No. 07-1127

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.

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

REPLY BRIEF FOR PETITIONERS

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REPLY BRIEF FOR PETITIONERS

I. THE CIRCUIT SPLIT IDENTIFIED IN THE PETITION IS REAL AND SUBSTANTIAL.

1. The City of Chicago is wrong to suggest that the sharp conflict between the decision below and those of other circuits is not a conflict at all, but instead the result of a "misread[ing]" of the Seventh Circuit's decision—a misreading apparently made not only by petitioners but by Judge Ripple in dissent as well. *See* Brief in Opposition ("Opp.") at 11. According to the City, there is no circuit split over the question presented—whether a law that singles out one religious group for unfavorable treatment is

nevertheless neutral and generally applicable if it is adopted for nondiscriminatory reasons—because the Seventh Circuit concluded that "petitioners were not singled out" at all. *Id.* *See also id.* at 2, 9, 13.

Not so. Contrary to the City's revisionist view of the decision below, the majority squarely acknowledged that the IRFRA amendment "t[ook] back part of what IRFRA gave," Pet. App. 31a, that it did so only with respect to St. John's, *id.* 36a, that St. John's "is now the only cemetery in the State of Illinois affected by the new § 30 of IRFRA," *id.* 35a-36a, and that "the legislation leaves other religious cemeteries untouched." *Id.* 36a. Moreover, Judge Ripple recognized 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." Pet. App. 61a (Ripple, J., dissenting). While the majority ultimately disagreed with the dissent over the significance of this differential treatment, it never suggested that Judge Ripple was "misread[ing]" its opinion or mischaracterizing the singular treatment afforded St. John's.

Indeed, what divided the majority and the dissent was not whether St. John's was denied state-sanctioned protections that all other religious groups in Illinois enjoy under IRFRA—of course it was—but whether that differential treatment standing alone warranted strict scrutiny. In conflict with decisions from the Third, Sixth, Tenth, and Eleventh Circuits, the majority held it did not. *See* Pet. 12-18. Instead, the majority ruled that a law that singles out religious groups for less favorable treatment remains

neutral and generally applicable so long as "the legislature had [a] nondiscriminatory purpose" in adopting it. Pet. App. 36a. Thus, contrary to the City's assertions (Opp. 12), the panel majority quite clearly announced a motive requirement that four circuits have rejected and three others have embraced. Pet. 12-22.

It was only to resolve that motive inquiry—whether "the legislature had [a] nondiscriminatory purpose" in adopting the IRFRA amendment—that the majority went on to examine the overall O'Hare Modernization Act ("OMA"). *See* Pet. App. 35a. Based on the omnibus nature of the OMA—a sprawling statute that amended many laws—the majority concluded that "the OMA was designed to remove any and all state-law based impediments to the O'Hare expansion project." Pet. App. 35a. The panel majority therefore concluded that, in adopting the amendment that deprived St. John's of its IRFRA rights, "the legislature had the nondiscriminatory purpose of clearing all land needed for O'Hare's proposed expansion"—and therefore strict scrutiny was not triggered. *Id.* 36a.

2. Trying to sow confusion where none exists, the City insists that, in examining the other portions of the OMA, the majority articulated a different ruling entirely: that petitioners were not "treated differently from other similarly situated property owners." Opp. 13. According to the City, because the OMA was an omnibus bill that stripped an array of legal protections from many landowners near O'Hare, there was no differential treatment.

But that, as we have demonstrated, is an incomplete account of the opinion below. The panel majority did address the OMA, but it did so for a

very specific reason: to demonstrate that the legislature lacked anti-religious animus. Pet. App. 34a-36a. That conclusion, in turn, drove the majority's holding that the IRFRA amendment was neutral and generally applicable despite its lack of even-handedness. *Id.* 36a.

