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The Growth of Chabad in the United States and the Rise of Chabad Related Litigation

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THE GROWTH OF CHABAD IN THE UNITED STATES AND THE RISE OF CHABAD RELATED LITIGATION

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I. INTRODUCTION

“Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof.”¹ These first two clauses of the United States Constitution have meant so many things to so many people over the years.² To one ever growing Jewish movement it has meant freedom and protection from the likes of Cossacks, Nazis, and other hatemongers.³ These are but some of the many groups that have made it their mission to kill Jews

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1. U.S. CONST. amend. I. These clauses are often referred to as the Establishment Clause and the Free Exercise Clause, respectively. BLACK’S LAW DICTIONARY 586, 690 (8th ed. 2004).

2. See *infra* Parts III–IV.

3. See, e.g., SUE FISHKOFF, THE REBBE’S ARMY: INSIDE THE WORLD OF CHABAD-LUBAVITCH 24, 72 (2003).

and to extinguish the light of Judaism. Fleeing from war torn Europe of the 1940s, Chabad-Lubavitch (Chabad), a branch of Orthodox Judaism that practices Hasidism,⁴ has made 770 Eastern Parkway, Crown Heights, New York their world headquarters.⁵ From this location, Chabad has become one of the most visible Jewish groups in the world.⁶

Chabad's mission is in fact to be visible and to spread its form of Judaism to other Jews around the world.⁷ Chabad has made it a goal to place *shlichim*, emissaries, on every corner of the globe.⁸ It is this wide visibility that has led to numerous lawsuits in the United States, both initiated by Chabad and by those wishing to stop Chabad's efforts.⁹ These lawsuits have made their way from coast to coast across the United States.¹⁰

This paper will focus on how Chabad has attempted to spread its message from community to community and how Jewish and non-Jewish neighbors have reacted with litigation. While often times the reaction has been one of welcome and open arms, there are many examples of communities responding with concerted attempts to force Chabad out.¹¹ Even when others did not initiate suit against Chabad, Chabad has been willing to complain when members felt their rights were being violated.¹² Part II of this

4. Chabad is an acronym of the Hebrew words, *chochmah*, *binah*, and *da'at* (wisdom, understanding, knowledge). Avraham Rubinstein, *Habad*, in 7 ENCYCLOPAEDIA JUDAICA 1013 (1982); FISHKOFF, *supra* note 3, at 18. The term Lubavitch is a geographical reference to the Russian town where four of the founding rebbes taught. FISHKOFF, *supra* note 3, at 18. Hasidism is commonly referred to as mystical Judaism. *Id.* at 17. This form of Judaism was founded by Rabbi Israel ben Eliezer (born around 1700), or the "Baal Shem Tov" (Besht), meaning "Master of the Good Name." *Id.*; Rubinstein, *supra*, at 1013. The Baal Shem Tov's disciple Rabbi Dov Ber was the teacher of Rabbi Shneur Zalman, the "Alter Rebbe," who is the founder of the Chabad-Lubavitch Movement. FISHKOFF, *supra* note 3, at 18.

5. FISHKOFF, *supra* note 3, at 24, 73.

6. *Id.* at 10.

7. *Id.* at 12, 31.

8. *Id.*

9. See, e.g., *Lucas Valley Homeowners Ass'n v. Chabad of N. Bay, Inc.*, 284 Cal. Rptr. 427, 443 (Cal. Ct. App. 1991) (holding that Chabad's receipt of a permit to hold services in a residential neighborhood was valid even in the face of neighbors' concerns about parking and noise); *Lubavitch Chabad House, Inc. v. City of Chicago*, 917 F.2d 341, 345, 348 (7th Cir. 1990) (recognizing that displaying a Christmas tree in an airport is secular while displaying a menorah is a reasonable time, place, and manner restriction); *Chabad-Lubavitch of Vt. v. City of Burlington*, 936 F.2d 109, 112 (2d Cir. 1991) (denying Chabad's right to place the menorah in the city park). This is not an exhaustive list, but a few examples in a long trail of litigation. Cases in Ohio, Georgia, and Florida are discussed below. This paper does not analyze litigation involving Chabad outside the United States.

10. See *Lucas Valley*, 284 Cal. Rptr. 427; *Lubavitch Chabad House*, 917 F.2d 341; *Chabad-Lubavitch*, 936 F.2d 109.

11. FISHKOFF, *supra* note 3, at 24, 72; see *infra* Parts III-IV.

12. See *infra* Parts III-IV.

paper will introduce the message and the mission of Chabad and how that has often times, unwittingly, instigated lawsuits. Chabad's message has not wilted even in the face of these lawsuits.¹³ If anything, in more recent lawsuits, Chabad is learning from past mistakes and more carefully choosing the best legal arguments. Part III of this paper focuses on the Chabad menorah, which has been heavily litigated across the country. This section discusses a few examples of cities where Chabad has both succeeded and failed in its efforts at displaying the menorah. In all of the examples to be discussed, the goal of publicity for Chabad was achieved. In Part IV of this paper, the focus is on Florida. Due to the recent growth of the active Chabad community in Florida and the tough real estate market, there have been a number of cases concerning the location of Chabad centers in residential neighborhoods. In the examples which will be discussed, the old adage, "location, location, location,"¹⁴ rings true. Finally, Part V will conclude this paper with a premonition that Chabad will continue to grow across the country, and so too will the number of Chabad-related lawsuits.

II. CHABAD COMES TO THE UNITED STATES: A LIGHT UNTO THE JEWS

Chabad became the well-known movement that it is today under the leadership of the seventh and last rebbe, Menachem Mendel Schneerson.¹⁵ In 1941, Schneerson, affectionately referred to as "the Rebbe," arrived on the shores of New York.¹⁶ The long and dangerous journey out of Nazi-occupied Europe took him to the United States to join his father-in-law and other family members.¹⁷ His father-in-law, the sixth Lubavitcher rebbe, quickly saw Menachem Mendel's potential and appointed him in charge of outreach.¹⁸ Upon taking the helm of Chabad, Schneerson transformed Chabad from a small and insulated remnant of European Jewry to a major force in the Jewish community.¹⁹

Part of the Rebbe's vision for Chabad was to have Chabad centers established all around the world.²⁰ It is considered an honor for a young Cha-

13. See FISHKOFF, *supra* note 3, at 10.

14. "Location, location, location" is the colloquial phrase referring to the importance of real estate when building or opening a new home or business.

15. See FISHKOFF, *supra* note 3, at 10.

16. See *id.* at 73.

17. See *id.*

18. See *id.* at 72-73.

19. See *id.* at 10-12.

20. See FISHKOFF, *supra* note 3, at 12. Even after the Rebbe's death, Chabad has continued to grow:

bad member, a Chabadnik, to be sent out as an emissary to open up a Chabad Center, whether it is in Boca Raton or Timbuktu.²¹ Most often a young couple is sent with just enough money for housing and to get started.²² It would be up to them to meet people and create a center in the community.²³ This usually requires a lot of hard work and fundraising.²⁴ The first goal though is always to get people interested and involved and to spread Chabad teachings.²⁵ The size of the center will depend on the needs of the community.²⁶

Usually Chabadniks will set up shop wherever they believe they can best meet the needs of the community and of course this decision also depends on the funding they have received, if any, prior to their arrival there.²⁷ If a storefront shop is in the best location and affordable, then the emissary might set up there; however, if the emissary can only afford a home to live in at that time and not such a meeting place, then often times the emissary's home will become the meeting place.²⁸ The focus though is always on providing for the community's needs, over and above any emissary's needs.²⁹

Wherever Chabad emissaries do choose to live or set up a center, Chabad has always been involved in the local community.³⁰ Sometimes this means speaking at the local schools about Jewish holidays, and other times it means inviting people over for Shabbat dinner.³¹ One common trend among

Between 1994 and 2002, more than 610 new emissary couples took up their postings and more than 705 new Chabad institutions were opened, including 450 new facilities purchased or built from scratch, bringing the total number of institutions world-wide—synagogues, schools, camps, and community centers—to 2,766. In the year 2000, 51 new Chabad facilities were established in California alone.

Id.

21. *See id.* at 31. One rabbi exclaimed that one can ““find more [people] every day willing to go on shlichus [missions] to farther places One guy just called me. He wants to go to Cyprus. Imagine . . . the rest of his life in Cyprus.”” *Id.*

22. *See id.* at 15.

23. *See* FISHKOFF, *supra* note 3, at 15. “These young, newly married Chabad couples leave home with one-way tickets and—if they’re lucky—a year’s salary. After that, most are expected to make their own way financially [T]he individual shliach [emissary] couple is pretty much on its own” *Id.*

24. *Id.* at 160.

25. *Id.* at 11, 121.

26. *See id.* at 160.

27. FISHKOFF, *supra* note 3, at 160. Each Chabad center is responsible for itself. *See id.* “Shlichim in the field are responsible for their own fundraising, and they must find the money they need not only for their own operation, but also to raise their children, pay their mortgage, and put food on their table.” *Id.*

28. *See id.* at 161.

29. *See id.*

30. *See* FISHKOFF, *supra* note 3, at 11.

31. *Id.* at 11, 30.

