No. 14-56137

IN THE
**UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

HARBOR MISSIONARY CHURCH CORPORATION,
Plaintiff—Appellant,

v.

CITY OF SAN BUENAVENTURA et al.,
Defendants—Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA
JUDGE MANUEL L. REAL, DISTRICT JUDGE • CASE NO. 2:14-CV-03730 R (VBK)

APPELLANT'S OPENING BRIEF

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CORPORATE DISCLOSURE STATEMENT

Harbor Missionary Church Corporation is a nonprofit religious corporation organized under the laws of California. No parent corporation or publicly held corporation owns ten percent or more of Harbor's stock.

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Defendants—Appellees.

APPELLANT'S OPENING BRIEF

JURISDICTIONAL STATEMENT

Plaintiff Harbor Missionary Church Corporation filed this action against defendants City of San Buenaventura and its officials (together the "City") in the United States District Court for the Central District of California. (2-ER 28-29.) The district court has subject matter jurisdiction under 28 U.S.C. § 1331 because the action arises under both the Religious Land Use and Institutionalized Persons Act (RLUIPA), 42 U.S.C. §§ 2000cc to 2000cc-5, and the United States Constitution. (2-ER 245-48.)

The district court denied, with findings of fact and conclusions of law it read from the bench, the Church's motion for a preliminary injunction at

a hearing on July 9, 2014. (1-ER 4-8; *see also* 2-ER 251.) On July 14, the Church timely filed a notice of appeal from the court's oral order. (2-ER 252-53.) *See* Fed. R. App. P. 4(a)(1)(A). This Court has jurisdiction over the Church's interlocutory appeal under 28 U.S.C. § 1292(a)(1) (2014).

The district court later signed a proposed order written by the City. (1-ER 14-27.) Because the written order, signed by the court on July 18, changed the grounds for the district court's decision, it was entered without jurisdiction (*see infra* pp. 18-22) and should be considered a nullity for purposes of this appeal. If, however, this Court were to determine that the district court had jurisdiction to enter the later order, and that the Church's notice of appeal is a premature appeal from that order, then under Federal Rule of Appellate Procedure 4(a)(2) the notice of appeal should be treated as filed on July 18, 2014, the day the district court signed the proposed order.

STATEMENT OF ISSUES PRESENTED

RLUIPA forbids a city from implementing a land-use regulation that imposes a substantial burden on religious exercise unless the city can show the regulation is the least restrictive means to achieve a compelling governmental interest. 42 U.S.C. § 2000cc(a)(1) (2013). The United States

Supreme Court recently stressed, "[t]he least-restrictive-means standard is exceptionally demanding" on defendants, and it is not for the government "to say that . . . religious beliefs are mistaken or insubstantial." *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2779, 2780 (2014).

For the past six years, until it was recently denied a permit to continue its ministry, the Church has ministered to and cared for the homeless in Ventura by providing food, showers, and laundry, in the context of prayer, song, religious instruction, and more formal worship. In its original order denying the Church a preliminary injunction to enjoin enforcement of the permit denial, the district court determined that the denial imposed no substantial burden on the Church's religious exercise because the court concluded the Church could continue its homeless ministry at a different location the court identified as the "Kingdom Center." There is no evidence in the record, however, that the religious organization or location called the Kingdom Center still exists in Ventura.

After the Church appealed from the district court's order, the court signed an order prepared by the City's counsel that entirely abandoned the court's Kingdom Center rationale for finding no substantial burden, instead substituting a redefinition of the Church's religious exercise that

split its homeless ministry into two components: (1) traditional worship, and (2) all other services the Church has been providing to the homeless. According to the post-appeal order, the Church can continue to provide only traditional worship at the Church, and food, laundry and other services at an unidentified separate location, all without any substantial burden on its past religious practice of providing combined spiritual and charitable care to the homeless in a single, religious setting.

In the context of that factual and procedural background, this appeal presents some or all of the following questions, the number depending on whether the district court had jurisdiction to adopt the City's proposed order after the Church filed its notice of appeal:

1. Did the district court abuse its discretion by finding that the Kingdom Center is an alternate location where the Church can house its ministry to the homeless without a substantial burden on the Church's exercise of religion, where there is no evidence in the record that the Kingdom Center currently operates in Ventura?

2. If a church follows its interpretation of scripture requiring ministering to, feeding, and caring for the homeless at its place of worship, does that activity qualify as protected religious exercise under RLUIPA's

broad definition? And if so, can a court redefine that religious exercise as a combination of secular and non-secular activity, and then determine that requiring the church to engage in what it has deemed merely secular activity at another location imposes no substantial burden on the church's religious exercise?

3. Is prohibiting religious activity by denying a conditional use permit the least restrictive means to achieve a compelling governmental interest where the religious activity has already been ongoing at the Church for six years, some so-called secular services to the homeless continue there on Wednesday nights and Sundays without objection by the City, and the professional City Planning Staff and two of the four voting City Council Members believed that the compelling governmental interest could be achieved by permitting the ministry with conditions?

4. Does a violation of the religious liberty protected by RLUIPA constitute irreparable harm?

5. Do the balance of equities and the public interest favor the protection of religious liberty under RLUIPA during the remaining course of this litigation where the City has already allowed the ministry to

continue for six years, including for almost two years during its permitting process?

STATEMENT OF THE CASE

Harbor Missionary Church appeals the district court's denial of its preliminary injunction motion to stop the City of San Buenaventura (more commonly known as Ventura) and its officials from interfering with the Church's charitable religious practice of ministering to, caring for, and feeding the homeless at its church building.

The district court, Judge Manuel Real presiding, initially granted a temporary restraining order ensuring the Church could continue its charitable work pending resolution of a dispute over whether the City properly denied a conditional use permit that the City told the Church it must obtain—even though the Church had never before needed one during the previous four years of its homeless ministry. But the district court then abruptly changed course and denied a preliminary injunction based on a finding of fact with no support in the record and on a legally erroneous view of RLUIPA, 42 U.S.C. §§ 2000cc to 2000cc-5 (2013). Because every passing day without such an injunction prevents the Church from exercising its religion and denies its congregants the resulting spiritual

and temporal benefits, the Church requests that this Court direct the district court to grant a preliminary injunction preventing the City from enforcing the permit requirement during this litigation, as required under established Supreme Court and Ninth Circuit precedent.

In analyzing the likelihood that the Church will succeed on the merits of its RLUIPA claim, the district court's denial of the preliminary injunction failed to follow this Court's jurisprudence and the Supreme Court's recent *Hobby Lobby* decision regarding what constitutes a substantial burden on religious exercise.

For example, the Church presented undisputed testimony that the homeless ministry at its place of worship is an integral part of the Church's religious practice, and that the ministry includes prayer, more formal worship, teaching of the Word, and caring for the homeless in a religious environment. (3-ER 365-68 (June 16, 2014, Rep. Tr.) [Test. of Pastor Sam Gallucci].) Nonetheless, the district court ruled that any service to the homeless beyond praying or proselytizing—e.g., feeding, clothing, providing showers—is not religious activity and can be done at unspecified secular locations that may be miles from the Church's place of worship without a substantial burden on religious exercise.

The district court's fundamental error of not following post-RLUIPA binding precedent is illustrated by its demand that the Church's counsel read aloud the specific scripture requiring charitable service to the homeless: "Well, you read it. You tell me where in Matthew 25 it says anything about helping the homeless, giving showers, and clothes . . . ." (*Id.* at 322.) Counsel then recited the scripture: "Take your inheritance. . . . For I was hungry and you gave me something to eat. I was thirsty and you gave me something to drink. I was a stranger and you invited me in. I needed clothes and you clothed me. . . . [W]hatever you did for one [of] the least of these brothers and sisters of mine, you did for me." (*Id.* at 323.) The Supreme Court recently, and unanimously, emphasized that it is not for courts "to say that . . . religious beliefs are mistaken or insubstantial." *Hobby Lobby*, 134 S. Ct. at 2779; *see id.* at 2798 (Ginsburg, J., dissenting) (agreeing with the majority on that point). In violation of that admonition, the district court responded to the scriptural reading by stating: "That doesn't say anything about what you are talking about." (3-ER 324.)