The City's gloss on the opinion below—that the panel considered only the OMA and concluded from it that petitioners were not singled out for unique treatment—not only contradicts what the opinion itself says, but would also make no sense. After all, IRFRA is a free-standing statutory entitlement. As the panel acknowledged, IRFRA now extends a benefit to all religious groups in the State except one. Pet. App. 35a-36a. Had IRFRA been enacted at the outset in such a gerrymandered form, it certainly would have violated the neutrality and general applicability commands of *Church of Lukumi Babalu Aye, Inc.* v. *City of Hialeah*, 508 U.S. 520 (1993), and *Employment Division, Department of Human Resources* v. *Smith*, 494 U.S. 872 (1990). That it assumed its current form through an amendment tacked on to an omnibus bill makes no difference. Indeed, the argument is absurd: Under the City's logic, Congress could enact a law protecting all religious structures except the Cathedral of St. Matthew the Apostle against taxation, so long as it did so in two stages—first exempting all religious structures, and later abrogating the exemption for the Cathedral on some commercial premise buried in broader legislation. The Free Exercise Clause would not tolerate such a statute.

3. Apart from arguing that the Seventh Circuit's opinion means something other than what it actually says, the City is unable to deny the circuit split that

the decision below has exacerbated. Indeed, its "similarly situated" argument is the only "distinction" it offers to "explain[ ] the supposedly conflicting decisions" from the Third, Sixth, Tenth, and Eleventh Circuits. Opp. 13.

The City's reluctance to join issue is understandable. As we explained in the petition (pp.13-15), the Seventh Circuit's rule squarely conflicts with the Tenth Circuit's decision in *Shrum* v. *City of Coweta*, 449 F.3d 1132 (10th Cir. 2006). As Judge McConnell wrote in *Shrum*, the Free Exercise Clause applies "when government officials interfere[ ] 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 (citations omitted). Judge McConnell could have easily added "airport expansion" to this list as well. Yet in stark contrast to the *Shrum* approach, the majority below held that stripping St. John's of a protection afforded every other religious group did not trigger strict scrutiny precisely because the legislature acted "not out of hostility or prejudice, but for secular reasons." *Id.* at 1144. The cases are in direct conflict.

The City's bid to minimize the conflict with the Eleventh Circuit's decision in *Midrash Sephardi* v. *Town of Surfside*, 366 F.3d 1214 (11th Cir. 2004), is equally flawed. Indeed, the City concedes that *Midrash* adopted the "principle * * * [that] [h]eightened scrutiny applies if a government action dissimilarly treats religious claimants and those who are, in relevant respects, similarly situated." Opp. 13. The City's only rejoinder is that in this case, St.

John's was not "similarly situated." *Id.* But this just reprises the same irrelevancy that permeates the City's brief: that "[n]either 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." Opp. 9. We do not disagree. The question, though, is whether IRFRA now treats some religious groups differently than other religious groups. And on that score, even the City concedes that petitioners "were treated differently * * * from religiously affiliated landowners elsewhere in the state." Opp. 2. To be sure, the "only" reason for this different treatment was that the other religious groups' "property was not needed for the airport project." *Id.* But while that may indeed show that "Chicago's actions * * * w[ere] based on geography, not religion," Opp. 9, the important question presented is whether that motivation *matters*. Under the Eleventh Circuit's rule in *Midrash*, it would not. The majority below adopted a rule that demonstrably conflicts with that decision. The same holds true for the Third and Sixth Circuits. Certiorari is warranted to resolve this split.

4. The City incorrectly argues that none of the circuits St. John's identified as having aligned with the court below have actually done so. Specifically, the City argues that this Court's opinion in *Locke* v. *Davey*, 540 U.S. 712 (2004), resolved the school-funding issue addressed in *Strout* v. *Albanese*, 178 F.3d 57 (1st Cir. 1999), and *KDM ex rel. WJM* v. *Reedsport School District*, 196 F.3d 1046 (9th Cir. 1999). Opp. 17-18. The City is right that *Locke* articulated a free-exercise inquiry for government-funding cases. We noted as much in the petition.

See Pet. 27 n.5. But the conclusion the City draws—that *Locke* cleared up the rampant confusion about when or whether some showing of animus is required to prove a free-exercise violation—is wrong.

