Case No. 17-11820

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

GERALD GAGLIARDI AND KATHLEEN MACDOUGALL,

Plaintiffs-Appellants,

v.

CITY OF BOCA RATON, FLORIDA,

Defendant-Appellee,

and

CHABAD OF EAST BOCA, INC. AND TJCV LAND TRUST,

Intervenors-Appellees.

On Appeal from the United States District Court
for the Southern District of Florida

BRIEF OF *AMICI CURIAE* THE UNION OF ORTHODOX JEWISH CONGREGATIONS OF AMERICA, THE RABBINICAL COUNCIL OF AMERICA, THE CHABAD-LUBAVITCH WORLD HEADQUARTERS, AND AGUDATH ISRAEL OF AMERICA IN SUPPORT OF APPELLEES AND AFFIRMANCE

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RULE 26.1 CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure and Rule 26.1-1(a)(1) of the Eleventh Circuit Rules, *amici curiae* each state they have no parent corporation and that no publicly held corporation owns any part of them.

RULE 26.1-1 CERTIFICATE OF INTERESTED PERSONS

Pursuant to Rules 26.1-1(a)(1), 26.1-2, and 28-1(b) of the Eleventh Circuit Rules, *amici* curiae incorporate by reference and adopt the lists of individuals and entities named in the Certificates of Interested Persons found in the briefs of the Plaintiffs-Appellants, Defendant-Appellee, and Intervenor-Appellee. In addition, *amici* add the following individuals and entities, and hereby certify that, to the best of their knowledge, the following list of interested persons, when combined with the parties' Certificates incorporated herein by reference, is a complete list of all trial judges, attorneys, persons, associations of persons, firms, partnerships, or corporations that have an interest in the outcome of this appeal:

Agudath Israel of America.

Coleman, Miles E., Nelson Mullins Riley & Scarborough, LLP.

Dershowitz, Alan M.

Dolin, Gregory, University of Baltimore School of Law.

Jews for Religious Liberty.

Slugh, Howard.

The Chabad-Lubavitch World Headquarters

The Rabbinical Council of America.

The Union of Orthodox Jewish Congregations of America.

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INTEREST OF *AMICI CURIAE*[1]

The Union of Orthodox Jewish Congregations of America, the Rabbinical Council of America, the Chabad-Lubavitch World Headquarters, and Agudath Israel of America respectfully submit this brief as *amici curiae* in support of Defendant-Appellee the City of Boca Raton and Intervenor-Appellee the Chabad of East Boca, Inc.

The **Union of Orthodox Jewish Congregations of America** ("Orthodox Union") is the nation's largest Orthodox Jewish synagogue organization, representing nearly 1,000 congregations across the Nation. The Orthodox Union advocated for and assisted in the development and passage of the Religious Land Use and Institutionalized Persons Act ("RLUIPA"), the statute at issue in this appeal. In addition, the Orthodox Union has participated as *amicus curiae* in many appeals that, like this one, raise issues of importance to the Orthodox Jewish community. Through *amicus curiae* briefs, the Orthodox Union seeks to inform courts of the perspective of our community and the impact a ruling will have.

[1] *Amici curiae* submit this brief accompanied by a motion for leave of the Court pursuant to Federal Rule of Appellate Procedure 29(a)(2). Counsel for *amici curiae* state pursuant to Federal Rule of Appellate Procedure 29(a)(4)(E) that no counsel for a party authored this brief in whole or in part, and no person other than *amici curiae*, their members, or their counsel made a monetary contribution to its preparation or submission.

The **Rabbinical Council of America** ("RCA") plays an integral role in Jewish life around the world. The 1,000 members of the RCA serve as congregational rabbis, community organizers, academics, youth and outreach professionals, and chaplains in the military, prisons, and health care systems. The RCA was active in the United States Civil Rights movement and fought for the legal accommodation of Shabbat observance in the United States. In addition, the RCA's members build and sustain Jewish schools, synagogues, and centers throughout the United States, and the RCA often represents North American Orthodox Jewry in its relations with American government officials and other bodies.

The **Chabad-Lubavitch World Headquarters** ("Chabad-Lubavitch") is an organization representing the Chabad-Lubavitch movement, a branch of Hasidic Judaism concerned with the totality of Jewish life, spiritual and physical. Today over 4,500 full-time emissary families apply 250-year-old principles and philosophy to direct more than 3,500 institutions dedicated to the welfare of the Jewish people worldwide. The Chabad-Lubavitch encourages and seeks to assist in the expansion of activities in existing Chabad Houses and the establishment of new Chabad Houses wherever Jews live throughout the nation.

