No. 18-1450

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

JESUS CHRIST IS THE ANSWER MINISTRIES, INC.; REV. LUCY WARE,

Plaintiffs-Appellants

v.

BALTIMORE COUNTY, MARYLAND; BOARD OF APPEALS OF BALTIMORE COUNTY,

Defendants-Appellees

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

BRIEF FOR THE UNITED STATES AS *AMICUS CURIAE* IN SUPPORT OF PLAINTIFFS-APPELLANTS AND URGING REVERSAL

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INTEREST OF THE UNITED STATES

The United States files this brief under Federal Rule of Appellate Procedure 29(a).

This appeal implicates the interpretation and application of the substantial burden and nondiscrimination provisions of the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA), 42 U.S.C. 2000cc(a) and (b)(2), in the context of religious land use. The Department of Justice is charged with

enforcing RLUIPA, see 42 U.S.C. 2000cc-2(f), and thus has an interest in the proper resolution of the legal issues raised in this appeal. The Department has filed briefs in other appeals involving RLUIPA's substantial burden and nondiscrimination provisions, including appeals in this Court. See, *e.g.*, *Bethel World Outreach Ministries* v. *Montgomery Cty. Council*, 706 F.3d 548 (4th Cir. 2013); *Chabad Lubavitch of Litchfield Cty., Inc.* v. *Litchfield Historic Dist. Comm'n*, 768 F.3d 183 (2d Cir.), cert. denied, 135 S. Ct. 1853 (2015).

STATEMENT OF THE ISSUES

The United States addresses the following questions only:

1. Whether the district court erred in dismissing plaintiffs' substantial burden claim under RLUIPA, 42 U.S.C. 2000cc(a).

2. Whether the district court erred in dismissing plaintiffs' discrimination claim under RLUIPA, 42 U.S.C. 2000cc(b)(2).

STATEMENT OF THE CASE

1. Facts Alleged In The Complaint

All of the following alleged facts are drawn from the complaint, which must be accepted as true when reviewing a motion to dismiss.[1]

[1] See *Woods* v. *City of Greensboro*, 855 F.3d 639, 642 (4th Cir.), cert. denied, 138 S. Ct. 558 (2017).

a. Reverend Lucy Ware founded Jesus Christ Is The Answer Ministries (the Church), a nondenominational Christian church, in approximately 1992. JA 9 (Compl.).[2] The Church operated from Ware's home in Baltimore County, Maryland, starting in 2002, and then used rented spaces at a hair salon, a school, and a hotel from mid-2002 through mid-2012. JA 10-11. During this time, the Church grew from its original size of ten congregants (reaching around 40 in 2017) and lacked sufficient space to conduct worship, outreach, and other religious activities. JA 10-11. In 2008, Ware and Church officials began searching for properties to purchase for use as a house of worship. JA 11.

In August 2012, Ware and the Church (the plaintiffs) purchased a Baltimore County property in a Density Residential Zone where churches are permitted as of right. JA 12; Baltimore Cty. Zoning Reg. (BCZR) 1B01.1.A.3. A realtor assisted plaintiffs with the purchase and correctly informed them that a church is a permitted use on the property. JA 11. The property is in a mixed-use area that includes schools and other institutions, multi-family residences, single-family dwellings, and at least ten religious-use buildings within one mile, "two of which are within a quarter-mile of the property." JA 12-13. Due to its proximity to dwellings, the property is in a residential transition area (RTA), which means that

[2] "JA __" refers to the page numbers within the Joint Appendix filed in this Court on June 25, 2018.

it must comply with buffer and setback requirements absent qualification for certain exceptions. JA 16-17; BCZR 1B01.1.B.1. The complaint is silent about plaintiffs' knowledge of the RTA requirements before they purchased the property.

After purchasing the property, Ware improved the house on the property and created a gravel parking area partially screened by trees. JA 13. The Church then held two events and a service at the property. JA 13. These events drew complaints from neighbors. JA 13.

In November 2012, a Baltimore County inspector notified Ware that she could not use the property as a church unless it complied with the land-use requirements. JA 14, 27. The inspector allegedly stated to Ware, who was born in Kenya, that, "You Africans don't even know what you're doing." JA 9, 27. Since then, plaintiffs have not held any Church-related activities at the property and have resumed limited operations from Ware's two-bedroom home, which cannot accommodate all of the Church's members or its activities (such as events, community outreach and ministry, and religious instruction). JA 14-15.

b. In December 2012, Ware filed a petition to bring the property into compliance with the County's land-use regulations. JA 18. Ware's petition sought approval to use the property for a church, complete relief from the 50-foot buffer and 75-foot setback requirements under an RTA exception for new churches, and variances from parking lot regulations. JA 18-19; BCZR 1B01.1.B.1.e and g(6).

