

SUPREME COURT
OF THE
STATE OF CONNECTICUT

S.C. 17690

CAMBODIAN BUDDHIST SOCIETY OF CONNECTICUT, INC.
AND PONG ME

v.

TOWN OF NEWTON PLANNING & ZONING COMMISSION

BRIEF OF THE AMICUS CURIAE
THE BECKET FUND FOR RELIGIOUS LIBERTY

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STATEMENT OF THE ISSUE

Did the trial court incorrectly hold that the denial of a permit for a religious temple was not a “substantial burden” under the federal Religious Land Use and Institutionalized Persons Act, 42 U.S.C. § 2000cc et seq. (“RLUIPA”), simply because the plaintiffs may be able to worship elsewhere and the defendant, on some future date, might relent and issue a permit?

Discussion begins on page 1.

INTEREST OF THE AMICUS

Pursuant to Practice Book § 67-7 and this Court's order of September 12, 2006, the Becket Fund for Religious Liberty respectfully submits this brief *amicus curiae* in support of Appellants Cambodian Buddhist Society and Pong Me. The Becket Fund has an interest in assuring that the Religious Land Use and Institutionalized Persons Act of 2000, 42 U.S.C. § 2000cc, et seq. ("RLUIPA"), is interpreted to address effectively the discretionary burdens that local governments so commonly impose on core religious activities -- including religious worship -- through land-use laws. *Amicus* believes that its experience in this area will offer a perspective that will aid this Court in resolving this appeal.

PRELIMINARY STATEMENT

The Newton Planning & Zoning Comm'n ("the Town") imposed a substantial burden upon the Cambodian Buddhist Society's ("the Society") religious exercise within the meaning of RLUIPA. The trial court erred in ruling otherwise. Supreme Court and lower court precedent make clear that a government action imposes a substantial burden on religious exercise when it has a tendency to inhibit that exercise. Controlling precedent likewise makes clear that religious accommodations, such as those that lift government-imposed burdens on religious exercise, do not violate the Establishment Clause.

ARGUMENT

I. THE TOWN PLACED A SUBSTANTIAL BURDEN UPON THE CAMBODIAN BUDDHIST SOCIETY'S RELIGIOUS EXERCISE.

A. RLUIPA Is a Civil Rights Statute Intended to Protect Religious Organizations Like the Society.

RLUIPA is a federal civil rights statute -- passed with broad, bi-partisan support -- designed to remedy a pattern of unconstitutional restrictions on religious exercise through highly discretionary or patently discriminatory land-use laws. By a series of nine separate

hearings over a three-year period, Congress determined that religious organizations “are frequently discriminated against on the face of zoning codes and also in the highly individualized and discretionary processes of land use regulation.”¹ Congress also found that religious organizations “cannot function without **a physical space adequate to their needs** and consistent with their theological requirements. The right to build, buy, or rent such a space is an indispensable adjunct of the core First Amendment right to assemble for religious purposes.” Id. (emphasis added).

In response to these findings, Congress carefully crafted RLUIPA § 2, the land-use part of the Act. The various distinct provisions of § 2 are designed to reinforce existing constitutional protections for religious speech, assembly, and worship. One of those protections is embodied in § 2(a), which provides as follows:

- (1) GENERAL RULE- No government shall impose or implement a land use regulation in a manner that imposes a **substantial burden** on the religious exercise of a person, including a religious assembly or institution, **unless the government demonstrates** that imposition of the burden on that person, assembly, or institution—
- (A) is in furtherance of a **compelling governmental interest**; and
 - (B) is the **least restrictive means** of furthering that compelling governmental interest.

42 U.S.C. § 2000cc(a)(1). RLUIPA also dictates that the “religious exercise” not to be burdened includes “**any** exercise of religion, whether or not compelled by, or central to, a system of religious belief,” and includes “[t]he use, building, or conversion of real property for the purpose of religious exercise.”² RLUIPA § 8(7).

¹ Joint Statement of Sens. Hatch & Kennedy, 146 CONG. REC. S7774 (daily ed. July 27, 2000) (“Sponsors’ Statement”).