Agudath Israel of America was founded in 1922 to serve as Orthodox Jewry's umbrella organization in the United States, uniting a diverse cross section of leading Orthodox rabbis, activists, philanthropists, and everyday community members. Over the past 95 years, Agudath Israel of America has worked to strengthen Jewish communities, strengthen religious education and Torah learning for adults, engage in government and legal advocacy, provide comprehensive community based social services, and inspire Jewish youth. Agudath Israel played an active role in the passage of RLUIPA. Agudath Israel of America is keenly attuned to the American Jewish community's challenges and triumphs, and has helped our communities grow, thrive, and advance through changing times.

Amici have substantial knowledge, training, and first-hand experience in the challenges, obstacles, biases, and prejudices that often face Jews and other minority religious groups. Accordingly, *amici* are committed to advocating for religious pluralism and acceptance, combatting hostility and animus like that directed at the Chabad of East Boca, and vigorously asserting the constitutional and statutory rights that permit and protect religious exercise and equality.

STATEMENT OF THE ISSUES ON APPEAL

Amici incorporate by reference and adopt the Statement of Issues articulated in the brief of Intervenor-Appellee the Chabad of East Boca, Inc. *See* Intervenor-Appellee's Brief at 5.

SUMMARY OF THE ARGUMENT

This Court should affirm the District Court's ruling dismissing the suit. Even assuming Plaintiffs had standing to bring their suit (and they assuredly do not), their claims would inevitably fail on the merits. Plaintiffs argue the City's decision to amend its zoning regulations to place the Chabad of East Boca ("the Chabad") on equal footing with other groups violated the Establishment Clause.[2] But Plaintiffs' reliance on the Establishment Clause is completely misplaced. The City of Boca Raton did not establish orthodox Judaism as the city religion when it enacted an equal access ordinance that ended the city's previously discriminatory zoning regulations and permitted all houses of worship the same land use rights that are afforded to secular entities.

Contrary to Plaintiffs' claim, the city's current policy of giving even-handed treatment to religious and non-religious groups is a textbook

[2] Although Plaintiffs' Amended Complaint also asserted Equal Protection and Due Process claims, their appellate briefing fails to discuss or support those claims beyond a single, conclusory paragraph devoid of any authority. Accordingly, those claims are abandoned on appeal. *See Sepulveda v. U.S. Att'y Gen.*, 401 F.3d 1226, 1228–29 n.2 (11th Cir. 2005) (per curiam) (holding a party abandons claims on appeal that are not argued in his or her brief). Furthermore, to the extent Plaintiffs' Amended Complaint challenged the City's approval of a specific building site plan, *amici* agree with Intervenor-Appellee that Plaintiffs' challenge to the site plan is moot. Only the Establishment Clause remains at issue.

example of *compliance* with the First Amendment's and RLUIPA's protection of the rights of religious groups—especially minority religious groups—to exercise their religion free from government oppression, exclusion, animus, or discrimination. Indeed, the virulent and ugly opposition the Chabad has encountered over the past few years aptly illustrates the need for such constitutional and statutory safeguards to ensure minority religious groups are given equal property and land use rights as other religious groups and secular entities. The fact that the city made such an accommodation does not establish a municipal creed nor does it promote one religion over others or over non-religion.

Lawsuits like this one—if not summarily dismissed—subvert the protections of the First Amendment and RLUIPA by disincentivizing cities from giving equal treatment to houses of worship, and would inundate federal courts with suits purporting to raise First Amendment claims but which, in reality, merely seek to impose an additional layer of federal court review to unpopular local zoning decisions. Accordingly, *amici* respectfully urge this Court to affirm the District Court's ruling.

ARGUMENT

Plaintiffs' lawsuit turns the First Amendment on its head, arguing the Establishment Clause forbids the City of Boca Raton from making religious accommodations that are, in fact, constitutionally *required*. Neither this distorted view of the Constitution nor the other animus directed at the Chabad have any legal or moral justification, and this Court should afford them no further opportunity to disrupt and delay the city's and the Chabad's constitutionally permissible actions.

I. The First Amendment's religion clauses, like RLUIPA, are especially meant to permit, not inhibit, the religious exercise of minority religious groups.

