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IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF PENNSYLVANIA

HOPE RISING COMMUNITY CHURCH,
a Pennsylvania nonprofit corporation,

Plaintiff,

v.

BOROUGH OF CLARION,
a Pennsylvania municipal corporation,

Defendant.

Case No. 2:24-cv-01504-WSH

STATEMENT OF INTEREST OF THE UNITED STATES OF AMERICA

I. INTRODUCTION

The United States respectfully submits this Statement of Interest pursuant to 28 U.S.C. § 517[1] to address arguments made by Defendant Borough of Clarion ("Borough") in its Brief in Support of its Motion to Dismiss, ECF No. 33 ("Motion"), regarding Plaintiff Hope Rising Community Church's ("Church") equal terms claim brought under the Religious Land Use and Institutionalized Persons Act of 2000 ("RLUIPA"), 42 U.S.C. §§ 2000cc–2000cc-5. The Department of Justice has authority to enforce RLUIPA and to intervene in proceedings involving RLUIPA. *Id.* § 2000cc-2(f). Because this litigation implicates the proper interpretation and application of RLUIPA, the United States has a strong interest in the issues raised by the Borough's Motion and believes that its participation will aid the Court.

As discussed below, the Church plausibly alleges a RLUIPA facial equal terms claim in its Amended Complaint, ECF No. 30. As a matter of law, a facial equal terms claim is not subject to the finality doctrine. Further, the Church has standing to bring that claim and the claim is not moot.[2] Accordingly, the Court should deny the Borough's Motion as to the Church's RLUIPA equal terms claim.

[1] Under 28 U.S.C. § 517, "[t]he Solicitor General, or any officer of the Department of Justice, may be sent by the Attorney General to any State or district in the United States to attend to the interests of the United States in a suit pending in a court of the United States, or in a court of a State, or to attend to any other interest of the United States." *See also Gross v. German Found. Indus. Initiative*, 456 F.3d 363, 384 (3rd Cir. 2006) ("The United States Executive has the statutory authority, in any case in which it is interested, to file a statement of interest . . . ." (citing 28 U.S.C. § 517)).

[2] The United States does not address the parties' other claims or arguments.

II. BACKGROUND

In 2013, the Borough adopted its current Zoning Code, which divides the Borough into eight districts. Clarion, Pa., General Code §§ 210-1, 210-9(A).[3] Each district provides for uses permitted by right, by special exception, and by conditional use. *Id.* §§ 210-13(B)–210-20(B). Special exception and conditional uses require discretionary approval from the Zoning Hearing Board and Borough Council, respectively. *Id.* §§ 210-11, 210-67(B), 210-72. Permitted uses do not require discretionary approval. *See, e.g.*, *id.* §§ 210-13(B)–210-20(B) (referring to uses "permitted by right"). If a zoning district does not permit a use, or allow it conditionally or by special exception, the only way to obtain approval for that use is by applying for a use variance from the Zoning Hearing Board. *Id*. § 210-67(A)(2)–(3). Use variances are "available [o]nly on narrow grounds." *Appeal of Girsh*, 263 A.2d 395, 396–97 (Pa. 1970). To obtain one, an applicant must satisfy numerous discretionary and subjective criteria, such as showing that the use will not alter the "essential character of the district or neighborhood" and that the property (1) could not qualify for another permitted use in any district except at prohibitive expense or (2) "has either no value or only distress value." General Code § 210-67(A)(2)–(3).

The Zoning Code does not permit churches as of right, conditionally, or as a special exception in any of the Borough's three commercial districts, including in the C-2 Commercial

[3] In ruling on the Borough's Motion, the Court may consider sources of state and local law because they are "matters of public record." *Pension Ben. Guar. Corp. v. White Consol. Indus., Inc.*, 998 F.2d 1192, 1196 (3d Cir. 1993); *see Campbell v. Conroy*, 55 F. Supp. 3d 750, 754 n.3 (W.D. Pa. 2014) (considering city ordinance in deciding motion to dismiss); *Moore U.S.A., Inc. v. Standard Reg. Co.*, 139 F. Supp. 2d 348, 363 (W.D.N.Y. 2001) (noting that courts may consider "statutes, case law, . . . [and] city ordinances" in ruling on a motion to dismiss).

