IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF ARKANSAS
PINE BLUFF DIVISION

HOUSE OF BREAD DELIVERANCE CHURCH

Plaintiff,

v.

CITY OF PINE BLUFF, ARKANSAS,

Defendant.

CASE NO. 5:10-CV-077 BSM

MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFF'S MOTION FOR TEMPORARY RESTRAINING ORDER/PRELIMINARY INJUNCTION

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I. INTRODUCTION

After working for about twenty years with the Arkansas Department of Corrections, first as a business manager and then as a Chaplain, Pastor Saint Mary Harris felt the call of God to work full time for House of Bread Deliverance Church ("**House of Bread**" or "**the Church**") so that she could devote all of her energy into ministry to the homeless, ex-offenders, the poor, and those in need in the Downtown Pine Bluff community. Ex. 1, Dec. ¶¶ 2-4.[1] However, through a facially illegal zoning ordinance, the City of Pine Bluff ("**City**") has discriminated against and nearly destroyed House of Bread by banning it from its leased space at 500 S. Main (the "Main Street Property") and forcing it to meet in an unsuitable location resulting in the cancellation of much of its ministry, lost members, lost ministry opportunities, and lost revenue. *Id.* ¶¶ 7, 26-32.

Indeed, due to the City's unlawful zoning restrictions and enforcement action during the previous two months, House of Bread's average weekly church attendance has quickly plummeted to an average of 20-25 people—a 70% drop from approximately 65 weekly attendees in 2009. *Id.* ¶¶ 7, 26. During this time, House of Bread has also lost additional new weekly parishioners due to the City's prevention of the Church from locating at its desired location, a place that affords much needed additional space. *Id.* ¶¶ 7, 26-28. House of Bread has also been forced to cancel its

[1] The following abbreviations are used throughout: "Dec." for "Declaration of Pastor Saint Mary Harris; "Ex." for "Exhibit"; and "Compl." for "Verified Complaint". All references to Exhibits refer to the Exhibits attached to Plaintiff's Motion.

children's ministry, nursery, special prayer meetings, singing and musical performances, outreach functions, and social gatherings due to insufficient space at its current location. *Id.* ¶¶ 27-28.

The illegal zoning by Pine Bluff is severely diminishing the existence of the religious mission of House of Bread and putting a major financial strain on the church. *Id.* ¶¶ 26-32. Pine Bluff has closed the doors to the House of Bread and its ministries may soon be fully destroyed. House of Bread accordingly challenges, both facially and as-applied to its religious exercise and speech, the City's illegal zoning provisions found in the Code of Ordinances of the City of Pine Bluff, Arkansas, Section 29, *et seq.* (collectively, "**Ordinance**"), *see* Ex. 5.

II. STATEMENT OF FACTS[2]

III. ARGUMENT

The City's Ordinance directly and facially violates the Religious Land Use and Institutionalized Persons Act ("**RLUIPA**") by requiring House of Bread to go through the arbitrary and discretionary Use Permitted on Review ("**UPOR**") permit application process to locate in the B-5 central business district (only to then be denied), while freely allowing other nonreligious assembly uses as of right. Instead of being able to conduct its church activities at its Main Street Property, House of Bread is losing members and irreplaceable ministry opportunities due to the City's

[2] Instead of repeating every fact from the Complaint, Plaintiff incorporates those facts by reference to the Complaint.

actions. This violation is amplified here where House of Bread now has an average of 20 weekly attendees and is on the brink of shutting down. Ex. 1, Dec. ¶¶ 26-32.

House of Bread is entitled to a temporary restraining order or, in the alternative, a preliminary injunction, enjoining the City from enforcing the zoning ordinance until the Court issues a final ruling. To satisfy the temporary restraining order/preliminary injunction standard, House of Bread must show: (1) a substantial likelihood of success on the merits; (2) irreparable injury without the injunction; (3) the threatened injury outweighs any harm that injunctive relief would inflict on the City; and (4) that injunctive relief is in the public interest. *Pediatric Specialty Care, Inc. v. Ark. Dep't of Human Servs.*, 444 F.3d 991, 994 (8th Cir. 2006); *Dataphase Sys., Inc. v. CL Sys.*, 640 F.2d 109, 113 (8th Cir. 1981). House of Bread prevails under each part of the above analysis, and this Court should issue temporary relief in its favor.