² This definition contravenes pre-RLUIPA, pre-Smith cases expressing doubt that religious land use was religious exercise. Yet the trial court inexplicably relied on this caselaw in interpreting RLUIPA. See Cambodian Buddhist Soc’y of Connecticut, Inc. v. Newtown

As the Seventh Circuit recently explained, § 2(a) exists to “backstop[] the explicit prohibition of religious discrimination in the later section of the Act, much as the disparate-impact theory of employment discrimination backstops the prohibition of intentional discrimination.” Sts. Constantine and Helen Greek Orthodox Church v. New Berlin, 396 F.3d 895, 900 (7th Cir. 2005). The provision protects religious organizations from inherent dangers of systems where “a state delegates essentially standardless discretion to nonprofessionals operating without procedural safeguards.” Id. In such systems, Congress found that unlawful intent is difficult to prove and may “lurk[] behind such vague and universally applicable reasons as traffic, aesthetics, or ‘not consistent with the city’s land use plan.’” Senate Sponsors’ Statement S7774. The danger is especially acute for religious minorities; Congress noted that “new, small, or unfamiliar churches in particular, are frequently discriminated against . . . in the highly individualized and discretionary processes of land use regulation.” Id. This case represents exactly what Congress targeted with RLUIPA § 2(a) -- a discretionary zoning process denying a religious minority an adequate home to gather for religious assembly and worship.

B. The Trial Court Failed to Apply the Proper Substantial Burden Standard.

1. *RLUIPA should be interpreted according to existing Supreme Court precedent.*

RLUIPA does not define the term “substantial burden.” RLUIPA’s legislative history shows, however, that Congress intended the term to be given the same meaning that it was given in the Supreme Court’s Free Exercise cases.³ Moreover, even without the benefit of

Planning and Zoning Comm’n, 2005 WL 3370834, at *13 (Conn. Super. Ct. Nov. 18, 2005) (citing Lakewood, Ohio Congregation of Jehovah's Witnesses, Inc v. City of Lakewood, Ohio, 699 F.2d 303 (6th Cir.), cert. denied, 464 U.S. 815 (1983)).

³ “[I]t is not the intent of this Act to create a new standard for the definition of ‘substantial

legislative history, it is a familiar canon of statutory construction that, in the absence of contrary indication, when a statute uses a term of art, “Congress intended it to have its established meaning.” McDermott v. Wilander, 498 U.S. 337, 342 (1991). Here, the term “substantial burden” has a well-established meaning in the Supreme Court’s Free Exercise jurisprudence dating to the Court’s seminal decision in Sherbert v. Verner.

2. Existing Free Exercise precedent demonstrates that a “substantial burden” on religious exercise is one which has a “tendency to inhibit” or a chilling effect upon such exercise.

In Sherbert v. Verner, 374 U.S. 398, 399-400 (1963), the Court held that the government’s denial of unemployment benefits to a Sabbatarian who refused to take a job on Saturday imposed a substantial burden on religious exercise in violation of the Free Exercise Clause. Although the regulation didn’t specifically prohibit religious practice, the Court rejected the argument that there was no burden merely because all that was at issue was denial of a governmental “benefit or privilege.” Id. at 404.

Instead, the Court held that the relevant inquiry for substantial burden was whether the government action had a “**tendency to inhibit** constitutionally protected activity.” Id. at 404 & n.6 (emphasis added). In Sherbert’s case, the Court held that there was such a “tendency to inhibit” because withholding employment benefits put “pressure upon her to forego [a religious] practice.” Id. at 404.

In Thomas v. Review Bd., 450 U.S. 707, 717 (1981), the Supreme Court re-affirmed and amplified Sherbert’s “tendency to inhibit” standard. There, the Court again emphasized that, although government action that “compel[led] a violation of conscience” would be a

burden’ on religious exercise. Instead that term as used in the Act should be interpreted by reference to Supreme Court jurisprudence.” Sponsors’ Statement S7776.

substantial burden, this wasn't the only way to meet the standard. Instead, the Court held it is sufficient to demonstrate a "coercive impact." Id. Accordingly, the Court held that "condition[ing] receipt of an important benefit" on the restraint of religious practice was a "substantial burden," because although government "compulsion may be indirect, the infringement upon free exercise is nonetheless substantial." Id. at 717-18.

