The amicus brief, Boyajian v. Gatzunis, AKA Dover Amendment, was joined by Clifton Kirkpatrick, as Stated Clerk of the General Assembly of the Presbyterian Church (U.S.A.). The brief was filed in the United States Court of Appeals for the First Circuit on November 29, 1999.

99-1760

UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

MARGARET BOYAJIAN, CHARLES COUNSELMAN and
JEAN DICKINSON,
Plaintiffs-Appellants

v.

THOMAS GATZUNIS, Building Inspector of the Town of Belmont, JOHN W. GAHAN, III, WILLIAM D. CHIN, THOMAS P. CALLAGHAN, JR., CARLO TAGARIELLO, ANTHONY LECCESE, JAMES D. HARRINGTON, CHARLES REARDON, KARL TOBIASON, as they are members of the Zoning Board of Appeals of the Town of Belmont, and CORPORATION OF THE PRESIDING BISHOP OF THE CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS,
Defendants-Appellees.

APPEAL OF JUDGMENT FROM THE UNITED STATES
DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS

BRIEF OF *AMICI CURIAE* IN SUPPORT OF APPELLEES AND AFFIRMANCE OF THE DISTRICT COURT'S JUDGMENT

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<u>**LISTING OF *AMICI CURIAE* CONTINUED FROM COVER**</u>

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<u>CORPORATE DISCLOSURE STATEMENT OF *AMICI CURIAE*</u>

Amici Curiae American Baptist Churches of Massachusetts; American Baptist Churches in the USA; Baptist General Conference; Baptist Joint Committee; Evangelical Covenant Church; Evangelical Lutheran Church in America; The First Church of Christ, Scientist; General Conference of Seventh-day Adventists; General Counsel on Finance and Administration of the United Methodist Church; Presbyterian Church (U.S.A.); Reorganized Church of Jesus Christ of Latter Day Saints; United House of Prayer for All People of the Church on the Rock of the Apostolic Faith; and Worldwide Church of God, hereby submit the following corporate disclosure statement pursuant to Fed. R. App. P. 26.1:

Amicus Evangelical Covenant Church has a parent corporation called Evangelical Covenant Church, which is an Illinois not for profit corporation. No other *amici* have parent corporations. No *amicus* has 10% or more of its stock owned by any publicly held company.

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CONCISE STATEMENT OF INTEREST OF THE *AMICI CURIAE*

Amici are religious denominations of various faiths that are deeply concerned that the right to worship receive adequate constitutional and statutory protection. Although Appellants have suggested that land use regulations do not threaten free exercise norms, in *amici*'s experience, such regulations are often serious obstacles to religious liberty. In the view of *amici*, the Dover Amendment is a constitutional attempt to lessen some of those obstacles by prohibiting zoning discrimination against religious uses of land. As the following demonstrates, the absence of such protections in other states has, at times, led to religious discrimination or harmful indifference toward religion. Guarding against such discrimination and indifference is in the best tradition of this nation's tolerance for religious diversity and in no way violates the Establishment Clause. Further statements regarding the interest of the individual *amici* may be found in the Motion for Leave to File *Amici Curiae* Brief, which was filed concurrently with this brief.

ARGUMENT

The freedom to worship God according to the dictates of one's conscience is fundamental to the American understanding of liberty and justice. As the

Supreme Court underscored in *United States v. Ballard*, 322 U.S. 78 (1944), in America "[a citizen's] relation to his God was made no concern of the state. He was granted the right to worship as he pleased . . . ." *Id.* at 87. Accordingly, protections for the right to worship are enshrined in the constitutions of the United States and the several states. *See, e.g.*, U.S. Const. amend I; Mass. Const., Decl. of Rts., art II (affirming "the right . . . to worship the SUPREME BEING").

For over two centuries, the imperative of respecting the free exercise of religion has also shaped numerous statutes. From prohibitions on religious discrimination in the marketplace, to the myriad exemptions and accommodations from generally applicable laws, the statute books are peppered with provisions that help ensure that neither the regulatory state, nor society, encroaches too far into the realm of religious exercise. Such laws reflect a deep commitment to religious liberty. They enable scores of religious denominations to co-exist peacefully in a single community despite their differences.

The Dover Amendment (Mass. Gen. L. ch. 40A, § 3) is just one among innumerable instances where a legislature has endeavored to ensure proper respect for the right to worship. For millions of Americans, the right to worship means the right to worship in community — in churches, chapels, synagogues, and temples,

in the communion and strength of fellow believers. The Dover Amendment seeks to protect that right in the context of local land use planning by precluding land use authorities from peremptorily banning houses of worship from entire city districts, or even from entire cities. Under the Amendment, no zoning district can be declared *per se* off limits for religious use, though specific projects remain subject to various reasonable regulations designed to mitigate adverse impacts.

