No. 06-1497

IN THE

Supreme Court of the United States

VISION CHURCH, UNITED METHODIST, THE NORTHERN ILLINOIS CONFERENCE OF THE UNITED METHODIST CHURCH, AND HEE-SOO JUNG, PRESIDING BISHOP,

Petitioners,

v.

VILLAGE OF LONG GROVE,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

MOTION FOR LEAVE TO FILE BRIEF AS *AMICI CURIAE* AND BRIEF OF BAPTIST GENERAL CONFERENCE, BAPTIST JOINT COMMITTEE FOR RELIGIOUS LIBERTY, THE CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS, THE ETHICS & RELIGIOUS LIBERTY COMMISSION OF THE SOUTHERN BAPTIST CONVENTION, EVANGELICAL LUTHERAN CHURCH IN AMERICA, THE FIRST CHURCH OF CHRIST, SCIENTIST, GENERAL CONFERENCE OF SEVENTH-DAY ADVENTISTS, GENERAL COUNCIL ON FINANCE AND ADMINISTRATION OF THE UNITED METHODIST CHURCH, INTERNATIONAL CHURCH OF THE FOURSQUARE GOSPEL, THE LUTHERAN CHURCH–MISSOURI SYNOD, NATIONAL ASSOCIATION OF EVANGELICALS, CLIFTON KIRKPATRICK, AS STATED CLERK OF THE PRESBYTERIAN CHURCH (U.S.A.), UNITED HOUSE OF PRAYER FOR ALL PEOPLE OF THE CHURCH ON THE ROCK OF THE APOSTOLIC FAITH, WORLDWIDE CHURCH OF GOD AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

VON G. KEETCH*
ALEXANDER DUSHKU
MATTHEW K. RICHARDS
KIRTON & MCCONKIE
60 East South Temple
Suite 1800
Salt Lake City, Utah 84145
(801) 328-3600

Counsel for Amici Curiae

* Counsel of Record

July 9, 2007

Blank Page

MOTION FOR LEAVE TO FILE BRIEF AS *AMICI CURIAE* AND BRIEF OF BAPTIST GENERAL CONFERENCE, BAPTIST JOINT COMMITTEE FOR RELIGIOUS LIBERTY, THE CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS, THE ETHICS & RELIGIOUS LIBERTY COMMISSION OF THE SOUTHERN BAPTIST CONVENTION, EVANGELICAL LUTHERAN CHURCH IN AMERICA, THE FIRST CHURCH OF CHRIST, SCIENTIST, GENERAL CONFERENCE OF SEVENTH-DAY ADVENTISTS, GENERAL COUNCIL ON FINANCE AND ADMINISTRATION OF THE UNITED METHODIST CHURCH, INTERNATIONAL CHURCH OF THE FOURSQUARE GOSPEL, THE LUTHERAN CHURCH–MISSOURI SYNOD, NATIONAL ASSOCIATION OF EVANGELICALS, CLIFTON KIRKPATRICK, AS STATED CLERK OF THE PRESBYTERIAN CHURCH (U.S.A.), UNITED HOUSE OF PRAYER FOR ALL PEOPLE OF THE CHURCH ON THE ROCK OF THE APOSTOLIC FAITH, WORLDWIDE CHURCH OF GOD AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

Amici curiae Baptist General Conference, Baptist Joint Committee for Religious Liberty, The Church of Jesus Christ of Latter-day Saints, The Ethics & Religious Liberty Commission of the Southern Baptist Convention, Evangelical Lutheran Church in America, The First Church of Christ, Scientist, General Conference of Seventh-Day Adventists, General Council on Finance and Administration of the United Methodist Church, International Church of the Foursquare Gospel, The Lutheran Church–Missouri Synod, National Association of Evangelicals, Clifton Kirkpatrick, as Stated Clerk of the Presbyterian Church (U.S.A.), United House of Prayer for All People of the Church on the Rock of the Apostolic Faith, Worldwide Church of God as *amici curiae* in support of petitioners respectfully request leave of this Court to file the following brief in the above-captioned matter. In support of this motion, *amici curiae* state as follows:

The petitioners have granted their written consent to the filing of briefs *amici curiae*, which consent is on file with this

Court. Respondent Village of Long Grove has withheld its consent, necessitating this motion.