This and other legal errors tainted the district court's analysis of whether a preliminary injunction is appropriate, leading the court to

conclude that the Church could minister to the homeless at an off-site location (in the pre-appeal order, a religious location that no longer exists—in the post-appeal order, some unidentified secular location) without any substantial burden on its religious exercise, contrary to this Court's holding in *International Church of Foursquare Gospel v. City of San Leandro*, 673 F.3d 1059 (9th Cir. 2011).

Under the appropriate legal standard, the Church is entitled to the preliminary injunction the district court denied. Accordingly, to maintain the status quo, and to avoid irreparable injury to both the Church and its congregants, this Court should reverse the district court's order and remand for entry of a preliminary injunction. The Church requests only to continue during this litigation a ministry it has practiced for six years—more than four before the City asked the Church to apply for a permit and almost two more during the City's permitting process.

STATEMENT OF FACTS

In 2004, the Church purchased a church building already permitted by the City to operate both as a church and a day-care center for up to 150 children. (2-ER 31-37.) The building is in a residential area of the City that includes mostly single-family homes, a public park, an elementary school,

a large shopping mall with over 100 vendors (including Target, J.C. Penney, Gap, and Sears), and a major hospital. (*Id.* at 52, 68.)

In 2008, with a new head pastor, the Church began welcoming the homeless into the Church, based on its understanding of Christ's command to feed the hungry and clothe the naked. (*Id.* at 242-44; 3-ER 366-67.) As City Staff reported to the Planning Commission, the Church's ministry to the homeless focuses on "spiritual guidance and basic living needs." (2-ER 106.) This ministry falls squarely within the Church's understanding of its religious exercise. (*Id.* at 60-62, 66-67, 164-65, 170, 176-78, 243-44; 3-ER 366-68.)

After the Church's homeless ministry had continued for more than four years, the City told the Church, in January 2013, that it needed a separate conditional use permit to continue its ministry. (2-ER 247.) In February 2013, the Church applied for the new permit. (*Id.* at 41-102.)

The Church requested a permit to "welcome into the church . . . as many people as choose to come, within applicable occupancy limits," so it can minister daily through prayer, breaking of bread, worship-music, religious teachings, communal worship, and the offering of clothing, food, showers, counseling, and other support. (*Id.* at 58.) One formerly homeless

resident of Ventura described his experience at the Church to the City Council: "They took me in, they clothed me, they fed me, they taught me how to serve God with all of my heart . . . ." (*Id.* at 218.)

After studying the issue, meeting with church officials, visiting the site, and hosting a public meeting, City Staff issued a report recommending that the Planning Commission grant the permit subject to conditions that City Staff proposed. (*Id.* at 104, 112.) Nonetheless, the Planning Commission denied the permit, based in part on the erroneous conclusion that the Church's ministry was a "secular land use[ ]." (*Id.* at 118.) One commissioner even compared the charitable-service aspect of the Church's ministry to "[l]aundromats, fast-food places or a private club." (*Id.* at 115.)

On November 22, 2013, the Church appealed to the City Council (*id.* at 120-21), which deadlocked on May 12, 2014 (*id.* at 228-35). Consequently, the Council took no action, and the Planning Commission's decision and reasoning became binding and final. Ventura, Ca., City Council Protocols III.15 (Sept. 2013). By that time, the Church had continuously operated its homeless ministry for six years. (2-ER 40.)

On May 15, 2014, city police and code enforcement officers arrived unannounced and searched the church building while taking photographs. (*Id.* at 126, 133.) The City did not initiate any administrative, criminal, or civil proceeding, but *only* because the Church had already suspended its homeless ministry after the City's decision declaring it to be an illegal land use. (*Id.* at 123, 134.)

The Church filed suit alleging the permit denial violated the Church's free exercise of religion rights under RLUIPA and the First Amendment. On May 30, 2014, the district court granted a temporary restraining order (*id.* at 135-41), and the Church resumed its homeless ministry (*id.* at 164). On June 16, the district court orally modified the temporary restraining order to impose conditions on the operation of the ministry that the City had requested (*id.* at 250), but never put those conditions in writing. Then, at a hearing on July 9, the district court read aloud its order denying the Church's motion for a preliminary injunction and asked counsel to submit an "order consistent . . . with this order." (1-ER 4-8; *see also* 2-ER 251.) The Church again suspended its ministry (*see* 2-ER 274, 275) and, on July 14 appealed from the court's oral order (*id.* at 252-53).

Eight minutes after the Church appealed, the City filed its proposed order—a fourteen-page order that included reasoning not relied on by the district court in its oral order and that excluded facts and reasoning the court had explicitly relied on in denying the injunction the week before. (*See id.* at 256-69.) Also on July 14, the Church filed an ex parte application for an injunction pending appeal (*id.* at 270-72), which the City opposed (*id.* at 280-85).

On July 18, over the Church's objections (*id.* at 276-79), the district court signed the City's proposed order without change (including all of counsel's typographical errors) except for the addition of one sentence stating that the court's oral and written orders were "totally consistent." (1-ER 27.)

After three weeks passed without entry of a ruling on its ex parte application for an injunction pending appeal, the Church filed an emergency motion in this Court under Circuit Rule 27-3 for an injunction pending appeal under Federal Rule of Appellate Procedure 8. The next day, on August 6, 2014, the Church notified the district court of its

emergency motion. (2-ER 268-87.) Less than four hours later, the court entered an order denying the Church's ex parte application.[1] (*Id.* at 288.)

As part of its homeless ministry, the Church has taken (and, if allowed to continue the ministry during the pendency of this litigation, will continue to take) a variety of steps to safeguard the neighborhood, including the employment of a full-time, licensed security guard, the enforcement of a strict no-loitering rule, the denial of service to anyone on the Megan's Law list, regular on-site coordination with social service agencies, the provision of escorts out of the neighborhood for anyone turned away from the church, the maintenance of a public hotline for complaints, and the coordination of operational hours with the adjacent elementary school. (*Id.* at 69, 72, 167-69, 173-206.) The Church also offers the homeless transportation in its van from outside the neighborhood directly to the Church and directly out of the neighborhood afterward; a third of the homeless people who attend the Church's homeless ministry use the Church's van service. (*Id.* at 167).

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[1] Although entered on August 6, the order was dated and filed July 18, 2014. (*Id.* at 288.)

SUMMARY OF THE ARGUMENT

Once a notice of appeal has been filed, a district court lacks jurisdiction to substantially change the basis of its order. Here, after the district court's July 9, 2014, oral ruling on the Church's motion for a preliminary injunction, and after the Church filed its notice of appeal, the district court purportedly replaced its original order with an entirely new July 18 order that had been prepared by the City's counsel and contained different bases for the court's ruling. Because the district court lacked jurisdiction to shift its legal analysis and factual determinations once this appeal was filed, this Court should review the lower court ruling based only on the July 9 pre-appeal order.

Based on the pre-appeal order, the district court abused its discretion when it ruled that the City's refusal to grant the Church a conditional use permit did not impose a substantial burden on the Church's religious practice and therefore did not violate RLUIPA. The district court based its ruling on a factual finding nowhere supported in the record—that the Kingdom Center is an alternative location to which the Church could move its homeless ministry without facing any substantial burden on the Church's exercise of religion. But even if forcing a church to move its

entire ministry from its existing house of worship to a different location were not a substantial burden in and of itself, there was no evidence that the Kingdom Center even still existed in Ventura when the City denied the Church's application for a permit. Therefore, the statute was violated because the denial of the permit adversely affected the ability of the Church and its members to practice an integral part of their religion—ministering to the homeless—without any evidence that the permit denial was the least restrictive means to achieve a compelling governmental interest.

