No. 07-1127

IN THE

Supreme Court of the United States

ST. JOHN'S UNITED CHURCH OF CHRIST, HELEN RUNGE, and SHIRLEY STEELE,
Petitioners,

v.

CITY OF CHICAGO, FEDERAL AVIATION ADMINISTRATION, and ROBERT A. STURGELL, Acting Administrator of the Federal Aviation Administration,
Respondents.

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

BRIEF FOR RESPONDENT CITY OF CHICAGO IN OPPOSITION

SEAN H. DONAHUE
Suite 808
2000 L Street, N.W.
Washington, DC 20036
(202) 466-2234

DAVID T. GOLDBERG
8th Floor
99 Hudson Street
New York, NY 10013
(212) 334-8813

* Counsel of Record

MARA S. GEORGES
Corporation Counsel
of the City of Chicago
BENNA RUTH SOLOMON *
Deputy Corporation Counsel
MYRIAM ZRECZNY KASPER
Chief Assistant Corporation Counsel
CHRISTOPHER M. GRUNEWALD
Assistant Corporation Counsel
30 N. LaSalle Street, Suite 800
Chicago, Illinois 60602
(312) 744-7764

Attorneys for Respondent City of Chicago

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

QUESTION PRESENTED

Whether the Seventh Circuit erred in declining to apply strict scrutiny to Chicago's actions in urging enactment of state legislation to expedite acquisition of real property—including petitioners' cemetery—needed for airport modernization when the legislation, on its face and in operation, treated petitioners no differently from similarly situated non-religious property owners or similarly situated religious entities.

TABLE OF CONTENTS

TABLE OF CONTENTS—Continued

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES—Continued

IN THE

Supreme Court of the United States

No. 07-1127

ST. JOHN'S UNITED CHURCH OF CHRIST, HELEN RUNGE, and SHIRLEY STEELE,
Petitioners,

v.

CITY OF CHICAGO, FEDERAL AVIATION ADMINISTRATION, and ROBERT A. STURGELL, Acting Administrator of the Federal Aviation Administration,
Respondents.

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

BRIEF FOR RESPONDENT CITY OF CHICAGO IN OPPOSITION

STATEMENT

This case arises from the City of Chicago's plan to modernize O'Hare International Airport to address longstanding design limitations that cause staggering delays and burden both national air traffic and local and state economies. The O'Hare Modernization Program (OMP) reflects years of work by local, state and federal agencies, and millions of dollars of studies, and requires acquisition of hundreds of privately owned properties, including homes, businesses, and one church-owned cemetery. To facilitate the project, the Illinois General Assembly passed the

O'Hare Modernization Act (OMA), 620 ILCS 65/5, which generally denies effect to all state laws that might otherwise apply to land acquisition and construction in the project area and expressly amends numerous identified statutes, including the Illinois Religious Freedom Restoration Act (IRFRA), 775 ILCS 35/1. Petitioners claim that Chicago violated the Free Exercise Clause when it urged enactment of this measure because IRFRA previously provided for heightened judicial scrutiny of government action incidentally burdening religious exercise. According to petitioners, Chicago targeted and singled out "those who worship at religious cemeteries located adjacent to O'Hare." Pet. 3. The Seventh Circuit held strict scrutiny inapplicable because Chicago's actions in advocating enactment of the OMA and eventually implementing the OMP were neutral in both purpose and effect—far from being singled out, petitioners were treated the same as others whose property was needed for the OMP; they were treated differently only from religiously affiliated landowners elsewhere in the state whose property was not needed for the airport project. The court went on to conclude that petitioners' allegations would fail even on strict scrutiny.

This decision was correct and not in conflict with decisions of any other court. This Court's review is not warranted.

Facts and Proceedings Below

1. Tens of millions of passengers pass through O'Hare every year. Pet. App. 38a. It is "not only one of the busiest airports in the world" but "one of the most congested," with delays "at least twice as bad as that of the next two airports that suffer from excessive delays, Atlanta and Newark." *Id.* at 37a.

Moreover, "[d]elays at O'Hare spark further delays around the country and the world, with serious economic and logistical consequences." *Id.* at 37a-38a. The OMP, announced in June 2001, addresses these chronic delays. *Id.* at 5a. It replaces O'Hare's current intersecting runway layout—designed for Eisenhower-era aviation—with six parallel and two crosswind runways, enabling a constant stream of landings and takeoffs. *Id.* at 5a-6a. As modified, O'Hare will resemble the modern design at other major hubs. *Id.* at 5a.

The OMP requires about 440 acres of land adjacent to O'Hare. FAA Record of Decision (ROD) 34.[1] This area includes 539 private homes, 197 businesses, public facilities, parklands, and St. Johannes Cemetery, which lies directly in the path of new runway 10C/28C. ROD 34, 97.[2] Chicago, the FAA, and relevant state agencies have entered into a memorandum of agreement specifying detailed protocols for relocation of the cemetery. ROD 76; ROD App. B.

2. After the OMP was announced, petitioners—St. John's United Church of Christ, which owns St. Johannes, and two individuals with relatives buried at the cemetery—filed suit in state court under IRFRA. Pet. 6. IRFRA subjects government action burdening religious exercise to more stringent scrutiny than imposed under the Free Exercise

---

[1] The ROD is at http://www.agl.faa.gov/OMP/ROD.htm.

[2] A diagram from the final Environmental Impact Statement showing the new runways and the cemetery is reprinted at App., *infra*, 1a. Chicago's original plan also proposed acquiring Rest Haven Cemetery, but it was accommodated in a cargo area. Pet. App. 11a, 17a-18a. After extensive analysis, FAA experts concluded that no alternative design would avoid St. Johannes without compromising the project. *Id.* at 39a, 42a.

Clause, see *Employment Division, Department of Human Resources v. Smith*, 494 U.S. 872 (1990), and was enacted after this Court held the federal Religious Freedom Restoration Act (RFRA), which imposed similar heightened standards, unconstitutional as applied to state and local governments, see *City of Boerne v. Flores*, 521 U.S. 507 (1997). Petitioners contended that Chicago's relocation of the cemetery was not the least restrictive means of accomplishing a compelling state interest. This was one of several state-court actions entangling implementation of the OMP. In another, brought by municipalities near O'Hare, the Circuit Court of DuPage County issued a preliminary injunction against acquisition of property without state approval. Pet. App. 6a-7a.

3. In May 2003, the Illinois General Assembly, responding to concerns that litigation under various state statutes would delay the OMP, enacted the OMA, declaring it "essential that the [OMP] be completed efficiently and without unnecessary delay" and that land acquisition "be completed as expeditiously as practicable." OMA § 5(a)(6), (7).[3] The OMA declares the General Assembly's intent "that all agencies of this State and its subdivisions * * * facilitate the efficient and expeditious completion of the [OMP] to the extent not specifically prohibited by law, and that legal impediments to the completion of the project be eliminated." *Id.* § 5(b).

