

App. No. 03-17343

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IN THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

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GURU NANAK SIKH SOCIETY OF YUBA CITY,

*Plaintiff-Appellee,*

v.

COUNTY OF SUTTER, CASEY KROON,  
DENNIS NELSON, LARRY MUNGER, DAN SILVA,

*Defendants-Appellants.*

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF CALIFORNIA  
Case No. Civ. S-02-1785

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**BRIEF *AMICUS CURIAE* OF  
THE BECKET FUND FOR RELIGIOUS LIBERTY IN SUPPORT OF  
PLAINTIFF-APPELLEE AND IN SUPPORT OF AFFIRMANCE**

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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 Appellee and affirmance. Counsel for Plaintiff-Appellee has consented to the filing of this brief.<sup>1</sup> The Becket Fund for Religious Liberty is an interfaith, nonpartisan 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. The Becket Fund also represents the plaintiffs in a host of RLUIPA cases both in and outside the Ninth Circuit.<sup>2</sup> In

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<sup>1</sup> Although numerous attempts at contact have been made, Counsel for *amicus* have not been able to secure consent from the Defendants-Appellants, County of Sutter *et al.*, represented by Mr. Jeffrey Melching. Counsel has therefore filed a Motion for Leave to File *Amicus* Brief accompanying this brief pursuant to Fed. R. App. P. 29(b).

<sup>2</sup> *See, e.g., United States v. Maui County*, 298 F. Supp. 2d 1010, (D. Haw. Dec. 29, 2003); *Hale O Kaula v. Maui Planning Comm’n*, 229 F. Supp. 2d 1056 (D. Haw. 2002); *Cottonwood Christian Center v. Cypress Redevelopment Agency*, 218 F. Supp. 2d 1203 (C.D. Cal. 2002); *Freedom Baptist Church v. Township of Middletown*, 204 F. Supp. 2d 857 (E.D. Pa. 2002). *See also Lighthouse Institute for Evangelism v. City of Long Branch*, 2004 WL 1179268 (3d Cir. May 28, 2004); *Castle Hills First Baptist Church v. City of Castle Hills*, 2004 WL 546792 (W.D. Tex. Mar. 17, 2004); *Redwood Christian Schs. v. County of Alameda*, Civ. No. 01-

addition, we have filed a series of *amicus curiae* briefs in land-use cases involving RLUIPA.<sup>3</sup> This Brief *Amicus Curiae* will present, *inter alia*, a unique perspective on the actual, and substantial, burdens suffered by religious institutions within the Ninth Circuit as a result of the application of 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.

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4282 (N.D. Ca. filed Nov. 16, 2001) (pending); *Missionaries of Charity, Brothers v. City of Los Angeles*, Civ. No. 01-08511 (C.D. Ca. filed Sept. 19, 2001) (pending); *Archdiocese of Denver v. Town of Foxfield*, Civ. No. 01-3299 (Colo. Dist. Ct., Arapahoe Cy., Div. 5) (pending); *Great Lakes Society v. Georgetown Charter Township*, No. 03-4599-AA (Mich. Cir. Ct., Ottawa Cy.) (pending); *Temple B'nai Sholom v. City of Huntsville*, Civ. No. 01-1412 (N.D. Ala. removed June 1, 2001) (settlement agreement signed June 2003); *Greenwood Comm'y Church v. City of Greenwood Village*, Civ. No. 02-1426 (Colo. Dist. Ct.) (permit granted Dec. 2, 2002); *Living Waters Bible Church v. Town of Enfield*, Civ. No. 01-450 (D.N.H.) (agreement for entry of judgment signed Nov. 18, 2002); *Calvary Chapel O'Hare v. Village of Franklin Park*, Civ. No. 02-3338 (N.D. Ill.) (settlement agreement signed Sept. 3, 2002); *Refuge Temple Ministries v. City of Forest Park*, Civ. No. 01-0958 (N.D. Ga. filed Apr. 12, 2001) (consent order signed Mar. 2002); *Unitarian Universalist Church of Akron v. City of Fairlawn*, Civ. No. 00-3021 (N.D. Ohio) (settlement approved Oct. 1, 2001); *Haven Shores Comm'y Church v. City of Grand Haven*, No. 1:00-CV-175 (W.D. Mich.) (consent decree signed Dec. 20, 2000).