District ("C-2 District"). *Id.* § 210, Attach. 2:2–3.[4] The C-2 District, however, permits twenty other uses as of right, including "civic/cultural buildings," theaters, government offices, and day-care centers. *Id.* § 210, Attach. 2:2. "The purpose of the C-2 Commercial District is to accommodate retail and service uses where sufficient infrastructure exists and which is suitable for both pedestrian and vehicular traffic." *Id.* § 210-18(A).[5] Notably, the C-2 District contains four churches that predate the current Zoning Code. Am. Compl. ¶ 17.[6]

Hope Rising Community Church is a 600-person Christian congregation in Clarion, Pennsylvania, that has outgrown its current facility. *Id.* ¶¶ 7, 11. The Church can no longer worship together as "one body of believers," as required by its religious beliefs. *Id*. ¶¶ 10, 31, 53(a). In August 2024, the Church entered a purchase agreement to buy the property at 1141 East Main Street in the C-2 District so that it could convert it into a church. *Id.* ¶¶ 18–20. No other properties in Clarion fit the Church's needs for a religious facility. *Id*. ¶ 29.

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[4] Churches are a permitted use only in the Borough's single MU Mixed Use District and a conditional use in three residential districts. ECF No. 30-1 (Zoning Map) at 2; General Code § 210, Attach. 2:1–2.

[5] The Zoning Code does not define "service uses," but it defines "personal services" and "professional services and offices," which are specific types of uses in multiple districts. General Code § 210, Attach. 2:1–2. "Personal services" are "[f]requent or recurrent needed services of a personal nature which do not involve primarily retail sales of goods or professional services, including, as example, a hairdresser, barber, tailor, shoe repair or masseuse, but not including tattoo artists." General Code § 210-11. "Professional services and offices" are "[s]ervices recognized by the general public as the practice of a profession for gain and livelihood in a field subject to license or registration through and regulation by the laws of the commonwealth and requiring special knowledge, skill, education, training and expertise, including, as example, an accountant, architect, attorney, dentist, engineer, insurance agent, medical or osteopathic doctor, and surveyor, but not an artist or musician." *Id.*

[6] In accordance with Federal Rule of Civil Procedure 12(b)(6), the United States accepts the Plaintiff's factual allegations as true for purposes of this Statement of Interest. *See Blanyar v. Genova Prods. Inc.*, 861 F.3d 426, 431 (3d Cir. 2017).

After the Church entered the purchase agreement, a Borough official immediately informed the Church that it could not use the property as a church and that it would not be granted a variance. *Id.* ¶ 21. The next month, Borough officials repeated those comments to the Church's pastor, explaining they did not want more churches because of the loss of property taxes. *Id.* ¶¶ 23–24. At one point, the city manager said, "I hope you find a building outside the Borough, because we don't need any more Churches." *Id.* ¶ 24. The Church applied for a use variance in October 2024, and four days later, the zoning administrator rejected it as incomplete. *Id.* ¶¶ 25–26. Given the multiple statements of Borough officials and the zoning administrator's rejection, the Church determined that any further application for a use variance would be futile. *Id.* ¶¶ 21–27. The Church filed this lawsuit three weeks before its scheduled closing date of November 22, 2024. ECF No. 1, Compl.; Am. Compl. ¶ 28.

III. ARGUMENT

The Court should deny the Borough's Motion as to the Church's equal terms claim. The Amended Complaint plausibly alleges a facial equal terms claim under RLUIPA because the C-2 District excludes religious assembly uses while permitting nonreligious assembly uses like "theaters" and "civic/cultural buildings" even though these uses all similarly impact the zoning district's "regulatory purpose." *Lighthouse Inst. for Evangelism, Inc. v. City of Long Branch*, 510 F.3d 253, 264 (3d Cir. 2007). And because this claim is a facial attack on the Zoning Code, it is not subject to the prudential ripeness finality doctrine established in *Williamson County Regional Planning Commission v. Hamilton Bank*, 473 U.S. 172 (1985), *overruled in part on other grounds by Knick v. Twp. of Scott*, 588 U.S. 180 (2019).