These cases make clear that the appropriate standard for determining whether a burden is substantial is to examine whether it has a tendency to inhibit or constrain religious conduct or expression. Or, as the Eleventh Circuit put it: "[A] 'substantial burden' must place more than an inconvenience on religious exercise . . . a substantial burden can result from pressure that tends to force adherents to forego religious precepts or from pressure that mandates religious conduct." Midrash Sephardi v. Town of Surfside, 366 F.3d 1214, 1227 (11th Cir. 2004), cert. denied, 543 U.S. 1146 (2005). Denying a permit to use land to assemble for religious exercise -- conduct specifically protected by RLUIPA's definition of religious exercise -- forces religious organizations like the Society to forego their protected religious exercise.

Although the tendency to inhibit test does not mean that every inconvenience placed on religious exercise is substantial (see infra p. 11-12), demonstrating the existence of a substantial burden "is not a particularly onerous task." McEachin v. McGuinness, 357 F.3d 197, 202 (2^d Cir. 2004). The plaintiff need only show that religious exercise was burdened in some non-trivial manner. Id. at 202 (discussing factors for finding "a substantial, as opposed to inconsequential burden" on religious exercise); see also Jolly v. Coughlin, 76 F.3d 468, 477 (2^d Cir.1996) (describing substantial burden as one which "puts substantial pressure on an adherent to modify his behavior and to violate his beliefs") (quoting

Thomas, 450 U.S. at 718). Thus, the fact that a “burden would not be insuperable” does “not make it insubstantial.” Constantine, 396 F.3d at 901.

3. *The weight of authority interpreting RLUIPA’s land use provisions mandates a finding of substantial burden in this case.*

The facts of this case fall well within the range of cases where courts have found a substantial burden. The Seventh Circuit’s analysis in Constantine is especially instructive. In the most extensive treatment of RLUIPA’s substantial burden provision, the court held that denying a church that had outgrown its existing facility a variance to construct a new church building violated RLUIPA. Judge Posner’s thoughtful decision made clear that burdens need not be “insuperable” in order to be substantial under RLUIPA:

The Church in our case doesn’t argue that having to apply for what amounts to a zoning variance to be allowed to build in a residential area is a substantial burden. It complains instead about having either to sell the land that it bought in New Berlin and find a suitable alternative parcel or ***be subjected to unreasonable delay by having to restart the permit process***

The burden here was substantial. ***The Church could have searched around for other parcels of land*** (though a lot more effort would have been involved in such a search than, as the City would have it, calling up some real estate agents), ***or it could have continued filing applications with the City***, but in either case there would have been ***delay, uncertainty, and expense***.

That the burden would not be insuperable would not make it insubstantial. The plaintiff in the *Sherbert* case, whose religion forbade her to work on Saturdays, could have found a job that didn’t require her to work then had she kept looking rather than giving up after her third application for Saturday-less work was turned down. But the Supreme Court held that the fact that a longer search would probably have turned up something didn’t make the denial of unemployment benefits to her an insubstantial burden on the exercise of her religion.

Constantine, 396 F.3d at 900-901 (emphasis added).

Like the Constantine church, the Society experiences a substantial burden. Here, as in Constantine, the Society was denied the ability to develop its property for religious exercise. Like the Constantine church, the Society suffered uncertainty, delay, and

expense with predictable and devastating results: it has no temple for religious instruction and worship, either in Newton or in the state of Connecticut. (Society’s Brief at 4.) Without a temple, its members must celebrate religious ceremonies in inadequate rented facilities; are unable to interact with, care for and learn from monks; and cannot properly prepare for death and rebirth. (Id. at 3-5.) Without a temple, the Society faces extinction. (Id. at 4.)

The Seventh Circuit’s holding that a burden need not be insuperable in order to be substantial was recently applied by the Ninth Circuit. In Guru Nanak Sikh Soc’y v. County of Sutter, 456 F.3d 978 (9th Cir. 2006), the Ninth Circuit found a substantial burden where the county’s actions in denying a CUP had “to a significantly great extent lessened the possibility that future CUP applications would be successful.” Id. at 989. Such uncertainty over whether the temple could ever obtain a CUP had a tendency to inhibit religious exercise. Id. at 988-92. There, as here, a minority faith was denied permission to build a temple, and that denial was based upon criteria so vague that it was uncertain whether the temple could be built anywhere in the jurisdiction. Id. at 987 & n.9, 982. The criteria here are even worse than those in Guru: the Town singled out “traditional Buddhists’ temple design” (as opposed to “churches with . . . typical New England design”) as partial justification for denial. (Mem. Dec. 2005 WL 3370834, at *14, Appendix at A12.)

