No. 07-

IN THE
# Supreme Court of the United States

ST. JOHN'S UNITED CHURCH OF CHRIST, *et al.*,
*Petitioners,*

v.

CITY OF CHICAGO, *et al.*,
*Respondents.*

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

## PETITION FOR A WRIT OF CERTIORARI

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## QUESTION PRESENTED

Illinois amended a state law to withdraw from one religious group a statutory protection that it continues to offer to all other religious groups in the State. In evaluating a Free Exercise challenge to this law, a divided panel of the Seventh Circuit refused to apply strict scrutiny: It held that the law remained neutral and of general applicability because the State, in treating this religious group differently, was pursuing a secular objective, not a religiously motivated one.

The rule adopted by the Seventh Circuit has been embraced by the First, Fifth, and Ninth Circuits. In contrast, four other Circuits—the Third, Sixth, Tenth, and Eleventh—have held that legislative motivation is irrelevant; a law that singles out religion for unique burdens is categorically not neutral and of general applicability, regardless of whether the law's goals are secular and benign.

The question presented is: Whether the Seventh Circuit correctly held that a law extending a benefit to some religious groups but withholding it from others is neutral and of general applicability simply because "the legislature had [a] nondiscriminatory purpose" in adopting the law.

## PARTIES TO THE PROCEEDINGS

Petitioners are St. John's United Church of Christ, Helen Runge, and Shirley Steele. They were plaintiffs in the District Court and appellants before the United States Court of Appeals for the Seventh Circuit.

Respondents are the City of Chicago ("Chicago"), the Federal Aviation Administration ("FAA"), and FAA Acting Administrator Robert A. Sturgell. Chicago, the FAA, and former FAA Administrator Marion C. Blakey were defendants in the District Court and appellees before the United States Court of Appeals for the Seventh Circuit.

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## PETITION FOR A WRIT OF CERTIORARI

St. John's United Church of Christ and two of its members, Helen Runge and Shirley Steele (collectively "St. John's"), respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit.

## OPINIONS BELOW

The opinion of the Seventh Circuit affirming the District Court's dismissal of petitioners' Free Exercise claim is reported at 502 F.3d 616 and reprinted in the appendix hereto ("App.") at 1a. The opinion of the District Court is reported at 401 F. Supp. 2d 887 and reprinted at App. 64a.

## JURISDICTION

The judgment of the Court of Appeals was entered on September 13, 2007. App. 2a. A timely petition for rehearing and rehearing *en banc* was denied on December 4, 2007. App. 105a. The jurisdiction of this Court rests on 28 U.S.C. § 1254(1).[1]

## CONSTITUTIONAL PROVISION INVOLVED

The First Amendment to the United States Constitution provides in pertinent part: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof."

## INTRODUCTION

In *Employment Division, Department of Human Resources of Oregon* v. *Smith*, 494 U.S. 872 (1990), and *Church of Lukumi Babalu Aye Inc.* v. *City of Hialeah*, 508 U.S. 520 (1993), this Court held that a law does not offend the Free Exercise Clause so long as it is neutral and generally applicable.

In the 15 years since, the lower courts have divided over a fundamental question: whether a law that singles out religious activity for differential treatment categorically lacks neutrality or general applicability. Four circuits have held that it does. But with the decision below, the Seventh Circuit joins three other circuits that have taken the opposite approach: They have held that a law

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[1] Because their lawsuit challenges the constitutionality of a state statute, petitioners named state officials in their complaint. The State of Illinois, however, moved to dismiss, arguing that Chicago was the proper defendant. The District Court dismissed the State on March 29, 2005. Since then, none of the parties has served the State with any pleadings. Nevertheless, petitioners have served a copy of this Petition on the Attorney General of Illinois. *See* S. Ct. R. 29.4(c).

imposing this sort of differential treatment remains neutral and generally applicable unless the law's object was to target the affected religious activity *because of* its religious nature.

At issue below was the Illinois Religious Freedom Restoration Act ("Illinois RFRA"). As first enacted, the Illinois RFRA provided all religious exercise with across-the-board protection against governmental intrusion. In 2003, however, the legislature amended the Illinois RFRA to withdraw its protections from one religious group: those who worship at religious cemeteries located adjacent to O'Hare International Airport. The legislature stripped RFRA protection from this group because the religious cemeteries supposedly interfered with Chicago's desire to expand O'Hare.

A divided panel of the Seventh Circuit deemed this amendment "neutral," even though it singles out a tiny subset of religious observers, and "generally applicable," even though it leaves the Illinois RFRA's protections applicable to some religious observers but not others. App. 36a. The court so held because it reduced the Free Exercise inquiry to one outcome-determinative question: "whether the object of the [law] was 'to infringe upon or restrict practices because of their religious motivation.' " App. 32a (quoting *Lukumi*, 508 U.S. at 533). Concluding that the legislature was motivated not by religion but by a desire to ease O'Hare's expansion, the court answered in the negative and ended the inquiry.

The panel majority thus embraced a rule that three other circuits—the First, Fifth, and Ninth—have endorsed: Unless the object of a law is to impose special burdens on certain religious groups *because of* religion, strict scrutiny is not triggered. But the

dissenting judge below (Ripple, J.) and four circuits—the Third, Sixth, Tenth, and Eleventh—have taken exactly the opposite approach: They have rejected a motive requirement and held that strict scrutiny applies whenever religious practice is subjected to objectively unequal treatment, even if that unequal treatment "was the means to an entirely secular end." *Shrum* v. *City of Coweta*, 449 F.3d 1132, 1144 (10th Cir. 2006).