Amici are national religious organizations, with millions of members, that support an interpretation of the Religious Land Use and Institutionalized Persons Act, 42 U.S.C. §§ 2000cc ("RLUIPA"), and the Free Exercise Clause of the First Amendment which provides meaningful protections for religious land uses. *Amici* are concerned that the decision below, which perpetuates an excessively high threshold for bringing RLUIPA and free exercise claims, will have adverse consequences on the ability of religious organizations to construct houses of worship and religious instruction, both for the thousands of congregations in the Seventh Circuit and for other congregations nationally. Accordingly, *amici* support the petition for a writ of certiorari.

As religious organizations whose members or affiliates depend on religious meetinghouses for the exercise of their respective religions, each of the *amici* has a direct and vital interest in the proper interpretation and application of constitutional and statutory protections for religious land uses. The specific interests of the *amici* are set forth in the addendum to this brief.

For the foregoing reasons, the motion for leave to file the attached brief of *amici curiae* should be granted.

Respectfully submitted,

VON G. KEETCH*
ALEXANDER DUSHKU
MATTHEW K. RICHARDS
KIRTON & MCCONKIE
60 East South Temple
Suite 1800
Salt Lake City, Utah 84145
(801) 328-3600

Counsel for Amici Curiae

* Counsel of Record

July 9, 2007

Blank Page

TABLE OF CONTENTS

TABLE OF CONTENTS – continued

TABLE OF AUTHORITIES

CASES Page

TABLE OF AUTHORITIES – continued

TABLE OF AUTHORITIES – continued

Blank Page

INTEREST OF THE *AMICI*[1]

The interest of the *amici* is set forth in the accompanying motion for leave to file and in the addendum to this brief.

REASONS FOR GRANTING THE PETITION

Religious organizations seeking to construct or renovate religious meetinghouses often experience unreasonable hostility and opposition from local land use bodies. Perhaps the biggest problem is land use standards that grant regulators virtually limitless discretion to reject religious land uses for wholly arbitrary or even invidious reasons, coupled with extremely deferential standards of judicial review. In response to this nationwide problem, Congress enacted the Religious Land Use and Institutionalized Persons Act, 42 U.S.C. §§ 2000cc ("RLUIPA"), which subjects discretionary land use decisions to meaningful judicial scrutiny. *Amici* and numerous other religious land users regularly depend on RLUIPA's protections to prevent arbitrary treatment and to assist them in seeking reasonable accommodations of their worship needs from local authorities. When interpreted as the text requires and Congress intended, RLUIPA creates a strong incentive for regulators to take religious exercise seriously and to work toward practical solutions to legitimate land use concerns, rather than merely acquiescing to local opposition or barring religious uses for minor or even trivial reasons.

However, the Seventh Circuit has created such a high standard for establishing when land use decisions impose a "substantial burden" on religious exercise that the protections of RLUIPA and the Free Exercise Clause are rendered virtually meaningless. Under the Seventh Circuit's test, a

---

[1] Counsel for *amici* state that they authored this brief in whole and that no person or entity, other than *amici*, made a monetary contribution to the preparation or submission of this brief.

municipality has no incentive based on RLUIPA or the Free Exercise Clause to accommodate religious land uses, since it is virtually impossible to win such a claim.

The Seventh Circuit's onerous and unjustified substantial burden standard conflicts with the decisions of other circuits and lower courts, is contrary in principle to this Court's prior decisions and teachings, and violates the express intent of Congress in enacting RLUIPA. It has also had widespread adverse impacts on the ability of religious organizations to construct houses of worship. As a practical matter, whether a religious organization is subject to the Seventh Circuit's substantial burden standard (which is also applied in the Second Circuit) will predetermine the outcome of a RLUIPA or Free Exercise claim. Claims governed by that standard nearly always fail after a cursory judicial review, whereas claims subject to the more probing moderate-threshold standards used in other circuits have at least some chance of prevailing, depending on the outcome of a fact-based inquiry into the degree of actual religious hardship.

Amici urge this Court to grant the petition to resolve these conflicts and reaffirm a substantial burden test consistent with the stated purpose of RLUIPA and this Court's prior free exercise jurisprudence. For the similar reasons stated in the petition, *amici* also support petitioner's request for review of the two other issues presented in the petition, namely, the proper interpretation of RLUIPA's "equal terms" provision and the proper application of the Equal Protection Clause in religious land use disputes.

I. THIS COURT'S REVIEW IS NEEDED BECAUSE THE DECISION BELOW SEVERELY UNDERMINES VITAL STATUTORY AND CONSTITUTIONAL PROTECTIONS FOR RELIGIOUS LAND USE.

