

The Amicus Brief, Westchester Day School v. Village of Mamaroneck, 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 Second Circuit on January 20, 2004.

03-9042

UNITED STATES COURT OF APPEALS
for the
SECOND CIRCUIT

WESTCHESTER DAY SCHOOL,

Plaintiff-Appellee, -

against-

VILLAGE OF MAMARONECK, et al. *Defendants-Appellants.*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

AMICI CURIAE BRIEF OF THE UNITED STATES CONFERENCE OF CATHOLIC BISHOPS; THE CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS; THE GENERAL COUNCIL ON FINANCE AND ADMINISTRATION OF THE UNITED METHODIST CHURCH, CLIFTON KIRKPATRICK, AS STATED CLERK OF THE GENERAL ASSEMBLY OF THE PRESBYTERIAN CHURCH (U.S.A.); THE ETHICS & RELIGIOUS LIBERTY COMMISSION OF THE SOUTHERN BAPTIST CONVENTION; THE FIRST CHURCH OF CHRIST, SCIENTIST; FOUNDATION FOR THE PRESERVATION OF THE MAHAYANA TRADITION; THE INTERNATIONAL CHURCH OF THE FOURSQUARE GOSPEL; THE UNITED HOUSE OF PRAYER FOR ALL PEOPLE OF THE CHURCH ON THE ROCK OF THE APOSTOLIC FAITH AND THE WORLDWIDE CHURCH OF GOD **IN SUPPORT OF PLAINTIFF-APPELLEE**

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CORPORATE DISCLOSURE STATEMENT

The *amici* are nonprofit religious corporations and associations. They have no parent corporations and no publicly held corporation owns more than 10% of their stock.

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INTEREST OF THE AMICI

Amici are a diverse group of national religious organizations that strongly support the Religious Land Use and Institutionalized Persons Act ("RLUIPA"). On many occasions, *amici* have experienced unreasonable hostility and opposition by neighbors and local land use bodies to their efforts to construct places of worship. Sometimes such opposition has an overtly anti-religious taint. Most often, however, the obstacles are land use standards that are ostensibly neutral and generally applicable but in reality provide officials with virtually limitless discretion to deny land use approvals for arbitrary reasons. Despite appellants' suggestion that RLUIPA is unnecessary because local land use regulation presents few religious liberty concerns, in the experience of *amici* RLUIPA is essential to ensure that, consistent with fundamental First Amendment values, religious land uses are reasonably accommodated and not subject to arbitrary regulations, prohibitions, or discrimination. *Amici* urge an interpretation of RLUIPA that is fully consistent with the strong protections Congress intended to provide.

Individual statements of interest of the *amici* may be found in Addendum 1 to this brief.

INTRODUCTION

No right is more precious than the right to worship God according to the dictates of one's own conscience. For tens of millions of Americans, "worship"

means worship in community - in chapels, synagogues, schools, and other meetinghouses, in the communion and strength of fellow believers. Entire modes of worship can only be experienced in community. The right to erect buildings where communities of faith may gather is therefore an indispensable element of the right to worship.

Unfortunately, too many municipalities see things differently. Extensive congressional hearings have uncovered widespread instances of religious discrimination and hostility toward churches – especially minority churches – by local land use authorities.¹ *See, e.g., 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. (1998).* In response, Congress unanimously passed and the President signed RLUIPA, Pub. L. No. 106-274, 114 Stat. 803 (2000), codified at 42 U.S.C. §§ 2000cc-2000cc-5. RLUIPA bars application of land use regulations that discriminate against churches or impose unjustified burdens on the exercise of religion.²

Appellants in this case have mounted a broad attack on RLUIPA, claiming it is unnecessary, unconstitutional, and that its "substantial burden" test should be

¹ The term "church" refers to chapels, synagogues, mosques, temples, and all other places of worship regardless of religious tradition. It is also used generically to refer to religious organizations or associations.

²This brief addresses only the religious land use portion of RLUIPA.

read in a way that would severely undermine its very purpose. The following first discusses why RLUIPA is necessary for the protection of religious liberty. In our experience, arbitrary and discriminatory land use burdens remain a serious threat to the free exercise of religion. RLUIPA guards against these burdens by clarifying and implementing existing First Amendment protections that are often misunderstood by attorneys and decision-makers alike. Second, the brief sets forth the appropriate analysis under RLUIPA's substantial burden test - one that is consistent with RLUIPA's purpose and Supreme Court precedent.

ARGUMENT

I. **RLUIPA IS VITAL TO PROTECT AGAINST LAND USE REGULATIONS THAT UNREASONABLY BURDEN THE EXERCISE OF RELIGION.**

A. **Arbitrary and Discriminatory Burdens On Religious Land Uses Remain a Serious Threat to the Free Exercise Of Religion.**

RLUIPA is necessary because municipal land use regulation often presents a daunting practical obstacle to the free exercise of religion. Local land use law affords municipalities almost total discretion to grant or deny applications to build or expand houses of worship and places of religious instruction. Legal standards exist, to be sure, but they are typically so subjective - and the standards of judicial review so deferential -- that in reality there is little or no meaningful limit on the decision making power of local officials. *See Corp. of the Presiding Bishop of The Church of Jesus Christ of Latter-day Saints v. City of West Linn*, LUBA No. 2002-