This latter approach is the correct reading of *Smith* and *Lukumi*. A statute that objectively treats one religious group differently than all other religious groups categorically lacks neutrality and general applicability and therefore triggers strict scrutiny. To be sure, the *Lukumi* majority suggested that a government motive to burden religion unequally because of its religious nature may be *sufficient* to trigger strict scrutiny, but it did not hold that such a motive inquiry is necessary in cases where religious practice is being subjected to demonstrably unequal treatment. And to clarify matters, Justice Scalia (joined by Justice Thomas) emphasized in *Lukumi* that "[t]he First Amendment does not refer to the purposes for which legislators enact laws, but to the effects of the laws enacted." *Lukumi*, 508 U.S. at 558 (Scalia, J., concurring in part and in the judgment). The rule adopted by the Seventh Circuit rejects that principle. Under the panel majority's approach, the unequal "effects of the laws enacted" will not trigger strict scrutiny unless they are coupled with evidence about the "purposes" animating those laws. *Id.*

The deep division over this issue has not gone unnoticed. Six judges of the Ninth Circuit have recognized "growing confusion among the lower courts" about Free Exercise and predicted that "[i]t is

only a matter of time before the Supreme Court confronts this confusion." *KDM ex rel. WJM* v. *Reedsport School Dist.*, 210 F.3d 1098, 1099 (9th Cir. 2000) (O'Scannlain, J., joined by Kozinski, Nelson, Kleinfeld, Tashima, and Wardlaw, dissenting from denial of rehearing en banc). Scholars likewise have noted that "confusion abounds in the lower courts, which interpret [*Smith* and *Lukumi*] in significantly divergent ways." Carol M. Kaplan, *The Devil Is in the Details: Neutral, Generally Applicable Laws and Exceptions from* Smith, 75 N.Y.U. L. Rev. 1045, 1046 (2000). The Court should grant certiorari to resolve this entrenched conflict and to provide much-needed clarity on this recurring and important question.

## STATEMENT OF THE CASE

### A. Facts

1. St. John's is a Christian church established in 1849 in Bensenville, Illinois. That same year, St. John's consecrated St. Johannes Cemetery. The remains of about 1,300 people are buried there.

St. John's is part of the United Church of Christ, a Protestant denomination with nearly two million members in the United States. A central belief of the Church is that on the Day of Resurrection, the bodies of Christian believers will be resurrected to live with God. Church members believe that because God ordained St. Johannes as their loved ones' final resting place, the remains should not be disturbed until judgment day. They believe the salvation of deceased members' souls would be impaired if their remains were removed. The District Court and the Seventh Circuit accepted that Chicago's plan to condemn and destroy the cemetery is a "sacrilege to

[St. John's] religious faith"; the sincerity of that belief is not at issue. App. 31a-32a, 81a.

Among the St. John's members who hold these beliefs are petitioners Helen Runge and Shirley Steele. Ms. Runge, now in her 80s, was baptized, married in, and intends to have her funeral at St. John's. About 25 of Ms. Runge's relatives, including her husband and infant son, are buried at St. Johannes. Ms. Runge visits the cemetery to honor those buried there; she also owns a plot next to her husband, where she intends to be buried. She believes disturbing the graves of her husband and son would be a sacrilege. Likewise, Ms. Steele visits the cemetery to care for and exercise her beliefs at the graves of her grandparents and others.

2. In 2001, Chicago announced a massive expansion plan for O'Hare International Airport. App. 5a. As part of this redevelopment, Chicago decided to acquire 433 acres of land in the Villages of Elk Grove and Bensenville, adjacent to O'Hare. *Id.* 6a. The properties scheduled for condemnation included homes, businesses, and two religious cemeteries—St. Johannes and a cemetery owned by the Rest Haven Cemetery Association ("Rest Haven"). *Id.* St. John's and Rest Haven responded by filing separate suits to block the City's acquisition, with St. John's arguing (among other things) that the City could not destroy the cemetery without violating the Illinois RFRA. The Villages of Bensenville and Elk Grove filed a parallel suit; the state court hearing that suit agreed with the localities' claim that the expansion needed a state permit and granted a preliminary injunction. *Id.* 7a.

Faced with this setback, Chicago turned to the Illinois legislature for relief. The legislature

responded by enacting the O'Hare Modernization Act ("OMA"), which re-wrote more than a dozen laws to remove legal obstacles to O'Hare's expansion. Most pertinent here are two provisions: First, the OMA granted Chicago the power to acquire any property needed for the O'Hare project. App. 8a. Second, the OMA amended the Illinois RFRA to eliminate the protections St. John's had previously enjoyed. Before the OMA's amendment, the Illinois RFRA—like its federal namesake—provided that:

> Government may not substantially burden a person's exercise of religion, even if the burden results from a rule of general applicability, unless it demonstrates that [the burden] (i) is in furtherance of a compelling governmental interest and (ii) is the least restrictive means of furthering that compelling governmental interest.

775 Ill. Comp. Stat. § 35/15. But the OMA revoked this across-the-board protection by adding a new Section 30 to the Illinois RFRA: "Nothing in [the Illinois RFRA] limits the authority of the City of Chicago to exercise its powers under the [OMA] for the purpose of relocation of cemeteries or the graves located therein." *Id.* § 35/30. Section 30, in other words, transformed the Illinois RFRA from a statute that provided strict-scrutiny protection to all religious exercise into a statute that provided that protection to *almost* all religious exercise. The one exception: religious exercise involving cemeteries adjacent to O'Hare. Religious adherents in this category are now excluded from the law's benefits.

### B. Proceedings Below

1. In light of Section 30, St. John's state-court Illinois RFRA claim was dismissed as moot. St.

John's, Rest Haven, and the localities responded by filing suit in the United States District Court for the Northern District of Illinois. App. 9a. In a proposed second amended complaint, St. John's[2] noted that absent Section 30, Chicago would be required to meet strict scrutiny under the Illinois RFRA before it could destroy or move St. Johannes. The complaint alleged that Section 30 was unconstitutional under the Free Exercise Clause because it stripped from St. John's members a benefit—RFRA protection—available to all other religious activity in the state.

2. The District Court found the Free Exercise claim to be without merit and therefore rejected the second amended complaint as futile, effectively dismissing it. The court correctly noted that this Court has deemed laws that are " 'neutral and of general applicability' " to pass muster under the Free Exercise Clause. App. 83a (quoting *Lukumi*, 508 U.S. at 531). But rather than analyze the neutrality and general-applicability requirements, the court read *Smith* to mean that "strict scrutiny applies only to laws that discriminate against religion." *Id.* 84a. Continuing in this vein, the court asked only whether Section 30 was intended to burden St. John's religious exercise because of religion. The answer, the court found, was no: There was "no indication in the complaint that the object of the law is to infringe upon or restrict practices *because* of their religious motivation" and Section 30 did not "single out St. Johannes or any other cemetery because of its religious affiliation." *Id.* 84a-85a (emphasis in original). The District Court concluded:

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[2] The Rest Haven relocation had by then been deleted from the O'Hare expansion plan.