The new church exception applies when there is a finding at a public hearing that "proposed improvements are planned in such a way that compliance, to the extent possible with RTA use requirements, will be maintained and that said plan can otherwise be expected to be compatible with the character and general welfare of the surrounding residential premises." JA 17; BCZR 1B01.1.B.1.g(6). An existing church may also receive an exception if it meets all other zoning regulations. JA 17; BCZR 1B01.1.B.1.g(4).

An administrative law judge (ALJ) denied Ware's petition following a hearing. Before the hearing, the County Director of the Department of Planning indicated that he did not oppose the petition, "provided a landscape and signage plan is submitted to the department for review and approval." JA 19. During the hearing, however, several neighbors who opposed the petition allegedly made statements disparaging the Church's African origin and religious practices, including that congregants were "dancing and hollering like they back at their home in Africa" and "dancing like from Africa. We don't have that in our block." JA 19. Neighbors who opposed the petition also allegedly made derogatory comments about Africans to Ware, and the property was vandalized multiple times. JA 27-29.

Ware appealed, and the Baltimore County Board of Appeals denied the petition following a hearing at which several community members again spoke in

opposition. JA 20. Although the Board noted that there were five other churches near the property, it concluded that the Church did not come close to complying with the RTA requirements and did not qualify for the new church exception. JA 20-21. Ware then appealed unsuccessfully to both the Circuit Court of Baltimore County and the Court of Special Appeals of Maryland. JA 21-22.

c. While Ware's first petition moved through the appeals process, she filed a substantially modified second petition, which also was denied. The second petition included an addition to the property's structure and reconfigured the parking lot to meet the required 50-foot buffer requirement and to come closer to the 75-foot setback requirement by increasing the setbacks from zero feet in the first plan to 55, 62, and 72.7 feet. JA 22-24. The petition also eliminated requests for parking variances. JA 25. This new proposal "complied either completely or much more substantially (and 'to the extent possible')" with the RTA requirements than Ware's first petition. JA 25. Nevertheless, a county official known as the People's Counsel, who also opposed the first petition, asked the ALJ by letter to dismiss the second petition based on the doctrine of *res judicata*, incorrectly claiming that the second petition sought "essentially the same relief" as the original petition. JA 25. The People's Counsel allegedly sought dismissal in response to "local residents' opposition to the Church's proposed use." JA 25. The ALJ denied the petition on

res judicata grounds without a hearing or briefing and also denied Ware's motion to reconsider. JA 25-26.

Ware appealed the denial of the second petition to the Board, and the People's Counsel again sought dismissal based on *res judicata*, this time joined by an attorney representing the community members who opposed the Church. JA 26. The People's Counsel ultimately acknowledged his error in invoking *res judicata* and withdrew the motion to dismiss in light of the differences between Ware's first and second petitions. JA 26. But the Board continued to review the motion because it had been adopted by the community members. JA 26.

The Board granted the motion in September 2017, holding that *res judicata* and collateral estoppel barred the second petition because it involved the same petitioner, property, proposed use, and RTA applications as Ware's first petition. JA 26-27. The two petitions, however, were substantially different. JA 27. Plaintiffs have alleged that the Board's decision was legally unnecessary and erroneous, and that other applicants have filed multiple petitions for the same use on the same property without the County barring another merits adjudication on *res judicata* or collateral estoppel grounds. JA 27.

2. District Court Proceedings

As relevant here, Ware and the Church filed a federal action against Baltimore County and the Board of Appeals of Baltimore County (collectively, the

County), alleging that the County's denial of their zoning petitions violated RLUIPA's substantial burden and nondiscrimination provisions. JA 31-32; see 42 U.S.C. 2000cc(a) and (b)(2). The County moved to dismiss, arguing, among other things, that plaintiffs failed to state a claim under RLUIPA and that their substantial burden claim was foreclosed by this Court's decision in *Andon, LLC* v. *City of Newport News*, 813 F.3d 510 (4th Cir. 2016), which affirmed dismissal of such a claim where the plaintiffs' burden was found to be self-imposed. See JA 37, 230.