The OMA authorizes Chicago, "notwithstanding any other law to the contrary," to acquire "for purposes related to" the OMP, "any property" rights, including "any property used for cemetery purposes

---

[3] The OMA is reprinted at App., *infra*, 2a-23a.

* * * and to require that the cemetery be removed to a different location." OMA § 15. See also Pet. App. 7a-8a. The OMA also effects express, partial repeals of "more than a dozen laws to remove legal obstacles to O'Hare's expansion." Pet. 7. See also Pet. App. 8a ("every statute that someone thought might stand in the way of the OMP"). These include the Archeological and Paleontological Resources Protection Act (OMA § 90); the Human Skeletal Remains Protection Act (§ 91); several provisions of the Illinois Municipal Code (§ 92); the Downstate Forest Preserve District Act (§ 93); the Illinois Aeronautics Act (§ 94); the Code of Civil Procedure (§ 95); and IRFRA (§ 96). IRFRA's new section 30 provides that "[n]othing in this Act limits the authority of the City of Chicago to exercise its powers under the [OMA] for the purposes of relocation of cemeteries or the graves located therein." 775 ILCS 35/30.

4. After the OMA was enacted, petitioners voluntarily dismissed their state-court suit and filed this federal action. Pet. 7. Petitioners claimed that Chicago had prohibited their free exercise of religion by advocating legislation including the IRFRA amendment. Pet. App. 35a, 84a, 86a.[4] The district court rejected petitioners' Free Exercise claim. *Id.* at 83a-87a. It ruled that the OMA is a neutral law of general applicability to facilitate and expedite the

---

[4] Petitioners also asserted claims under the Equal Protection Clause and the federal Religious Land Use and Institutionalized Persons Act (RLUIPA), 42 U.S.C. 2000cc et seq. Along with the two municipalities that had obtained the state-court injunction, they asserted a variety of federal claims against the FAA. And Rest Haven Cemetery asserted the same claims as the other plaintiffs. These claims have all been abandoned.

OMP and "does not single out St. Johannes * * * because of its religious affiliation." *Id.* at 84a.

5. While the case was pending in the district court, the FAA completed its environmental review and approved Chicago's airport layout plan (ALP) pursuant to federal aviation statutes. The FAA compiled a "voluminous" administrative record supporting its decision. *Village of Bensenville v. FAA*, 457 F.3d 52, 73 (D.C. Cir. 2006). Among other issues, the FAA examined petitioners' claim that approving a plan requiring relocation of St. Johannes would violate RFRA. ROD 92. Assuming applicability of RFRA for purposes of analysis, the FAA examined thirteen alternative designs that would avoid relocating the cemetery—including five submitted by petitioners—but concluded that none would fulfill the compelling interest in reducing delays and congestion. ROD 95, 98-102. The FAA therefore determined that Chicago's project satisfied RFRA. ROD 102. The FAA also rejected petitioners' Free Exercise claim. ROD 103-04.

Petitioners, among others, sought review in the D.C. Circuit of the ALP approval and, when the FAA issued a letter of intent (LOI) to provide funding for the OMP, of that decision, too. Petitioners abandoned their Free Exercise claim, arguing only for heightened scrutiny under RFRA. The D.C. Circuit ruled that RFRA did not apply and denied both the petition for review, see *Bensenville,* 457 F.3d at 59-68, and a petition for rehearing en banc. The court also ruled that the LOI was not reviewable and vacating it would not redress petitioners' claimed injury. See *id.* at 68-70.[5]

---

[5] Petitioners filed three more petitions for review in the D.C. Circuit from FAA decisions regarding OMP funding. *St. John's*

6. The Seventh Circuit affirmed the dismissal of petitioners' Free Exercise claim against Chicago. The court "accept[ed]" petitioners' representations that relocation of the cemetery was a "'sacrilege to [their] religious faith.'" Pet. App. 31a-32a. Nevertheless, under *Smith* and *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah,* 508 U.S. 520 (1993), the OMA was a neutral law of general applicability not subject to strict scrutiny. The court noted that "to determine whether a law is neutral, as the Court used the term in *Smith*, we must examine the object of the law" to ensure that it does not "'infringe upon or restrict practices because of their religious motivation.'" Pet. App. 29a (quoting *Lukumi*, 508 U.S. at 533). The "related principle of 'general applicability' forbids the government from 'impos[ing] burdens only on conduct motivated by religious belief' in a 'selective manner.'" *Id.* at 29a-30a (quoting *Lukumi*, 508 U.S. at 543). The "text of the OMA" (*id.* at 33a) did not discriminate against or target religious institutions; it provided that "*any* property, religious or otherwise, within the area designated for O'Hare expansion is subject to the extraordinary powers conferred in the OMA" (*id.* at 32a).

The court similarly rejected petitioners' claim that the OMA "singled [them] out" (Pet. App. 40) from those previously protected by IRFRA, noting that "as matters have developed, [St. Johannes] is now the

---

United Church of Christ v. FAA, No. 06-1386 (filed November 20, 2006; decided March 21, 2008) (challenging first grant under LOI); *St. John's United Church of Christ v. FAA*, No. 07-1362 (filed September 12, 2007) (challenging approval of passenger facility charges); *St. John's United Church of Christ v. FAA*, No. 07-1435 (filed October 25, 2007) (challenging second grant under LOI).

only cemetery * * * affected" (*id.* at 35-36a), but that "'adverse impact will not always lead to a finding of impermissible targeting'" (*id.* at 36) (quoting *Lukumi*, 508 U.S. at 535). Here, the provision would have applied to any religious cemetery in the project area, and the supposedly different treatment of St. Johannes, in comparison to cemetery properties in other parts of the State, reflects that only St. Johannes "is near O'Hare and * * * the City badly needs the land to construct additional runways." *Id.* at 46a.

The court then examined "available evidence" of the OMA's "object" and concluded that it was not based on any "subtle or masked hostility to religion." Pet. App. 34a. The OMA's "stated purpose" was to eliminate legal impediments to the OMP, and "most" of the statute had "absolutely nothing to do with religion, cemeteries, or IRFRA." *Id.* at 35a. Finally, the court concluded that, even if heightened scrutiny applied, the pressing need to expand O'Hare and the careful consideration of alternatives satisfied that test. See *id.* at 36a-42a.