Plaintiff-Appellants ("Plaintiffs") contend that such protections are unnecessary. According to Plaintiffs, "[t]here is no evidence of any on-going discrimination [in the land use context]. There is no evidence that municipalities would oppose the establishment of religious institutions." Brief of Plaintiff-Appellants ("Pls.' Brf."), p. 30. As demonstrated below, these assertions are simply untrue. Discrimination and insensitivity to religion in the area of land use regulation are among the most significant, on-going threats to the fundamental right to worship. State zoning acts generally afford local regulators sweeping power to control the use of land, subject only to deferential review by state courts. Unfortunately, neighboring land owners and municipal officials too often use local discretion over land use matters to oppose the construction of new houses of worship. Sometimes the opposition is rooted in plain religious bigotry, as a

number of examples below illustrate. But more often, opposition arises from concerns about property values, tax revenue, aesthetics, traffic, etc., or simply from fear of the unknown. Sensitive to their constituencies, local officials often undervalue religious worship and overvalue the fears of objecting neighbors, resulting in decisions that are unfavorable toward religious land uses.

By providing that religious buildings — together with schools and other important uses — may not be zoned completely out of a community or eliminated from entire city districts, while still allowing for a variety of reasonable regulations, the Dover Amendment helps to level the playing field. Nothing in the Supreme Court's jurisprudence suggests that such a measure is unconstitutional. To the contrary, the Dover Amendment comports with well-recognized land use principles. Although Plaintiffs' greatest fear is that churches will locate in residential areas, many respected land use authorities have noted that houses of worship should be located near those they serve, rather than zoned to the edge of town like cement factories or adult bookstores. The Dover Amendment helps make that outcome possible.

In brief, the Dover Amendment is entirely consistent with America's deep tradition of respect for the free exercise of religion. Striking it down will likely lead

to increased religious discrimination of the sort that has plagued other jurisdictions and which gave rise to the Dover Amendment in the first place. The Establishment Clause does not require such a result.

I. THE DOVER AMENDMENT IS A CONSTITUTIONAL ATTEMPT BY THE MASSACHUSETTS LEGISLATURE TO ENSURE THAT LOCAL LAND USE PLANNERS DO NOT COMPLETELY BAN HOUSES OF WORSHIP FROM CITY DISTRICTS OR ENTIRE CITIES.

In today's world, completely unfettered control over land use is an awesome power. With extremely broad discretion, with numerous intangibles to be weighed and considered, and with the historically great deference paid them by courts, local planning commissions and city councils are in many instances the last word on land use applications. In most cases, this is as it should be. Those most impacted by a newly proposed use of property should, generally speaking, have the most to say about whether that new use is allowed. Local officials often have the best insight and judgment as to which projects should be allowed in various areas of a city. Citizens' voices will most likely be heard if they are allowed to communicate their concerns to elected officials who live in the community with them and sympathize with their views.

It has long been apparent, however, that there are a few crucial instances

where this model of land use control can break down. There are certain land uses that are important to every community and to the state as a whole. Almost everyone acknowledges that these uses must be allowed by — and are often important to the operation of — general society. They include schools, day care centers, community centers, churches,[1] homes for the disabled, and agricultural uses, just to name a few.

Often, however, even though they acknowledge that such uses are important, a super-majority of residents in a particular area will strongly oppose locating one of these uses on their street, in their neighborhood, or even sometimes in their city as a whole. This "not in my backyard" mentality has existed since modern land use planning began and is well understood by state legislatures which ultimately must decide just how much land use authority to give to local cities and towns.[2]

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[1]The use of the word "church" in this brief refers generically to any house of worship, be it a Christian chapel, Jewish synagogue, Mormon temple, Muslim mosque, etc.

[2]In Massachusetts, as in other states, all local authority to regulate land use comes directly from the state legislature; municipalities have no zoning power of their own. *See, e.g.*, *Attorney General v. Dover*, 327 Mass. 601, 604-05, 100 N.E.2d 1, 3 (Mass. 1951) ("'The power of the [the state legislature] over the subject of zoning is supreme. When it has spoken as to any branch of that subject, conflicting by-laws or ordinances established by local authority must give way.") (internal citations and quotation marks omitted); *accord Johnson County Mem'l Gardens, Inc. v. City of Overland Park*, 239 Kan. 221, 224, 718 P.2d 1302, 1305 (1986) ("A municipality has no inherent power to enact zoning laws, and the power of a local government to accomplish zoning exists only by virtue of authority delegated by the state."); *Transamerica Title Ins. Co. v. Tucson*, 157 Ariz. 346, 350, 757 P.2d 1055, 1059 (1988).

