
In the United States Court of Appeals for the Tenth Circuit

GRACE UNITED METHODIST CHURCH,

Plaintiff-Appellant,

v.

CITY OF CHEYENNE, *et al.*,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF WYOMING

Brief *Amicus Curiae* of The Becket Fund for Religious Liberty
in Support of Plaintiff-Appellant and in Support of Reversal

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, *Amicus* states that it does not have a parent corporation, nor does it issue any stock.

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INTEREST OF THE *AMICUS*

Pursuant to Fed. R. App. P. 29, the Becket Fund for Religious Liberty respectfully submits this brief *amicus curiae* in support of Appellant and reversal. Counsel for Plaintiff-Appellant has consented to the filing of this brief. Fed. R. App. P. 29(a). The Becket Fund for Religious Liberty is an interfaith, bipartisan public interest law firm dedicated to protecting the free expression of all religious traditions, and the equal participation of religious people and institutions in public life and public benefits. It shares a common interest with religious organizations nationwide in assuring that the Religious Land Use and Institutionalized Persons Act of 2000, 42 U.S.C. § 2000cc, *et seq.* (“RLUIPA”) is interpreted in a manner faithful to Congress’ intent, by reducing burdens frequently imposed on religious institutions by municipal land use regulation. *Amicus* believes that its experience in this otherwise divisive area of the law will assist the Court in its resolution of this appeal.

ARGUMENT

I. **AS THIS COURT RECENTLY REAFFIRMED, STRICT SCRUTINY REVIEW APPLIES UNDER THE FREE EXERCISE CLAUSE TO GOVERNMENTAL ACTION THAT “SUBSTANTIALLY BURDENS” RELIGIOUS EXERCISE PURSUANT TO SYSTEMS OF “INDIVIDUALIZED ASSESSMENTS.”**

As the court below noted, laws that are “neutral and generally applicable” are usually subject to rational basis review under the Free Exercise Clause. *Grace United Methodist Church v. City of Cheyenne*, 235 F.Supp.2d 1186, 1199 (D. Wyo. 2002) (citing *Employment Div., Dept. of Human Resources of Ore. v. Smith*, 494 U.S. 872, 879 (1990)). However, the court failed to recognize the “individualized exemption exception,” which requires strict scrutiny review “in circumstances in which individualized exemptions from a general requirement are available,” *Church of the Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 537 (1993); *Axson-Flynn v. Johnson*, __ F.3d __, 2004 WL 198304 (10th Cir. Feb. 3, 2004) (recognizing individualized exemption exception to *Smith* rule). Remarkably, the District Court explicitly rejected this exception, applying mere rational basis review “notwithstanding that [zoning ordinances] may have individualized procedures for obtaining special use permits or variances.” *Grace United*, 235 F.Supp.2d at 1200. This holding runs contrary to the decisions of the Supreme Court and this Court, and the nearly unanimous weight of authority holding that such discretionary application of land use regulations is indeed subject to strict

scrutiny review. The grant of summary judgment in favor of the City on the Church's Free Exercise Claim must therefore be reversed.

A. “Where a [Government’s] Facially Neutral Rule Contains a System of Individualized Exemptions, a [Government] ‘May Not Refuse to Extend that System to Cases of ‘Religious Hardship’ Without Compelling Reason.’”

To be fair, the District Court did not have the benefit of this Court's recent decision in *Axson-Flynn v. Johnson*, where it defined the parameters of the “individualized exceptions” doctrine. Although this Court recognized that “the [Supreme] Court has never explained with specificity what constitutes a ‘system’ of individualized exceptions,” *id.* at *14, it held that in the Tenth Circuit,

[A] system of individualized exemptions is one that “give[s] rise to the application of a subjective test.” *Swanson [v. Guthrie Indep. Sch. Dist. No. I-L]*, 135 F.3d 694, 701 (10th Cir. 1998). Such a system is one in which case-by-case inquiries are routinely made, such that there is an “individualized governmental assessment of the reasons for the relevant conduct” that “invite[s] considerations of the particular circumstances” involved in the particular case. *Smith*, 494 U.S. at 884....

Id. This Court's holding, then, makes clear that a “system of individualized exceptions” can be identified by the presence of any one of three characteristic hallmarks:

1. It permits a “subjective test” of whether conduct will be permitted.
2. It permits “case-by-case inquiries” where “individualized assessments” are common.
3. It invites “considerations of the particular circumstances” involved.

Id. In applying these principles to the land use context, Section I(B), *infra*, demonstrates that courts are nearly unanimous in holding that the *application* of land use regulations, such as granting or denying a use permit or variance for a particular religious use of property, fits within this standard. And as discussed below in Section I(C), the application of Cheyenne’s variance provisions also falls squarely within this standard.¹

However, not only did the District Court refuse to accept the “individualized exceptions” doctrine, it appears to have explicitly rejected it. *See* 235 F.Supp.2d at 1200 (suggesting that zoning ordinances “are neutral and generally applicable notwithstanding that they may have individualized procedures for obtaining special use permits or variances” (emphasis added)); *id.* (“[A]lthough zoning laws generally require individualized assessment for special use permits or variances, they are motivated by secular purposes” (emphasis added)). The court’s opinion therefore directly contradicts this Court’s decision in *Axson-Flynn*.