Judge Ripple dissented. He concluded that the IRFRA amendment triggered strict scrutiny both because "the *only* cemeteries affected * * * are those *religious* cemeteries that the City may seek to relocate" (Pet. App. 60a) and because strict scrutiny applied even to a "facially neutral" law that "imposes a substantial burden on religion" (*id.* at 61a), circumstances he thought were present because "relocation of St. Johannes would force St. John's to forego its religious precepts regarding the burial of its members" (*id.* at 62a).

The Seventh Circuit denied rehearing en banc and a motion to stay the mandate.[6]

REASONS FOR DENYING THE PETITION

One fact controlled the disposition below: Chicago must acquire hundreds of properties to modernize O'Hare. One is a cemetery owned by a church; the rest are private homes and businesses and a few public facilities and parks. Neither the OMA itself nor IRFRA after its amendment treats the church differently from any other property owner in the acquisition area or any other secular owner outside the acquisition area. Likewise, if St. Johannes were located elsewhere in Illinois, petitioners would continue to enjoy full IRFRA protection, while if any other denomination owned a cemetery at the location of St. Johannes, that church would not. As the Seventh Circuit aptly noted, the IRFRA amendment, like Chicago's actions in allegedly procuring it, was based on geography, not religion.[7]

For this reason, the Seventh Circuit's unexceptionable—and entirely correct—decision does not warrant review. The "fundamental question" petitioners claim divides the federal courts—"whether a law that singles out religious activity for differential treatment" (Pet. 2) necessarily triggers strict First

---

[6] Chicago has since filed a complaint to condemn St. Johannes and a motion for immediate vesting of title under the "quick-take" provisions of state law.

[7] Petitioners pled their Free Exercise claim solely against Chicago, and they litigated that claim against Chicago alone in the Seventh Circuit. Thus, while the FAA is a respondent in the case (because it was a defendant on other claims), the sole question presented in the petition for certiorari does not concern the FAA.

Amendment scrutiny—is simply not presented here. Nor is there any conflict in the Circuits. Rather, the Seventh Circuit recognized—as does every Circuit—that a law burdening religion triggers strict scrutiny if similarly situated religious claimants are treated differently *or* there is evidence of discriminatory intent.

Petitioners' allegation of conflict with this Court's "Free Exercise jurisprudence" (Pet. 23) adds nothing. Petitioners do not even claim a conflict with any decision other than *Lukumi*—not the Court's landmark decision in *Smith*, nor the post-*Lukumi* decision in *Locke v. Davey*, 540 U.S. 712 (2004), which they discuss in a lone footnote. Even their discussion of the *Lukumi* "jurisprudence" is limited to a concurring opinion, and they find a conflict only by fundamentally misreading both the Seventh Circuit's decision and Justice Scalia's opinion, which addresses a narrow issue having nothing to do with this case. The analysis and result in the court below conflict with no opinion in *Lukumi*—or any decision of this Court, pre- or post-*Lukumi*.

In any event, for many reasons this case represents an extraordinarily poor vehicle for considering any legal issue of general significance. First, this case does not even present the issue on which petitioners seek review. Second, the Seventh Circuit, like the FAA before it, actually undertook the strict scrutiny petitioners seek here and still rejected their claims. Third, petitioners' contention that Chicago's role in obtaining the IRFRA amendment prohibits the free exercise of their religion cannot be likened to any claim ever sustained by any court. Finally, petitioners' challenge to the constitutionality of the OMA in this case, without actually presenting their IRFRA

claim, means that even success in this litigation would be a pyrrhic victory, since the IRFRA rights they seek to reclaim would confront the state-law bar of res judicata.

I. THIS CASE PRESENTS NO CIRCUIT SPLIT.

Petitioners seek review because the Seventh Circuit supposedly held, in conflict with other Circuits, that, without animus or hostility, government action targeting and singling out religion (or one particular religion) is not subject to strict scrutiny. Petitioners claim that in the Third, Sixth, Tenth, and Eleventh Circuits, laws selectively burdening religion (or particular religions) themselves trigger strict scrutiny, without a showing of improper purpose, while other courts have taken the Seventh Circuit's side, requiring proof of hostility even where government action is not neutral toward religion.

Petitioners' claim of conflict misreads the Seventh Circuit's decision. That court did not uphold the targeting of religion. Instead, the court rejected petitioners' claim on its own terms—because petitioners were not singled out. All property owners in the acquisition area were treated alike, and no similarly situated religious claimant retained more rights.

No case petitioners cite applies any different rule. While the Seventh Circuit's application of settled law to the facts of this case would not be certworthy in any event, the result reached below would have been the same in every Circuit.

Nor do the older decisions of the First and Ninth Circuit petitioners cite support their call for review in

this case. First, to the extent those decisions could be read to imply hostility must be shown, even where religion is selectively burdened, the Seventh Circuit rejected that rule. Second, those decisions, addressing Free Exercise challenges to restrictions on funding religious education, did not announce an across-the-broad "hostility" requirement, but grappled with the difficulties particular to that setting, including the government's interest in avoiding establishment of religion. As for the Fifth Circuit, its unpublished decision naturally does not treat the Free Exercise claim in depth but rather generally included it in a broader discussion of free speech and assembly claims leveled at one individual's arrest. Nothing significant can be gleaned from that decision—except that petitioners were bent on magnifying their claim of a circuit split.

A. The Decision Below Does Not Conflict With That Of Any Other Circuit.

The Seventh Circuit did not hold, as petitioners argue repeatedly, that strict scrutiny requires proof of hostility toward religion. See, *e.g.*, Pet. 12, 18, 23, 26. Nor did it "concede[]" that "a law singl[ing] out religion for unequal treatment * * * was not enough." *Id.* at 20. These assertions cannot be squared with the opinion below. The Seventh Circuit explicitly recognized that "'general applicability' forbids the government from 'impos[ing] burdens only on conduct motivated by religious belief.'" Pet. App. 29a-30a (citations omitted). Just as clearly, the court expressly disavowed that under "the inquiry required by *Lukumi* * * * a plaintiff is *required* to allege animus or prejudice * * * to state a free exercise claim." *Id.* at 43a. Instead, it treated evidence of invidious motive as a sufficient, alternative basis for

invalidating (or at least, closely scrutinizing) a neutral law of general applicability (see *id.* at 34a-36a)—a rule especially solicitous of Free Exercise claims. Finally, the court did not reject petitioners' bid for strict scrutiny because they did not allege more than "targeting" or "selective burden," but rather because they failed to allege the kind of selective burdening necessary for a Free Exercise claim—namely, that the OMA treated them differently from other similarly situated property owners. See *id.* at 32a, 36a, 43a-44a.