The district court granted the County's motion and dismissed the RLUIPA claims. JA 219-254. The court concluded that plaintiffs did not state a substantial burden claim because, it believed, their failure to research local zoning laws before purchasing and improving the property defeated their "reasonable expectation" to use it as a church. JA 245-246. The court stated that "a critical function of RLUIPA's substantial burden restriction is to protect a plaintiff's reasonable expectation to use real property for religious purposes," and held that any burden plaintiffs experienced in the absence of a reasonable expectation was "self-imposed." JA 244, 246 (quoting *Andon,* 813 F.3d at 515). The court declined to consider plaintiffs' allegations of substantial burden through "delay, uncertainty, and expense," explaining that plaintiffs' own actions produced these difficulties. JA 246-247.

The court also found that plaintiffs failed to state a claim under RLUIPA's nondiscrimination provision. The court focused on what it viewed as two deficiencies in plaintiffs' complaint: (1) the lack of a sufficient comparator, given that the other churches the Board permitted in the same residential area as plaintiffs' property had larger lot sizes; and (2) plaintiffs' failure to "allege[] facts supporting an inference that the Board acted with intentional or purposeful discrimination," particularly because the Board invoked the doctrines of *res judicata* and collateral estoppel to deny the second petition.[3] JA 249-250. The court largely disregarded plaintiffs' allegations that community animus influenced the decisionmaking process.

SUMMARY OF THE ARGUMENT

This Court should reverse the district court's dismissal of plaintiffs' substantial burden and discrimination claims.

First, the district court erred in concluding that plaintiffs did not state a claim that the County imposed a substantial burden on their religious exercise. The court

[3] Ware's second petition invoked both the "new church" and "existing church" exceptions to the RTA requirements. See JA 225. The district court gave weight to the Board's finding that plaintiffs attempted to avoid a *res judicata* determination by invoking the "existing church" exception rather than the "new church" exception, which they failed to satisfy in the first petition. JA 227 (citing JA 126 (Bd. App. Op.)); JA 249-250. The Board found, however, that the second petition was precluded by *res judicata* and collateral estoppel regardless of the exception invoked. See JA 127-128.

failed to consider the totality of the circumstances, as required by the precedents of this Court and other circuit courts, including plaintiffs' need for a church and the County's complete denial of their requests to use the property for religious worship. The court also erred in concluding—at the pleadings stage—that any burden was plaintiffs' fault. In making this error, the court failed to acknowledge both that the property's zoning designation created a reasonable expectation of religious use and that plaintiffs offered to modify their proposal substantially to meet the County's requirements.

Second, the district court erred in dismissing plaintiffs' RLUIPA discrimination claim by ignoring factual allegations that may support such a claim under the Act. These allegations include the County's departures from normal procedures and community members' contemporary statements of bias that influenced decisionmakers.

ARGUMENT

I

THE DISTRICT COURT ERRED IN DISMISSING THE SUBSTANTIAL BURDEN CLAIM WHEN IT FAILED TO CONSIDER THE COUNTY'S COMPLETE DENIAL OF PLAINTIFFS' PETITIONS TO USE THEIR PROPERTY FOR A CHURCH AND WHEN IT ATTRIBUTED ANY BURDEN TO PLAINTIFFS

A. RLUIPA Prohibits Governments From Imposing A Substantial Burden On Religious Land Use

RLUIPA prohibits a government from "impos[ing] or implement[ing] a land use regulation that imposes a substantial burden on the religious exercise of a person" unless the burden "is in furtherance of a compelling governmental interest [and] is the least restrictive means of furthering that compelling governmental interest." 42 U.S.C. 2000cc(a)(1). The statute defines "religious exercise" as "any exercise of religion, whether or not compelled by, or central to, a system of religious belief," specifying that "[t]he use, building, or conversion of real property for the purpose of religious exercise shall be considered to be religious exercise." 42 U.S.C. 2000cc-5(7). Although RLUIPA does not define the term "substantial burden," the Act should be "construed in favor of a broad protection of religious exercise, to the maximum extent permitted by the terms of this chapter and the Constitution." 42 U.S.C. 2000cc-3(g).

This Court has held that "a plaintiff can succeed on a substantial burden claim by establishing that a government regulation puts substantial pressure on [the

plaintiff] to modify its behavior." *Bethel World Outreach Ministries* v. *Montgomery Cty. Council*, 706 F.3d 548, 556 (4th Cir. 2013) (citation omitted); see also *Andon, LLC* v. *City of Newport News*, 813 F.3d 510, 514-515 (4th Cir. 2016). Such pressure must cause more than mere "inconvenience" to constitute a substantial burden. *Midrash Sephardi, Inc.* v. *Town of Surfside*, 366 F.3d 1214, 1227 (11th Cir.), cert. denied, 543 U.S. 1146 (2005). Additionally, there must be a "close nexus between the coerced or impeded conduct and the institution's religious exercise." *Westchester Day Sch.* v. *Village of Mamaroneck*, 504 F.3d 338, 349 (2d Cir. 2007).