Should this Court decide to consider the district court's July 18 post-appeal order, that order should be given only minimal deference because it was prepared by the City's counsel and signed verbatim by the district court, and because it entirely shifted the basis of the court's original order. But even under an abuse of discretion review, the Church is entitled to a reversal because where the court adopts erroneous legal premises, as here, this Court reviews the underlying issues of law de novo.

Religious exercise includes any exercise of religion, whether or not compelled by, or central to, a system of religious belief. Because courts may not question the validity of beliefs or practices to a religion, in its

post-appeal order the district court erred in finding that it was not a central belief of the Church to minister to the homeless with prayer and charity at a single location, and that moving the purportedly secular part of its ministry would not constitute a substantial burden. Moreover, the Church has established that the permit denial and the corresponding penalties and costs that would attach should the Church continue its religious ministry constitute a substantial burden on its religious exercise, and the district court's contrary ruling is wrong as a matter of law.

Furthermore, the district court's finding that the unconditional denial of *any* permit is the least restrictive means of advancing the City's interest is without basis in the record. There was no recent change in the ministry's operation or other exigent circumstances that mandated an emergency resolution. Indeed, City Staff had identified and recommended conditions to protect the City's interests and allow the homeless ministry to continue. Even the City's counsel raised several options in its briefing. The post-appeal order did not consider those or any other conditions or restrictions that could have been placed on the Church, much less explain why *no* set of conditions could have achieved the City's purported compelling interest.

Thus, regardless of whether this Court considers the district court's post-appeal order or only its pre-appeal order, there is no basis for the district court's preliminary injunction ruling. This Court should remand and order that a preliminary injunction be issued.

ARGUMENT

I. THE DISTRICT COURT'S POST-APPEAL PRELIMINARY INJUNCTION ORDER SHOULD EITHER BE TREATED AS A NULLITY OR GIVEN HEIGHTENED SCRUTINY.

A. Review should be confined to the district court's pre-appeal order, rather than the order prepared by the City's counsel and signed and entered only after the notice of appeal was filed.

A "properly filed notice of appeal vests jurisdiction of the matter in the court of appeal," and a district court "thereafter ha[s] no power to modify its judgment in the case or proceed further except by leave of the appellate court." *Sumida v. Yumen*, 409 F.2d 654, 656-57 (9th Cir. 1969). An "amended order" entered after the notice of appeal has been filed therefore "is a nullity." *Id.* at 657. There is an exception for post-appeal modifications that are "consistent with the court's oral findings . . . because they aid [in] review of the court's decision." *In re Silberkraus*, 336 F.3d 864, 869 (9th Cir. 2003). But that exception does not

apply when the district court "attempt[s] to move the target," as "the appellate court is entitled to review a fixed, rather than a mobile, record." *Kern Oil & Refining Co. v. Tenneco Oil Co.*, 840 F.2d 730, 734 (9th Cir. 1988); *see also Federal Trade Comm'n v. Enforma Natural Prods., Inc.*, 362 F.3d 1204, 1215 n.11 (9th Cir. 2004) (holding that "[a]dditional findings that merely 'set [the target] in place' . . . are acceptable," while "[a]dditional findings that 'move the target' are disfavored.")

Here, a threshold question is whether this Court's review should be confined to the district court's order, issued from the bench on July 9, 2014 (1-ER 4-8; *see also* 2-ER 251), which denied the Church's motion for a preliminary injunction, and from which the Church appealed on July 14 (2-ER 252-53). That same day, but only *after* the notice of appeal had already been filed, the City's counsel submitted a proposed order omitting most of the district court's reasoning and replacing it with legal analysis and factual findings nowhere found in the earlier order from which the Church appealed. (*Id.* at 254-55.) Nonetheless, on July 18, the district

court signed the proposed order that had been presented to him by the City—with even counsel's typographical errors untouched.[2] (1-ER 14-27.)

At the end of the proposed order prepared by counsel, the district court added a sentence stating the new order was "totally consistent" with its pre-appeal order.[3] (1-ER 27.) Despite that statement, the post-appeal order was dramatically inconsistent with the earlier order. The court's pre-appeal order rested exclusively on a single factor in the RLUIPA analysis—that the denial of a conditional use permit did not impose any substantial burden on the Church's exercise of religion because the Church could continue providing its same services to the homeless at a different location, "the Kingdom Center sight [sic]." (*Id.* at 7.) But the post-appeal order deleted any reference to the Church's relocating its entire homeless ministry to the Kingdom Center (presumably because when the City's

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[2] *E.g.*, "[T]he City's decision to deny Harbor's CUP application does not automatically impose a substantial burden its [sic] religious practice," (*compare* 1-ER 21, *with* 2-ER 263), "Harbor has failed to meet its burden of establishing that Defendants placed a substantial burden on it [sic] religious exercise," (*compare* 1-ER 21, *with* 2-ER 263)), "healthy" instead of "health" (*compare* 1-ER 25, *with* 2-ER 267), and "liter" instead of "litter" (*compare* 1-ER 27, *with* 2-ER 269).

[3] The Church had previously filed objections to the proposed order, noting the inconsistencies between the proposed order and the court's July 9 order. (2-ER 276-79.)

counsel drafted that order, he knew the Kingdom Center no longer existed in Ventura (*see* 2-ER 275)).

Also, the post-appeal order relied on an entirely new substantial burden analysis. Under that new analysis, the Church purportedly would suffer no substantial burden from a permit denial because it could conceivably *split* its ministry, continuing to provide "religious services and spiritual succor" at its own church building, but providing "homeless services"—i.e., "meals, clothing, laundry and showers"—only at unnamed "alternative locations in the city." (1-ER 22-23.) Thus the post-appeal order is inconsistent with the court's original order and shifts the target of review from one issue to another.

Furthermore, the bulk of the post-appeal order consists of factual findings and legal reasoning on which the pre-appeal order was entirely silent—including an extended analysis of RLUIPA factors not previously addressed such as "compelling governmental interest," "least restrictive means," "irreparable harm," and "balance of equities." (*Id.* at 24-27.) Significantly, the pre-appeal order contained no analysis or finding that an unconditional permit denial is the least restrictive means of advancing a compelling governmental interest. (*See id.* at 4-8.) Thus, after the appeal

was filed, the district court shifted the basis for its ruling by signing an order containing the analysis that *counsel for the City* would have liked the court to have adopted, but which was entirely different than the analysis on which the court actually based its decision. (*Id.* at 19-27.)

Because the district court was foreclosed from "attempting to move the target" after the notice of appeal was filed, this Court's review should be limited to the district court's pre-appeal order preceding the filing of the notice of appeal, rather than including the inconsistent order prepared by the City's counsel and entered only *after* the notice of appeal was filed.

B. Should this Court consider the district court's post-appeal order, it should be given increased appellate scrutiny.

In general, this Court reviews a denial of a preliminary injunction for abuse of discretion. *Sw. Voter Registration Educ. Project v. Shelley*, 344 F.3d 914, 918 (9th Cir. 2003). A district court "necessarily abuses its discretion when it bases its decision on an erroneous legal standard or on clearly erroneous findings of fact." *Rucker v. Davis*, 237 F.3d 1113, 1118 (9th Cir. 2001) (en banc), *rev'd on other grounds sub nom. Dep't of Hous. & Urban Dev. v. Rucker*, 535 U.S. 125 (2002). However, "[w]hen the district court is alleged to have relied on an erroneous legal premise, [this Court]

review[s] the underlying issues of law de novo." *Cmty. House, Inc. v. City of Boise*, 490 F.3d 1041, 1047 (9th Cir. 2006).