While acknowledging that local residents — through their local governments — are generally in the best position to determine what should be allowed in particular zones or in particular localities, state legislatures historically have also recognized that some important uses must be regulated and protected at the state level. That has resulted in literally scores of state-wide land use provisions, most of which provide that a local government may not exclude certain uses from certain zones.[3] As specifically applied to churches, total local control by a city or town over what may be built in the community (and who may build it) has, in the past, led to serious infringement on the fundamental right to worship. Because of the sensitivity of municipal officials to public opinion, unfettered local discretion over land use invites invidious discrimination against religious uses of land, particularly where minority religions are concerned. Even where anti-religious animus is absent, local land use officials faced with conflicting interests can seriously undervalue free exercise norms and overvalue the concerns of nervous neighbors. If left solely to the local political process, the outcome is often predetermined — a place of worship vitally needed by a small minority of residents within the community is

[3] *See e.g.*, 3 Ziegler, *Rathkopf's The Law of Zoning and Planning*, § 31.03[16] (1999) (day care centers); *id.* § 31.03[14] (cemeteries); *id.* § 31.03[11] (wharves, wetlands and waters); *id.* § 31.03[5] (roads); *id.* § 31.03[2] (schools); *id.* § 31.03[3] (group homes); *id.*, Vol. 1, § 7A.06[3] (waste).

rejected by a large majority of residents who (at worst) simply do not want the minority religion in their community or who (at best) do not understand the importance of a church as balanced against the disadvantages they believe will accompany it.

In this context, a measure like the Dover Amendment that limits the exclusionary power of city planners, while still preserving local authority to regulate harmful impacts, is a salutary attempt to lessen the threat of religious discrimination and ensure that minority religions stand on the same footing as majority religions and that religious uses are on a par with non-religious uses. Such a provision helps ensure that houses of worship are built where members may conveniently meet together to worship as their consciences dictate.

A. The Ability to Construct Houses of Worship is Integrally Related to the Fundamental Right to Worship.

As discussed in the Introduction, for millions of believers across this country, religion is not solely a private affair. Men and women are by nature social creatures and their varying modes of worship reflect that basic fact. Communal worship is an integral facet of almost every religion found on earth today. As Justice Brennan perceptively noted over a decade ago:

> For many individuals, religious activity derives meaning in

> large measure from participation in a larger religious community. Such a community represents an ongoing tradition of shared beliefs, an organic entity not reducible to a mere aggregation of individuals.

Corporation of the Presiding Bishop v. Amos, 483 U.S. 327, 342 (1987) (Brennan, J., concurring) (footnote omitted). A worshiping community is much more than the sum of its individual parts.

For example, as they worship together, Christians "are no more strangers and foreigners, but fellow citizens with the saints," members "of the household of God." *Ephesians* 2:19. Perhaps most profoundly, many Christians feel the presence of God when worshiping in their churches, for Jesus taught that "where two or three are gathered in my name, there am I in the midst of them." *Matthew* 18:20. For Christians, therefore, excluding a house of worship from an entire city (or even from an entire city zone) is not just a routine land use issue. It burdens or outright precludes fundamentally important modes of worship.

[4]

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[4]Many forms of Christian worship and practice either require or are often experienced in communal settings. These may include: giving and receiving a name (christening); baptism; laying on of hands for the gift of the Holy Ghost (confirmation); partaking of the Sacrament of the Lord's Supper (communion); confession of sins; holy unction; marriage; preaching of the sermon; reception of new members into the Body of Christ; group Bible study; speaking in tongues; miraculous healing; public acceptance of Jesus as one's personal Savior; the singing of hymns of praise; funerals; and congregational prayer.

Similarly, communal worship has long been crucial to Judaism and the Jewish sense of identity and continuity. Many Jewish religious practices and rituals must be conducted in communal settings. In ancient days, Jews gathered in the central Temple of Jerusalem to conduct rituals and ceremonial rites. After the Temple's destruction and the expulsion of the Jews from Israel in 70 A.D., Jews in the Diaspora came to rely on the synagogue as the central place for worship. *See* M. JOSEPH, JUDAISM AS CREED AND LIFE 219 (1903). Zoning restrictions on houses of worship burden or preclude many elements of Jewish worship and the millenia-old sense of spirituality and purpose they convey.

The fundamental importance of communal worship, and the concomitant need for a place to worship, is of course not limited to Christianity and Judaism. In many other religions too numerous to list here, adherents find solace and spiritual enrichment in meeting with others striving for common religious ends. Freedom of worship is integrally related to the ability of religious adherents to join together in a building that has been consecrated for religious meetings, where they can honor and worship God as a group, according to the dictates of their beliefs.

B. History Confirms That Unfettered Local Discretion in the Land Use Planning Context Can Lead to Discrimination Against Unpopular or Minority Religions or Even Against Religion as a Whole.

In Massachusetts, as across the country, local land use authorities have sweeping discretion to regulate land use. *See* Mass. Gen. L. ch. 40A, § 5. Flexibility in addressing the many complexities that attend land use is no doubt important. But there is a dark side as well. A highly discretionary regulatory system can easily be manipulated by those who object to a proposed project or dislike its sponsor. With land use officials ever sensitive to their constituencies, such a system makes possible invidious discrimination against religious uses of land, particularly where politically vulnerable minority religions are concerned.