A. Discriminatory and Arbitrary Land Use Regulations Create Significant Religious Hardships.

1. No one denies that the right to worship God according to one's own conscience is fundamental. But less appreciated is the fact that for tens of millions of Americans "worship" means worship in community – in chapels, synagogues and other religious meetinghouses, in the communion and strength of fellow believers. In many faiths, vital elements of worship can be experienced only in community. A sermon or homily has little significance without an audience. Religious ceremonies and sacraments are usually performed in a communal context. Prayer meetings, Bible study sessions, and religious choirs are but a few of many examples of group worship and religious exercise. As believers worship together, religious exercise acquires meaning that transcends the individual.

The ability to erect religious meetinghouses where communities of faith may gather and worship is indispensable to religious liberty. "The 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." 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, 945 (2001). As Congress found in enacting RLUIPA, "[c]hurches and synagogues cannot function without a physical space adequate to their needs and consistent with their theological requirements." 146 Cong. Rec. S7774 (daily ed. July 27,

2000). Our long and diverse experiences confirm the truth of that finding.

When land use regulators prohibit or significantly constrain the construction or renovation of a house of worship, they often impose considerable religious hardships. This may be because the prohibition results in people having no place to worship; in such instances, the land use regulation is effectively a direct prohibition on the free exercise of religion. But substantial religious hardship can also arise where regulatory obstacles bar the construction or expansion of a house of worship that is needed to alleviate overcrowding, reasonably accommodate new members, or enable certain religious practices. Just because it is physically possible for current and prospective adherents to cram into an existing or makeshift meetinghouse does not mean that barring a church[2] from building or expanding a house of worship creates no hardship. Overcrowding can be a severe impediment to religious exercise. Inevitably, some are denied the ability to worship with the main body of adherents, being relegated to foyers, hallways and overflow seating; many simply leave. Essential religious courses cannot be taught. Prospective members become discouraged as a congregation appears to have no room for them. Parents lack adequate space to care for restless children. The quality of services and an atmosphere conducive to worship suffer.

Similarly, the design of church buildings themselves is "freighted with religious meaning," with particular liturgies requiring particular building designs. *First Covenant Church* v. *City of Seattle*, 840 P.2d 174, 182 (Wash. 1992); *Society of Jesus of New England* v. *Boston Landmarking Comm.*, 564 N.E.2d 571, 573 (Mass. 1990). Such features as the sanctuary, altar, steeple, counseling rooms, and classrooms all

---

[2] The term "church" is used inclusively to refer to religious organizations generally, whether Christian, Jewish, Muslim, Buddhist, Hindu, etc.

are critical to religious practice and expression. Activity facilities, such as a soccer field or basketball court, often play a vital role in ministering to youth. Restricting the construction or expansion of churches to preclude or impede any of these features can greatly burden religious exercise. In sum, substantial religious hardships often arise when regulators significantly constrain a church's ability to construct adequate facilities.

2. Municipal land use regulators are often hostile toward religious land uses, or at a minimum insensitive to the religious hardships just described. In the experience of these *amici*, discriminatory and arbitrary treatment of religious land uses by municipalities poses significant obstacles to religious exercise. 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, e.g.*, Storzer & Picarello, 9 Geo. Mason L. Rev. at 929.

Prior to the enactment of RLUIPA, during nine hearings over three years, Congress amassed substantial evidence of pervasive religious discrimination and violations of free exercise rights in the land use area, especially in respect to minority faiths. 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 RFRAs and Land Use Regulation, 32 U.C. Davis L. Rev. 755, 769-83 (1999).

146 Cong. Rec. S7774.[3]

---

[3] *See also* H.R. Rep. No. 106-219, at 17-24 (1999) (summarizing hearing testimony); *see generally* Religious Liberty Protection Act of

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 – where the instant case arose – indicated that in twelve of these codes churches (unlike other assembly uses) could not locate *anywhere* as of right without a special use permit, giving regulators extremely broad discretion over religious land use.[4] Witnesses repeatedly testified about regulators barring churches from worshipping in buildings previously used by non-religious assemblies and of instances where non-religious assemblies were not subject to the same restrictions.[5] 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. No. 106-219, at 19. Ironically, such regulations can leave churches worse off than adult book stores with live entertainment, which under this Court's decisions cannot be entirely excluded from a municipality. *See Schad* v. *Borough of Mount Ephraim*, 452 U.S. 61, 74-75 (1981).