This precise distinction explains the supposedly conflicting decisions petitioners cite. The Eleventh Circuit, in *Midrash Sephardi, Inc. v. Town of Surfside*, 366 F.3d 1214 (2004), cert. denied, 543 U.S. 1146 (2005), like the Seventh Circuit here, held that proof of hostility or subjective invidious intent is not required (see *id.* at 1234 n.16), but did not hold that every law burdening religious practice is subject to strict scrutiny. Rather, "[z]oning laws * * * restricting religious assemblies to designated districts" (*id.* at 1234) trigger heightened review only when they "treat[] similarly situated secular and religious assemblies differently" (*id.* at 1232). See also *id.* ("unequal treatment indicates the ordinance improperly targets the religious character of an assembly").[8]

The court thus stated the same principle as the Seventh Circuit here. Heightened scrutiny applies if challenged government action dissimilarly treats religious claimants and those who are, in relevant respect, similarly situated. What distinguishes

---

[8] Petitioners do not acknowledge that the court in *Midrash* interpreted the "equal terms" provision of RLUIPA, which it assumed was coextensive with constitutional guarantees.

the two cases is not disagreement about the Free Exercise Clause but rather that Surfside, unlike Chicago, did not regulate evenhandedly between religious and secular property owners. Surfside's land-use regulation, based on "retail synergy," was "pursued only against religious assemblies, * * * not other non-commercial assemblies," without any "evidence that private clubs and lodges *actually* contribute to the business district in a way appreciably different than religious institutions." 366 F.3d at 1234. See also *id.* at 1234-35 (citing evidence of underinclusiveness of the restriction). Here, however, there is a glaringly obvious difference between property within and without the acquisition area—only the former is needed to construct the airport. As a result, the differing treatment is not actionable. See *Lukumi*, 508 U.S. at 542-43 ("All laws are selective to some extent, * * * [but] inequality results when a legislature decides that the governmental interests it seeks to advance are worthy of being pursued only against conduct with a religious motivation.").

Likewise, *Fraternal Order of Police Newark Lodge No. 12 v. City of Newark*, 170 F.3d 359 (3d Cir.), cert. denied, 528 U.S. 817 (1999), did not hold that application of a police department's no-beard policy would be subject to strict scrutiny simply because it burdened Muslim officers' religious exercise—or because the policy singled out religious beard-wearing while leaving other religious practices unaffected. Rather, the Third Circuit held that the policy warranted heightened scrutiny because Newark's stated motivation—uniformity—applied to beards worn for religious and non-religious reasons, yet Newark treated religious and non-religious claimants differently for purposes of granting excep-

tions. See *id.* at 364-66. This reflected an impermissible "value judgment that secular (*i.e.*, medical) motivations for wearing a beard are important enough to overcome [the] general interest in uniformity but that religious motivations are not." *Id.* at 366.[9] Here, petitioners challenge no similar "value judgment," and no value judgment was made. Petitioners' cemetery was excluded from IRFRA simply because of where it is located, and Chicago's acquisitions embrace all property, secular and religious, needed to expand O'Hare.

Nor is the decision in *Shrum v. City of Coweta*, 449 F.3d 1132 (10th Cir. 2006), inconsistent. *Shrum* was a qualified immunity appeal in which the police chief accepted, for purposes of appeal, that he made assignments "to force Officer Shrum out, [by] making him choose between his duties as a police officer and his duties as a minister." *Id.* at 1144. The court recognized that if the Sunday morning work assignment was the result of a neutral seniority policy, the Free Exercise claim would fail. See *id.* at 1145. The court nevertheless affirmed the denial of summary judgment based on evidence that the Sunday assignment was "motivated by Officer Shrum's religious commitments" and that a shift exchange with another officer had been denied because of those commitments; such action would not be "neutral" toward religion (*id.* at 1144) and would violate the

---

[9] By contrast, as then-Judge Alito also explained, the exemption for undercover officers did not trigger heightened scrutiny. Undercover officers were not similarly situated with respect to the government's "interest in uniformity," and "the Free Exercise Clause does not require the government to apply its laws to activities that it does not have an interest in preventing." *FOP*, 170 F.3d at 366.

Free Exercise Clause without proof of "animus" (*id.* at 1145). Indeed, the Seventh Circuit correctly noted the discriminatory treatment at issue in *Shrum*, but likewise noted that petitioners were not treated differently from other similarly situated property owners. See Pet. App. 43a-44a.

Petitioners' last claim of conflict, based on *Kissinger v. Board of Trustees*, 5 F.3d 177 (6th Cir. 1993), is wrong as well. There, the Sixth Circuit followed a two-step approach similar to the Seventh Circuit's and similarly recognized that "illicit motive is merely a sufficient, not a necessary, condition to trigger strict scrutiny." Pet. 17. Nevertheless, Kissinger's Free Exercise claim failed because she did not identify any veterinary student allowed to graduate without passing the course she found religiously objectionable. See 5 F.3d at 179-80. Here, petitioners' claim failed because they cannot identify any property owner whose land is similarly needed for airport expansion and who is treated any differently under the OMA. Indeed, *Kissinger* precludes petitioners' attempt to compare themselves to owners and believers outside the acquisition area—plainly there were students at Ohio State, but outside the veterinary school, who were not required to pass the course Kissinger did not want to take.

In sum, petitioners' claim of conflict ignores the critical step in the decisions they invoke and commits the very error the Seventh Circuit identified: claiming "differential" (Pet. 2) or "objectively unequal treatment" (*id.* at 4) simply because Chicago's actions affect them and not members of other religions. But the court below sensibly asked whether petitioners were adversely affected as compared to others situated similarly with respect to Chicago's legitimate and neutral purposes. See *Lukumi*, 508 U.S. at

543. Petitioners' claim failed because they were not "targeted" or "singled out," not because the Seventh Circuit applied a different legal standard than other courts of appeals.