Many other courts have likewise found a substantial burden where the government denied a zoning permit that prevented religious exercise at a particular piece of property:

- DiLaura v. Ann Arbor Charter Township, 30 Fed. Appx. 501 (6th Cir. 2002): Finding a substantial burden under RLUIPA where the town denied a variance to allow the plaintiffs to use a particular property in the township as a religious retreat center. The Court held that preventing “gatherings of individuals for the purposes of prayer (the activity [sought by the religious landowner]) is a use of land constituting a religious exercise that is substantially burdened.” Id. at 509. Notably, the Court held that the burden existed even though the plaintiff had the option of applying for a CUP after the variance was denied.

- Church of the Hills v. Township of Bedminster, 2006 WL 462674 (D.N.J. Feb. 24, 2006) (Appendix at A16-A26): Allowing RLUIPA substantial burden claim to go forward where variance denial prevented church from meeting together as a body, participating in necessary ministries, and being accessible to its congregation.
- Westchester Day School v. Village of Mamaroneck, 417 F. Supp. 2d 477, 547 (S.D.N.Y. 2006): Finding substantial burden under RLUIPA where denial of permission to expand religious school “seriously impeded” religious exercise and had a “chilling effect” upon it. The permit denial forced the school to continue operating in inadequate facilities that inhibited religious instruction: “By precluding the construction of much needed facilities, defendants significantly interfered with WDS’ ability to provide an adequate and effective dual curriculum of Judaic and general studies education, and so limited its ability to retain and attract students and faculty as to imperil its continued existence.” Id.
- Living Water Church of God v. Charter Township of Meridian, 384 F. Supp. 2d 1123, 1133 (W.D. Mich. 2005): Denying a CUP to build a permanent home for a Christian school substantially burdened religious exercise. The denial left the church unable to adequately practice its religious beliefs and “severely limited in its ability to recruit” because of “the uncertainty about the future space and the current lack of programming.”
- Cottonwood Christian Center v. Cypress, 218 F. Supp. 2d 1203 (C.D. Cal. 2002): Substantial burden existed where the city refused to grant a CUP for a church that had outgrown its existing facility. The inadequate size of the existing facility impeded and prevented the church from carrying out various religious activities and from conducting outreach to potential new members.
- Hale O Kaula v. Maui Planning Comm’n, 229 F. Supp. 2d 1056 (D. Haw. 2002): Allowing RLUIPA substantial burden claim to go forward where county denied church SUP to expand building to allow needed religious activities.
- Alpine Christian Fellowship v. County Comm’rs, 870 F. Supp. 991 (D. Colo. 1994): Finding substantial burden under Free Exercise Clause where County denied a SUP to allow church to operate a religious school on its property.
- Greater Bible Way Temple v. Jackson, 2005 WL 3036527 (Mich. App. Nov. 10, 2005) (Appendix at A27-A36): Finding substantial burden where the city prohibited the church from adding a ministry building for the elderly and disabled near existing church property.
- Jesus Center v. Farmington Hills, 544 N.W.2d 698, 703–704 (Mich. App. 1996): Finding substantial burden in denial of application to run a homeless shelter on church property where that action “flow[ed] from [] religious beliefs and [was] an exercise of those beliefs.”

In sum, the vast weight of authority demonstrates that permit denials that inhibit

religious exercise on a particular property impose a substantial burden under RLUIPA § 2(a). The facts demonstrate that the Society's religious exercise was inhibited in many specific ways. The trial court's ruling must be overturned.

4. *Cases finding no substantial burden are inapposite.*

a. The trial court relied upon an inapposite facial challenge standard.

