

*Amicus does not request
oral argument*

Appellate Division – Second Department Docket No. 2001-10123
Westchester County Clerk’s Index No. 15524/97

Court of Appeals
of the
State of New York

In the Matter of the Application of
LEGION OF CHRIST, INCORPORATED,
Petitioner-Appellant,

-against-

THE TOWN OF MOUNT PLEASANT, A Municipal Corporation,
Its Assessor and Board of Review,
Respondents-Respondents.

For a review under Article 7 of the Real Property Tax Law of the State of New
York of the 1997 assessment of certain real property situated in Respondent
Municipal Corporation, located in the County of Westchester and
State of New York

**BRIEF *AMICUS CURIAE* OF THE BECKET FUND FOR RELIGIOUS LIBERTY
IN SUPPORT OF PETITIONER-APPELLANT**

THE BECKET FUND FOR RELIGIOUS LIBERTY

Amicus Curiae

Kevin J. Hasson, Esq.

Anthony R. Picarello, Jr., Esq.

Roman P. Storzer, Esq.

Anthony J. Vlatas, Esq.

1350 Connecticut Avenue NW, Suite 605

Washington, DC 20036-1735

Telephone: (202) 955-0095

Telecopier: (202) 955-0090

December 17, 2003

TABLE OF CONTENTS

	<u>Page</u>
TABLE OF AUTHORITIES	ii
INTEREST OF <i>AMICUS CURIAE</i>	1
ARGUMENT	2
I. Requiring Local Land-Use Permits as a Condition of Tax Exemption for Religious Groups Would Needlessly Introduce a Prolific Source of Religious Discrimination into the Administration of the Tax Laws.	4
II. Religious Discrimination in the Application of the Tax Laws Would Violate Multiple, Overlapping Protections of the First and Fourteenth Amendments to the Federal Constitution.	7
CONCLUSION	12

TABLE OF AUTHORITIES

CASES

Am. Friends of the Soc’y of St. Pius v. Schwab,
417 N.Y.S.2d 991 (N.Y. App. Div. 1979) 4

Archdiocese of Denver v. Town of Foxfield,
Case No. 01-CV-3299 (Colo. D.Ct., pending)..... 1

Bd. of Trustees of Univ. of Ala. v. Garrett, 531 U.S. 356 (2001) 6

Braunfeld v. Brown, 366 U.S. 599 (1961) 12

Brown v. Borough of Mahaffey, 35 F.3d 846 (3d Cir. 1994)..... 12

C.L.U.B. v. City of Chicago, 342 F.3d 752 (7th Cir. 2003)..... 2,11

Calvary Chapel O’Hare v. Village of Franklin Park,
Civ. No. 02-3338 (N.D. Ill., settled) 1

Castle Hills First Baptist Church v. City of Castle Hills,
Civ. No. 01-1149 (W.D. Tex., pending) 1

Church of the Lukumi Babalu Aye v. Hialeah, 508 U.S. 520 (1993) 5, 9, 10

City of Boerne v. Flores, 521 U.S. 507 (1997)..... 4

City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432 (1985)..... 3, 7, 8

City of New Orleans v. Dukes, 427 U.S. 297 (1976) 8

Cottonwood Christian Center v. City of Cypress,
218 F. Supp. 2d 1203 (C.D. Cal. 2002) 1, 5, 10

Dept. of Agriculture v. Moreno, 413 U.S. 528 (1973)..... 8

Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. and Const. Trades Council,
485 U.S. 568 (1988)..... 2

Employment Div. v. Smith, 494 U.S. 872 (1990)..... 5, 8, 9

Euclid v. Ambler Realty Co., 272 U.S. 365 (1926)..... 8

<i>Fifth Avenue Presbyterian Church v. City of New York</i> , 293 F.3d 570 (2d Cir. 2002).....	1
<i>Freedom Baptist Church v. Township of Middletown</i> , 204 F. Supp. 2d 857 (E.D. Pa. 2002)	1
<i>Greenwood Comm’y Church v. City of Greenwood Village</i> , Civ. No. 02-1426 (Colo. D.Ct.)	1
<i>Hale O Kaula v. Maui Planning Comm’n</i> , 229 F. Supp. 2d 1050 (D. Haw. 2002)	1
<i>Hartmann v. Stone</i> , 68 F.3d 973 (6 th Cir. 1995)	12
<i>Haven Shores Comm’y Church v. City of Grand Haven</i> , 1:00-CV-175 (W.D. Mich., settled)	1
<i>Islamic Center of Mississippi v. City of Starkville</i> , 840 F.2d 293 (5 th Cir. 1988).....	9, 10
<i>Johnson v. Martin</i> , 223 F. Supp. 2d 820 (W.D. Mich. 2002).....	2
<i>Lighthouse Institute for Evangelism v. City of Long Branch</i> , Civ. No. 00-3366 (D.N.J., pending).....	2
<i>Living Waters Bible Church v. Town of Enfield</i> , Civ. No. 01-450 (D.N.H., settled).....	1
<i>Marks v. City of Chesapeake</i> , 883 F.2d 308 (4 th Cir. 1989)	8, 10
<i>Midnight Sessions, Ltd. v. City of Philadelphia</i> , 945 F.2d 667 (3d Cir. 1991).....	8
<i>Missionaries of Charity, Brothers v. City of Los Angeles</i> , Civ. No. 01-08511 (C.D. Ca., pending)	1
<i>Mont Belvieu Square, Ltd. v. City of Mont Belvieu, Texas</i> , 27 F. Supp. 2d 935 (S.D. Tex. 1998)	9
<i>Moore v. East Cleveland</i> , 431 U.S. 494 (1977).....	8
<i>Murphy v. Town of New Milford</i> , ___ F. Supp. 2d ___, No. 3:00-CV-2297, 2003 WL 22299219 (D. Conn. Sept. 30, 2003)	5, 11
<i>N.L.R.B. v. Catholic Bishop of Chicago</i> , 440 U.S. 490 (1979)	2
<i>Nectow v. Cambridge</i> , 277 U.S. 183 (1928).....	8

