No. 07-1358

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

TOBY DIGRUGILLIERS,

Plaintiff-Appellant

v.

CONSOLIDATED CITY OF INDIANAPOLIS,
METROPOLITAN BOARD OF ZONING APPEALS OF MARION COUNTY,
DEPARTMENT OF METROPOLITAN DEVELOPMENT OF MARION
COUNTY, DIVISION OF COMPLIANCE,

Defendants-Appellees

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF INDIANA
1:06-cv-952-SEB-JMS

BRIEF FOR THE UNITED STATES AS *AMICUS CURIAE* SUPPORTING APPELLANT

WAN J. KIM
Assistant Attorney General
Civil Rights Division

DAVID K. FLYNN
ERIC W. TREENE
KARL N. GELLERT
Attorneys
Department of Justice
Ben Franklin Station
P.O. Box 14403
Washington, D.C. 20044-4403
(202) 353-4441

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v.

CONSOLIDATED CITY OF INDIANAPOLIS, *et al.*,

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BRIEF FOR THE UNITED STATES AS *AMICUS CURIAE* SUPPORTING APPELLANT

STATEMENT OF THE ISSUE

Whether Indianapolis's zoning ordinance, which requires religious assemblies, but not secular assemblies, to obtain a use variance in commercial districts, violates the "equal terms" provision of Section 2(b)(1) of the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA), 42 U.S.C. 2000cc(b)(1).

INTEREST OF THE UNITED STATES

This case concerns the appropriate interpretation of the prohibitions under RLUIPA, 42 U.S.C. 2000cc *et seq.* The Department of Justice is charged with

enforcing RLUIPA, see 42 U.S.C. 2000cc-2(f), and therefore has an interest in the correct application of the statute's protections.

STATEMENT OF FACTS

A. Background

Plaintiff Toby Digrugilliers is the pastor and a trustee of the Baptist Church of the Westside. Since July 2005, the church has leased property in Indianapolis to use for its worship services. R.41 (Entry Denying Pl.'s Motion for Prelim. Injunction, February 15, 2007 at 2 (hereinafter "Order")). The church uses the property for worship services and also for "classes for Bible instruction, fellowship gatherings, administrative functions, and various ministries of the outreach to the community." R.26 (Stipulation of Facts, ¶ 8). Between 30 and 50 persons attend the Sunday morning worship services. R.6 (Mem. in Supp. of Prelim. Inj. at 2).

The property that the church leases is zoned C-1, which is designated for "office-buffer commercial use." R.41 (Order at 3-4). Permitted uses in the C-1 zone include "auditoriums, assembly halls, community centers, certain health services, membership organizations or clubs, mortuaries, any type of office use, radio and television studios, museums, and certain types of specialized schools." R.41 (Order at 4).

The city has created a specific use category for "religious use." "Religious use" is a permitted use in all "dwelling districts" if the user obtains a Special Exception. Indianapolis City Code § 731-224(a). The city has also designated one type of Special Use district, the SU-1 district, where "religious use" is the only

permitted use. Indianapolis City Code § 735-700(c). For both dwelling districts and the SU-1 district, "religious use" is defined as

> a land use and all buildings and structures associated therewith devoted primarily to the purpose of divine worship together with reasonably related accessory uses, which are subordinate to and commonly associated with the primary use, which may include but are not limited to, educational, instructional, social or residential uses.

Indianapolis City Code § 731-102(152) (dwelling districts); Indianapolis City Code § 735-751(b) (SU-1 district). The City has 615 SU-1 districts, of which 44 currently have no structure on them. R.41 (Order at 16-17).

In February 2006, the City notified the Church that it was violating the City's zoning code by "conducting an activity not permitted in a C-1 district," and informed the Church that if it wished to continue to operate on the property, it would have to apply for a use variance. R.41 (Order at 5). In response, Mr. Digrugilliers sent the City a letter, stating that he did not believe that the Church was violating the ordinance because an "[a]uditorium [and an] assembly hall" were permitted uses. R.26 (Stipulation of Facts, Exh. G). Mr. Digrugilliers noted that "we are a group of people who believe in the Lordship of Jesus Christ and choose to 'assemble' [on the property in question] for 'Corporate' worship." *Ibid*. The Church declined to apply for a variance because of the cost and burden. R.41 (Order at 5).[1]

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[1] It is unclear from the record what the entire cost of the application process would be, although the fee for the application would be reduced for a religious entity. See R.41 (Order at 11 n.6).