Plaintiffs have suggested that such fears are entirely overblown and that, in today's world, no special protections against religious discrimination are justified. *See* Pls.' Brf. at 30. They could not be more mistaken. The history of the Dover Amendment itself makes plain that any local community — left with absolute land use authority in a heated political process — is capable of engaging in religious discrimination.

[5] More recent experience absolutely confirms this fact. In a recent law review article, Professor Douglas Laycock, a leading scholar on the Free Exercise and Establishment Clauses, documents numerous instances of land use discrimination against churches. *See* Douglas Laycock, *State RFRAs and Land Use Regulation*, 32 U.C. Davis L. Rev. 755 (1999). In the same volume, attorneys Von Keetch and Matthew Richards report on a recent study documenting discrimination against minority religions in the land use context. *See* Von G. Keetch & Matthew K. Richards, *The Need for Legislation to Enshrine Free Exercise in the Land Use Context*, 32 U.C. Davis L. Rev. 725 (1999). Both articles demonstrate that religious discrimination remains a very real concern in the land use context and thus, that measures like the Dover Amendment are still necessary. A few examples are worth reviewing as a reminder of what can happen when adequate protections are lacking.

Drawing from data compiled in congressional hearings, Professor Laycock cites several examples of hostility toward religion from the Chicago area:

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[5]The Dover Amendment was passed in response to an ordinance enacted by the Town of Dover that banned religious educational uses from residential zones but allowed secular educational uses. The intent behind the ordinance was to prevent the construction of Catholic parochial schools. *See The Bible Speaks v. Board of Appeals of Lenox*, 8 Mass. App. Ct. 19, 28, 391 N.E.2d 279, 283 n.10 (1979) (reviewing history of Dover Amendment); *Attorney General v. Dover*, 327 Mass. 601, 603, 100 N.E.2d 3 (1951).

> [Of] twenty-one cases of zoning permits denied for apparently illegitimate or discriminatory reasons . . . [m]ost of these did not even involve new construction. Rather, the cities refused to permit church use of existing buildings — often buildings that had been used as secular places of assembly. Family Christian Center in Rockford, Illinois was not allowed to use a former school building as a church; this decision was ultimately set aside as arbitrary and capricious. Living Word Outreach Full Gospel Church and Ministries in Chicago Heights, Illinois was not allowed to use a Masonic Temple as a church. Gethsemane Baptist in Northlake, Illinois was not allowed to use a VFW hall as a church. Faith Cathedral Church in Chicago was not allowed to use a funeral parlor, which had a chapel and plentiful parking. Vinyard Church in Chicago was not allowed to use a former theater as a church. Evanston Vinyard Church in Evanston, Illinois was not allowed to use an office building with an auditorium for a church. Cornerstone Community Church in Chicago Heights was not allowed to use a former department store as a church. A flower shop, a former branch bank, and a theater were each rezoned as single-parcel manufacturing zones to prevent their being used as a church.

Laycock, *supra* at 777.

[6]

Other cities with similar absolute zoning power fare no better. In the City of

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[6]Citing, *inter alia, Family Christian Fellowship v. County of Winnebago*, 151 Ill. App. 3d 616, 620-23, 503 N.E.2d 367, 371-73 (1986); *City of Chicago Heights v. Living Word Outreach Full Gospel Church and Ministries, Inc.*, 302 Ill. App. 564, 707 N.E.2d 53 (1999), *appeal allowed*, — N.E.2d — (Ill., June 2, 1999) (finding effects on traffic insignificant, drainage problems fixable, and residential use impractical)) (internal citations omitted).

Forest Hills, Tennessee,

> four large churches sat on or near the intersection of two major arterial roads — one Methodist, one Presbyterian, and two Churches of Christ. One of these churches closed, and the Mormons bought the property. Yet the city refused permission to locate a Mormon temple on the site, citing its desire to have no more churches in the community.

Id. at 778 (citing, *inter alia*, *Corporation of the Presiding Bishop v. Board of Comm'rs*, No. 95-1135 (Chancery Ct. Davidson County, Tenn., Jan. 27, 1998)). In the Midwest, a Minnesota town coerced a church to vacate its leased property because church hours were not compatible with the business environment the town sought to cultivate. *See* Keetch & Richards, *supra* at 733 (discussing *Cornerstone Bible Church v. City of Hastings*, 948 F.2d 464 (8th Cir. 1991)). In California, a "city's development plan that designated [a] church['s] property as open space disabled the church, whose school building was damaged by natural disaster, from selling the property to raise much needed funds." *See id.* (discussing *Romona Convent of Holy Names v. City of Alhambra*, 21 Cal. App. 4th 10, 26 Cal. Rptr. 2d 140 (1993)).

Land use discrimination against Orthodox Jews has been particularly blatant. Rabbi Chaim Rubin testified before Congress about an incident in California, a

state with the type of unlimited land use discretion Plaintiffs prefer.