¹ The “individualized exceptions” doctrine is also the basis for the jurisdictional component of the Religious Land Use and Institutionalized Persons Act’s zoning provisions, as several courts have held. *See* RLUIPA § 2(a)(2)(C); *Cottonwood Christian Center v. Cypress Redevelopment Agency*, 218 F.Supp.2d 1203, 1222 (C.D.Cal. 2002); *Freedom Baptist Church v. Tp. of Middletown*, 240 F.Supp. 857, 873 (E.D.Pa. 2002); *Guru Nanak Sikh Society of Yuba City v. County of Sutter*, Civ. No. 02-1785, slip op. (E.D. Cal. Nov. 19, 2003); *Hale O Kaula v. Maui Planning Comm’n*, 229 F.Supp.2d 1056 (D.Haw. 2002); *United States v. Maui County*, ___ F.Supp.2d ___, 2003 WL 23148864 at *13 (D.Haw. Dec. 29, 2003); *Murphy v. Zoning Com’n of Town of New Milford*, 289 F.Supp.2d 87, 119 (D.Conn. 2003); *Westchester Day School v. Village of Mamaroneck*, 280 F.Supp.2d 230, 236 (S.D.N.Y. 2003).

Instead, the District Court relied on *Messiah Baptist Church v. County of Jefferson, Colo.*, 859 F.2d 820 (10th Cir. 1988), for the proposition that the regulation at issue here was neutral and generally applicable. 235 F.Supp.2d at 1200-01. Such reliance is faulty for two reasons. First, *Messiah Baptist Church* was decided in 1988, two years prior to the Supreme Court’s decision in *Smith* and five years before *Church of the Lukumi Babalu Aye*. Thus, the *Messiah Baptist Church* Court was not able to avail itself of the development in Free Exercise jurisprudence—especially the renewed importance of the individualized exceptions doctrine—that *Smith* and *Hialeah* fashioned.² Second, as discussed in greater detail below, the challenge in *Messiah Baptist Church* was a facial challenge to the zoning ordinance—and not to the application of land use regulation as here—and thus was arguably “neutral and generally applicable.” 859 F.2d at 821 (“The Church contends the zoning regulations enacted by the County are facially unconstitutional under the Due Process Clause of the Fourteenth Amendment and the Free Exercise Clause of the First Amendment.”).

² In fact, the only relevant district court decision within this Circuit decided subsequent to *Smith* and *Hialeah* did apply strict scrutiny to a very similar application of land use regulation. *Alpine Christian Fellowship v. Cy. Comm’rs of Pitkin*, 870 F.Supp. 991, 994-95 (D.Colo. 1994); *see infra* § I(B).

B. Courts Have Held that While Zoning Regulations Are Often Facially Valid as “Neutral Laws of General Applicability,” the Denial of Discretionary Land Use Permission, Such as a Variance, Is Accomplished Pursuant to a “System of Individualized Assessments.”

An examination of cases in the church-zoning field leads inescapably³ to the conclusion that (1) facial challenges to the mere existence of zoning ordinances are (generally) judged under rational basis review as “neutral and generally applicable” laws; but (2) challenges to denials of land use permits are judged under strict scrutiny review as “systems of individualized exemptions.” The rationale behind the distinction is clear: Facial challenges involve claims that a particular religious entity should be exempt from a requirement that all other entities must comply with—the requirement for a permit, a variance, etc. These challenges are therefore much more analogous to the law at issue in *Smith*. On the other hand, challenges to the denial of land use permits involve examination of government action that employs great discretion and much subjective analysis. Often, one religious entity is denied a permit that has been granted to other secular or religious entities. This challenge is much more akin to that of *Sherbert v. Verner*, 374 U.S. 398 (1963), and *Axson-Flynn*.

³ See, e.g., 146 CONG. REC. S7775 (daily ed. July 27, 2000) (“The hearing record demonstrates a widespread practice of individualized decisions to grant or refuse permission to use property for religious purposes. These individualized assessments readily lend themselves to discrimination, and they also make it difficult to prove discrimination in any individual case.”); H.R. REP. NO. 106-219, at 17 (“Local land-use regulation, which lacks objective, generally applicable

The following is a description of cases in each category:

“As-Applied” Challenges—Strict Scrutiny:

- *Guru Nanak Sikh Society of Yuba City v. County of Sutter*, Civ. No. 02-1785, slip op. (E.D.Cal. Nov. 19, 2003) (attached as Exhibit “A”) (striking down denial of conditional use permit for religious use): “It is ... beyond cavil that zoning decisions such as the one at issue in this case are properly described as ‘individualized assessments.’” *Id.* at 41.
- *Hale O Kaula v. Maui Planning Comm’n*, 229 F.Supp.2d 1056 (D.Haw. 2002) (refusing to dismiss Free Exercise challenge to special use permit denial): Special permit “provisions are a system of ‘individualized exemptions’ to which strict scrutiny applies” under the Free Exercise Clause. *Id.* at 1073.
- *Greater Bible Way Temple of Jackson v. City of Jackson*, Civ. No. 01-003614, slip op. (Mich.Cir.Ct. Feb. 25, 2003) (attached as Exhibit “B”) (granting summary judgment (in part) to church denied the ability to build apartment building for the elderly): “There is no question that the City of Jackson’s review of Plaintiff’s request for rezoning was an individualized assessment.”
- *Westchester Day School v. Village of Mamaroneck*, 280 F.Supp.2d 230 (S.D.N.Y. 2003) (striking down denial of special permit for religious educational use): “In limiting [RLUIPA’s] applicability ... to those cases where governments make ‘individual assessments,’ the statute draws the very line *Smith* itself drew when it distinguished neutral laws of general applicability from those ‘where the State has in place a system of individual exemptions,’”” *Id.* at 236 (quoting *Smith*) (footnote omitted)
- *United States v. Maui County*, __ F.Supp.2d __, 2003 WL 23148864 (D.Haw. Dec. 29, 2003) (upholding RLUIPA as constitutional in case involving denial of special use permit): “If, as the Court finds here, RLUIPA codified existing precedent regarding when to apply the strict

standards, and instead relies on discretionary, individualized determinations, presents a problem that Congress has closely scrutinized and found to warrant remedial measures under its section 5 enforcement authority.”).

scrutiny test (*i.e.*, if a generally applicable and neutral law also contains exceptions based upon ‘individualized assessments’ which can be used in a pretextual manner—as is the special use permit process) then it is Constitutional.” *Id.* (emphasis added).

- *Cottonwood Christian Center v. Cypress Redevelopment Agency*, 218 F.Supp.2d 1203 (C.D.Cal. 2002) (denial of a conditional use permit for religious use): “Defendants’ land-use decisions here are not generally applicable laws.... [T]he City’s refusal to grant Cottonwood’s application for a CUP ‘invite[s] individualized assessments of the subject property and the owner’s use of such property, and contain mechanisms for individualized exceptions.’ 840 P.2d at 181.” *Id.* at 1222-23.
- *Freedom Baptist Church v. Tp. of Middletown*, 240 F.Supp. 857 (E.D.Pa. 2002) (upholding RLUIPA): “No one contests that zoning ordinances must by their nature impose individual assessment regimes. That is to say, land use regulations through zoning codes necessarily involve case-by-case evaluations of the propriety of proposed activity against extant land use regulations. They are, therefore, of necessity different from laws of general applicability which do not admit to exceptions on Free Exercise grounds. *See Smith*, 494 U.S. at 890” *Id.* at 868 (emphasis added).
- *Korean Buddhist Dae Won Sa Temple v. Sullivan*, 953 P.2d 1315 (Haw. 1998) (challenge to denial of variance for religious structure): “The City’s variance law clearly creates a ‘system of individualized exceptions’ from the general zoning law.” *Id.* at 1344-45 n.31.
- *Keeler v. Mayor and City Council of Cumberland*, 940 F.Supp. 879 (D.Md. 1996) (denial of a land use permit): Landmark ordinance “has in place a system of individualized exemptions.” *Id.* at 885.
- *Al-Salam Mosque Fdn. v. Palos Heights*, 2001 WL 204772 (N.D.Ill.): “[F]ree exercise clause prohibits local governments from making discretionary (*i.e.* not neutral, not generally applicable) decisions that burden the free exercise of religion, absent some compelling governmental interest.... Land use regulation often involves ‘individualized governmental assessment of the reasons for the relevant conduct,’ thus triggering *City of Hialeah* scrutiny.” *Id.* at *2.

- *Western Presbyterian Church v. Bd. of Zoning Adjustment*, 862 F.Supp. 538 (D.D.C. 1994) (challenge to enforcement of zoning regulations against religious feeding program): Applying strict scrutiny test under the First Amendment to zoning action that prohibited a feeding ministry. *Id.* at 545, 547.
- *First Covenant Church of Seattle v. Seattle*, 840 P.2d 174 (Wash. 1992) (challenge to designation of church as landmark): Landmark ordinances “invite individualized assessments of the subject property and the owner’s use of such property, and contain mechanisms for individualized exceptions.” *Id.* at 181.
- *Alpine Christian Fellowship v. Cy. Comm’rs of Pitkin*, 870 F.Supp. 991 (D.Colo. 1994) (challenge to denial of special permit for religious school): Special use permit denial triggered strict scrutiny because determination was made under discretionary “appropriate[ness]” standard. *Id.* at 994-95.
- *Oblates of St. Joseph v. Nichols*, Civ. No. 01-2349, slip op. at 12 n.9 (E.D.Cal. Apr. 26, 2002) (attached as Ex. “C”) (challenge to denial of permit to expand parking lot): Recognizing that, in religious land use cases, “[g]iven the individualized determinations necessary in land use cases, ... it may very well be that plaintiffs’ claim does not concern a generally applicable law and thus is subject to First Amendment constraints.”

