In The
United States Court Of Appeals
For The Eleventh Circuit

GERALD GAGLIARDI; KATHLEEN MACDOUGAL,
Plaintiffs-Appellants,

v.

CITY OF BOCA RATON FLORIDA, a Florida Municipal Corporation,
Defendant-Appellee,

CHABAD OF EAST BOCA, INC.; TJCV LAND TRUST,
Defendant – Intervenors-Appellees,

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA

BRIEF OF *AMICI CURIAE* JEWS FOR RELIGIOUS LIBERTY, *ET AL.* IN SUPPORT OF APPELLEES AND AFFIRMANCE

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CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Pursuant to 11th Cir. R. 26.1, Amici hereby certify that the following is a complete list of the trial judge and all attorneys, persons, associations of persons, firms, partnerships, or corporations that have an interest in the outcome of this particular case on appeal.

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STATEMENT OF THE ISSUES

1. Whether the District Court correctly determined Plaintiffs–Appellants lack standing?
2. Whether, in the alternative, this suit is now moot?
3. Whether, in the alternative, Plaintiffs–Appellants have failed to state a claim on which relief may be granted?

INTEREST OF *AMICI CURIAE*

Jews for Religious Liberty is an unincorporated association of American Jews concerned with the current state of religious liberty jurisprudence. Its members are interested in protecting the religious liberty of their coreligionists as well as religious adherents nationwide.

The Coalition for Jewish Values ("CJV") is a trade name of Project Genesis, Inc., a charity incorporated in the State of Maryland and operating pursuant to 26 U.S.C. § 501(c)(3). The CJV advocates for classical Jewish ideas and standards in matters of American public policy. The CJV has a board of seven traditional, Orthodox Rabbis who have served the Jewish and greater American communities for decades as leaders, scholars and opinion makers.

Rabbi Dov Fischer is a Senior Rabbinic Fellow at Coalition for Jewish Values, the spiritual leader of Young Israel of Orange County, California and an Adjunct Professor of law at two Southern California law schools.

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Rabbi Steven Pruzansky is the spiritual leader of Congregation Bnai Yeshurun, a synagogue consisting of nearly 600 families in Teaneck, New Jersey.

Rabbi Mitchell Rocklin has experience as a congregational rabbi and a U.S. Army Reserve chaplain.

The individual *amici* have all written extensively on the role of religion in public life.

Amici have a deep interest in the freedom of religion and the role of religion in public life; and their experience with these topics may provide a helpful perspective for this Court to consider. The *amici* maintain that the Plaintiffs' interpretation of the Establishment Clause, would make America a less welcoming place to its Jewish citizens. *Amici* assert that by interpreting the Establishment Clause in light of its historical meaning,

this court can follow Supreme Court precedent and continue America's proud legacy as a country where "[a]ll possess alike liberty of conscience and immunities of citizenship." Letter from George Washington to the Hebrew Congregation in Newport, R.I. (Aug. 18, 1790), *available at* https://goo.gl/P2GPw7.[1]

Accompanying this brief, the *amici* will file a motion requesting leave of the Court to file this brief.[2]

SUMMARY OF ARGUMENT

After years of jurisprudential uncertainty, the Supreme Court recently provided definitive guidance as to how the Establishment Clause *must* be interpreted. In *Town of Greece v. Galloway*, the Supreme Court provided the clarity that lower courts had been craving for so long holding that the Establishment Clause "must be interpreted by reference to historical practices and understandings." 134 S. Ct. 1811 (2014)(internal quotation marks omitted). *Town of Greece*

[1] No party's counsel authored this brief in whole or in part, no party or party's counsel contributed money that was intended to fund preparing or submitting this brief, and no person—other than the *amici*, their members, or their counsel—contributed money that was intended to fund preparing or submitting this brief.

[2] The *amici* have obtained consent for the filing of this brief from all parties save for Plaintiffs-Appellants. The Plaintiffs have declined to consent.

banished the specters of the ahistoric judicially–manufactured Establishment Clause tests once and for all, firmly anchoring its analysis in the historic understanding of the provision.

Based on that historic understanding, Plaintiffs–Appellants' ("Plaintiffs") argument that the City of Boca Raton ("City" or "Boca Raton") violated the First Amendment when it changed its laws to allow Chabad of East Boca ("Chabad") to build a synagogue is untenable. The Establishment Clause was intended to prohibit governmental actions resembling "the coercive state establishments that existed at the founding." *Id.* at 1837 (Thomas, J., concurring). Allowing religious institutions to use the political process to lobby governments for favorable decisions does not meet that criteria.