"Nothing in the complaint supports the proposition that Chicago wants the St. Johannes land for any reason other than * * * the expansion of O'Hare Airport. Because [there] is no indication that § 30 discriminates against religion, this Court applies rational basis review." *Id.* 86a.

3. On appeal, the Seventh Circuit divided two-to-one, with the majority adopting the same approach as the District Court. The majority accepted that the destruction of St. Johannes would be a sacrilege to church members and would impose a burden on their religious exercise. App. 31a-32a. The majority also acknowledged the "obvious point" that St. Johannes is "the only cemetery in the State of Illinois affected by the new § 30." *Id.* 35a-36a. But it concluded that this differential treatment was not sufficient to state a Free Exercise claim. That was so because St. John's had failed to show something more—that "the object of the OMA was 'to infringe upon or restrict practices *because of* their religious motivation.' " *Id.* 32a (quoting *Lukumi*, 508 U.S. at 533) (emphasis added). Having framed the question this way, the majority found it immaterial that St. John's alone was singled out by Section 30. In fact, precisely because St. John's was the only religious group targeted, the majority was all the more convinced "that the legislature had the nondiscriminatory purpose of clearing all land needed for O'Hare's proposed expansion." *Id.* 36a. The majority also found that Section 30 was facially neutral because it did not " 'refer[ ] to a religious practice without a secular meaning discernible from the language or context.' " *Id.* 33a (quoting *Lukumi*, 508 U.S. at 533).

The majority, in short, concluded that the government could treat St. John's differently than all

other religious groups in the State, and could thereby impose unique burdens on its members' religious practice, so long as the legislature's underlying motive was unrelated to religion. Because the underlying motive was indeed unrelated to religion, the majority held that "the OMA, including the portion that amends [Illinois RFRA], is a neutral law of general applicability." App. 36a.

This sufficed to dispose of petitioners' claim. The majority nonetheless opined, in dicta, that if strict scrutiny had applied, Section 30 would have satisfied it. Though the task of assessing compelling interest and least-restrictive means is highly fact-bound—and though the case was on appeal from a grant of a motion to dismiss—the majority hypothesized: "Although we think it unnecessary to ask whether the plan passes the strict scrutiny test * * * we add for the sake of completeness that * * * the plan passes muster." App. 36a.

Judge Ripple dissented. He first rejected the majority's conclusion that Section 30 was neutral on its face. Explaining that " '[a] law lacks facial neutrality if it refers to a religious practice without a secular meaning discernable from language or context,' " App. 59a (quoting *Lukumi*, 508 U.S. at 533), Judge Ripple concluded that "it is clear that the OMA's amendment to the Illinois RFRA is not facially neutral." *Id.* 59a-60a. He emphasized that the majority's "analysis fails to appreciate that, when read in context," Section 30—an amendment to a law that addressed nothing but religion—had no possible secular referent. *Id.* 60a.

Judge Ripple then turned to the majority's other proposition—that a Free Exercise claim requires not just differential treatment but also a showing that

the government singled out a religious group *because of* religion—and rejected it too. Judge Ripple explained that "[t]he effect of the amendment is to remove from the protections afforded to every other individual's religious observance, those individuals whose religious practices would be substantially burdened by the relocation of cemeteries in connection with the expansion of O'Hare." *Id.* 60a-61a. That unequal treatment was sufficient to trigger strict scrutiny: "The OMA amendment * * * offends the Free Exercise Clause by penalizing those individuals whose religious observance is affected by the expansion project by denying them 'an equal share of the rights, benefits, and privileges enjoyed by other citizens.' * * * [S]trict scrutiny must be applied." *Id.* 61a (quoting *Lyng* v. *Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439, 449 (1988)).

Finally, Judge Ripple rebuked the majority for addressing in dicta, and at the motion-to-dismiss stage, how the state's action would have fared under the strict-scrutiny inquiry. He emphasized that the court could not reach the merits of strict scrutiny because "accepting the City's assertions [regarding narrow tailoring] at this stage in the litigation is inconsistent with our obligation * * * to accept all well pleaded facts as true." App. 63a. Since "there has been none of the factual development necessary to determine whether the means chosen by the City are narrowly tailored to meet the compelling interest asserted here," Judge Ripple chided the majority for needlessly speculating that Chicago could satisfy strict scrutiny. *Id.*[3]

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[3] Judge Ripple's conclusion was consistent with that of the only judge to actually review the full panoply of evidence and

## REASONS FOR GRANTING THE WRIT

### I. THE RULING BELOW EXACERBATES AN EXISTING CIRCUIT SPLIT.

The Seventh Circuit's decision deepens an entrenched circuit split on a question federal courts regularly face: whether selectively imposing burdens on certain religious practices is enough to trigger strict scrutiny under the Free Exercise Clause, or whether plaintiffs must also show that the government specifically burdened their religious practice *because of* its religious nature. The Seventh Circuit held that this extra showing is necessary. That same rule has been embraced by the First, Fifth, and Ninth Circuits. In contrast, at least four other circuits—the Third, Sixth, Tenth, and Eleventh—have held just the opposite. This Court should grant the writ to resolve the four-to-four split. *See* S. Ct. R. 10(a); *Braxton* v. *United States*, 500 U.S. 344, 347 (1991) (a "principal purpose for which we

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consider on the merits whether the O'Hare plan could survive strict scrutiny. In *Village of Bensenville* v. *FAA*, 457 F.3d 52 (D.C. Cir. 2006), the D.C. Circuit denied a petition for review brought by, among others, St. John's, which challenged under federal RFRA the decision by the FAA to approve the O'Hare plan. *Id.* at 68. A majority of the D.C. Circuit held, as a threshold matter, that FAA's approval of Chicago's expansion plan was not governed by federal RFRA. Judge Griffith dissented, concluding that federal RFRA did apply. He therefore went on to apply strict scrutiny and found that the FAA had failed to carry its burden under that exacting standard. Petitioners, he explained, had presented alternative designs that would permit O'Hare's expansion while preserving St. Johannes. *Id.* at 77 (Griffith, J., concurring in part and dissenting in part). Indeed, one of these alternatives involves nothing more than "shifting one runway 350 feet" and would "still achieve the FAA's objectives." *Id.*

use our certiorari jurisdiction * * * is to resolve conflicts among the United States courts of appeals").