“Facial” Constitutionality of Land Use Laws—Rational Basis:

- *Tran v. Gwinn*, 554 S.E.2d 63 (Va. 2001) (unsuccessful challenge to the requirement of a permit; no permit applied for): “The instances in which a zoning ordinance was found to impermissibly regulate religious conduct in a manner inconsistent with free exercise requirements can be distinguished. Those instances involved the constitutionality of a zoning ordinance as applied.” *Id.* (emphasis added). “The procedure requiring review by government officials on a case-by-case basis for a grant of a special use permit may support a challenge based on a specific application of the special use permit requirement, *see, e.g., Islamic Center*, but such a procedure does not alter the generally applicable

- nature of the ordinance.” *Id.* at 581-82 (footnote omitted).
- *Open Door Baptist Church v. Clark Cy.*, 995 P.2d 33 (Wash. 2000) (unsuccessful challenge to the requirement of a permit; permit had not been applied for): Holding that *requiring church to apply* for CUP did not burden religious exercise, but “[p]recedent makes it clear that *closure* of a church would require a compelling state interest.” *Id.* (emphasis added).
 - *Area Plan Comm’n of Evansville and Vanderbilt Cy. v. Wilson*, 701 N.E.2d 856 (Ind.App. 1998) (holding that requirement of Special Use Permit did not violate the Free Exercise Clause): “Furthermore, we have previously held that a zoning board’s denial of a special permit will be subject to strict review. See *Board of Zoning Appeals v. Schulte*, 241 Ind. 339, 172 N.E.2d 39, 43 (1961).” *Id.* at 862 (emphasis added).
 - *Messiah Baptist Church, supra*, 859 F.2d at 823 (unsuccessful facial challenge to zoning ordinance): “The Church contends that the 1974 A-2 zoning regulations are invalid on their face because they preclude the Church from building a house of worship on its property located within the A-2 zoning district.”
 - *Civil Liberties for Urban Believers v. City of Chicago*, 342 F.3d 752 (7th Cir. Aug. 20, 2003) (challenge to ordinance that required special use permit): In analyzing whether “the costs, procedural requirements, and inherent political aspects of the Special Use, Map Amendment, and Planned Development approval processes, impose . . . such a substantial burden,” *id.* at 761 (emphasis added), court held that requirement of applying for a permit was not a substantial burden on churches’ religious exercise. See also *United States v. Maui, supra* (“Essentially, the Seventh Circuit [in *C.L.U.B.*] upheld a *facial* challenge to Chicago’s laws that required churches to apply for certain exemptions.”).
 - *Grosz v. City of Miami Beach*, 721 F.2d 729, 732 (11th Cir. 1983) (appellants had not applied for—and been denied—a permit): “Miami Beach Zoning Ordinance No. 1891 had been construed by the City to prohibit churches, synagogues and similarly organized religious congregations in single-family residential zones.” *Id.* at 731. “Plaintiffs have not requested rezoning of the property.” *Id.*

- *Cornerstone Bible Church v. City of Hastings*, 948 F.2d 464 (8th Cir. 1991) (holding that zoning code in the whole was “generally applicable.”): “Although the Church has requested zoning variances or amendments with respect to both industrial and commercial zones, this lawsuit focuses on the City’s exclusion of churches from the central business district (C-3) zone.” *Id.* at 467.
- *First Assembly of God of Naples, Fla. v. Collier Cy.*, 20 F.3d 419 (11th Cir. 1994) (church began operating a homeless shelter without attempting to acquire the necessary permits): “First Assembly had not applied for a provisional permit to maintain a homeless shelter on its premises.” *Id.* at 420.
- *Mount Elliott Cemetery Ass'n v. City of Troy*, 171 F.3d 398 (6th Cir. 1999) (property sought to be used as religious cemetery not zoned for such use): “[T]he City of Troy's ordinances governing residential and community facilities districts are neutral laws of general applicability.” *Id.* at 405.
- *Rector of St. Bartholomew's Church v. City of New York*, 914 F.2d 348 (2^d Cir. 1990) (challenge to New York City’s Landmarks Law): “The Landmarks Law is a facially neutral regulation of general applicability within the meaning of Supreme Court decisions. It thus applies to ‘[a]ny improvement, any part of which is thirty years old or older, which has a special character or special historical or aesthetic interest or value.’” *Id.* at 354 (emphasis added).

The Court should note that every single case relied upon by the District Court for its determination that “land use regulations, i.e. zoning ordinances, are neutral and generally applicable,” 235 F.Supp.2d at 1200, were decisions holding that a particular land use law was facially “neutral and generally applicable,” and not that a denial of a land use permit (like the regulation at issue here) was neutral and generally applicable. *See id.* (relying on *Collier County, Cornerstone Bible*

Church, Mount Elliot Cemetery Association, St. Bartholomew's Church, and C.L.U.B., each discussed supra).⁴

C. Cheyenne Denied Grace United Methodist Church's Variance Pursuant to a "System of Individualized Assessments."

This case is no different. There is nothing unique about Cheyenne's variance law that makes it less of an individualized determination. The following characteristics of the procedure at issue are undisputed:

- “Defendant City of Cheyenne Board of Adjustment ... has been delegated the power to hear and decide: ... (2) special exceptions and variances from zoning ordinances.” 235 F.Supp.2d at 1188.
- “[D]ay care facilities over a certain size are not permitted in residential areas unless a variance is granted.” *Id.* at 1189 (citing Cheyenne Zoning Code) (emphasis added); Defendants’ Motion to Dismiss at 4 (R.36) (citing Complaint ¶ 8).
- The Cheyenne City Staff concluded that “[i]t does not appear that the proposed use complies with the criteria in § 74.020(a-d).” Board of Adjustment Agenda, Staff Report (Apr. 19, 2001) at 3 (R.493).
- “The Board of Adjustment denied the appeal, concluding:... (3) the proposed day care was incompatible with community goals and the neighborhood.” *Id.* at 1190.