Plaintiffs' suit is premised on the erroneous assertion that the Establishment Clause prohibits the City of Boca Raton from giving the Chabad (and other religious groups) the same land use rights available to secular entities. This argument, however, misunderstands the First Amendment's plain language and ignores more than 200 years of consistent understanding that the Establishment Clause requires the government's accommodation of minority religious groups. Indeed, since the earliest days of the Republic, the First Amendment was understood to provide particular solicitude to minority religious groups including

Jews. As President Washington noted in his letter to a Jewish congregation, the Constitution gives minority groups full and equal standing and will not tolerate religious bigotry and animus:

> The Citizens of the United States of America have a right to applaud themselves for having given to mankind examples of an enlarged and liberal policy: a policy worthy of imitation. *All possess alike liberty of conscience and immunities of citizenship*. It is now no more that toleration is spoken of, as if it was by the indulgence of one class of people, that another enjoyed the exercise of their inherent natural rights. For happily the Government of the United States, *which gives to bigotry no sanction, to persecution no assistance* requires only that they who live under its protection should demean themselves as good citizens, in giving it on all occasions their effectual support.
>
> It would be inconsistent with the frankness of my character not to avow that I am pleased with your favorable opinion of my Administration, and fervent wishes for my felicity. May the Children of the Stock of Abraham, who dwell in this land, continue to merit and enjoy the good will of the other Inhabitants; while every one shall sit in safety under his own vine and figtree, and there shall be none to make him afraid. May the father of all mercies scatter light and not darkness in our paths, and make us all in our several vocations useful here, and in his own due time and way everlastingly happy.

George Washington, Letter to the Jewish community of Newport, Rhode Island, August 18, 1790, https://founders.archives.gov/documents/Washington/05-06-02-0135.

This constitutional protection of minority religious groups arises from *both* of the First Amendment's religion clauses, and courts have expressly recognized that the Establishment Clause—acting in harmony with the Free Exercise Clause—is intended to promote, not inhibit, the flourishing of minority religions. *See*, *e.g.*, *Goldman v. Weinberger*, 475 U.S. 503, 524 (1986) (Brennan, J., dissenting) ("A critical function of the Religion Clauses of the First Amendment is to protect the rights of members of minority religions against quiet erosion by majoritarian social institutions that dismiss minority beliefs and practices as unimportant, because unfamiliar."); *Lynch v. Donnelly*, 465 U.S. 668, 701 (1984) ("The effect on minority religious groups . . . is to convey the message that their views are not similarly worthy of public recognition nor entitled to public support. It was precisely this sort of religious chauvinism that the Establishment Clause was intended forever to prohibit."); *Illinois v. Board of Educ.*, 333 U.S. 203, 231 (1948) (holding that the protection of minority groups is a crucial goal of the first

amendment religion clauses); *Newdow v. U.S. Cong.*, 313 F.3d 500, 505 (9th Cir. 2002) ("Just as the foundational principle of the Freedom of Speech Clause in the First Amendment tolerates unpopular and even despised ideas, so does the principle underlying the Establishment Clause protect unpopular and despised minorities from government sponsored religious orthodoxy tied to government services."); *Graham v. Cent. Cmty. Sch. Dist. of Decatur Cty.*, 608 F. Supp. 531, 537 (S.D. Iowa 1985) ("The Constitution protects all of us, including those who are in the minority. Indeed, First Amendment rights (religion, speech, press, peaceable assembly and petitioning for redress of grievances) would be meaningless if they were not available to minorities."); *Lemke v. Black*, 376 F. Supp. 87, 89 (E.D. Wis. 1974) ("Perhaps the most obvious purpose of the religion clause of the First Amendment was to protect the rights of religious minorities.").[3]

[3] *See also* Thomas C. Berg, *Minority Religions and the Religion Clauses*, 82 WASHINGTON UNIV. L. QUARTERLY 919 (2004); Stephen M. Feldman, *Religious Minorities and the First Amendment: The History, the Doctrine, and the Future*, 6 U. PA. J. CONST. L. 222 (2003); Samuel J. Levine, *Toward a Religious Minority Voice: A Look at Free Exercise Law Though a Religious Minority Perspective*, 5 WM. & MARY BILL RTS. J. 153 (1996); Roman P. Storzer and Anthony R. Picarello, Jr., *The Religious Land Use and Institutionalized Persons Act of 2000: A Constitutional Response to Unconstitutional Zoning Practices*, 9 GEO. MASON L. REV. 929, 941 (2001).