Here, if the July 18 order is not completely disregarded by this Court, as an order prepared entirely by counsel it should not be reviewed merely for abuse of discretion, but should instead be given "increased appellate scrutiny." *Smith Int'l, Inc. v. Hughes Tool Co.*, 664 F.2d 1373, 1375 (9th Cir. 1982); *see also Silver v. Executive Car Leasing Long-Term Disability Plan*, 466 F.3d 727, 733 (9th Cir. 2006) ("[W]hen a district court engage[s] in the regrettable practice of adopting the findings drafted by the prevailing party wholesale, . . . we review the district court's decision with special scrutiny . . . to determine whether its findings were clearly erroneous.") (second alteration in original) (internal quotation marks omitted); *Living Designs, Inc. v. E.I. Dupont de Nemours & Co.*, 431 F.3d 353, 373 (9th Cir. 2005) (noting past Ninth Circuit criticism of "district courts that 'engaged in the "regrettable practice" of adopting the findings drafted by the prevailing party wholesale'"); *Norris Indus., Inc. v. Tappan Co.*, 599 F.2d 908, 909 (9th Cir. 1979) (holding that findings "prepared and submitted by counsel" are "suspect").

Indeed, the "mechanical adoption of a litigant's findings is an abandonment of the duty imposed on trial judges by Rule 52 . . . ." *Kelson v. United States*, 503 F.2d 1291, 1294-95 (10th Cir. 1974); *see also United States v. El Paso Natural Gas Co*., 376 U.S. 651, 656 n.4 (1964) (quoting a circuit judge's address to newly appointed district judges that they should "avoid as far as you possibly can simply signing what some lawyer puts under your nose" which in "the courts of appeals . . . won't be worth the paper they are written on as far as assisting . . . in determining why the judge decided the case."); *Enforma*, 362 F.3d at 1215 (vacating preliminary injunctions for want of proper findings where "adopted verbatim from the FTC's conclusory, 'boilerplate' order").

II. IN ITS PRE-APPEAL ORDER, THE DISTRICT COURT ABUSED ITS DISCRETION BY BASING ITS RULING ON A FACT THAT HAS NO SUPPORT IN THE RECORD.

"A plaintiff seeking a preliminary injunction must establish that he [or she] is likely to succeed on the merits, that he [or she] is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his [or her] favor, and that an injunction is in the public interest." *Arizona Dream Act Coal. v. Brewer*, No. 13-16248, 2014 WL 3029759, at *4 (9th Cir. July 7, 2014) (alterations in original) (quoting

Winter v. Natural Res. Def. Council, Inc., 555 U.S. 7, 20 (2008)). Injunctions that prohibit enforcement of a new law or policy, because they preserve the status quo, are not subject to a heightened burden of proof. *Id.*

Under these criteria, the district court abused its discretion in denying the Church a preliminary injunction based on a factual assumption that is unsupported in the record—that the Kingdom Center currently operates in Ventura, and is a location where the Church could now perform its entire homeless ministry without any substantial burden on its religious exercise.

The evidence in the record concerning the Kingdom Center is that in 2009 the Church sought a permit to provide for the physical and spiritual needs of the homeless in cooperation with another religious organization identified as the Kingdom Center. (2-ER 131-32, 170; *see also* 1-ER 23 [post-appeal order] ("[I]t is undisputed that Harbor applied for a CUP to operate its homeless program at another site called the Kingdom Center before it began its unpermitted homeless outreach services at the Property.").) But there was no evidence before the district court that, five years after the Church considered housing its religious ministry to the

homeless at the Kingdom Center, the Kingdom Center is still operating in Ventura.[4] There is also no evidence in the record that the City would grant a permit for the Church to minister to the homeless at the Kingdom Center even if it existed. (*See* 2-ER 131-32 (explaining that the Church "abandoned that application"); *id.* at 170 ("withdrew its application").)

Nor is there evidence of any presently existing viable alternative location for the Church to continue its homeless ministry providing the combination of spiritual and charitable services that make up its religious practice. The district court found that the Church "is not attempting to convert or proselytize to [the] homeless but quite admirably trying to provide help and charity." (1-ER 5.) But there is no evidence in the record that supports the assertion that the Church does not convert or proselytize to the homeless. To the contrary, all of the evidence presented to the district court on the nature of the ministry, including the live testimony of Pastor Gallucci, establishes the opposite—that the ministry includes prayer, more formal worship, and teaching of the Word. (3-ER 365-68.) The

[4] Because the City has never suggested during this litigation that the Church could move its ministry to the Kingdom Center, the Church put no evidence in the record about the Kingdom Center's nonexistence. But after the district court's oral ruling, the Church submitted evidence that in fact the Kingdom Center no longer operates in Ventura. (2-ER 275.)

City has never questioned whether conversion or proselytizing is part of the homeless ministry, and the order prepared by the City omits the court's finding to the contrary. And even if there were another location where the Church could provide both spiritual and charitable services together (although there is no evidence that any such location exists in Ventura), there is no evidence the Church could relocate its homeless ministry without facing substantial delay, uncertainty and expense—that is, without facing a substantial burden. *See Int'l Church of Foursquare Gospel*, 673 F.3d at 1068.

In sum, because the district court based its pre-appeal order on a fact with no support in the record, it abused its discretion. The pre-appeal order denying the Church a preliminary injunction should therefore be reversed. *See Rucker*, 237 F.3d at 1118.

III. THE DISTRICT COURT'S PRE- AND POST-APPEAL ORDERS BOTH APPLIED THE WRONG LEGAL STANDARD IN EVALUATING THE CHURCH'S RLUIPA CLAIM.

A. Contrary to both district court orders, the Church's ministering to the homeless qualifies as religious exercise.

RLUIPA forbids a city from implementing a land-use regulation that imposes a substantial burden on religious exercise unless it can show the

regulation is the least restrictive means to achieve a compelling governmental interest. 42 U.S.C. § 2000cc(a)(1).

RLUIPA defines "religious exercise" broadly to include "any exercise of religion, whether or not compelled by, or central to, a system of religious belief." 42 U.S.C. § 2000cc-5(7)(A); *Hobby Lobby*, 134 S. Ct. at 2762. All sincere religious beliefs are protected. *Shakur v. Schriro*, 514 F.3d 878, 884 (9th Cir. 2008) ("[I]t is not within the judicial ken to question the centrality of particular beliefs or practices to a faith, or the validity of particular litigants' interpretations of those creeds."); *Hobby Lobby*, 134 S. Ct. at 2798 (Ginsburg, J., dissenting) (agreeing with the majority that a court must accept as true allegations that a plaintiff's beliefs about its own religious activity are sincere and religious in nature). Further, "[t]he use . . . of real property for the purpose of religious exercise shall [itself] be considered to be religious exercise." 42 U.S.C. § 2000cc-5(7)(B).

"[T]he exercise of religion involves not only belief and profession but the performance of . . . physical acts that are engaged in for religious reasons." *Hobby Lobby,* 134 S. Ct. at 2770 (internal quotation marks omitted). The United States has made clear that it considers homeless ministry to constitute religious exercise. *See* U.S. Dep't of Justice,

Statement of the Department of Justice on the Land-Use Provisions of the Religious Land Use and Institutionalized Persons Act (RLUIPA), Civil Rights Div. 3 (Sept. 22, 2010), http://www.justice.gov/crt/rluipa_q_a_9-22-10.pdf. (religious exercise includes "operation of homeless shelters, soup kitchens, and other social services").

Here, the Church's use of its property to minister to the homeless is religious exercise. The Church follows its understanding of Christ's commandment that his followers minister to the poor. Courts have recognized that such a ministry is "in every respect" "religious activity and a form of worship." *W. Presbyterian Church v. Bd. of Zoning Adjustment of D.C.*, 862 F. Supp. 538, 546 (D.D.C. 1994); *accord Fifth Ave. Presbyterian Church v. City of New York*, No. 01 Civ. 11493(LMM), 2004 WL 2471406, at *2 n.3 (S.D.N.Y. Oct. 29, 2004) ("[S]ervices to the homeless have been judicially recognized as religious conduct, within the ambit of the First Amendment.") (internal quotation marks omitted); *Stuart Circle Parish v. Bd. of Zoning Appeals*, 946 F. Supp. 1225, 1236-37 (E.D. Va. 1996); *St. John's Evangelical Lutheran Church v. City of Hoboken*, 479 A.2d 935, 938 (N.J. Super. Ct. Law Div. 1983) ("In view of the centuries old church tradition of sanctuary for those in need of shelter and aid, St. John's and

its parishioners in sheltering the homeless are engaging in the free exercise of religion.").