Chabad emissaries is to host large parties celebrating the Jewish holidays.³² This has become a way for Chabad members to show non-observant Jews how Judaism can offer both spirituality and fun.³³

The Jewish holiday that has often received the most public attention, due to the way Chabad chooses to spread the holiday's message, is Chanukah.³⁴ It is Chabad's display of one of the symbols of the holiday, the Chanukah menorah,³⁵ a nine-branched candelabrum, that has led to some of the most protracted litigation.³⁶

III. IF YOU BUILD IT A LAWSUIT WILL FOLLOW: TO LIGHT THE MENORAH OR NOT TO LIGHT THE MENORAH

One of the best known symbols of Chabad in most communities, other than the men being known for wearing black hats and black coats and having beards, is their large Chanukah menorahs.³⁷ Chabad emissaries usually try to find the most visible place in the city possible to place the menorah.³⁸ While some might argue that this symbol of Chanukah is meant to compete with the Christmas tree or Christmas decorations, Jewish law requires that every Jew place a Chanukah menorah in a place that can be seen by strangers.³⁹ This

32. *See id.* at 11.

33. *See id.* at 11, 30.

34. *See id.* at 11. The Jewish holiday of Chanukah is an eight-day festival, commemorating two great miracles in Jewish history: 1) a small group of Jews, known as the Maccabees, defeated the much larger Syrian-Greek army; and 2) the rededication of the Holy Temple in Jerusalem (circa 164 B.C.E.). *See* Moshe David Hern, *Hanukkah*, in 7 ENCYCLOPAEDIA JUDAICA 1280 (1982); RABBI JOSEPH TELUSHKIN, *JEWISH LITERACY: THE MOST IMPORTANT THINGS TO KNOW ABOUT THE JEWISH RELIGION, ITS PEOPLE, AND ITS HISTORY* 117–18 (1991). Chanukah is known as the Holiday of Lights because upon the Maccabees entering the Temple, they discovered a small jar of holy oil that was only enough to last for one day, but instead it lasted for eight days. Hern, *supra*, at 1283–84. This is also often referred to as a Chanukah miracle. *Id.* at 1284.

35. *See* FISHKOFF, *supra* note 3, at 11. The menorah is a symbol of the holiday and has eight evenly laid branches with a ninth branch set off from the others known as a *shammash* (servant) that is meant to light all of the others. Jacob Elbaum, *Hanukkah Lamp*, in 7 ENCYCLOPAEDIA JUDAICA 1288–92, 1315 (1982).

36. *See generally, e.g.*, *Chabad-Lubavitch of Vt. v. City of Burlington*, 936 F.2d 109 (2d Cir. 1991) (regarding denial of request to place menorah in city park); *Lubavitch Chabad House, Inc. v. City of Chicago*, 917 F.2d 341 (7th Cir. 1990) (regarding the City of Chicago's denial of Lubavitch's request to display a free-standing Chanukah menorah at O'Hare International Airport).

37. *See* FISHKOFF, *supra* note 3, at 11.

38. *See id.*

39. *See* Elbaum, *supra* note 35, at 1289–90.

symbol of Chanukah is over a thousand years old.⁴⁰ During the Chanukah holiday, the menorah is often placed in a central location, so that many members of the local community can see it.⁴¹ The more visible the location, the more attention it gets. This increased visibility has brought both admirers and detractors out of the woodwork.

A. *Cincinnati, Ohio Exemplifies the Difficulty Faced by Chabad in Many Cities*

One example of a city that has attempted (and is continuing to attempt) to prevent Chabad from placing its menorah in the city's downtown square is the City of Cincinnati.⁴² In *Chabad of Southern Ohio v. City of Cincinnati*,⁴³ a battle ensued between a local Chabad group and the City of Cincinnati (the City).⁴⁴ This case was not the first time the City has faced off with groups wanting to use the downtown square, known as Fountain Square Plaza; in fact, this case is one out of a series of cases where the City has attempted to limit public displays to only those of the City counsel's choosing.⁴⁵

It was not difficult to anticipate that litigation would follow when Rabbi Sholom Kalmanson was told that the only time that he *could not* put up a menorah in the city square was during the winter months, which is of course during the season of Chanukah.⁴⁶ The City created an ordinance that restricted the use of Fountain Square for the City's exclusive use from the last two weeks of November, through the month of December, and the first week

40. See *id.* at 1288–90. Most often, Jews who display a menorah place it on their window sill to be seen by passersby. *Id.* at 1289–90.

41. See *id.*

42. *Chabad of S. Ohio v. City of Cincinnati (Chabad Ohio I)*, 233 F. Supp. 2d 975, 976 (S.D. Ohio 2002), *vacated*, 537 U.S. 1501, 1502 (2002).

43. *Id.* at 975.

44. See *id.* at 979–80. While the court documents do not make any claims of anti-semitism or anti-Judaism as a motive for the actions of the City, Rabbi Kalmanson believes that it is “obvious what was behind it all.” Telephone Interview with Sholom B. Kalmanson, Rabbi, Chabad of Southern Ohio (July 24, 2005).

45. *Chabad Ohio I*, 233 F. Supp. 2d at 977, 981, 984. The city has a history of litigation. See, e.g., *Knight Riders of the Ku Klux Klan v. City of Cincinnati*, 72 F.3d 43 (6th Cir. 1995). While not frequently linked, both the Ku Klux Klan and Chabad have found themselves suing the city over the years to lift restrictions on their ability to gather ceremoniously in Fountain Square Plaza. See *id.* at 45; *Congregation Lubavitch v. City of Cincinnati (Congregation Lubavitch I)*, 923 F.2d 458, 459 (6th Cir. 1991).

46. *Chabad Ohio I*, 233 F. Supp. 2d at 978–79.

of January.⁴⁷ This is the very square that Rabbi Kalmanson had already submitted a permit request to display his approximately ten-foot tall menorah from November 29, 2002 to December 8, 2002.⁴⁸ In fact, Chabad had been celebrating Chanukah in the very same square since 1985 by erecting a menorah⁴⁹ and holding a candle lighting ceremony on one of the days of the holiday.⁵⁰

The Cincinnati City Counsel unanimously passed the restrictive ordinance without community discussion.⁵¹ The ordinance's text specifies, among other purposes, that its goal is "to promote and develop tourism and recreation" and "to encourage, promote, stimulate, and assist in the development of the Cincinnati business economy."⁵² Not surprisingly, Chabad filed a complaint, along with a homeless advocacy group that annually sponsors a program called "Santa on the Square" during the winter season, requesting an injunction from the court.⁵³ In *Chabad of Southern Ohio*, the simple yet persuasive argument by Chabad was that their First Amendment rights were violated.⁵⁴ The district court agreed.⁵⁵

During an evidentiary hearing before the court, the City was incapable of presenting evidence that explained the origins or the reason for the ordinance's seven-week ban on issuing permits during the time of the year when the Fountain Square was most widely requested.⁵⁶ However, there was evidence presented that the City was at that time preparing for a display created by the City, which was to include two Christmas trees and a skating rink.⁵⁷ Coincidentally, a tree lighting ceremony was also planned by the City to take place on November 29, the first night of Chanukah that year.⁵⁸

47. *Id.* at 978 (citation omitted). Since the Hebrew calendar and the Jewish holidays are set according to a lunar cycle, the days of Chanukah on the secular calendar fluctuate from any time in November to the first week of January. *See id.* at 977 n.1. The first day of Chanukah on the Hebrew calendar is always Kislev 25. *Hern, supra* note 34, at 1280.

48. *Chabad Ohio I*, 233 F. Supp. 2d at 979.

49. *Id.* at 977.

50. *See id.* at 979.

51. *Id.* at 978.

52. *Id.* at 979.

53. *Chabad Ohio I*, 233 F. Supp. 2d at 979.

54. *Id.* at 981. Chabad also argued that the City violated the Due Process Clause of the Fourteenth Amendment by retroactively applying the city's new regulations. *Id.*

55. *Id.* at 988.

56. *Id.* at 980.

57. *Chabad Ohio I*, 233 F. Supp. 2d at 980.

58. *Id.*

Chabad made a strong case, and the court ruled that Chabad had met its burden for a preliminary injunction.⁵⁹ It is ironic that one of the arguments by the City was that the display of a menorah is not symbolic speech and thus not protected by the First Amendment⁶⁰—as this fact was conceded by the City in the same court in a similar case ten years earlier.⁶¹

Chabad's primary First Amendment arguments were based on the protected nature of speech⁶² and their ability to use the public forum for this type of speech.⁶³ In both arguments, the court cited previous Chabad litigation against the City where "the very same menorah at issue here [was upheld] as speech deserving full First Amendment protection."⁶⁴ This decision was easy for the court based on clear precedent.⁶⁵ Even though the menorah is considered speech (of a symbolic nature) deserving protection, the court also needed to decide if "the [g]overnment's interest in limiting the use of its property to its intended purpose outweighs the interest of those wishing to use the property for other purposes."⁶⁶

In determining the government's interest, the court defined the forum at issue and determined the type of forum.⁶⁷ This classification is an important step in the constitutional analysis since different types of forums are afforded varying levels of protection.⁶⁸ Again, this determination was easy since there was no argument that Fountain Square was the relevant forum, and, furthermore, it had already been defined by the Sixth Circuit Court of Appeals as a traditional public forum.⁶⁹ The final step taken by the court was to determine if the City's regulation was a constitutional restriction on the use of Fountain Square.⁷⁰

59. *Id.* at 981. Chabad proved that there was a "strong likelihood of succeeding on the merits of their free speech claims under the First Amendment." *Id.*

60. *Id.* (citing *Congregation Lubavitch v. City of Cincinnati* (*Congregation Lubavitch III*), 997 F.2d 1160, 1164 (6th Cir. 1993)).