In addition to being foreclosed by Supreme Court precedent, the Plaintiffs' argument would turn religious believers into second–class citizens. The Plaintiffs argue that governmental entities may not take any action that is primarily motivated to benefit religious institutions. Such a rule would make religious adherents ineligible to petition and seek redress of grievances from the government through the same political process as any other group of citizens. Such an anti–religious

reading of the First Amendment would prevent governmental actors from doing things like providing chaplains or kosher food to Jews in prison or in the military. The First Amendment was never intended to make America inhospitable to religious practitioners. This Court should reject the Plaintiffs' request to do so, especially when the Chabad received no special privileges from the City and was merely treated like every other group of citizens. Even if the Court were to accept the Plaintiffs' erroneous characterization that the City was particularly solicitous of Chabad's requests, it should still rebuff their interpretation of the Establishment Clause. Accepting Plaintiffs' arguments would result in a return to the bad old days when ahistoric and overly antagonistic interpretation of the Establishment Clause menaced religious Americans "[l]ike some ghoul in a late–night horror movie that repeatedly sits up in its grave and shuffles abroad, after being repeatedly killed and buried." *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 398 (1993) (Scalia, J., concurring).

ARGUMENT

I. The Historic Understanding of the Establishment Clause Does Not Bar Governmental Actions that Benefit Religious Entities.

The District Court properly concluded that the Plaintiffs failed to allege that they, "suffered the injuries that the Establishment Clause exists to protect against." Order Granting Motion to Dismiss at 14, *Gagliardi v. City of Boca Raton*, No. 16–80195 (S.D. Fla. Mar. 28, 2017), ECF No. 76. Plaintiffs claim that the City violated the Establishment Clause because it altered its "land use code for the primary purpose of benefiting the Chabad." Br. of Appellants at 9, 15–17 (June 14, 2017). In their view, the government violates the Establishment Clause whenever it acts "for a predominant purpose of benefitting a religious entity." *Id.* at 15. The Plaintiffs are incorrect both in their interpretation of the City's actions, which merely afforded Chabad equal rather than special treatment, and with respect to the meaning of the Establishment Clause. Their argument is inconsistent with the original meaning and the Supreme Court precedents interpreting that Clause. This Court should, therefore, affirm the decision below.

A. The Establishment Clause Must be Interpreted by Reference to Its Historical Understanding.

The Supreme Court's jurisprudence over the last decade makes clear that the Court has "abandoned the antiquated 'endorsement test'" in favor of interpreting the Establishment Clause "by reference to historical practices and understandings." *Elmbrook Sch. Dist. v. Doe*, 134 S. Ct. 2283, 2284–85 (2014) (Scalia, J., dissenting from denial of certiorari) (quoting *Town of Greece*, 134 S. Ct. at 1819); *see also Town of Greece*, 134 S. Ct. at 1834 (Alito, J. concurring) (noting that where there is inconsistency between historic practice and judge–crafted Establishment Clause tests, historic practice controls).

In *Van Orden v. Perry*, the Court, looked to "our Nation's history" to determine that a Ten Commandments monument on Texas State Capitol grounds did not violate the Establishment Clause. 545 U.S. 677, 686 (2005) (plurality opinion). Because displaying the Decalogue in a manner similar to Texas' display had not historically been considered an "establishment of religion," the display was constitutionally permissible. The plurality rejected the application of the *Lemon* test, *Lemon v. Kurtzman*, 403 U.S. 602 (1971), which would require the Court to determine if a "reasonable observer" might

interpret the monument as an endorsement of religion, holding that the test was "not useful" in that situation. *Van Orden*, 545 U.S. at 686.

The Court's plurality also doubted "the fate of the *Lemon* test in the larger scheme of Establishment Clause jurisprudence." *Id.* In the years following *Van Orden*, the Supreme Court has resolved these doubts—the Establishment Clause must be applied in light of its historical meaning rather than on the basis of abstract principles.

In *Hosanna–Tabor Evangelical Lutheran Church and School v. EEOC*, the Supreme Court, eschewing other Establishment Clause "tests," went through an extensive historical analysis to determine what the founding generation prohibited when it "sought to foreclose the possibility of a national church." 565 U.S. 171, 183 (2012). The Court's historical analysis confirmed that applying employment discrimination law to the employment of religious ministers would violate the Establishment Clause. *Id.* at 188–89.

The Supreme Court reinforced the correctness of this approach the following year in *Town of Greece v. Galloway*. There, the Court confirmed that "the Establishment Clause must be interpreted by reference to historical practices and understandings." 134 S. Ct. at

1819 (internal quotation marks omitted). Having considered historical practices, the Court concluded that the town's legislative prayer did not violate the Establishment Clause, *id.* at 1821–26, in part because the original understanding of "establishment" reflected "the coercive state establishments that existed at the founding." *Id.* at 1837 (Thomas, J., concurring).