Congress also found, as the First Circuit has 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

---

1998: Hearing on H.R. 4019 Before the Subcomm. on the Constitution of the House Comm. on the Judiciary, 105th Cong. (1998).

[4] *See* H.R. Rep. No. 106-219, at 18; 146 Cong. Rec. E1234, E1235 (daily ed. July 14, 2000) (statement of Rep. Canady); Douglas Laycock, *State RFRAs 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).

[5] H.R. Rep. No. 106-219, at 19, 21, 23.

– 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 of course familiar. For example, Congress heard about *Orthodox Minyan of Elkins Park* v. *Cheltenham Twp. Zoning Hearing Bd.*, 552 A.2d 772 (Pa. Commw. 1989). In that case the zoning board denied an application of an Orthodox Jewish congregation because the proposed building lacked parking spaces – even though such spaces were unnecessary since Orthodox Jews do not drive on the Sabbath – but then, when the congregation amended its proposal to include added spaces, the board denied the application because it would generate too much traffic! H.R. Rep. No. 106-219, at 23. However, Congress also found that "increasing numbers of the recent cases involve opposition to churches in commercial zones, or even industrial zones" because officials oppose taking such lands off the tax rolls. Laycock, 32 U.C. Davis L. Rev. at 761. The "practical effect [of this] 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," resulting in "widespread political and governmental opposition to the exercise of a core First Amendment right." *Id.* at 761-62.

Independent studies have confirmed these problems and the religious hardships they impose. One study 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 showing that fully one-half to two-thirds of reported cases involve minority religions). Congress found that new, unfamiliar, and minority faiths are particularly vulnerable to unconstitutional treatment at the hands of land use regulators. *See supra* 146 Cong. Rec. S7774. Of course, every denomination is in the minority

somewhere in the country and thus vulnerable to such treatment. One survey demonstrated that arbitrary land use treatment is far more prevalent, even with respect to familiar mainline denominations, than the case law suggests, with reported cases being just the "tip of the iceberg." Laycock, 32 U.C. Davis L. Rev. at 772-73.

3. Based on their ongoing experience with numerous land use bodies across the nation, *amici* can attest that congressional concerns about religious hardships arising from discriminatory and arbitrary treatment of religious land uses are well founded. Too frequently, *amici* encounter outright anti-religious bias and discrimination, sometimes directed toward religious land uses generally and sometimes directed specifically at our particular faith communities. Occasionally that bias is overt and easily discernable, as it was in this case. But most often it is difficult to prove even when clearly present; local land use bodies are usually too sophisticated to include evidence of their own bias in the record. One court accurately noted:

> 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.

American Friends of the Society of St. Pius v. *Schwab*, 417 N.Y.S.2d 991, 993 (N.Y. App. Div. 1979). Where residential zones are at issue, *amici* 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 or a rigid, preconceived notion of what a

"church" should be like. As the petition indicates, here the Village went so far as to insist that Petitioner build not only a "nice traditional country church," but "one like Commissioner Walter attends." Pet. at 5 (citing record). Court records rarely contain such stark evidence of religious bias, but bias is nevertheless common.

Amici can also confirm 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. In short, land use officials often fight tooth and nail to hinder the construction or expansion of much-needed houses of worship, whether in residential, commercial, or industrial districts.

B. The Decision Below Sets the Threshold for Finding a Substantial Burden So High that the Protections of RLUIPA and the Free Exercise Clause Are Often Rendered Meaningless.

In response to these types of problems, Congress unanimously passed RLUIPA, Pub. L. No. 106-274, 114 Stat. 803 (2000), codified at 42 U.S.C. §§ 2000cc to 2000cc-5. RLUIPA protects religious land use from discriminatory and arbitrary treatment by subjecting discretionary land use decisions that substantially burden the exercise of religion to strict scrutiny. *See id.* RLUIPA also requires that its provisions 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).

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, while still preserving a remedy for claims involving actual religious hardship. Although RLUIPA defines religious exercise to include the construction or use of a house of worship, 42

U.S.C. § 2000cc-5(7), it does not specify what qualifies as a "substantial burden" on the exercise of religion. Congress intended that term to be interpreted in accordance with this Court's past decisions. *See* 146 Cong. Rec. S7774, S7776 (daily ed. July 27, 2000).