The Church also has standing to bring its facial equal terms claim. It alleges a concrete injury in that the Borough's Zoning Code has stymied its efforts to buy and develop the only

suitable property for the Church in Clarion. And this injury is redressable. This Court could enjoin the Borough's enforcement of the allegedly unequal zoning provisions, which would substantially increase the likelihood that the Church can develop the property into a church, and may also award damages to the Church.

The case is not moot. Regardless of whether the Church is still under contract on the property, the Court can issue meaningful relief by enjoining the zoning provisions that violate RLUIPA's equal terms provision, which would allow the Church to proceed with its plan to develop a church. And even if injunctive relief were unavailable, the Church's claim for damages would not be moot.

A. The Church Has Stated a Facial Equal Terms Claim Under RLUIPA

Under RLUIPA's equal terms provision, "[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). In the Third Circuit, "a plaintiff asserting a claim under [this] provision must show (1) it is a religious assembly or institution, (2) subject to a land use regulation, which regulation (3) treats the religious assembly on less than equal terms with (4) a nonreligious assembly or institution (5) that causes no lesser harm to the interests the regulation seeks to advance." *Lighthouse*, 510 F.3d at 270. The Church has plausibly alleged each of these elements and has shown that the C-2 District prohibits religious assemblies while permitting nonreligious assemblies like "theaters" and "civic/cultural buildings" even though these uses all have a comparable impact on the stated purpose of the C-2 District.

In *Lighthouse*, the Third Circuit explained that a religious institution prevails on a RLUIPA equal terms claim by showing that "a secular comparator that is similarly situated as to

the *regulatory purpose of the regulation in question*" "enjoys better terms under the land-use regulation." *Id.* at 264 (emphasis added). The issue is not whether "there exists a secular comparator that *performs the same functions*," but whether the regulation "treats religious assemblies or institutions less well than secular assemblies or institutions that are similarly situated *as to the regulatory purpose*." *Id.* at 266 (first emphasis added). Stated another way, "if a land-use regulation treats religious assemblies or institutions on less than equal terms with nonreligious assemblies or institutions that are no less harmful to the governmental objectives in enacting the regulation, that regulation—without more—fails under RLUIPA." *Id*. at 269.

Key to this analysis is defining the "regulatory purpose of the regulation in question." *Id*. at 264. *Lighthouse* is instructive. There, a religious organization seeking to operate a church in the city's C-1 Central Commercial District challenged an older "Ordinance" regulating the district and the "Redevelopment Plan" that "superseded the Ordinance as the land use regulation applicable to the Property." *Id*. at 257–58. The Third Circuit looked only at the specific language of both the Ordinance and Redevelopment Plan to understand their regulatory purposes. *See id*. at 270, 272; *see also Hope Rising Cmty. Church v. Mun. of Penn Hills*, No. 15-cv-1165, 2015 WL 7720380, at *5 (W.D. Pa. Oct. 28, 2015) (examining the language of the "[t]he challenged Light Industrial District ordinance" under *Lighthouse*, and finding that "the City has failed to show how a religious institution would cause greater harm to the Light Industrial District and its objectives"), *report and recommendation adopted*, 2015 WL 7721252 (W.D. Pa. Nov. 30, 2015).

Here, the regulation in question is the "C-2 District," the district where the subject property is located. Am. Compl. ¶¶ 13–17, 19, 37–44. The C-2 District contains its own statement of purpose: "The purpose of the C-2 Commercial District is to accommodate retail and

service uses where sufficient infrastructure exists and which is suitable for both pedestrian and vehicular traffic." General Code § 210-18(A). Accordingly, the question is whether the Church has plausibly alleged that nonreligious assembly uses permitted in the C-2 District such as "theaters" and "civic/cultural buildings" cause no more harm to this stated purpose than religious assembly uses. *See Lighthouse*, 510 F.3d at 270. It has.