<i>New Orleans v. Dukes</i> , 427 U.S. 297 (1976).....	9
<i>Pace Resources, Inc. v. Shrewsbury Township</i> , 808 F.2d 1023 (3d Cir. 1987).....	7
<i>Palmore v. Sidoti</i> , 466 U.S. 429 (1984).....	10
<i>Pine Hills Zendo v. Town of Bedford, N.Y. Zoning Bd. of Appeals</i> , No. 17833-01 (N.Y. Sup. Ct., settled)	1
<i>Redwood Christian Schs. v. County of Alameda</i> , Civ. No. 01-4282 (N.D. Ca., pending).....	1
<i>Refuge Temple Ministries v. City of Forest Park</i> , Civ. No. 01-0958 (N.D. Ga., settled).....	1
<i>Romer v. Evans</i> , 517 U.S. 620 (1996)	8
<i>San Jose Christian College v. City of Morgan Hill</i> , No. 02-15693 (9 th Cir., pending).....	2
<i>Santa Fe Independent School Dist. v. Doe</i> , 530 U.S. 290 (2000)	9
<i>Schad v. Borough of Mt. Ephraim</i> , 452 U.S. 61 (1981)	8
<i>Seattle Title Trust Co. v. Roberge</i> , 278 U.S. 116 (1928).....	8
<i>Temple B'nai Sholom v. City of Huntsville</i> , Civ. No. 01-1412 (N.D. Ala., settled).....	1
<i>Unitarian Universalist Church of Akron v. City of Fairlawn</i> , Civ. No. 00-3021 (N.D. Ohio, settled).....	1
<i>United States v. City of Chicago Heights</i> , 161 F. Supp. 2d 819 (N.D.Ill. 2001).....	10
<i>Vernon v. City of Los Angeles</i> , 27 F.3d 1385 (9th Cir. 1994).....	12
<i>Village of Arlington Heights v. Metropolitan Hous. Dev. Corp.</i> , 429 U.S. 252 (1977).....	10
<i>Village of Willowbrook v. Olech</i> , 528 U.S. 562 (2000).....	7, 8
<i>Wallace v. Jaffree</i> , 472 U.S. 38 (1985).....	9
<i>Westchester Day Sch. v. Village of Mamaroneck</i> , 280 F. Supp. 2d 230 (S.D.N.Y. 2003).....	11

<i>Williams v. Bitner</i> , 285 F. Supp. 2d 593 (M.D. Pa. 2003).....	2
<i>Wolff v. McDonnell</i> , 418 U.S. 539 (1974)	7

STATUTES

New York Real Property Tax Law, Section 420-a(3).....	3, 4, 10
Religious Land Use and Institutionalized Persons Act of 2000, 42 U.S.C. § 2000cc, <i>et seq.</i>	1

OTHER AUTHORITIES

146 CONG. REC. E1564-E1567 (Sept. 22, 2000)	6
146 CONG. REC. S7774, S7775 (daily ed. July 27, 2000).....	3, 4, 5
Douglas Laycock, <i>State RFRA's and Land Use Regulation</i> , 32 U.C. DAVIS L. REV. 755 (1999)	7
H.R. REP. NO. 106-219	3, 5
John W. Mauck, <i>Tales from the Front: Municipal Control of Religious Expression Through Zoning Ordinances</i> (July 9, 1998) (statement submitted to Congress, < http://www.house.gov/judiciary/mauck.pdf >, to supplement live testimony of June 16, 1998)	5, 6
Laycock, <i>State RFRA's and Land Use Regulation</i> , 32 U.C. DAVIS L. REV. 755 (1999)	5
<i>Protecting Religious Freedom after Boerne v. Flores (III)</i> , <i>Hearing Before the Subcomm. on the Constitution of the House Comm. on the Judiciary</i> , 105th Cong., 2d Sess. (Mar. 26, 1998) (statement of Von Keetch, Counsel to Mormon Church, < http://commdocs.house.gov/committees/judiciary/hju57227.000/hju57227_of.htm >).....	5, 6
<i>Protecting Religious Liberty: Hearings Before the Senate Comm. on the Judiciary</i> , 106 th Cong., 2d Sess. (Sept. 9, 1999), (statement of Prof. Douglas Laycock, Univ. Texas Law Sch., < http://www.senate.gov/~judiciary/9999dlay.htm >)	7
<i>Religious Liberty Protection Act of 1998: Hearing on H.R. 4019 Before the Subcomm. on the Constitution of the House Comm. on the Judiciary</i> , 105 th Cong., 2d Sess. (June 16 and July 14, 1998) (“June-July 1998 House Hearings”)	