The substantial burden test has a significant pedigree in this Court's free exercise jurisprudence and in other decisions applying the Religious Freedom Restoration Act ("RFRA"), 42 U.S.C. §§ 2000bb to 2000bb-4. As explained in greater detail below, this Court has always defined substantial burden to include cases of actual religious hardship – where government action makes religious exercise significantly more difficult or costly. (*See infra*, Section II.C.) To be sure, the precise rubric for determining substantial burden has varied in this Court's decisions.[6] But this Court, unlike the Seventh and Second Circuits, has never conditioned judicial review under the Free Exercise Clause on the government outright barring a religious practice or making it effectively impossible; and it is clear that Congress did not intend to adopt so high a standard when it passed RLUIPA.

Nevertheless, the Seventh Circuit has established an extremely exacting substantial burden standard. It requires that the challenged land use regulation "necessarily bear[] direct, primary, and fundamental responsibility for rendering religious exercise – including the use of real property for the purpose thereof within the regulated jurisdiction generally – effectively impracticable." *Civil Liberties for Urban Believers* v. *City of Chicago*, 342 F.3d 752, 761 (7th Cir. 2003) (hereafter "*CLUB*"); *see* Pet. App. 62a-63a (adopting *CLUB* standard). Hence, even where the burden on religious

---

[6] The variety of formulations this Court has used has engendered some confusion in the lower courts. For example, the Eleventh Circuit has observed that "[t]he Court's articulation of what constitutes a 'substantial burden' has varied over time." *Midrash Sephardi, Inc.* v. *Town of Surfside*, 366 F.3d 1214, 1226 (11th Cir. 2004). An additional benefit of certiorari is the opportunity to clarify the law in this important area.

exercise is "formidable" and "severe" (*CLUB*, 342 F.3d at 773 (Posner, J., dissenting)), under the Seventh Circuit's standard that still is not enough to constitute a substantial burden under RLUIPA unless the burden makes worship essentially impossible "within the regulated jurisdiction generally." Pet. App. 62a-63a; *CLUB* 342 F.3d at 761. Indeed, the standard adopted below is so difficult for churches to satisfy that it renders federal protections for religious land use almost meaningless, leaving churches defenseless in the face of the very arbitrariness and discrimination Congress intended RLUIPA to remedy.

For example, the Seventh Circuit's standard would preclude a RLUIPA claim against a municipality that arbitrarily mandated changes in a chapel's architecture, even if the proposed structure were fully compliant with all objective land use standards and even if the changes significantly inhibited religious worship. Under the Seventh Circuit's standard, the bare fact that parishioners could still worship in a structure whose architecture is religiously deficient would preclude any judicial review whatsoever under RLUIPA or the Free Exercise Clause. Moreover, no matter how great the religious hardship and how arbitrary the reasons, under the Seventh Circuit's standard the municipality can simply deny an application to build a house of worship as long as it leaves open at least one other place to build "within the regulated jurisdiction." Pet. App. 62a-63a; *CLUB*, 342 F.3d at 761. RLUIPA would not even be triggered. The same would be true of protections under the Free Exercise Clause. Not surprisingly, no court in the Seventh Circuit has found a substantial burden under the Seventh Circuit's interpretation of the substantial burden test.[7]

---

[7] *See e.g.*, *Petra Presbyterian Church* v. *Village of Northbrook*, 409 F.Supp.2d 1001 (N.D. Ill. 2006) (no substantial burden under Seventh Circuit standard where a church prohibited from opening house of worship in one zone because churches potentially allowed in other zones); *Sisters of St. Francis Health Services, Inc.* v. *Morgan County*, 397 F.Supp.2d

The Seventh Circuit's test reduces the First Amendment's free exercise guarantee and RLUIPA's powerful safeguards against arbitrary land use regulations into an easily satisfied technicality that regulators not make a religious practice effectively impossible within an entire jurisdiction. And it precludes a RLUIPA claim based on the cost or burden imposed by unreasonable delay, no matter how substantial or even crippling it may be. The Seventh Circuit's standard thus vitiates essential protections for religious land use and will result in the abridgment of basic religious freedoms. Indeed, that standard, or its equivalent, has been adopted by a number of courts already[8] and is now routinely advanced by land use regulators seeking to avoid RLUIPA's protections.

At the local level, moreover, such a high standard destroys any incentive for land use regulators to accommodate religious exercise, as long as some opportunity for worship remains. Regulators can take the hardest line knowing that RLUIPA's powerful protections will remain out of reach.