Just this past term, the Supreme Court reiterated that the First Amendment requires that generally available public benefits must be made available to religious entities on the same terms as secular entities. *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012 (June 26, 2017). The church in *Trinity Lutheran*, like the Chabad in Boca Raton, was "not claiming any entitlement to a subsidy" or other special treatment. *Id.* at 2022. Rather, the church in *Trinity Lutheran* merely sought to be placed on equal footing with secular groups to compete for a grant without being disqualified due merely to its religious status. *Id.* Here too, the Chabad has not sought or received any preferential treatment, but merely was given the same land use rights given to secular groups. The *Trinity Lutheran* holding teaches that this result is not only permitted by the First Amendment, but is required by it. *See id.* at 2019 (noting the parties agreed the participation of religious entities in the grant program was permissible under the Establishment Clause); *id.* at 2025 ("The State has pursued its preferred policy to the point of expressly denying a qualified religious entity a public benefit solely because of its religious character. Under our precedents, that goes too far. The Department's policy violates the Free Exercise Clause."). Here too,

the City of Boca Raton's equal treatment of religious groups like the Chabad and secular groups is not only permissible, but required.

In contrast to this long-standing and well-established understanding of the First Amendment, Plaintiffs argue that while the Free Exercise Clause may provide religious groups with some degree of equal access and protection, the Establishment Clause, in seeming dissonance, limits that equality in the land use context. *See* Plaintiffs-Appellants' Brief at 16 (arguing "the Establishment Clause is not a duplicate of the Free Exercise Clause but rather establishes distinct and other obligations on the government" and arguing the lower court erred by treating the two religion clauses as harmonious to one another). But as this Court has previously recognized, the religion clauses speak in unison and demand the government accommodate religious groups and place them on equal footing with non-religious groups:

> We agree with Justice O'Connor's observation that "the Religion Clauses—the Free Exercise Clause, the Establishment Clause, the Religious Test Clause, . . . and the Equal Protection Clause as applied to religion—all speak with one voice on this point: Absent the most unusual circumstances, one's religion ought not affect one's legal rights or duties or benefits." . . . [T]o deny equal treatment to a [religious organization] on the grounds that it conveys religious ideas is to

> penalize it for being religious. Such unequal treatment is impermissible based on the precepts of the Free Exercise, Establishment and Equal Protection Clauses.

Midrash Sephardi, Inc. v. Town of Surfside, 366 F.3d 1214, 1239 (11th Cir. 2004) (quoting *Bd. of Educ. of Kiryas Joel Village Sch. Dist. v. Grumet*, 512 U.S. 687, 715 (1994) (O'Connor, J., concurring)).

Similarly, the Religious Land Use and Institutionalized Persons Act ("RLUIPA") echoes the First Amendment's goal of preserving and protecting the rights of minority and disfavored religious groups. *Salazar v. Buono*, 559 U.S. 700, 728–29 (2010) (Alito, J., concurring) (noting that, in enacting RLUIPA, "Congress has shown notable solicitude for the rights of religious minorities"); Enrique Armino, *Belief Behind Bars: Religious Freedom in Prison, RLUIPA, and the Establishment Clause*, 31 NEW ENGLAND J. ON CRIM. & CIV. CONFINEMENT 297, 318–22 (2005) ("[I]n both its formulation and application, RLUIPA seeks first to protect minority religious practices. . . . It is hardly a coincidence that most claims brought by prisoners, first under RFRA and then under RLUIPA, have involved prisoners practicing minority religions," which "implies that RLUIPA works to protect the religious liberty of those individuals

practicing minority religions, which under any interpretation is one of the major premises of the Establishment Clause") (citations omitted).

The essence of the Plaintiff's claim—that the equal treatment of religious groups and individuals required by RLUIPA violate the Establishment Clause—has already been rejected by the Supreme Court in the prison context. *See Cutter v. Wilkinson*, 544 U.S. 709, 720 (2005) (explaining that RLUIPA's prisoner provision is "compatible with the Establishment Clause because it alleviates exceptional government-created burdens on private religious exercise"). The same reasoning applies in the land use context and leads to a similar result.

In sum, the Plaintiffs' argument that the Establishment Clause forbids a city from giving houses of worship the same land use rights that are afforded to secular entities is hopelessly misguided and inverts the well-established purpose and interpretation of the First Amendment's religion clauses and RLUIPA.