<sup>3</sup> See, e.g., *Midrash Sephardi v. Town of Surfside*, 366 F.3d 1214 (11th Cir. April 21, 2004) (*amicus* brief filed Nov. 21, 2003); *Fifth Avenue Presbyterian Church v. City of New York*, 293 F.3d 570 (2d Cir. 2002) (*amicus* brief filed on behalf of broad coalition, Mar. 15, 2002); *San Jose Christian College v. City of Morgan Hill*, 360 F.3d 1024 (9th Cir. March 8, 2004) (*amicus* brief filed on behalf of a broad coalition Aug. 28, 2002); *C.L.U.B. v. City of Chicago*, 342 F.3d 752 (7th Cir. 2003) (*amicus* brief filed June 26, 2002); *Primera Iglesia Bautista Hispana v. Broward County*, No. 01-6530-CIV (S.D. Fla.) (*amicus* brief filed Apr. 18, 2003).

## ARGUMENT

Few church-state issues have caused greater debate in recent decades than the scope of local government power to regulate religious activity through land use law. In addition to litigation across the Nation—and nowhere is such litigation more prevalent than in California—Congress passed a statute specifically designed to address this widespread problem: The Religious Land Use and Institutionalized Persons Act (“RLUIPA”), 42 U.S.C. § 2000cc *et seq.* The California Assembly has also passed, and the Senate is currently considering, similar legislative protection for houses of worship. Assembly Bill 1903, 2003-2004 Session (as amended, May 11, 2004).

The reason for this conflict is unmistakable: in no other context does government regulate group religious activity so closely,<sup>4</sup> and few rights matter more to religious assemblies than to have a place to assemble. As will be described below, land use regulation has been used to prevent religious organizations from educating their youth, providing access to their handicapped members, feeding and clothing the poor, expanding their ministries, or even establishing any permanent home. Ironically, opponents of deregulating religious exercise in the land use context have asserted that by passing RLUIPA, Congress “abandoned, quite literally, the American Dream,” arguing that such fundamental

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<sup>4</sup> With the exception, perhaps, of the institutionalized persons context (the other major provision in RLUIPA, 42 U.S.C. § 2000cc(3)).

liberties must yield to commonplace NIMBYism or worse. M. Hamilton, *Commentary*, 56 A.P.A. PLANNING & ENVIRONMENTAL LAW 8, 13 (Apr. 2004).

In *San Jose Christian College v. City of Morgan Hill*, 360 F.3d 1024 (9<sup>th</sup> Cir. 2004) (“*SJCC*”), this Court decided that merely requiring a complete zoning application for a religious institution did not “substantially burden” its religious exercise. *Id.* at 1035 (“The City’s ordinance imposes no restriction whatsoever on College’s religious exercise; it merely requires College to submit a *complete* application, as is required of all applicants.”). In doing so, it left open the question of the legal effect of a denial of such an application. *See id.* (“Should College comply with this request, it is not at all apparent that its re-zoning application will be denied.”).

The Court is now faced with the very question left open in *SJCC*. This case involves a denial of a religious use permit pursuant to a “system of individualized assessments,” *see infra* § III, a category of Free Exercise cases that was so far removed from the facts of *SJCC* that it was not even discussed as a doctrinal matter by this court. In fact, present Appellee has been denied permission to build a place of worship twice: first in a residential neighborhood, then in an agricultural zone. Both times, a discretionary finding of “inconsisten[cy] with existing uses in the area” was the basis for the rejection. As a result, Guru Nanak Sikh Society has been prohibited from building a temple which would serve as their place of weekly

worship, the repository of their Holy Book, their priest's residence, the location of their daily prayers, and a facility for holidays and weddings. *Guru Nanak Sikh Society of Yuba City v. County of Sutter*, Civ. No. 02-1785, slip op. at 20-21 (E.D. Cal. 2003). This is not *San Jose Christian College's* simple refusal to "delineate the nature and scope of proposed development" within an administrative process. *Id.* at 1036. This is a direct and substantial burden on religious exercise.

**I. CONTRARY TO APPELLANTS' ASSERTION, MUNICIPAL ZONING ACTIONS CAN—AND OFTEN DO—BURDEN RELIGIOUS EXERCISE SO SIGNIFICANTLY THAT THEY RISE TO THE LEVEL OF "SUBSTANTIAL."**

The Central District of California recently collected the applicable standards within the Ninth Circuit for determining whether a burden on religious exercise is "substantial" in the zoning context:

"Substantial burden" has been defined or explained in various ways by the courts. *See Thomas*, 450 U.S. at 718, 101 S. Ct. at 1432 (exists where state "put[s] substantial pressure on an adherent to modify his behavior and to violate his beliefs"); . . . *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 that is central to the religious doctrine"); . . . . 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 v. Cypress Redevelopment Agency*, 218 F. Supp. 2d 1203, 1226 (C.D. Cal. 2002).