(statement of Rev. Elenora Giddings Ivory, Presbyterian Church (USA),
<http://commdocs.house.gov/committees/judiciary/hju59929.000/hju59929_of.htm>)..... 5, 6

Roman P. Storzer & Anthony R. Picarello, Jr., *The Religious Land Use and Institutionalized Persons Act of 2000: A Constitutional Response to Unconstitutional Zoning Practices*, 9 GEO. MASON L. REV. 929 (Summer 2001)..... 2

Von G. Keetch & Matthew K. Richards, *The Need for Legislation to Enshrine Free Exercise in the Land Use Context*, 32 U.C. DAVIS L. REV. 725 (1999) 7

INTEREST OF AMICUS CURIAE

The Becket Fund for Religious Liberty is an interfaith, bi-partisan, public interest law firm dedicated to protecting the free expression of all religious traditions and the freedom of religious people and institutions to participate fully in public life. The Becket Fund litigates in support of these principles in state and federal courts throughout the United States, both as primary counsel and as *amicus curiae*.

Accordingly, the Becket Fund has been heavily involved in litigation on behalf of a wide variety of religious worshippers, ministers, and institutions under the new Religious Land Use and Institutionalized Persons Act of 2000, 42 U.S.C. § 2000cc, *et seq.* (“RLUIPA” or “the Act”). The Becket Fund’s RLUIPA cases run the gamut – as *amicus curiae* and as plaintiffs’ counsel, in prisoner and land-use cases, from New Hampshire to Hawaii – including cases arising out of New York.¹ The Becket Fund is also litigating a host of RLUIPA land-use cases as plaintiffs’ counsel outside New York, including some that have resulted in published decisions.² Some of our RLUIPA land-use cases have concluded by favorable settlement.³ In addition, we have filed

¹ See, e.g., *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); *Pine Hills Zendo v. Town of Bedford, N.Y. Zoning Bd. of Appeals*, No. 17833-01 (N.Y. Sup. Ct.) (settlement agreement allowing religious use and paying plaintiffs’ costs, Apr. 8, 2002).

² See, e.g., *Hale O Kaula v. Maui Planning Comm’n*, 229 F. Supp. 2d 1050 (D. Haw. 2002); *Cottonwood Christian Center v. City of Cypress*, 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 *Castle Hills First Baptist Church v. City of Castle Hills*, Civ. No. 01-1149 (W.D. Tex. removed Dec. 14, 2001); *Redwood Christian Schs. v. County of Alameda*, Civ. No. 01-4282 (N.D. Ca. filed Nov. 16, 2001); *Missionaries of Charity, Brothers v. City of Los Angeles*, Civ. No. 01-08511 (C.D. Ca. filed Sept. 19, 2001); *Archdiocese of Denver v. Town of Foxfield*, Case No. 01-CV-3299 (Colo. D.Ct.).

³ See, e.g., *Temple B’nai Sholom v. City of Huntsville*, Civ. No. 01-1412 (N.D. Ala.) (settlement approved June 26, 2003); *Greenwood Comm’y Church v. City of Greenwood Village*, Civ. No. 02-1426 (Colo. D.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.) (consent order signed Mar. 14, 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*, 1:00-CV-175 (W.D. Mich.) (consent decree signed Dec. 20, 2000).

a series of *amicus* briefs in both land-use and prisoner cases involving RLUIPA.⁴ We intend to continue filing lawsuits and *amicus curiae* briefs under RLUIPA until the jurisprudence under the law, as well as its constitutionality, is established beyond reasonable dispute.

Finally, two authors of this brief have published a law review article that contains a guide for applying the Act and a defense of its constitutionality against the challenges most frequently raised. See Storzer & Picarello, *The Religious Land Use and Institutionalized Persons Act of 2000: A Constitutional Response to Unconstitutional Zoning Practices*, 9 GEO. MASON L. REV. 929 (Summer 2001).

The Becket Fund believes that its experience in this area of the law will enable it to aid the Court in understanding the grave constitutional implications of predicating tax exemptions for the real property of religious groups on the discretionary processes that characterize local land-use permitting.