61. *See* *Congregation Lubavitch v. City of Cincinnati* (*Congregation Lubavitch II*), 807 F. Supp. 1353, 1356 (S.D. Ohio 1992).

62. *Chabad Ohio I*, 233 F. Supp. 2d at 981.

63. *See id.* at 982–86.

64. *Id.* at 981 (citing *Congregation Lubavitch v. City of Cincinnati* (*Congregation Lubavitch I*), 923 F.2d 458, 461–62 (6th Cir. 1991)).

65. *See id.* at 981–86.

66. *Id.* at 982 (quoting *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 800 (1985)).

67. *Chabad Ohio I*, 233 F. Supp. 2d at 982.

68. *Id.* at 982 n.3.

69. *Id.* at 982 (citing *Knight Riders of the Ku Klux Klan v. City of Cincinnati*, 72 F.3d 43, 45 (6th Cir. 1995)).

70. *Id.* at 983.

The restrictions were considered content-neutral on their face since all types of private speech were forbidden during the holiday season, regardless of their content.⁷¹ This is not the end of the analysis because even a content-neutral restriction on its face can be content-based in fact.⁷² This situation was similar to a previous Chabad case where the City passed an ordinance restricting unattended structures in Fountain Square.⁷³ In that case, the ordinance was found facially content-neutral; but the Sixth Circuit Court of Appeals found it *de facto* content-based⁷⁴ since the aim, as evidenced by statements of various city council members, was to prohibit a Ku Klux Klan cross and a menorah from being erected.⁷⁵ In this instance, the court heard testimony by Rabbi Kalmanson that a city official suggested that the rabbi quickly get his permit request in, since the permits were being issued on a first come first serve basis to prevent the Ku Klux Klan from receiving a permit.⁷⁶ It was also telling that the City's own stated intention was to ensure that any speech that was heard in Fountain Square appealed to "the widest of audiences," thus forbidding that speech which appealed to a minority of individuals.⁷⁷

After concluding that the regulations were content-based, the court then looked to whether the City's permit scheme was "narrowly tailored to achieve a compelling state interest."⁷⁸ The City listed six interests, which it believed justified the ban on non-governmental use of Fountain Square during the winter season.⁷⁹ All six were found not to justify the regulation and

71. *Id.* at 984.

72. *See* *Congregation Lubavitch v. City of Cincinnati (Congregation Lubavitch III)*, 997 F.2d 1160, 1166 (6th Cir. 1993).

73. *Id.* at 1162.

74. *Chabad Ohio I*, 233 F. Supp. 2d at 984.

75. *Congregation Lubavitch III*, 997 F.2d at 1164–65.

76. *Chabad Ohio I*, 233 F. Supp. 2d at 984.

77. *Id.* "Distinctions between speech that is 'controversial' and speech that is 'acceptable,' or between that which appeals to 'the widest of audiences' and that which appeals to only a few individuals, are distinctions based, at the very least, on content." *Id.*

78. *Id.*

79. *Id.* at 984–85. The newly amended city code listed the following purposes for its enactment:

- (1) to better coordinate competing uses of Fountain Square;
- (2) to ensure equal access to Fountain Square;
- (3) to promote and develop tourism and recreation;
- (4) to encourage, promote, stimulate, and assist in the development of the Cincinnati business economy;
- (5) to maintain, develop, and increase employment opportunities for those who live, work, and may consider moving to Cincinnati and the Cincinnati region; and
- (6) to pursue efforts to promote the expansion of the population residing within Cincinnati and to specifically encourage, stimulate, and develop an expanding downtown resident population.

its ban on issuing permits.⁸⁰ None of them clearly rose to the level of a compelling state interest that could override Chabad's First Amendment rights.⁸¹ The City was also unable to show how the ban on the issuance of permits over the seven weeks during the winter holiday season fulfilled any of the City's stated interests.⁸² On the contrary, the court commented that it would seem as though the menorah, "Santa on the Square" program, or any other private speech, would attract more tourists and visitors to Fountain Square than just the "arguably Christian symbols featured in the City-sanctioned holiday display."⁸³ Even if the regulations were content-neutral, under a lesser constitutional standard (that of time, place, and manner restrictions), the ordinances were still not "narrowly tailored to serve a significant government interest," nor would they leave open the required alternative channels of communication.⁸⁴

The district court issued the preliminary injunction barring enforcement of the ordinances and concluded that, based on Chabad's arguments, the suit had a strong likelihood of success on the merits.⁸⁵ However, this was not the end. In a whirlwind of appeals over a forty-eight hour timeframe, the city obtained a stay of the injunction from the Sixth Circuit followed by Chabad taking the issue to the United States Supreme Court, where Justice Stevens, acting as a Circuit Justice, vacated the stay.⁸⁶ Chabad prevailed over the "outrageous intrusion on the rights guaranteed by the First Amendment" and was able to celebrate Chanukah in Fountain Square.⁸⁷ This dispute began just prior to Chanukah in November 2001, but it took the Sixth Circuit until April 2004 to affirm the District Court's decision.⁸⁸

Chabad Ohio I, 233 F. Supp. 2d at 985.

80. *Id.*

81. *Id.* The court cited the prevention of terrorism and the practice of professions as the types of regulations that rise to the level of compelling state interests to justify restrictions on freedom of speech. *Id.*

82. *Id.*

83. *See Chabad Ohio I*, 233 F. Supp. 2d at 985.

84. *Id.* at 986. The court explained that no other place in Cincinnati is comparable to Fountain Square as a location providing the opportunity for speeches and demonstrations. *See id.* Even presidential candidates chose to hold rallies in Fountain Square when in the area. *Id.*

85. *Id.* at 986–87. The injunction was ordered on November 27, 2002, just two days before the first night of Chanukah for that year. *Chabad Ohio I*, 233 F. Supp. 2d at 975, 980, 988.

86. *Chabad of S. Ohio v. City of Cincinnati (Chabad Ohio II)*, 537 U.S. 1501, 1501–02 (2002).

87. *Chabad Ohio I*, 233 F. Supp. 2d at 987.

88. *See Chabad of S. Ohio v. City of Cincinnati (Chabad Ohio III)*, 363 F.3d 427, 436 (6th Cir. 2004). In reality, the case history between Chabad and the city goes back to the

Even though, during Chanukah of 2004, Chabad of Southern Ohio received the proper permit and placed the menorah in Fountain Square, future Chanukah celebrations are still in doubt.⁸⁹ According to Rabbi Kalmanson, more litigation might be on the horizon.⁹⁰ The City has notified Chabad that it is planning to do construction in Fountain Square and is also considering selling it to private entities.⁹¹ In light of the past two decades of fortitude exhibited by Chabad in Ohio, it appears that the City once again will have a fight on its hands.

B. *Atlanta, Georgia Greets Chabad with Good Old Southern Hospitality*

In the case of *Chabad-Lubavitch of Georgia v. Harris*,⁹² followed by *Chabad-Lubavitch of Georgia v. Miller*,⁹³ two Chabad rabbis sought to place a menorah on the steps of the capitol building and in the Capitol Rotunda.⁹⁴ Similar to the cases in Ohio, Chabad of Georgia did not succeed at first, but, in the end, the First Amendment prevailed, and the menorah took its place in Atlanta.⁹⁵

In 1989, the Georgia Building Authority granted Chabad permission to display their fifteen-foot menorah in Atlanta on the plaza in front of the state capitol building for the eight days of Chanukah.⁹⁶ Permission was also granted for an accompanying sign, “HAPPY CHANUKAH from CHABAD OF GEORGIA,” and for a lighting ceremony.⁹⁷ Each day the menorah was to be lit for no more than forty-five minutes.⁹⁸ Located inside the Capitol Rotunda was a live nativity scene, “surrounded by a Christmas tree, reindeer, gifts and a Santa Claus.”⁹⁹ This display was sponsored and organized by the

1980s. See *Congregation Lubavitch v. City of Cincinnati (Congregation Lubavitch I)*, 923 F.2d 458, 459 (6th Cir. 1991).

89. Telephone Interview with Sholom B. Kalmanson, *supra* note 44.

90. *Id.*

91. *Id.* Rabbi Kalmanson has not shied away from litigating with the City as a matter of principle. *Id.* The rabbi also sees the attention that the menorah has received as positive since it helps to publicize the miracle of Chanukah, which is his goal to begin with. *Id.*

92. *Chabad-Lubavitch of Ga. v. Harris (Chabad Ga. I)*, 752 F. Supp. 1063 (N.D. Ga. 1990), *rev'd en banc*, 5 F.3d 1383 (11th Cir. 1993).