Indeed, "the concept of acts of charity as an essential part of religious worship is a central tenet of all major religions." *W. Presbyterian Church*, 862 F. Supp. at 544 (noting Muslims, Hindus, Jews, and Christians all hold to such teachings).[5] Therefore, the use of real property for the religious exercise of ministering to the homeless is itself religious activity under 42 U.S.C. § 2000cc-5(7)(B).

In its earlier temporary restraining order, the district court recognized the Church's homeless ministry to be an exercise of religion, calling it "a significant part of Harbor's religious expression," (2-ER 138), and explaining that "in the absence of a TRO [the Church] will not be able to exercise its religious beliefs without Ventura instituting enforcement proceedings against it" (*id.* at 139). But, in an almost complete reversal, the court subsequently denied the Church's request for a preliminary

[5] The district court recognized the universal, religious nature of the homeless ministry, but erroneously implied that only *idiosyncratic* religious practice is protected by RLUIPA: "Well, all religions manifest that. What we want to do is we want to help the homeless. We want to help people. We want to help people. All religions do that . . . not just this religion. All religions do that." (3-ER 302.)

injunction because it found the Church presented "no evidence" that its religious beliefs "require" it to provide meals and otherwise care for the homeless at its property. (1-ER 22-23.) However, a religious claimant under RLUIPA need not prove its faith *requires* it to engage in the burdened religious exercise. *See* 42 U.S.C. § 2000cc-5(7)(A); *Hobby Lobby*, 134 S. Ct. at 2762. It is sufficient for RLUIPA purposes that ministering to the homeless is merely part of the Church's sincere religious exercise and that the Church is using its property for such religious purposes. *See* 42 U.S.C. § 2000cc-5(7)(B).

On this crucial point, the district court erred by relying on First Amendment cases predating RLUIPA (*see* 1-ER 22-23) to hold otherwise; *see Hobby Lobby*, 134 S. Ct. at 2761-62 ("In RLUIPA, in an obvious effort to effect a complete separation from First Amendment case law, Congress deleted the reference to the First Amendment and defined the exercise of religion [more broadly] to include any exercise of religion, whether or not compelled by, or central to, a system of religious belief.") (internal quotation marks omitted); *Navajo Nation v. U.S. Forest Serv.,* 535 F.3d 1058, 1068 (9th Cir. 2008). Moreover, the Church *did* present *undisputed*

evidence that ministering to the homeless is central to its beliefs. (*See* 2-ER 124, 244.)

Accordingly, the district court failed in its obligation to "construe[] [RLUIPA] in favor of a broad protection of religious exercise, to the maximum extent permitted by the terms of this chapter and the Constitution." 42 U.S.C. § 2000cc-3(g).

B. The City's permit denial substantially burdens the Church's exercise of religion.

A substantial burden is one that is "oppressive to a significantly great extent" or that puts "substantial pressure" "to modify . . . behavior and to violate . . . beliefs." *Guru Nanak Sikh Soc'y of Yuba City v. Cnty. of Sutter*, 456 F.3d 978, 988 (9th Cir. 2006) (internal quotation marks omitted). Permit denials meet this standard when they leave a church with "no ready alternatives, or where the alternatives require substantial delay, uncertainty, and expense." *Int'l Church of Foursquare Gospel*, 673 F.3d at 1068 (internal quotation marks omitted). Among other things, the "practical considerations" of finding another "suitable" property can amount to a substantial burden. *Id.* at 1068, 1069.

Here, the Church risks a $1,000 fine and its congregants risk six months' imprisonment *for each day* they continue the Church's charitable work on its premises. *See* Ventura, Ca., Mun. Code §§ 1.150.010, 1.150.020, 24.580.030 (1971). By any objective measure, these penalties impose a substantial burden. *See Hobby Lobby*, 134 S. Ct. at 2775-76 (holding a tax of $100 per day for each affected employee is a substantial burden). The burden for a relatively small Church with limited means is especially substantial; beyond the possibility of imprisonment for its members, the Church could afford the financial penalties for only a month before depleting its resources entirely. (*See* 2-ER 40 ("At the end of 2013, the church's available cash was about $36,726.").)

Further, the Church has no alternatives allowing it to perform its religious ministry to the homeless. The Church has investigated its options and to continue its religious ministry at a single location it would have to sell its current property and raise at least $1.4 million to acquire a new location. (*Id.*) "[A] law that operates so as to make the practice of . . . religious beliefs more expensive [even] in the context of business activities imposes a burden on the exercise of religion." *Hobby Lobby*, 134 S. Ct. at 2770 (internal quotation marks omitted); *accord Int'l Church of*

Foursquare Gospel, 673 F.3d at 1068 (substantial burden shown when alternative would require substantial delay, uncertainty, and expense); *Westchester Day Sch. v. Vill. of Mamaroneck*, 504 F.3d 338, 349 (2d Cir. 2007) (same); *Saints Constantine & Helen Greek Orthodox Church, Inc. v. City of New Berlin*, 396 F.3d 895, 901 (7th Cir. 2005) (same). And even if the Church could relocate, such relocation would take time, especially in light of the uncertainty of either obtaining a permit at an alternative location or finding a location not requiring one; in the meantime, the Church would be forced to cease its ministry to the homeless.

The district court rejected the Church's claim that the permit denial imposes a substantial burden because it believed the Church could either relocate or simply minister to the homeless someplace else. (1-ER 23.) But as just explained, the theoretical possibility that, with substantial funds the Church does not have, it could relocate does not establish there is no substantial burden.[6] "[A] burden need not be found insuperable to be held substantial." *Int'l Church of Foursquare Gospel*, 673 F.3d at 1068 (internal quotation marks omitted).

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[6] This is true even if, as the post-appeal order asserts, the Church has expressed interest in someday relocating to another church building. (1-ER 23.)

Indeed, the district court's analysis—which rests on whether the Church can exercise its religion at another location—misses the very point of RLUIPA, which is to protect religious *land use*, i.e., RLUIPA protects the Church's right to exercise its religion *on its property*. "The use . . . of real property for the purpose of religious exercise shall be considered to be religious exercise." 42 U.S.C. § 2000cc-5(7)(B). RLUIPA's protection for religious land uses would be nullified if the mere possibility of moving the religious use to a different location were sufficient to avoid any finding of substantial burden.

Consequently, this Court has explained that to establish substantial burden a religious group need not "show that there was no other parcel of land on which it could build its church." *Guru Nanak*, 456 F.3d at 989 (internal quotation marks omitted); *see also Barr v. City of Sinton*, 295 S.W.3d 287, 302 (Tex. 2009) ("[E]vidence of *some* possible alternative, irrespective of the difficulties presented, does not, standing alone, disprove substantial burden.") (emphasis in original). Accordingly, the Church's showing of the practical and financial barriers to relocating its ministry was sufficient to establish a substantial burden.

Similarly, the district court erred in evading the substantial-burden analysis by redefining the Church's religious practice—by parsing what it deems secular activity from traditional religious worship. *See Jesus Ctr. v. Farmington Hills Zoning Bd. of Appeals*, 544 N.W.2d 698, 704 (Mich. Ct. App. 1996) (refusing to separate a homeless ministry from its church building). Having segregated what it viewed as secular activity from what it viewed as religious activity, the court determined that the Church can continue the "religious functions" at the church (1-ER 22), and continue the "homeless services" elsewhere in conjunction with some other homeless-services provider (*id.* at 23). "The City's permit denial," the post-appeal order says, "merely limits the services (including meals, clothing laundry, and showers) that Harbor can provide to its congregants and to the public at a single location (the Property) within the city." (*Id.* at 22.)