Thus, a court assessing a substantial burden claim should determine whether, given the totality of the circumstances, the government's imposition or application of land-use regulations substantially inhibits religious exercise rather than merely inconveniences it. See, *e.g.*, *Bethel*, 706 F.3d at 558; *Livingston Christian Schs.* v. *Genoa Charter Twp.*, 858 F.3d 996, 1003-1004 (6th Cir.), cert. denied, 138 S. Ct. 1696 (2018); *Chabad Lubavitch of Litchfield Cty., Inc.* v. *Litchfield Historic Dist. Comm'n*, 768 F.3d 183, 195-196 (2d Cir.), cert. denied, 135 S. Ct. 1853 (2015); *Westchester Day Sch.*, 504 F.3d at 348-349, 350-351; *Guru Nanak Sikh Soc'y of Yuba City* v. *County of Sutter*, 456 F.3d 978, 988 (9th Cir. 2006). In so doing, a court should take into account a party's religious needs. For example, a religious institution's need to establish facilities on a new property to accommodate its

growing congregation may implicate the substantial burden provision. See *Bethel*, 706 F.3d at 558; *Chabad Lubavitch*, 768 F.3d at 188; *Saints Constantine & Helen Greek Orthodox Church, Inc.* v. *City of New Berlin*, 396 F.3d 895, 898 (7th Cir. 2005). So, too, may a congregation's need to expand or modify its existing property to facilitate additional forms of religious exercise, such as religious schooling. See *Westchester Day Sch.*, 504 F.3d at 347-348, 352. By contrast, a substantial burden claim may fail where a plaintiff is unable to support conclusory and speculative allegations that its existing facility is inadequate to attract community interest due to its location. See, *e.g.*, *Livingston Christian Schs.*, 858 F.3d at 1007-1008.

In determining whether a burden is substantial, this Court has considered "significant" whether a land-use decision forecloses or seriously diminishes the possibility that a party ever may be able to use its property for the proposed development or expansion. *Bethel*, 706 F.3d at 558; see also, *e.g.*, *Westchester Day Sch.*, 504 F.3d at 349; *Guru Nanak*, 456 F.3d at 989. Because of the evident difference between being completely foreclosed from using a property for religious exercise and having that use denied conditionally subject to certain modifications, courts have given great weight to this factor. As the Second Circuit has explained, "whether the denial * * * was absolute is important; if there is a reasonable opportunity for the institution to submit a modified application, the denial does not

place substantial pressure on [a plaintiff] to change its behavior." *Westchester Day Sch.*, 504 F.3d at 349.

Complete foreclosure from *any* religious use on a property or within a jurisdiction is not required to establish a substantial burden, however. Rather, courts should consider whether the government's decision—including a decision that restricts the size or scope of a proposed use rather than forbidding religious use altogether—prevents a party from carrying out its religious functions. See, *e.g.*, *Bethel*, 706 F.3d at 557-560; *Livingston Christian Schs.*, 858 F.3d at 1006; *Westchester Day Sch.*, 504 F.3d at 349, 352.

A substantial burden also may exist where government action leaves an organization without "quick, reliable, and financially feasible alternatives" to expand or locate facilities as part of their religious exercise, *Westchester Day Sch.*, 504 F.3d at 352, or imposes the "delay, uncertainty and expense" of either identifying another suitable property, *e.g.*, *Bethel*, 706 F.3d at 557, or continuing to file potentially futile permit applications, *Saints Constantine & Helen*, 396 F.3d at 898-901.

Additionally, courts may consider whether the government's decision (or decisionmaking process) was arbitrary and capricious or unlawful, such that the institution received "less than even-handed treatment" that frustrates its use of the property for religious exercise. *Westchester Day Sch.*, 504 F.3d at 351. In such

instances, RLUIPA's substantial burden provision may "backstop[] the explicit prohibition of religious discrimination" in RLUIPA's nondiscrimination provision. *Ibid*.; see also *Chabad Lubavitch*, 768 F.3d at 195; *Saints Constantine & Helen*, 396 F.3d at 899-900.