The Ninth Circuit has made clear that the government imposes a “substantial burden” by prohibiting actions “rooted in religious belief,”<sup>5</sup> even when those actions exceed “what is minimally required of adherents of a religion.” *Peterson v. Minidoka County School District No. 331*, 118 F.3d 1351, 1357 (9th Cir. 1997). Instead, “[w]hat is mandated by religion”—that is, what amounts to a substantial burden if prohibited by the government—“is what the individual human being perceives to be the requirement of the transhuman Spirit to whom he or she gives allegiance.” *Id.*

The County in this Appeal, on the other hand, strives to replace these standards with one that exists nowhere else in First Amendment law: That the Temple must engage in a perpetual series of land purchases, applications, and denials *ad infinitum* until every last property has been exhausted within a jurisdiction before the burden becomes “substantial.” *See* Appellants’ Brief at 26 (“no evidence shows that the County has or will prohibit the use of other sites for a Temple.”). As the court below noted, such an extreme interpretation would make

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<sup>5</sup> Following the Supreme Court’s guidance in this area, the Ninth Circuit defers to the beliefs of the free exercise claimant in determining whether a government-imposed burden on group religious exercise exists. *E.E.O.C. v. Townley Engineering & Mfg. Co.*, 859 F.2d 610 (9th Cir. 1988) (footnote omitted) (“The Townleys state that the Bible and their covenant with God require them to share the Gospel with all of their employees. The EEOC does not dispute the sincerity of this belief, and in any event ‘[c]ourts are not arbiters of scriptural interpretation.’ *Thomas v. Review Board*, 450 U.S. 707, 716 (1981).”).

the “Substantial Burdens” provision wholly redundant with the “Exclusion and Limits” provision, 42 U.S.C. § 2000cc(2)(b)(3)(A). Under this interpretation, no application of land use regulation would violate RLUIPA Section (a)(1) unless places of worship were wholly excluded from a jurisdiction. Slip op. at 28.<sup>6</sup>

*Amicus* respectfully suggests that this Court preserve the holdings of *Thomas*, *Bryant*, *Townley Engineering*, and *Peterson*, *supra*, and reject the County’s alternative analysis. From these precedents, the following guidelines emerge:

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<sup>6</sup> “Localities may not bar religious uses on the ground that they had not met a burden of proving that suitable location elsewhere could not be found.” ARDEN H. RATHKOPF & DAREN A. RATHKOPF, *THE LAW OF ZONING AND PLANNING* 20-4 (4th ed. 1975). Furthermore, it is no defense to a religious accommodation claim by a government employee to assert that other jobs exist elsewhere, nor is it a defense to a public school student prohibited from observing his faith to suggest that he attend another school instead. Such arguments would be laughable in other contexts; they are equally unsound here. *See, e.g., Freedom Baptist Church v. Township of Middletown*, 204 F. Supp. 2d 857, 871 (E.D. Pa. 2002) (“[O]ne is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place”) (quoting *Schad v. Borough of Mt. Ephraim*, 452 U.S. 61, 76-77 (1985)); *Church of Jesus Christ of Latter-Day Saints v. Jefferson County*, 741 F. Supp. 1522, 1534 (N.D. Ala. 1994) (“Allowing churches to go only where they are welcome smacks of an unreasonable burden.”); *Community Synagogue v. Bates*, 136 N.E.2d 488, 496 (N.Y. 1956) (“[I]f the municipality has the unfettered power to say that the ‘precise spot’ selected is not the right one, the municipality has the power to say eventually which is the proper ‘precise spot.’”); *State ex rel. Synod of Ohio of United Lutheran Church v. Joseph*, 39 N.E. 2d 515, 525 (Ohio 1942) (rejecting argument that because “sites in the business district were still available” it was permissible to deny churches from locating in residential districts).

- Does the application of the County’s land use regulations “put substantial pressure on [the religious entity] to modify [its] behavior and to violate [its] beliefs”? *Thomas*, 450 U.S. at 718.
- Does the “state action prevent [the religious entity] from engaging in conduct or having a religious experience that is central to the religious doctrine”? *Bryant v. Gomez*, 46 F.3d 948, 949 (9th Cir. 1995).
- Is the burden “more than an inconvenience to [the religious entity]”? *Jolly v. Couglin*, 76 F.3d 468, 476 (2d Cir. 1996).
- Would the state action result in “ending . . . attendance at the devotional services”? *E.E.O.C. v. Townley Engineering & Mfg. Co.*, 859 F.2d 610 (9th Cir. 1988); *see also Church of Christ in Hollywood v. Superior Court*, 99 Cal. App. 4th 1244, 1257 (2002) (holding that loss of a church’s members and resulting inability to minister to them constitutes “irreparable harm” to religious exercise).