93. *Chabad-Lubavitch of Ga. v. Miller (Chabad Ga. IV)*, 5 F.3d 1383 (11th Cir. 1993).

94. See *Chabad Ga. I*, 752 F. Supp. at 1064; *Chabad Ga. IV*, 5 F.3d at 1386. The style of both cases reflects the change in sitting governors, Joe Frank Harris in 1990 and Zell Miller in 1992.

95. *Chabad Ga. IV*, 5 F.3d at 1395–96.

96. *Chabad Ga. I*, 752 F. Supp. at 1064.

97. *Id.*

98. *Id.*

99. *Id.* at 1065.

Georgia Building Authority.¹⁰⁰ There were no public complaints or disturbances formally noted that year attributed to the menorah's placement or the nativity scene and its accoutrements.¹⁰¹

The following year, in 1990, Chabad attempted to get the same permission from the Building Authority, but was met with new limitations.¹⁰² According to the Attorney General, Chabad could still display the menorah and conduct a candle lighting ceremony, but, instead of eight days, they could only observe one day.¹⁰³ Ironically, this scenario sounds like the Chanukah miracle in reverse. The Attorney General concluded that the entire eight days would give off the impression of an unconstitutional state endorsement of re-ligion.¹⁰⁴ The Christmas scene, as displayed the previous year, was given a similar pronouncement due to the dominance of religious symbols, but a tree and ceremony led by a Methodist minister was permitted.¹⁰⁵

Soon after the restrictions were placed on Chabad's ability to exhibit the menorah, Chabad, led by two rabbis, initiated a complaint and requested a temporary restraining order based on First Amendment violations.¹⁰⁶ Chabad had to meet four elements to obtain the order: 1) irreparable harm would be inflicted; 2) there was no harm to the state; 3) public interest was not adversely affected; and 4) the claim was likely to succeed on the merits of the case if a trial was to proceed.¹⁰⁷ The district court found that Chabad had met the first three requirements, but it was the final one that Chabad did not overcome.¹⁰⁸

The first step in the court's analysis was to determine if Chabad did in fact have a constitutionally valid claim.¹⁰⁹ Chabad was able to show that the menorah did fall under the category of constitutionally protected symbolic speech.¹¹⁰ The issue then became whether this type of speech was permitted on the steps of the capitol building.¹¹¹ Since the state had previously determined that the plaza was a public forum and that it has been regularly used

100. *Id.*

101. *Chabad Ga. I*, 752 F. Supp. at 1064-65.

102. *Id.* at 1065.

103. *See id.*

104. *Id.*

105. *See id.* In addition to the invocation by the minister, secular and religious songs were performed, and the governor's wife gave a benediction. *Chabad Ga. I*, 752 F. Supp. at 1065.

106. *See id.* at 1064-65.

107. *Id.* at 1066.

108. *Id.* at 1066, 1068.

109. *See id.* at 1066.

110. *Chabad Ga. I*, 752 F. Supp. at 1066.

111. *See id.*

over the years for public debates and rallies, the court then needed to decide if the restrictions placed on Chabad were content based.¹¹²

A content based restriction on speech in the public forum required a strict scrutiny analysis, whereby the state must show the restrictions were “narrowly tailored to serve a compelling state interest.”¹¹³ In its analysis, the court distinguished this case from two other Chabad menorah cases that were published the year before: one in the Supreme Court and one in the Second Circuit.¹¹⁴ The court did not believe that people visiting the capitol building would confuse “a menorah labelled as the property of Chabad for a state sponsored event.”¹¹⁵

The State also argued that under a non-content-based policy, the restrictions placed on Chabad were reasonable in the time, place and manner that the menorah could be displayed.¹¹⁶ This was a persuasive argument for the court since the State could show that the Georgia Building Authority had instituted an unrelated policy in 1988 “that placement of any object on the property of the grounds by members of the public is prohibited.”¹¹⁷ While Chabad claimed that the 1988 policy did not play a part in the decision to deny Chabad permission in 1990, the court held that since the policy is valid it made no difference if it was originally considered by the Building Authority.¹¹⁸

Interestingly enough, the court concluded its order in denying Chabad the right to place the menorah in the square by contrasting the Christmas tree and the menorah.¹¹⁹ The court found that the Christmas tree in the Rotunda “is a mixed secular-and-religious symbol which is not predominantly reli-

112. *Id.*

113. *Id.* at 1066–67 (citing *Widmar v. Vincent*, 454 U.S. 263, 270 (1981)).

114. *Id.* at 1067 (distinguishing this case from *County of Allegheny v. ACLU*, 492 U.S. 573 (1989) and from the majority opinion in *Kaplan v. City of Burlington*, 891 F.2d 1024 (2d Cir. 1989)). The Georgia court decided that its case was different from the case in Pennsylvania because the menorah at issue there was to be maintained by county employees. *Chabad Ga. I*, 752 F. Supp. at 1067. The Vermont decision was not binding in its finding that by the mere proximity of the menorah to the seat of government the state was endorsing religion. *Id.* The court agreed with the dissent in *Kaplan* where the judge concluded: “[p]ermitting religious speech in a public forum in and of itself ‘does not confer any imprimatur of state approval on religious sects or practices’ any more than permitting political speech conveys governmental endorsement of a political group.” *Id.* (quoting *Kaplan*, 891 F.2d at 1033) (Meskill, J., dissenting)).

115. *Id.*

116. *Id.*

117. *Chabad Ga. I*, 752 F. Supp. at 1067.

118. *Id.* at 1068.

119. *Id.*

gious,” whereas the menorah is a predominantly religious symbol.¹²⁰ The court held that the ban on Chabad’s eight-day celebration was narrowly tailored, and thus Chabad’s motion for a temporary restraining order was denied.¹²¹

This final comment by the district court foreshadowed how they were to rule the following year.¹²² Since Chabad could no longer keep the menorah on the square throughout the celebration of Chanukah, they next sought to move the menorah into the Rotunda, surrounded by secular displays and right where the Christmas tree was permitted to be displayed.¹²³

Chabad made the request of the governor to allow the menorah to be placed in the Rotunda like the Christmas tree, but four months went by without an answer.¹²⁴ Chabad returned to the courts again to seek relief.¹²⁵ At first, the request by Chabad to place the menorah in the Capitol Rotunda, in the form of an amended complaint before the appellate court, was denied per curiam by a three-judge panel of the Eleventh Circuit.¹²⁶ Eventually, the Eleventh Circuit convened en banc to reverse and granted Chabad’s menorah a place in the Rotunda.¹²⁷ The court, in an opinion by the chief judge, concluded that although the state had a compelling interest in distancing itself from the endorsement of any religion, the allowance of Chabad to display the menorah in the Rotunda would not necessarily signify that the state is endorsing, and thus establishing, Judaism.¹²⁸

Over the years various groups have utilized the open space in the center of the Capitol Building.¹²⁹ The court highlighted various organizations and programs that have utilized the Rotunda such as the National Organization for the Reform of Marijuana Laws, two Holocaust commemoration ceremonies, and the previous year’s Methodist minister.¹³⁰ There have also been

120. *Id.*

121. *Id.* The decision by the court was entered on December 11, 1990, the first evening of Chanukah that year. *Chabad Ga. I*, 752 F. Supp. at 1063.

122. *See id.* at 1068.

123. *See Chabad-Lubavitch of Ga. v. Miller (Chabad Ga. IV)*, 5 F.3d 1383, 1386 (11th Cir. 1993).

124. *Id.* at 1386–87.

125. *Id.* at 1387.

126. *Id.*; *Chabad-Lubavitch of Ga. v. Miller (Chabad Ga. II)*, 976 F.2d 1386, 1387 (11th Cir. 1992) (upholding the district court decision).

127. *Chabad Ga. IV*, 5 F.3d at 1385, 1387; *Chabad Ga. II*, 976 F.2d 1386, *reh’g granted*, (*Chabad Ga. III*), 988 F.2d 1563, 1564 (11th Cir. 1993).

128. *Chabad Ga. IV*, 5 F.3d at 1385.

129. *Id.* at 1386.

130. *Id.*

unattended displays there, such as an eighteen-foot tall Indian hut that was exhibited during Indian Heritage Week.¹³¹

The court focused its discussion on the inability of the state to demonstrate how the exclusion of Chabad's display from the Rotunda based solely on the content of the exhibit could withstand the heightened constitutional analysis of strict scrutiny.¹³² More specifically, the court could not "countenance Georgia's exclusion of Chabad's display from the Rotunda unless Georgia [could] demonstrate that the exclusion [was] 'necessary to serve a compelling state interest and that it [was] narrowly drawn to achieve that end.'"¹³³ Georgia was unable to do so.¹³⁴

Georgia could not support its claim that it must not permit Chabad to display the menorah in order to avoid an Establishment Clause violation.¹³⁵ The court went one step further to state that if Georgia did have a compelling state interest in keeping the menorah out of "the Rotunda, total exclusion is not narrowly tailored to achieve that interest."¹³⁶

In order to determine that Georgia would not violate the Establishment Clause, the court utilized the test created in *Lemon v. Kurtzman*.¹³⁷ The test must be used to determine if Georgia did permit Chabad open-access to the Rotunda, as it does all of its citizens,¹³⁸ would Georgia be violating the Establishment Clause?¹³⁹ The *Lemon* test requires that the state act: 1) with a secular purpose; 2) with the primary effect neither advancing nor inhibiting religion; and 3) without fostering excessive entanglement with religion.¹⁴⁰

Georgia did not argue in depth either the first or the third prong of the test, but focused its attention on the second prong.¹⁴¹ The court used the

131. *Id.*

132. *Id.* at 1387.