II. The opposition to the Chabad reflects a troubling rise in religious animus generally and anti-Semitism specifically.

From before the nation's founding to the present day, the vast majority of the American people have been and continue to be accepting of and welcoming to a broad and diverse spectrum of ethnicities,

religions, and viewpoints. The recent opposition to the Chabad, however, occurs amidst a larger context in which a small but vocal minority of the populous are increasingly open in their opposition to religion generally and Jews particularly. *See generally Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 369 (1978) (considering societal context in determining the history of particular discriminatory actions against a minority).

To be abundantly clear, *amici* do not ascribe anti-Semitic bias to Plaintiffs or to the overwhelming majority of Americans and South Floridians. But the opposition faced by the Chabad in recent years has unquestionably included a strand of racial and religious prejudice. *See* Plaintiffs-Appellant's Brief at 5 (noting that "neighbors strongly opposed the project to the point of religious animus"). Furthermore, as explained below, the allegations and legal theories asserted in Plaintiffs' lawsuit reflect—perhaps unintentionally—an opposition to religion generally that has no place in a pluralistic and tolerant society.

A. Religious animus and anti-Semitism are on the rise across the nation and in South Florida.

Religious animus generally, and anti-Semitism particularly, are undeniably on a troubling increase across the nation. *See* Alan Dershowitz, *A new tolerance for anti-Semitism*, Fox News (June 9, 2017),

http://www.foxnews.com/opinion/2017/06/09/dershowitz-new-tolerance-for-anti-semitism.html. In recent years, anti-Semitism has become increasingly accepted, and those who would normally oppose many forms of bigotry such as racism or sexism will tolerate the anti-Semitic views of those who also promote other views that are deemed acceptable. *Id.*

Accordingly, it is not altogether surprising—though nonetheless deeply disconcerting—that incidents of crimes targeting Jews in the United States are also on the rise. *See* FBI Uniform Crime Reporting Hate Crime Statistics, https://ucr.fbi.gov/hate-crime (last visited July 12, 2017) (noting crimes motivated by anti-Semitic bias increased nine percent from 2014 to 2015, the most recent years reported); *see also Responses to Increase in Religious Hate Crimes: Hearings Before the S. Judiciary Comm.*, 115th Cong. 4 (2017) [hereinafter *Hearings*] (statement of Jonathan A. Greenblatt, CEO and National Director, Anti-Defamation League), https://www.judiciary.senate.gov/download/05-02-17-greenblatt-testimony (last visited July 12, 2017) ("[A]nti-Semitic incidents in the U.S.—assaults, vandalism, and harassment— increased by more than one-third in 2016."); Doug Criss & Carma Hassan, *Anti-Semitic incidents rose a whopping 86% in the first 3 months of 2017*, CNN

(Apr. 24, 2017), http://www.cnn.com/2017/04/24/us/antisemitic-incidents-reports-trnd/ (noting the number of anti-Semitic attacks and threats in the United States between January and March of 2017 was 86% higher than the same period in 2016).

Moreover, crimes targeting Jews account for the overwhelming majority of religious-based hate crimes, though Jews constitute less than three percent of Americans. *Hearings*, *supra*, at 5; FBI Uniform Crime Reporting Hate Crime Statistics, https://ucr.fbi.gov/hate-crime/2015/tables-and-data-declarations/1tabledatadecpdf (last visited July 12, 2017) (noting anti-Jewish hate crimes accounted for more than 50% of the hate crimes motivated by religious bias in 2015). In fact, Jews have been the most targeted religious minority in America *every* year since the FBI began collecting data in 1992. *Hate Crime*, FBI, https://ucr.fbi.gov/hate-crime (follow various years' hyperlinks, then view tables from publication) (last visited July 12, 2017); Aneri Pattani & Elizabeth Levi, *How Hate-Crime Data Reveal Surprising Trends in American Anti-Semitism*, Northeastern Univ. (Apr. 26, 2017), http://www.northeastern.edu/rugglesmedia/2017/04/26/hated-faiths-how-hate-crime-data-reveal-surprising-trends-in-american-anti-semitism/ ("FBI data show that Jews

have experienced the most hate crimes of any religious minority in America since collection began in 1992. They are the target of more than half of all reported religious hate crimes each year.").