ARGUMENT

It is axiomatic that courts should interpret statutory law in a manner that avoids unnecessary constitutional risks. See *Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. and Const. Trades Council*, 485 U.S. 568, 575 (1988) (“[W]here an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress.”). This rule applies with special frequency and force in the area of religious liberty, for “[t]he values enshrined in the First Amendment plainly rank high ‘in the scale of our national values.’” *N.L.R.B. v. Catholic Bishop of Chicago*, 440 U.S. 490, 501 (1979); see, e.g., *id.*

⁴ See, e.g., *Williams v. Bitner*, 285 F. Supp. 2d 593, 598 (M.D. Pa. 2003) (noting Becket Fund intervention in defense of constitutionality of RLUIPA); *Johnson v. Martin*, 223 F. Supp. 2d 820, 822 (W.D. Mich. 2002) (same); *San Jose Christian College v. City of Morgan Hill*, No. 02-15693 (9th Cir.) (*amicus* brief filed Aug. 28, 2002); *C.L.U.B. v. City of Chicago*, No. 01-4030 (7th Cir.) (*amicus* brief filed June 26, 2002); *Lighthouse Institute for Evangelism v. City of Long Branch*, Civ. No. 00-3366 (D.N.J.) (*amicus* brief filed May 7, 2001).

(declining to apply National Labor Relations Act to parochial school teachers because that interpretation “would give rise to serious constitutional questions”).

Before this Court is an important issue of statutory construction: whether a non-profit, religious use of land must obtain all municipal land-use permits before the use “is in good faith contemplated” within the meaning of Section 420-a(3) of the New York Real Property Tax Law, and thus before the real property qualifies as exempt from taxation. *Amicus* respectfully submits that, if local land-use permits were deemed necessary to obtain the exemption, the administration of that exemption would then entail a high risk of constitutional violation.

Specifically, as recent congressional hearings have confirmed, land-use permitting processes are notoriously discretionary and susceptible to capture for the purpose of enforcing private biases, especially as against locally disfavored religious groups. *See* 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 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.”). *See also City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 448 (1985) (finding constitutional violation in discriminatory application of land use laws, and noting that “[p]rivate biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect.”) (internal quotations omitted).

Indeed, what Congress took many hearings to conclude, the Appellate Division stated with particular clarity years ago:

Human experience teaches us that public officials, when faced with pressure to bar church uses by those residing in a residential neighborhood, tend to avoid any appearance of an antireligious stance and temper their decision by carefully couching their grounds for refusal to permit such use in terms of traffic dangers, fire hazards and noise and disturbance, rather than on such crasser grounds as lessening of property values or loss of open space or entry of strangers into the neighborhood or undue crowding of the area.

Am. Friends of the Soc’y of St. Pius v. Schwab, 417 N.Y.S.2d 991, 993 (N.Y. App. Div. 1979).

To introduce this known wellspring of religious discrimination into the administration of the statutory tax exemption at issue – which is otherwise neutral and generally applicable – would be to manufacture needless constitutional risks under the Free Exercise Clause of the First Amendment, and the Equal Protection and Due Process Clauses of the Fourteenth Amendment. Accordingly, this Court should avoid any interpretation of Section 420-a(3) that would predicate its tax exemption on local land-use permitting processes.

I. Requiring Local Land-Use Permits as a Condition of Tax Exemption for Religious Groups Would Needlessly Introduce a Prolific Source of Religious Discrimination into the Administration of the Tax Laws.

Congress has “compiled massive evidence,” 146 CONG. REC. S7774 – based on nine (9) hearings over a period of three (3) years – that clearly establishes a “widespread pattern of religious discrimination in this country” in land-use regulation, including “examples of legislation enacted *or* enforced due to animus or hostility to the burdened religious practices.” *City of Boerne v. Flores*, 521 U.S. 507, 531 (1997) (emphasis added). The congressional record reflects that land-use laws are commonly *both* enacted *and* enforced out of hostility to religion. *See Murphy v. Town of New Milford*, ___ F. Supp. 2d ___, No. 3:00-CV-2297, 2003 WL

22299219, at *23 (D. Conn. Sept. 30, 2003).⁵ Congress found that discriminatory *application* of zoning laws is particularly common because, as here, zoning laws across the country are overwhelmingly discretionary; in other words, the systems of “individualized assessments” described in *Employment Div. v. Smith*, 494 U.S. 872, 884, and *Church of the Lukumi Babalu Aye v. Hialeah*, 508 U.S. 520, 537 (1993), are especially common in the land-use context. See *Murphy*, 2003 WL 22299219, at *23 n. 31.⁶

These findings were backed by evidence presented to Congress in various forms, which were cumulative and mutually reinforcing. Some evidence was *statistical*, including national surveys of churches, zoning codes, and public attitudes.⁷ Some was *judicial*, including

⁵ Compare 146 CONG. REC. S7774 (“Churches in general, and new, small, or unfamiliar churches in particular, are frequently discriminated against *on the face* of zoning codes.”) (emphasis added), and Laycock, *State RFRA’s and Land Use Regulation*, 32 U.C. DAVIS L. REV. 755, 773 (1999) (discussing examples from congressional record of “evidence of discrimination *in the zoning codes themselves*”) (emphasis added), with 146 CONG. REC. S7774 (“Sometimes, zoning board members or neighborhood residents explicitly offer race or religion as the reason to exclude a proposed church, especially in cases of black Churches and Jewish shuls and synagogues. More often, discrimination lurks behind such vague and universally applicable reasons as traffic, aesthetics, or ‘not consistent with the city’s land use plan.’”).