In this Appeal, for all of the reasons described by the District Court, by the Appellees, and by the United States, the answer to these questions must be “yes.” And furthermore, this conclusion is not uncommon in the zoning context. Many of the religious organizations represented by *amicus* within the Ninth Circuit suffer from similar—and substantial—burdens Cottonwood Christian Center, Cypress, California.

The significant harm suffered by this church at the hands of the City of Cypress and its Redevelopment Agency demonstrates a common problem faced by such institutions. *Cottonwood Christian Center v. Cypress Redevelopment Agency*, 218 F. Supp. 2d 1203 (C.D. Cal. 2002). Cottonwood had steadily outgrown its previous facility, was “unable to accommodate all the people that want to attend its services and . . . unable to conduct outreach to potential new members.” *Id.* at

1212. It had purchased sufficient land to build a new facility, but was denied a discretionary permit and was subsequently the target of a City eminent domain action. *Id.* at 1213-15. As a result of this denial, the church continued to suffer from limitations in its various ministries, including “youth conferences, women’s ministries, daycare facilities, English language classes for native Spanish speakers, and missionary training.” *Id.* at 1212. Furthermore, the new facility would have had sufficient space for all of these activities. *Id.* at 1213.

This was not, the court held, a mere “inconvenience.” *Id.* at 1226. Rather, applying this Court’s standard as elucidated in *Bryant v. Gomez, supra*, the district court held that “[p]reventing a church from building a worship site fundamentally inhibits its ability to practice its religion. Churches are central to the religious exercise of most religions.” *Id.* This unexceptional proposition—that preventing a church from building a place of worship is a substantial burden, as opposed to simply requiring a religious institution to properly apply as in *San Jose Christian College* and *C.L.U.B.*—was reiterated by the court below in *Guru Nanak*:

The requirement that there be a facility for religious assembly is common and fundamental to many of the world’s religions. As one pair of commentators put it, “[t]he physical embodiment of a faith group—its church—represents its ability to speak, assemble, and worship together . . . .”

Slip op. at 21.

Hale O Kaula Church, Maui, Hawaii.

Like the case at bar, this church was twice denied a discretionary zoning permit for a church facility. *Hale O Kaula Church v. Maui Planning Comm'n*, 229 F. Supp. 2d 1050, 1053 (D. Haw. 2002). The effects on the church have been substantial: Its current facility was “inadequate for the organization’s activities and . . . meeting at community centers was not a satisfactory long-term solution. Space for programs involving children was needed. The church practices the Joseph Ministry one of whose emphases is on agricultural land use for which the Haiku property was very limiting.” *Id.* at 1052.

In fact, the burden on this small church of 60 members, *id.*, was so egregious that the United States Department of Justice filed suit against Maui County for its treatment of Hale O Kaula. *See* Letter from Steven H. Rosenbaum, Chief, Housing and Civil Enforcement Section, to Brian T. Moto, Corporation Counsel, County of Maui (May 14, 2003) (available at <http://www.rluipa.org/cases/HOK-DOJ-letter.pdf>); *United States v. Maui County*, 298 F. Supp. 2d 1010 (D. Haw. 2003). *Missionaries of Charity, Brothers, Los Angeles, California.*

This religious order founded by Mother Theresa has served the homeless for over a decade at its location in the Pico-Union area of L.A. Recently, in response to neighborhood gentrification, the City, driven by complaints of a new neighbor, has been attempting to use the zoning laws to shut them down. *Missionaries of Charity, Brothers v. City of Los Angeles*, Civ. No. 01-08511 (C.D. Cal. filed Sept.

19, 2001) (pending). See Allison B. Cohen, *Neighbors divided; A religious land-use law designed to protect institutions fuels some zoning disputes*, L.A. TIMES, Apr. 25, 2004 at K1 (“I don't want to put these people in a warehouse somewhere,’ [Brother James] Walker said. ‘They act differently because they are here. We provide them a safe haven. This is how we worship . . . by helping the poorest of the poor.’”).

Elsinore Christian Center, Lake Elsinore, California.