133. *Chabad Ga. IV*, 5 F.3d at 1387 (quoting *Burson v. Freeman*, 504 U.S. 191, 198 (1992)).

134. *Id.*

135. *Id.* at 1388.

136. *Id.*

137. *Id.* (citing *Lemon v. Kurtzman*, 403 U.S. 602, 612–13 (1971)).

138. *Chabad Ga. IV*, 5 F.3d at 1389. The court set out to review under the *Lemon* test whether the denial of Chabad's request to display the menorah in the rotunda was consistent with its neutral open-access policy. *Id.* The court stated:

As a matter of course, Georgia grants private speakers equal and unimpeded access to the Rotunda, a designated public forum. Its citizens may come and go, speak and listen, applaud and condemn, and preach and blaspheme as they please. . . . In sum, Georgia neutrally opens the Rotunda as a public forum available to all speakers, and Chabad seeks to exercise its constitutional right to speak in that public forum.

Id. at 1388–89.

139. *Id.* at 1389.

140. *Id.* (citing *Lemon*, 403 U.S. at 612–13).

141. *Chabad Ga. IV* 5 F.3d at 1389.

County of Allegheny v. ACLU decision, in conjunction with *Lemon*, to determine if the placement of the menorah in the Rotunda would create the appearance of state endorsement of religious beliefs, as argued by Georgia.¹⁴²

The court stated that Georgia was just plain wrong.¹⁴³ It is Georgia's stated policy to allow open and equal access to the Rotunda, as a public forum.¹⁴⁴ Any reasonable person would not visit the capitol building, enter the Rotunda, and, upon seeing either a menorah or a Christmas tree, believe that Georgia officially endorsed Judaism or Christianity.¹⁴⁵ "Precisely because the religious speech is communicated in a true public forum, however, the state, by definition, neither endorses nor disapproves of the speech . . . but rather acts in a strictly neutral manner toward, private speech."¹⁴⁶

In dicta, the court advised the state not to create a public forum in a place that citizens would automatically associate with state authority if it believed the citizens of Georgia would not be able to distinguish the private speech of some with the state sponsored speech of others.¹⁴⁷ If the state was so concerned with this perception, it should have taken steps to teach the uninformed and not to silence constitutionally protected speech, such as the display of Chabad's menorah.¹⁴⁸ Thus, the Eleventh Circuit held that Georgia could allow Chabad a place in the Rotunda to display its fifteen-foot menorah during Chanukah and this display would not violate the Establishment Clause.¹⁴⁹

142. *Id.* at 1390 (citing *County of Allegheny v. ACLU*, 492 U.S. 573, 597 (1989)). *Allegheny* added an endorsement test that may be considered in Establishment cases, but in that case the courthouse steps were not considered a public forum so it is distinguished from the facts of *Chabad Ga. IV*. See *Allegheny*, 492 U.S. at 597; *Chabad Ga. IV*, 5 F.3d at 1390-91.

143. See *Chabad Ga. IV*, 5 F.3d at 1395-96.

144. *Id.* at 1392.

145. *Id.* at 1390 n.11.

146. *Id.* at 1393.

147. *Id.* at 1393-94.

148. *Chabad Ga. IV*, 5 F.3d at 1394. The court, seemingly amused, quoted Chabad's counsel who recited a limerick at oral argument in order to emphasize his point: "It seems to a young rabbi of Chabad, [t]hat the Constitution is exceedingly odd; [t]o protect all speech in a public place [o]n AIDS, abortion, or race, [b]ut to prohibit any person's mention of God." *Id.* at 1394 n.17.

149. *Id.* at 1395-96.

IV. LOTS OF LITIGATION IN THE SUNSHINE STATE

A. *Home Is Where the Prayer Is at: Disney World, Universal Studios, and Chabad*

Two additional examples of Chabad-initiated litigation occurred just south of Georgia, in Florida.¹⁵⁰ In both cases, a local Chabad rabbi lawfully owned a home in a residential neighborhood; and, in both cases, the rabbi's neighbors were not pleased with the apparent transformation of the rabbi's home into a place of meeting and worship.¹⁵¹ In each of the cases discussed below, it was not only an individual neighbor that challenged Chabad's right to hold services or meetings out of their homes, but it was also the city through a zoning enforcement board or local city commission.¹⁵²

While in each case various First Amendment arguments were made, as well as other constitutional arguments, in both cases there also appeared potential claims of antisemitism against the city.¹⁵³ In neither case though did Chabad outwardly claim such motives were involved in denying them the right to worship in the community of their choosing.¹⁵⁴ Antisemitic motives are not easy to prove, but in both cases there were non-Jewish, particularly Christian, groups that were allowed to do what the city was arguing Chabad was not permitted to do.¹⁵⁵

In Sue Fishkoff's book, *The Rebbe's Army*, she dedicates a whole chapter to the South Florida Jewish community and the growth of Chabad in Florida.¹⁵⁶ South Florida is described as the second largest Jewish community in the United States, only after New York City.¹⁵⁷ Not only does Chabad in

150. *Konikov v. Orange County (Konikov II)*, 302 F. Supp. 2d 1328, 1331 (M.D. Fla. 2004), *aff'd in part, rev'd in part*, 410 F.3d 1317, 1331 (11th Cir. 2005); Amended Complaint at 1, *Hollywood Cmty. Synagogue, Inc. v. City of Hollywood*, No. 04-61212 (S.D. Fla. Nov. 24, 2004) [hereinafter HCS Complaint].

151. *Konikov II*, 302 F. Supp. 2d at 1331-32; Omnibus Order Denying in Part and Granting in Part Defendant Sal Oliveri's Motion to Dismiss Amended Complaint (D.E. 17-1); Denying Motion to Strike in Part Amended Complaint (D.E. 17-2); Denying as Moot Defendant Sal Oliveri's Motion for Protective Order (D.E. 29); Denying Defendant Sal Oliveri's Motion to Strike Plaintiff's Response (D.E. 47) at 2, *Hollywood Cmty. Synagogue, Inc. v. City of Hollywood*, No. 04-61212 (S.D. Fla. Mar. 18, 2005) [hereinafter HCS Order].

152. *Konikov II*, 302 F. Supp. 2d at 1332; HCS Order, *supra* note 151, at 3.

153. *See Konikov II*, 302 F. Supp. 2d at 1334-35; HCS Order, *supra* note 151, at 5.

154. *See Konikov II*, 302 F. Supp. 2d at 1331; HCS Order, *supra* note 151, at 1-7.

155. *Konikov II*, 302 F. Supp. 2d at 1335; HCS Order, *supra* note 151, at 5-6.

156. *See FISHKOFF*, *supra* note 3, at 33. In this chapter, Fishkoff's research focuses on Boca Raton, in Palm Beach County, which has not in fact had any known litigation filed against Chabad there. *Id.*

157. *Id.*

South Florida make itself seen and heard because of the hard work of each individual Chabad rabbi, but now attention is also on Chabad because of its numbers and the sheer masses that are visible in the community.¹⁵⁸ This growth has led to at least two recent legal actions in the Sunshine State.¹⁵⁹

One of the examples of Chabad related litigation can be found in one of the most tourist friendly cities in the world, Orlando, Florida.¹⁶⁰ The court reminded the parties in *Konikov v. Orange County*¹⁶¹ that Orange County is home to Disney World, Sea World, and Universal Studios, among other theme parks, but it seems to not have room for Chabad.¹⁶² This suit began in 2001 in a county administrative hearing, and eventually made its way up to the United States Eleventh Circuit Court of Appeals.¹⁶³ On June 3, 2005, the court decided that the district court left some unanswered questions and sent the case back for a determination of the definition of “religious organization” under the Orange County Zoning Code.¹⁶⁴ The Eleventh Circuit also held that Chabad did have an action under the Religious Land Use and Institutionalized Persons Act (RLUIPA) of 2000 as to unequal treatment and with regard to Due Process.¹⁶⁵ Finally in January 2006, the district court, on remand, concluded that Rabbi Konikov and Chabad of Orlando did have a right to utilize the residential home as a place of worship.¹⁶⁶

In 2001, Rabbi Konikov began to use a single-family home situated in a residential neighborhood as a meeting place.¹⁶⁷ While many new neighbors might bring over apple pie or freshly baked cookies, the rabbi’s neighbors complained of excessive noise and traffic.¹⁶⁸ Even though there are many examples in the same county of religious groups meeting in a member’s

158. *Id.*

159. *See, e.g., Konikov II*, 302 F. Supp. 2d 1328; HCS Order, *supra* note 151.

160. *Konikov v. Orange County (Konikov III)*, 410 F.3d 1317, 1319–20 (11th Cir. 2005).