South Florida is no exception to this troubling trend. The state of Florida has consistently ranked among the states with the most frequent anti-Semitic incidents. *See* Press Release, *ADL Finds That Anti-Semitic Incidents In Florida Spike In 2017 After Surging Last Year*, Anti-Defamation League (Apr. 24, 2017), http://florida.adl.org/news/pr-adl-finds-that-anti-semitic-incidents-in-florida-spike-in-2017-after-surging-last-year/. Verified anti-Semitic incidents in Florida increased 50% from 2015 to 2016, *id.*, compounding a 30% increase from 2014 to 2015, Press Release, *ADL Audit: Anti-Semitic Assaults Rise Dramatically Across the Country in 2015*, Anti-Defamation League (June 22, 2016), https://www.adl.org/news/press-releases/adl-audit-anti-semitic-assaults-rise-dramatically-across-the-country-in-2015.

For example, a prestigious private country club in South Florida has repeatedly discriminated against Jews, refusing for decades to add a single Jew to its rolls and subsequently refusing to accept other Jews. *See* Jess Bravin, *One Jewish Member's Acceptance Didn't Stop Anti-Semitism*

Debate, Wall St. J. (Feb. 28, 2001), https://www.wsj.com/articles/SB983312821253881279. In addition, Florida was the last large state prison system in the country to provide Kosher and halal meals, eventually doing so only under compulsion by this Court. *See United States v. Sec'y, Florida Dep't of Corr.*, 828 F.3d 1341, 1349 (11th Cir. 2016) (noting the state "fail[ed] to explain why the Department cannot offer kosher meals when the Federal Bureau of Prisons and other states do so").

In short, while the vast majority of Boca Raton's citizens and the entire City Council have been appropriately welcoming of the Chabad, the historical and social context surrounding the recent opposition faced by the Chabad evince a growing and increasingly strident fraction of Americans and South Floridians who are hostile towards Orthodox Jews. The First Amendment and RLUIPA forbid the government from participating in or lending its aid to such religious discrimination, and the City of Boca Raton's provision of equal land use rights to the Chabad was constitutionally and statutorily permissible.

B. Some of the opposition to the Chabad has been tainted by express and implied anti-Semitism.

Consistent with the national and regional rise in anti-Semitic views, the local community's opposition to the Chabad has been marked

by express and implied anti-Semitic actions and sentiments. Even Plaintiffs' pleadings admit religious animus motivated community opposition to the Chabad. *See* Dkt. No. 1 (Compl. ¶¶ 24, 55, 87); Dkt. No. 46 (Amend. Compl. ¶ 18). For example, in 2014, vandals broke and detached a concrete parking slab at the Chabad and used it to shatter the glass of the Chabad's door. Randall P. Lieberman, *Vandalism at Chabad of East Boca*, Sun Sentinel (Mar. 18, 2014), http://articles.sun-sentinel.com/2014-03-18/florida-jewish-journal/fl-jjps-vandalism-0326-20140318_1_vandalism-hate-crime-jewish-journal. In 2015, a man assaulted a rabbinical student of the Chabad, shouting he "should go back to Auschwitz" and that "Hitler was right." Randall P. Lieberman, *Chabad rabbinical student claims he was assaulted*, Sun Sentinel (Dec. 1, 2015), http://www.sun-sentinel.com/florida-jewish-journal/news/palm/fl-jjps-chabadeastboca-1202-20151201-story.html. In addition, an individual used email and social media to attack a Boca Raton Planning and Zoning committee member who supported plans for the relocation of the Chabad of East Boca. Brian Entin, *Boca Raton city leader says he experienced anti-Semitism after Synagogue vote*, WPTV NewsChannel 5 (Nov. 25,

2015), http://www.wptv.com/news/region-s-palm-beach-county/boca-raton/city-leader-says-he-experienced-anti-semitism-after-synagogue-vote.

In 2016, someone stole and destroyed mezuzahs that were attached to the exterior of the Chabad. *Chabad of East Boca Raton vandalized, mezuzahs destroyed*, Fox 29 WFLX TV (Apr. 18, 2016), http://www.wflx.com/story/31750022/chabad-of-east-boca-raton-vandalized-mezuzahs-destroyed. In 2017, an individual drew swastikas on a bathroom stall at a Boca Raton middle school. Jorge Milian, *Swastika found drawn in boys' bathroom at Boca middle school*, Palm Beach Post (Feb. 17, 2017), http://www.palmbeachpost.com/news/crime--law/new-swastika-found-drawn-boys-bathroom-boca-middle-school/MTMBZ7GcZmcHipv0VgCTZM/. In addition, an individual spray-painted a swastika on a black Ford Mustang parked in a largely Jewish Boca Raton neighborhood. *Id.*