B. The Cases Petitioners Align With The Decision Below Do Not Show A Need For Review Here.

Petitioners' discussion of the cases on the other side of the supposed circuit conflict is even more deficient. In fact, since, as we explain above, the Seventh Circuit explicitly noted no showing of motive or animus is required if the plaintiff actually establishes that he was selectively burdened or targeted (see Pet. App. 32a, 36a, 43a), if the Circuits were truly divided on whether strict scrutiny applies to discrimination, the Seventh Circuit would be on petitioners' side of the divide. But the First, Fifth, and Ninth Circuits, which petitioners labor to place in conflict with the decisions just discussed, do not impose a general hostility requirement either. Two cases involved challenges to restricted funding for religious education. As petitioners observe, both *Strout v. Albanese*, 178 F.3d 57 (1st Cir.), cert. denied, 528 U.S. 931 (1999), and *KDM ex rel. WJM v. Reedsport School District*, 196 F.3d 1046 (9th Cir. 1999), cert. denied, 531 U.S. 1010 (2000), rejected the argument that *Lukumi* required strict scrutiny, concluding, *inter alia*, that rational-basis review applied absent evidence that the distinctions were invidiously intended. Petitioners also correctly quote Judge O'Scannlain, dissenting from denial of rehearing *en banc* in *KDM ex rel. WJM v. Reedsport School District*, 210 F.3d 1098 (9th Cir. 2000), lamenting the "'growing confusion among the lower courts over the demands of the First Amendment.'" Pet. 21 (citation

omitted). But petitioners' lengthy discussion of these cases has a Rip Van Winkle quality to it. The notion that this Court now needs to settle a conflict involving the 1999 and 2000 decisions in *Strout* and *KDM* simply ignores that this Court did just that in *Locke*.[10]

Notably, the Court's resolution of the issue in *Locke* was not what the *KDM* dissent expected. While Judge O'Scannlain was confident that any "faithful reader of [*Lukumi*]" would recognize that every law "*non-neutral on its face* * * * triggers strict (and almost always fatal) scrutiny—even in the absence of extrinsic evidence suggesting that the law was the result of anti-religious bigotry or animus," 210 F.3d at 1099, Chief Justice Rehnquist, writing for a 7-2 majority, rejected the Free Exercise claim because it "would extend the *Lukumi* line of cases well beyond not only their facts but their reasoning." 540 U.S. at 720. Noting the States' strong interest in not funding religious ministry, the Court held that refusing to fund preparation for that vocation on equal terms with preparation for other professions was not a denial of Free Exercise, absent evidence that it was motivated by "hostility toward religion." *Id.* at 721. As the Court explained, "training for religious professions and training for secular professions are not fungible" (*id.*), and "nothing in Washington's overall approach * * * indicates it 'single[s] out' anyone 'for special burdens on the basis of * * * religious calling'" (*id.* at 724 n.8) (quoting dissent)).

---

[10] Those cases were called to the Court's attention in *Locke*. See Brief for the United States, No. 02-1315, at 17 n.3. And since *Locke*, the First Circuit has held that while *Strout* was no longer controlling as a matter of *stare decisis*, it would reach same conclusion under *Locke*. See *Eulitt v. Maine*, 386 F.3d 344, 350, 356 (2004).

As for *World Wide Street Preachers Fellowship v. Town of Columbia*, 245 Fed. Appx. 336 (2007), although petitioners do not reveal the disposition, the Fifth Circuit reversed summary judgment on the ground that a Free Exercise claimant was entitled to show discriminatory motive.[11]

Also misplaced is petitioners' reliance on Justice Thomas's dissent from the denial of certiorari in *Columbia Union College v. Clarke*, 527 U.S. 1013 (1999), as prelude to their claim that "guidance is needed even more urgently today than it was then." Pet. 22. That case has no relevance here. *Columbia Union College v. Clarke*, 159 F.3d 151 (4th Cir. 1998), addressed this Court's Establishment Clause and Free Speech cases; and neither the court of appeals' majority nor the dissent mentioned *Lukumi* even once, while the Free Exercise Clause received only passing mention. See *id.* at 155 n.1 & 172. In any event, like reliance on the other pre-*Locke* cases, this citation fails to take account of the Court's intervening effort to provide guidance. Of all petitioners' citations, only a student note post-dates *Locke*; and it deals exclusively with *Lukumi*'s application to education funding laws, ultimately concluding that "the neutrality principle does not work in the school funding context" and that "[t]he Court in *Locke* was right to focus on 'animus towards

---

[11] Only by selecting a few words out of context can petitioners find anything in the Fifth Circuit's unpublished opinion to complain about. Ignoring that the court analyzed the free speech and free exercise claims together, they highlight language that was the court's shorthand for the free exercise analog to content-based discrimination on speech. It is clear that this decision was pressed into service because it is the only one in the country petitioners could find post-*Locke* with any remotely helpful language.

religion.'" Sarah Waszmer, *Taking It Out of Neutral: The Application of* Locke's *Substantial Interest Test to the School Voucher Debate*, 62 Wash. & Lee L. Rev. 1271, 1274, 1309 (2005).

That said, the Seventh Circuit did not rely on the First and Ninth Circuit decisions, or on *Locke* itself; nor did it need to.[12] As we explain above, the court below correctly held that Chicago's actions and the OMA itself were neutral in every relevant respect. The standard of review in cases like *Strout* and *KDM*, involving non-neutral statutes, is simply irrelevant. Nevertheless, the court went on to conclude both that there was no anti-religious animus here and that strict scrutiny would be satisfied if it were required. Indeed, this case would be no different under the *Locke* dissent, which maintained that withholding a "generally available benefit" from "some individuals solely on the basis of religion" violates the Free Exercise Clause. That did not happen here. The "benefits" of IRFRA (Pet. 7)—and other state laws—were withheld solely on the basis of geography (see Pet. App. 35a-36a, 40a) and, moreover, were withheld from all property owners in the acquisition area.

II. THE DECISION BELOW IS ENTIRELY FAITHFUL TO THIS COURT'S PRECEDENTS.

Unsurprisingly, given the Seventh Circuit's complete consistency with the decisions of other courts of appeals, the decision below does not conflict with any precedent of this Court, either. On the contrary, it

---

[12] The opinion contains a solitary citation to *Locke* (Pet. App. 34a), for the principle that other provisions of a statute are a more reliable guide to intent than legislative history.

correctly applies the rules laid down in *Lukumi*—the only of this Court's Free Exercise decisions petitioners actually discuss—to the facts of this case.

Petitioners' claim of conflict proceeds from the premise that the Seventh Circuit construed the First Amendment as imposing "a motive requirement," while *Lukumi* established that proof of "an intent to suppress religion was * * * sufficient," but not necessary. Pet. 26. This contention fails because petitioners get the decision below exactly backwards. As we explain above, the Seventh Circuit recognized that "the inquiry required by *Lukumi*" entails determining both whether the challenged statute is "a neutral law of general applicability" and whether a law's "'facial[] neutral[ity] * * * masks more insidious underpinnings.'" Pet. App. 43a (quoting Pet. App. 85a). Nevertheless, the court did not "inclu[de] * * * a motive requirement." Pet. 28. To the contrary, as we also explain, the court explicitly rejected any notion that the district court had "suggest[ed] that a plaintiff is *required* to allege animus or prejudice in order to state a free exercise claim." Pet. App. 43a. And beyond the obvious problems caused by misreading or at least mischaracterizing the decision below, petitioners' attempts to generate a conflict with this Court's cases depend on misreading *Lukumi* as well (not to mention a willful blindness to *Locke* and *Smith*).