161. *Id.* at 1317.

162. *Id.* at 1319–20.

163. *Id.* at 1320.

164. *Id.* at 1330. As of the time of the writing of this paper, the district court has not yet settled the matter.

165. *Konikov III*, 410 F.3d at 1322–25, 1331; *see* Religious Land Use and Institutionalized Persons Act (RLUIPA) of 2000, 42 U.S.C. § 2000cc (2000).

166. Order on Remand at 1, 9–10, *Konikov v. Orange County*, No. 02-CV-376 (M.D. Fla. Jan. 20, 2006) [hereinafter *Konikov Order*].

167. *Konikov v. Orange County (Konikov II)*, 302 F. Supp. 2d 1328, 1331–32 (M.D. Fla. 2004).

168. *Id.* at 1332. One neighbor eagerly testified that a “high traffic business is being run out of a single-family dwelling.” *Id.* at 1334 (internal quotations omitted). Another explained his dissatisfaction with Chabad as a neighbor: “I did not buy my house next to a chabad or a synagogue or anything else. I bought my house in a residential neighborhood four years ago. And now it’s become changed.” *Id.* (internal quotations omitted).

home, in a residential neighborhood,¹⁶⁹ the complaints against Konikov brought on a full-scale investigation by the Orange County Code Enforcement Division.¹⁷⁰

This investigation led the Code Enforcement Board to conclude that Rabbi Konikov “was operating a religious organization from a residential property without special exception approval and thus was in violation” of a number of county codes.¹⁷¹ It was at that time that Konikov initiated litigation against the county and against a number of members of the Code Enforcement Board personally.¹⁷²

The first two issues before the court were 1.) whether Rabbi Konikov could have two rabbis testify on his behalf as experts in Hebrew and Yiddish terms and to testify as to the religious practices and obligations of Hassidim, and 2.) whether an attorney could testify as an expert on the constitutionality of the zoning codes as applied in the case.¹⁷³ The court held that the attorney could not testify, but that the rabbi’s testimony would offer insight into determining the extent that the county regulations restrict Rabbi Konikov’s ability to observe Judaism.¹⁷⁴ This testimony will later be important because

169. *Id.* at 1335. The pastors at Northland Community Church and Trinity Baptist Church testified on behalf of Rabbi Konikov that their worshippers meet weekly at individual homes for prayer and none of their groups have been fined or ticketed by the code enforcement division for such activities. *Konikov II*, 302 F. Supp. 2d at 1335.

170. *Id.* at 1332.

171. *Id.* at 1336. No explanation was offered by Rabbi Konikov to the court as to why he never sought a code provided exception to the zoning regulation. *See id.*

172. *Id.*

173. *Konikov v. Orange County (Konikov I)*, 290 F. Supp. 2d 1315, 1316, 1318–19 (M.D. Fla. 2003).

174. *Id.* at 1319–20. The Magistrate’s decision was confirmed and ordered by the court. *Id.* at 1316. Rabbi Immanuel Schochet of Ontario, Canada and Rabbi Eliyahhu Touger of Jerusalem, Israel were allowed to explain the Chabad movement and the obligatory practices and rituals that are binding on Hasids, followers of Hasidism. *Id.* at 1320. Rabbi Touger explained how Jews commonly meet in their rabbis’ homes:

It is longstanding Jewish practice to gather in the homes of Rabbis—either because they cannot come to the synagogue or as a token of respect—for communal prayer. And yet no one would consider their private homes anything other than that. For example in my community in Jerusalem, there is a [minyan] three times a day in the home of Rav Ovadah Yosef, the former [C]hief Rabbi of Israel. Now although he lives in an apartment building with 20+ families, no one considers his holding these prayer services as transforming his home into a synagogue.

Id. at 1319; *see also* Eliyahu Ashtor, *Minyan*, in 12 ENCYCLOPAEDIA JUDAICA 67 (1982) (defining the term “minyan” as a prayer quorum of ten Jews). Rabbi Schochet also concurred that “communal prayer will not transform the private dwelling into a synagogue” or consecrated place. *Konikov I*, 290 F. Supp. 2d at 1319.

the rabbi's claim that his home was not a house of worship will cause the code's definition of "religious institution" to fall short.¹⁷⁵

Rabbi Konikov sued Orange County, Florida and four members of the county's Code Enforcement Board claiming that the county's enforcement of its zoning regulations violated his right to practice Judaism.¹⁷⁶ In total, Konikov's complaint contained nine counts, which included a challenge to the county code based on the Free Exercise Clause of the United States and Florida Constitutions, as well as various claims under RLUIPA and Florida's Religious Freedom Restoration Act (FRFRA) of 1998.¹⁷⁷ There was also a count of civil conspiracy.¹⁷⁸

The Free Exercise claims under both the United States Constitution and the Florida Constitution were held invalid based on the court's ruling that "[t]he Orange County zoning ordinances comprise a valid system of land use regulation that does not infringe on Plaintiff's constitutional rights."¹⁷⁹ The court found that *Konikov* was controlled by *Grosz v. City of Miami Beach*,¹⁸⁰ which dealt with a similar situation in which the court ruled that the zoning ordinance in question did not violate the plaintiff's free exercise of religion.¹⁸¹ While *Grosz* did not involve Chabad, it did involve another Orthodox Jewish group that was held in violation of city zoning ordinances by holding religious services in the residence of their rabbi.¹⁸² In *Grosz*, the court concluded that zoning laws aimed at maintaining the residential quality of a neighborhood must be enforced "whenever that quality is threatened."¹⁸³ The court concluded that the Groszs could find another location nearby with different zoning to hold services and not find their religious observances restricted.¹⁸⁴ In addition to denying Rabbi Konikov's claims based on the precedent set by *Grosz*, the court also predicated its denial on the same reasons for which Konikov's RLUIPA claim was denied.¹⁸⁵

175. See *Konikov v. Orange County (Konikov III)*, 410 F.3d 1317, 1328 (11th Cir. 2005). The code defines a "religious institution" as a place "used primarily or exclusively for religious worship and related religious activities." *Id.* at 1328 (internal quotations omitted).

176. *Konikov v. Orange County (Konikov II)*, 302 F. Supp. 2d 1328, 1331, 1336 (M.D. Fla. 2004).

177. *Id.* at 1336.

178. *Id.*

179. *Id.* at 1337.

180. 721 F.2d 729 (11th Cir. 1983).

181. *Konikov II*, 302 F. Supp. 2d at 1338-40 (citing *Grosz*, 721 F.2d at 733, 741).

182. *Id.* at 1338-39 (citing *Grosz*, 721 F.2d at 731-32).

183. *Id.* at 1340 (quoting *Grosz*, 721 F.2d at 739).

184. *Id.* at 1341 (citing *Grosz*, 721 F.2d at 739).

185. *Id.* at 1345.

While RLUIPA was enacted to broaden religious protection, the court held that Rabbi Konikov did not show that his religious exercise had been sufficiently burdened.¹⁸⁶ The court also explained that while the county zoning regulations might make religious practice more expensive based on appropriation of suitable facilities for worship, this did not mean that a “substantial burden” under RLUIPA was manifested.¹⁸⁷ The RFRA claim was decided similarly in that Konikov did not present evidence as to a substantial burden in light of the county’s compelling interest to maintain the residential quality of the neighborhood.¹⁸⁸

Rabbi Konikov also charged civil conspiracy against four members of the Board, arguing that they conspired to violate his religious rights.¹⁸⁹ This count is understandably a common complaint among Jewish groups that find themselves in the minority and find their freedom to practice their beliefs restricted. Whether the limitation is based on antisemitism or not, it is hard to prove such a claim, and, thus, often left out of complaints.¹⁹⁰ Konikov was unable to present enough evidence to prove the conspiracy claim.¹⁹¹ In all nine counts, the Middle District of Florida ruled against Rabbi Konikov and granted the defendants’ motion for summary judgment.¹⁹² The case was then appealed to the Eleventh Circuit.¹⁹³

It was the RLUIPA claims of unequal treatment and Due Process violations that the Eleventh Circuit reversed and remanded to the Middle District.¹⁹⁴ The court found that the relevant “question [was] whether the land use regulation or its enforcement treats religious assemblies and institutions on less than equal terms with nonreligious assemblies and institutions.”¹⁹⁵ The code did not define “religious organization” even though Konikov was

186. *Konikov II*, 302 F. Supp. 2d at 1344. While RLUIPA’s whole aim is to prevent unreasonable government exclusion of religious groups from a jurisdiction, the court concluded that the statute’s use of the word “unreasonabl[e]” suggests Congress must have intended that “religious assemblies could be reasonably limited within a jurisdiction.” *Id.* at 1345–46.

187. *Id.* at 1345.

188. *Id.* at 1346.

189. *Id.* at 1357.

190. *See Konikov II*, 302 F. Supp. 2d at 1357. “An action for civil conspiracy ordinarily requires proof of an agreement between two or more people to achieve an illegal objective, an overt act in furtherance of that illegal objective, and a resulting injury to the plaintiff.” *Id.* (quoting *Bivens Gardens Office Bldg., Inc. v. Barnett Banks of Fla., Inc.*, 140 F.3d 898, 912 (11th Cir. 1998)).