The City of Lake Elsinore has prevented the church from ministering to the elderly and the disabled through its denial of a conditional use permit for the church to use an existing structure as a place of worship. Its existing structure “pose[s] particular difficulties for elderly Church members and those with disabilities, and [] the current facility is too small to accommodate a growing congregation.” *Elsinore Christian Center v. City of Lake Elsinore*, 291 F. Supp. 2d 1083, 1086 (C.D. Cal. 2003).<sup>7</sup>

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<sup>7</sup> That District Court stands alone as the only court ever to have struck down RLUIPA’s zoning provisions as unconstitutional. Its decision is on appeal now to this Court, Appeal No. 04-55320 (filed Feb. 26, 2004), and has been widely criticized by others. See *Fortress Bible Church v. Feiner*, 2004 WL 1179307, at \*2 (S.D.N.Y. Mar. 29, 2004) (holding that “the *Elsinore* holding contradicts a significant weight of the case law on this subject, including two recent cases from District Courts within this Circuit, and this Court finds the contradicting case law more persuasive.”); *United States v. Maui*, 298 F. Supp. 2d at 1015 (rejecting *Elsinore*); *Castle Hills First Baptist Church v. City of Castle Hills*, 2004 WL 546792, at \*19 n.143 (W.D. Tex. 2004) (same); *Murphy v. Zoning Com’n of Town of New Milford*, 289 F. Supp. 2d 87, 119 (D. Conn. 2003) (same). The rest of the

The court found these burdens substantial:

The burden on the Church's use of land in this case is not only substantial, but entire. By denying the conditional use permit, the City has effectively barred *any* use by the Church of the real property in question. This is not a case where the Church's proposed use of land—equated with “religious exercise” by RLUIPA—is restricted in a minor or “unsubstantial” way (e.g., by limiting a building's size or occupancy). Rather, the denial of the CUP bars the Church's use altogether, thereby imposing the ultimate burden on the use of that land.

*Id.* at 1169-1170. These principles reinforce the holdings of *Cottonwood Christian Center* and *Guru Nanak Sikh Society*, *supra*.

Redwood Christian Schools, Alameda County, California.

This religious institution has been prevented from building a permanent home with facilities adequate to house its student population. *Redwood Christian Schs. v. County of Alameda*, Civ. No. 01-4282 (N.D. Cal. filed Nov. 16, 2001) (pending). The School has been renting various sites from the local school district in an attempt to survive, and desperately needs a permanent home. *See Benjamin Pimentel, Putting Their Faith in New Religious Act/Bay Area Groups Try to Protect Space, Practices*, S.F. CHRONICLE, March 11, 2001, at A17. These problems are not unique in the religious school context. *See, e.g., Ventura Cy.*

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authority is unanimous in upholding its constitutionality. *See, e.g., Westchester Day School v. Village of Mamaroneck*, 280 F. Supp. 2d 230 (S.D.N.Y. 2003); *Murphy, supra*; *U.S. v. Maui, supra*; *Cottonwood Christian Center v. Cypress Redevelopment Agency*, 218 F. Supp. 2d 1203, 1221 (C.D. Cal. 2002); *Freedom Baptist Church v. Township of Middletown*, 204 F. Supp. 2d 857, 868 (E.D. Pa. 2002).

*Christian High School v. City of San Buenaventura*, 233 F. Supp. 2d 1241, 1244 (C.D. Cal. 2002) (school claiming that, as a result of city action, “enrollment has dropped from 90 students to 54 students” and that “it will have to either close its doors, or so severely curtail its operations as to be an unrecognizable and radically different entity.”).

Victory Outreach Church, Santa Clara, California.

Like the Missionaries of Charity described above, this church’s mission is to minister to “recovering addicts, ex-gang members and hundreds of other devoted followers.” Karen de Sá, *Church to stay at rural site near San Jose*, SAN JOSE MERCURY NEWS, Sept. 19, 2002 at 1. And like the Missionaries of Charity, Santa Clara is trying to use zoning laws to drive them out. *Id.* They have no other home or place to worship. *See County of Santa Clara v. Victory Outreach Church*, Civ. No. 01-02-810127, slip op. at 3 (Cal. Super. Ct. Apr. 14, 2004) (ordering church to “[c]ease using the Property and structures thereon for [religious] purpose[s].”).