According to petitioners, the Seventh Circuit erred by following a section of Justice Kennedy's *Lukumi* opinion that failed to garner a majority, one in which he (joined only by Justice Stevens) supposedly endorsed a "motive requirement" (Pet. 28), rather than recognizing that a majority of the Court held that a law could be invalidated absent hostility to

religion (see *id.* at 27). But the disputed portion of the *Lukumi* opinion did not assert that invidious legislative motive was required—it merely suggested that evidence of bad motive, such as that found in legislative history, could be considered in analyzing the object of a law. See 508 U.S. at 540-42. Petitioners likewise mistake Justice Scalia's concurring opinion, which they say declared the object or purpose of the law irrelevant, in favor of an effects test. See Pet. 25-26. Of course, a complete rejection of any concern for a law's "object" would have been, to the say the least, extraordinary for Justice Scalia, who had authored the Court's then-recent opinion in *Smith*.

Nor can Justice Scalia's opinion be fairly interpreted to reject this inquiry. To the contrary, the whole thrust of the language petitioners extract from his separate opinion addresses the propriety of considering the subjective motivations of individual legislators in ascertaining the "object" of the law they enacted. The opinion took pains to clarify that determining the "object" of the law is the central inquiry in Free Exercise analysis. See 508 U.S. at 558 ("I do not join [Part II-A-2 of Justice Kennedy's opinion] because it departs from the opinion's general focus on the object of the *laws* at issue to consider the subjective motivation of the *lawmakers* * * *."). Thus, Justice Scalia's view that legislative motive should not be considered recognizes a narrower Free Exercise right than Justices Kennedy and Stevens envisioned, *i.e.*, a regime in which evidence of invidious motive would not invalidate a law that was otherwise neutral and generally applicable. And far from faulting the lead opinion for insufficiently separating the "neutrality" and "general applicability" requirements, Justice Scalia emphasized that

neither term is "to be found within the First Amendment itself" but are used to describe a law that limits religiously motivated conduct but "nonetheless [does] not * * * constitute a 'law * * * prohibiting the free exercise' of religion within the meaning of the First Amendment." *Id.* at 557. For Justice Scalia, neutrality and general applicability were "not only 'interrelated,'" as the lead opinion wrote, but "substantially overlap." *Ibid.*

Here, the Seventh Circuit disclaimed any motive requirement and relied on precisely the considerations Justice Scalia urged should be considered in determining whether a measure is neutral and generally applicable, namely, whether the law "*by [its] terms* impose[s] disabilities on the basis of religion" and whether it, while "neutral in [its] terms, through [its] design, construction, or enforcement target[s] the practices of a particular religion for discriminatory treatment." 508 U.S. at 557. Thus, the Seventh Circuit, after finding facial neutrality, looked to whether "there was a more subtle or masked hostility to religion." Pet. App. 34a. See also *ibid.* (cautioning against "selective use of statements in legislative history"). This approach cannot fairly be described as failing to follow *Lukumi* or heed Justice Scalia's views.

Equally ill-conceived is petitioners' accusation that the Seventh Circuit "distort[ed] the neutrality and general-applicability inquiries" by improperly "import[ing]" the government's interest into the determination whether a law is neutral and generally applicable. Pet. 29. *Lukumi* could hardly be clearer that a court deciding a Free Exercise claim must consider the governmental interest in just the way the Seventh Circuit did here. Hialeah lost *Lukumi*

because it failed to pursue its legitimate objectives in an evenhanded way. Thus, despite recognizing that an "adverse impact will not always lead to a finding of impermissible targeting" (508 U.S. at 535), the Court held the "principle of general applicability was violated because the secular ends asserted in defense of the laws were pursued only with respect to conduct motivated by religious beliefs" (*id.* at 524). For example, "many * * * secular killings fall[ing] within the city's interest in preventing the cruel treatment of animals" went unpunished, while the Santeria "religion alone * * * [bore] the burden of the ordinances." *Id.* at 544. What petitioners decry as a distortion of *Lukumi* is one of that decision's central precepts: that "unequal treatment" becomes suspect when those similarly situated relative to the government's legitimate interests are treated dissimilarly. See *id.* at 542-43 (Free Exercise concern triggered "when a legislature decides that the governmental interests it seeks to advance are worthy of being pursued only against conduct with a religious motivation").

Here, by contrast, as the Seventh Circuit recognized, there is no claim, nor could there be, that the OMA is underinclusive with respect to the concededly legitimate objective of expanding O'Hare. Petitioners identify no owner of property, religious or secular, whose property is equally necessary to the airport modernization but who was nevertheless permitted to retain state-law rights that risk interference with the project. Instead, petitioners' claim of targeting is based on differential treatment of those who are outside the project area and therefore not similarly situated. Of course, the IRFRA amendment does not extend to religiously owned properties outside the project area—that

would not advance the government's interest in removing impediments to modernization of the airport. Petitioners' claim is therefore altogether incompatible with *Lukumi*, as well as *Smith*. The necessary implication of *Lukumi* (and the very holding of *Smith*) is that a law incidentally burdening a particular religious practice, for example, by forbidding the killing of all animals in a geographic area (where certain religious adherents lived or worshiped) or prohibiting the use of a drug (although certain religious adherents used it as a sacrament), is not for that reason subject to strict scrutiny. See *Lukumi*, 508 U.S. at 535-36, 539; *Smith*, 494 U.S. at 882-90. Yet on petitioners' theory, individuals burdened by those laws could have claimed they were "targeted" and "singled out" relative to those who lived and worshiped elsewhere or observed other sacraments. That failed theory—that St. Johannes must, for purposes of assessing petitioners' Free Exercise claim, be classified together with church-owned properties outside the O'Hare project area (see Pet. App. 32a)—explains why petitioners lost this case.