155, slip op. at 22 (Or. Land Use Bd. App. July 17, 2003), *appeal pending*, No. CA A122194 (Or. App. Aug. 7, 2003) (see Addendum-2). Consequently, but for RLUIPA, local opposition to religious land uses, whether from neighbors or government officials, easily translates into essentially non-reviewable decisions that can arbitrarily deny a faith community a place to worship. As one land use board of appeals admitted, typical land use regulations permit the construction or renovation of churches,

only if [the] petitioner demonstrates compliance with extremely subjective conditional use and design review criteria that afford the local government decision maker significant discretion to approve or deny the application. That discretion is considerably augmented by the deferential review afforded the [municipality's] evidentiary judgments and interpretations of local legislation

Id. at 22-23. Moreover,

[t]hat discretion offers the possibility of inconsistent application, in which controversial and noncontroversial land use proposals suffer different fates, depending on the local government's willingness to consider reasonable conditions of approval. ... As the legislative history of RLUIPA indicates, land use decisions involving religious institutions are often controversial

Id. at 34.

Of course, many land use officials are reasonable and accommodating.

However, as the findings of extensive congressional hearings and the practical experiences of these *amici* attest, arbitrariness, and even outright hostility toward

religious land uses, sufficiently infects the nation's land use system to fully justify RLUIPA.

1. Congress identified substantial evidence of arbitrary and discriminatory land use regulations.

Religious organizations of all faiths face widespread and increasing pressure by municipal authorities nationwide to limit their physical presence in America's cities and towns. See Roman P. Storzer & Anthony R. Picarello, Jr., *The Religious Land Use and Institutionalized Persons Act of 2000: A Constitutional Response to Unconstitutional Zoning Practices* [hereinafter "Storzer & Picarello"], 9 Geo. Mason L. Rev. 929, 929 (2001). During nine hearings over three years, Congress amassed evidence establishing pervasive religious discrimination and violations of free exercise rights in the area of land use. As summarized by Senators Kennedy and Hatch in their Joint Statement in support of RLUIPA:

The hearing record compiled massive evidence that this right [freedom to worship] is frequently violated. Churches in general, and new, small, or unfamiliar churches in particular, are frequently discriminated against on the face of zoning codes and also in the highly individualized and discretionary processes of land use regulation. Zoning codes frequently exclude churches in places where they permit theaters, meeting halls, and other places where large groups of people assemble for secular purposes. Or the codes permit churches only with individualized permission from the zoning board, and zoning boards use that authority in discriminatory ways.

Sometimes, zoning board members or neighborhood residents explicitly offer race or religion as the reason to exclude a proposed church, especially in cases of black churches and Jewish shuls and synagogues. More often, discrimination lurks behind such vague and

universally applicable reasons as traffic, aesthetics, or "not consistent with the city's land use plan." Churches have been excluded from residential zones because they generate too much traffic, and from commercial zones because they don't generate enough traffic. Churches have been denied the right to meet in rented storefronts, in abandoned schools, in converted funeral homes, theaters, and skating rinks - in all sorts of buildings that were permitted when they generated traffic for secular purposes.

The hearing record contains much evidence that these forms of discrimination are very widespread. Some of this evidence is statistical - from national surveys of cases, churches, zoning codes, and public attitudes. Some of it is anecdotal, with examples from all over the country. Some of it is testimony by witnesses with wide experience who say that the anecdotes are representative. This cumulative and mutually reinforcing evidence is summarized in the report of the House Committee on the Judiciary (House Rep. 106-219) at 18-24, in the testimony of Prof. Douglas Laycock to the Committee on the Judiciary 23-45 (Sept. 9, 1999), and in Douglas Laycock, *State RFRA's and Land Use Regulation*, 32 U.C. Davis L. Rev. 755, 769-83 (1999).

146 Cong. Rec. S7774 (daily ed. July 27, 2000). *See also* H.R. Rep. No. 106-219, at 17-24 (summarizing hearing testimony); *Guru Nanak Sikh Soc 'y of Yuba City v. County of Sutter*, No. Civ. S-02-1785, slip op. at 43 (E.D. Cal. Nov. 19, 2003) (relying on the Joint Statement); *Murphy v. Zoning Comm 'n of Town of New Milford*, 289 F.Supp.2d 87, 118 (D. Conn. 2003) (same); *Freedom Baptist Church of Delaware Cnty v. Township of Middletown*, 204 F.Supp.2d 857, 861-863 (E.D. Pa. 2003) (same).

In addition to laws with an overtly anti-religious purpose, congressional hearings uncovered many ostensibly benign land use laws that are systematically

applied to reach anti-religious results. For example, a survey of twenty-nine zoning codes from suburban Chicago indicated that in twelve of these codes churches (unlike other uses) could not locate *anywhere* as of right without a special use permit, giving regulators wide discretion over religious land use. *See* H.R. Rep. 106-219, at 18; 146 Cong. Rec. E1234, E1235 (daily ed. July 14, 2000) (statement of Rep. Canady); Douglas Laycock, *State RFRA's and Land Use Regulation* [hereinafter "Laycock"], 32 U.C. Davis L. Rev. 755, 773-74 (1999) (summarizing congressional record; Laycock's article was incorporated into the congressional record at 146 Cong. Rec. S7774). "In ten more [jurisdictions], churches could locate as of right only in residential neighborhoods, which is generally impractical" given the scarcity and limited size of lots and the frequency of neighborhood opposition. Laycock, 32 U.C. Davis L. Rev. at 773.