A. House of Bread's Likelihood of Success Is Strong On Multiple Statutory and Constitutional Grounds.

There is a substantial likelihood of House of Bread succeeding on the merits. The Ordinance on its face discriminates against churches like House of Bread in violation of RLUIPA and the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.

1. The Ordinance Facially and As Applied Violates the Church's Statutory Rights Under RLUIPA

a. RLUIPA was enacted to remedy the precise type of violation occurring here.

The Church is forced to meet in other ill-suited property (where it has had to cancel much of its ministry) in a different location to worship while obligated to pay rent on a property the City prohibits them from using as a church based on its discretionary and discriminatory Ordinance. Ex. 1, Dec. ¶¶ 7, 27-30. "As indicated during nine hearings held before both houses of Congress, RLUIPA targets zoning codes which use individualized and discretionary processes to exclude churches, especially "new, small or unfamiliar churches . . . [like] black churches and Jewish shuls and synagogues." *Midrash Sephardi v. Town of Surfside*, 366 F.3d 1214, 1236 (11th Cir. 2004) (quoting 146 CONG. REC. S7774-01).

Importantly, RLUIPA requires a broad construction: "This Act shall be construed in favor of broad protection of religious exercise, to the maximum extent permitted by the terms of this Act and the Constitution." 42 U.S.C § 2000cc-3(g).

b. The City's Ordinance violates RLUIPA's "equal terms" section.

The City's Ordinance violates the "equal terms" provision[3] of the discrimination and exclusion subsection:

> (b) Discrimination and exclusion.
> (1) Equal terms. No government[4] shall impose or implement a land use regulation[5] in a manner that treats a religious assembly or institution on less than equal terms with a nonreligious assembly or institution.

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[3] Due to space limitations and urgency of this motion, House of Bread only briefs the RLUIPA equal terms provision for purposes of this Motion. House of Bread does not waive its other claims under RLUIPA and will brief these claims if necessary as the case proceeds.

[4] RLUIPA applies to the City's action, for it is applicable to all levels of government, which includes "(i) a State, county, municipality, or other government entity created under the authority of a State; (ii) any branch, department, agency, instrumentality, or official of an entity listed in clause (i); and (iii) any other persons acting under color of State law." § 2000cc-5(4).

The Pine Bluff zoning ordinance on its face does not treat religious assemblies on equal terms with non-religious organizations. Churches are not allowed as a "permitted" use the B-5 district, where House of Bread's Main Street Property is located, and are forced to obtain a UPOR permit to meet for religious purposes. Ex. 5, Ordinance Sec. 29-112(c).

Yet, "private clubs," "labor unions," and "fraternal organizations" are permitted as of right and are not required to obtain a UPOR permit in the B-5 district.[6] Ex.5, Ordinance Sec. 29-112 (b) and (c). This discriminatory provision

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[5] A "land use regulation" that is addressed under RLUIPA includes a "zoning or landmarking law, or the application of such law, that limits or restricts a claimant's use or development of land (including a structure affixed to land), if the claimant has an ownership, leasehold, easement, servitude, or other property interest..." §2000cc-5(5) (emphasis added). The City's Ordinance is such a land use regulation that completely restricts House of Bread's leasehold use of the Main Street Property.