The Church alleges that theaters and civic/cultural buildings are comparable nonreligious assemblies. *See* Am. Compl. ¶¶ 37–38, 42. Civic/cultural buildings—places where civic and cultural associations can gather—are nonreligious assembly uses. *See Centro Familiar Cristiano Buenas Nuevas v. City of Yuma*, 651 F.3d 1163, 1171 & n.35, 1175 (9th Cir. 2011) (holding that zoning district, which excluded religious assemblies but permitted "secular membership assemblies" like "*civic* associations, social associations, fraternal associations, [and] political organizations," treated religious organization on "less than equal terms" (emphasis added and internal quotation marks omitted)).[7]

Theaters are also assembly uses, which courts have widely acknowledged to be comparable to religious assemblies because they have a similar impact on the stated zoning purpose. *See New Harvest Christian Fellowship v. City of Salinas*, 29 F.4th 596, 607–08 (9th Cir. 2022) (holding that "theatres . . . are similarly situated to religious assemblies with respect to the City's stated purpose and criterion"); *United States v. City of Troy*, 592 F. Supp. 3d 591, 605 (E.D. Mich. 2022) (holding that "places of worship must be treated on equal terms with nonreligious institutions that are similarly situated," such as "theatres, banquet centers[,] and

[7] Indeed, the Borough conceded that libraries are a type of civic/cultural building permitted as of right in the C-2 District. *See* ECF No. 35-3 at 55:3–14. Courts have found that libraries are valid secular comparators for RLUIPA equal terms claims. *See, e.g.*, *Opulent Life Church v. City of Holly Springs*, 697 F.3d 279, 293-94 (5th Cir. 2012) (finding that libraries were "nonreligious civic uses" and thus valid comparators for RLUIPA equal terms analysis).

similar assemblies" that have "similar impacts on traffic, safety[,] and neighboring properties"); *River of Life Kingdom Ministries v. Village of Hazel Crest*, 611 F.3d 367, 373 (7th Cir. 2010) (en banc) (explaining that a municipality seeking to maintain "regular . . . vehicular traffic" would be "require[d] . . . to allow the church in the zone with the movie theater" because both "generate[] groups of people coming and going at the same time"). Congress, in enacting RLUIPA, considered testimony concerning the differential treatment of theaters and places of worship as evidence of the need to protect religious land use as equal to secular uses. *See* H.R. Rep. No. 106-219, at 19 (1999) ("[T]heaters are often permitted as of right in zones where churches require a special use permit . . . ."). As the Ninth Circuit explained, theaters are comparable secular uses to houses of worship because they "are open only on certain days of the week and for certain portions of the day; they attract sporadic foot traffic around their opening hours; and while they have some regular patrons, they are also open to newcomers." *New Harvest Christian Fellowship*, 29 F.4th at 608. And in *Lighthouse*, the Third Circuit held that because "the Ordinance's aims [were] not well documented," and the ordinance excluded churches but permitted a variety of uses, including movie theaters, restaurants, retail stores, assembly halls, and government buildings, it violated RLUIPA's equal terms provision. 510 F.3d at 272–73.

Further, the Church plausibly alleges that civic/cultural buildings and theaters cause no lesser harm to the C-2 District's stated "service use," "infrastructure," and "traffic" interests than a church would. *See* Am. Compl. ¶¶ 37–38, 42. Churches "accommodate . . . service uses" just as much as theaters and civic/cultural buildings, and they do not inherently require any more "infrastructure" than these other assembly uses. Nor are they less suitable for "pedestrian and vehicular traffic." As the Third Circuit explained in *Lighthouse*, "it is not apparent from the allowed uses why a church would cause greater harm to regulatory objectives than" a

civic/cultural building or theater, for example, "that could be used for unspecified meetings," events, or gatherings. 510 F.3d at 272. Each involve "large groups of people" who "come and go at set times" for recurring events, services, shows, or movies. *Troy*, 592 F. Supp. 3d at 605; *see also Centro Familiar*, 651 F.3d at 1173 (finding that no "accepted zoning criteria justifies the exception of religious organizations in the as of right ordinance provision" when secular assembly uses are allowed (internal quotation marks omitted)).