The First Circuit's post-*Locke* opinion in *Eulitt ex rel. Eulitt* v. *Maine*, 386 F.3d 344 (1st Cir. 2004), demonstrates as much. *Eulitt* correctly read *Locke* as limited to free-exercise cases involving government-funding decisions. 386 F.3d at 355. But it also reiterated *Strout*'s holding that *Lukumi* requires a showing of animus in all other free-exercise cases. *Id.* It accordingly rejected Eulitt's free-exercise claim because "[t]here is not a shred of evidence that any comparable animus fueled the enactment of the challenged Maine statute." *Id.* *Eulitt* thus confirms that the First Circuit's *Strout* approach—which the City does not deny conflicts with the decisions of the Tenth, Eleventh, Third, and Sixth Circuits—survives.[1]

II. THE DECISION BELOW CONFLICTS WITH THIS COURT'S CASES.

1. When it comes to the conflict between the majority's decision below and this Court's precedents, the City's principal response is to accuse us of again "misreading" cases. The City states, for example, that our "discussion of the *Lukumi* 'jurisprudence' is limited to a concurring opinion," Opp. 10—even though the petition spends four pages

[1] The City insists that "[o]f all petitioners' citations, only a student note post-dates *Locke*." Opp. 19. That is wrong. Most of the authorities on which St. John's relies were decided after *Locke*, including *Shrum*, *Midrash*, *World Wide Street Preachers Fellowship* v. *Town of Columbia*, 245 Fed. Appx. 336 (5th Cir. 2005), and the article by Professor Laycock. Pet. v, vi, 27 n.5.

discussing the *Lukumi* majority. Pet. 24-27. The City likewise asserts that we "do not even claim a conflict with any decision other than *Lukumi*," Opp. 10—even though the petition devotes more than two pages to analyzing the conflict between the opinion below and the *Smith* holding. Pet. 27-29. And although the City levels several other high-pitched accusations, none merits a response. *See*, *e.g.*, Opp. 30 (accusing St. John's of "bluster"); *id.* ("seriously distorting this Court's precedent").

2. The City is also wrong on substance. It argues that this Court's decision in *Locke* ameliorates the Seventh Circuit's conflict with *Smith* and *Lukumi*. But as we have noted, *Locke* is about "government's decision not to fund certain religious instruction." Pet. 27 n.5. The Court held that a state may create a scholarship program for college students but refuse to offer the funds to devotional-theology majors. *Locke,* 540 U.S. at 717. The majority, however, was careful to explain that its ruling was peculiar to government funding for religious education. *See id.* at 720-725. This special rule was appropriate because such funding raises unique Establishment Clause concerns: "[T]he subject of religion is one in which both the United States and state constitutions embody distinct views—in favor of free exercise, but opposed to establishment—that find no counterpart with respect to other callings and professions." *Id.* at 721. *See id.* at 722 ("[W]e can think of few areas in which a State's antiestablishment interests come more into play").

Given these careful limits on *Locke*, it is unsurprising that courts, and most commentators, have understood it to be a *sui generis* "funding case" that does not resolve "[t]he central dispute" in free-

exercise doctrine "about the meaning of 'generally applicable laws.'" 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). The First Circuit said as much in *Eulitt*, 386 F.3d at 354-355, as have other courts. *See Pucket* v. *Hot Springs Sch. Dist. No. 23-2*, 2007 WL 1673887, at *13 (D.S.D. June 6, 2007). Indeed, we are not aware of any court that has applied *Locke* outside the funding context.

To be sure, district courts *have* struggled with *Locke*'s scope at the margins, debating whether it applies to all government-funding cases, or only those involving education funding, or only those involving the funding of religious ministers. *See*, *e.g.*, *Colorado Christian Univ.* v. *Baker*, 2007 WL 1489801, at *4-*5 (D. Colo. May 18, 2007). And a few commentators have argued that *Locke* goes further, abrogating the *Smith-Lukumi* neutrality principles and requiring government animus in every case. *See* Marci Hamilton, *The Supreme Court Issues a Monumental Decision: Equal State Scholarship Access for Theology Students Is Not Required by the Free Exercise Clause*, Findlaw (Feb. 27, 2004).[2] But this muddle over *Locke*'s scope, far from helping the City, merely confirms the need for this Court's guidance. The Court should grant the petition to resolve the ongoing confusion.