[6] In addition to clubs, the following uses are also permitted as of right in the B-5 district: (1) Stores offering special types of consumer household goods such as furniture, rugs and carpets, household appliance stores, radio and television sales and services, sewing machine sales and services, interior decorating shops, paint and wall paint (paper), hardware, etc.; (2) Other stores offering goods such as department stores, antique shops, pawnshops, book and stationary stores, camera and photography stores, hobby shops, jewelry, gift and novelty shops, china and glassware shops, optical goods, sporting goods stores, pet shops, auto parts stores, etc.; (3) Offices, professional and business.; (4) Eating and *hotel* establishments; (5) Finance, insurance and real estate offices; (6) Personal services such as beauty and barber services; shop repair; watch, clock and jewelry repair; bookkeeping services; apparel repair and alteration; dry cleaning services; repair shops for home appliances; employment offices; (7) *Private schools such as music and art schools*, barber and beauty schools, *business schools, dance schools*; (8) Other activities and services such as bars, taverns and package liquor stores; *business associations such as professional membership organizations, labor unions, civic and fraternal organizations; theaters*; seasonal farm produce open-air markets; *recreational centers*; (9) Wholesale tobacco, wholesale candy, vending machine companies; (10) Parking lots; (12) Drive-in and fast food establishments; (13) Drive-up window. *See* Ex. 5, Ordinance Sec. 29-112 (*italics added to identify other uses that are a "nonreligious assembly" use under RLUIPA (b)(1)*).

alone dooms the City's Ordinance. *Cornerstone Bible Church v. City of Hastings*, 948 F.2d 464 (8th Cir. 1991).

In *Cornerstone*, the City's code allowed the Masonic Lodge, Alcoholics Anonymous and a pregnancy counseling center as permitted uses in the C-3 zone while excluding churches. Similar to the claims of Pine Bluff, the City of Hastings cited the economic vitality of the central business district as its reason for excluding churches, and the district court granted summary judgment. In reversing the district court, the Eighth Circuit held that "[t]he City is excluding the church because it will not generate economic activity, but the Church has established a relevant similarity between itself and permitted non-commercial entities. It now is incumbent on the City to provide the rational basis for this apparent unequal treatment of similarly situated entities." *Id.* at 471. *Cornerstone* was decided under the Equal Protection Clause prior to the enactment of RLUIPA. RLUIPA makes a judicial determination of unequal treatment even easier than the *Cornerstone* analysis: if a city freely permits any non-religious assembly use it must freely permit a church.

Additionally, the Eleventh Circuit has held that where a town did not treat churches the same as private clubs and lodges, it violated the equal terms provision of RLUIPA. In *Midrash Sephardi v. Town of Surfside*, the town prohibited churches and synagogues in seven out of the eight zoning districts, including the business district where the synagogue wished to locate. 366 F.3d at 1219-20. In order to determine which uses were similarly situated for sake of comparison, the

court held that RLUIPA's categories of "assemblies or institutions" should be the natural perimeter. *Id.* at 1230. Finding a church to be similar in nature to a private club or lodge, the *Midrash* court held that "churches and synagogues, as well as private clubs and lodges, fall within the natural perimeter of 'assembly or institution.'" 366 F.3d at 1231.

Salient too is the Southern District of Florida's decision in *Chabad of Nova v. City of Cooper City*, 533 F.Supp.2d 1220 (S.D.Fla. 2008), holding that a city's ordinance violated RLUIPA's equal terms provision by prohibiting religious assemblies in business districts, but permitting nonreligious assemblies such as "indoor recreational facilities" and "theaters" within the same districts. 533 F.Supp.2d at 1222-23 (citation omitted). Here, the City of Pine Bluff permits "theaters" and "recreational centers" to exist as of right in the B-5 district—the zone in which the Main Street Property is situated. Ex. 5, Ordinance Sec. 29-112(b). Pursuant to *Chabad of Nova* and *Midrash*, these permitted uses are properly categorized as "assemblies," as is House of Bread's religious use. The resulting unequal treatment of House of Bread as compared to these similar uses violates RLUIPA's equal terms provision.