C. Plaintiffs-Appellants' suit is inextricably bound up with religious animus generally.

Although neither the Plaintiffs nor their lawsuit have asserted any anti-Semitic views or arguments, their claims reflect an objection to religious buildings solely because they are religious. The entire gravamen of their Amended Complaint is inextricably bound up with the fact that the proposed land use is *religious* in nature. Each of Plaintiffs' claims is

tied to and dependent on their allegation of an Establishment Clause violation. Stated differently, the Plaintiffs could not (and most likely would not[4]) have asserted any of their claims if the proposed occupant of this parcel was a Bojangles, Piggly Wiggly, or other commercial establishment.

Although Plaintiffs (and other opponents of the Chabad) attempt to cloak some of their religious animus in benign terms, courts have long noted that religious bias in land use disputes often hides behind seemingly non-discriminatory justifications such as traffic concerns:

> Human experience teaches us that public officials, when faced with pressure to bar church uses by those residing in a residential neighborhood, tend to avoid any appearance of an antireligious stance and temper their decision by carefully couching their grounds for refusal to permit such use in terms of traffic dangers . . . . Under such circumstances it is necessary to most carefully scrutinize the reasons advanced for a denial to insure that they are real and not merely pretexts used to preclude the exercise of constitutionally protected privileges.

[4] *Amici* infer Plaintiffs would not object to a secular occupant of the tract of land at issue based on the fact that Plaintiffs apparently never objected to the prior occupant—a French restaurant—nor have they ever voiced any concern regarding the construction of other commercial establishments in the area or the presence of several 22-story high-rise condominiums not far away.

Am. Friends of Soc'y of St. Pius, Inc. v. Schwab, 68 A.D.2d 646, 649 (N.Y. App. Div. 1979).

The co-sponsors of RLUIPA—Senators Hatch and Kennedy—likewise recognized the inclination of local zoning officials and neighbors to disguise their opposition to a minority religion's house of worship behind seemingly non-discriminatory justifications:

> Sometimes, zoning board members or neighborhood residents explicitly offer race or religion as the reason to exclude a proposed church, especially in cases of black churches and Jewish shuls and synagogues. More often, discrimination lurks behind such vague and universally applicable reasons as traffic, aesthetics, or "not consistent with the city's land use plan." Churches have been excluded from residential zones because they generate too much traffic, and from commercial zones because they don't generate enough traffic. 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.
>
> The hearing record contains much evidence that these forms of discrimination are very widespread. Some of this evidence is statistical—from national surveys of cases, churches, zoning codes, and public attitudes. Some of it is anecdotal, with examples from all over the country. Some of it is testimony by witnesses with wide experience who say that the anecdotes are representative. This

> cumulative and mutually reinforcing evidence is summarized in the report of the House Committee on the Judiciary (House Rep. 106–219) at 18–24, in the testimony of Prof. Douglas Laycock to the Committee on the Judiciary 23–45 (Sept. 9, 1999), and in Douglas Laycock, *State RFRAs and Land Use Regulation*, 32 U.C. DAVIS L. REV. 755, 769–83 (1999).

146 Cong. Rec. 16698–99 (2000). Here, Plaintiffs do exactly what Senators Hatch and Kennedy predicted, masking their opposition to the Chabad in terms of seemingly benign concerns about traffic.[5] *See* Dkt. No. 46 (First Amend. Compl. ¶¶ 33, 35, 57, 72, 80, 81, 94); Appellants' Br. at 6–7, 17, 21 n.2. (In an irony apparently lost on Plaintiffs, practitioners of Orthodox Judaism generally *walk* to Sabbath services.) The plausibility of Plaintiffs' vehicular concerns, however, is belied by the fact that any slight uptick in traffic caused by the Chabad pales in comparison to that generated by the multiple and sizeable condominium and commercial establishments a mere stone's throw away. *Compare* Plaintiffs-Appellants' Brief at 7 and 20 (complaining that on one occasion

[5] An archived version of the now-defunct website of Save Boca Beaches—one of the primary groups opposing the Chabad—instructed readers to cloak their opposition in terms of traffic concerns. *See* Save Boca Beaches, https://web.archive.org/web/20150412020250/http://savebocabeaches.com:80/ (instructing opponents of the Chabad to attend city meetings and "[v]oice your *TRAFFIC* concerns" and "COMMUNICATE YOUR *TRAFFIC CONCERNS*," noting that "[c]alling is the most effective communication tool to voice your *TRAFFIC* concerns") (emphasis in original).