This Court heeded the Supreme Court's admonitions and looked to history in rejecting the Establishment Clause challenge to a municipality's legislative prayer. *Atheists of Florida, Inc. v. City of Lakeland*, 713 F.3d 577, 590 (11th Cir. 2013).

B. The Historical Understanding of the Establishment Clause Is Consistent with the City's Actions.

Recent Supreme Court cases illuminate the sort of governmental practices that would have historically been understood to violate the Establishment Cause.

On one hand, the Court has held that legislative prayers "posed no threat of an establishment" of religion so long as no one was compelled to pray, "no faith was excluded by law, nor any favored," and the prayers "imposed a vanishingly small burden on taxpayers." *Town*

of Greece, 134 S. Ct. at 1819 (citing S. REP. NO. 376, 32d Cong., 2d Sess., 2 (1853); H.R. REP. NO. 124, 33d Cong., 1st Sess., 6 (1854)).

On the other hand, it has always been understood that an "establishment" occurs where "attendance at the established church [is] mandatory, and taxes [are] levied to generate church revenue." *Id.* at 1837 (Thomas, J., concurring) (citing Michael W. McConnell, *Establishment and Disestablishment at the Founding, Part I: Establishment of Religion*, 44 WM. & MARY L. REV. 2105, 2144–46, 2152–59, 2161–68, 2176–80 (2003)). It was also understood that a church was "established" whenever "[d]issenting ministers were barred from preaching, and political participation was limited to members of the established church." *Id.*

In *Hosanna–Tabor*, the Supreme Court indicated that under a proper historical understanding, the Establishment Clause "prevents the government from appointing ministers" and ensures that the government has "no role in filling ecclesiastical offices." 565 U.S. at 184. The Court explained that this extended to a prohibition on interfering in "questions of discipline, or of faith, or ecclesiastical rule, custom, or law," in other words, "matters of church government as well

as those of faith and doctrine." *Id.* at 185–86 (internal quotation marks omitted).

In short, Establishment Clause violations are likely whenever there is: "(1) [state] control over doctrine, governance, and personnel of the church; (2) compulsory church attendance; (3) financial support; (4) prohibitions on worship in dissenting churches; (5) use of church institutions for public functions; and (6) restriction of political participation to members of the established church." *Felix v. City of Bloomfield*, 847 F.3d 1214, 1216 (10th Cir. 2017) (Kelly, J., dissenting from denial of rehearing *en banc*) (quoting McConnell, *Establishment*, *supra*, at 2131).

C. Governmental Entities Do Not Violate the Establishment Clause Whenever They Act with the Intention of Benefiting Religious Institutions.

This Court has recognized that it is permissible for a government entity to legislate or regulate for the benefit of religious institutions. For example, just last year it held that religious exemptions from the Department of Health and Human Services' abortifacient mandate do not violate the Establishment Clause. *Eternal Word Television Network, Inc. v. Sec'y of U.S. Dep't of Health & Human Servs.*, 818

F.3d 1122, 1165 (11th Cir. 2016). The Court acknowledged that it is "disingenuous to look for a purely secular purpose when the manifest objective of a statute is to facilitate the free exercise of religion by lifting a government–imposed burden. Instead, the Court should simply acknowledge that the religious purpose of such a statute is legitimated by the Free Exercise Clause." *Id.* (quoting *Wallace v. Jaffree*, 472 U.S. 38, 83 (1985) (O'Connor, J., concurring)). The Establishment Clause is not violated even when the government offers religious institutions "advantages . . . over other entities," such as favorable tax status. *Id.* at 1165–66 (quoting *Geneva Coll. v. Sec'y, U.S. Dep't of Health & Human Servs.*, 778 F.3d 422, 443 (3d Cir. 2015)). The question is not whether a religious entity is a beneficiary of a government program, but whether the government program itself has a religious nature. *See, e.g.*, *Corp. of Presiding Bishop of Church of Jesus Christ of Latter–Day Saints v. Amos*, 483 U.S. 327, 337 (1987).

Governmental entities' willingness to aid or accommodate their citizens is not a sign that they secretly wish to establish Judaism as their official religion. Courts have long recognized that governments may have constitutionally sound reasons for facilitating their citizens'

ability to live in conformity with their conscience. *See Zorach v. Clauson*, 343 U.S. 306, 313–14 (1952) ("When the state encourages religious instruction or cooperates with religious authorities by adjusting the schedule of public events to sectarian needs, it follows the best of our traditions. For it then respects the religious nature of our people and accommodates the public service to their spiritual needs."); *Bd. of Educ. of Kiryas Joel Vill. Sch. Dist. v. Grumet*, 512 U.S. 687, 715 (1994) (O'Connor, J., concurring) (describing government accommodations for deeply held religious beliefs as "permissible, even praiseworthy"); *id.* at 723 (Kennedy, J., concurring) ("Government policies of accommodation, acknowledgment, and support for religion are an accepted part of our political and cultural heritage.") (quotation marks omitted); *Lamb's Chapel*, 508 U.S. at 400 (Scalia, J., concurring) ("indifference to 'religion in general' is *not* what our cases, both old and recent, demand").