Such reasoning was explicitly rejected by this Court in *International Church of Foursquare Gospel*, 673 F.3d 1059. There, a church sought property rezoning to build a large new church based on "'unique core beliefs'" that required it "to meet in one place . . . to hold Sunday school and other ministries that take place at the same time as the traditional Sunday service." *Id.* at 1069. As here, the district court reasoned that the

City's rezoning denial did not impose a substantial burden because the Church "could continue to conduct three separate Sunday services or could acquire several smaller properties throughout the City and relocate some of its operations off site." *Id.* The Ninth Circuit reversed, holding that the "district court's flat rejection of the Church's characterization of its core beliefs runs counter to the Supreme Court's admonition that while a court can arbiter the sincerity of an individual's religious beliefs, courts should not inquire into the truth or falsity of stated religious beliefs." *Id.*

Similarly, the Church's ministry—its religious activity—is to provide for both spiritual and temporal needs *together*. (*See, e.g.*, 2-ER 178 ("Through [its ministry to the homeless], the Church becomes a safe place where homeless congregants can meet their spiritual and physical needs and on an integrated basis, with access to continuous worship, spiritual guidance, a hot meal, a warm shower, and a clean change of clothes.").) And there is no evidence the Church could continue to provide the combination of services making up its religious practice—including prayer, worship-music, religious teachings, and communal worship—in partnership with any existing homeless-services provider. As discussed above, *see supra* pages 25-26, the Kingdom Center is the only religious

homeless-services provider mentioned in the record, and there is no evidence that the Kingdom Center still operates in Ventura. (And, indeed, it does not.)

In addition, the written order prepared by defense counsel contained a new legal rule neither advanced in the court's oral ruling nor supported by precedent: that because the City did not burden the Church's pre-2008 religious practice, the City merely denied the Church's request to *change* its religious practice, and accordingly the burden is not substantial. (1-ER 22.) But it is undisputed that for *four years* before the City's insistence on a new conditional use permit the Church had been practicing its faith by ministering to the homeless; any change in that practice *years earlier* is legally insignificant.

The two cases cited by the post-appeal order do not suggest otherwise. The first, *Christian Gospel Church, Inc. v. City & County of San Francisco*, 896 F.2d 1221 (9th Cir. 1990), which was superseded by RLUIPA, as stated in *Midrash Sephardi, Inc. v. Town of Surfside*, 366 F.3d 1214, 1226 (11th Cir. 2004), involved a proposed change in religious practice that would have taken place had a permit been granted, *see Christian Gospel Church*, 896 F.2d at 1224, not a change in practice that

had occurred years earlier. Likewise, in *San Jose Christian College v. City of Morgan Hill*, No. C091-20857, 2001 WL 1862224, at *7 (N.D. Cal. Nov. 14, 2001), the court found significant that San Jose Christian College, whose permit application to move to a different facility had been denied, continued to have "an existing facility which it is presently using." Again, the change in practice was merely prospective. The post-appeal order cites no authority that would allow (let alone encourage) a court to devalue, or to treat differently, a religious practice that has been ongoing for years simply because the practice evolved from earlier religious practice.

Finally, there can be no greater proof of substantial burden—and that the alternatives relied on by the City and district court are illusory—than the fact that after the district court denied the preliminary injunction, the Church ceased its homeless ministry. (*See* 2-ER 274-75.)

C. Even assuming the City's interest in protecting the neighborhood from the homeless is compelling, the City has not shown that its permit denial was the least restrictive means of advancing that interest.

Even where a government has proven a compelling interest, it cannot substantially burden religious exercise unless it can also show that it has selected the least restrictive means of advancing that interest. 42 U.S.C. §

2000cc(a)(1)(B). "The least-restrictive-means standard is exceptionally demanding." *Hobby Lobby*, 134 S. Ct. at 2780. "[I]f a less restrictive means is available for the Government to achieve its goals, the Government must use it." *United States v. Playboy Entm't Grp.*, 529 U.S. 803, 815 (2000) (applying the least restrictive means standard to a content-based speech regulation). A city "cannot meet its burden to prove least restrictive means unless it demonstrates that it has actually considered and rejected the efficacy of less restrictive measures before adopting the challenged practice." *Warsoldier v. Woodford*, 418 F.3d 989, 999 (9th Cir. 2005).

An outright permit denial does not constitute the least restrictive means where a city "ha[s] the opportunity to approve [a permit] subject to conditions, but refuse[s] to consider doing so." *Westchester*, 504 F.3d at 353; *see also Jesus Ctr.*, 544 N.W.2d at 705 (concluding that least restrictive means standard requires city officials to work with a homeless ministry "to develop guidelines for its operation of the shelter to mitigate community concerns"); *St. John's Evangelical Lutheran Church*, 479 A.2d at 939 (same).

Here, the district court's pre-appeal order did not address RLUIPA's least restrictive means requirement at all; the district court's post-appeal

order determined that the City's outright denial of the permit was the "less restrictive means" because the City showed the Church's "use was so incompatible with the neighborhood, and so detrimental to the health, safety, and welfare of its neighbors, that outright denial of the permit was the only way of achieving its compelling governmental interest." (1-ER 25-26.) But the signed order prepared by the City's counsel fails to specify the "use" to which it was referring and identifies the "compelling governmental interest" at a level of generality that has the effect of hiding the absence of the required narrow tailoring.

The Church's land use at issue here is ministering to the homeless. The "compelling governmental interest" is safeguarding the neighborhood *by preventing crime*. "Homeless" and "criminal" are not synonyms. Outright denial of the Church's right to minister to the homeless at its place of worship is not the least restrictive means of preventing crime if the City or the Church can take steps to prevent crime without outlawing the homeless ministry.

For example, the City could address crime in the neighborhood by increased enforcement of its criminal laws. In 1939, the Supreme Court rejected a city's attempt to prohibit distribution of literature on a public

street, explaining that "[t]here are obvious methods of preventing littering. Amongst these is the punishment of those who actually throw papers on the streets." *Schneider v. State (Town of Irvington)*, 308 U.S. 147, 162 (1939). And recently, the Supreme Court recognized that protecting religious freedom guaranteed by RLUIPA may require the government to take action and to bear the cost of that action: "[B]oth RFRA and its sister statute, RLUIPA, may in some circumstances require the Government to expend additional funds to accommodate citizens' religious beliefs." *Hobby Lobby*, 134 S. Ct. at 2781. It is the City's burden to show that there are no less restrictive means, *see* 42 U.S.C. § 2000cc,—that increased enforcement of its criminal laws in the neighborhood surrounding the Church (alone or in conjunction with conditions placed on the permit) would not protect the City's compelling interest. It has not met that burden.

In addition to actions that the City could have taken to prevent crime in the neighborhood, the City could have granted the Church a permit to continue its homeless ministry under conditions designed to minimize any secondary effect of crime in the neighborhood. The fact that City Staff recommended conditions (2-ER 106-07, 145-58), which were rejected by the Planning Commission due to political pressure from neighborhood

residents, illustrates that there are less restrictive means available than an unconditional prohibition on the Church's continuing operation of its homeless ministry. (*See id.* at 111 ("With the conditions described above . . . the Use Permit would be compatible with the surrounding neighborhood.").)

According to the post-appeal order, the City required the Church to obtain a new conditional use permit because the Church "ramp[ed] up" its ministry to the homeless in 2012. (1-ER 16, 22.) But that merely demonstrates why outright denial of any permit at all is necessarily a RLUIPA violation. If no permit for the homeless ministry was necessary—and no compelling interest was compromised—before the Church "ramped up" its ministry in 2012, then a less restrictive means of advancing the City's compelling interest now would be to "ramp down" the program to its pre-2012 level. According to the City's Community Development Director, complaints from residential neighbors began in the fall of 2012, which coincided with "Harbor increasing the size and level of its homeless services operation in approximately 2011-2012." (2-ER 132.) The City by its own admission lived with the program without incident for four years, demonstrating that at some "size and level of . . . services" the Church's

homeless ministry can operate consistent with any compelling interest of the City. (*See id.*; *see also id.* at 214 (recognizing that the City was aware of the homeless ministry, but took no action to stop it or to require that it be permitted); *id.* at 223-24 (same).)