This Court's review is necessary to address this issue of fundamental importance to religious organizations across the nation.

1032 (S.D. Ind. 2005) (no substantial burden under Seventh Circuit standard); *see also Lighthouse Institute for Evangelism, Inc.* v. *City of Long Branch*, 100 Fed.Appx. 70 (3d Cir. 2004) (unpublished decision) (same); *cf. Gerlach* v. *Brown*, 2007 WL 1659060 (D.N.J. Jun. 5, 2007) (denying prisoner RLUIPA claim under Seventh Circuit standard).

[8] *See, e.g., Ridley Park United Methodist Church* v. *Zoning Hearing Bd. Ridley Park Borough*, 920 A.2d 953 (Pa. Commw. Ct. 2007); *Rector, Wardens & Members of Vestry* v. *City of New York*, 914 F.2d 348, 355 (2d Cir. 1990) (adopting similarly rigid approach).

II. THIS COURT'S REVIEW IS NEEDED TO RESOLVE INTOLERABLE CONFLICTS AND CONFUSION IN THE LOWER COURTS OVER THE MEANING OF "SUBSTANTIAL BURDEN" UNDER RLUIPA AND THE FREE EXERCISE CLAUSE.

A. The Lower Courts Are Deeply Conflicted Over What Constitutes a "Substantial Burden," with Courts Generally Divided Between High- and Medium-Threshold Standards.

Widespread confusion exists in the lower courts as to what constitutes a substantial burden on religious exercise, with standards and formulations varying greatly from case to case. Many lower courts have noted the confusion in their attempt to define the proper standard. *See, e.g.*, *Mack* v. *O'Leary,* 80 F.3d 1175 (7th Cir. 1996), *vacated on other grounds*, 521 U.S. 507 (1997); *Hicks* v. *Garner*, 69 F.3d 22, 26 (5th Cir. 1995) (reviewing different approaches of the circuit courts).[9] And as *amici* can attest, confusion over the proper standard has led many religious institutions and local governments into costly litigation rather than mutually beneficial accommodations.

Generally, the lower courts are divided between high-threshold and moderate-threshold standards for satisfying the substantial burden requirement. On the high-threshold side, the Seventh Circuit holds that a regulation must "direct[ly], primar[ily], and fundamental[ly]" render religious exercise "effectively impracticable" anywhere in "the regulated jurisdiction generally." Pet. App. 62a-63a; *CLUB*, 342 F.3d

---

[9] *See also, e.g., Guru Nanak Sikh Society of Yuba City* v. *County of Sutter*, 326 F.Supp.2d 1140, 1152 (E.D. Cal. 2003) ("It is easy to identify these general principles [regarding substantial burden], as explained by the appellate courts; it is far more difficult to discern what they mean in the real world or apply them to real facts."), *aff'd* 456 F.3d 978 (9th Cir. 2006).

at 761. As explained, this standard is nearly impossible to satisfy in the land use context. The Second Circuit takes essentially the same approach, holding that there can be no "substantial burden" absent "coercion in religious practice, or the Church's *inability* to carry out its religious mission in its existing facilities." *Rector, Wardens & Members of Vestry* v. *City of New York*, 914 F.2d 348, 355 (2d Cir. 1990) (emphasis added); *see also id.* (a law substantially burdens religious exercise only when it "denies" or "drastically restrict[s]" the "ability" to exercise religion).

On the moderate-threshold side, the Fifth, Ninth, Tenth and Eleventh Circuits and the Supreme Courts of Oregon and Washington employ more lenient and practical tests. The Eleventh Circuit in *Midrash Sephardi, Inc.* v. *Town of Surfside*, 366 F.3d 1214 (11th Cir. 2004), specifically rejected the Seventh Circuit's high-threshold standard on the ground that it would "render [RLUIPA's] total exclusion prohibition meaningless." *Id.* at 1277.[10] The court instead held that a substantial burden is one that "place[s] more than an inconvenience on religious exercise; a 'substantial burden' is akin to significant pressure which directly coerces the religious adherent to conform his or her behavior accordingly. Thus, a substantial burden can result from pressure that tends to force adherents to forgo religious precepts or from pressure that mandates religious conduct." *Id.* The Ninth Circuit has also rejected the Seventh Circuit's impossibility standard as too stringent. *Guru Nanak Sikh Society* v. *County of Sutter*, 456 F.3d 978, 989 n. 12 (9th Cir. 2006). In its place, the court adopted a "more lenient" (*id.*) standard where a substantial burden is one that is "'oppressive' to a 'significantly great'

---

[10] RLUIPA's exclusion provision, 42 U.S.C. § 2000cc(b)(3), provides: "No government shall impose or implement a land use regulation that – (A) totally excludes religious assemblies from a jurisdiction; or (B) unreasonably limits religious assemblies, institutions, or structures within a jurisdiction."

extent," or "impose(s) a significantly great restriction or onus upon [religious] exercise." *Id.* at 988-89.