B. Proceedings Below

On June 16, 2006, Mr. Digrugilliers brought this suit on behalf of himself and the Baptist Church of the Westside (collectively, "the Church") against the city and the agencies involved in the zoning dispute (collectively, "the City"). R.41 (Order at 6). The Church asserted that the City's requirement that the Church apply for a variance violated the Indiana Constitution, the Free Exercise, Free Speech, and Equal Protection Clauses of the U.S. Constitution, and RLUIPA. The Church sought a preliminary injunction against the City, asserting only its RLUIPA and federal constitutional claims. R.41 (Order at 6). The district court denied the motion for a preliminary injunction, concluding that the Church had failed to show a likelihood of success on the merits.

Turning first to the Church's Free Exercise claim, the court concluded that the zoning ordinance was neutral and generally applicable. Accordingly, the court held that the ordinance did not unconstitutionally burden religious exercise. R.41 (Order at 11). The court also concluded that the Church's use of the property was not "operationally similar" to the other permitted uses in a C-1 district. *Ibid*. The court reasoned that the Church was different because the zoning ordinance defined religious use more broadly than other assembly uses. Further, the court noted that under Indiana law, the presence of a church impairs the ability of neighboring properties to obtain a liquor license or to sell pornography. R.41 (Order at 11-12).

The court also held that the City had not violated the Church's Free Speech rights. The court reasoned that the ordinance was not content-based and that it

imposed only reasonable time, place, and manner restrictions on land use. R.41 (Order at 15-17). In addition, the court found that the state's delegation of authority to the board of zoning appeals to rule on applications for variances was not an unlawful prior restraint on speech. R.41 (Order at 17-18).

Further, the court held that the ordinance did not violate the Church's right to equal protection of the laws under the Fourteenth Amendment. R.41 (Order at 18). Distinguishing this case from *Cleburne* v. *Cleburne Living Center, Inc.*, 473 U.S. 432 (1985), the court found that the city's zoning requirements were rationally related to legitimate grounds and, as a result, did not violate the Equal Protection Clause.

Rather than separately analyze the Church's RLUIPA claims, the court stated that "[b]ecause Mr. Digrugilliers's arguments under RLUIPA are substantially similar to those he advances in the constitutional context, our analysis is necessarily the same." R.41 (Order at 20). Relying on two district court opinions, the court concluded that RLUIPA merely codifies existing Free Exercise and Equal Protection jurisprudence. R.41 (Order at 21). The court thus held that because the Church's constitutional claims failed, necessarily its RLUIPA claims failed. R.41 (Order at 21) (citing *Vision Church* v. *Village of Long Grove*, 468 F.3d 975, 988-991, 1002-1003 (7th Cir. 2006)).

Because the district court believed that the Church had not shown a likelihood of success on the merits, the court denied the motion for a preliminary injunction. R.41 (Order at 21). The Church then filed this interlocutory appeal.

SUMMARY OF ARGUMENT

The district court made two fundamental errors in concluding that the Church had not shown a likelihood of success on the merits of its claim under RLUIPA Section 2(b)(1).

First, the district court incorrectly concluded that the Church's statutory and constitutional claims involved identical analyses. This Court, however, has held that a claim under RLUIPA's "equal terms" provision is distinct from an Equal Protection Clause claim based on disparate treatment of religious and secular uses, and thus must be analyzed according to a different standard.

Second, the district court incorrectly concluded that it did not violate RLUIPA to treat churches less favorably than other assemblies in the C-1 zoning district. The court's reasoning that the Church's proposed use was meaningfully different from that of other assemblies was flawed. The court's perceived difference between the Church's land use and those of other assemblies relied not on the actual use of this particular church, but rather on various accessory uses and characteristics that the City ascribes to churches as a category. Furthermore, the court also viewed the uses as different because state law protects churches, whether they want protection or not, from proximity to establishments serving liquor or selling pornography. Since all of these distinctions rested on perceived differences created by the City and the State through their ordinances and statutes, rather than actual differences in uses, there is no justification for denying the equal treatment required by Section 2(b)(1) of RLUIPA. The district court thus should have

concluded that the Church had shown a likelihood of success on the merits of its equal terms claim. Therefore, the denial of the preliminary injunction should be vacated, and the case remanded to the district court for further proceedings on the Church's preliminary injunction motion.