The Supreme Court "has never indicated that statutes that give special consideration to religious groups are *per se* invalid. That would run contrary to the teaching of our cases that there is ample room for accommodation of religion under the Establishment Clause." *Amos*,

483 U.S. at 338. Nor must "[r]eligious accommodations … 'come packaged with benefits to secular entities.'" *Cutter v. Wilkinson*, 544 U.S. 709, 724 (2005) (quoting *Amos*, 483 U.S. at 338). The Constitution does not require government to "show a callous indifference to religious groups. That would be preferring those who believe in no religion over those who do believe." *Zorach*, 343 U.S. at 314; *see also Sch. Dist. of Abington Twp. v. Schempp*, 374 U.S. 203, 299 (1963) (Brennan, J., concurring) ("[H]ostility, not neutrality, would characterize the refusal to provide chaplains and places of worship for prisoners and soldiers cut off by the State from all civilian opportunities for public communion").

Examining the history of American law reveals a positive attitude toward religion and religious adherents. As the Court stated over 100 years ago, "no purpose of action against religion can be imputed to any legislation, state or national, because this is a religious people. This is historically true." *See Holy Trinity Church v. United States*, 143 U.S. 457, 465 (1892). And though the society may have become more pluralistic, it remains true that

> [e]very religious institution contributes to the common good or general welfare of the whole community, even though it be attended by a particular group or is denominational in character. A democratic society where every man must unselfishly devote some part of his energy in the interest of good government cannot succeed without the moral and spiritual influence of the church.

State ex rel. Anshe Chesed Congregation v. Bruggemeier, 115 N.E.2d 65, 69 (Ohio Ct. App. 1953).

D. Unlike the City's Actions, Modern Day Established Churches Share Many of the Hallmarks of Those That Existed When the Framers Drafted the Establishment Clause.

There are still countries with established Churches, and those Churches retain the attributes that the drafters of the First Amendment intended to preclude. For example, in Denmark, the Constitution "requires the state to support the Evangelical Lutheran Church, which is the 'Established Church of Denmark.' The constitution of the Church itself is to be set forth by government statute." Richard Albert, *American Separationism and Liberal Democracy: The Establishment Clause in Historical and Comparative Perspective*, 88 MARQ. L. REV. 867, 912 (2005). Bishops and other church officials are employed by the state. Liselotte Malmgart, *State and Church in Denmark and Norway* in DYNAMICS OF RELIGIOUS REFORM IN NORTHERN EUROPE, 1780–1920:

POLITICAL AND LEGAL PERSPECTIVES 219 (Keith Robbins, ed. 2010) ("[E]piscopal salaries in Denmark are paid directly from the Treasury"); *Frequently Asked Questions*, LUTHERAN CHURCH *available at* http://www.lutheranchurch.dk/faq/ ("The pastor is employed by the Ministry for Ecclesiastical Affairs."). The Church is also tasked with a number of civil service duties. *See* Marie Vejrup Nielsen and Lene Kühle, *Religion and State In Denmark: Exception Among Exceptions?*, 24 NORDIC J. OF RELIGION & SOC'Y 173, 176 (2011). While other denominations and religions may exist without the government's permission, only "state–approved" congregations can conduct weddings, establish cemeteries, and enjoy certain tax and immigration privileges. *Id.* at 177. These types of entanglements would have constituted an "establishment of religion" in 1791, and they continue to do so today. The City's actions, however, fall well short of this threshold.

II. The City's Zoning Decisions Do Not Violate the Establishment Clause.

A. The City's Decisions Are an Outcome of Regular Political Processes.

The City's actions that led to Chabad being allowed to build a synagogue can be grouped in two broad categories: 1) changes to the

underlying zoning plan, and 2) variances from that plan. It is important to understand the difference between the two in order to appreciate why neither set of actions violates the Establishment Clause understood in its proper historical context.

1. Changes to the Zoning Plan

Florida courts have recognized that "it is difficult to draw a definite, distinct line of demarcation between rezoning and the granting of a variance from, or an exception to, zoning rules and regulations. . . . However, in a legal sense, rezoning ordinarily contemplates a change in existing zoning rules and regulations within a district, subdivision or other comparatively large area in a given governmental unit . . . ." *Troup v. Bird*, 53 So. 2d 717, 720 (Fla. 1951). The City Ordinance at issue in this case would fall into that category because it changed the zoning rules by redefining the permissible types of buildings to include "places of worship."