Testimony also established that so-called neutral rules – e.g., subjecting churches to the same rules as commercial establishments – dramatically affect religious assembly rights by, for example, preventing church activities outside of approved "operational hours." H.R. Rep. 106-219, at 11. There was repeated testimony of churches being denied use of buildings previously used by non-religious assemblies and of instances where non-religious assemblies were not subject to the same heightened requirements. *Id.* at 19, 21, 23; *Life Teen, Inc. v. Yavapi County*, No. Civ 01-1490, slip op. at 32 (D. Ariz. Mar. 26, 2003)

("Congress found that the vague, discretionary, and subjective standards applied to land use decisions resulted in widespread discriminatory application of land use regulations to religious assemblies.").

Congress found that some municipalities totally exclude new churches by cleverly authorizing religious uses only in places where churches already exist. Thus, "[t]he code shows multiple sites for churches but in fact all new churches are totally excluded." Laycock; 32 U.C. Davis L. Rev. at 773-74; H.R. Rep. 106-219, at 19.

Congress also found, as the First Circuit recently summarized, the increasingly common "phenomenon of churches being unwanted either in residential areas – because of increased traffic or noise, or impact on aesthetics – or in business zones – because tax-exempt churches dampen the vibrancy of commercial development." *Boyajian v. Gatzunis*, 212 F.3d 1, 8 (1st Cir. 2000). Opposition to new churches in residential zones is familiar,³ but Congress found that "increasing numbers of the recent cases involve opposition to churches in

³ For example, Congress heard about *Orthodox Minyan of Elkins Park v. Cheltenham Twp. Zoning Hearing Bd.*, 552 A.2d 772 (Pa. Commw. 1989), where the zoning board denied an application of an Orthodox Jewish congregation because the proposed building lacked parking spaces (unnecessary since Orthodox Jews do not drive on the Sabbath), but when the congregation amended its proposal to include added spaces, the board again denied the application because it would

generate too much traffic. H.R. Rep. 106-219, at 23.

commercial zones, or even industrial zones." Laycock, 32 U.C. Davis L. Rev. at 761.

It is hard to identify reasons for [such] opposition that do not either derive from actual hostility to some or all churches, or, however derived, are so universal in scope that they translate into de facto hostility to all churches. The most tangible reasons for local officials may be that they do not want property taken off the tax rolls. Some observers may think that this is a legitimate or neutral reason – it is based on money, and not on any views about theology. But its practical effect is continuous opposition to any new places of worship, with local officials offering real or imagined or wholly phony land use concerns as a subterfuge to fight the state legislature's policy of tax exemption. Whatever the motives, the resulting pattern of behavior is clear. We have widespread political and governmental opposition to the exercise of a core First Amendment right.

Id. at 761-62. Such opposition is dangerously "contagious," especially in areas with closely adjoining suburbs, because if one "jurisdiction restricts or excludes churches, new churches may be displaced to neighboring jurisdictions," forcing them to bear the burden of additional non-taxable properties, which "increas[es] the risk of activating there the political forces that oppose the location of churches." *Id.* at 762.

Congress relied on independent studies as well. A study of reported cases conducted by Brigham Young University and the Chicago law firm of Mayer, Brown & Platt demonstrated an overwhelming, nationwide pattern of discrimination in zoning decisions involving small religious groups. *Id.* at 770-71; see Von G. Keetch & Matthew K. Richards, *The Need for Legislation to Enshrine*

Free Exercise, 32 U.C. Davis L. Rev. 725, 731 (1999) (describing study: fully one-half to two-thirds of reported cases involve minority religions). Another survey demonstrated that arbitrary land use treatment is far more prevalent, even with respect to such mainline denominations as the Presbyterian Church (U.S.A.), than even the case law suggests, with reported cases being just the "tip of the iceberg." Laycock, 32 U.C. Davis L. Rev. at 772-73.

A full review of the evidence amassed by Congress to support RLUIPA is well beyond the scope of this brief. *See* Laycock, 32 U.C. Davis L. Rev. at 769-83; 146 Cong. Rec. S7774 (extensively summarizing evidence). However, these highlights amply support the findings summarized in the congressional Joint

Statement. In sum:

Congress found substantial evidence of violations of *each of the constitutional standards that RLUIPA codifies*: individualized assessments that substantially burden religious exercise; discrimination between religious and nonreligious assemblies; discrimination among religious assemblies; and total exclusion or other unreasonable limits on religious assemblies.

Storzer & Picarello, 9 Geo. Mason L. Rev. at 985 (citations omitted) (emphasis added). Given the great deference afforded congressional findings by courts (*see Walters v. Nat'l Ass 'n of Radiation Survivors*, 473 U.S. 305, 331 n.12 (1985)), appellants' conclusory assertion that RLUIPA lacked a sufficient evidentiary basis must be rejected.

The ongoing experiences of these *amici* confirm the need for RLUIPA.

Amici can attest from our own experience with numerous land use bodies that congressional concerns about discriminatory and arbitrary treatment of religious land uses were well founded. Too frequently we have encountered outright anti-religious bias and discrimination, sometimes directed toward religious land use generally and sometimes directed specifically at our particular faith communities. Occasionally that bias is overt and easily discernable, but most often it is difficult to prove even when clearly present. Local land use bodies are usually too sophisticated to include evidence of bias in the record:

Human experience teaches us that public officials, when faced with pressure to bar church uses by those residing in a residential neighborhood, tend to avoid any appearance of an antireligious stance and temper their decision by carefully couching their grounds for refusal to permit such use in terms of traffic dangers, fire hazards and noise and disturbance, rather than on such crasser grounds as lessening of property values or loss of open space or entry of strangers into the neighborhood or undue crowding of the area.