Rather than look to the Second Circuit's formulation of "substantial burden" in Jolly and McEachin, the trial court relied on inapposite cases involving challenges to rules that required a religious organization to participate in the land use permitting process. (Mem. Dec., 2005 WL 3370834, at *7, Appendix at A6-A7) (citing Civil Liberties for Urban Believers v. Chicago, 342 F.3d 752 (7th Cir. 2003), cert. denied, 541 U.S. 1096 (2004) ("CLUB") and San Jose Christian College v. Morgan Hill, 360 F.3d 1024 (9th Cir. 2004) ("SJCC"). The trial court overlooked that these decisions fall into a distinct category of religious land use cases involving **facial** challenges to the zoning permitting process where plaintiffs argue that **merely having to apply** for a permit is a substantial burden and in which courts generally hold there is no substantial burden. See CLUB, 342 F.3d at 761 (rejecting argument that process of applying for a permit to locate a church in R zones was a substantial burden); SJCC, 360 F.3d at 1035 (rejecting claim of "substantial burden" in requirement to file "complete" zoning application).

In contrast, this case involves a challenge to a **particular denial** of a permit to engage in religious exercise. It is a firmly entrenched distinction in religious land-use cases that the general requirement to apply for a permit does **not** impose a substantial burden, but the particular denial of such a permit may. Thus while facial challenges like those of CLUB and SJCC routinely fail, courts like Constantine, Guru Nanak, DiLaura, Westchester Day School, and the many others cited above evaluating the **denial** of permits for religious

institutions consistently hold that such denials may impose a substantial burden.

For that reason, the “effectively impracticable” standard of CLUB cannot be divorced from the context of the facial challenge in which it was announced. The rigorousness of the “effectively impracticable” standard is consistent with the normal hurdle faced by plaintiffs bringing a facial challenge of showing that “no set of circumstances exists” in which the law can be applied constitutionally. United States v. Salerno, 481 U.S. 739, 745 (1987).

But courts -- including the Seventh Circuit in Constantine -- have made clear that the rigors of a facial challenge are not appropriate for as-applied challenges to a decision to deny a particular use permit. In “as-applied” cases, the standard is whether the denial inhibits the religious institution’s attempt to use its property for religious exercise in a way that is more than an inconvenience. See, e.g., Constantine, 396 F.3d at 900 (distinguishing CLUB from Constantine because “the Church in [this] case doesn’t argue that **having to apply** for what amounts to a zoning variance to be allowed in a residential area is a substantial burden”) (emphasis added).⁴ The Seventh Circuit’s rejection of its own CLUB standard in Constantine is fatal to any suggestion that CLUB should govern this case.⁵

The trial court also cited SJCC as support for the “effectively impracticable” standard. The Ninth Circuit has, however, explicitly rejected the “effectively impracticable”

⁴ United States v. Maui Cy., 298 F. Supp. 2d 1010, 1017 (D. Haw. 2003) (holding that because CLUB’s “facial challenge” standard did not apply to “an as-applied challenge” to permit denial).

⁵ Application of the “effectively impracticable” standard to as-applied challenges to permit denials is also inappropriate because it would render meaningless RLUIPA’s “exclusions and limitations” provision, which prohibits restrictions that exclude religious assemblies from jurisdictions. See RLUIPA § 2(b)(3). The Eleventh Circuit declined to follow CLUB’s “effectively impracticable” standard in a substantial burden case for that very reason. Midrash, 366 F.3d at 1227.

standard, explaining that the result in SJCC is consistent with CLUB only in that both cases reject the notion that the mere requirement to apply for a permit imposes a substantial burden. See Guru, 456 F.3d at 989 n.12. Thus, the Society need not prove that it cannot worship anywhere in the jurisdiction in order to establish a substantial burden upon its religious exercise.

b. A narrow reading of “substantial burden” is contrary to Congressional intent and existing precedent.

The trial court’s conclusion that the mere ability to submit a revised application defeats most claims of substantial burden proves too much. (Mem. Dec., 2005 WL 3370834 at *11, Appendix at A9-A10.) If that were the rule, no RLUIPA claim would ever succeed, because it is always possible to submit a new application. This result is not what Congress intended, so it is unsurprising that courts consistently reject that argument. As discussed supra, Constantine, Guru, and Living Water specifically reject this argument, finding substantial burdens in re-applying because such applications necessarily impose delay, expense, and uncertainty upon the religious organization. Guru, 456 F.3d at 991-92; Constantine, 396 F.3d at 901; Living Water, 384 F. Supp. 2d at 1132-33. Any attempt to manufacture a distinction between those cases and this one is both unpersuasive as a matter of law and contrary to the facts.

c. The trial court relied upon cases where permit denials had no tendency to inhibit religious exercise.