Moreover, although an error in applying *Lukumi* to the particular facts of this case would not be grounds for certiorari in any event, the decision below was unassailably correct. As even petitioners recognize, IRFRA was amended "because the religious cemeteries supposedly interfered with Chicago's desire to expand O'Hare" (Pet. 3), "not out of religious hostility" (*id.* at 14).[13] They also recognize that the

---

[13] Petitioners improperly qualify the interference as "supposed." The FAA's determination that St. Johannes cannot be accommodated without compromising the delay-reduction and capacity-increasing ALP is final. See *Bensenville*, 457 F.3d at

law of which section 96 is a part—the OMA—was enacted for reasons unrelated to its effect on religious practice. See *id.* at 7 (OMA "re-wrote more than a dozen laws to remove legal obstacles to O'Hare's expansion"). Under *Lukumi*, the IRFRA amendment must be examined as a part of that entire statute. See 508 U.S. at 540 (treating ordinances "as a group for neutrality purposes" and declining to "decide whether Ordinance 87-72 could survive constitutional scrutiny if it existed separately"). The Seventh Circuit did just that. See Pet. App. 34a-35a. That court recognized, moreover, that the specific impetus for the OMA was a state-court decision having nothing to do with religion-based claims, but rather a case brought by the municipal plaintiffs below in which Chicago was enjoined from proceeding from land acquisition for alleged noncompliance with Illinois Aeronautics Act. See *id.* at 7a-8a (citing *Philip v. Daley*, 790 N.E.2d 961 (Ill. App. Ct. 2003)). Finally, the statute, in both its policy and its operative provisions, made clear that the General Assembly was singlemindedly bent on eliminating legal obstacles of whatever kind to the OMP. See *id.* at 8a, 35a.

Nor have petitioners ever challenged another provision of the same statute, section 15, which grants Chicago the power, "notwithstanding any law to the contrary," to "acquire" "any" property, public or private, "for purposes related to the [OMP]," by "condemnation or otherwise," including "any property used for cemetery purposes within or outside of the City, and to require that the cemetery be removed to a different location." OMA § 15. No doubt this

---

73 (dismissing petition for review). That precludes the claim that it was possible to "shift[] one runway 350 feet" (Pet. 11-12 n.3), as well as other alternatives.

omission reflects that even petitioners understand section 15 is a quintessentially neutral law of general applicability and, for that reason, valid under *Smith* and *Lukumi*. Petitioners are therefore left to suggest that a fundamentally different Free Exercise result should have obtained because the OMA, in addition to including this neutral, comprehensive provision, as well as numerous other specific amendments to various state statutes, also includes a provision specifically amending IRFRA to limit their IRFRA rights, but not those of others. This argument has no merit.

The inclusion of OMA section 96 (like the other similar statutory amendments) is almost certainly an artifact of Illinois law—which requires that "[a] bill expressly amending a law shall set forth completely the sections amended." Ill. Const. art. 4, § 8(d). Moreover, given section 15, it is unimaginable how section 96 could have independent Free Exercise Clause significance, let alone trigger a presumption of unconstitutionality. And, petitioners' incessant claim that they were singled out notwithstanding, even section 96 does not, either on its face or application, apply to petitioners alone. Rather, it extinguishes a state-law ground for an objection under IRFRA to "relocation of cemeteries," in the plural. While St. Johannes is "now the only cemetery" (Pet. App. 35a) directly affected by the IRFRA amendment, the OMA provision, as the court recognized, applies by its terms to any religious cemetery in the project area—"[i]f there were ten cemeteries in * * * [the acquisition area, it] would apply to all ten * * *" (*id.* at 36a)—as it would, presumably, to a religious individual who made a similar claim about a cemetery in the project area that had no religious affiliation.

Petitioners' hypothetical—involving an arbitrary exemption of religious groups in a particular area from the benefit of a state law requiring heightened scrutiny for religion, apparently for its own sake, not to serve any nondiscriminatory policy or as part of a larger statute (see Pet. 29)—bears no resemblance to this case. The OMA is not aimed at and does not affect only religious adherents. Nor is it capricious; the line it draws reflects the obvious fact that only some land is adjacent to O'Hare and needed for the OMP. The OMA reaches no more broadly than necessary to serve its purpose, and nothing in the federal Constitution required the General Assembly to repeal IRFRA in its entirety in order to exempt the land needed for O'Hare expansion.

An apt analogy to this case would be a law imposing, in a limited area of Richmond, a cap of 100 feet on the height of buildings (perhaps to enable planes to more safely approach a new runway), applicable to hundreds of apartment and office buildings but also inhibiting a church's planned construction of a 120-foot steeple. The notion that such a neutral law of general applicability should be subject to strict scrutiny under the Free Exercise Clause, simply because it burdens the church in relation to congregations outside the flight path, is wholly contrary to *Smith*.[14]

Finally, although the Seventh Circuit did not—and did not need to—rely on *Locke*, petitioners' attempt to

---

[14] Moreover, while petitioners are unable to obtain strict scrutiny of the cemetery relocation, their hypothetical ignores that they retain all other rights under IRFRA, even in the project area. Similarly, as the Seventh Circuit noted, the OMA did not disturb IRFRA rights of those in other parts of the state who embrace similar tenets. See Pet. App. 36a.

brush aside that case is startling. Petitioners' response to *Locke*'s refusal to invalidate an education funding restriction "unless it (1) burdens religious practice or (2) is the product of bad motive" is to assert that "Section 30 concededly imposes a substantial burden on religious practice." Pet. 27 n.5. But Chicago has never conceded such a thing. See Brief of Defendant-Appellee City of Chicago, No. 05-4418, at 45-50 (on-line version). Nor did the Seventh Circuit find a substantial burden. While it "accept[ed]" that relocation of the cemetery was a "'sacrilege to [petitioners'] religious faith'" (Pet. App. 31a-32a), it did not identify any religious practice, much less any substantial burden on religious practice. Any claim of burden, moreover, is inconsistent with *Lyng v. Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439, 447-55 (1988) (government action making land unavailable for religious practices and offending religious beliefs does not violate Free Exercise Clause).

More important, while relocation of the cemetery was the heart of petitioners' RLUIPA claim, their Free Exercise claim—the only claim they press in this Court—did not challenge the construction of the OMP or the cemetery relocation it entails. It challenged Chicago's role in the enactment of the OMA, including section 96's partial repeal of IRFRA. It is an exceedingly odd notion that Chicago burdened religion by urging the General Assembly to enact a law, especially one that merely "restore[d] Illinois law to the regime governed by *Smith*." Pet. App. 36a. But even if Chicago could be held responsible for the IRFRA amendment, it is hard to say that it imposes any burden, let alone a substantial one. As we explain above, OMA section 15 itself, which petitioners have never challenged,

grants Chicago the power to condemn and relocate any property used for cemetery purposes—meaning that section 96 imposes no independent burden at all.

III. THIS CASE PRESENTS AN EXTRAORDINARILY POOR VEHICLE FOR REVISITING THIS COURT'S FREE EXERCISE JURISPRUDENCE.

To the extent that the federal courts require any further guidance concerning the Free Exercise Clause, granting certiorari here would present no opportunity for this Court to supply it.

1. As we demonstrate above, the motive question petitioners ask the Court to decide is not even presented by this case. Nor does the case raise the issue raised by the First and Ninth Circuit decisions they claim align with the Seventh. That issue, moreover, was considered four Terms ago in *Locke*. Petitioners' bluster notwithstanding, the Seventh Circuit applied the rule of law petitioners seek—that heightened scrutiny would attach if petitioners had identified an actual "selective" burden, without any further showing of animus.