Am. Friends of the Soc'y of St. Pius v. Schwab, 417 N.Y.S.2d 991, 993 (N.Y.App.Div. 1979).

Where residential zones are at issue, we have found that land use officials commonly undervalue the religious needs of churches and dramatically overvalue the minor, even trivial, concerns of neighbors who oppose anything but purely residential development. Our experiences also support congressional findings that

municipalities increasingly seek to exclude churches from commercial and industrial zones as allegedly inconsistent with their business development and tax collection agendas. Even with RLUIPA, land use officials often fight `tooth and nail' to hinder the construction or expansion of houses of worship or places of religious instruction, whether in residential, commercial, or industrial districts. Two representative examples illustrate just a few of the many types of obstacles we routinely face.

a. The Church of Jesus Christ of Latter-day Saints.

In 1991, the City of Forest Hills, Tennessee adopted zoning regulations limiting new development to single family units. The City created a new "Educational and Religious Zone" ("ER") for schools and churches, but then granted that designation only to the City's existing school and churches. To construct a church on another site required a zoning change.

In 1994, The Church of Jesus Christ of Latter-day Saints began seeking approval to build a temple on property it already owned within City limits. However, the City rejected the Church's request to change the zoning designation to ER, though indicating it would give fair consideration to a zoning change of a more appropriate lot. The Church then acquired a nearly 22-acre parcel at the intersection of two major arterial roads. A church building had previously stood there and three other churches of different denominations were located nearby.

The Church designed the temple to conform to the size and capacity of the other churches in the City; measured by lot size and seating capacity, the temple would actually be less burdensome than other City churches.

Nevertheless, land use officials rejected the proposal because it was not in the "best interests" of the City since it would detract from the "suburban estates character of the City" and might increase traffic. *Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-day Saints v. Bd. of Comm'rs of the City of Forest Hills*, No. 96-1421-I(11), slip op. at 5 (Tenn. Ct. Ch. Davidson County 1998). In a subsequent lawsuit, the trial court found no First Amendment problems with the City's blanket exclusion of all new churches from the jurisdiction. *Id.*

b. Vision Church, United Methodist

In 2000, Vision United Methodist Church, a predominantly Korean congregation, purchased a vacant 27-acre parcel in a relatively rural suburban area of unincorporated Lake County, Illinois, just outside the Village of Long Grove. Because many of its members lived near Long Grove, and because its current meetinghouse was too small, the Church sought to construct a new house of worship on the parcel.

After Village planners led the Church to believe it could easily obtain land use approval, the Church applied for Village annexation of the property, a zoning designation allowing construction of a meetinghouse, and permission to build.

However, opposition from Village officials and citizens, some of it laced with thinly veiled racial slurs and innuendos, was intense and the application was rejected. Land use officials questioned whether it was proper for a church comprised primarily of non-residents to be located in the Village.

The Church then applied to Lake County for the requisite land use approvals. However, when County approval was imminent, the Village changed course and forcibly annexed the land. The Village then amended its zoning ordinance to preclude construction of any kind of church on the parcel. The amendment also had the effect of preventing the Church from constructing its church anywhere in the Village. As a result, Church members were forced to share worshiping space in an old and cramped facility already used by another congregation, preventing many of its planned ministries and religious activities. The Church has filed suit in Illinois District Court, alleging *inter alia* violation of the First Amendment and RLUIPA. *See Vision Church, United Methodist v. Village of Long Grove*, No. 03 C 5761 (N.E. Ill. 2003).

B. RLUIPA Is Necessary to Correct the False Perception that Free Exercise Doctrine Imposes Almost No Constraints on the Regulation of Religious Land Uses.

In *Sherbert v. Verner*, 374 U.S. 398 (1963), the Supreme Court held that laws burdening religious exercise must pass the strict scrutiny test. In *Employment Div. v. Smith*, 494 U.S. 872 (1990), the Court held that *Sherbert's* strict scrutiny

test does not apply to religiously neutral and generally applicable laws (such as the "across-the-board criminal prohibition" at issue there) that incidentally burden religious exercise. *Id.* at 881, 884; *Church of the Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 531 (1993) (summarizing *Smith*).

After *Smith*, many municipalities appeared to conclude that the Free Exercise Clause had ceased to impose any meaningful constraints on local land use regulation. This was a serious misreading of *Smith*. *Smith* was clear that strict scrutiny still applies *inter alia* in cases like *Sherbert* where the "context ... len[ds] itself to individualized governmental assessment of the reasons for the relevant conduct." *Id.* at 884 (emphasis added). As the Supreme Court later explained, "in circumstances in which individualized exemptions from a general requirement are available, the government `may not refuse to extend that system to cases of "religious hardship" without compelling reason.'" *Hialeah*, 508 U.S. at 537 (quoting *Smith*, 494 U.S. at 884).

Where government can "consider[] ... the particular circumstances" (*Smith*, 494 U.S. at 884) of a case and then provide discretionary exemptions from the general rule based on amorphous standards, then the rule is not truly generally applicable and *Sherbert's* strict scrutiny test still applies. That was precisely the situation in *Hialeah*, where an ostensibly general ban (one "broad on its face") on the unnecessary killing of animals was subject to enough non-religious exceptions

that the Court, applying strict scrutiny, held that it could not be applied to ban religious sacrifices. 508 U.S. at 537.