The Third Circuit in *Lighthouse* did not—as urged by the Borough here—look beyond the specific zoning district at issue to *generic* governmental interests or to purported interests not "well-documented" in the challenged ordinance itself. *Lighthouse*, 510 F.3d at 272–73. For example, in its Opposition to the Church's Motion for a Preliminary Injunction, ECF No. 20 (which the Borough "incorporates by reference," Mot. at 8), the Borough argues that the C-2 District is intended "to provide the Borough's residents with a place to shop, eat, and consume entertainment" and "ensures that the Borough will not diminish its already low tax base." ECF No. 20 at 2. These alleged purposes do not appear anywhere in the C-2 District ordinance (or anywhere in the Zoning Code) and are therefore not legitimate "regulatory objectives" under *Lighthouse*. 510 F.3d at 272–73.[8] Indeed, the Zoning Code defines "district" as "[a] land area

[8] The Borough also argues that the Court should look to the Zoning Code's general purposes in Section 210-2 and community development objectives in Section 210-3(A), (C). *See* ECF No. 35-3 at 56:4–12; ECF No. 20 at 10. In addition to being contrary to *Lighthouse*'s specific "regulatory purpose of the regulation in question" inquiry, 510 F.3d at 264, the Borough's approach ignores that each zoning district has a specific "[p]urpose of district," *see* General Code §§ 210-13(A)–210-20(A), and renders them "superfluous," violating a "cardinal rule of statutory interpretation," *United States v. Williams*, 917 F.3d 195, 202 (3d Cir. 2019). If a municipality could simply select any general language from its zoning code, such as "promot[ing] . . . the general welfare," *see, e.g.*, General Code § 210-2(A)(1), to justify less than equal treatment of religious institutions, as the Borough argues, RLUIPA's equal terms provision and its directive that it be "construed in favor of a broad protection of religious exercise," 42 U.S.C. § 2000cc-3(g), would be meaningless.

with designated boundaries as indicated on the Zoning Map and within which *certain uniform requirements* apply under the provisions of this chapter." General Code § 210-11 (emphasis added and capitalization altered). Accordingly, the C-2 District's "uniform requirements"—its stated purpose and listed uses—are the "regulatory purpose" at issue.

In any event, the Borough's purported interests are belied by the text of the C-2 District. The C-2 District allows "government offices," "public utilities," "light warehousing," "rental storage buildings," and "dry cleaning and commercial laundry," *id.* § 210, Attach. 2:2—hardly the sort of places where residents "shop, eat or consume entertainment." *See Centro Familiar*, 651 F.3d at 1173 (rejecting city's "street of fun" zoning criterion because zoning district allowed jails and prisons); *see also Christian Fellowship Centers of New York, Inc. v. Vill. of Canton*, 377 F. Supp. 3d 146, 157, 159 (N.D.N.Y. 2019) (citing *Lighthouse* and holding that church's equal terms claim would likely succeed because many permitted uses did "not drive economic development or any other purpose a church would obstruct").

Further, the C-2 District does not support the Borough's purported tax generation argument, because it allows a host of non-tax revenue generating uses, like "government offices," "public utilities," and possible non-profit uses such as theaters and civic/cultural buildings.[9] *See Centro Familiar*, 651 F.3d at 1173 (rejecting purported tax revenue criterion because the zoning district in question "allows all sorts of non-taxpayers to operate as of right, such as the United States Postal Service, museums, and zoos" (footnotes omitted)); *see also*

[9] For example, the General Code defines "Charitable, Nonprofit Organizations" to "[i]nclude[] political, patriotic, religious, service, welfare, benevolent, educational, *civic* or fraternal corporations, organizations, associations, societies and the like, not organized for private gain." General Code § 157-1 (emphasis added and capitalization altered). The C-2 District contains no requirement that theaters and civic/cultural organizations must be tax revenue generating, and, in practice, many theaters and civic/cultural institutions are non-profit.