STANDARD OF REVIEW

"To win a preliminary injunction, a party must show that it is reasonably likely to succeed on the merits, it is suffering irreparable harm that outweighs any harm the nonmoving party will suffer if the injunction is granted, there is no adequate remedy at law, and an injunction would not harm the public interest." *Christian Legal Society* v. *Walker*, 453 F.3d 853, 859 (7th Cir. 2006). This Court reviews the denial of a motion for a preliminary injunction for an abuse of discretion. *Autotech Tech. Ltd. Partnership* v. *Automationdirect.com*, 471 F.3d 745, 748 (7th Cir. 2006). "A district court by definition abuses its discretion when it makes an error of law." *Hobley* v. *Burge*, 433 F.3d 946, 949 (7th Cir. 2006).

The issue whether the Church is reasonably likely to succeed on the merits of its RLUIPA claim depends on the proper interpretation of the statute, which this Court reviews *de novo*. See *Disability Rights Wisconsin, Inc.* v. *Wisconsin Dep't of Public Instruction*, 463 F.3d 719, 724 (7th Cir. 2006).

ARGUMENT

THE DISTRICT COURT ERRED IN CONCLUDING THAT THE CHURCH HAD NOT SHOWN A LIKELIHOOD OF SUCCESS ON THE MERITS OF ITS RLUIPA "EQUAL TERMS" CLAIM

A. The District Court Erroneously Concluded That The Church's RLUIPA And Constitutional Claims Were Identical

Section 2(b)(1) of RLUIPA prohibits government action that treats religious assemblies and institutions on less than equal terms with non-religious assemblies and institutions. 42 U.S.C. 2000cc(b)(1).[2]

The district court did not separately analyze the Church's Section 2(b)(1) claim. This was error. As noted above, the district court concluded that if the Church could not prevail on its Free Exercise and Equal Protection claims, necessarily its RLUIPA claims failed for similar reasons. R.41 (Order at 21). This Court has already held that such reasoning is incorrect. In *Vision Church*, this Court stated that the appropriate analysis under the Equal Protection Clause and the kind of "equal terms" claim under Section 2(b)(1) that the Church asserts in this case are different. 468 F.3d at 998. Although in *Vision Church*, this Court did conclude that "total exclusion" claims under the First Amendment and under RLUIPA's Section 2(b)(3)(A) could be analyzed together, the Church did not bring such a claim in this case. *Ibid*. Thus, the district court's improper reliance solely on its constitutional analysis to reject the Church's RLUIPA 2(b)(1) claim conflicts with binding Seventh Circuit precedent.[3]

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[2]Section 2(b)(3)(B) prohibits a government from unreasonably limiting religious land uses. 42 U.S.C. 2000cc(b)(3)(B). The Church made a 2(b)(3)(B) claim below, but does not appear to advance that claim on appeal.

[3] As discussed below, the district court's analysis of whether the Church's

(continued...)

B. The City's Zoning Ordinance Treats Religious Assemblies Less Favorably Than Non-Religious Assemblies And So Violates RLUIPA's Equal Terms Provision

RLUIPA's equal terms provision, 42 U.S.C. 2000cc(b)(1), provides that "[n]o 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." In *Vision Church*, this Court stated that when analyzing an equal terms claim under Section 2(b)(1), the appropriate inquiry is "whether the land use regulation treats a religious assembly or institution on less than equal terms with a nonreligious assembly or institution." 468 F.3d at 1003 (quoting *Konikov* v. *Orange County*, 410 F.3d 1317, 1324 (11th Cir. 2005)) (quotation marks and ellipses omitted). Here, since Indianapolis's zoning ordinance permits assembly uses as of right in C-1 zones such as "membership organizations or clubs," "assembly halls," and "auditoriums," and others that are comparable to houses of worship, but excludes the latter, it violates RLUIPA Section 2(b)(1).