RLUIPA codifies these important free exercise doctrines by subjecting land use regulations that substantially burden religious exercise to strict scrutiny where the "burden is imposed in the implementation of a land use regulation or system of land use regulations, under which a government makes, or has in place formal or informal procedures or practices that permit the government to make, *individualized assessments* of the proposed uses for the property involved." 42 U.S.C. § 2000cc(a)(2)(C) (emphasis added).

As explained in *Freedom Baptist*, 204 F.Supp.2d 857 (E.D. Penn. 2002), "[i]n limiting [RLUIPA's] applicability to those cases where governments make 'individual assessments,' the statute draws the very line *Smith* itself drew when it distinguished neutral laws of general applicability from those 'where the state has in place a system of individual exemptions,' but nevertheless 'refuse[s] to extend that system to cases of 'religious hardship.' *Id.* at 873 (quoting *Smith*, 494 U.S. at 884). In these situations, strict scrutiny, not the deferential rule in *Smith*, would have applied anyway under a proper view of the First Amendment.⁴

⁴ See *Keeler v. Mayor of Cumberland*, 940 F.Supp. 879, 885 (D. Md. 1996) (landmark ordinance "has in place a system of individualized exemptions"; thus, strict scrutiny applies); *Alpine Christian Fellowship v. County Comm 'rs*, 870 F.Supp. 991, 994-95 (D. Colo. 1994) (denying special use permit triggered strict

scrutiny under discretionary "appropriate[ness]" standard); *Area Plan Comm 'n v.*

In short, "RLUIPA's limitations and proscriptions codify firmly established Supreme Court rights under its Free Exercise and Equal Protection jurisprudence" and, therefore, it "does not `attempt a substantive change in constitutional protections' of the sort "that came to constitutional grief in *City of Boerne*." *Id.* at 874 (quoting *City of Boerne v. Flores*, 521 U.S. 507, 532 (1997)); *see also* *Murphy*, 289 F.Supp.2d at 119 ("RLUIPA is therefore not hostile to *Smith*, *Lukumi*, or *Flores*, and in fact represents a fair amalgamation of those decisions."); *Cottonwood Christian Ctr. v. Cypress Redev. Agency*, 218 F.Supp.2d 1203, 1221 (C.D. Cal. 2002) (same). RLUIPA sets forth and enforces important nuances in free exercise law that are often overlooked or misinterpreted by land use officials and even some courts.

Appellants contend that RLUIPA goes far beyond existing free exercise doctrine because, they assert, "the strict scrutiny test never applied to challenges outside the employment compensation field." Brief of Appellants ("Brf. Appls.") at 27. That is not true, as the Supreme Court's decisions in *Wisconsin v. Yoder*, 406 U.S. 205 (1972) (strict scrutiny of compulsory education law burdening Amish

Wilson, 701 N.E.2d 856, 862 (Ind. Ct. App. 1998) (same); *Korean Buddhist Dae Won Sa Temple v. Sullivan*, 953 P.2d 1315, 1344-45 n.31 (Haw. 1998) ("The City's variance law clearly creates a `system of individualized exceptions' from the general zoning law."); *First Covenant Church v. City of Seattle*, 840 P.2d 174, 181 (Wash. 1992) (landmark ordinances "invite individualized assessments of the subject property and the owner's use of such property, and contain mechanisms for individualized exceptions").

religion), and *Hialeah*, 508 U.S. 520 (strict scrutiny of ordinance banning ritual sacrifice), illustrate. The *Sherbert* strict scrutiny test is still very much alive where the law at issue is not truly neutral and generally applicable.⁵

Appellants argue that RLUIPA's reliance on the "individualized assessment" language of *Smith* as a basis for employing the strict scrutiny test is misplaced because land use regulation "do[es] not involve inquiry into the reasons for [a land use] application," only the appropriateness of the "use". Brf. Applts. at 27 (emphasis in original). According to appellants, under *Smith* "strict scrutiny is not constitutionally warranted in zoning and planning matters because there is no danger of discrimination among applicants in terms of the adequacy of their reasons for seeking exemptions." *Id.* at 28.

This argument focuses so narrowly on *Smith's* precise words that it misses the Court's broader holding. But first, it is inaccurate to say that land use law does not involve any inquiry into the "reasons" for a land use. The reasons for a use are often the defining feature of the use itself. In a commercial-only zone, for example, the different reasons people assemble in a building can determine

⁵ See also, *supra*, note 4; *Fifth Avenue Presbyterian Church v. City of New York*, 293 F.3d 570, 574 (2nd Cir. 2002) (strict scrutiny of city homeless policy); *Hartman v. Stone*, 68 F.3d 973, (6th Cir. 1995) (military regulations); *Peterson v. Minidoka County School Dist. No. 331*, 118 F.3d 1351 (9th Cir. 1997) (government personnel decisions); *Christian Gosel Church, Inc. v. City and County of San Francisco*, 896 F.2d 1221, 1224 (9th Cir. 1990) (applying strict scrutiny to land-use

decisions).

whether an application is granted (movie viewing) or denied (worshiping God).

The religious reason for the use is the very basis for its exclusion.