191. *Id.* at 1357.

192. *Id.* at 1358.

193. *Konikov v. Orange County (Konikov III)*, 410 F.3d 1317 (11th Cir. 2005).

194. *Id.* at 1319 n.1.

195. *Id.* at 1324.

cited for operating one.¹⁹⁶ The Board based much of their conclusion—that Konikov operated a religious organization—on the investigation of the Code Enforcement Division.¹⁹⁷ The court’s analysis of the transcript of the Board hearing showed that the Board’s conclusions relied heavily on the weight of the evidence showing a high frequency of meetings.¹⁹⁸ However, the testimony by the Code Enforcement Officers showed that even they were unclear as to what constituted high frequency.¹⁹⁹ The court recognized the contrast between the violation by Konikov’s Chabad, which was cited for a few weekly meetings, and those meetings which are not considered violations—such as when the Cub Scouts hold weekly meetings out of homes or even when friends gathered to watch a sports game a few times a week.²⁰⁰ There are no examples of the officers citing those groups.²⁰¹ “In other words, a group meeting with the same frequency as Konikov’s would not violate the Code, *so long as religion is not discussed*. This is the heart of [the court’s] discomfort with the enforcement of this provision.”²⁰² Thus, the court concluded that by treating religious assemblies on unequal terms with nonreligious assemblies, an equal terms violation existed.²⁰³ Because the Code was not clear on what constitutes a violation, the court also held that there was no fair notice to those that might be violating the Code.²⁰⁴

On remand to the Middle District in January 2006, in light of the Eleventh Circuit’s opinion, District Judge John Antoon II concluded both in favor of Rabbi Konikov on his RLUIPA challenge and his claim that the Code was unconstitutionally vague.²⁰⁵ The court found that the Eleventh Circuit’s opinion clearly pointed to the Board’s violation of RLUIPA and that Orange County failed to provide any compelling reason for treating Chabad differently than other religious groups.²⁰⁶ The court also held that the Code was

196. *Id.* at 1330. The court discussed how the Code defined “religious institution,” but not “religious organization,” which when given their ordinary and natural meaning, are distinct from one another. *Id.* at 1328, 1330.

197. *See Konikov III*, 410 F.3d at 1330–31.

198. *Id.* at 1327.

199. *Id.* at 1328. Testimony by two of the Code Enforcement Division officers makes clear that the code is unclear as to what constitutes a violation. *Id.* While the manager of the division commented “that even one meeting per week might constitute a violation,” another officer “testified that it would not be a violation for a group to meet with the same frequency as Konikov if the group had a social or family-related purpose.” *Id.*

200. *Konikov III*, 410 F.3d at 1328.

201. *See id.*

202. *Id.*

203. *Id.* at 1329.

204. *Id.* at 1329–31.

205. Konikov Order, *supra* note 166, at 1, 9–10.

206. *Id.* at 3, 6.

vague as to its definition of “religious organization”²⁰⁷ and, therefore, also vague as to its notice to citizens of what in fact the regulation prohibits.²⁰⁸ While for now Konikov has won his case, the final celebration will have to wait until the county decides what move it will make next.²⁰⁹

B. *Hollywood Is Home to Chabad*

Not too far south of Orange County, a similar Chabad lawsuit was initiated in Broward County.²¹⁰ While in the Orange County case Rabbi Konikov was up against tough odds because he could have sought an exception to the zoning code and did not, in this case in Hollywood, Rabbi Korf did apply for the exception.²¹¹

In *Hollywood Community Synagogue, Inc., v. City of Hollywood*, Chabad is in the midst of litigation to protect its Chabad center from seemingly biased actions on the part of the City and one particular city commissioner.²¹² The Hollywood Community Synagogue, Inc. (HCS) is a Chabad center located in a residential neighborhood of Hollywood.²¹³

In 1999, Yosef Elul, president of the synagogue, purchased two homes for the purpose of holding classes on Judaism and to serve as a residence for the associate rabbi of the synagogue.²¹⁴ At that time, religious services were also being held there, and it was suggested to the synagogue by the Director of Planning for the City of Hollywood that they apply for a House of Worship Special Exception.²¹⁵ In May of 2001, an exception was applied for and “[t]he Board of Appeal and Adjustments (BAA) granted a six month Special Exception.”²¹⁶ In September 2001, HCS was granted a one-year exception and was informed that it was to be reviewed by the Board after the year was up.²¹⁷

207. *Id.* at 7.

208. *Id.* at 8–9.

209. Rich McKay, *Rabbi Wins Long Fight for Religious Rights*, ORLANDO SENTINEL, Jan. 24, 2006, at B1.

210. Telephone Interview with Jason Gordon, Attorney for Chabad, Broad and Cassel in Fort Lauderdale, Florida (July 19, 2005).

211. *Id.*

212. See HCS Order, *supra* note 151, at 1, 3.

213. See *id.* at 2.

214. HCS Complaint, *supra* note 150, at 8.

215. HCS Order, *supra* note 151, at 2.

216. *Id.*

217. *Id.* at 2–3.

During this time, Chabad members were regularly receiving parking tickets for parking on the synagogue's property.²¹⁸ The rabbi witnessed that only the cars parked on the side of the synagogue's property were ticketed and not other similarly parked cars across the street or nearby.²¹⁹ Upon further inquiry, the rabbi was told by an officer that he was following the orders of Commissioner Sal Oliveri.²²⁰ The synagogue administrator also relayed that a Code Enforcement Officer told him "that the department was under orders from Commissioner Sal Oliveri and the Mayor to keep an eye on the Chabad . . . and to enforce the code."²²¹

"In September 2002, the Development Review Board . . . granted . . . a six month Temporary Special Exception subject to certain enumerated conditions."²²² The Board explained that the property could be used as a house of worship and be "compatible with the existing natural environment and other properties within the vicinity."²²³ Commissioner Oliveri filed an appeal to the Commission.²²⁴

Seemingly without a response to Oliveri's September 2002 appeal, in March 2003 the Board granted the synagogue a Permanent Special Exception subject to certain conditions being met within six months.²²⁵ Commissioner Oliveri appealed again.²²⁶

One month after receiving the Permanent Special Exception, the Commission reversed the decision of the Development Review Board finding that HCS was "too controversial."²²⁷ Oliveri was recorded as saying, "it's almost common sense and reasonable that the Chabad . . . will never fit in Hollywood Hills."²²⁸

218. *See id.* at 3.

219. *Id.*

220. HCS Order, *supra* note 151, at 3.

221. *Id.*

222. *Id.* at 3-4. Five conditions were laid out by the Board: 1) no parking was permitted in the alley behind the synagogue; 2) a lease agreement for off-site parking must be obtained; 3) City-approved garbage dumpsters were required; 4) they must enter into a property maintenance agreement with a provider who will keep the property in compliance with the city code; and 5) they must create an approved buffer along the rear side of the residences. *Id.* at 4 n.1.

223. *Id.* at 4.

224. HCS Order, *supra* note 151, at 4. HCS also claims that "Oliveri was permitted to vote on his own appeal and cast the deciding vote . . . [which was] against" Commission procedure. *Id.*

225. *Id.*

226. *Id.*

227. *Id.* (internal quotations omitted).

228. HCS Order, *supra* note 151, at 5.

By July of 2004, Commissioner Oliveri was asking the Commission “to evict” HCS.²²⁹ He even went so far as to say in support of eviction, “[w]e’re talking about neighborhoods here. We’re talking about neighborhoods having a smell.”²³⁰ Later that month, the city filed suit in Broward County Circuit Court against HCS for operating as a house of worship without a Special Exception.²³¹

HCS offered as evidence of unfair treatment that there were at least twelve houses of worship in residential neighborhoods in Hollywood Hills.²³² In one home only blocks away from HCS is a residence operating as a shrine to the Virgin Mary.²³³ Even though numerous complaints have been made about the traffic, noise and garbage associated with the activities there, no Special Exception has been requested or granted.²³⁴ When Oliveri was asked by synagogue members as to why the shrine was not required to obtain an exception, he is alleged to have shrugged them off claiming the shrine did not need an exception because it was a miracle.²³⁵

HCS filed a complaint in federal court in response to the state court complaint by the city.²³⁶ The amended complaint by HCS had a total of fifteen counts, levied against the city and Oliveri, individually.²³⁷ Most of the claims centered around HCS’s First Amendment rights (freedom of speech, freedom of religion, and freedom of assembly) being taken away by the denial of the Special Exception, as well as various similar claims under RLUIPA and FRFRA.²³⁸ The First Amendment claims are similar to those made by Rabbi Konikov in *Konikov v. Orange County*.²³⁹

229. *Id.*

230. *Id.* at 5, 22. In a footnote to the court’s order, Judge Lenard adds that “Oliveri subsequently stated that his comment was an effort to compare his efforts to protect his single family neighborhood with the City of Hollywood’s efforts to protect the Hollywood Lakes section from a smelly waste treatment facility.” *Id.* at 5 n.5.

231. *Id.* at 5.