In the district court, the City argued that its zoning ordinance was neutral and generally applicable. For this reason, the City contended that the ordinance

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[3](...continued)
use of the property is similar to the other permitted uses and whether the zoning ordinance is neutral and generally applicable was incorrect. This error also would infect the district court's analysis of the Church's constitutional claims. The United States takes no position on the Church's constitutional claims, since RLUIPA is dispositive here.

did not violate either the Free Exercise Clause or Section 2(b)(1) under this Court's decision in *Civil Liberties for Urban Believers* v. *City of Chicago*, 342 F.3d 752 (7th Cir. 2003) ("*CLUB*"). See R. 13 (Defs.' Resp. in Opp. to Motion for Prelim. Inj., pp. 10-15). The district court accepted this argument. R.41 (Order at 11-12 & 21). This was in error. In *CLUB*, Chicago's ordinance required churches to obtain a special use permit to locate in the challenged, non-residential districts, but it also required "clubs, lodges, meeting halls, recreation buildings, and community centers" to obtain a special use permit to locate in those zones. 342 F.3d at 759. Thus, this Court held that the ordinance in that case was generally applicable because all non-conforming uses were required to apply for a permit. 342 F.3d at 764. *CLUB* was not a case, like this one, where non-religious assemblies need not apply for a variance but religious assemblies must. Moreover, this Court in *CLUB* did not address a claim under Section 2(b)(1). The district court's reliance on *CLUB* was therefore misplaced.

The zoning ordinance here is similar to the zoning ordinance that the Eleventh Circuit found was invalid in *Midrash Sephardi, Inc.* v. *Town of Surfside*, 366 F.3d 1214 (11th Cir. 2004). There, the zoning ordinance permitted "private clubs and lodge halls, health clubs, dance studios" and various specialized schools to locate in a business district. 366 F.3d at 1220. Churches and synagogues were not permitted uses. *Ibid*. Two synagogues challenged the town's refusal to allow them to operate in space they had rented above a bank in the district. The court concluded that, based on Section 2(b)(1)'s text, the appropriate inquiry was

whether the permitted non-religious and excluded religious uses were both assemblies. *Ibid*. The court held that because the synagogues' proposed uses "fall under the umbrella of 'assembly or institution' as those terms are used in RLUIPA," the town's prohibition on the synagogues' uses violated Section 2(b)(1). *Id*. at 1231.

Similarly, in this case, the gatherings that the Church conducts are not meaningfully different from the gatherings of "assembly halls, community centers, * * * [and] membership organizations or clubs," which are all permitted uses in the C-1 district. R.41 (Order at 4). Thus, just as in *Midrash*, by treating religious assemblies less favorably than non-religious ones, the City has violated RLUIPA's equal terms provision. See *Vision Church*, 468 F.3d at 1003; see also *Konikov* v. *Orange County*, 410 F.3d 1317, 1329 (11th Cir. 2005) ("Groups that meet with similar frequency are in violation of the Code only if the purpose of their assembly is religious. This treatment of religious assemblies on less than equal terms than nonreligious assemblies constitutes an equal terms violation.").

The district court's reasoning that the Church's use of the property was meaningfully different from the other permitted uses is unpersuasive. As noted above, the Church has used the property only to assemble for religious worship, Bible study, fellowship, ministries, and administrative functions. The district court found such uses to be different from the uses of permitted non-religious assemblies for two reasons. First, the court noted that under the zoning ordinance, religious uses are defined to include worship activities and all "reasonably related"

accessory uses, such as educational and social uses, as well as residential uses such as parsonages. R.41 (Order at 4 n.4). Second, the court also noted that, under Indiana law, the presence of a church or school substantially limits the ability of neighboring businesses to sell alcohol or pornography. Specifically, one Indiana statute prohibits a person from obtaining a license to sell liquor within 200 feet of a church or school, although the church or school may, for drug stores and grocery stores, waive that prohibition. Similarly, under another statute, a person may not sell pornography within 500 feet of a church or school. R.41 (Order at 11-12 & n.7).