More importantly, appellants' argument misses the broader point behind the *Smith* Court's individualized assessment language. The Court made clear that where the government can make individualized assessments and grant individualized exemptions - as evidenced, for instance, by a discretionary "good cause" standard - the law is not truly generally applicable and strict scrutiny will apply. 494 U.S. at 884. The same is true where the legal standard is elastic enough (such as with a term like "unnecessarily") that government officials have discretion to enforce it in a manner that suppresses religious conduct (e.g., the ritual slaughter of animals) while permitting analogous secular conduct (e.g., "hunting or fishing for sport"). *Hialeah*, 508 U.S. at 537 (applying strict scrutiny). Such laws may have a veneer of general applicability because they ostensibly apply to everyone, but in reality they are not generally applicable at all because the standard is so dependant on the subjective interpretations of the decision maker that the government can simply impose a restriction in one instance and not in another. In these situations, strict scrutiny is necessary to protect religious liberty.

C. **As this Case Illustrates, Land Use Regulations Are Typically Not Generally Applicable.**

Appellants' assertion that land use regulation is typically neutral and generally applicable within the meaning of *Smith* is without merit. It is widely

understood that "[1]and use regulation is among the most individualized and least generally applicable bodies of law in our legal system." Laycock, 32 U.C. Davis

L. Rev. at 767. For instance, "[t]he whole point of requiring a special use permit is, to provide for 'individualized governmental assessment' of the proposed use." *Id.* As one court noted:

No one contests that zoning ordinances must by their nature impose individual assessment regimes. That is to say, land use regulations through zoning codes necessarily involve case-by-case evaluations of the propriety of proposed activity against extant land use regulations. *Freedom Baptist*, 204 F.Supp.2d at 868; *Cottonwood*, 218 F.Supp.2d at 1222 (same).

It is the very nature of zoning law that certain restrictions apply to some properties but not others, which is the very antithesis of general applicability under *Smith*.

Broad discretion for land use officials and deferential judicial review are hallmarks of municipal land use law. *See Murphy*, 289 F.Supp.2d at 106-07 ("This case is specifically *about* individualized governmental assessments on exemptions from a general requirement"; zoning regulations are "subjective," "permissive" and "open to interpretation").

The present case perfectly illustrates how land use law fails *Smith's* general applicability test. The relevant special permit standards require the Zoning

⁶It is not enough to say that every property is subject to the general zoning

law. The mere fact that everyone is generally subject to criminal law does not mean that a provision singling out one class of persons for special criminal sanctions is generally applicable.

Board of Appeals to "ascertain that the proposed use will not adversely affect the public health, safety and *welfare* and the *comfort and convenience* of the public in general and of the residents of the neighborhood in particular." Code of the Village of Mamaroneck, N.Y., § 342-71 (emphasis added). The proposed use must "be in harmony with the appropriate and orderly development of the district," and various physical aspects of the project must "not hinder or discourage the appropriate development and use of the adjacent land and buildings." *Id.* More elastic, subjective standards could hardly exist. When does a proposed religious land use "adversely affect ... the comfort and convenience of the ... residents of the neighborhood"? Having to look at a church one does not like can cause discomfort. Is that enough? When is a church "in harmony with the appropriate and orderly development of the district"? It all depends on the subjective views of the regulators. As a practical reality, such amorphous standards no more limit the discretion of the decision maker than the "good cause" standard that the Court in *Smith* said would trigger strict scrutiny. *Smith*, 494 U.S. at 884. These types of essentially standardless provisions, applied on a case-by-case basis by municipal bodies with wide discretion, are extremely common in land use jurisdictions across the nation. They are not, by any stretch, generally applicable laws within the meaning of *Smith*.

Congress' decision to subject such laws to strict scrutiny is perfectly consistent with current free exercise law. RLUIPA serves the important functions of clarifying and implementing existing free exercise standards that are often misunderstood.

II. RLUIPA'S SUBSTANTIAL BURDEN TEST SHOULD BE INTERPRETED CONSISTENT WITH THE STRONG PROTECTIONS CONGRESS INTENDED TO PROVIDE.

Appellants argue that RLUIPA's substantial burden test can only be met when governmental regulation "has a tendency to coerce individuals into acting contrary to their religious beliefs." Brf. Appls. at 19. They urge the adoption of the standard articulated by one panel of the Seventh Circuit in *Civil Liberties for Urban Believers v. City of Chicago*, 342 F.3d 752, 761 (7th Cir. 2003) ("*CLUB*"): "a land-use regulation that imposes a substantial burden on religious exercise is one that necessarily bears direct, primary, and fundamental responsibility for rendering religious exercise - with the regulated jurisdiction generally - effectively impracticable." Brf. Appls at 19. Under this view, as long as the municipality allows worship at least somewhere in the jurisdiction, the denial of an application to construct a house of worship cannot substantially burden religious exercise.

This cramped reading totally conflicts with congressional intent and firmly established free exercise precedent applying the substantial burden test. RLUIPA itself requires that its provisions, including the substantial burden test, be

"construed in favor of a broad protection of religious exercise, to the maximum extent permitted by the terms of this chapter and the Constitution." 42 U.S.C. § 2000cc-3(g). The interpretation advanced by appellants here and adopted by the court in *CLUB* contradicts that mandate.

A. RLUIPA's Substantial Burden Test Was Primarily Intended to Weed Out Tenuous Claims Based on Minor or Incidental Burdens that Are Inherent in Any Land Use System - Not Claims Involving Religious Hardship.