⁶ See 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 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.”). See also *Cottonwood*, 218 F. Supp. 2d at 1224 (noting that once the city “vest[ed] absolute discretion in a single person or body ...” “[t]hat decision-maker would then [be] free to discriminate against religious uses and exceptions with impunity, without any judicial review.”).

⁷ The record contains at least four such studies. See, e.g., *Protecting Religious Freedom after Boerne v. Flores (III)*, Hearing Before the Subcomm. on the Constitution of the House Comm. on the Judiciary, 105th Cong., 2d Sess., at 127-54 (Mar. 26, 1998) (statement of Von Keetch, Counsel to Mormon Church, <http://commdocs.house.gov/committees/judiciary/hju57227.000/hju57227_0f.htm>) (“Keetch Statement”) (summarizing and presenting findings of Brigham Young University study of religious land use conflicts); *Religious Liberty Protection Act of 1998: Hearing on H.R. 4019 Before the Subcomm. on the Constitution of the House Comm. on the Judiciary*, 105th Cong., 2d Sess., at 364-75 (June 16 and July 14, 1998) (“June-July 1998 House Hearings”) (statement of Rev. Elenora Giddings Ivory, Presbyterian Church (USA), <http://commdocs.house.gov/committees/judiciary/hju59929.000/hju59929_0f.htm>) (discussing survey by Presbyterian Church (USA) of zoning problems within that denomination); *id.* at 405, 415-16 (statement of Prof. Douglas Laycock, Univ. Texas Law Sch.) (discussing Gallup poll data indicating hostile attitudes toward religious minorities) (“Laycock Statement”); John W. Mauck, *Tales from the Front: Municipal Control of Religious Expression Through Zoning Ordinances*, at 7-8 (July 9, 1998) (statement submitted to Congress, <<http://www.house.gov/judiciary/mauck.pdf>>, to supplement live testimony of June 16, 1998) (“Mauck Statement”) (compiling zoning provisions affecting churches in 29 suburbs of northern Cook County).

“decisions of the courts of the States and ... the United States [reflecting] extensive litigation and discussion of the constitutional violations.”⁸ *Bd. of Trustees of Univ. of Ala. v. Garrett*, 531 U.S. 356, 376 (2001) (Kennedy, J., concurring). Some was *anecdotal* evidence *paired with* testimony by experienced witnesses indicating that the anecdotes were representative.⁹ *Cf. Garrett*, 531 U.S. at 369 (finding “half a dozen examples from the record” insufficient *by themselves* to establish pattern of constitutional violation). The Church highlights below a small sample of the evidence presented to Congress:

- The Brigham Young University study indicated that religious minorities are vastly over-represented in religious land use litigation, even controlling for the merits of the case. Specifically, religious minorities representing 9% of the population are involved in 49% of reported religious land-use disputes over a principal use, but win in court at the same rate as mainline religious groups. For example, self-identified Jews of all denominations represent about 2.2% of the population, but were involved in 20% of reported principal use cases. *See Keetch Statement* at 118, 127-30; *Laycock Statement* at 411.
- This pattern of land-use decisions reflects broader public attitudes to religious minorities, as reported in the Gallup poll presented to Congress. Specifically, 86% of Americans admit mostly unfavorable or very unfavorable attitudes toward religions they categorize as “sects ” or “cults,” and 45% of Americans hold mostly or very unfavorable

⁸ *See Keetch Statement*, at 131-53 (listing numerous state and federal zoning cases involving religious assemblies).

⁹ *See, e.g.*, *Mauck Statement*, at 1-5 (describing 22 representative cases based on 25 years experience representing churches in land-use disputes); June-July 1998 House Hearings, at 360-64 (statement of Bruce D. Shoulson, attorney) (describing experiences representing Jewish congregations in land-use disputes, and concluding that “the implications of these examples, which I believe are not unique, are obvious, and the need for assurances to Americans of all faiths that they will be free to exercise their religions should be equally obvious”). *See also* 146 CONG. REC. E1564-E1567 (Sept. 22, 2000) (listing 19 additional instances of land-use burdens on religious exercise arising since conclusion of hearings).

opinions of those termed “fundamentalists.” When asked whether they would want to have these same groups as neighbors, 62% and 30% of Americans, respectively, would not. Laycock Statement at 415.

- According to John Mauck, a leading religious land-use attorney in Chicago, 30% of all cases before the city’s Zoning Board of Appeals involved houses of worship, even though that type of use does not remotely approach 30% of the land uses in the city. Laycock Statement at 414.¹⁰

Thus, the discretionary decision-making process that characterizes most land-use permitting decisions bears special risks of religious discrimination that should be closely scrutinized – and certainly should not be amplified – by state and federal courts charged with policing constitutional boundaries.