> [T]he City of Los Angeles refused to let fifty elderly Jews meet for prayer in a house in the Hancock Park neighborhood, an area of some six square miles, because Hancock Park had no place of worship and the City did not want to create a precedent for one. That is, the City's express reason for excluding a place of worship was that it wanted to exclude places of worship! Yet the City permitted other places of assembly in Hancock Park, including schools, recreational uses, and embassy parties. Whittier Law School was just down the street from Rabbi Rubin's shul. Eighty-four thousand cars passed the building every day, and hundreds of law students came and went to both the day school and the night school. But [supposedly] fifty Jews arriving on foot once a week would irrevocably change the neighborhood.

Laycock, *supra* at 779 (summarizing and commenting on testimony).

[7] In a similar incident, land use regulators barred fourteen Orthodox Jews from establishing a nondescript shul in a rented Los Angeles house, even though the city council contemporaneously permitted a sex club to locate adjacent to another residential neighborhood. *See* Keetch & Richards, *supra* at 732. According to the Los Angeles Times, the incident prompted one City Hall insider to exclaim: "'How

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[7] Citing *The Need for Federal Protection of Religious Freedom and Boerne v. Flores, I, Hearing Before the Subcomm. on the Constitution of the House Comm. on the Judiciary*, 105th Cong. (Feb. 26, 1998) (Statement of Rabbi Chaim Baruch Rubin, Congregation Etz Chaim, Los Angeles, California) <http://www.house.gov/judiciary/22382.htm>.

does the council basically knock down the right of 13 or 14 people to pray together and allow a sex club to exist near a residential neighborhood? . . . What am I missing here? Praying is a bad thing and a sex club is a good thing?'" *Id.* at 732 n.17 (quoting Jodi Wilgoren, *Troubled House of Worship*, L.A. TIMES, July 9, 1997). Obviously, something more was going on.

Discrimination against Jews is by no means limited to Los Angeles.

[8]

> Orthodox Jews must live within walking distance of a synagogue or shul, because they cannot use motorized vehicles on the Sabbath. Thus, a community that excludes synagogues and shuls effectively excludes Orthodox Jews from living in the community at all. Attorney Bruce Shoulson testified [before Congress] to a pattern of such exclusion in northern New Jersey, where he has handled more than thirty such cases. Land use authorities often refuse permits for Orthodox synagogues because they do not have as many parking spaces as the city requires for the number of seats. This is pretextual, because on the Sabbath when the seats are occupied, the people cannot [according to their religious beliefs] arrive by car. Cheltenham Township, Pennsylvania, carried this to the lengths of insisting on the required parking spaces, refusing to count leased spaces off-site, and then, when

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[8] *See, e.g.*, *LeBlanc-Sternberg v. Fletcher*, 67 F.3d 412 (2d Cir. 1995) (finding violation of fair housing act by village incorporated for purpose of excluding Orthodox Jews); *Grosz v. City of Miami Beach*, 721 F.2d 729 (11th Cir. 1983) (upholding exclusion of prayer services from rabbi's residence); *Orthodox Minyan v. Cheltenham Township Zoning Hearing Bd.*, 123 Pa. Commw. 29, 552 A.2d 772 (1989) (reversing denial of special use permit for conversion of residence to Orthodox synagogue).

> the synagogue offered to construct the parking spaces and let them sit empty, denying the permit on the ground that cars for that much parking would aggravate traffic problems.

Laycock, *supra* at 779-80.

[9]

Though usually cloaked in the language of land use, hostility toward a particular religion sometimes erupts into the open:

> Most chillingly, Shoulson described a hearing in which "an objector turned to the people in the audience wearing skull caps and said 'Hitler should have killed more of you.'" In another New Jersey community, the board invited testimony on the effect that substantial Orthodox Jewish populations had had on other communities. Anti-Semitic views were openly expressed in the campaign for the Ohio referendum voting down the Jewish proposal that had received land use approval. Residents created the Village of Airmont, New York, for the openly stated purpose of using the zoning power to exclude Orthodox Jews.
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> In the Family Christian Center case, a neighbor said, outside the hearing process, "Let's keep these [expletive] Pentecostals out of here." The judge in that case said from the bench that "We don't want twelve-story prayer

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[9]Citing *inter alia, Religious Liberty Protection Act of 1998, Hearing on H.R. 4019 Before the Subcomm. on the Constitution of the House Comm. on the Judiciary*, 105th Cong. (July 14, 1998) (statement of Bruce D. Shoulson, attorney) <http://www.house.gov/judiciary/222494.htm>; *Orthodox Minyan*, 123 Pa. Commw. at 30, 552 A.2d at 773 (reversing the denial of the permit).

> towers in Rockford," apparently because there was a twelve-story prayer tower at Oral Roberts University in Oklahoma, and the Illinois church in the case had a loose affiliation with the University, although that was not in the record and the judge had to have learned it outside of court. The church had not applied to build anything, let alone a twelve-story tower; it wanted to use an existing school for worship purposes.

Laycock, *supra* at 780.