Although RLUIPA does not define "substantial burden," the term has a significant pedigree in free exercise jurisprudence and in decisions applying the Religious Freedom Restoration Act ("RFRA"), 42 U.S.C. §§ 2000bb-2000bb-4. *See, e.g., Marria v. Broaddus*, 200 F.Supp.2d 280, 298 (S.D.N.Y. 2002) (adopting "substantial burden" interpretation under RFRA in applying RLUIPA).

1. Supreme Court Precedent Under The Free Exercise Clause Supports A Liberal Interpretation Of Substantial Burden. Congress intended the term "substantial burden" to be interpreted in accordance with the Supreme Court's free exercise precedent that was in effect when RLUIPA was passed. *See* 146 Cong. Rec. S7774, S7776 (daily ed. July 27, 2000). The Supreme Court has articulated the definition of substantial burden in various ways, but the test's purpose has always been to weed out minor or incidental burdens from those that materially inhibit the exercise of religion. Supreme Court decisions finding substantial burden have required that the burden

be more than incidental, *see Hernandez v. Commissioner*, 490 U.S. 680, 699 (1989), but as a practical matter the hurdle has not been particularly high.

In *Smith*, for example, the Supreme Court described the requirement as merely one of "religious hardship." *Smith*, 494 U.S. at 885 (quotation marks omitted). Indeed, the ease with which someone can show religious hardship (substantial burden) was key to the Court's argument for limiting the application of strict scrutiny, lest numerous generally applicable laws that impose religious hardships be struck down. *See id.* The Court reiterated in *Hialeah* that a showing of "religious hardship" is sufficient to trigger strict scrutiny when a law is not generally applicable. *Hialeah*, 508 U.S. at 537 (strict scrutiny applies when a regime of "individualized exemptions" is not extended "to cases of `religious hardship'). In short, a showing of religious hardship is sufficient under Supreme Court precedent to satisfy the substantial burden test.'

The Supreme Court's earlier decisions confirm this view. In *Sherbert*, the Court held that denying a plaintiff unemployment benefits for refusing to work on her Sabbath constituted a substantial burden on religious exercise. 374 U.S. at 404. The Court in *Thomas* reached the same result where the plaintiff refused a job he

' A contrary conclusion would eviscerate the core rationale of *Smith*. If the substantial burden test is as difficult to satisfy as appellants suggest, then the Court's concerns about social anarchy resulting from applying strict scrutiny to generally applicable laws would make no sense, since religious claimants would

rarely be able to make the requisite showing of burden.

considered religiously objectionable. *Thomas v. Review Bd. of Indiana Employment Sec. Division*, 450 U.S. 707, 717-718 (1981). In neither case was the burden on religious exercise so exceptional that religious exercise was "effectively impracticable," as appellants would require: the plaintiffs could have foregone unemployment compensation and still practiced their religions. Mere financial hardship was sufficient to satisfy the substantial burden test. Moreover, it made no difference that the hardship was "indirect": "the infringement upon free exercise is nonetheless substantial." *Id.*; see also *Hobbie v. Unemployment Appeals Comm'n of Fla.*, 480 U.S. 136, 141-142 (1987) (substantial burden where the state "put[s] substantial pressure on an adherent to modify his behavior and to violate his beliefs"); *McDaniel v. Paty*, 435 U.S. 618, 620 (1978) (prohibition on ministers serving as delegates to constitutional convention was substantial burden on minister's religious exercise notwithstanding no compulsion to become delegate).

RFRA Cases Support A Liberal Interpretation Of Substantial Burden.

RFRA cases reiterate that a substantial burden need not be an "extraordinary" burden. *Bryant v. Gomez*, 46 F.3d 948, 949 (9th Cir. 1995) (*per curiam*) (citations omitted); *Jolly v. Coughlin*, 76 F.3d 468, 477 (2d Cir. 1996) (citations omitted). In RFRA cases, regulatory burdens qualify as "substantial" if they "force[] adherents of a religion to refrain from religiously motivated conduct." *Mack v. O'Leary*, 80 F.3d

1175, 1179 (7th Cir. 1996), *cert granted*, *judgmt vac'd on*

other grounds, 522 U.S. 801 (1997); *Brown-El v. Harris*, 26 F.3d 68, 70 (8th Cir. 1994) (same); *Werner v. McCotter*, 49 F.3d 1476, 1480 (10th Cir. 1995) (action that "significantly inhibit[s] or constrain[s] conduct or expression" substantially burdens religious exercise).

3. The Substantial Burden Test Does Not Require Or Permit An Assessment Of Whether The Hardship Impacts A "Central" Religious Belief.

The substantial burden test, both under RLUIPA and free exercise precedent, does not include an inquiry into whether the exercise of religion is compelled by or central to a system of religious beliefs. *See* 42 U.S.C. § 2000cc-5(7)(A) ("religious exercise" includes "any exercise of religion, whether or not compelled by, or central to a system of religious belief"); *Smith*, 494 U.S. at 886-887 (inappropriate "for judges to determine the 'centrality' of religious beliefs before applying [the] 'compelling interest' test") (citations omitted); *Hernandez*, 490 U.S. at 699.