These rationales for treating the Church differently from other assemblies are flawed. The district court's reasoning begs the question because both of the "differences" identified by the district court relate not to how this Church uses its property, but rather to the uses and characteristics which the City and the State have chosen to ascribe to houses of worship as a category. Quite likely, the City's and State's actions were meant to accommodate what City and State lawmakers believed most houses of worship would want. Many houses of worship have accessory uses like schools or parsonages. And many very well may not want alcohol or pornography nearby. Thus with the SU-1 districts, many churches may be getting the treatment they would prefer. But this church wishes to locate in a commercial district and simply be treated the same as secular assemblies. RLUIPA Section 2(b)(1) provides a cause of action to *individual* houses of worship that are treated differently from other assemblies: "[n]o government shall impose or

implement a land use regulation in a manner that treats *a* religious assembly or institution on less than equal terms with a nonreligious assembly or institution." 42 U.S.C. 2000cc(b)(1) (emphasis added).

This plain reading of the text is consistent with the legislative history of RLUIPA. RLUIPA's sponsors were concerned with the specific problem of municipalities making determinations that churches are better suited for particular zones and less well suited for others, which can vary widely according to the perceptions of local officials. The Senate sponsors' joint statement notes that "[c]hurches have been excluded from residential zones because they generate too much traffic, and from commercial zones because they don't generate enough traffic." Joint Statement of Senator Hatch and Senator Kennedy on the Religious Land Use and Institutionalized Persons Act of 2000, 146 Cong. Rec. S7774-75 (2000). As a result, houses of worship have been denied the ability to locate where comparable secular assemblies are permitted: "Zoning codes frequently exclude churches in places where they permit theaters, meeting halls, and other places where large groups of people assemble for secular purposes * * * Churches have been denied the right to meet in rented storefronts, in abandoned schools, in converted funeral homes, theaters, and skating rinks — in all sorts of buildings that were permitted when they generated traffic for secular purposes." *Ibid.*

Consistent with RLUIPA's text and legislative history, the Eleventh Circuit in *Midrash* correctly understood that once less favorable treatment for religious uses is identified, the court must analyze whether the ordinance is in fact treating

similar uses differently, or different uses differently. See *Midrash*, 366 F.3d at 1230; see also *Konikov*, 401 F.3d at 1327 (comparing prohibited religious use with permitted non-religious use "having comparable community impact."). Here, the District Court erred in simply adopting the City's decision to define religious uses and assembly uses as being different, rather than focusing on the actual nature of the uses.

The City's ordinance only permits religious assemblies to operate as of right in the SU-1 zones. The City thus lumps together as indistinguishable as a matter of law a church that wishes to have a worship building, school, and parsonage — all of which could be permitted activities in the SU-1 district — with a church, like the one in this case, which desires only to have worship, prayer, and study meetings in space that it leases. Because the actual use of the particular church here is not meaningfully different from the permitted non-religious assemblies, the ordinance violates Section 2(b)(1).

The district court also concluded that the Church was not similar to the permitted types of assemblies because Indiana limits the sale of alcohol and pornography near churches and schools. R.41 (Order at 12-13). The district court held that since churches could impact surrounding businesses in a manner that other assemblies could not, church uses and assembly uses were thus not similar. But any harm to businesses wishing to sell alcohol or pornography does not arise from any activity of the Church that could differentiate it from a secular assembly; rather, it arises from Indiana's decision to protect churches as a category from the

harm of being near premises selling alcohol or pornography. Such a paternalistic desire of the State to protect houses of worship as compared to other assemblies, whether or not they want such protection at all, must not be permitted to thwart a Congressional statute designed to ensure that religious assemblies are not treated less favorably merely because they are religious. However well-meaning the State and City might have been in enacting these laws does not alter the conclusion that what they have actually done is treat the Church less favorably than non-religious assemblies in violation of RLUIPA. A paternalistic desire to protect someone does not transform unlawful discrimination into permissible discrimination. Cf. *Dothard* v. *Rawlinson*, 433 U.S. 321, 335 (1977) (desire to protect women from risks, by itself, cannot justify sex discrimination because "[i]n the usual case, the argument that a particular job is too dangerous for women may appropriately be met by the rejoinder that it is the purpose of Title VII to allow the individual woman to make that choice for herself"); *International Union, UAW* v. *Johnson Controls, Inc.*, 499 U.S. 187, 199 (1991) ("the absence of a malevolent motive does not convert a facially discriminatory policy into a neutral policy with a discriminatory effect"). Under RLUIPA, governments cannot justify their policy of denying land use opportunities to houses of worship merely by asserting that their real motive is to protect them from some harm, just as a Title VII defendant cannot justify its policy of denying job opportunities to women by asserting that its real motive is to protect them.