II. Religious Discrimination in the Application of the Tax Laws Would Violate Multiple, Overlapping Protections of the First and Fourteenth Amendments to the Federal Constitution.

All government action, no matter how local, is subject to the federal constitutional requirement of rationality, which is enshrined primarily in the Due Process and Equal Protection Clauses of the Fourteenth Amendment.¹¹ From virtually the dawn of zoning law, the Supreme

¹⁰ For a more nearly complete summary of the evidence presented to Congress, *Amicus* respectfully directs this Court’s attention to Douglas Laycock, *State RFRA’s and Land Use Regulation*, 32 U.C. DAVIS L. REV. 755, 769-83 (1999), and *Protecting Religious Liberty: Hearings Before the Senate Comm. on the Judiciary*, 106th Cong., 2d Sess. (Sept. 9, 1999), (statement of Prof. Douglas Laycock, Univ. Texas Law Sch., <<http://www.senate.gov/~judiciary/9999dlay.htm>>). In addition, the BYU study presented to Congress in the Keetch Statement has been published at Von G. Keetch & Matthew K. Richards, *The Need for Legislation to Enshrine Free Exercise in the Land Use Context*, 32 U.C. DAVIS L. REV. 725 (1999).

¹¹ *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 440 (1985) (Equal Protection Clause ordinarily requires laws to be “rationally related to a legitimate state interest”); *Pace Resources, Inc. v. Shrewsbury Township*, 808 F.2d 1023, 1034 (3d Cir. 1987) (noting same rational basis standard under Due Process Clause, including for zoning regulations). See *Village of Willowbrook v. Olech*, 528 U.S. 562, 564 (2000) (“[t]he purpose of the equal protection clause ... is to secure every person ... against intentional and arbitrary discrimination....”) (internal quotations omitted); *Wolff v. McDonnell*, 418 U.S. 539, 558 (1974) (“The touchstone of due process is protection of the individual against arbitrary action of government, *Dent v. West Virginia*, 129 U.S. 114, 123 (1889).”).

Court has made clear that local zoning laws – no less than other government actions – must have a rational basis.¹² Indeed, the Supreme Court has struck down zoning actions on several occasions for failure to satisfy even this modest demand.¹³ But the Court has also made clear that zoning ordinances will be subjected to even more demanding constitutional scrutiny if they employ suspect classifications or trample fundamental rights.¹⁴

Zoning laws are not “rationally related to a legitimate state interest” when a plaintiff demonstrates *either* that the asserted interest (*i.e.*, the government end) is illegitimate, *or* that the chosen classification (*i.e.*, the government means) is not rationally related to even a legitimate interest. *Cleburne*, 473 U.S. at 440, 446-47. Thus, for example, passing or enforcing zoning laws out of “a bare ... desire to harm a politically unpopular group cannot constitute a legitimate governmental interest.”¹⁵ “[M]ere negative attitudes, or fear” are also illegitimate government interests. *Cleburne*, 473 U.S. at 448. Similarly, government action based on “speculation, prejudice, self interest, or ignorance is arbitrary and irrational,” and therefore unconstitutional.¹⁶

More specifically, prohibited governmental irrationality includes religion-based hostility. It is an illegitimate government purpose to act out of negative attitudes or prejudice against some

¹² *Seattle Title Trust Co. v. Roberge*, 278 U.S. 116, 121 (1928) (zoning “restriction cannot be imposed if it does not bear a substantial relation to the public health, safety, morals, or general welfare.”) (quoting *Nectow v. Cambridge*, 277 U.S. 183, 188 (1928)); *Euclid v. Ambler Realty Co.*, 272 U.S. 365, 395 (1926).

¹³ *See, e.g., Cleburne*, 473 U.S. at 440; *Moore v. East Cleveland*, 431 U.S. 494, 520 (1977); *Nectow*, 277 U.S. at 188-89; *Seattle Title Trust Co.*, 278 U.S. at 121. *See also Village of Willowbrook*, 528 U.S. at 565 (affirming denial of motion to dismiss rational basis challenge to zoning requirement).

¹⁴ *See Schad v. Borough of Mt. Ephraim*, 452 U.S. 61, 68-69 (1981). *See also Employment Div. v. Smith*, 494 U.S. 872, 886 n.3 (1990) (“Just as we subject to the most exacting scrutiny laws that make classifications based on race, or on the content of speech, we strictly scrutinize governmental classifications based on religion.”) (citations omitted); *City of New Orleans v. Dukes*, 427 U.S. 297, 303 (1976) (listing religion among suspect classifications that trigger strict scrutiny).

¹⁵ *Romer v. Evans*, 517 U.S. 620, 634 (1996) (quoting *Dept. of Agriculture v. Moreno*, 413 U.S. 528, 534 (1973)); *Cleburne*, 473 U.S. at 446-47.