⁴ The Colorado District Court case that directly conflicts with *Grace United—Alpine Christian Fellowship* (also involving the denial of permission to operate a religious school in an existing church)—did not make this error: “Because this is an individualized question, the state interests which justify zoning codes in general are not applicable. The more narrow focus here is whether the reasons given for denial of this special permit application can be characterized as compelling governmental interests.” 870 F.Supp. at 993.

- “The Board also concluded that ... the City has a compelling governmental interest in protecting the integrity and sustaining the safety of the neighborhood.” *Id.* (citation omitted).
- The Board concluded that “the proposed use is [not] in conformance with all other applicable policies ...” *In the Matter of Grace United Methodist Church*, Decision of the Board at 4 (May 22, 2001) (“Decision”) (R.95).
- The Board also concluded that the “denial of the proposed day care use does not impose a substantial burden upon the Grace’s religious exercise.” *Id.*
- The City has repeatedly argued that the variance was denied because “the Church ... had not demonstrated that the ‘proposed use is compatible with the neighborhood and with protected community goals.’” Response of the City of Cheyenne to the Plaintiff’s Motion for Summary Judgment at 4 (R.353).

Following these determinations, Grace United Methodist Church was denied a variance to operate a religious educational institution:

Mr. Buchhammer: ... I would find that under the guidelines with which this Board has to work, it is incumbent upon the applicant to establish the criteria found in section 74.020 A through D of the zoning ordinance.

....

Moving to the next requirement that must be proven by the applicant, this would be subsection C, that the proposed use is in conformance with all other applicable policies adopted by the City of Cheyenne or Laramie County....

Finally Subsection D of 74.020 which requires that the proposed uses be compatible with the neighborhood and will not protect community goals. I find that, again, no evidence has been submitted by the ... applicant on that particular subject.

In fact, the opponents of the – the request submitted evidence, the testimony that the placement of a day care in this residential area would be

absolutely contrary to the nature of the neighborhood, would be incompatible with the neighborhood.

....

Mr. Young: Question. In summary, then, you're making a motion to deny the requested variance?

Mr. Buchhammer: Yes.

Transcript at 113-115 (R.210-212). The relevant standards under Cheyenne law for the granting of the variance are as follows:

- a. The proposed use may be permitted by board approval in the district in which it is located, and that it is in conformance with all of the development standards of that district.
- b. RESERVED
- c. The proposed use is in conformance with all other applicable policies adopted by the City of Cheyenne or Laramie County.
- d. The proposed use is compatible with the neighborhood and will protect community goals.

Cheyenne Laramie County Zoning Ordinance 1988 § 74.020(a)-(d) (quoted in Decision at 3 (R.94)) (emphasis added). When compared with the hallmarks of “individualized exceptions” laid out by this Court in *Axson-Flynn*, *see supra* § I(A), there is little doubt that the City’s denial meets this standard. Certainly, analysis of “community goals,” “all other applicable policies,” and “development standards” may be legitimate—but they are also “subjective.” There can also be no argument that the procedure and hearing resulting in the variance denial was a “case-by-case inquiry” (as the title of the decision attests to: “In the Matter of

Grace United Methodist Church Application for Board Approval of a Day Care Center in an LR-1 Zoning District,” *id.* at 1 (R.92)), and also that there were “considerations of the particular circumstances,” as even a cursory review of the hearing transcript demonstrates. (R.98-215) As in *Guru Nanak Sikh Society, supra*, “[i]t is difficult to take seriously defendants’ position that the use permit requirements at issue in this case are somehow not ‘individualized assessments.’” *Id.* at 41. Under *Axson-Flynn*, this is a system of “individualized exceptions,”⁵ and is therefore subject to strict scrutiny review.

II. THE APPLICATION OF CHEYENNE’S LAND USE REGULATIONS CONSTITUTES A SUBSTANTIAL BURDEN ON GRACE UNITED METHODIST CHURCH’S RELIGIOUS EXERCISE UNDER THE FIRST AMENDMENT.

In addition to rejecting the “individualized exceptions” doctrine, the court below granted summary judgment to the City on the Church’s Free Exercise claims based on its holding that the “burden” on the Church’s religious exercise was not

⁵ The basis for the lower court’s disagreement with this conclusion is the City’s own self-serving one-line statement that “The Board has no authority or discretion to grant the proposed day care use.” (R.94) 235 F.Supp.2d at 1201 (“In fact, the Board of Adjustment specifically concluded it was without discretion to grant such a variance; hence, it cannot be argued that any subjective individualized considerations were at play in this case.”). The lower court’s standard—that as long as the municipality says it has “no discretion” regardless of how much discretion is evident in the text of the code and how much has actually been exercised by the City—is untenable. It would insulate all such zoning action and render the Free Exercise Clause meaningless in this sphere.

constitutionally sufficient. 235 F.Supp.2d at 1201 (“Grace United’s Free Exercise claim fails because, viewing the facts in the light most favorable to it, all the evidence demonstrates is, at most, an incidental burden on its religious conduct.”). This conclusion misstates the law, and again fails to take into account the great weight of authority holding that, while the general requirement of having to apply for a land use permit is not usually a substantial burden on religious exercise, the *specific* application of a land use regulation to prevent a church from engaging in religious exercise is a “substantial burden” on religious exercise which must satisfy strict scrutiny review.