Even when other uses are compared to churches, the City fares no better. "Business associations" and "professional membership organizations" are all permitted uses in the B-5 district. Ex. 5, Ordinance Sec. 29-112(b). Yet, exactly *zero* of these uses require a UPOR permit to exist in the B-5 district as required of churches. *Id.* To shut down a church while allowing other comparable assembly

uses is a terrible injustice and an explicit violation of the equal terms provision of RLUIPA.[7]

c. Strict liability applies to a violation of RLUIPA's "equal terms" section.

Government regulations that discriminate against religious assemblies or institutions on their face fall under RLUIPA's "equal terms" provision. While the Eighth Circuit has not ruled on this particular provision, the Third Circuit Court of Appeals has held that "RLUIPA's Equal Terms provision operates on a strict liability standard; strict scrutiny does not come into play." *Lighthouse Institute for Evangelism, Inc. v. City of Long Branch*, 510 F.3d 253 (3d Cir. 2007).

There is, however, a circuit split on whether strict liability or strict scrutiny applies once a plaintiff proves a violation of the "equal terms" provision. Opposite the Third Circuit, the Eleventh Circuit Court of Appeals in *Midrash* held that "a violation of § (b)'s equal treatment provision ... must undergo strict scrutiny." 366 F.3d at 1232.

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[7] Importantly, for purposes of RLUIPA's equal terms provision, the City's treatment of churches must be compared with its treatment of secular assembly uses in the pertinent district zone where House of Bread's Main Street Property is located (B-5 central business district)—not its treatment of churches in other areas where House of Bread has neither a property nor a desire to locate. This rule stems not only from the Supreme Court's holdings in *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432 (1985) (examining only the permitted uses in Cleburne's R-3 zone) and *Schad v. Borough of Mt. Ephraim*, 452 U.S. 61, 77 (1981) (holding that "one is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place"), but also that of other federal courts. *See, e.g.*, *Digrugilliers v. City of Indianapolis*, 506 F.3d 612, 616 (7th Cir. 2007) ("The existence of alternative sites for a church is relevant only when a zoning ordinance is challenged as imposing a 'substantial burden' on religious uses of land...under a different section of [RLUIPA] from the equal-terms section at issue in this appeal"); *Cornerstone Bible Church*, 948 F.2d at 464 (examining solely uses in C-3 zone in adjudicating equal treatment violation).

Regardless, the City cannot satisfy the strict scrutiny test. Any interests asserted by the City, especially ones speaking to the need of revitalization in economic terms, must fail as both legally and factually insufficient. In the religious land use context, courts have found that the City's asserted interests—*e.g.*, "a church does not benefit or complement existing uses and does not further...the revitalization of Pine Bluff" (*see* Ex. 6, documentation of Planning Commission's denial)—are not compelling, or that religious uses do not injure such interests.

For example, in *Cottonwood Christian Center v. Cypress Redevelopment Agency*, 218 F.Supp.2d 1203 (C.D.Cal. 2002), the court held that "[i]f revenue generation were a compelling state interest, municipalities could exclude all religious institutions from their cities." *Id.* at 1228; *see also, Love Church v. City of Evanston*, 671 F.Supp. 515, 519 (N.D.Ill. 1987) ("That a church needs the city's permission to operate because it is not a commercial enterprise, while a funeral parlor, because it charges for its services, is unprincipled. The absence of commercial exchange of a church does not threaten any compelling interest of Evanston"), *vacated on other grounds*, 896 F.2d 1082 (7th Cir. 1990).

Further, the City does not regulate other tax exempt entities, such as "private clubs," "labor unions," and "fraternal organizations" (which similarly reduce property tax revenue) in the same manner as churches. Ex. 5, Ordinance Sec. 29-112(b). These facts make Pine Bluff's purported justification based on revitalization of the City hollow.

