment Memo at 8–9 (discussing how the City's wrongful conduct caused the City's staff to not "work[] with Plaintiffs to address any concerns or land use impacts"). The City did not conduct a traffic study, or any study of possible alternatives. *See Redeemed Christian Church*, 17 F.4th at 511–12 (describing how defendant failed to show it considered less restrictive means).

The district court did not conduct any sort of inquiry into possible alternative means, but instead just asserted in a single sentence that the City's denial was the least restrictive way of securing its compelling interest in its zoning laws. *Thai II*, 2022 WL 1194066, at *21 ("The City's interest to preserve the character of the property and the surrounding neighborhood could not have been alleviated by conditional approval and, therefore, denial of the Plaintiffs' Application was the least restrictive means to further the City's compelling interest in its Zoning Ordinance."). This analysis would have been insufficient even after a full trial. *Compare Redeemed Christian Church*, 17 F.4th at 511–12 (discussing evidence). It is indefensible at summary judgment, where the court should "view 'the evidence and all factual inferences therefrom in the light most favorable to the party opposing the motion.'" *Greenberg v. BellSouth Telecomms., Inc.*, 498 F.3d 1258, 1263, 1265 (11th Cir. 2007). Given the evidence, finding the City satisfied

strict scrutiny's least-restrictive-means test as a matter of law is clear error. The district court's judgment should be reversed.

CONCLUSION

The Court should vacate the district court's order granting summary judgment for Defendant and remand for further proceedings.

Dated: September 15, 2022

Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE WITH RULES 29(a) AND 32

This brief complies with the type-volume limitation set forth in Federal Rule of Appellate Procedure 29(a)(5), 32(a)(7)(B) and 11 Cir. R. 32-4 because it contains 6495 words, excluding the parts of the brief exempted by Rule 32(f), as counted using the word-count function on Microsoft Word 2016 software.

This brief complies with the typeface requirements of Rule 32(a)(5) and the type style requirements of Rule 32(a)(6), as modified by 11 Cir. R. 32-3, because it has been prepared in proportionally spaced typeface using Microsoft Word 2016, in Times New Roman style, 14 point font.

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CERTIFICATE OF SERVICE

I hereby certify that on September 15, 2022, I electronically filed the original of the foregoing Brief of Christian Legal Society; the Hindu American Foundation; and the Coalition for Jewish Values as Amici Curiae with the Clerk of the Court using the CM/ECF system. Notice of this filing will be sent to all attorneys of record by operation of the Court's electronic filing system.

Dated: September 15, 2022

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