Courts do not delve into the religious beliefs themselves when determining substantial burden. As this Court held, "scrutiny extends only to whether a claimant sincerely holds a particular belief and whether the belief is religious in nature." *Jolly*, 76 F.3d at 476; *Fifth Avenue Presbyterian*, 293 F.3d at 574. If the government is creating a non-trivial hardship with respect to the exercise of a sincerely held religious belief, the substantial burden test is met.

4. Setting the Substantial Burden Standard Too High Would Vitiolate the Entire Purpose of RLUIPA.

Many courts have correctly applied RLUIPA's substantial burden test.

However, the Seventh Circuit in *CLUB* did not, adopting instead what a subsequent court has called an "extremely high threshold." *Guru Nanak*, slip op. at 27. The *CLUB* decision's requirement that the burden on religious exercise be "direct" and "primary" (342 F.3d at 761) specifically conflicts with *Sherbert's* holding that "[i]f the purpose *or effect of a law* is to impede the observance of one or all religions ... that law is constitutionally invalid even though the burden may be characterized as being *only indirect*." 374 U.S. at 404 (citation omitted) (emphasis added); *see also Thomas*, 450 U.S. at 717-718 ("While the compulsion may be indirect, the infringement upon free exercise is nonetheless substantial."); *Hobbie*, 480 U.S. at 141 (same).

CLUB also set the required level of burden too high. As explained above, the issue is religious hardship, not impossibility or total impracticality. *See Smith*, 494 U.S. at 886-887. The belief or practice burdened need not even be central to the religion. 42 U.S.C. § 2000cc-5(7)(A).

A literal application of the *CLUB* definition of substantial burden would allow a municipality to designate one spot of property in an entire jurisdiction for a disfavored minority religion, even if the location is far away and in a blighted area.

To suggest this would not substantially burden religious exercise is untenable. *Cf.*

Church of Jesus Christ v. Jefferson County, 741 F.Supp. 1522, 1534 (N.D. Ala. 1990) ("Allowing churches to go only where they are welcome smacks of an unreasonable burden."). The *CLUB* definition starkly conflicts with RLUIPA's express mandate that its terms be broadly construed to protect religious exercise. 42 U.S.C. § 2000cc-3(g). Indeed, it would vitiate the entire purpose of RLUIPA's land use provisions, omitting from its reach virtually all of the abuses Congress sought to remedy. This is not a plausible reading of the statute.

RLUIPA's Substantial Burden Test Is Satisfied When a Land Use Regulation Prevents the Construction or Expansion of a Meetinghouse or Other Structure Needed for Religious Worship, Education, or Instruction.

In applying RLUIPA, the substantial burden test is satisfied when a land use regulation or decision prevents the construction, expansion, or use of a meetinghouse or other structure that is needed for religious worship or instruction. The majority of courts addressing the substantial burden issue have adopted this view.

In *Murphy*, for example, the court ruled that an order capping the number of people who could gather for Sunday prayer meetings constituted a substantial burden. 289 F.Supp.2d at 113 & n.29. The court concluded that "turning people away from the Sunday meetings would constitute a substantial burden to plaintiffs' exercise of their religion" (*id.*) because it "forces them to modify their religious

practices and to choose between their expression of these beliefs on the one hand,

and violating the cease and desist order on the other." 148 F.Supp.2d 173, 189 (D. Conn. 2001).

Likewise, the court in *Cottonwood* found that "[p]reventing a church from building a worship site fundamentally inhibits its ability to practice its religion" and thus constitutes a substantial burden. 218 F.Supp.2d at 1226-27.⁸ This conclusion follows from the fact that "[c]hurches are central to the religious exercise of most religions." *Id.*

As noted above, in most faiths worship is a communal experience that requires a gathering place. *See Corp. of the Presiding Bishop v. Amos*, 483 U.S. 327, 342 (1987) (Brennan, J., concurring) ("For many individuals, religious activity derives meaning in large measure from participation in a larger religious community."). Indeed, "[t]he physical embodiment of a religious group — its church — represents its ability to speak, assemble, and worship together: three fundamental rights embodied in the First Amendment." *Storzer & Picarello*, 9 *Geo. Mason L. Rev.* at 945. Thus, as Congress found, "[c]hurches and synagogues cannot function without a physical space adequate to their needs and consistent with their theological requirements." 146 *Cong. Rec.* S7774. To prevent a faith

⁸*See also* *Guru Nanak*, slip op. at 25; *Shepherd Montessori Center Milan v. Ann Arbor Charter*, 2003 WL 22520439 (Mich. App. Nov. 6, 2003) (remanded for factual development); *Grace United Methodist Church v. City of Cheyenne*, 235

F.Supp.2d 1186, 1196 (D. Wyo. 2002) (same).


community from building a house of worship or religious instruction on its own land constitutes a substantial burden on religious exercise.

CONCLUSION

The decision below should be AFFIRMED.

DATED this o20 11 day of January, 2004.

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CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

I, Alexander Dushku, hereby certify that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 6,997 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii), according to the word count of the word processing system (Microsoft Word) used to prepare it.


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Dated this PO ' day of January, 2004.

PROOF OF SERVICE

I hereby certify that I caused one original and twenty-five copies of the foregoing **BRIEF OF AMICI CURIAE** to be mailed, via U.S. Mail, 1st class, postage prepaid, this jh\1-day of January, 2004, to the following:

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I also certify that I caused two copies of the foregoing **BRIEF OF AMICI CURIAE** to be mailed, via U.S. Mail, 1st class, postage prepaid, this 20th day of January, 2004, to the following:

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