¹⁶ *Midnight Sessions, Ltd. v. City of Philadelphia*, 945 F.2d 667, 685 (3d Cir. 1991). *See also Marks v. City of Chesapeake*, 883 F.2d 308, 311 (4th Cir. 1989) (“government officials simply cannot act solely in reliance on public distaste for certain activities”) (internal quotations omitted).

or all religions, or out of desire to harm some or all religious groups – purposes that additionally offend the First Amendment.¹⁷ Thus, religious prejudice and racial prejudice are equally irrational bases for government action, and so equally offensive to the constitution.¹⁸

In sum, government action that is based on hostility to religion but cloaked by facially legitimate, but actually pretextual, asserted government interests fails *both* rational-basis scrutiny *and* strict scrutiny. It fails rational basis scrutiny because it serves an illegitimate government purpose. It triggers strict scrutiny because it employs the suspect classification of religion and tramples the fundamental right of religious exercise, and then fails that scrutiny because the asserted governmental interests, even if not pretextual, are merely legitimate and not compelling.

When applying these well-established, mutually-reinforcing legal principles, courts will scrutinize even the facially legitimate purposes that a government asserts in order to assess whether they are actually pretexts that conceal an illegitimate purpose.¹⁹ Thus, courts will not limit their inquiry to verbal expressions of motive by individual officials or the express language

¹⁷ See, e.g., *Marks*, 883 F.2d at 312 (“[I]f, as alleged, the City Council denied Marks’ permit application solely in an effort to placate those members of the public who expressed “religious” objections to the plaintiff’s proposed use of his property, it thereby acted “arbitrarily” and “capriciously.”); *Islamic Center of Mississippi v. City of Starkville*, 840 F.2d 293, 302 (5th Cir. 1988) (citing *Cleburne* and concluding that “neighbors’ negative attitudes” toward Islamic Center were impermissible “justification for differentiating between familiar and unfamiliar religions”). See also *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 532 (1993) (“[T]he First Amendment forbids an official purpose to disapprove of a particular religion or of religion in general.”).

¹⁸ See *Employment Div. v. Smith*, 494 U.S. 872, 886 n.3 (1990) (“Just as we subject to the most exacting scrutiny laws that make classifications based on race, or on the content of speech, so too we strictly scrutinize governmental classifications based on religion.”) (citations omitted); *New Orleans v. Dukes*, 427 U.S. 297, 303 (1976) (finding classification presumptively unconstitutional if “drawn upon inherently suspect distinctions such as race, religion, or alienage”); see, e.g., *Mont Belvieu Square, Ltd. v. City of Mont Belvieu, Texas*, 27 F. Supp. 2d 935, 944 (S.D. Tex. 1998) (“Certainly if [plaintiff] can prove that a discriminatory motive underlie the actions surrounding the denial of its permit application, the City’s actions are were irrational, arbitrary, and capricious.”).

¹⁹ See *Santa Fe Independent School Dist. v. Doe*, 530 U.S. 290, 308 (2000) (“[I]t is nonetheless the duty of the courts to ‘distinguish[h] a sham secular purpose from a sincere one.’”) (quoting *Wallace v. Jaffree*, 472 U.S. 38, 75 (1985) (O’Connor, J., concurring); *Lukumi*, 508 U.S. at 534 (“The Free Exercise Clause protects against governmental hostility which is masked, as well as overt.”); see, e.g., *Mont Belvieu Square*, 27 F. Supp. 2d at 943 (“If in fact the [asserted governmental interest] was a pretext to hide a discriminatory motive for denying [plaintiff’s] permit, the City’s actions were unrelated to a legitimate state interest and thus unconstitutional.”).

of a regulation.²⁰ ““Relevant evidence includes, among other things, the historical background of the decision under challenge, the series of events leading to the enactment or official policy in question, and the legislative or administrative history, including contemporaneous statements made by members of the decisionmaking body.””²¹ Also, where a plaintiff claims that government action enforces the discrimination of private actors, evidence of those discriminatory inputs is also relevant.²²

In this legal context, interpreting Section 420-a(3) to predicate its tax exemption on land-use permitting decisions would be especially ill-advised. Not only would it needlessly introduce a known risk of religious discrimination (and other forms of irrationality and arbitrariness) into a process otherwise free of religious entanglement, it would – again, needlessly – open the corresponding floodgates of constitutional litigation and prompt repeated and thorough judicial probing of tax exemption decisions that would otherwise be routine.

Indeed, this case provides a good example of a zoning ordinance that vests essentially unbridled discretion in local government officials to let in the religious groups they like and keep out the ones they don’t. Specifically, the ordinance distinguishes a “church and other place of worship” (which is permitted as of right), from a “religious institution” (which is permitted only with a special use permit). Although Respondents-Respondents invoke what they consider the

²⁰ See *Lukumi*, 508 U.S. at 534 (“The Free Exercise Clause, like the Establishment Clause, extends beyond facial discrimination.”); *Cottonwood Christian Center v. City of Cypress*, 218 F. Supp. 2d 1203, 1225 (C.D. Cal. 2002) (“The government’s motive may be determined both from direct and circumstantial evidence.”).