A. Precedent Clearly Establishes that Being Denied The Ability To Use Real Property in Order to Engage in Religious Exercise Constitutes a Substantial Burden on Religious Exercise.

State and federal courts have repeatedly confronted the issue of land use regulations imposing “burdens” on religious exercise. From this jurisprudence, a standard for determining whether that burden is “substantial” has emerged:

The district court in *Murphy v. Zoning Com’n of Town of New Milford*, 148 F.Supp.2d 173 (D. Conn. 2001), thoroughly set out the framework on the issue of “substantial burden”:

“Substantial burden has been defined or explained in various ways by the courts. *See Thomas [v. Review Bd. Of Indiana Employment Sec. Div., 450 U.S. 707, 718 (1981)]* (exists where state “put[s] substantial pressure on an adherent to modify his behavior and to violate his beliefs”); *Sherbert [v. Verner, 374 U.S. 398, 404 (1963)]* (occurs when a person is required to “choose between following the precepts of her religion and forfeiting benefits, on the one hand, and

abandoning the precepts of her religion ... on the other”); *Bryant v. Gomez*, 46 F.3d 948, 949 (9th Cir. 1995) (state action “prevent[s] him or her from engaging in conduct or having a religious experience”); *Reese v. Coughlin*, No. 93 CIV. 4748 (LAP), 1996 WL 374166, *6 (S.D.N.Y. July 3, 1996) (quoting *Davidson v. Davis*, No. 92 CIV. 4040 (SWK), 1995 WL 60732, *5 (S.D.N.Y. Feb. 14, 1995)) (same). This burden must be more than an inconvenience to the plaintiffs, but the court’s “scrutiny extends only to whether a claimant sincerely holds a particular belief and whether the belief is religious in nature.” *Jolly v. Coughlin*, 76 F.3d 468, 476 (2d Cir. 1996).

Cottonwood Christian Center, 218 F.Supp.2d at 1226 (finding substantial burden on religious exercise where municipality denied Conditional Use Permit to church seeking to relocate and expand its ministry from its existing, inadequate facility).

In a case nearly identical to the one at bar, the Michigan Court of Appeals vacated a lower court’s grant of summary judgment against a religious organization attempting to locate a religious school on its facility. *Shepherd Montessori Center Milan v. Ann Arbor Charter Tp.*, 2003 WL 22520439 (Mich. App. Nov. 6, 2003) (holding that governmental regulation imposes a substantial burden under RLUIPA if it “compel[s] action or inaction with respect to the sincerely held belief; mere inconvenience to the religious institution or adherent is insufficient.”). In direct contradiction to the holding below, the Michigan court noted

that there is no claim by plaintiff that the location at issue has some religious significance such that plaintiff’s faith requires a school at that particular site. But plaintiff asserted that it would not be feasible to operate a Montessori school at another location because of the burdens of having duplicate administration. In addition, it can be inferred from the record that moving

both the day care center and the school to a different location would not be convenient to those parents who work in the adjacent office park. Thus, even if there is another location within the township that could house the proposed school, it is not clear that the school would necessarily be successful at this other location. Additionally, of course, if the school were not successful, then those parents desiring a religious education in the Montessori tradition for their children would, instead, be forced to send their children elsewhere for schooling.

Id. at *7. Thus, that appellate court rejected the District Court’s reasoning in this case that the Church’s claim should fail because “there is no evidence that operating the religious education program in the LR-1 zoned area, *i.e.* ‘that particular site,’ is integrally related to Grace United’s underlying religious belief.” 235 F.Supp.2d at 1201. The compelling reasoning of the Michigan Court of Appeals should be followed by this Court.

The Southern District of New York also rejected arguments similar to the court below in another religious education case:

Defendants charge that WDS has failed to demonstrate how the Village is substantially burdening their exercise of religion where the students at WDS have been, and continue to be, able to gather to pray and be educated just as they did before WDS applied for a modification of a special use permit.... Defendants’ argument misses the point.... It is the burden on the quality of the religious education that concerns us here. While it is true that the students of WDS may still, without the special permit modification gather to pray and be educated, their religious experience is limited by the current size and condition of the school buildings.

Westchester Day School, supra, at *9. The Court’s decision below stands alone in ruling that a specific denial of permission for a religious educational institution does not substantially burden religious exercise.

In addition to *Cottonwood Christian Center*, *Shepherd Montessori Center*, and *Westchester Day School*, many other courts disagree with the lower court's holding. The Eastern District of California, ruling in *Guru Nanak Sikh Society v. County of Sutter*, No. S-02-1785 (Nov. 19, 2003), formulated the standard similarly:

To meet the "substantial burden" standard the governmental conduct being challenged must actually inhibit religious activity in a concrete way, and cause more than a mere inconvenience.