III. THE CITY'S PROCEDURAL OBJECTIONS ARE MERITLESS.

1. The City hypothesizes that if IRFRA were restored to its pre-amendment scope, St. John's could

[2] A*vailable at* http://writ.news.findlaw.com/hamilton/20040227.html.

not invoke it because "any reliance on IRFRA would surely be barred by petitioners' failure to raise such a claim in this case." Opp. 32. This argument is bizarre, given that St. John's *did* raise an IRFRA claim when the City first moved to destroy the cemetery. Of course, after the City successfully persuaded the Illinois legislature to repeal IRFRA's protections for St. John's, petitioners moved to dismiss their now-nonexistent IRFRA claim without prejudice on mootness grounds and then filed this suit challenging the IRFRA amendment. Pet. App. 9a. This is not the stuff of res judicata. Under Illinois law, "[r]es judicata should be applied * * * only to facts and conditions as they existed at the time judgment was entered." *In re J'America B.*, 806 N.E.2d 292, 300 (Ill. App. Ct. 2004). Thus "an intervening change in law renders res judicata inapplicable." *Statler* v. *Catalano*, 691 N.E.2d 384, 386 (Ill. App. Ct. 1997). Under this commonsense rule, a party cannot be estopped for refusing to pursue a claim that was repealed by statute.

2. The City maintains that the FAA's Record of Decision is res judicata on the strict-scrutiny question. Opp. 33. This argument too is baseless. The FAA purported to conduct a strict-scrutiny analysis in the context of RFRA, but the D.C. Circuit on appeal held that RFRA did not even apply to the FAA's involvement in the O'Hare project; the court's majority therefore did not reach the merits of the strict-scrutiny question (unlike the dissenting judge, who did reach the merits and found that the FAA failed to satisfy strict scrutiny). *See Village of Bensenville* v. *FAA*, 457 F.3d 52, 68 (D.C. Cir. 2006). That fact dooms the City's preclusion argument, for it is a "general rule" that "if a judgment is appealed,

collateral estoppel only works as to those issues specifically passed upon by the appellate court." *Hicks* v. *Quaker Oats Co.*, 662 F.2d 1158, 1168 & n. 6 (5th Cir. 1981) (citing cases); *see Niagara Mohawk Power Corp.* v. *Tonawanda Band of Seneca Indians*, 94 F.3d 747, 754 (2d Cir. 1996); Restatement (Second) of Judgments § 27, cmt. o. The FAA's unreviewed findings are not preclusive.

3. Finally, the City urges the Court to deny the petition because the panel majority speculated—in what the City concedes was "dicta"—that the City could satisfy strict scrutiny. Opp. 31. According to the City, "even though the Seventh Circuit's strict-scrutiny analysis was dicta * * * [t]here is no reason to expect the majority" on remand would "reach the opposite conclusion." *Id.* But there is. The reason courts do not accord preclusive effect to an alternative holding is because it tends not to be "as carefully or rigorously considered as it would have [been] if it had been necessary to the result." Restatement § 27, cmt. i. Here, that is particularly true, given that (1) St. John's asserted in its amended complaint that there are reasonable ways to facilitate the O'Hare expansion without destroying the cemetery, and (2) the panel majority could not have deemed the O'Hare plan "narrowly tailored" without rejecting that assertion. That rejection flies in the face of the court's duty when reviewing a motion to dismiss to "assume that petitioners' well-pleaded allegations are true." *Rutan* v. *Republican Party of Ill.*, 497 U.S. 62, 65 n.1 (1990). Speculation over whether the Seventh Circuit on remand may—or may not—find strict scrutiny satisfied should not deter this Court from resolving the important and recurring question presented by the petition.

* * *

The City emphasizes the importance of an efficient O'Hare, and St. John's certainly does not disagree. But the point is for another day. The First Amendment requires that St. John's receive the benefit—the protection of strict scrutiny—that the state of Illinois currently offers to all religious groups but one. "If the Religion Clauses demand neutrality, we must enforce them, in hard cases as well as easy ones." *Locke*, 540 U.S. at 728 (Scalia, J., dissenting). That principle does not change just because the O'Hare plan might need to be modestly altered to accommodate important free-exercise rights.

CONCLUSION

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

Respectfully submitted,

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