2. No federal court would have decided the question presented here any differently. Certainly no post-*Lukumi* Free Exercise decision comes close to crediting a claim like petitioners': that the decision to apply the OMA to those whose property actually stands in the path of the runway, but not to those in other parts of Illinois, constitutes the kind of targeting that triggers a presumption of unconstitutionality. While the dissenting opinion below reached a contrary result, it rested in part on a rationale that simply disregards the central teaching of *Smith* (see Pet. App. 59a); and even petitioners do not defend it.

3. While petitioners declare that strict scrutiny is "outcome-determinative" in this case (Pet. 3), it is, in fact, immaterial. Despite holding that heightened scrutiny was not required, the Seventh Circuit nonetheless applied it, for the sake of completeness, and held it satisfied. Petitioners' efforts (*id.* at 30-31) to brush aside this conclusion, which occupies six pages of decision (Pet. App. 36a-42a), misses the point. This Court, to be sure, is not "bound" by the dictum of lower courts (Pet. 31)—or their holdings, for that matter—but it absolutely considers whether it is asked to decide an issue unlikely to affect the result. Here, while the Seventh Circuit's strict-scrutiny analysis was dicta when the court pronounced it, if petitioners obtain reversal on the standard of review, the question would be foremost on remand. There is no reason to expect the majority, which ruled strict scrutiny was satisfied and denied a petition for rehearing on this question, would, on a third examination, reach the opposite conclusion.

4. Petitioners' peculiar claim is also so riddled with idiosyncracies that it is exceedingly unlikely that the Court could reach any generally significant constitutional question. Their claim of a burden on religion is at least three times removed from claims typically forwarded under the Free Exercise Clause. Petitioners challenge Chicago's role in advocating enactment of the OMA (Pet. App. 84a), government conduct against which, to our knowledge, no Free Exercise claim has ever been made. Moreover, the law that Chicago allegedly desired (and the General Assembly enacted) does not burden religious exercise, but merely eliminates one defense that petitioners could have interposed against the proposed condemnation—namely that the alleged burden on religion is

not the least restrictive means of achieving a compelling interest. That standard is not required under the Free Exercise Clause for neutral, generally applicable government action like the broad-based OMP land acquisition. Finally, this Court has repeatedly rejected claims like petitioners' objection to relocation of the cemetery, namely that it is a "sacrilege to * * * religious faith." Pet. App. 31a-32a. See, *e.g.*, *Lyng; Bowen v. Roy*, 476 U.S. 693 (1986).

5. Even complete success in this litigation would not likely aid petitioners. On the single Free Exercise claim remaining in this case, the very most petitioners could obtain would be a declaration that OMA section 96 is ineffective to take them out of IRFRA, with the result that they could assert IRFRA to resist condemnation in the case now pending in state court. But any reliance on IRFRA would surely be barred by petitioners' failure to raise such a claim in this case. Under Illinois law, res judicata bars litigation of claims that "arise[] from a single group of operative facts" as prior litigation between the same parties. See, *e.g.*, *River Park, Inc. v. City of Highland Park*, 703 N.E.2d 883, 893 (Ill. 1998). Petitioners brought three claims in this case challenging Chicago's proposed acquisition of the cemetery. Two were directed at the OMA because of its amendment to IRFRA. The third, under RLUIPA, even sought strict scrutiny. Thus, if petitioners regain a claim under IRFRA by invalidating OMA section 96, that claim would challenge the same action they challenged in this case and is therefore precluded.[15] Moreover, petitioners could obtain

---

[15] Petitioners had filed a state-court action under IRFRA when Chicago first announced the OMP. Pet. 6. Petitioners write that the "claim was dismissed as moot" (*id.* at 7), but it

actual relief only if the state courts were willing and allowed to overrule the FAA's determination, reached after thousands of hours of expert study, regarding the proper layout for O'Hare's ALP—an issue that is itself res judicata. See *Bensenville*, 457 F.3d at 70-73 (upholding FAA's approval of ALP). While petitioners may contest our reading of state law, there is no reason to think the state court will forgive their attempt to multiply judicial proceedings and profit from their delay by challenging the condemnation under IRFRA at this late date.

6. Petitioners close by assuring the Court that they are not "Luddites" and that their multi-year, multi-jurisdiction litigation campaign against the OMP is not motivated by hostility to O'Hare expansion but merely incidental to sincere religious belief. Pet. 31. Whatever petitioners' motivation, they consistently ignore that the real party in interest on the other side of these proceedings is not Chicago. Rather, Chicago is building the OMP for the millions of travelers whose lives (including their own religious commitments) are disrupted by delays and capacity-restrictions as a result of O'Hare's outmoded present design. Petitioners, raising claims unavailable to hundreds of other property owners affected by the OMP, have been repeatedly heard on their claims that they were "targeted" or "singled out"; this is the third of eight federal appeals, and petitioners or their former co-plaintiffs are also

---

was dismissed on their motion (App., *infra*, 24a), and it was not moot at all. The claim was not currently available to petitioners, but success on either of the two claims they leveled at OMA section 96 in this case would have enabled them to pursue an IRFRA claim. At a minimum, therefore, the claim could have and should have been brought in this case.

parties to at least four state-court cases.[16] The instant petition, in which petitioners are able to advance a colorable plea for certiorari only by affirmatively misrepresenting the Seventh Circuit's decision and seriously distorting this Court's precedent, should be denied.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

SEAN H. DONAHUE
Suite 808
2000 L Street, N.W.
Washington, DC 20036
(202) 466-2234

DAVID T. GOLDBERG
8th Floor
99 Hudson Street
New York, NY 10013
(212) 334-8813

* Counsel of Record

MARA S. GEORGES
Corporation Counsel
of the City of Chicago
BENNA RUTH SOLOMON *
Deputy Corporation Counsel
MYRIAM ZRECZNY KASPER
Chief Assistant Corporation Counsel
CHRISTOPHER M. GRUNEWALD
Assistant Corporation Counsel
30 N. LaSalle Street, Suite 800
Chicago, Illinois 60602
(312) 744-7764

Attorneys for Respondent City of Chicago

April 11, 2008

---

[16] The cemetery is among only 54 pieces of property out of 605 parcels in the acquisition area that Chicago does not already own. Thirty-five of the unacquired properties are either owned by the Village of Bensenville, one of the municipal plaintiffs below, or represented by one of petitioners' counsel. Another 13 are in litigation. Only 6 have not yet received formal offers, as required by state law.