[10]

This is land use regulation at its worst — citizens within a community using political pressure to oppose new houses of worship because of prejudice. To be sure, there are numerous land use determinations made across the country which focus on proper concerns of density and traffic and the overall impact on the community, and which are sensitive to the difficulties faced by religious minorities as they seek to erect churches. But to suggest, as Plaintiffs do, that land use discrimination against religion is no longer a real problem is just incorrect.

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[10]Citing *The Need for Federal Protection of Religious Freedom* and Boerne v. Flores, II: *Hearing Before the Subcomm. on the Constitution of the House Comm. on the Judiciary*, 105th Cong. (Mar. 26, 1998) (statement of Marc Stern, American Jewish Congress) <http://www.house.gov/judiciary/222390.htm>, Appendix, Table 4 (reporting study of reported cases); *LeBlanc-Sternberg*, 67 F.3d at 418-19, 431 (quoting statements such as "the only reason we formed this village is to keep those Jews from Williamsburg out of here").

C. Even When No Intentional Discrimination is Present, Local Land Use Planners Can Seriously Undervalue Free Exercise Norms in Setting Land Use Policies, Disparately Impacting the Rights of Minority Religions.

Even absent invidious intent, local land use authorities often undervalue free exercise norms when setting land use policies and evaluating the merits of specific projects involving religious uses. One survey of zoning codes showed that, for whatever reason, "places of secular assembly are often not subject to the same [land use] rules" as churches. Laycock, *supra* at 776.

> The details vary, but uses such as banquet halls, clubs, community centers, funeral parlors, fraternal organizations, health clubs, gyms, places of amusement, recreation centers, lodges, libraries, museums, municipal buildings, meeting halls, and theaters are often permitted as of right in zones where churches require a special use permit, or permitted on special use permit where churches are wholly excluded. . . . Many business uses are also generally permitted as of right without special use permits.

Id.

More and more in today's expanding analysis of how property may be used to the best advantage of the city and its residents, churches find themselves on the outside looking in. Those in residential zones oppose churches in their neighborhoods citing increased traffic, noise, or a negative impact on community aesthetics.

[11] They argue that churches are better suited to commercial or other zones where residents will not be directly affected in their homes. At the same time, city planners and other commercial developers oppose churches in commercial zones, arguing that they do not generate any tax revenues for the community and that it is not in the business community's best interests to locate churches next to vibrant commercial developments.

[12] Church property is typically tax exempt, which means that each new house of worship reduces a municipality's potential for new tax revenue. Sometimes cities

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[11]*See Christian Gospel Church, Inc. v. City of San Francisco*, 896 F.2d 1221, 1224 (9th Cir. 1990) (zoning "protects the zones' inhabitants from problems of traffic, noise and litter"); *State v. Cameron*, 184 N.J. Super. 66, 75, 445 A.2d 75, 80 (1982) (collecting cases on traffic problems associated with churches), *rev'd on other grounds*, 100 N.J. 586, 498 A.2d 1217 (1985). Permits denied for flimsy traffic reasons are sometimes granted on judicial review, especially in states where churches are a protected use, and sometimes even where they are not. *See Kali Bari Temple v. Board of Adjustment*, 271 N.J. Super. 241, 638 A.2d 839 (1994) (ordering permit for occasional Hindu worship services in home of clergyman (situated on 7.24 acres) and finding little traffic impact); *Grace Community Church v. Planning & Zoning Comm'n*, 42 Conn. Supp. 256, 275-78, 615 A.2d 1092, 1103-04 (Conn. Super. Ct. 1992) (collecting cases); *Lucas Valley Homeowners Ass'n, Inc. v. County of Marin*, 233 Cal. App. 3d 130, 154-55, 284 Cal. Rptr. 427, 441-42 (1991) (approving permit for synagogue, find that traffic impact would not be great enough to justify withholding permit).

[12]*See Cornerstone Bible Church v. City of Hastings*, 948 F.2d 464, 467 (8th Cir. 1991) (quoting city council resolution justifying exclusion of churches on ground that "no business or retail contribution or activity is generated"); *International Church of the Foursquare Gospel v. City of Chicago Heights*, 955 F. Supp. 878, 881 (N.D. Ill. 1996) (distinguishing church from permitted uses "which will encourage shopper traffic in the area during shopping hours"); *City of Chicago Heights v. Living Word Outreach Full Gospel Church and Ministries, Inc.*, 302 Ill. App. 3d 564, 571-72, 707 N.E.2d 53, 59 ("The city submitted evidence that its zoning plan [excluding churches from commercial zones] was designed to invigorate the commercial corridor to regenerate declining revenues and create a strong tax base."), *appeal allowed*, — N.E.2d — (Ill., June 2, 1999).

have succumbed to the temptation to exclude churches for the purpose of bolstering their tax base.

[13] This practice is especially dangerous "in areas with small and adjoining jurisdictions." Laycock, *supra* at 762.