The City has also not furthered any possible interest by the least restrictive means. "The City has done the equivalent of using a sledgehammer to kill an ant." *Cottonwood*, 218 F. Supp. 2d at 1229. The City may address certain issues on a specific (narrowly-tailored or least restrictive means) basis, but what it may not do under the law is what it has done here: shut down a church while allowing non-religious assembly uses. Indeed, *Midrash* held that a city's restrictions on a synagogue failed narrowly-tailoring in substantial respects: "The proffered interests of retail synergy are not pursued against analogous nonreligious conduct, and those interests could be achieved by narrower ordinances that do not improperly distinguish between similar secular and religious assemblies." 366 F.3d at 1235.

B. The Ordinance Facially and As Applied Violates the Church's Constitutional Rights

In addition to violating RLUIPA, the City's discriminatory Ordinance violates the Church's constitutional rights.[8]

1. The City's Ordinance Violates the Church's Equal Protection Rights.

The Equal Protection Clause provides in pertinent part, "No State shall make or enforce any law which shall . . . deny to any person within its jurisdiction the equal protection of the laws," U.S. Const. amend XIV, § 1. This is "essentially a direction that all persons similarly situated should be treated alike." *Cleburne*, 473 U.S. at 439 (citing *Plyler v. Doe*, 457 U.S. 202, 216 (1982)).

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[8] House of Bread only discusses the violation of its Fourteenth Amendment Equal Protection rights in this brief, but does not waive its claims for violation of other constitutional rights, including, but not limited to, free exercise, free speech, and free assembly. House of Bread will brief these claims if necessary as the case proceeds.

a. The City's actions are subject to strict scrutiny.

If a "classification trammels fundamental personal rights or is drawn upon inherently suspect distinctions such as race, religion, or alienage," it must satisfy strict scrutiny. *City of New Orleans v. Dukes*, 427 U.S. 297, 303 (1976). "Unquestionably, the free exercise of religion is a fundamental right," protected by the Constitution. *Johnson v. Robinson*, 415 U.S. 361, 375 n.14 (1974). Pine Bluff's Ordinance both trammels fundamental personal rights and is drawn upon a suspect class, religion, and therefore is subjected to strict scrutiny, sustainable only if "suitably tailored to serve a compelling state interest." *Cleburne*, 473 U.S. at 440.

"Equal protection limits the power of a legislature to target a particular individual, organization, or group by requiring that the legislature confer benefits or impose costs on a larger, neutrally defined group; it cannot pick on the most vulnerable." *Vineyard Christian Fellowship of Evanston, Inc. v. City of Evanston*, 250 F. Supp. 2d 961, 975 (N.D.Ill. 2003). Pine Bluff is indeed picking on the most vulnerable here. House of Bread is a small inner-city church with approximately twenty current members and no deep pockets, politically or monetary. Ex. 1, Dec.¶¶ 26, 30-32. It has no ability to fend for itself and it has been rebuffed by the City. Dec.¶¶ 21-33. And, despite the fact that the Church has struggled to exist for a couple of months at the Pastor's home, the City nonetheless has denied the Church the right to operate at their Main Street Property without valid reason. *Id.*

The court in *Vineyard Christian Fellowship* analyzed whether the ordinance in question there classified on the basis of religion by looking at a prior case where an ordinance discriminated against churches:

> Suppose, for example, a group of people wished to assemble on a regular basis in [the city] to discuss and hear lectures on classical literature. This group might also wish to have seminars for young people after school or on weekends to expose them to 'great books.' These people could rent a building in any business or commercial zone and have their meetings. But if that same group of people wished to assemble for the purpose of religious worship and to hold classes for its young people to educate them about religion, they would have to get special permission from [the city].

250 F. Supp. 2d at 976 (citing *Love Church*, 671 F. Supp. at 518-19 (N.D. Ill. 1987), *vacated on other grounds*, 896 F.2d 1082 (7th Cir. 1990)). This portrayal applies here, as House of Bread wishes to meet for worship in the B-5 district, but cannot because the "great book" they wish to study is the Bible.

b. The City cannot show a compelling government interest that is narrowly tailored.