Id. at 25. See also *Stuart Circle Parish v. Bd. of Zoning Appeals*, 946 F.Supp. 1225 (E.D.Va. 1996) (involving zoning laws that prevented location of homeless shelter: "[A] substantial burden on the free exercise of religion ... is one that forces adherents of a religion to refrain from religiously motivated conduct" (quoting *Mack v. O'Leary*, 80 F.3d 1175, 1178 (7th Cir. 1996))); *Jesus Center v. Farmington Hills Zoning Bd. of Appeals*, 544 N.W.2d 698, 703 (Mich.Ct.App. 1996) (government attempt to limit church's provision of shelter services that flow from church's "religious beliefs and is an exercise of those beliefs" is a substantial burden even if those services could be provided elsewhere); *Alpine Christian Fellowship*, 870 F.Supp. at 994 ("It has been agreed that religious education is an integral part of the religious beliefs of the church's membership.... Given the importance of religious education to the members of the Church, the importance of conducting the school within the church building is self evident.").

Finally, the court below based its decision partially on the argument that Church could simply continue to worship where it currently exists, and provide its religious education elsewhere. 235 F.Supp.2d at 1201 (“Grace United could operate its religious education program in another area of Cheyenne that is properly zoned for such an operation.”). To legally require a disjointed ministry—to tell a church that it can worship at Point A and send its most junior members to be taught and cared for many miles away at Point B—is hardly simply a matter of “inconvenience.” Courts have repeatedly rejects such claims. *See, e.g., Jesus Center v. Farmington Hills Zoning Bd. of Appeals*, 544 N.W.2d 698, 704 (Mich. App. 1996) (“The Jesus Center’s program flows out of and is a witness to the love of God for the poor. By serving the homeless at the same location where The Jesus Center adherents worship their God, this witness is greatly facilitated.”). Similarly, the Eastern District of Virginia rejected a contention that requiring a church to serve the homeless at a different location was not acceptable. *See Stuart Circle Parish*, 946 F.Supp. at 1239 (“Finally, as to the suggestion that the meals be shared among several of the churches, testimony showed that the synergy of the group and the continuity of meeting with the same people in the same atmosphere would be lost, rendering the practice of their faith less effective and less meaningful.”).

In sum, the cases teach that the appropriate standard for determining whether a burden is “substantial” is to ask whether government action puts pressure on a

religious institution to modify their religious behavior, or prevents it from engaging in religious conduct, in a way that is greater than a mere inconvenience.

B. Courts (Including This One) Have Regularly Distinguished “Facial” Challenges to Zoning Ordinances—Which Do Not Usually Substantially Burden Religious Exercise—With Challenges to the Denial Of A Land Use Permit—Which Often Do.

Similar to the “individual exceptions” doctrine discussed *supra*, the court’s holding that the Church has not demonstrated a sufficient burden on religious exercise is once again based on a failure to recognize a critical distinction in this area of law: the difference between facial challenges to zoning regulations and challenges to the application of such laws to religious institutions.

Cases involving the *denial* of permits (or other individualized, discretionary action) for religious institutions consistently hold that such denials may substantially burden the institution’s religious exercise:

- *United States v. Maui, supra*, at *5-6 (D. Haw. Dec. 29, 2003) Denial of a conditional use permit; court held that denial of permit preventing church from relocating from existing inadequate facility involved system of individualized assessment and allegations of complaint concerning burden imposed on church’s religious exercise were sufficient to withstand motion to dismiss.
- *Guru Nanak Sikh Society v. County of Sutton, supra*: Denial of conditional use permit to Sikh congregation for a temple; court held that preventing the construction of new temple was substantial burden on religious exercise.
- *Murphy v. Zoning Comm’n of the Town of New Milford*, 289 F.Supp. 2d 87 (D. Conn. 2003): Discretionary cease and desist order against

religious meetings; court held that forbidding prayer group from meeting in home substantially burdened group's religious exercise.

- *Elsinore Christian Center v. City of Lake Elsinore*, 291 F.Supp.2d 1083 (C.D. Cal. Aug. 21, 2003): Denial of a conditional use permit; court held that prohibiting use of property as church was substantial burden on religious exercise.
- *Cottonwood Christian Center v. Cypress Redevelopment Agency*, *supra*: Denial of a conditional use permit and attempted exercise of eminent domain powers; court held that preventing the construction of new church needed to replace current inadequate facility was substantial burden on religious exercise.
- *DiLaura v. Ann Arbor Charter Tp.*, 30 Fed. Appx. 501 (6th Cir. 2002): Denial of a variance; court held that allegations of complaint were sufficient to show that refusal of permission for gatherings of individuals for prayer on the religious institution's land was a substantial burden on religious exercise.
- *First Covenant Church of Seattle v. City of Seattle*, *supra*: Designation of church property as "landmark"; court held that prohibiting church from altering structure's exterior was a substantial burden on religious exercise.
- *Alpine Christian Fellowship v. Cy. Comm'rs of Pitkin Cy.*, 870 F.Supp. 991 (D.Colo. 1994): Denial of special use permit; court held forbidding the operation of religious school was substantial burden on religious exercise.
- *Jesus Center v. Farmington Hills Zoning Bd. of Appeals*, *supra*: Discretionary decision prohibiting homeless shelter; court held that prohibiting the operation of shelter was a substantial burden on church's religious exercise.