The Seventh Circuit's standard conflicts with an earlier Fifth Circuit decision under the Free Exercise Clause in which the court found a substantial burden where the municipality had merely made religious assemblies "relatively inaccessible within the city limits." *Islamic Center of Mississippi, Inc.* v. *City of Starkville*, 840 F.2d 293, 299-303 (5th Cir. 1988); *see also Adkins* v. *Kaspar*, 393 F.3d 559, 569-70 (5th Cir. 2004) (adopting similarly moderate standard under RLUIPA in claim by incarcerated persons).

The Seventh Circuit's standard also conflicts with the Tenth Circuit's definition of substantial burden under the Religious Freedom Restoration Act, 42 U.S.C. § 2000bb-1 to -4, in *Thiry* v. *Carlson*, 78 F.3d 1491 (10th Cir. 1996). There the court held that a substantial burden is one that has a "tendency to coerce individuals into acting contrary to their religious beliefs" or that "significantly inhibit[s] or constrain[s]," "meaningfully curtail[s]," or denies "reasonable opportunities" for religious exercise. *Id.* at 1495 (internal quotations omitted). *See also Corporation of the Presiding Bishop of The Church of Jesus Christ of Latter-day Saints* v. *City of West Linn*, 111 P.3d 1123, 1130 (Or. 2005) (rejecting Seventh Circuit standard in favor of reasoning of the Ninth and Eleventh Circuits); *First Covenant Church* v. *City of Seattle*, 840 P.2d 174, 183-85 (Wash. 1992) (substantial burden arises where government action imposes a "*financial* burden on religious activity" by, for example, "grossly diminish[ing] the value of the church's principal asset") (emphasis added).

Adding to the confusion, the Seventh Circuit's standard conflicts with the decisions of many other lower courts that have adopted moderate-threshold tests.[11]

---

[11] *See, e.g.*, *Wesley Spratt* v. *Rhode Island Department of Corrections*, 482 F.3d 33, 38 (1st Cir. 2007) (declining to adopt a test for substantial burden

B. In the Religious Land Use Context, Conflicting Substantial Burden Standards Produce Different Substantive Results Even Under Closely Analogous Facts.

Because the outcome of the substantial burden analysis often determines whether a land use decision is subject to judicial scrutiny under RLUIPA or the Free Exercise Clause, conflicting standards inevitably produce conflicting outcomes in an area of the law vital to religious organizations. The petition provides a number of examples of this from the reported cases. See Pet. at 14-17. *Amici*'s own vast experience with numerous land use bodies and local courts around the country confirms the argument in the petition.

The different outcomes are driven by fundamental differences in the nature of the inquiry. Because the high-threshold standard probes only for outright preclusion, near impossibility, or some sort of drastic restriction, a simple showing of a theoretical alternative land use site (an actual, suitable alternative site is almost never available without prohibitive cost or the church would not be litigating) will generally end the analysis. The same is true if the land use body can claim that the church may be able to reapply for land use approvals under some other theory or code provision. Once the land use body shows that religious exercise is not being foreclosed, then under the high-threshold standard the

---

but noting that the District Court of Rhode Island had adopted a moderate-threshold test.); *Mintz* v. *Roman Catholic Bishop of Springfield*, 424 F.Supp.2d 309 (D. Mass. 2004) (inability to alleviate crowding in rectory through additional building substantially burdens religious exercise); *Greater Bible Way Temple of Jackson* v. *City of Jackson*, 708 N.W.2d 756 (Mich. App. 2006) (church substantially burdened where other alternatives not "economically feasible"); *House of Fire Christian Church* v. *City of Clifton*, 879 A.2d 1212 (N.J. Super. App. Div. 2005) (adopting Eleventh Circuit standard); *Odneal* v. *Dretke*, 435 F.Supp.2d 608 (S.D. Tex. 2006); *City of Hope* v. *Sadsbury Township Zoning Hearing Board*, 890 A.2d 1137 (Pa. Commw. 2006) (adopting Eleventh Circuit substantial burden test).

actual burden, inconvenience, and expense to the church are deemed irrelevant – real religious hardship is beside the point.