The trial court also relied upon a second category of inapposite cases: those where permit denials had no tendency to inhibit religious exercise. This is well-illustrated by the citation to Midrash, 366 F.3d at 1227-28, where the only alleged burden was the mere

“inconvenience” of “walking a few extra blocks” to services.⁶ By contrast, the Society has nowhere else to go. (Society Brief at 4-5 (the Society does not have the resources for a second search and application).) Without a temple, the Society faces extinction. (Id.) Unlike the plaintiffs in Midrash, Episcopal Student Foundation, and West Linn, the Society suffers more than mere inconvenience and has no simple solution to its problems. Its religious exercise is substantially burdened.

II. THE PROPER DEFINITION OF “SUBSTANTIAL BURDEN” DOES NOT VIOLATE THE ESTABLISHMENT CLAUSE.

The trial court decision was based upon the incorrect legal premise that RLUIPA requires only that religious land uses be treated no worse than secular land uses, and that any other reading would violate the Establishment Clause. (Mem. Dec., 2005 WL 3370834, at *11-12, Appendix at A9-A12.) This stingy reading not only undermines the express purpose of RLUIPA § 2(a), it relies upon a view of the Establishment Clause which the Supreme Court, Second Circuit, and numerous circuit courts have explicitly rejected.

RLUIPA § 2(a) targets substantial burdens that governments place on religious exercise through discretionary land use processes. RLUIPA § 2(a). A **separate** section of the act -- § 2(b) -- deals with overtly discriminatory land use actions, those which treat religious land uses worse than secular land uses. While a town need only treat religious and non-religious uses equally in order to comply with § 2(b), it must do something more in order to comply with § 2(a) -- it must refrain from imposing substantial burdens through its

⁶ See also Episcopal Student Foundation v. City of Ann Arbor, 341 F. Supp. 2d 691, 704 (E.D.Mich. 2004) (no substantial burden where the institution had a large unused space in its existing facility that could be used for religious exercise); Corporation of the Presiding Bishop v. West Linn, 111 P.3d 1123, 1130 (Ore. 2005) (no substantial burden in denying permit where church had ample room to operate without “eliminat[ing] or reduc[ing] church activities”).

land use procedures.⁷ RLUIPA § 2(a) requires more than mere evenhanded treatment.

Such accommodation for religious exercise does not violate the Establishment Clause. Last year, the Supreme Court unanimously rejected an Establishment Clause challenge to RLUIPA's accommodations. Cutter v. Wilkinson, 544 U.S. 709 (2005). There, the Supreme Court ruled that RLUIPA's prisoner provisions properly lifted "government-created burdens on private religious exercise," a legislative action perfectly compatible with the Establishment Clause.⁸ Id. at 720. Even though application of RLUIPA would mean that persons with religious reasons for conduct would be treated differently and better than persons with secular reasons, the Court upheld this accommodation. The Supreme Court based its decision upon the venerable principle that "[r]eligious accommodations . . . need not 'come packaged with benefits to secular entities.'" Id. at 724 (quoting Corporation of Presiding Bishop v. Amos, 483 U.S. 327, 338 (1987)).

The Second Circuit upholds broad legislative accommodations of religious exercise, even when they do not come packaged with similar secular accommodations.⁹ In Hankins v. Lyght, 441 F.3d 96 (2^d Cir. 2006), the Second Circuit upheld the Religious Freedom Restoration Act (RLUIPA's predecessor) as applied to actions of the federal government.

⁷ See also RLUIPA § 5(e) (stating municipalities can alleviate substantial burdens by changing their practices generally or by ***specifically exempting*** religious land uses).

⁸ The Cutter decision came down after the Second Circuit's musings about the scope of RLUIPA in Westchester Day School v. Village of Mamaroneck, 386 F.3d 183 (2^d Cir. 2004).