### A. Four Circuits Hold That Laws Singling Out Religion For Differential Treatment Are Categorically Not Neutral And Generally Applicable.

The decision below squarely conflicts with the decisions of four circuits. These circuits have applied strict scrutiny to laws singling out religious practice for unequal burdens regardless of the government's underlying motivation for imposing those burdens.

**The Tenth Circuit.** Most recently, the Tenth Circuit so held in *Shrum*, 449 F.3d 1132. *Shrum* concerned a police officer who also worked as a minister. He alleged that the police chief rearranged his work schedule so that it would conflict with his ministerial duties, forcing him to quit his police job. *Id.* at 1134. The allegation was not that the chief had burdened Shrum's religious practice because of its religious nature, but instead that he had done so to achieve an underlying goal unrelated to religion—forcing Shrum to quit the force.

Writing for a unanimous panel, Judge McConnell held that this act triggered strict scrutiny even though the chief's motivation was, at base, secular. "To be sure, Officer Shrum does not allege that Chief Palmer held Officer Shrum's faith against him or acted from religious prejudice," Judge McConnell wrote. "Rather, the claim is that religious discrimination was the means to an entirely secular end: Chief Palmer wanted to force Officer Shrum out, and making him choose between his duties as a police officer and his duties as a minister was the method at hand." *Id.* at 1144. But that fact did not

immunize the chief's action. "[T]he Free Exercise Clause," Judge McConnell wrote,

> is not limited to acts motivated by overt religious hostility or prejudice. As its language suggests, the animating ideal of the constitutional provision is to protect the 'free exercise of religion' from unwarranted governmental inhibition whatever its source. * * * True to this history, the Free Exercise Clause has been applied numerous times when government officials interfered with religious exercise not out of hostility or prejudice, but for secular reasons, such as saving money, promoting education, obtaining jurors, facilitating traffic law enforcement, maintaining morale on the police force, or protecting job opportunities. [*Id.* at 1144-45 (collecting cases) (citations omitted).]

The Tenth Circuit's decision in *Shrum* squarely conflicts with the rule adopted by the Seventh Circuit. In the case below, as in *Shrum*, the government singled out a religious actor for a special burden. The government entities in both cases did so not out of religious hostility, but instead as "the means to an entirely secular end"—airport expansion here and work-force reduction in *Shrum*. The panel below held that because of this "secular reason[ ]," the Illinois law was neutral, generally applicable, and outside the Free Exercise Clause's protection. The case would have come out the other way under the Tenth Circuit's rule.

The majority below denied that its ruling conflicted with *Shrum*. App. 42a. But its attempt to distinguish *Shrum* on its facts misses the point: Unlike the rule the majority adopted, *Shrum* held that laws that treat religious practices differently are

categorically not neutral or generally applicable. Whether the governmental actor was motivated by religious prejudice or animus is simply irrelevant under the Tenth Circuit's decision in *Shrum*. The Tenth Circuit's rule thus squarely conflicts with the decision below, which required plaintiffs to show that the government burdened religious practice *because of* its religious nature.

**The Eleventh Circuit.** The Eleventh Circuit has adopted the same rule as the Tenth. In *Midrash Sephardi* v. *Town of Surfside*, 366 F.3d 1214 (11th Cir. 2004), plaintiffs challenged a zoning ordinance that excluded religious assemblies from a downtown business district but allowed private clubs. *Id.* at 1219. Applying the *Smith-Lukumi* rubric, the court held that the ordinance was non-neutral: It "target[ed]" religious practice in the sense that it "treat[ed] religious assemblies differently than secular assemblies." *Id.* at 1233. According to the court, strict scrutiny was appropriate even though there was no reason to believe that the differential treatment was motivated by a desire to suppress religious exercise: "We reject Surfside's contention that the [business district] is neutral because there is no evidence of selective and discriminatory intent against Orthodox Jews, a pattern of hostility or discriminatory animus toward the synagogues, or evidence that Surfside directly targeted religion." *Id.* at 1234 n.16. As the court explained, "[u]nder *Lukumi*, it is unnecessary to identify an invidious intent in enacting a law—only Justices Kennedy and Stevens attached significance to evidence of the lawmakers' subjective motivation." *Id.* (citing *Lukumi*, 508 U.S. at 540-542; *id.* at 558 (Scalia, J., concurring in part and concurring in judgment)).

The Eleventh Circuit, in short, understood *Lukumi* to condemn not just the imposition of unequal restrictions on a religious practice *because* it is religious, but also the imposition of unequal restrictions for *any* reason at all. Applying that approach here, the decision below would have come out the other way. For although Section 30 was enacted for secular reasons—to make room for a new runway at O'Hare—it nevertheless targeted one type of religious practice for special treatment. Under the Eleventh Circuit's decision in *Midrash*, that alone would have triggered strict scrutiny.

**The Third Circuit.** The Third Circuit has aligned itself with the Tenth and Eleventh, most notably in decisions authored by now-Justice Alito. *See Blackhawk* v. *Pennsylvania*, 381 F.3d 202 (3d Cir. 2004); *Fraternal Order of Police Newark Lodge No. 12* v. *City of Newark*, 170 F.3d 359 (3d Cir. 1999).