> If one such jurisdiction restricts or excludes churches, new churches may be displaced to neighboring jurisdictions, increasing the risk of activating there the political forces that oppose the location of churches. These neighboring jurisdictions must either accept a disproportionate share of area churches or else exclude churches as aggressively as the first jurisdiction. Each additional jurisdiction that excludes churches puts more pressure on its neighbors to follow suit.

Id.

In this "domino-effect zoning," churches find themselves in a land use no man's land. Unwanted in either the core residential or commercial districts, often the only zones where churches are allowed (if they are allowed at all) in these cities are on the very outskirts of town in undeveloped or industrial areas. Indeed, in what can only be viewed as the ultimate irony, it appears that the two major land use difficulties facing such cities and towns is where to locate churches and adult

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[13] *See* Laycock, *supra* at 762 n.19 (describing a situation in "Chicago Heights, Illinois, where [a] city preferred that a long-abandoned department store remain vacant rather than be occupied by a church, because as long as the building sat empty, there remained some chance that it might be occupied by a commercial user that would generate tax revenue").

bookstores.

The cause of such treatment may be indifference or ignorance rather than outright hostility to religion, but it is clear that minority religions are hardest hit. A 1997 comprehensive study of religious land use litigation shows a large disparity between mainline and minority religions, with small religions vastly over-represented in the reported church zoning cases. *See* Keetch & Richards, *supra* at 729 (reviewing findings of study, which is included in the article's appendices).[14] Tellingly, minority religious groups affiliated with denominations accounting for less than 9% of the population account for almost 50% of the reported litigation over the right to locate a religious building at a particular site, and over 33% of the reported litigation seeking approval of accessory uses at existing churches. *Id.* When nondenominational and other unidentifiable religious bodies are added to the mix, the numbers become truly disturbing, with minority religious groups, again with less than 9% of the population, accounting for about 69% of the reported cases involving the right to locate in a particular area and almost 51% of the reported cases involving the right to engage in an accessory use. *Id.* Reviewing

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[14]Involving an extensive review of all reported land use cases, the study was conducted by Professor W. Cole Durham of Brigham Young University's School of Law in conjunction with attorneys at the Chicago law firm of Mayer, Brown, and Platt.

this data, Professor Laycock insightfully notes that while "Jews account for only 2% of the population," they are involved in "20% of the reported location cases and 17% of the reported accessory use cases." Laycock, *supra* at 771.

This study presents strong evidence that "minority religions have a much harder time obtaining approval for construction of a house of worship — and for utilizing that place of worship in an important religious way — than do majority religions." Keetch & Richards, *supra* at 729. Consequently, they are forced to litigate far more often. "Yet once they get to court, these small faiths win their cases at about the same rate as larger churches. It is not that small churches bring weak cases, but that small churches are more likely to be unlawfully denied land use permits." Laycock, *supra* at 771.

In sum, land use regulation can pose a serious threat to the free exercise of religion. Professor Laycock concludes his survey with this sobering assessment:

> Land use regulation has become the most widespread obstacle to the free exercise of religion. Part of the problem is discrimination against churches and among churches; part of the problem is highly intrusive and burdensome regulation, imposed for modest public purposes and without regard to the effect on constitutional rights. Part of the problem is persistent failure of land use authorities in many jurisdictions to recognize that they are even dealing with a constitutional right.

Id. at 783.

Plainly stated, Plaintiffs' faith that there is no need for the protections of the Dover Amendment because local land use regulators will be sensitive to the rights of religious minorities is seriously misplaced. Local city councils and planning commissions often fail to respect the fundamental right to worship, choosing instead to advance locally attractive political agendas or other interests advanced by residents and planners. Local residents are not normally interested in protecting the religious rights of the few in the community who desire to build a new house of worship. Commercial developers and city tax collectors, interested in the most profitable use of land, are often no more sympathetic. As a result, unless some overarching protection like the Dover Amendment is put in place for minority religions, their ability to build a house of worship exists only on those parcels of land that neither the residents nor the commercial developers want. As a result — figuratively, if not literally — minority religious worship is relegated to the far edges of the community, without protection under local zoning law, and often without effective recourse in the courts.

D. The Dover Amendment Lessens the Threat of Discrimination Against Religious Uses of Land.

The incidents related above are clearly inconsistent with the American ideal

of tolerance for the fundamental right to worship. To its credit, for almost fifty years Massachusetts has had a law that drastically reduces such problems. In direct response to religious discrimination by the town of Dover, and undoubtedly with the realization that minority religions have little power in the local land-use planning process, the Massachusetts legislature enacted the Dover Amendment. This Amendment is simple and straight forward: It prevents a city from zoning religious uses (among many others) completely out of any zone within the municipality. *See* Mass. Gen. L. ch. 40A § 3. In the judgment of the state legislature, no city zone is *per se* unfit for religious worship.