Under well–established Florida (and federal) law, a city's power to promulgate *or change* a zoning plan must be upheld unless such a classification is not "fairly debatable." *Schauer v. City of Miami Beach*, 112 So. 2d 838, 843 (Fla. 1959); *Village of Euclid, Ohio v. Ambler Realty*

Co., 272 U.S. 365, 388 (1926). Thus, the City's power to adopt the original zoning requirement that would have barred Chabad from building a synagogue is co–extensive with its power to change that definition, and either exercise of such power must be sustained unless so unreasonable as to not be "fairly debatable."

Florida cities (including Boca Raton) exercise their power to amend or rezone quite frequently. This is not unexpected, for after all, the purpose of zoning is to promote "public welfare, health, safety, and morals." *Parking Facilities, Inc. v. City of Miami Beach*, 88 So. 2d 141, 144 (Fla. 1956) (quoting *State ex rel. Taylor v. City of Jacksonville*, 133 So. 114, 116, 101 Fla. 1241, 1244 (1931)). What constitutes "public welfare, health, safety, and morals" in turn, is not fixed. *See City of Miami Beach v. First Tr. Co.*, 45 So. 2d 681, 688 (Fla. 1949) ("Zoning restrictions, like other phases of the law are subject to change or removal when the reason for them ceases.").

In exercising "the power to determine as conditions demand, what services and functions the public welfare requires," the citizens of every community petition the government and/or attempt to convince their fellow citizens that their view of the current communal needs is the

correct one. It is not surprising therefore, that changes to zoning laws are often "tailor–made" for the group that lobbied in their favor.

The present case reflects nothing more than a successful lobbying campaign for changes to the town's zoning laws. Indeed, as Plaintiffs acknowledge, it is a *combination* of *several* political campaigns. Chabad's original plans were scuttled because of the political opposition from the residents of the Golden Triangle neighborhood. In response to the political pressure from Golden Triangle residents, the City changed its zoning regulations in such a way as "limit[] 'places of worship' in a residential district." *Gagliardi v. City of Boca Raton,* 197 F. Supp. 3d 1359, 1363 (S.D. Fla. 2016). Plaintiffs do not object to the successful lobbying by the Golden Triangle residents, but that was not the end of the story. As a compromise, the City also changed its code in a way that allowed Chabad to build on nearby property. *Id.* Plaintiffs do object to this successful lobbying by Chabad and its supporters.

It appears that Plaintiffs' true complaint is that the group that successfully lobbied the City, in the second instance, is religious. Plaintiffs' logic appears to be that the City may freely succumb to a political campaign from any individual or group except those that are

religious. According to the Plaintiffs, succumbing to political pressure brought by religious groups violates the Establishment Clause.

It should be obvious that the facts of this case "bear no resemblance to the coercive state establishments that existed at the founding." *Town of Greece*, 134 S. Ct. at 1837 (Thomas, J. concurring). Additionally, the Supreme Court had held that the Plaintiffs' approach, which would treat religious groups unfavorably as compared to secular groups, violates the Free Exercise Clause. *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012, 2020–21 (2017). Plaintiffs would not have brought an Establishment Clause challenge had the City changed the zoning ordinance in a way that was "tailor–made" to benefit, for example, a fraternal lodge. They only brought this case because Chabad is a religious organization. Plaintiffs would therefore have Chabad of East Boca make a choice: "participate in an otherwise available [political process] or remain a religious institution." *Id.* at 2021–22. The Supreme Court rejected this Hobbesian choice in *Trinity Lutheran*, and this Court ought not permit the Plaintiffs to revive it.

As the Court explained, "[t]he Free Exercise Clause 'protect[s] religious observers against unequal treatment' and subjects to the

strictest scrutiny laws that target the religious for 'special disabilities' based on their 'religious status.'" *Id.* at 2019 (quoting *Church of Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520, 533, 542 (1993)). If Plaintiffs' view were to prevail, the City could respond to secular lobbying, but would be constitutionally obligated to ignore religious lobbying, *i.e.*, it would be forced to subject religious observers to "unequal treatment." This cannot be so.

Such a result would be particularly problematic with respect to minority religions such as Judaism. Were the Plaintiffs to succeed, observant Jews would be forced to hide their religious practices and affiliations any time they interacted with government officials and attempted to convince them of taking actions favorable to the Jewish community. It is hard to imagine an outcome more out of tune with the American experiment.