In *Blackhawk,* the appellant was a Native American who kept bears for religious reasons. State officials demanded that Blackhawk obtain a special permit, and he applied for a waiver, which was denied. *Id.* at 205. Blackhawk sued on Free Exercise grounds, arguing that the waiver process constituted a "system of individualized exemptions" that entitled him to an exemption of his own. *Id.* at 206; *see Smith*, 494 U.S. at 884 ("[W]here the State has in place a system of individual exemptions, it may not refuse to extend that system to cases of 'religious hardship' without compelling reason.").

The Third Circuit, per Judge Alito, agreed that the waiver process at issue created an exemption system sufficient to trigger strict scrutiny. *Id.* at 209. That was so even though there was no evidence that the state had denied Blackhawk's waiver

because of a desire to burden his religious practices. Judge Alito explained why with a quote from his earlier opinion in *Fraternal Order*: "'[T]he * * * exemption raises concern because it indicates that the Department has made a value judgment that secular * * * motivations * * * are important enough to overcome its general interest in uniformity but that religious motivations are not.'" *Id.* at 208 (quoting *Fraternal Order*, 170 F.3d at 366) (alteration in *Blackhawk*). And "'when the government makes a value judgment in favor of secular motivations, but not religious motivations, the government's actions must survive heightened scrutiny.'" *Id.* (quoting *Fraternal Order*, 170 F.3d at 366). *See also Tenafly Eruv Ass'n, Inc.* v. *Borough of Tenafly*, 309 F.3d 144, 165-168 (3d Cir. 2002).

The Third Circuit's decisions in *Fraternal Order* and *Blackhawk* square with those of the Tenth and Eleventh Circuits. As in *Shrum* and *Midrash*, the Third Circuit found Free Exercise violations based solely on unequal treatment. *Blackhawk*, 381 F.3d at 208. The court never paused to ask *why* government had treated religious practice differently—whether the officials involved had disliked the groups at issue, or conversely whether they had had some wholly benign underlying motive. The mere fact that government had engaged in unequal treatment, which inherently "devalues" religious practice, *Fraternal Order*, 170 F.3d at 366, was sufficient to trigger strict scrutiny.

**The Sixth Circuit.** In *Kissinger* v. *Board of Trustees*, 5 F.3d 177 (6th Cir. 1993), the Sixth Circuit likewise held that illicit motive is merely a sufficient, not a necessary, condition to trigger strict scrutiny. *Kissinger* involved a student's claim that her college

offended the Free Exercise Clause by requiring her to dissect animals despite her religious beliefs. *Id.* at 178-179. The court applied a disjunctive test drawn from *Smith*. *Id.* at 179. One part focused on the motive inquiry: It asked whether the curriculum was intended to "attack or exclude any individual on the basis of his or her religious beliefs." *Id.* But a separate part of the analysis—a part unconcerned with motive—asked only whether "evidence exist[ed] that any student was allowed to graduate without" participating in the challenged program. *Id.* If the answer had been "yes," the college's curriculum would not have been "generally applicable" and strict scrutiny would have applied. *See id.*

*Kissinger* squares with *Shrum*, *Midrash*, and *Blackhawk*. Like those cases, it stands for the proposition that laws singling out religious groups are categorically non-neutral or non-generally applicable. These holdings cannot be reconciled with the Seventh Circuit's ruling.

### B. Four Circuits Have Adopted A Contrary Rule.

The First, Fifth, and Ninth Circuits have adopted a rule that squarely conflicts with the decisions above. In these circuits—and in the Seventh Circuit now—laws that impose differential treatment on religious groups do not categorically trigger strict scrutiny. Instead, such laws remain neutral and generally applicable unless their object was to target religious activity *because of* its religious nature. Certiorari is warranted to resolve this entrenched split.

**The First Circuit.** In *Strout* v. *Albanese*, 178 F.3d 57 (1st Cir. 1999), parents challenged a Maine law that allowed the state to fund students' private-

school educations, provided the private schools were "non-sectarian." *Id.* at 59. The court rejected a Free Exercise challenge to this law, concluding that the *Smith-Lukumi* line of cases was "inapposite." *Id.* at 65. This was so because in *Lukumi* "the record showed a substantial animus against [religion] that motivated the law in question. No such showing has been made here." *Id.* The First Circuit, in other words, treated a showing that government singled out religion because of its religious nature as necessary, not merely sufficient, to state a Free Exercise claim, just as the Seventh Circuit did below.

**The Ninth Circuit.** The Ninth Circuit adopted this same approach in *KDM ex rel. WJM* v. *Reedsport School District*, 196 F.3d 1046 (9th Cir. 1999), *cert. denied*, 531 U.S. 1010 (2000). *KDM* involved an Oregon regulation allowing the provision of state-funded special-education services to private-school students, but only if the services were provided in a "religiously-neutral setting." *Id.* at 1048. When KDM, a disabled child, transferred to a Christian school, the school district no longer allowed a vision specialist to visit him at his schoolhouse. The district instead required KDM—who was blind and suffered from cerebral palsy—to leave the school and travel to a firehouse down the street. *Id.*

KDM argued that the Oregon rule was non-neutral and non-generally applicable because the rule, on its face, treated students at private sectarian schools differently than students at private non-sectarian schools: The latter would not have had to leave their school grounds to receive services. A divided Ninth Circuit panel rejected this challenge. The majority recognized that "the Oregon regulation is not 'neutral.'" *Id.* at 1050. Even so, the majority held

that strict scrutiny was not triggered because "as applied here [the regulation] does not have 'the object or purpose * * * [of] suppression of religion or religious conduct.' " *Id.* (quoting *Lukumi*, 508 U.S. at 533). It concluded: "We agree with the [First Circuit] in *Strout* v. *Albanese*, [which] distinguished *Lukumi* because there was no evidence of 'a substantial animus * * * that motivated the law in question.' " *Id.* (quoting *Strout*, 178 F.3d at 65).

The Ninth Circuit, in short, did just what the Seventh Circuit did below: It conceded that a law singled out religion for unequal treatment but held that that was not enough; the plaintiff also had to show that the law's goal was to burden religious conduct precisely because it was religious conduct.