By contrast, the moderate-threshold standard requires a more practical and disciplined analysis to determine whether the regulation imposes an actual religious hardship on the claimant, *i.e.*, whether it meaningfully curtails or makes significantly more costly religious exercise. This often requires a probing inquiry into the real circumstances and burdens facing a church. When the test severely constricts the facts a trial court may even consider in this initial inquiry – as does the Seventh Circuit's high-threshold test – religious land users have little if any chance of prevailing under RLUIPA; the result is virtually always denial of the claim. By contrast, courts applying the moderate-threshold test reach different outcomes depending on the facts of each case. *See, e.g.*, *Guru Nanak Sikh Soc'y*, 456 F.3d at 988-89 (substantial burden); *Islamic Ctr.*, 840 F.2d 298-99 (undue burden); *First Covenant*, 840 P.2d at 183-84 (impermissible burden); *Midrash Sephardi*, 366 F.3d at 1228 (no substantial burden); *Thiry*, 78 F.3d at 1495-96 (same); *Corporation of the Presiding Bishop*, 111 P.3d at 1130 (same).

In short, the doctrinal and theoretical conflicts set forth above and in the petition result in starkly conflicting outcomes in religious land use cases. Under the standard established by the Seventh and Second Circuits, a church's RLUIPA claim will nearly always fail even when a substantial religious hardship is the result of an arbitrary regulation. However, in the Fifth, Ninth, Tenth, and Eleventh Circuits, in the States of Oregon and Washington, and in various other lower courts across the nation, under identical facts, a church's showing of religious hardship will result in a successful prima facie claim under RLUIPA. This intolerable conflict, which can only be resolved by this Court, is deep and mature, and should be resolved now.

C. The High Threshold Standard Established by the Seventh Circuit Conflicts in Principle with this Court's Prior Decisions and Teachings Concerning Substantial Burden.

Lastly, this Court's prior free exercise decisions have not required that religious exercise be precluded or rendered practically impossible through direct government action to qualify as a substantial burden. Rather, the requirement has been that government action, direct or otherwise, create a real religious hardship. As explained in the petition (at 17-19), the Seventh Circuit's creation of such a strict substantial burden test in the RLUIPA context creates fundamental tension with this Court's longstanding free exercise decisions.

It is particularly noteworthy that the decision below is contrary to the key assumptions underlying this Court's decision in *Employment Division* v. *Smith*, 494 U.S. 872, 885 (1990). In *Smith*, this Court described the substantial burden requirement as one of "religious hardship," a formulation it reaffirmed in *Church of the Lukumi Babalu Aye* v. *City of Hialeah*, 508 U.S. 520, 537 (1993) (strict scrutiny applies when a regime of "individualized exemptions" is not extended "to cases of 'religious hardship'"). Indeed, a moderate-threshold formulation of the test for substantial burden was central to the holding in *Smith*. *Smith* was based on this Court's view that, because the substantial burden test is relatively easy to satisfy, religiously neutral laws of general application must be evaluated under a more deferential test than strict scrutiny, lest the federal courts continuously be placed in the untenable position of dispensing religion-based exemptions to innumerable general laws. *Smith*, 494 U.S. at 885. It was precisely because of the moderate threshold of the substantial burden standard that this Court was reluctant to subject all neutral and generally applicable laws to strict scrutiny.

However, where strict scrutiny continues to apply – such as where laws target religion or require individualized

assessments – these concerns are not implicated. In those contexts, it makes no sense for the substantial burden test to be as strict as the Seventh Circuit's standard. In fact, the standard articulated below would turn *Smith* on its head. It makes the substantial burden requirement so onerous that even those regulations that *Smith* recognizes as subject to strict scrutiny would be effectively immune from challenge in all but the most extreme cases.

The Seventh Circuit's approach conflicts with the most basic assumptions of this Court's modern free exercise decisions. This Court should grant review to resolve this important doctrinal conflict.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

VON G. KEETCH*
ALEXANDER DUSHKU
MATTHEW K. RICHARDS
KIRTON & MCCONKIE
60 East South Temple
Suite 1800
Salt Lake City, Utah 84145
(801) 328-3600

Counsel for Amici Curiae

* Counsel of Record

July 9, 2007