Similarly, and perhaps more tellingly, the Church continues to have Wednesday night and Sunday afternoon services that include the provision of meals to everyone who attends, and homeless congregants attend those services. (*See id.* at 62, 105, 215 ("[I]f it wasn't for the Monday through Friday and Sunday morning meals, I had no idea where I was going to feed myself."), 216, 239.) The Church described those services to the City in its permit application (*id.* at 62, 64), and the City has never taken the position that the Church need apply for a separate conditional use permit to continue those services. It is therefore apparent that even the City believes some level of charitable service to the homeless beyond worship and prayer—service that includes attending to some basic physical needs—does not compromise its compelling interest.

Suppose, for example, that the City had limited the homeless ministry's hours of operation to just one hour at lunchtime, and had permitted the Church to provide only traditional prayer and a meal, and

only to five homeless people a day. Or suppose the City had also restricted the Church to serving only those five homeless people it picks up with its van at a location outside the neighborhood and transports back to that same location after the ministry. Surely those restrictions would have been sufficient to protect the City's compelling interest. And as long as any set of such lesser restrictions exists, then flat permit denial was not the City's least restrictive means to achieve its compelling governmental interest.

Significantly, two of the four councilmembers who voted on the Church's appeal recognized there were less restrictive ways to achieve the City's compelling interest than outright permit denial. Councilmember Andrews, for example, observed that "there are mechanisms that we have not yet discussed and could discuss that would make this at least feasible, this use of this facility." (*Id.* at 232.) Councilmember Morehouse stated that "[i]f we were to develop a Conditional Use Permit that had very strong measurement points in it, I think it would be a chance to test that for the church and truly work with the neighborhood more effectively, because those conditions would have to be met, they would have to have time points, they would have to have measurement tools; and, therefore, we would have a better way to monitor them. (*Id.* at 231.) Accordingly, he

wanted "to go ahead and try to develop a Conditional Use Permit with some very stringent conditions on it." (*Id.*)

Indeed, there is *almost always* some less restrictive means to achieve a compelling government interest, and RLUIPA demands that to whatever extent possible religious freedom must be protected. In a memorandum to the City Council that became part of the public record, Special Counsel to the City, Thomas B. Brown and Robert Pittman of Burke Williams & Sorensen, LLP explained as much: "[O]ne thing is clear—outright denial of an application is rarely justified as the least restrictive means to achieve a compelling governmental interest." (*Id.* at 209.) *See Westchester Day Sch. v. Vill. of Mamaroneck*, 417 F. Supp. 2d 477, 551 (S.D.N.Y. 2006) (holding that "defendants bear the burden of demonstrating that no alternatives, other than outright denial, could further their interests relating to traffic.") *aff'd*, 504 F.3d 338 (2d Cir. 2007); *Castle Hills First Baptist Church v. City of Castle Hills,* No. SA-01-CA-1149-RF, 2004 WL 546792, at *16 (W.D. Tex. Mar. 17, 2004) ("The City's interest . . . can be addressed by the manner in which a permit is granted, not by an outright refusal to consider a permit's application when at potentially stake is a religious institution's ability to use the land for religious conduct.").

Finally, the City appears to have conceded, in opposition to the Church's preliminary injunction motion, that it might approve a "less intensive" application subject to "rigorous conditions." (2-ER 143.) The City stated, "It is not at all clear that the Planning Commission and City Council would reject a scaled-back program, with perhaps fewer persons receiving services on fewer days . . . ." (*Id.* at 143 n.5.) Because the City has already conceded that it might approve a scaled-back program, the City has not met its burden to determine what is the least restrictive means to achieve its compelling interest and to restrict no more religious activity than necessary to achieve that interest.

In sum, at the heart of the RLUIPA analysis is whether a government's *determination* of the least restrictive means is *actually* the least restrictive means. The question is therefore where the line should be drawn, not whether the government can decline to draw a line at all by simply prohibiting the religious exercise. Nor must the claimant agree with the government on where the line should be drawn or else risk the outright loss of its right to religious exercise. Rather, it is the government's obligation to draw the line, and if the claimant believes the conditions imposed are not the least restrictive to ensure the compelling interest, the

claimant can exercise its rights under RLUIPA to challenge that determination. Here, the City's failure to draw any line at all, and its outright denial of any permit that would allow the Church to continue operating its homeless ministry regardless of limitations it could have imposed, violated RLUIPA's least restrictive means requirement.

IV. THE CHURCH WILL SUFFER IRREPARABLE HARM IF THE CITY IS NOT ENJOINED DURING THE PENDENCY OF THIS LITIGATION.

"Irreparable harm is traditionally defined as harm for which there is no adequate legal remedy, such as an award of damages." *Arizona Dream Act Coal.*, 2014 WL 3029759, at *11 ("[T]he district court erred by attempting to evaluate the severity of the harm to Plaintiffs, rather than simply determining whether the harm to Plaintiffs was irreparable.").

"'[T]he loss of First Amendment freedoms, for *even minimal periods of time*, unquestionably constitutes irreparable injury' . . . ." *Sammartano v. First Judicial Dist. Court, in & for Cnty. of Carson City*, 303 F.3d 959, 973 (9th Cir. 2002) (emphasis added) (quoting *Elrod v. Burns*, 427 U.S. 347, 373 (1976)); *see also Satiacum v. Laird*, 475 F.2d 320, 321 (D.C. Cir. 1972) ("In view of the constitutional rights involved, [Native Americans who wished to perform religious ceremony in cemetery] plainly will suffer

irreparable injury unless the relief sought [an injunction preventing government from prohibiting the ceremony] is granted."). This logic "applies with equal force to the violation of RLUIPA rights because RLUIPA enforces First Amendment freedoms, and the statute requires courts to construe it broadly to protect religious exercise." *Opulent Life Church v. City of Holly Springs*, 697 F.3d 279, 295 (5th Cir. 2012); *O Centro Espirita Beneficiente Uniao Do Vegetal v. Ashcroft*, 389 F.3d 973, 995 (10th Cir. 2004) ("[The plaintiff] would certainly suffer an irreparable harm, assuming of course that it is likely to succeed on the merits of its RFRA claim."), *aff'd*, 546 U.S. 418 (2006).

Forcing the Church to abandon its religious exercise constitutes irreparable harm. The permit denial forces the church to close its ministry to the homeless and abandon its religious exercise.

V. THE BALANCE OF THE EQUITIES TIPS IN THE CHURCH'S FAVOR.

"[I]t is clear that it would not be equitable or in the public's interest to allow the state . . . to violate the requirements of federal law, especially when there are no adequate remedies available." *Arizona Dream Act Coal.,*

2014 WL 3029759, at *12 (alteration and ellipsis in original) (quoting *Valle del Sol Inc. v. Whiting*, 732 F.3d 1006, 1029 (9th Cir. 2013)).

The Church has been ministering to the poor at its current location for over six years—since April 2008. (2-ER 170.) Yet the City did not notify the Church until January 2013 that it thought the Church needed to apply for a separate conditional use permit for its homeless ministry. (*Id.* at 247.) And, tellingly, the City allowed the Church to continue operating even during the City's own permit application proceedings, both at the Planning Commission stage and during the appeal to the City Council. (*Id.* at 40.) The ministry's uninterrupted operation throughout the permit application process alone demonstrates the City will face no significant hardship from the Church's continued operation during this litigation. In any event, whatever hardship the City might face under an injunction will be far less than the irreparable harm the Church will face if one is not issued.

VI. GRANTING A PRELIMINARY INJUNCTION IS IN THE PUBLIC INTEREST.

Granting an injunction will serve the public interest. Courts have consistently recognized "the significant public interest in upholding First

Amendment principles." *Sammartano*, 303 F.3d at 974. Likewise, the public interest may be declared in the form of a statute. *Golden Gate Rest. Ass'n v. City & Cnty. of San Francisco*, 512 F.3d 1112, 1127 (9th Cir. 2008). "By passing RLUIPA, Congress conclusively determined the national public policy that religious land uses are to be guarded from interference by local governments to the maximum extent permitted by the Constitution." *Cottonwood Christian Ctr. v. Cypress Redevelopment Agency*, 218 F. Supp. 2d 1203, 1230-31 (C.D. Cal. 2002).