2. Variances from the Amended Plan

Plaintiffs allege that the Chabad was granted several variances, which is not technically accurate,[3] but even if it were, would not

[3] Chabad was actually only required to obtain a technical deviation and a height permit, both of which are substantially easier to obtain than a standard variance permit.

constitute a violation of the Establishment Clause. Under Florida law, variances are treated differently from rezoning, and the granting of a variance "usually contemplates only a special exception to existing zoning rules and regulations in a specific instance permitting a non–conforming use in order to alleviate undue burden or 'unnecessary hardship' . . . ." *Troup*, 53 So. 2d at 720. By definition, *every* variance is "tailor–made" to a given applicant, because in *every* case an applicant must show that given his unique circumstances, absent relief, he would suffer an "undue burden" or an "unnecessary hardship" of the type not visited upon his neighbors. *Id.*

"[T]he [City] necessarily found that the grant of the variance was justified because of the existence of 'unnecessary hardship' or it would not have granted the variance . . . ." *Troup*, 53 So. 2d at 722. Plaintiffs bear the burden of showing that Chabad did not face "unnecessary hardship" if they wish to call into question the City's decision. *Id.* Plaintiffs cannot make an end run around shouldering this significant burden by claiming that the City's behavior violates the Establishment Clause, for it does not.

To the extent that Plaintiffs are arguing that variances given to Chabad impermissibly advance Judaism, their argument is inconsistent with the historic interpretation of the Establishment Clause, and runs head first into *Trinity Lutheran*'s injunction that governmental entities may not deny generally available benefits to religious institutions simply because of their faithfulness.

It is true that by granting the variance, the City made it easier for Chabad to carry out its religious mission; however, the mere fact that an exemption from an otherwise applicable rule makes religious organizations "better able to advance their purposes" is insufficient to create an Establishment Clause violation. *Amos*, 483 U.S. at 336. "A law is not unconstitutional simply because it *allows* churches to advance religion, which is their very purpose." *Id.* at 337 (emphasis in original). In fact, quite the opposite is true, "the refusal to allow the Church—solely because it is a church—to compete with secular organizations" in the political process runs afoul of the Constitution. *Trinity Lutheran*, 137 S. Ct. at 2022.

III. Plaintiffs' Approach Uniquely Disadvantages Religions, Like Judaism, that May Require Governmental Cooperation to Fulfill Their Religious Obligations.

Accepting Plaintiffs' interpretation of the Establishment Cause would make America a less hospitable place for observant Jews. At the District Court, Plaintiffs argued that the Establishment Clause prohibits the City from acting for the primary purpose of benefiting a religious organization, as it did when it changed its zoning laws and allowed Chabad to build a synagogue. Pls.' Response to Intervenors' Motion to Dismiss at 9, *Gagliardi v. City of Boca Raton*, No. 16–80195 (S.D. Fla. Apr. 14, 2016), ECF No. 31.

According to Plaintiffs, the City's actions are unconstitutional because they were intended to "further the development of the Chabad." *Id.* at 10.[4] In Plaintiffs' view, the government cannot grant benefits to a religious group, unless those same benefits are also received by secular groups. *Id.* at 9. Leaving aside the fact that the benefits granted to Chabad *are* equally available to all comers, *see supra* Part II, the tests advocated by Plaintiffs would turn religious groups into second–class

[4] Plaintiffs further maintain that the mere fact that the City and Chabad communicated with one another regarding the zoning variances violated the Establishment clause by creating an "excessive entanglement" between church and state. *Id.* at 11–12.

citizens by making it impossible for them to work with the government to advance their interests.

Judaism is particularly needful of governmental cooperation for its free exercise, since it is a religion that imposes many restrictions and responsibilities on its adherents. With the growth of the scope and reach of government, it becomes inevitable that religious individuals will spend ever more time in contact with governmental entities, and will have to apply for various licenses and permits to engage in activities necessary for the fulfillment of their religious obligations.

For example, Jewish law prohibits adherents from carrying items between public and private domains on the Sabbath. Sharonne Cohen, *What Is An Eruv*?, MY JEWISH LEARNING, https://goo.gl/hoK9TQ (last visited July 27, 2017). One way religious Jews avoid violating this prohibition is by creating a ritual (but physical) separation between the "home" neighborhood and the rest of the world. In the absence of this demarcation (known as an "*eruv*"), Jews cannot carry their house keys, strollers, or even their children without violating the Sabbath. The *eruv* often takes form of a wire or a string strung up between utility poles to create an enclosed perimeter. In order to accomplish that task, Jewish

communities often need to obtain the consent of the local municipality that owns and maintains the poles.

Many governmental entities give Jewish communities permission to erect and maintain an *eruv* around their neighborhoods to facilitate the community's observance of the Sabbath. Howard Rosenberg, *Orthodox Jews Seek a Symbolic Zone*, WASHINGTON POST (Mar. 15, 1990), *available at* goo.gl/gDhY99 (noting that building an *eruv* in Washington D.C. "requires permission from the National Park Service and Potomac Electric Power Co., both of which signed off on the plan last month, and the D.C. Department of Public Works"); Tina Kelley, *Town Votes for Marker Used by Jews*, NEW YORK TIMES (Jan. 25, 2006), *available at* https://goo.gl/mBCyUn (explaining that an *eruv* in Tenafly, N.J. had been approved by the Borough Council, the county, and local utilities).