Finally, courts may assess whether the burden alleged is attributable to the government or, instead, to the plaintiff. In determining whether a burden is "self-imposed," this Court has considered whether the plaintiff had a reasonable expectation to use a property for religious exercise. See *Andon*, 813 F.3d at 516; *Bethel*, 706 F.3d at 557; see also *Livingston Christian Schs.*, 858 F.3d at 1004; *Petra Presbyterian Church* v. *Village of Northbrook*, 489 F.3d 846, 851 (7th Cir.), cert. denied, 552 U.S. 1131 (2008). A plaintiff's willingness to modify its proposed use to comply to the extent possible with applicable zoning requirements while meeting its religious needs may be relevant to whether the burden is attributable to the government or self-imposed. See *Guru Nanak*, 456 F.3d at 989-990.

At bottom, whether the government's application of its land-use regulations constitutes a substantial burden on a plaintiff's religious exercise is a fact-intensive inquiry that often is not well suited for disposition at the motion to dismiss stage.

B. The District Court Should Have Considered The Totality Of The Circumstances In Assessing The Substantial Burden Claim, Including Plaintiffs' Needs, The Finality Of The County's Denials, And The Lack Of Quick, Reliable And Feasible Alternatives For Plaintiffs' Religious Exercise

The district court improperly overlooked plaintiffs' allegations of several factors relevant to the burden on their religious exercise—in particular the County's complete denial of religious use on plaintiffs' property despite their undisputed need to establish a facility to accommodate their growing congregation. The district court also ignored other factors that plaintiffs plausibly pleaded, including allegations that the County's decisions left plaintiffs without quick, reliable and viable alternatives for their operations and unjustifiably caused them delay, uncertainty, and expense in pursuing religious land use.

There can be no question that the complaint sufficiently articulates plaintiffs' need to establish a house of worship to accommodate the Church's congregation and activities. Plaintiffs alleged that since Ware founded the Church in 2002, the congregation has grown from at most ten to approximately 40 members. JA 10. Before purchasing the property in 2012, the Church had been operating out of inadequate temporary spaces, including Ware's home, a hair salon, a school, and a hotel. JA 10-11. The Church now operates, once again, from Ware's two-bedroom home. JA 14. The lack of adequate worship and meeting space has curtailed the Church's ability to accommodate congregants, hold ceremonies and events, engage in community service, instruct children, host Bible

study groups, and evangelize. JA 11, 14-15. The burden on plaintiffs in light of their undisputed needs is no less substantial than what this Court found to exist in *Bethel*, in which the plaintiff also sought relief from land-use regulations that prevented it from expanding to a property that could accommodate a new, larger church suitable to its growing congregation. See 706 F.3d at 558. That a congregation may have access to (or even own) other facilities will not render a burden insubstantial if the plaintiff can show that existing facilities are inadequate. *Ibid.*

In addition to discounting the importance of plaintiffs' need for a new facility, the district court failed to weigh plaintiffs' allegations that the County completely foreclosed their use of the property for a church by finding their second petition barred by *res judicata*. This Court and several other courts of appeals have explained that a government's complete denial of permission to use property for religious exercise—rather than imposing conditions on use—may support a substantial burden claim. See, *e.g.*, *Bethel*, 706 F.3d at 558; *Westchester Day Sch.*, 504 F.3d at 349; cf. *Guru Nanak*, 456 F.3d at 989 (substantial burden found where rationales behind denials to operate temple at two properties in different zones significantly diminished prospect that future applications on any property might be successful).

Indeed, this Court in *Bethel* considered it "significant that the County has completely prevented Bethel from building any church on its property, rather than simply imposing limitations on a new building." 706 F.3d at 558 (citations omitted). There, Montgomery County foreclosed the plaintiff from using its property as a church by denying its application for public water and sewer service (which were only available by request at the property), deferring a modified request for private service, and then amending zoning rules such that the property was no longer eligible for private institutional development. *Id.* at 553-554. Here, too, the County's unconditional denial of plaintiffs' first petition, followed by its *res judicata* decision barring a merits determination on plaintiffs' second petition, completely foreclosed plaintiffs from using their property for church activities. JA 29.