These hardships suffered by *amicus*’ clients are not unusual. Rather, they represent examples of the increasingly frequent conflicts borne by increasingly diverse houses of worship facing increasingly assertive and callous zoning authorities. And while this Court held that San Jose Christian College’s objection to the regulatory process did not create a burden that was “oppressive” or “significantly great,” 360 F.3d at 1034, these examples of actual prohibitions or

ejections most certainly are. Parties on all sides of these disputes sorely need this Court's clarification regarding the rights and duties of religious institutions in the zoning context.

## **II. THE DECISION BELOW IS CONSISTENT WITH BOTH *SAN JOSE CHRISTIAN COLLEGE AND CIVIL LIBERTIES FOR URBAN BELIEVERS V. CITY OF CHICAGO*.**

Appellants' argument is based on the faulty premise that the District Court's substantive standard for substantial burdens on religious exercise "is inconsistent with the test adopted and applied by this Court in *SJCC*." Appellants' Br. at 19. The County fails to recognize the critical factual distinction between cases such as *SJCC* and *CLUB* on one side, and those such as *Guru Nanak* and *Cottonwood Christian Center* on the other:<sup>8</sup> the former involve broad-based challenges to the requirement merely to participate fully in the zoning process, while the latter deals with denials of particular use permits after complete participation in a discretionary process, *i.e.* in a system of "individualized assessments."

This Court recognized this distinction in *SJCC*:

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<sup>8</sup> The County suggests that the decision in *Cottonwood Christian Center v. Cypress Redevelopment Agency*, 218 F. Supp. 2d 1203 (C.D. Cal. 2002), "is no longer good law in light of *San Jose Christian College*." Appellants' Br. at 35. In fact, this Court cited *Cottonwood Christian Center* favorably in *San Jose Christian College* in its discussion of the substantial burden standard, and did not criticize its holding. 360 F.3d at 1024. For the reasons described below, there is no conflict between *Cottonwood* and *SJCC*.

College identifies the substantial burden in this case as its inability to use its own property “to carry on its mission[s] of Christian education and transmitting its religious beliefs.” As stated previously, however, it appears that College is simply adverse to complying with the PUD ordinance’s requirements. The City’s ordinance imposes no restriction whatsoever on College’s religious exercise, it merely requires College to submit a *complete* application, as is required of all applicants. Should College comply with this request, it is not at all apparent that its re-zoning application will be denied.

360 F.3d at 1035 (second emphasis added); *see also id.* at 1028 (“Upon receipt and review of the initial application ‘for completeness and accuracy of filing,’ the City informed College that its application was ‘incomplete,’ and outlined ‘the additional information needed to make the application complete.’”). If the “re-zoning application [would] be denied,” the opinion suggests, the institution’s religious exercise may well have been substantially burdened. *Id.* at 1035.

The same holds true for the Seventh Circuit’s *CLUB* decision:

Appellants contend that the scarcity of affordable land available for development in R zones, along with the costs, procedural requirements, and inherent political aspects of the Special Use, Map Amendment, and Planned Development approval processes, impose precisely such a substantial burden. However, we find that these conditions—which are incidental to any high-density urban land use—do not amount to a substantial burden on religious exercise. While they may contribute to the ordinary difficulties associated with location (by any person or entity, religious or nonreligious) in a large city, they do not render impracticable the use of real property in Chicago for religious exercise, much less discourage churches from locating or attempting to locate in Chicago.

342 F.3d at 761 (emphasis added). In fact, this Court specifically cited this passage with approval. 360 F.3d at 1035. The Seventh Circuit emphasized as “significant” the fact that “each of the five individual plaintiff churches has successfully located within Chicago’s city limits.” *Id.* Again, the clear implication is that churches that are denied such permission—rather than simply required to seek permission—may be substantially burdened. *See, e.g., U.S. v. Maui*, 298 F. Supp. 2d at 1017 (“Essentially, the Seventh Circuit [in *CLUB*] upheld a facial challenge to Chicago’s laws that required churches to apply for certain exemptions. . . . Most importantly for present purposes, the opinion did not involve an as-applied challenge as is at issue here; . . .”).

*SJCC* and *CLUB* are examples from a long line of cases distinguishing broad-based challenges to zoning ordinances/procedures from specific challenges to actual permit denials. Cases involving the latter consistently hold that such denials may substantially burden the institution’s religious exercise:

- *Westchester Day School v. Village of Mamaroneck*, 280 F. Supp. 2d 230, 240 (S.D.N.Y. 2003): Holding, under *Thomas* and *Bryant*, that denial of special permit to religious school to build a *shul*, modern classrooms, other instruction rooms and a cafeteria, was a substantial burden on religious exercise. *See id.* at 241-42 (“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.”) (citing *Bryant*).
- *Williams Island Synagogue v. City of Aventura*, 2004 WL 1059798 at

\*5 (S.D. Fla. May 6, 2004): Denial of conditional use permit for synagogue may be a substantial burden on religious exercise where City “prevent[ed] Plaintiff from relocating to a facility which may allow its increased membership to worship more consistently with the requirements of Orthodox Judaism.”