Because the granting of such permission is done solely to benefit a religious entity, in the view of Plaintiffs it would violate the Establishment Clause. The construction of an *eruv* may require extensive discussion, negotiation, and cooperation between Jewish citizens and their government—another sinister hallmark of Establishment, according to the Plaintiffs. To state the proposition is to

refute it. The Constitution simply does not require the government to actively hinder the everyday activities of its religious citizens by gratuitously rejecting permits for harmless actions simply because such permits are sought by the faithful.

Similarly, Jewish law requires adherence to dietary restrictions colloquially known as "keeping kosher." *What is Kosher?*, CHABAD.ORG, *available at* goo.gl/rsUQLd (last visited July 25, 2017). Many observant Jews will only eat foods certified as kosher by Jewish organizations. *Id.* In certain circumstances, Jews need government facilitation to obtain kosher food. For example, observant Jewish servicemembers, prisoners, and even attendees at certain government–sponsored events are provided kosher food by government entities. *Meals, Religious, Kosher/Halal*, DEFENSE LOGISTICS AGENCY, *available at* https://goo.gl/4LraHs (last visited July 25, 2017); KOSHER TODAY, *5,360 Inmates in Federal Prisons Request Kosher Meals* (Feb. 16, 2009), *available at* https://goo.gl/qEkhCG. These restrictions are heightened during the biblical holiday of Passover. The Defense Logistics Agency of the Department of Defense rises to the occasion and provides Passover meals to Jewish servicemembers. Alexandra Siemiatkowski, *DLA Troop*

Support helps Jewish service members celebrate Passover, DEFENSE LOGISTICS AGENCY (Apr. 21, 2016), *available at* goo.gl/ATs38L.

Under Plaintiffs' view of the Establishment Clause, providing soldiers, prisoners, or professors attending government conferences with food that they are comfortable eating is an unconstitutional establishment of religion. Kosher food is ordered for the sole purpose of benefiting Jews, and it offers no benefit to non–Jewish citizens. Ordering kosher food also requires communication with kosher certification agencies. *See* BUREAU OF PRISONS, *Certified Religious Diet Specifications Quote Sheet* (Oct. 2014), *available at* https://goo.gl/NZDrFy. According to Plaintiffs, all of that should be impermissible.

Of course, other citizens may have their own dietary restrictions. Some may be vegetarians for ethical reasons. Others, out of their concern for climate change, may wish to eat foods grown in an environmentally friendly manner. In many circumstances, the government accommodates such individuals. *See* Richard Bowie, *US Prisons to Start Offering Vegan Meals*, VEGNEWS (Sept. 25, 2016), *available at* https://goo.gl/1EFh7Q (noting that, starting in October 2016, "every federal prison in the country will begin offering vegan

entrées to its prisoners."). Yet, according to the Plaintiffs, the accommodation of religious citizens, and of religious citizens alone, is unconstitutional. That cannot be the law. However strong antiestablishment interests might be, they cannot justify precluding religious citizens from the protections available to their compatriots, simply because of their faithfulness.

CONCLUSION

When governmental entities take steps to facilitate their citizens' exercise of religion, such as allowing Jews to build an *eruv*, order kosher food, or obtain a zoning variance to build a synagogue, they are acting in the best interest of their citizens These actions do not constitute establishment of Judaism as the State religion. Prohibiting the government from extending such accommodation to religious entities "would cut a broad swath through a forest of government programs and protections of religious exercise." *Benning v. Georgia*, 391 F.3d 1299, 1310 (11th Cir. 2004). Plaintiffs' view of religious liberty would not produce a religion–neutral government; instead it would yield one that is actively hostile to religion and treats the faithful as second–class citizens. The Constitution neither requires nor permits such an

anomalous and shocking result. Rather, the accommodation of religious beliefs being "a practice that was accepted by the Framers and has withstood the critical scrutiny of time and political change," cannot violate the Establishment Clause. *Town of Greece,* 134 S. Ct. at 1819.

For these reasons, the Court should affirm the decision below.

August 3, 2017

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because:

this brief contains 5,565 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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 proportional-spaced typeface using Microsoft Word in 14 point Century Schoolbook.

Dated: August 3, 2017

s/ Gregory Dolin
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CERTIFICATE OF FILING AND SERVICE

I hereby certify that, on this 3rd day of August, 2017, I caused the foregoing to be filed with the Clerk of the Court, via the CM/ECF System, which will send notice of such filing to all registered users.

I further certify that the required paper copies have been dispatched to the Clerk of the Court, via United Parcel Service, for delivery within three business days.

The necessary filing and service were performed in accordance with the instructions given to me by counsel in this case.