Here, an injunction will serve the public interest because it will allow the Church to continue its religious exercise protected under RLUIPA.

Further, caring for the homeless is in the public interest, so much so that recently this Court urged a neighboring city to do more to resolve the "pressing problem of mass homelessness." *Lavan v. City of Los Angeles*, 693 F.3d 1022, 1033 (9th Cir. 2012); *see Missouri v. Jenkins*, 495 U.S. 33, 77 (1990) (Kennedy, J., concurring in part and concurring in the judgment) (characterizing "feeding the poor" as a public need). Homeless residents are a particularly "vulnerable group in our society." *Lavan*, 693 F.3d at 1033. "[A]s many as 50 percent of homeless women and children are fleeing domestic violence." *United States v. Morrison*, 529 U.S. 598, 631

(2000) (Souter, J., dissenting) (quoting S. Rep. No. 101–545 at 37 (1990)). The loss of the Church as a safe place to eat, bathe, and pray for the period of this litigation could be devastating. (*See* 2-ER 237, 241 [declarations describing the effect of the Church's temporary closing].)

Finally, the safety of the community surrounding the church is not a factor contrary to the public interest. The community has lived with the Church's homeless ministry since 2008, and for two years during the permit application process. As detailed above, *see supra* page 14, the Church has put in place many measures suggested by the City for the benefit of the surrounding community, and the Church will continue to voluntarily implement reasonable measures designed to protect the community.

In addition, the City can ensure the community's safety in the same way that, through enforcement of criminal laws, it protects the safety of all of its citizens. And even though the City could theoretically be required by RLUIPA to expend additional funds to ensure the Church can engage in religious activity on its property, *see Hobby Lobby*, 134 S. Ct. at 2781, according to City Staff the police department has been able to respond to

calls for service as part of its normal operations and without the need for additional police officers (*see* 2-ER 113).

VII. ON REMAND, THIS CASE SHOULD BE REASSIGNED TO A NEW DISTRICT COURT JUDGE.

This Court's supervisory powers under 28 U.S.C. § 2106 permit it to reassign cases on remand when "unusual circumstances" are present. *United Nat'l Ins. Co. v. R & D Latex Corp.*, 242 F.3d 1102, 1118 (9th Cir. 2001). Reassignment is warranted where a district court judge may "have substantial difficulty in putting out of his or her mind previously expressed views or findings determined to be erroneous," making "reassignment . . . advisable to preserve the appearance of justice." *Id.* (quoting *United States v. Sears, Roebuck & Co.*, 785 F.2d 777, 780 (9th Cir. 1986)).

Here, reassignment is justified by Judge Real's adherence to views at odds with clear precedent, including the Supreme Court's recent guidance in *Hobby Lobby* that "it is not for [the Court] to say that [the] religious beliefs [of the plaintiff] are mistaken or insubstantial." 134 S. Ct. at 2779; *see also id.* at 2798 (Ginsburg, J., dissenting) (recognizing that "courts are not to question where an individual 'dr[aws] the line' in defining which

practices run afoul of her religious beliefs"(alteration in original) (quoting *Thomas v. Review Bd. of Ind. Emp't Sec. Div.*, 450 U.S. 707, 715 (1981))). (*See generally* 3-ER 289-446.) This Court has previously reassigned cases based on Judge Real's failure to follow clear precedent. *See, e.g., Rhoades v. Avon Prods., Inc.,* 504 F.3d 1151, 1166 (9th Cir. 2007) (reassigning case after determining Judge Real's "invocation of the primary jurisdiction doctrine was clearly erroneous" and concluding "that if this case were before him[, the judge] would have substantial difficulty in putting his previously expressed views out of his mind."); *Research Corp. Techs., Inc. v. Microsoft Corp.*, 536 F.3d 1247, 1255 (Fed. Cir. 2008) (reassigning case where Judge Real erred in ignoring one prong of clear two-prong inquiry and "this court must recognize that a pattern of error based on previously-expressed views or findings may make it difficult for a trial court to approach a remanded case with an open mind"); *Neurovision Med. Prods. Inc. v. NuVasive, Inc.*, 494 F. App'x 749, 752 (9th Cir. 2012) (finding reassignment warranted "in light of [Judge Real's] adherence to a view of trademark law that is at odds with clear Ninth Circuit precedent," creating "reason to believe [he] may 'have substantial difficulty in putting out of his . . . mind previously expressed views or findings determined to be

erroneous" (alteration in original)); *Barrios v. Diamond Contract Servs., Inc.*, 461 F. App'x 571, 573 (9th Cir. 2011) (finding reassignment warranted where Judge Real "misapplied the law" and may "have substantial difficulty in putting out of his . . . mind previously expressed views or findings determined to be erroneous").

Past cases have also been reassigned where, as here, Judge Real adopted one party's proposed findings and conclusions either verbatim or with only minor revisions. *See, e.g., Living Designs,* 431 F.3d at 373 (finding reassignment advisable where Judge Real adopted and published the 64-page summary judgment order tendered by the defendants "with only a few minor changes"); *TriMed Inc. v. Stryker Corp.*, 608 F.3d 1333, 1344 (Fed. Cir. 2010) (reassigning case after Judge Real twice followed the "regrettable practice" of "adopting the findings drafted by the prevailing party wholesale" in granting motion for summary judgment); *Ermovick v. Mitchell Silberberg & Knupp LLP Long Term Disability Coverage for All Emps.*, 373 F. App'x 761, 762 (9th Cir. 2010) (reassigning case after Judge Real twice ruled for the defendant, and in each instance "adopted the [defendant's] proposed findings and conclusions verbatim").

Here, this case is still at a preliminary stage, such that reassignment would not "entail waste and duplication out of proportion to any gain in preserving the appearance of fairness." *Davis & Cox v. Summa Corp.*, 751 F.2d 1507, 1523 (9th Cir. 1985) (internal quotation marks omitted); *see Trudeau v. Direct Mktg. Concepts, Inc.*, 90 F. App'x 486, 488 (9th Cir. 2003) (reassigning case from Judge Real "to a different district judge on remand" where, "[g]iven the preliminary nature of the proceedings, the minimal potential for waste or duplication of judicial resources is outweighed by the need to proceed in a manner that preserves the appearance of fairness"). Indeed, reassigning the case now could avoid "waste and duplication of resources" by avoiding the risk that on remand Judge Real would persist in applying an erroneous view of clear precedent, requiring further correction of error by this Court. *See* Toby J. Heytens, *Reassignment*, 66 Stan. L. Rev. 1, 21 (2014) (noting that Judge Real is, "by far, the most reassigned federal trial court judge in the United States, with forty-three appellate-court-ordered reassignments over the course of twenty-six years").

CONCLUSION

This Court should reverse the district court's order denying a preliminary injunction and remand for entry of a preliminary injunction providing that, until ordered otherwise, Defendants City of San Buenaventura, Jeffrey Lambert, and Mark Watkins are enjoined from enforcing any land use regulation against Harbor Missionary Church Corporation in a manner that prohibits, interferes with, or abridges the Church's continued use of its property at 3100 Preble Avenue for its homeless ministry. The Church also respectfully requests that this Court include instructions on remand that the case be reassigned to a different judge in the Central District of California.

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STATEMENT OF RELATED CASES

We are not aware of any pending appeals related to this appeal. *See* 9th Cir. R. 28-2.6.

CERTIFICATION OF COMPLIANCE WITH TYPE-VOLUME LIMITATION, TYPEFACE REQUIREMENTS, AND TYPE STYLE REQUIREMENTS [FED R. APP. P. 32(a)(7)(C)]

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Date

s/ Lisa M. Freeman
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I hereby certify that on August 11, 2014, I electronically filed the foregoing **APPELLANT'S OPENING BRIEF (Filed Concurrently with Excerpts of Record • Volumes 1-3)** with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

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