Christian Assembly Rios De Agua Viva v. City of Burbank, 237 F. Supp. 3d 781, 792 (N.D. Ill. 2017) ("On its face, the Prior Ordinance appears to treat similar assemblies on less than equal terms . . . because the secular institutions do not necessarily generate significant tax revenue and are non-commercial in nature.").[10]

Finally, the Borough's argument that the Church "could have been considered as a civic/cultural building if they went through the proper procedure," Mot. at 9, underscores the facial inequality of the C-2 District.[11] According to the Borough, the "proper procedure" was a "use variance" or a "petition to the Zoning Hearing Board." *Id*. But in the C-2 District, a theater or civic/cultural building is not required to obtain a use variance or petition the Zoning Hearing Board to operate. Those uses are permitted as of right. That is textbook unequal treatment. *See Opulent Life Church,* 697 F.3d at 293–94 (requirement that churches—but not nonreligious institutions like libraries, museums, and art galleries—"obtain discretionary approval from the mayor and Board of Aldermen" "plainly violated the Equal Terms Clause" and "[was] unlawful under RLUIPA"); *Troy*, 592 F. Supp. 3d at 606 (prima facie equal terms case established because of "requirement that places of worship apply for and obtain a special permit to operate in the City's Community Facilities district" while "institutions such as fine and performing arts

[10] The Borough's appeal to *River of Life Kingdom Ministries*, *see* ECF No. 20 at 15–16, is similarly unavailing. Even under the Seventh Circuit's test—whether religious and nonreligious uses are treated equal as a function of the "accepted zoning criterion," *River of Life*, 611 F.3d at 371—the Church has still stated an equal terms claim. The Borough has not identified any accepted zoning criterion that justifies the unequal treatment. Moreover, the *River of Life* Court explained that a purported commercial district allowing secular assembly uses that "do not generate significant taxable revenue or offer shopping opportunities," but prohibiting religious uses, like the C-2 District does here, would result in an equal terms violation and "an easy victory" for a church. *Id.* at 373–74.

[11] Of course, if the Borough was willing to stipulate that the Church is, in fact, a "civic/cultural building," litigation over the legality of the C-2 District could be obviated.

facilities, recreational facilities, and primary, secondary, and post-secondary schools" are "permitted by right"); *United States v. Bensalem Twp.*, 220 F. Supp. 3d 615, 621 (E.D. Pa. 2016) (allegation that zoning district permitted secular uses but required a "use variance" "for a religious purpose" supported plaintiff's RLUIPA equal terms claim).

B. The Church's Facial Equal Terms Claim is Not Subject to the Finality Doctrine

In *Williamson County*, the Supreme Court held that an as-applied takings claim "is not ripe until the government entity charged with implementing the regulations has reached a final decision regarding the application of the regulations to the property at issue." 473 U.S. at 186. The Borough appears to concede that *Williamson County*'s finality rule does not apply to facial challenges. *See* Mot. at 5 ("Defendant observes that this may not be needed for a facial challenge."). In case there was any doubt, numerous courts, including the Third Circuit, have held that facial challenges raising RLUIPA or the First Amendment are not subject to the finality doctrine. *See Opulent Life Church*, 697 F.3d at 287 (noting that the finality requirement "presents no barrier . . . to *facial* challenges" in a RLUIPA equal terms case); *Peachlum v. City of York*, 333 F.3d 429, 438 (3d Cir. 2003) (holding that a facial First Amendment challenge is not subject to the finality doctrine); *Cty. Concrete Corp. v. Town of Roxbury*, 442 F.3d 159, 166 (3d Cir. 2006) ("*Williamson*'s finality rule only applies to as-applied challenges . . . and not to facial due process claims." (citing *Taylor Inv., Ltd. v. Upper Darby Twp.*, 983 F.2d 1285, 1294 n.15 (3d Cir. 1993))). And although the Borough suggests that many of the Church's claims function as applied challenges, *see* Mot. at 5, the Church's RLUIPA equal terms claim springs from the language of the Zoning Code itself, *see* Am. Compl. ¶¶ 32–46. It is therefore a facial challenge.