Further, the district court improperly declined to consider plaintiffs' allegations that the County's decisionmaking process left them without "quick, reliable and viable alternative options for the Church's operations." See JA 31, 246-247. In *Saints Constantine & Helen*, the Seventh Circuit explained that having to identify another property for a church (after purchasing one property and attempting in vain to gain approval from local authorities) created a burden that was not "insuperable," but was, nevertheless, substantial. 396 F.3d at 901. This Court, too, has acknowledged that the "'delay, uncertainty, and expense'" of

selling an unusable property and identifying a new one is "burdensome." *Bethel*, 706 F.3d at 557-558 (quoting *Saints Constantine & Helen*, 396 F.3d at 899-901); see also *Westchester Day Sch.*, 504 F.3d at 352 (existence of "quick, reliable, and financially feasible alternatives" for religious exercise is relevant to substantial burden assessment). Plaintiffs' pleadings here also state a claim for such a burden: after years of County proceedings culminating in the Board's refusal to consider a substantially modified site proposal, plaintiffs were left without feasible options for the Church's operations, as Ware's home cannot adequately accommodate either the Church's congregation or its activities. See JA 14-15, 31.

Moreover, plaintiffs' allegations that the County proceedings were susceptible to bias, and that the Board's *res judicata* decision was legally unnecessary, unjustified, and inconsistently applied (JA 19, 25-27), indicate uncertainty as to whether any proposal plaintiffs might submit would gain County approval. See *Guru Nanak*, 456 F.3d at 989-991; see also *Westchester Day Sch.*, 504 F.3d at 350-351. These allegations, too, support a claim that the County's zoning decisions substantially burdened plaintiffs' religious exercise under RLUIPA.

C. The District Court Erred In Finding, On A Motion To Dismiss, That Plaintiffs' Burden Was Self-Imposed Where Local Regulations Supported A Reasonable Expectation Of Religious Land Use And Where Plaintiffs Pleaded That They Willingly Modified Their Site Plan To Substantially Comply With Those Regulations

The district court also erred in finding, on a motion to dismiss, that the burden on plaintiffs' religious exercise was self-imposed rather than potentially attributable to the County. In reaching this conclusion, the district court misapplied this Court's precedent regarding a party's reasonable expectation of religious land use and ignored plaintiffs' revised site proposal (which the County refused to consider) that substantially complied with the RTA requirements.

This Court recently explained that "a critical function of RLUIPA's substantial burden restriction is to protect a plaintiff's reasonable expectation to use real property for religious purposes." *Andon*, 813 F.3d at 515 (citing *Bethel*, 706 F.3d at 556-557). Here, the district court abandoned that protective function and instead found that the plaintiffs' failure to plead that they researched the zoning regulations before beginning the petition process rendered their burden "self-imposed." JA 244-246. But this Court's decisions on which the district court purportedly relied—*Andon*, and its predecessor, *Bethel*—cannot be read to foreclose a substantial burden claim where, as here, the land in question was zoned to permit religious use, and where plaintiffs attempted to modify their proposal to meet local zoning regulations.

Bethel and *Andon* together support the proposition that whether a plaintiff has a reasonable expectation of religious land use flows from whether religious use is generally permitted on a property, not whether a specific land-use proposal is certain to gain approval. In *Bethel*, this Court rejected Montgomery County's argument that Bethel lacked a reasonable expectation to expand its operations to a newly-purchased property because the county had been considering regulatory changes, and the necessary facilities approvals were not guaranteed. 706 F.3d at 558. The Court focused on the general expectation created by existing regulations, explaining that "the County does not contest that it permitted churches in the [zoned area] at the time Bethel bought the property, and modern zoning practices are such that landowners are rarely *guaranteed* approvals." *Ibid.* In contrast, religious use in *Andon* was not permitted on the subject property absent compliance with conditions that the desired property did not meet and, as developed, could not meet. 813 F.3d at 515. Before the *Andon* plaintiffs sought a variance from these conditions, the zoning administrator had informed them that their application would be denied. *Ibid.* The Court in *Andon*, therefore, held that the plaintiffs' hardship was knowing and self-imposed, rather than government-imposed, and could not support the finding of a substantial burden. *Ibid.*

Here, local zoning regulations and practice support a reasonable expectation of religious land use. As in *Bethel*, plaintiffs' property is located in a zone where

religious use is allowed, even if additional permitting steps may be required to use the property as a church. See *Bethel*, 706 F.3d at 558. The close proximity of other churches to plaintiffs' property (JA 12) also lends support to a reasonable expectation of religious use at this location. Further, the *Bethel* court's observation that approval of land-use plans is "rarely guaranteed," 706 F.3d at 558, undercuts the district court's criticism of plaintiffs' failure to probe beyond their realtor's correct assurance that religious use was permitted by right on the property. Indeed, even the most diligent religious entity might struggle to predict the outcome of a petition seeking a new church exception to the RTA buffer and setback provisions, which incorporates undefined, subjective standards—namely, compliance with RTA requirements "to the extent possible" and "compat[ibility] with the character and general welfare of the surrounding residential premises." BCZR 1B01.1.B.1.g(6).