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In The
United States Court Of Appeals
For The Eleventh Circuit

GERALD GAGLIARDI; KATHLEEN MACDOUGAL,
Plaintiffs-Appellants,

v.

CITY OF BOCA RATON FLORIDA, a Florida Municipal Corporation,
Defendant-Appellee,

CHABAD OF EAST BOCA, INC.; TJCV LAND TRUST,
Defendant – Intervenors-Appellees,

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA

MOTION FOR LEAVE TO FILE BRIEF OF *AMICI CURIAE* JEWS FOR RELIGIOUS LIBERTY, *ET AL.* IN SUPPORT OF APPELLEES AND AFFIRMANCE

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17-11820 *Gerald Gagliardi, et al v. City of Boca Raton*

CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

In addition to those listed in Appellant's Opening Brief and Appellee's Brief, the following persons have an interest in the outcome of this case:

Dolin, Gregory, and

Slugh, Howard N., as counsel for proposed *amici*.

The proposed *amici*:

Jews for Religious Liberty, an unincorporated association of American Jews concerned with the current state of religious liberty jurisprudence.

The Coalition for Jewish Values ("CJV"), a trade name of Project Genesis, Inc., a charity incorporated in the State of Maryland and operating pursuant to 26 U.S.C. § 501(c)(3), and dedicated to furthering the principles of Judaism.

Rabbi Dov Fischer, a Senior Rabbinic Fellow at Coalition for Jewish Values, is the spiritual leader of Young Israel of Orange County, California and an Adjunct Professor of law at two Southern California law schools.

17-11820 *Gerald Gagliardi, et al v. City of Boca Raton*

Rabbi Gil Student, an editor of the online magazine Torah Musings and a columnist and frequent writer in Jewish media.

Rabbi Avrohom Gordimer, a Senior Rabbinic Fellow at the CJV.

Rabbi Yaakov Menken, the Director of the CJV.

Rabbi Steven Pruzansky, the spiritual leader of Congregation Bnai Yeshurun, a synagogue consisting of nearly 600 families in Teaneck, New Jersey.

Rabbi Mitchell Rocklin, a congregational rabbi and a U.S. Army Reserve chaplain.

MOTION FOR LEAVE TO FILE BRIEF OF *AMICI CURIAE*

Rabbi Dov Fischer is a Senior Rabbinic Fellow at Coalition for Jewish Values, the spiritual leader of Young Israel of Orange County, California and an Adjunct Professor of law at two Southern California law schools.

Rabbi Gil Student is the editor of the online magazine Torah Musings and a columnist and frequent writer in Jewish media.

Rabbi Avrohom Gordimer is a Senior Rabbinic Fellow at the Coalition for Jewish Values ("CJV"), a non–profit charitable organization that advocates for classical Jewish ideas and standards in matters of American public policy.

Rabbi Yaakov Menken is the Director of the CJV.

Rabbi Steven Pruzansky is the spiritual leader of Congregation Bnai Yeshurun, a synagogue consisting of nearly 600 families in Teaneck, New Jersey.

Rabbi Mitchell Rocklin has experience as a congregational rabbi and a U.S. Army Reserve chaplain.

The individual *amici* have all written extensively on the role of religion in public life.

Jews for Religious Liberty is an unincorporated association of American Jews concerned with the current state of religious liberty jurisprudence. Its members are interested in protecting the religious liberty of their coreligionists as well as religious adherents nationwide.

The Coalition for Jewish Values ("CJV") is trade name of Project Genesis, Inc., a charity incorporated in the State of Maryland and operating pursuant to 26 U.S.C. § 501(c)(3). The CJV advocates for classical Jewish ideas and standards in matters of American public policy. The CJV has a board of seven traditional, Orthodox Rabbis who have served the Jewish and greater American communities for decades as leaders, scholars and opinion makers.

Amici have a deep interest in the freedom of religion and the role of religion in public life; and their experience with these topics may provide a helpful perspective for this Court to consider. The arguments in this brief are aimed at broadly protecting the freedom of religion generally (with particular emphasis on religious minority communities), and not just of defendants in particular. The arguments are complementary to the arguments in Defendants' brief, but not

redundant of those arguments. Proposed *amici* therefore hope that the arguments will assist the Court in deciding this case.

Based on the above, proposed *amici* move this court to accept the *amici curiae* brief submitted together with this motion. All Defendants have consented to the filing of this brief, but the Plaintiffs have declined to consent.

Dated: August 3, 2017

s/ Gregory Dolin
Gregory Dolin
**Counsel of Record*

Counsel for Amicus Curiae Jews for Religious Liberty, et al.

CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

1. This motion complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because:

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Dated: August 3, 2017

s/ Gregory Dolin
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The necessary filing and service were performed in accordance with the instructions given to me by counsel in this case.

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