The City's denial of a variance in this case and consequent prevention of the Church's ability to have a religious day care integrated into its existing religious

exercise at the site falls squarely within this line of cases.

On the other hand, facial challenges to zoning ordinances often fail,⁶ with courts holding that the mere requirement of having to apply for a permit does not constitute a substantial burden on religious exercise:

- *C.L.U.B.*, 342 F.3d at 761: Challenge to ordinance that required special use permit; court held that requirement of applying for a permit was not a substantial burden on churches' religious exercise because it did not render their religious exercise "effectively impracticable."
- *Open Door Baptist Church v. Clark Cy.*, *supra*: Requirement of zoning permit; court held that the permit requirement did not substantially burden church's religious exercise, but that denial of such a permit would be subject to strict scrutiny.
- *Tran v. Gwinn*, *supra*: Requirement of a zoning permit; court held that religious organization had no free exercise right to be free from the permit requirement, but that denial of permit could be subject to strict scrutiny.
- *First Assembly of God of Naples, Fla. v. Collier Cy.*, *supra*: Requirement of a zoning permit; court held that being subjected to such a requirement did not substantially burden church's religious exercise.
- *Area Plan Comm'n of Evansville and Vanderbilt Cy.*, *supra*: Requirement of a zoning permit; court held that the mere requirement of having to apply was not a substantial burden, but that denial of the permit would be subject to strict scrutiny.

⁶ Courts have, however, struck down zoning ordinances that substantially burden religious exercise on their face as well. *See, e.g., Stuart Circle Parish, supra; Western Presbyterian Church v. Bd. of Zoning Adjustment of D.C.*, 862 F.Supp. 538 (D.D.C. 1994) (ordinance which prevented some religious activities at church was a substantial burden on church's religious exercise).

- *Petra Presbyterian Church v. Village of Northbrook*, Civ. No. 03-1936, 2003 WL 22048089 (N.D. Ill. Aug. 29, 2003): Facial challenge to zoning ordinance; court held that ordinance declaring uses permitted or not permitted in various districts did not substantially burden religious exercise.
- *Davis v. Lockland Zoning Bd. of Appeals*, Civ. No. 020795, 2003 WL 22149329 (Ohio App. Sept. 19, 2003): Lot and setback requirements; court held that neutral setback requirements did not substantially burden religious exercise of church.
- *Korean Buddhist Dae Won Sa Temple of Hawaii v. Sullivan*, 953 P.2d 1315, 1320, 1344-47 (Haw. 1998): Enforcement of height restriction; court held that prohibiting Temple from unilaterally raising roof height *without requesting permit* from Building Department did not substantially burden religious exercise.

There should be little doubt that the burden on the Church's religious exercise caused by the denial of the variance more closely matches the former group of cases, and not the latter.

Special notice must be paid to the Seventh Circuit's decision in *C.L.U.B.* Significantly, the District Court failed to recognize that the *C.L.U.B.* decision falls into the "facial challenge" category of religious land use cases, involving a challenge to Chicago's requirement that the churches obtain a permit to locate in certain zones. In particular, the churches in *C.L.U.B.* argued that "the costs, procedural requirements, and inherent political aspects of [Chicago's] Special Use, Map Amendment, and Planned Development *approval processes*, impose . . . a substantial burden." 342 F.3d at 761 (emphasis added). The court held that this challenge failed because the churches had not shown that their religious exercise

was rendered “effectively impracticable.” *Id.* Specifically, the court noted that “each of the five individual plaintiff churches has successfully located within Chicago’s city limit. That they expended considerable time and money so to do does not entitle them to relief under RLUIPA’s substantial burden provision.” *Id.* Here, unlike *C.L.U.B.*, the Church has challenged the application of the City’s land use regulations. Having to go through the land use process might not be a substantial burden, as several courts have held. Being rejected certainly is.

Application of the substantial burden test to these undisputed facts appears to contradict the lower court’s holding that the denial of a variance to the Church for a religious day care is no mere inconvenience, but instead substantially burdens the Church’s ability to carry out its religious mission in the matter it deems necessary. Put another way, the City’s flat rejection of the variance actually inhibits the Church from engaging in the full range of activities it has determined necessary to carry out its religious mission of evangelizing to youth. At the very least, this Court should remand the matter for reconsideration of the substantial burden issue under the correct legal standard.

CONCLUSION

For the foregoing reasons, the District Court's order should be reversed.

Respectfully submitted,

February 24, 2004

THE BECKET FUND FOR RELIGIOUS LIBERTY

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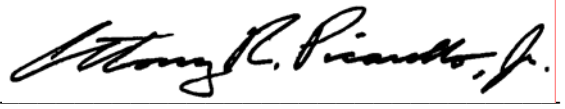
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CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing brief is 6,823 words in length and complies with Federal Rules of Appellate Procedure 32(a)(7)(B) and (C).

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CERTIFICATE OF SERVICE

I hereby certify that two true and correct copies of the above and foregoing Corrected Brief *Amicus Curiae* were sent this 24th day of February, 2004 via First Class Mail to each of the following:

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