"over 200 vehicles converged on the Property, snarling traffic and requiring police assistance" and bemoaning that Plaintiffs may in the future be "forced to find convoluted and lengthier" routes to avoid the location) *with* The Chalfonte at Boca Raton, http://www.chalfonteboca.com/ (advertising "twin 22-story buildings" with "378 condominium units . . . just south of Palmetto Park Road"); The Marbella Condominiums, http://www.langrealty.com/boca-raton-marbella.php (advertising "155 luxury oceanfront condominiums" in a multi-story high-rise "just south of Palmetto Park Road"); 7-Eleven, https://www.7-eleven.com/Home/Locator (noting store No. 3599 is located at 831 E. Palmetto Park Road, Boca Raton, FL 33432, which is *closer* to one of the Plaintiffs than would be the Chabad).

At bottom, this lawsuit—whether intentionally or not—exemplifies the type of opposition to houses of worship that RLUIPA prevents from infecting government decisions in the land use context. The city's decision to treat houses of worship the same as secular entities was compelled by RLUIPA and the First Amendment and did not "establish" religion.

III. Lawsuits like this one—if allowed to proceed—subvert the protections of the First Amendment and RLUIPA and would open the federal courts to local zoning disputes disguised as First Amendment claims.

The negative effect of granting the relief requested by Plaintiffs would be twofold. First, in contrast to federal courts' general reticence to sit in review of local zoning decisions,[6] this Court's countenancing of the case at bar would open the federal courthouse doors to lawsuits challenging local zoning rulings draped in First Amendment garb. *See*, *e.g.*, Plaintiffs-Appellants' Brief at 11 ("Appellant's argument is that the City violated the land use law . . . and that in so doing it violated Appellants' constitutional rights."). Local discrimination against Orthodox Judaism has often been expressed in the context of land use, and if a federal lawsuit seeking to exclude synagogues from a neighborhood is an additional avenue for such discrimination, these

[6] *See Maverick Enters., LLC v. Frings*, 456 Fed. Appx. 870, 872 (11th Cir. 2012) (per curiam) ("[F]ederal courts do not sit as zoning boards of review.") (citing *Campbell v. Rainbow City, Ala.*, 434 F.3d 1306, 1313 (11th Cir. 2006)); *Rainbow City*, 434 F.3d at 1313 ("As a preliminary consideration, federal courts should be disinclined to 'sit as a zoning board of review,' and as a 'general rule,' zoning decisions 'will not usually be found by a federal court to implicate constitutional guarantees.'") (quoting *Greenbriar Village, L.L.C. v. Mountain Brook, City*, 345 F.3d 1258, 1262 (11th Cir. 2003) (per curiam)); *Hynes v. Pasco Cnty., Fla.*, 801 F.2d 1269, 1270 (11th Cir. 1986) (per curiam) ("The federal courts will not sit as a zoning review board.").

disputes will inevitably make their way into the federal court system cloaked in First Amendment attire.

Second, lawsuits like this, if not summarily dismissed, create a powerful disincentive for cities to give equal treatment or even fair consideration to religious groups' requests for building permits or zoning variances or amendments, since any such accommodation will likely lead to a protracted and costly federal lawsuit. The result—that cities will be *dis*inclined to permit religious land uses—turns RLUIPA on its head by making it *harder* and *less* likely to get zoning variances and exceptions.

CONCLUSION

For the foregoing reasons, *amici curiae* respectfully request this Court affirm the ruling of the District Court. The Chabad of East Boca, like the Jewish Congregation of Newport, Rhode Island in 1790, has a constitutional right to "sit in safety under his own vine and figtree, and there shall be none to make him afraid." The City of Boca Raton correctly gave religious groups the same land use rights available to secular groups, and the District Court did not err by dismissing the suit.

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 29(a)(5) because this brief contains 4,675 words, including footnotes, but excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Century Schoolbook font.

August 4, 2017

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CERTIFICATE OF SERVICE

I hereby certify that on the 4th day of August 2017, I caused the foregoing Brief of Amici Curiae to be filed with the Clerk of the Court for the United States Court of Appeals for the Eleventh Circuit by using the CM/ECF system. I certify that all participants in this case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

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