⁹ The trial court overlooked Hankins in its discussion of Second Circuit precedent. Instead, it relied wholly upon superceded dicta in the first opinion in the Westchester Day School case. Moreover, the trial court on remand in Westchester Day rejected the very arguments accepted by the trial court here and ruled in favor of the religious claimant on its substantial burden claim. See supra p.8.

In doing so, the court rejected an Establishment Clause challenge to RFRA, holding that “exempting religious organizations from compliance with neutral laws does not violate the Constitution . . . appellant faces an unwinnable battle in claiming that the RFRA . . . violates the Establishment Clause.” Id. at 108. And just last term, a unanimous Supreme Court applied RFRA with force to favor a religious claimant, by upholding an injunction barring the government from enforcing against a religious sect otherwise generally applicable drug laws banning hallucinogenic tea. Like RLUIPA, RFRA provides accommodations to religious claimants that are not available to secular claimants. The unanimous decision by Chief Justice Roberts never hinted that such accommodation violated the Establishment Clause. Gonzales v. O Centro, 126 S. Ct. 1211 (2006). This reasoning applies with greater force to RLUIPA, which is even more narrowly limited than RFRA.¹⁰

Other circuits have also upheld religious land-use accommodations over Establishment Clause challenges. See Ehlers-Renzi v. Connelly School of the Holy Child, 224 F.3d 283 (4th Cir. 2000), cert. denied, 531 U.S. 1192 (2001) (rejecting Establishment Clause challenge to a law that exempted religious schools from the special exception permitting process entirely); Boyajian v. Gatzunis, 212 F.3d 1, 8 (1st Cir. 2000), cert. denied, 531 U.S. 1070 (2001) (“[T]he state’s decision to give religion an assist in the local land-use planning process is consistent with the Supreme Court’s holding in *Amos* that legislation isolating religious groups for special treatment is permissible when done for the ‘proper purpose’ of alleviating a burden on the exercise of religion.”); Cohen v. City of Des

¹⁰ RFRA imposed the strict scrutiny test on all laws that burdened religious exercise. Even in its pared-down form, it still applies to all such actions by the federal government. Id. at 105-09. RLUIPA, by contrast, is narrowly tailored to two distinct areas of law in which Congress found evidence of frequent abuse: land use and prisoners.

Plaines, 8 F.3d 484, 492 (7th Cir. 1993), cert. denied, 512 U.S. 1236 (1994) (“By exempting churches (which themselves do not require a special use permit to operate) from the special use requirement in the operation of nursery schools and day care centers, the city has removed a burden to the free exercise of religion.”).

Indeed, some religious accommodations are mandated by the Free Exercise Clause, despite the fact they may be unavailable to non-religious claimants, and RLUIPA’s land use provisions largely mirror those constitutional accommodations.¹¹ The Supreme Court has a long history of upholding such accommodations. In Sherbert, the Court found a substantial burden on religious exercise where the plaintiff was penalized for abstaining from work on Saturdays for religious reasons. Id. 374 U.S. at 404-05. No similar benefits were available to persons with non-religious reasons for abstaining from work on Saturdays, but the Court expressly rejected the notion that this accommodation violated the Establishment Clause.¹²

Given the overwhelming weight of precedent, the Town faces an “unwinnable battle” in arguing that application of RLUIPA to lift the burden on the Society’s religious exercise arising from the permit denial violates the Establishment Clause.

CONCLUSION

For the foregoing reasons, the judgment of the trial court should be REVERSED.

¹¹ See Guru, 456 F.3d at 993-94 (RLUIPA targets land use regulations already subject to strict scrutiny under the Free Exercise Clause). See also Sponsors’ Statement (summarizing the evidence of widespread government-imposed burdens on religious exercise through discretionary land use regulation).

¹² Id. at 409-10. Similarly, in Thomas, the Court found a substantial burden where the government penalized the plaintiff for refusing war-related work due to his religiously motivated pacifism. Id. 450 U.S. at 716-18. No such benefits were available to those who abstained from war-related work due to secular motivations. Id. at 714. The Supreme Court summarily rejected the notion that this accommodation violated the Establishment Clause. Id. at 719-20.

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