This holding inspired a pair of impassioned dissents. Judge Kleinfeld, dissenting from the panel decision, explained that "[t]he regulation at issue here is *not* neutral on its face. By requiring a 'religiously-neutral setting,' the government expressly and intentionally discriminates against religious as opposed to secular private schools." *Id.* at 1053 (Kleinfeld, J., dissenting) (emphasis in original). He concluded: "When the government, by a law not neutral on its face, treats people of one or all religions better or worse than others, the constitutional question is traditionally formulated so that the answer has to be 'No!' " *Id.*

KDM's petition for rehearing en banc was denied, but not before six judges heaped criticism on the panel's rule. Judge O'Scannlain, writing on behalf of Judges Kozinski, Nelson, Kleinfeld, Tashima, and Wardlaw, explained that the panel decision suffered from a "fundamental inconsistency with Supreme Court precedent" because under *Lukumi*, "a law that

is *non-neutral on its face*, like the Oregon regulation at issue here, triggers strict * * * scrutiny—even in the absence of extrinsic evidence suggesting that the law was the result of anti-religious bigotry or animus." *KDM ex rel. WJM* v. *Reedsport Sch. Dist.*, 210 F.3d 1098, 1099 (9th Cir. 2000) (O'Scannlain, J., dissenting from denial of rehearing en banc) (emphasis in original). Underscoring the need for this Court to provide clarity and uniformity, Judge O'Scannlain criticized the panel for "contribut[ing] to the growing confusion among the lower courts over the demands of the First Amendment." *Id.*

**The Fifth Circuit.** Finally, the Fifth Circuit has adopted the approach of the First, Seventh, and Ninth Circuits. In *World Wide Street Preachers Fellowship* v. *Town of Columbia*, 245 Fed. Appx. 336 (5th Cir. 2007), the Fifth Circuit announced in an unpublished opinion that "[t]he constitutional test[ ] for whether governmental action unconstitutionally infringes on the free exercise of religion" is "dependent on whether the restriction was motivated by the nature of the conduct that is restricted." *Id.* at 344. "[A] restriction of religious practices because of their religious nature must survive strict scrutiny. * * * Thus, the motivation for the restriction on the exercise of religion *must be established before the restriction can be legally analyzed*." *Id.* (emphasis added). This holding is, by its plain terms, irreconcilable with decisions like *Shrum* and *Midrash*. After all, in those cases, the courts recognized that a restriction on religious exercise can—and should—be analyzed by examining nothing more than the restriction's unequal treatment of religion. In contrast, the Fifth Circuit—like the panel majority below—requires courts to divine "the

motivation for the restriction" before reaching any conclusion about its constitutionality.

* * *

The circuits thus divide four-to-four on the question presented by this petition. This persistent division has drawn the attention of not just prominent jurists but also academics. Professor Laycock, a leading religion-law scholar, has noted that "we have the *Smith/Lukumi* test, but we have considerable disagreement over what exactly that test means." Douglas Laycock, *The Supreme Court and Religious Liberty*, 40 Cath. Law 25, 26 (2000). Other commentators likewise have noted that "[t]he federal circuits have split on whether *Lukumi* requires an object to infringe upon religious practice before a law must be supported by a compelling government interest" and that "the Supreme Court has not addressed this split." 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, 1285 (2005).

On a broader level, the legal academy has long documented the lower courts' confusion about what it means to say government must be "neutral" toward religion. *See, e.g.*, Laycock, *supra*. That confusion has not escaped the attention of the Justices of this Court. In 1999, Justice Thomas noted that the "lower courts * * * are struggling to reconcile our conflicting First Amendment pronouncements," and suggested that the Court provide "much needed guidance." *Columbia Union College* v. *Clark*, 527 U.S. 1013 (1999) (Thomas, J., dissenting from denial of certiorari). That guidance is needed more urgently today than it was then. This Court should exercise

its certiorari jurisdiction to resolve the deep divisions within the country.

## II. THE RULING BELOW CONFLICTS WITH THIS COURT'S PRECEDENTS.

The rule adopted below also conflicts with this Court's Free Exercise jurisprudence. This Court's cases establish that an underlying motive to burden religion may be a *sufficient*, but is not a *necessary*, condition to trigger strict scrutiny: Where unequal treatment exists, that is enough to render the governmental action non-neutral and non-generally applicable.[4] The Seventh Circuit's contrary holding leads to absurd results in practice, immunizing religion-targeting laws simply because they were adopted in good faith and for secular reasons. The Court should grant the writ and clarify that "neutrality" and "general applicability" do not turn on any showing of religious hostility. *See* S. Ct. R. 10(c) (certiorari is warranted when "a United States court of appeals * * * has decided an important federal question in a way that conflicts with relevant decisions of this Court").

1. The Free Exercise Clause's modern history begins with *Smith*. *Smith* involved two men who were denied unemployment benefits after being fired for using peyote. 494 U.S. at 874. They challenged the denial, arguing that they were entitled to a religious exemption for their peyote use. The Court declined to apply strict scrutiny. It concluded that "the right of free exercise does not relieve an

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[4] It does not matter whether the treatment is unequal *vis a vis* another religious group or *vis a vis* a secular group. Either type of singling-out runs afoul of the First Amendment. *See Larson* v. *Valente*, 456 U.S. 228, 245-246 (1982).

individual of the obligation to comply with a valid and neutral law of general applicability." *Id.* at 879 (quotation omitted). The Court explained that "if prohibiting the exercise of religion" is "merely the incidental effect of a generally applicable and otherwise valid provision, the First Amendment has not been offended." *Id.* at 878.

The Court subsequently considered in *Lukumi* several municipal ordinances that were designed to prohibit Santeria animal sacrifice, while leaving activities such as fishing untouched. *Lukumi*, 508 U.S. at 543. The Court, per Justice Kennedy, held that the ordinances triggered strict scrutiny.