C. The Church Has Standing to Bring its Facial Equal Terms Claim

Article III standing requires a plaintiff to establish that they have suffered a "concrete, particularized injury-in-fact"; that injury is "fairly traceable to the challenged action of the defendant"; and that injury is redressable by a favorable decision. *Toll Bros. v. Twp. of Readington*, 555 F.3d 131, 137–38 (3d Cir. 2009) (quoting *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992)). The Borough challenges the injury and redressability elements, *see* Mot. at 6–7, both of which the Church's Amended Complaint satisfies.

First, the Church alleges that it suffered a concrete injury-in-fact. "There is no known land . . . available for [the Church] to build or use in Clarion other than the property" at issue. Am. Compl. ¶ 29. The Church alleges that it contracted to buy, and cannot close on, the property without obtaining zoning approval. *Id.* ¶¶ 20, 28. The Church also alleges that the unequal provision in the C-2 District entitles it to damages and attorney's fees. *Id*. ¶ 46. Plaintiff has thus plausibly alleged that the Borough's Zoning Code prevents the Church from using the property to accommodate its religious needs, inflicting a concrete injury.[12] *See Toll Bros*., 555 F.3d at 142–43 (holding that plaintiff, who had option to purchase property, had standing to challenge zoning restrictions that barred planned development).

Second, this Court can redress the Church's injury by enjoining the *Borough's* enforcement of the allegedly unequal provisions of the C-2 District, which "would tangibly

[12] The Court should construe the Borough's standing and mootness arguments as facial (and not factual) attacks. The Borough has "not answered" the Amended Complaint, the parties have "not engaged in discovery," and this is the Borough's first motion to dismiss. *Askew v. Trustees of Gen. Assembly of Church of the Lord Jesus Christ of the Apostolic Faith Inc*., 684 F.3d 413, 417 (3d Cir. 2012). If the Court construes the Borough's standing challenge as a factual attack and looks beyond the pleadings, testimony from the preliminary injunction hearing establishes that the Church signed a purchase agreement for the property. *See* ECF No. 35-3 at 27:10–16, 29:24–25; *see also* ECF No. 45-2 (signed purchase and sale agreement).

improve the chances" of the Church building a religious facility at 1141 East Main Street. *Id.* at 143 (quoting *Huntington Branch, NAACP v. Town of Huntington*, 689 F.2d 391, 395 (2d Cir. 1982)). The Borough Council adopted the Zoning Code and may amend or repeal it. *See* General Code §§ 1-1; 1-10; 210, Attach. 2:1; 210-1; *see also* 53 Pa. Stat. § 10601 ("The governing body of each municipality . . . may enact, amend and repeal zoning ordinances . . . ."). Contrary to the Borough's argument, "[t]he cooperation of the . . . Zoning Hearing Board is not required to effectuate a remedy under RLUIPA" because the Borough "has the authority to enforce (or decline to enforce) the zoning ordinances" and to "amend the zoning ordinances at issue." *Bensalem*, 220 F. Supp. 3d at 620; *see also Bikur Cholim, Inc. v. Vill. of Suffern*, 664 F. Supp. 2d 267, 287 (S.D.N.Y. 2009) ("[W]here a plaintiff seeks to enjoin enforcement of a zoning decision, courts have upheld the naming of only the town as defendant and not the appropriate zoning board."); *cf. Hovsons v. Twp. of Brick*, 89 F.3d 1096, 1100, 1106 (3d Cir. 1996) (although local zoning board was also a defendant in Fair Housing Act case, Third Circuit enjoined only the township "from interfering with the construction of the nursing home facility").[13]

D. The Church's Facial Equal Terms Claim is Not Moot

The Borough is wrong that the Church's request for injunctive relief on its facial equal terms claim is moot because the closing date alleged in the Amended Complaint has passed. *See* Mot. at 7. "A case becomes moot 'only when it is impossible for a court to grant any effectual relief whatever to the prevailing party.'" *Delaware Riverkeeper Network v. Sec'y Pennsylvania Dep't of Env't Prot.*, 833 F.3d 360, 374 (3d Cir. 2016) (quoting *Decker v. Nw. Env't Def. Ctr.*, 568