Instead, the district court erroneously likened this case to *Andon*. As another judge in the District of Maryland recently observed in declining to dismiss a RLUIPA substantial burden claim, the plaintiffs' proposed use in *Andon* was "categorically contrary to law." *Hunt Valley Baptist Church, Inc.* v. *Baltimore Cty., Md.*, No. 17-804, 2017 WL 4641987, at *27 (D. Md. Oct. 17, 2017). Thus, that court reasoned that *Andon* did not preclude Hunt Valley Baptist Church's substantial burden claim because, even though religious use required a "special

exception," such a use was "presumed to be * * * valid" under Maryland law. *Ibid.* Moreover, the complaint and record showed that the church could meet conditions for approval for at least part of their proposed development. *Ibid.* *Andon* does not doom the substantial burden claim here, either, as plaintiffs' proposal was not categorically contrary to law. Rather, the property's overall zoning designation, which allows a church as of right, created an expectation that the Church could operate on the property and simply needed to meet or receive a church-based exception to the RTA buffer and setback requirements.[4]

Moreover, the district court should have considered plaintiffs' demonstrated willingness and ability to achieve substantial compliance with the County's zoning regulations. In *Guru Nanak*, the Ninth Circuit found that the county had imposed a substantial burden on religious exercise where the plaintiff, which sought and was denied permission to build a temple in a residential zone and then in an agricultural zone, "readily agreed to every mitigation measure suggested * * * , but the County, without explanation, found such cooperation insufficient." 456 F.3d at 989. In this case, too, the County completely rebuffed plaintiffs' endeavor to comply with local regulations. Ware's initial petition was unlikely to have met the RTA exception for new churches because, rather than complying "to the extent

[4] Although plaintiffs sought variances from generally applicable parking lot regulations in their first petition, these were not required in order to operate as a church, and plaintiffs abandoned the variance requests in their second petition.

possible" with the RTA requirements, the petition sought complete relief from the buffer and setback provisions, as well as parking variances. JA 17-19; BCZR 1B01.1.B.1.g(6). But Ware's second petition sought only modest deviations from the RTA requirements (it met the required RTA buffer and increased the setbacks from zero feet in the original petition to between 55 and 72.7 feet in the second) and eliminated requests for parking variances. JA 22-26. Plaintiffs' willingness to make these modifications—contrasted with the County's unwillingness to even hear the merits of the second petition, see pp. 6-7, *supra*—support a finding that plaintiffs adequately pleaded a claim for a government-imposed, rather than self-imposed, burden on religious land use.[5]

II

THE DISTRICT COURT ERRED IN DISMISSING PLAINTIFFS' DISCRIMINATION CLAIM BECAUSE IT IGNORED RELEVANT ALLEGATIONS OF PROCEDURAL IRREGULARITIES AND PUBLIC STATEMENTS OF COMMUNITY BIAS

A. RLUIPA Prohibits Religious Discrimination In Zoning

RLUIPA's nondiscrimination provision states that "[n]o government shall impose or implement a land use regulation that discriminates against any assembly or institution on the basis of religion or religious denomination." 42 U.S.C.

[5] If plaintiffs establish that the County substantially burdened their religious exercise, the finder of fact must go on to assess whether the burden "is in furtherance of a compelling government interest [and] is the least restrictive means of furthering that compelling government interest." 42 U.S.C. 2000cc(a)(1).

2000cc(b)(2). The provision codifies First and Fourteenth Amendment nondiscrimination principles. See, *e.g.*, *Chabad Lubavitch* 768 F.3d at 198; *Midrash Sephardi*, 366 F.3d at 1238-1240.

Courts assessing a RLUIPA discrimination claim have followed the approach set out in *Village of Arlington Heights* v. *Metropolitan Housing Development Corp.*, 429 U.S. 252, 265-266 (1977), which requires a "sensitive inquiry into such circumstantial and direct evidence of intent as may be available" to determine whether discrimination was a "motivating factor" in the challenged decision. See, *e.g.*, *Bethel*, 706 F.3d at 559-560; *Chabad Lubavitch*, 768 F.3d at 199; *Reaching Hearts Int'l, Inc.* v. *Prince George's Cty.*, 584 F. Supp. 2d 766, 781 (D. Md. 2008), aff'd, 368 F. App'x 370 (4th Cir. 2010).