²¹ *Id.* (quoting *Lukumi*, 508 U.S. at 540). See also *Village of Arlington Heights v. Metropolitan Hous. Dev. Corp.*, 429 U.S. 252, 266-67 (1977) (listing factors to consider in assessing racially discriminatory purpose).

²² See *Islamic Center*, 840 F.2d at 302 (“Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect.”) (quoting *Palmore v. Sidoti*, 466 U.S. 429, 433 (1984)); see, e.g., *Marks*, 883 F.2d at 309-10 (considering evidence of neighborhood opposition including religion-based hostility); *United States v. City of Chicago Heights*, 161 F. Supp. 2d 819, 831 (N.D. Ill. 2001) (“Evidence of community opposition voiced to the [government defendants] is, of course, relevant to the ... [plaintiff’s] intentional discrimination claim.”).

“clear and unambiguous” language of the ordinance, and the “common, ordinary meaning of the terms,” *see* Resp. Br. at 23-24, there is at least one unavoidable ambiguity in these terms. In short, all “churches” and “places of worship” may *also* be fairly characterized as “religious institutions.” It is at least plausible – if not simply the “common, ordinary meaning of the terms” – to read the former as a subset of the latter. In other words, a church, synagogue or mosque is merely one of several types of “religious institution.” As a consequence, even the use that most squarely fits within the category “place of worship” could – at the whim of zoning officials – be categorized instead as a “religious institution.” Thus, depending on how local officials may feel about such a use, it could just as easily be permitted as of right, as it could be subjected to the costs, uncertainty, and potentially discriminatory inputs of the special use permitting process.

Amicus states no opinion on the question whether religiously discriminatory motive – or some other form of government irrationality – informed the decision to characterize the use at issue here as a “religious institution” rather than a “place of worship.” It suffices merely to establish that this zoning ordinance is a good example of one so susceptible to discretion and manipulation that it represents a wide open door to the religion-based discrimination that is so common in permitting decisions for religious land uses. Accordingly, the ordinance exemplifies why this Court should avoid the needless constitutional risks associated with incorporating the land-use permitting process into what could otherwise be a religion-neutral process for determining the tax exemption of real property.²³

²³ Respondents-Respondents also claim that the mere requirement to apply for a special use permit does not impose a “substantial burden” within the meaning of RLUIPA, following *C.L.U.B. v. City of Chicago*, 342 F.3d 752 (7th Cir. 2003). *Amicus* agrees with that modest claim, as it is usually the denial of a particular permit that is held to create a “substantial burden,” not the mere requirement to apply for the permit in the first place. *See, e.g., Westchester Day Sch. v. Village of Mamaroneck*, 280 F. Supp. 2d 230 (S.D.N.Y. 2003) (finding substantial burden as a matter of law in denial of permit to expand existing Jewish day school); *Murphy*, 2003 WL 22299219, at *19 (finding substantial burden as a matter of law in application of zoning law to prohibit worship at residential property). *See also C.L.U.B.*, 342 F.3d at 764 (“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

CONCLUSION

For the reasons set forth herein, this Court should reverse the Decision and Order of the Appellate Division.

Dated: Washington, DC
December 17, 2003

Respectfully submitted,

THE BECKET FUND FOR RELIGIOUS LIBERTY
1350 Connecticut Avenue, NW, Suite 605
Washington, DC 20036-1735
Telephone: (202) 955-0095
Telecopier: (202) 955-0090

By: _____
Kevin J. Hasson, Esq.
Anthony R. Picarello, Jr., Esq.
Roman P. Storzer, Esq.
Anthony J. Vlatas, Esq.

Attorneys for Amicus Curiae

the procedural *system* by which such approval may be sought.”) (emphasis added). More importantly, though, a claim based on the existence of a “substantial burden” is conceptually distinct from one based on the existence of religious discrimination. *See Braunfeld v. Brown*, 366 U.S. 599, 607 (1961) (distinguishing laws that “impede the observance of one or all religions” from those that “discriminate invidiously between religions,” and describing both as “constitutionally invalid”); *see, e.g., Hartmann v. Stone*, 68 F.3d 973, 978 (6th Cir. 1995) (declining to reach “substantial burden” claim under RFRA, because law at issue failed requirement of neutrality under the Free Exercise Clause); *Brown v. Borough of Mahaffey*, 35 F.3d 846, 849-50 (3d Cir. 1994) (rejecting requirement to show “substantial burden” for discrimination claims, because religious discrimination cases “have never limited liability to instances where a ‘substantial burden’ was proved by the plaintiff,” and because it “would make petty harassment of religious institutions and exercise immune from the protections of the First Amendment.”); *Vernon v. City of Los Angeles*, 27 F.3d 1385, 1392-1393 (9th Cir. 1994) (noting that, even if a law satisfies substantial burden test under *Sherbert*, the Free Exercise Clause still demands that the law “not discriminate between religions, or between religion and nonreligion”) (quotations and citations omitted). This brief focuses on the constitutional risks associated primarily with religious discrimination, not incidental, substantial burdens on religious exercise.