[13] The Court can also redress the Church's injuries through awarding damages, costs, and attorney's fees. *See Lutter v. JNESO*, 86 F.4th 111, 128 (3d Cir. 2023) ("Lutter's claim for compensatory damages against JNESO is redressable. Damages, which operate as a '*substitute* for a suffered loss,' are a recognized form of judicial redress for past injuries." (quoting *Bowen v. Massachusetts*, 487 U.S. 879, 895 (1988))).

U.S. 597, 609 (2013)). "When a court can fashion some form of meaningful relief or impose at least one of the remedies enumerated by the [plaintiff], even if it only partially redresses the grievances of the prevailing party, the case is not moot." *Id*. (internal quotation marks omitted).

As alleged in the Amended Complaint, the Church intends to develop 1141 East Main Street into a church facility and entered into a purchase agreement to do so. Am. Compl. ¶¶ 18, 20. There is nothing on the record to suggest that the Church has changed course or that the property is no longer available.[14] While the Borough argues that the Church "failed to aver that [the] closing date has been moved or that they still seek to purchase the property," Mot. at 7, the Borough "bears the burden to establish that a once-live case has become moot," *West Virginia v. EPA*, 597 U.S. 697, 719 (2022), which it has failed to do. As discussed above, an order by the Court enjoining the unequal provisions of the C-2 District would "tangibly improve the chances" of the Church building its religious facility. *Toll Bros.*, 555 F.3d at 143 (citation and internal quotation marks omitted).

Nor is the Church's request for damages on its facial equal terms claim moot. *See* Am. Compl. ¶ 46; *id*. at 20. "A case is saved from mootness if a viable claim for damages exists." *Khodara Env't, Inc. ex rel. Eagle Env't L.P. v. Beckman*, 237 F.3d 186, 196 (3d Cir. 2001) (internal quotation marks omitted); *see Lighthouse*, 510 F.3d at 260 (plaintiff's facial claim for damages under RLUIPA was not moot despite ordinance being amended); *see also Donovan v. Punxsutawney Area School Bd*., 336 F.3d 211, 218 (3d Cir. 2003) (holding that although plaintiff's claim for declaratory and injunctive relief was moot, her "damages and attorney's fees

[14] If the Court construes the Borough's mootness challenge as a factual attack and looks beyond the pleadings, an affidavit from the Church's pastor establishes that "the property remains available to buy" and the Church "can secure a loan to purchase 1141 [East] Main Street, if[] the zoning allows religious assembly uses." ECF No. 45-3 ¶ 17.

claims continue[d] to present a live controversy"); *Bais Brucha Inc. v. Twp. of Toms River*, No. 21-cv-3239, 2024 WL 863698, at *4 (D.N.J. Feb. 29, 2024) (holding that despite amendment of land use regulations, plaintiffs' claim for damages as to facial challenge under RLUIPA was not moot); *Khal Anshei Tallymawr, Inc. v. Twp. of Toms River*, No. 21-cv-2716, 2021 WL 5757404, at *6 (D.N.J. Dec. 3, 2021) (holding that plaintiff's "claims for damages save from mootness [its] facial First Amendment and RLUIPA challenges" (internal quotation marks and alteration omitted)). Because the Church has plausibly alleged a RLUIPA equal terms claim, it has also pled a viable claim for damages. Accordingly, the case is not moot.

IV. CONCLUSION

For the reasons stated above, the United States respectfully requests that the Court consider its views and deny the Borough's Motion with respect to the Church's facial equal terms claim under RLUIPA.

Dated: March 3, 2025

RESPECTFULLY SUBMITTED,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the attached document was duly served on all counsel of record on March 3, 2025, by electronically filing the document with the Clerk's Office using the CM/ECF System for filing.

/s/ Jonathan Ostrowsky