- *U.S. v. Maui, supra*: Denial of a conditional use permit; court held that allegations of complaint concerning burden imposed on church’s religious exercise were sufficient to withstand motion to dismiss.
- *Castle Hills First Baptist Church v. City of Castle Hills*, 2004 WL 546792 (W.D. Tex. Mar. 17, 2004): Holding that refusal to accept application to use real property for religious exercise was a “substantial burden” on religious exercise, and that denial of such permission “would likely be” substantial burden.
- *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*, 840 P.2d 174 (6th

Cir. 2002): 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*, 544 N.W. 2d 698 (Mich. App. 1996): Discretionary decision prohibiting homeless shelter; court held that prohibiting the operation of shelter was a substantial burden on church’s religious exercise.
- *Shepherd Montessori Center Milan v. Ann Arbor Charter Tp.*, 675 N.W.2d 271, 281 (Mich. App. 2003) Denial of petition to operate religious school; holding that governmental regulation may impose 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.”

The County’s denial of a variance here, and the Sikh Society’s consequent ability to build a place of worship falls squarely within this line of cases. In stark contrast, broad challenges to zoning ordinances and procedural requirements, or ordinances as a whole, often fail (as in *SJCC* and *CLUB*),<sup>9</sup> with courts holding that the mere requirement of having to apply for a permit does not constitute a substantial burden on religious exercise:

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<sup>9</sup> On occasion however, Courts have struck down zoning ordinances that substantially burden religious exercise on their face as well. *See, e.g., Stuart Circle Parish v. Bd. of Zoning Appeals*, 946 F. Supp. 1225 (E.D. Va. 1996); *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).

- *Open Door Baptist Church v. Clark Cy.*, 995 P.2d 33 (Wash. 2000): 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 trigger strict scrutiny.
- *Tran v. Gwinn*, 554 S.E.2d 572 (Va. 2001): Requirement of a zoning permit; court held that religious organization had no free exercise right to be free from the requirement to apply for a permit, but that denial of a permit could be subject to strict scrutiny.
- *First Assembly of God of Naples, Fla. v. Collier Cy.*, 20 F.3d 419 (11th Cir. 1994): Requirement of a zoning permit; court held that a requirement to seek a permit did not substantially burden church's religious exercise.
- *Area Plan Comm'n of Evansville and Vanderbilt Cy.*, 701 N.E.2d 856 (Ind. App. 1998) : 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.
- *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.
- *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.

This Appeal does not involve the requirement to seek a permit, it involves the denial of such a permit. As such, the burden it suffers is “significantly great[er],” *SJCC*, 360 F.3d at 1034, than merely having to properly apply for such a permit.

### **III. GURU NANAK SIKH SOCIETY’S RELIGIOUS EXERCISE IS SUBSTANTIALLY BURDENED PURSUANT TO A SYSTEM OF INDIVIDUALIZED ASSESSMENTS.**

Appellants also make a half-hearted attempt to argue that the process of reviewing a conditional use permit application is not a “system of individualized assessments.” Appellants’ Br. at 38-44; *see generally* RLUIPA, 42 U.S.C. § 2000cc(a)(2); *Employment Div. v. Smith*, 494 U.S. 872, 884 (1990) (“The *Sherbert* test, it must be recalled, was developed in a context that lent itself to individualized governmental assessment of the reasons for the relevant conduct.”); *Church of the Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 537 (1993) (“[I]n circumstances in which individualized exemptions from a general requirement are available, the government may not refuse to extend that system to cases of religious hardship without compelling reason.”).