232. HCS Order, *supra* note 151, at 5.

233. *Id.* at 6. Rosa Lopez, who owns the home, has hosted as many as 4000 people. *Id.* She also operates a gift shop on the premises. *Id.*

234. *See id.*

235. *See* HCS Order, *supra* note 151, at 6. Oliveri is alleged to have replied: “[T]he Virgin Mary visits that particular home If you people know anything about the Catholic religion, that’s called a vision. To Christians and Catholics, that is considered a miracle. That’s not establishing a house of worship. That is a miracle.” *Id.* (omission in original).

236. *See* HCS Complaint, *supra* note 150, at 1, 16.

237. *Id.* at 17–33. At the time of the writing of this paper there was only one order issued by the court. *See* HCS Order, *supra* note 151.

238. *See* HCS Complaint, *supra* note 150, at 22–26.

239. *See* *Konikov v. Orange County (Konikov II)*, 302 F. Supp. 2d 1328 (M.D. Fla. 2004), *aff’d in part, rev’d in part*, 410 F.3d 1317 (11th Cir. 2005).

One of the counts that HCS charged was that the its right to Substantive Due Process under the Fourteenth Amendment was violated.²⁴⁰ This charge was based on the Commission's reversal of the Board's decision to grant the Permanent Special Exception.²⁴¹ HCS claimed the Commissions' reversal had nothing to do with "public health, safety, welfare or morals."²⁴² This claim was substantiated by the fact that HCS had not created a greater problem than the other twelve houses of worship in the neighborhood and the shrine a few blocks away.²⁴³ Also, distinct from *Konikov*, HCS applied for the exception and at least temporarily received it.²⁴⁴ HCS could therefore claim a property interest in the grant of the exception and an injury based on its expenditures for relying on that grant in good faith.²⁴⁵ HCS claimed this property right is protected under the Fourteenth Amendment.²⁴⁶

Some of the actions described by HCS as violating its rights are charged against Oliveri specifically.²⁴⁷ In count three of the complaint, HCS claims that he abused his power and authority as a commissioner.²⁴⁸ By ordering law enforcement to focus their attention on HCS and to only ticket synagogue members' cars, HCS argued that "Oliveri acted under color of law" to harass HCS's congregants.²⁴⁹ The synagogue did not claim, for example, that cars parked on the side of the road cannot be ticketed according to the city's parking code, but rather that under the direction of Oliveri there had been selective enforcement of this code.²⁵⁰ Thus, HCS claimed that Oliveri has denied its members rights guaranteed by the Constitution.²⁵¹

Making the accusations against Oliveri is one thing, but it is much more difficult to bring Oliveri into court. While no decisions have been reached by the court on the merits of HCS's claims, HCS did overcome a high hurdle in just being able to sue Oliveri individually. Since Oliveri is a city commissioner, generally, his status as a government official would entitle him to

240. HCS Complaint, *supra* note 150, at 29.

241. *See id.*

242. *Id.*

243. *See id.*

244. *See id.* at 8–9.

245. HCS Complaint, *supra* note 150, at 29.

246. *Id.*

247. *See id.* at 20–21, 27.

248. *Id.* at 20. Oliveri succeeded in having this claim dismissed based on HCS's lack of proof "that it was arbitrarily and capriciously deprived of its property right in a Permanent Special Exception." HCS Order, *supra* note 151, at 33. The court held that there is no fundamental right in the Constitution to a Permanent Special Exception. *Id.*

249. HCS Complaint, *supra* note 150, at 21.

250. HCS Order, *supra* note 151, at 20.

251. HCS Complaint, *supra* note 150, at 21.

qualified immunity.²⁵² This defense was argued by Oliveri in his motion to dismiss the case.²⁵³

Qualified immunity is meant to free the hands of government officials, individually, who are acting in the legal capacity of their office and to prevent them from constantly defending frivolous lawsuits.²⁵⁴ The caveat to this type of immunity is that if an official knowingly violates long held “statutory or constitutional right[s] of which a reasonable person would have known,” then such immunity cannot serve as a defense.²⁵⁵ The court stated that it does not shield “the plainly incompetent and those who knowingly violated the law.”²⁵⁶

In determining whether Oliveri was shielded by qualified immunity from the charges levied by HCS, the court had to first determine if the commissioner “was acting within the scope of his . . . authority when the allegedly unconstitutional acts [claimed by HCS] took place.”²⁵⁷ The court looked at the accusation that he abused his power by instructing law enforcement personnel to ticket HCS cars parked on the side of road.²⁵⁸ In this example, the court found that it was his job to ensure that the city’s code was being upheld.²⁵⁹ Since it was within his power to instruct law enforcement to make sure that residents abided by parking regulations, Oliveri did act within his job.²⁶⁰ Once Oliveri proved this, the burden shifted to HCS to show that qualified immunity does not apply.²⁶¹

At first, the court noted that when looking at Oliveri’s activities generally, they appeared to fall within the discretion of his job as commissioner (e.g., working with code inspectors and police on upholding parking regulations in the community).²⁶² But after its analysis, the court changed its view based on HCS’s claims of selective enforcement of the law in order to harass synagogue members and disrupt and discourage HCS’s activities.²⁶³ The court stated that the testimony regarding the selective enforcement of parking and the comments regarding the shrine indicated “a nexus linking Oliveri, the harassment of the synagogue by city personnel, and the discouragement

252. See *Ray v. Foltz*, 370 F.3d 1079, 1081 (11th Cir. 2004).

253. HCS Order, *supra* note 151, at 16.

254. *Williams v. Consol. City of Jacksonville*, 341 F.3d 1261, 1267 (11th Cir. 2003).

255. *Ray*, 370 F.3d at 1081.

256. HCS Order, *supra* note 151, at 16 (quoting *Ray*, 370 F.3d at 1082).

257. *Id.* (citing *Storck v. City of Coral Springs*, 354 F.3d 1307, 1314 (11th Cir. 2003)).

258. *Id.* at 20.

259. *Id.* at 19.

260. *Id.*

261. HCS Order, *supra* note 151, at 19–20.

262. *Id.* at 19.

263. *Id.* at 20–22.

of the Chabad from continuing its religious activities in the Hollywood Hills neighborhood."²⁶⁴ Those facts were also "sufficient to state a prima facie case of selective enforcement."²⁶⁵ The court ruled that if the amended complaint was "taken as true and if all reasonable inferences therefrom are considered in the light most favorable" to HCS, then "a reasonable person could find that Defendant Oliveri targeted the Synagogue and its members for the purpose of discouraging them from joining together to practice their faith."²⁶⁶ The court found that all of the facts taken together as presented by HCS and the allegation that the inspections and citations happened over a long period of time were enough to establish that Oliveri's behavior and orders fell outside the permitted range of conduct for a commissioner.²⁶⁷

The facts presented by HCS have so far been enough to overcome Oliveri's motion to dismiss, but the judge has warned HCS that more evidence will be needed to substantiate the facts presented to overcome Oliveri's qualified immunity defense on a likely forthcoming motion for summary judgment.²⁶⁸ While the conclusions by the court are merely reflective of HCS's right to go forward with their claims of constitutional violations, it is a significant step in moving forward against Oliveri. Unless some compromise is met, there is likely still a long way to go before the Chabad members of the Hollywood Community Synagogue are out of the courts.

V. CONCLUSION

Chabad's goal or mission when it comes to outreach is to be seen and to be heard.²⁶⁹ Chabad emissaries are driven by the Rebbe's message of spreading Judaism to those who want to embrace it.²⁷⁰ Sometimes, though, the

264. *Id.* at 23.

265. *Id.* at 25. Oliveri argued that he could not have targeted Chabad for selective enforcement, since Temple Sinai and Temple Solel, which operated near HCS, were similarly situated (meaning both were Jewish houses of worship) and there were no allegations against Oliveri from those synagogues. HCS Order, *supra* note 151, at 28. The court seemed to think Oliveri's argument was misguided and responded accordingly:

This line of argument appears to assume that the improper or discriminatory motive underlying Oliveri's alleged acts is anti-Semitism, and then argues that anti-Semitism has not been shown since there is no allegation of selective enforcement against Temple Sinai of Hollywood and Temple Solel. The Court notes however that Chabad, unlike Temple Sinai of Hollywood or Temple Solel, was described in Commission hearings as "too controversial."

Id. at 28–29.

266. *Id.* at 21.

267. *Id.* at 31.

268. *Id.* at 31–32.

269. FISHKOFF, *supra* note 3, at 11–12.

270. *Id.*

message is perceived as too loud by those who are not interested. Many have resorted to the court system to silence Chabad. As the litigation headlining Chabad around the country has shown, it is not very difficult today to bring a lawsuit, nor to defend one. In Chabad's case, there are plenty of attorneys who are willing to take on the case pro bono. Chabad members have also not hesitated to initiate litigation when they felt their rights were being constrained. While the litigation might be time consuming, it has also helped garner attention to Chabad and the attention often helps Chabad fundraise.

While clearly Chabad rabbis and members are not seeking to be sued, nor do they want to be forced into court to be able to display a religious symbol or to hold services out of their home, such things have become regular occurrences in the past two decades. This situation may be partly due to the ever-growing ease of bringing a lawsuit, or it may be due to the growth of Chabad. Whichever way, it does not appear that there is an end in sight for either.