Following the determination that the Ordinance classifies on the basis of religion, "the court must inquire whether the provision of the ordinance . . . furthers a compelling interest and is narrowly-tailored to meet that interest." *Vineyard Christian Fellowship*, 250 F.Supp.2d at 977. For those reasons found in the RLUIPA section, *supra*, the City of Pine Bluff fails both requirements.

c. The City's actions fail the rational basis test.

In addition to the fact that the City cannot meet its burden under strict scrutiny, it cannot even meet the much lower level rational basis test. As the Eighth Circuit said in *Cornerstone Bible Church*, "under the equal protection clause

we must consider whether the City has a rational basis to differentiate between the Church and the entities it permits in the C-3 zone. Any differentiation must be relevant to the objectives the City is attempting to achieve through its ordinance." 948 F.2d at 471.

The City of Pine Bluff has no rational basis for discriminating against churches when other similar uses are permitted by right in the same zone where churches are banned without special permission. *See* Ex. 5, Ordinance Sec. 29-112(b) and (c). "The question is whether it is rational to treat worship services differently than, for example, a meeting of the Masons. . . ." *Vineyard Christian Fellowship*, 250 F. Supp. 2d at 979. The answer is "no," but that is exactly what the City does, as "fraternal organizations" and "labor unions" are permitted as of right. Ex. 5, Ordinance Sec. 29-112(b) and (c).

C. House of Bread and Its Members Are Suffering Irreparable Harm.

House of Bread's remedy at law is inadequate if temporary and preliminary relief is not granted. "When a plaintiff alleges deprivation of a constitutional right, then no further showing of an irreparable injury is necessary." *Doe v. Human*, 725 F. Supp. 1499, 1502 (W.D.Ark. 1989). *See also, e.g., Elrod v. Burns*, 427 U.S. 347, 373 (1976) ("The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury.); *Murphy v. Zoning Comm'n of the Town of New Milford*, 148 F.Supp.2d 173, 180-81 (D.Conn. 2001) ("Since [RLUIPA] was enacted for the express purpose of protecting First Amendment rights of individuals, the allegation that defendants have violated this statute also

triggers the same concerns that led the courts to hold that these violations result in a presumption of irreparable harm") (*citations omitted*). House of Bread's damages here go far beyond money; they are losing members and worship and ministry opportunities that cannot be replaced—injuries for which money cannot compensate. Ex. 1, Dec. ¶¶ 26-33.

D. An Injunction Will Not Harm Others.

Granting a preliminary injunction that protects House of Bread's constitutional rights threatens no significant harm to Pine Bluff. The City has no governmental interest that is served by forcing churches to get special permission from the Planning Commission (only to be denied) while freely admitting other non-religious assembly uses such as clubs, labor unions and fraternal organizations. The harm done to House of Bread by inhibiting its ministry far outweighs any speculative harm that a preliminary injunction might cause to Pine Bluff. *Ark. Soc'y of Freethinkers v. Daniels*, 2009 U.S. Dist. LEXIS 116982 (E.D. Ark. Dec. 16, 2009) ("public policy considerations support the exercise of free speech, and when balanced against the risk that [plaintiffs] will be denied its First Amendment right to free speech if a preliminary injunction does not issue, the potential harm to the State is minimal.")

E. An Injunction Will Serve The Public Interest.

As this Court recently held, "it is always in the public interest to protect constitutional rights." *Ark. Soc'y of Freethinkers*, 2009 U.S. Dist. LEXIS 116982 (*citing Phelps-Roper v. Nixon*, 545 F.3d 685 (8th Cir. 2008)). Here, the public has no

interest in seeing an unlawful Ordinance enforced to squelch religious expression, and every interest in seeing House of Bread locate at the Main Street Property and conduct church ministries.

IV. CONCLUSION

The City's Ordinance violates several of the House of Bread's statutory and constitutional rights, including, but not limited to, those under the equal terms provision of RLUIPA, and Equal Protection. Accordingly, the Church's Motion to for a Temporary Restraining Order and Preliminary Injunction should be granted.

Respectfully submitted this 22nd day of March, 2010.

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