Again, the County relies on the *San Jose Christian College* and *CLUB* decisions, without acknowledging the same, highly relevant fact pattern that those cases shared: They were broad-based attacks on zoning ordinance procedures, and an attempt to bypass them. *See supra* § II. In *San Jose Christian College*, this Court upheld the finding that “the city’s zoning ordinance applies throughout the entire City,” 360 F.3d at 1032, and therefore that the ordinance was a neutral law of general applicability. Similarly, in *CLUB*, the Seventh Circuit likewise held that the challenged ordinance was generally applicable, because it is “mandatory. In

short, no person, nor any nonconforming land use, is exempt from the procedural system in place for Special Use, Map Amendment, or Planned Development approval specifically, or the CZO generally.” 342 F.3d at 764. That court explained the distinction omitted from Appellants’ analysis: “Appellants appear to confuse exemption from a particular zoning provision (in the form of Special Use, Map Amendment, or Planned Development approval) with exemption from the procedural system by which such approval may be sought.” *Id.* The standard advocated by the County here goes much further than *SJCC* and *CLUB*, and would result in an unprecedented elimination of free exercise rights enjoyed by religious institutions.

In the context at issue here—the denial of a discretionary use permit—courts have held time and time again that such a system is a “system of individualized assessments” within the meaning of RLUIPA and the Free Exercise Clause, and thus subject to strict scrutiny:

- *Hale O Kaula v. Maui Planning Comm’n*, 229 F. Supp. 2d 1056 (D. Haw. 2002) (Christian association attempting to build church in agricultural zone): Zoning “provisions are a system of ‘individualized exemptions’ to which strict scrutiny applies” under the Free Exercise Clause. *Id.* at 1073.
- *Castle Hills First Baptist Church v. City of Castle Hills*, 2004 WL 546792 at \*10 (W.D. Tex. Mar. 7, 2004): Holding that zoning actions were individualized assessments.
- Murphy, *supra*: Cease and desist order to discontinue prayer meetings was “specifically about individualized governmental assessments.”

- *Shepherd Montessori Center*, 675 N.W.2d at 276: Denial of plaintiff’s petition for variance was accomplished pursuant to a system of individualized assessments.
- *Corporation of Presiding Bishop of Church of Jesus Christ of Latter-Day Saints v. City of West Lynn*, 86 P.3d 1140, 1148 (Or. App. 2004): Denial of conditional use permit for church was “subjective in nature,” and therefore a “system of individualized assessments.”
- *Westchester Day School*, *supra*: “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*, *supra*: “If, as the Court finds here, RLUIPA codified existing precedent regarding when to apply the strict 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*, *supra* (granting preliminary injunction in favor of church seeking to use property as worship center): “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*, *supra*: “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): “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.
  - *Greater Bible Way Temple of Jackson v. City of Jackson*, Civ. No. 01-003614, slip op. (Mich. Cir. Ct. Feb. 25, 2003) (ministry to build housing for the elderly): “There is no question that the City of Jackson’s review of Plaintiff’s request for rezoning was an individualized assessment.”
  - *First Covenant Church of Seattle v. Seattle, supra*: 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) (religious school): Special use permit denial triggered strict scrutiny because determination was made under discretionary “appropriate[ness]” standard. *Id.* at 994.
  - *Oblates of St. Joseph v. Nichols*, Civ. No. 01-2349, slip op. at 12 n.9 (E.D. Cal. Apr. 26, 2002) (expansion of parking lot at religious shrine): 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.”
  - *Open Door Baptist Church v. Clark Cy., supra*: “Precedent makes it clear that *closure* of a church would require a compelling state interest.” *Id.*

- *Area Plan Comm'n of Evansville and Vanderbilt Cy. v. Wilson, supra*: “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.

For all of the reasons described in the Appellee’s Brief, the administrative scheme at issue here—the procedure for reviewing a conditional use application—is no different. Appellee Br. at 45-48. The distinction between this Appeal and *SJCC* is the difference between an ordinance that requires an application procedure for all use permits, and the denial of such a permit based on vague and discretionary factors.

## CONCLUSION

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

Respectfully submitted,

June 9, 2004

THE BECKET FUND FOR RELIGIOUS  
LIBERTY

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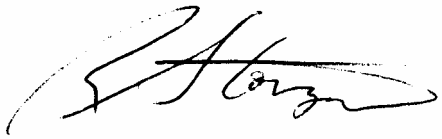
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**CERTIFICATE OF COMPLIANCE PURSUANT TO FED. R. APP.  
32(A)(7)(C) AND CIRCUIT RULE 32-1 FOR CASE NO. 03-17343**

I certify that pursuant to Fed. R. App. P. 29(d) and Ninth Circuit Rule 32-1, the attached amicus brief is proportionally spaced, has a typeface of 14 points or more, and contains 7,000 words or fewer.

June 9, 2004  
Date

  
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## CERTIFICATE OF SERVICE

I hereby certify that two true and correct copies of the above and foregoing Amicus Brief was sent this 9th day of June, 2004 via Federal Express to each of the following:

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