Consistent with *Arlington Heights*, this Court has explained that several factors may be probative of a decisionmaking body's discriminatory intent, including: (1) a "consistent pattern" of actions by the decisionmaking body that disparately impacts members of a particular class; (2) the historical background of the decision, including instances of discrimination by the jurisdiction or its decisionmaking body; (3) the specific sequence of events leading up to the challenged decision, including significant departures from normal procedures; and (4) contemporary statements by decisionmakers. *Sylvia Dev. Corp.* v. *Calvert Cty., Md.*, 48 F.3d 810, 819 (4th Cir. 1995) (citing *Arlington Heights*, 429 U.S. at 266-

268); *Reaching Hearts*, 584 F. Supp. 2d at 781. Community-member bias will not by itself render a government liable for discrimination, but it can support a discrimination claim to the extent that the bias influences government decisionmakers. See *Sylvia Dev. Corp.*, 48 F.3d at 824; *Marks* v. *City of Chesapeake*, 883 F.2d 308, 311-312 (4th Cir. 1989); *Hunt Valley Baptist Church*, 2017 WL 4641987, at *30. Although the unequal treatment of similarly situated institutions may be relevant to the analysis, this alone will not establish a claim of religious discrimination. See *Sylvia Dev. Corp.*, 48 F.3d at 819; see also *Chabad Lubavitch*, 768 F.3d at 199.

B. The District Court Failed To Consider Allegations Of Procedural Irregularities And Bias In The Zoning Petition Process

The district court recited the factors enunciated in *Sylvia Development Corp.* but did not engage meaningfully with any of them (see JA 248-250), thereby failing to conduct the "sensitive inquiry" of the allegations in the complaint that *Arlington Heights* demands. 429 U.S. at 266. The court erred by focusing only on whether other churches near the property were "similarly situated" to plaintiffs, and on the Board's stated rationale for barring the second petition on *res judicata* grounds. JA 249. In doing so, the court failed to conduct a proper inquiry at the motion to dismiss stage by bypassing relevant allegations and failing to draw all reasonable inferences in plaintiffs' favor. See, *e.g.*, *Kensington Volunteer Fire Dep't, Inc.* v. *Montgomery Cty., Md.*, 684 F.3d 462, 467 (4th Cir. 2012).

The court failed, in particular, to consider plaintiffs' allegations regarding the sequence of events, procedural irregularities, and the role of community-member bias in the petition processes. Plaintiffs claimed that community members who disparaged Ware and the Church's African roots gave biased testimony at the ALJ hearing on the first petition (*e.g.*, complaining that they observed Church members "dancing and hollering like they back at their home in Africa") and also spoke at the Board hearing on the first petition. JA 19-20. The ALJ and Board denied the petition, even though the County Director of the Department of Planning indicated before the initial hearing that he did not oppose the petition "provided a landscape and signage plan is submitted to the department for review and approval." JA 19. Plaintiffs also claimed that the People's Counsel asserted the doctrine of *res judicata* to dismiss their second, substantially compliant petition in response to community opposition to the Church. JA 25. The People's Counsel subsequently withdrew its *res judicata* argument as erroneous, but plaintiffs asserted that the Board nevertheless considered and then denied the second petition on this basis because community members—some of whom had made public statements evincing religious bias—had adopted the *res judicata* rationale that the People's Counsel had abandoned. JA 26. The complaint also suggests that the People's Counsel and Board have used *res judicata* and collateral estoppel

selectively to avoid adjudicating the merits of certain applicants' successive petitions. JA 22.

These allegations—taken together and considered in the context of the larger decisionmaking process—are sufficient to survive a motion to dismiss because they plausibly support an inference that bias infected the County's zoning decisions. See *Hunt Valley Baptist Church*, 2017 WL 4641987, at *30 (on a motion to dismiss, finding the plaintiffs' allegations that the Board was responsive to opponents who made biased public comments about the church adequate to plead a discrimination claim); cf. *Marks*, 883 F.2d at 311-313 (affirming judgment for plaintiff based on evidence at trial that community members expressed religious bias in public zoning hearings and that officials were influenced by community concern). The court failed to consider these allegations of bias, inconsistency, and irregularities in the petition processes and thus incorrectly held that plaintiffs had not adequately pleaded that discrimination was a motivating factor in the County's denial of their zoning petitions.

CONCLUSION

For the foregoing reasons, the district court's dismissal of plaintiffs' RLUIPA claims should be reversed.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT
Effective 12/01/2016

No. 18-1450 **Caption:** Jesus Christ Is The Answer Ministries v. Baltimore Cty.

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