Justice Kennedy analyzed separately the "neutrality" and "general applicability" inquiries. As to the first, he noted that "*[a]t a minimum*, the protections of the Free Exercise Clause pertain if the law at issue discriminates against some or all religious beliefs or regulates or prohibits conduct because it is undertaken for religious reasons." *Id.* at 531 (emphasis added). He explained that "the minimum requirement of neutrality is that a law not discriminate on its face." *Id.* at 533. That "minimum requirement" is violated if the law "refers to a religious practice without a secular meaning discernible from the language or context." *Id.*

In a separate section of his neutrality analysis—a section joined only by Justice Stevens—Justice Kennedy wrote that "[i]n determining if the object of a law is a neutral one under the Free Exercise Clause, we can also find guidance in our equal protection cases." *Id.* at 540. He suggested that "[h]ere, as in equal protection cases, we may determine the city council's object from both direct and circumstantial evidence," including legislative

history. *Id.* (citing *Arlington Heights* v. *Metropolitan Housing Dev. Corp.*, 429 U.S. 252, 267-268 (1977)). Having examined this evidence, Justice Kennedy concluded that the ordinances "were enacted 'because of,' not merely 'in spite of,' their suppression of Santeria religious practice." *Id.* (quoting *Arlington Heights*, 429 U.S. at 279).

Writing for a majority again, Justice Kennedy "turn[ed] next to a second requirement of the Free Exercise Clause, the rule that laws burdening religious practice must be of general applicability." *Id.* at 542. Here he abandoned his concerns for "legislative object" and focused on the differential treatment of similarly situated actors: "The principle that government, in pursuit of legitimate interests, cannot in a selective manner impose burdens only on conduct motivated by religious belief is essential to the protection of the rights guaranteed by the Free Exercise Clause." *Id.* at 542-543. He concluded that the ordinances were non-generally applicable because they burdened Santeria animal sacrifice while not burdening other practices—fishing, for example—that also undermined the ordinances' ostensible goals. *Id.* at 544-545.

Justice Scalia, joined by Chief Justice Rehnquist, concurred in part but rejected Justice Kennedy's analogy to the Equal Protection Clause. He explained that First Amendment analysis does not require "determination of legislative motive." *Id.* at 558 (Scalia, J., concurring in part and concurring in the judgment). He explained that "[t]he First Amendment does not refer to the purposes for which legislators enact laws, but to the effects of the laws enacted." *Id.* at 559. For that reason, it would not matter "that a legislature consists entirely of the

pure-hearted, if the law it enacts in fact singles out a religious practice for special burdens." *Id.*

2. The panel majority below viewed *Smith* and *Lukumi* as cases about motive. According to the panel, *Smith* and *Lukumi* require not just that religious activity be singled out but also that the singling-out be motivated by the activity's religious aspects. That rule, however, conflicts with *Smith* and *Lukumi* in at least three ways.

a. *First*, a motive requirement cannot be extracted from *Lukumi*. The Court focused on legislative "object" only when analyzing one of the two Free Exercise inquiries—neutrality—and not the other—general applicability. The general-applicability inquiry was instead concerned with differential treatment of similarly situated entities. *See Lukumi*, 508 U.S. at 542-544. Indeed, the majority's explanation of "general applicability" used language that cannot be reconciled with a motive requirement: It wrote that government, even "*in pursuit of legitimate interests*, cannot in a selective manner impose burdens only on conduct motivated by religious belief." *Id.* at 542-543 (emphasis added). Further, even the neutrality discussion was not so limited. *Lukumi* did not announce that an intent to suppress religion was *required* to deem a law non-neutral, but only that it was sufficient. *See id.* at 532 ("*At a minimum*," the Clause pertains to a law that "regulates or prohibits conduct because it is undertaken for religious reasons.") (emphasis added). And importantly, the portion of *Lukumi* tying the Free Exercise Clause to *Arlington Heights*-style "because of, not in spite of" equal-protection analysis garnered only two votes.

These points have led four circuits to conclude that the *Smith-Lukumi* line does not announce a motive requirement—a conclusion with which the legal academy agrees. "Whatever else it may be, *Lukumi* is not a motive case. * * * Seven Justices failed to find bad motive, but nine voted to strike down the ordinances." Laycock, 40 Cath. Law at 28. Then-Professor (now Judge) McConnell reached the same conclusion: "*Smith* did not limit free exercise protection to laws motivated by 'religious bigotry,' 'persecution,' or even 'animus or hostility to the burdened religious practices' * * *. Rather, *Smith* held that the Free Exercise Clause applies to laws that are not neutral or generally applicable (regardless of their motivation)." Michael W. McConnell, *Institutions and Interpretation: A Critique of* City of Boerne v. Flores, 111 Harv. L. Rev. 153, 167 (1997); *see also* Laurence H. Tribe, *American Constitutional Law* § 5-16, at 956 (3d ed. 2000) (same); 5 Ronald D. Rotunda & John E. Nowak, *Treatise on Constitutional Law: Substance and Procedure* § 21.6, at 106 (3d ed. 1999) (same).[5]

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[5] This Court has decided one Free Exercise case since *Lukumi*, but it is not to the contrary. In *Locke* v. *Davey*, 540 U.S. 712 (2004), the Court held that a government's decision not to fund certain religious instruction is permissible unless it (1) burdens religious practice *or* (2) is the product of bad motive. *See Locke*, 540 U.S. at 720; *see also* Douglas Laycock, *Theology Scholarships, The Pledge of Allegiance, and Religious Liberty: Avoiding the Extremes but Missing the Liberty*, 118 Harv. L. Rev. 155, 216 (2004). Here, Section 30 concededly imposes a substantial burden on religious practice. *Locke*'s "motive" discussion therefore is irrelevant. In any event, *Shrum*, *Midrash* and *Blackhawk*—all of which rejected a motive requirement—were decided after *Locke* was handed down. *Locke* therefore has not ameliorated the circuit split.