That does not mean, of course, that every lot is automatically suitable for every religious use. Contrary to Plaintiffs' characterization, the Dover Amendment permits local government to impose a wide array of regulations to address concerns commonly associated with meetinghouses. With the power to regulate the "bulk and height" and "building coverage" (the percentage of the lot the structure occupies) of a meetinghouse, as well as "yard sizes," and "setbacks," the Amendment assures that land use authorities have the power to make any new chapel or synagogue conform to the basic land use requirements of the zone. *See id.* As a practical matter, this gives regulators the power to limit the size of the

structure and thus the number of worshipers and types of activities it can accommodate. When the authority to regulate "open spaces" (*id.*) is added, regulators also have the power to mitigate aesthetic concerns. Reasonable "parking" regulations are likewise proper under the Amendment, ensuring that the vehicles of worshipers do not burden residential neighbors or commercial establishments. *Id.*

Thus, the Amendment grants land use authorities significant power to shape and mold the outcome of any proposed religious structure. If a structure is too large under general zoning restrictions, local government may force it to a smaller dimension. If the religious building does not provide enough open space as required in the general zoning provisions, the city may mandate that additional space be made available. If a proposed building is too large or too high or too close to the street, the city may require changes to the structure, just as with any other building project. The list goes on and on. In the end, contrary to Plaintiffs' assertion, the Dover Amendment does not provide religious entities with a trump card for development in a particular zone. It merely allows them into the game.

II. THE DOVER AMENDMENT SIMPLY CODIFIES THE LONG-RECOGNIZED PRINCIPLE THAT RELIGIOUS USE OF PROPERTY SHOULD BE ACCOMMODATED IN RESIDENTIAL AREAS.

Plaintiffs are most troubled that the Dover Amendment allows houses of worship to be built in residential areas. They complain that religious use of property in residential areas may detract from the overall beauty of the neighborhood and may have adverse consequences on the individuals who reside there. But this position lies far outside the recognized principles of law that have for decades governed the building of religious houses of worship in residential areas:

> Religious uses are favored for a variety of reasons ranging from their unique contribution to the public welfare to constitutional guarantees of freedom of worship. The contribution of religious use to the public welfare is generally regarded as beyond discussion or dispute, and the fostering rather than the hindering of such uses is considered to be established policy, and consequently, a proposed religious use should be accommodated, even when it would be inconvenient for the community. That is not to say, however, that churches may not be regulated to some extent as any other land use.

83 Am. Jur. 2d *Zoning and Planning* § 436 (1992). Hence, "churches may not . . . validly be excluded from residential areas as an absolute and invariable rule . . . ."

74 A.L.R.2d 377, *Zoning Regulations — Churches* § 2 (1960). Rather, just as the Dover Amendment contemplates, religious use of property is presumed to be a valid and correct use of property, subject of course to the general rules of the zone where the property is located. As a leading treatise on zoning law concludes:

> The reasons for maintaining religious uses in residential areas are equally compelling. Religious uses serve people best when they are accessible to homes. Religious buildings provide convenient meeting places for youth groups and civic associations. This need can be filled best when the religious institution is convenient to the residents who attend.
>
> The wide majority of courts hold that religious uses may not be excluded from residential districts. As religious uses contribute to the general welfare of the community, and can contribute most when located in residential districts, an ordinance which excludes such uses from residential zones does not further the public health, safety, morals, or general welfare.

Kenneth H. Young, *Anderson's American Law of Zoning* § 12.22, p. 578 (4th ed. 1996). Churches often are best suited to residential areas, so long as they conform with the general rules applicable in the zone. That is all that the Dover Amendment provides.

CONCLUSION

The right to worship God according to the dictates of one's conscience is

fundamental to the American concept of liberty and justice. No one denies that. The necessary (but harder-to-accept) corollary is that religious groups must have a meaningful right to build houses of worship where they are needed; otherwise the right to worship is largely illusory. For a variety of reasons, local authorities sometimes oppose any new religious uses of land. Such opposition may arise from religious bigotry, or it may be rooted in other factors, such as the desire to maximize tax revenues.

Whatever the source, meaningful legal protections for religious uses of land are both necessary and constitutionally proper. The Dover Amendment provides such protection. By precluding Massachusetts' local governments from excluding churches in entire municipal zones, while still allowing a variety of regulations to mitigate adverse impacts, the Dover Amendment strikes a reasonable balance between the need for land use regulation and the fundamental right to worship. *Amici* respectfully urge this Court to affirm the constitutionality of this important safeguard against religious discrimination.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Gerald J. Caruso, do hereby certify that I served a true copy of the within Brief by hand on November 29, 1999, on the following counsel of record: Mark A. White, O'Brien, Partlow & White, P.C., 50 Congress Street, Suite 936, Boston, MA 02019; G. Michael Peirce, Mofenson & Nicoletti, Three Newton Executive Park, Newton, MA 02162; David C. Hawkins, Morrissey & Hawkins, 2 International Place, Boston, MA 02110; and Paul Killeen, Holland & Knight LLP, One Beacon Street, Boston, MA 02108.

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