Certainly, if a church, like the one in this case, demanded to be treated just like a permitted secular assembly in a particular zone, a municipality would not violate RLUIPA if it then withheld any special benefits available to churches, such as the accessory uses automatically available to churches in the SU-1 zone, or the bans on alcohol and pornography. But under RLUIPA, if a congregation chooses merely to assemble like non-religious assemblies, states and municipalities may not force them to accept the perceived benefits that the government has decided to give to houses of worship as a category. The Church in this case indicated in its reply brief below that there are no establishments selling liquor within 200 feet of its location. R.19 (Pl.'s Reply Br. at 4). So long as the Church would waive any right to enforce the distance laws against future businesses, it should be treated the same as other assemblies under RLUIPA.[4]

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[4] If a state decided to refrain from enforcing a law regarding alcohol and pornography near a church, this would not be akin to giving churches a "veto" over liquor applications, which was found to be a violation of the Establishment Clause in *Larkin* v. *Grendel's Den*, 459 U.S. 116, 127 (1982) (the challenged statute "substitutes the unilateral and absolute power of a church for the reasoned decisionmaking of a public legislative body"). Indiana's statute already permits churches to waive the prohibition on obtaining a liquor license within 200 feet of a church for drug stores and grocery stores. R.41 (Order at 12). A provision permitting a county to waive a liquor-establishment-protection law, after seeking consent from the affected church, was recently upheld as being distinct from the delegation of government power at issue in *Larkin* and therefore valid. *See VFW John O'Connor Post 4833* v. *Santa Clara Cty.*, No. 3:06-cv-152, 2007 U.S. Dist. LEXIS 17150 (N.D. Fla. March 12, 2007). In this case, if the Church were treated equally to secular assemblies under RLUIPA, there would not be a waiver of the state law at all, but rather an assertion by the Church of a federal statutory right to

(continued...)

Since the Church's use and other assembly uses in the C-1 district are similar, the district court erred in failing to find a likelihood of success on the merits of the Church's 2(b)(1) claim.

[4](...continued)
be treated as favorably as secular assemblies.

CONCLUSION

This Court should vacate the district court's denial of the Church's motion for a preliminary injunction, and remand the case for further proceedings.

Respectfully submitted,

WAN J. KIM,
Assistant Attorney General

_____

DAVID K. FLYNN
ERIC W. TREENE
KARL N. GELLERT
Attorneys
Civil Rights Division
Department of Justice
Ben Franklin Station
P.O. Box 14403
Washington, D.C. 20044-4403
(202) 353-4441

CERTIFICATE OF COMPLIANCE

I certify that this BRIEF FOR THE UNITED STATES AS *AMICUS CURIAE* SUPPORTING APPELLANT complies with the type-volume limitation set forth in Fed. R. App. P. 29(d) and Rule 32(a)(7). This brief contains 4,579 words, as calculated by the WordPerfect 12 word-count system. The typeface is Times New Roman, 14-point font.

I also certify that the electronic version of this brief, which has been sent to the Court by overnight mail on a CD, has been scanned with the most recent version of Trend Micro Office Scan (version 7.0) and is virus-free.

_____
KARL N. GELLERT

Date: April 4, 2007

CERTIFICATE OF SERVICE

I certify that on April 4, 2007, two copies of the foregoing BRIEF FOR THE UNITED STATES AS *AMICUS CURIAE* were sent by overnight mail, postage prepaid to the following counsel:

David R. Langdon
LANGDON & HARTMAN LLC
11175 Reading Road, Suite 104
Cincinnati, OH 45241

Lakshmi Hasanadka
Assistant Corporation Counsel
1601 City County Building
Indianapolis, IN 46204

_____
KARL N. GELLERT