The Seventh Circuit ignored this guidance—and the holdings of four sister circuits—when it announced its contrary rule. In so doing it saw fit to rely explicitly on the equal-protection portion of *Lukumi*, even though that portion attracted just two votes. App. 34a. Its motive requirement, in short, relies on portions of *Lukumi* that were rejected by most of the Court and cannot in any event be squared with the rest of *Lukumi*'s text.

b. *Second*, the inclusion of a motive requirement, even in cases where unequal treatment and burden have been shown, is unfaithful to the plain language of both the Free Exercise Clause and the Court's test. As to the former, the Court was careful to note in *Smith* that the rule adopted there was a "permissible reading of the [constitutional] text." 494 U.S. at 878. Not so with the Seventh Circuit's approach: It looks only to "the purposes for which legislators enact laws," and not, like the Clause itself, "to the effects of the laws enacted." *Lukumi*, 508 U.S. at 558 (Scalia, J., concurring in part and concurring in the judgment). And as to the latter, the Seventh Circuit's approach hews to the plain meaning of neither the word "neutral" nor the phrase "generally applicable." "Neutral" means "taking neither side," *The New Shorter Oxford English Dictionary* (2005); it can hardly be said that a law extending benefits to all religious adherents and then withdrawing them from a small group is neutral. It is still more difficult to claim such a law is generally applicable. "Taking 'generally applicable' at its literal English meaning, the law has to apply to everyone, or nearly everyone." Laycock, 40 Cath. Law at 26-27. Not so with Illinois RFRA after the addition of Section 30.

Because the Seventh Circuit's approach strays from the plain meaning of "neutral" and "generally applicable" it creates the potential for absurd results. Say, for example, that a Virginia law provided: "All religious adherents shall be entitled to strict-scrutiny protection for their religious exercise, except those who belong to churches or synagogues in downtown Richmond." It is difficult to imagine how such a law could be considered "neutral" or "generally applicable," regardless of the legislature's motivation in enacting it. And yet this hypothetical law is identical in every relevant respect to the law deemed neutral and generally applicable by the court below.[6]

c. *Third*, and finally, the approach adopted by the Seventh Circuit conflicts with this Court's cases because it effectively collapses the Free Exercise inquiry announced in *Smith* and *Lukumi* from two stages into one. Under *Smith* and *Lukumi*, a court must first determine whether a law is neutral and generally applicable; if it is not, strict scrutiny applies and the court *then* considers the government's interest, determining whether it is "compelling." Under the Seventh Circuit's approach, by contrast, consideration of the government's interest is imported into stage one of the analysis and permitted to distort the neutrality and general-applicability inquiries. Under the Seventh Circuit's

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[6] That the hypothetical law mentions "church" and "synagogue," while Section 30 avoids words that connote religion, is not a relevant difference. After all, "a law lacks facial neutrality if it refers to a religious practice without a secular meaning discernible from the language *or context*." *Lukumi*, 508 U.S. at 533 (emphasis added). Section 30 lacks a discernible secular meaning when read in context, for it amends a law—the Illinois RFRA—that has religion as its only subject.

approach, so long as the government can identify some legitimate, secular reason for its differential treatment, that is the end of the inquiry. This rule radically restricts the Free Exercise Clause protection that *Smith-Lukumi* carefully preserved.

## III. THE CASE PRESENTS AN IDEAL VEHICLE TO ADDRESS AN IMPORTANT AND RECURRING QUESTION.

1. Free-exercise cases are far from rare—several hundred have been decided just in the federal appellate courts in the past decade—and this case presents an ideal vehicle to address a question about free-exercise doctrine that has vexed the lower courts since *Smith* and *Lukumi* were handed down. The question presented was squarely raised and addressed below. App. 31a-36a. Other circuits have weighed in with analyses so clearly incompatible as to be outcome-determinative. *Supra* at 13-19. And there are no procedural complications that would prevent the Court from reaching the merits.

The fact that the panel majority speculated in dicta that Chicago could satisfy strict scrutiny creates no barrier to this Court's review. Indeed, even respondents have admitted that this portion of the majority's opinion was "wholly unnecessary to the decision." Answer of Defendants-Appellees to Petition for Panel Rehearing or, in the Alternative, Rehearing En Banc 13 (filed Nov. 16, 2007). It was also inappropriate because the strict-scrutiny test is a heavily fact-bound inquiry—one which an appellate court is ill-suited to resolve in the first instance on an appeal arising from a motion to dismiss. *See* App. 63a (Ripple, J., dissenting). Moreover, the only federal judge ever to apply strict scrutiny to the O'Hare plan on a fully developed factual record

concluded that the government had failed to carry its burden of demonstrating the existence of "least restrictive means." *Village of Bensenville*, 457 F.3d at 77 (D.C. Cir. 2006) (Griffith, J., concurring in part and dissenting in part). Judge Ripple was therefore exactly right to criticize the majority for ruminating in dicta on the strict-scrutiny test when "there has been none of the factual development necessary to determine whether the means chosen by the City are narrowly tailored to meet the compelling interest asserted here." App. 63a. Because this Court is not bound even by its own dicta, *see Central Va. Cmty. Coll.* v. *Katz*, 546 U.S. 356, 363 (2006), it need not be detained by that of the panel majority below.

Nor should this Court be deterred by any fear that, as a practical matter, petitioners' victory on the merits would block an expansion of O'Hare. Petitioners are not Luddites seeking to block modern improvement to O'Hare. They instead simply want to ensure that their religious cemetery is not destroyed if there are in fact less destructive alternatives—the very purpose of the strict-scrutiny analysis. To that end, petitioners themselves have identified alternative designs that would save St. Johannes while allowing the O'Hare expansion to proceed *almost exactly* as Chicago has envisioned it. *See supra* at 12; *Village of Bensenville*, 457 F.3d at 77 (Griffith, J., concurring in part and dissenting in part) (noting petitioners' alternative designs and finding that the FAA offered only "conclusory responses" that did not allow the court to "determine if any of these alternatives are a less restrictive means"). The Court therefore may take this opportunity to clarify the Free Exercise Clause's meaning without fear that "strict mechanical

adherence" to the resulting doctrine would "produce[ ] absurd results." *Maislin Indus. U.S., Inc.* v. *Primary Steel, Inc.*, 497 U.S. 116, 151 (1990) (Stevens, J., dissenting).

2. It has been 15 years since the Court squarely addressed the issues presented by this case. In that time, an impressive list of legal lights—judges, scholars, even a Justice of this Court—have recognized that the lower courts' Free Exercise jurisprudence is hopelessly divided. Because the question whether governmental conduct violates the Constitution should not turn on accidents of geography, this Court should grant the writ.

## CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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