

*Amicus does not request  
oral argument*

Appellate Division – Second Department Docket No. 2004-02406  
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**Court of Appeals**  
*of the*  
**State of New York**

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THE TOWN OF MOUNT PLEASANT,  
*Plaintiff-Respondent,*

-against-

LEGION OF CHRIST, INCORPORATED,  
*Defendant-Appellant.*

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

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## INTEREST OF AMICUS CURIAE

The Becket Fund for Religious Liberty is a non-partisan, interfaith, public interest law firm dedicated to protecting the free expression of all religious traditions. 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.<sup>1</sup> 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.<sup>2</sup> Some of our RLUIPA land-use cases have concluded by favorable settlement.<sup>3</sup> In addition, we have filed

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<sup>1</sup> See, e.g., *Westchester Day School v. Village of Mamaroneck*, 386 F.3d 183 (2d Cir. 2004) (*amicus* brief on behalf of a broad coalition filed January 20, 2004); *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).

<sup>2</sup> See, e.g., *United States v. Maui County*, 298 F. Supp. 2d 1010 (D. Haw. 2003); *Hale O Kaula v. Maui Planning Comm’n*, 229 F. Supp. 2d 1056 (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 *Congregation Kol Ami v. Abington Township*, 2004 WL 1837037 (E.D. Pa. Aug. 17, 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. 01-4282 (N.D. Cal. 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); *Great Lakes Society v. Georgetown Charter Township*, No. 03-4599-AA (Mich. Cir. Ct., Ottawa Cy.) (pending); *Archdiocese of Denver v. Town of Foxfield*, Case No. 01-CV-3299 (Colo. D.Ct.).

<sup>3</sup> See, e.g., *Living Faith Ministries v. Camden County Improvement Authority*, Civ. No. 05 cv 877 (D.N.J. filed Feb. 15, 2005) (consent order signed May 2, 2005); *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-

a series of *amicus* briefs in both land-use and prisoner cases involving RLUIPA.<sup>4</sup> 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, Becket Fund attorneys have published two law review articles on RLUIPA, one on its land use provisions and another on its prisoner provisions. *See* Derek Gaubatz, *RLUIPA at Four: Evaluating the Success and Constitutionality of RLUIPA's Prisoner Provisions*, 28 HARV. J.L. & PUB. POL'Y 501 (2005); Roman Storzer & Anthony 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

In its opening brief, the counsel for the Legion of Christ, Incorporated (the "Legion") forcefully presents the two distinct claims that would arise under RLUIPA if this Court were to

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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>4</sup> *See, e.g.,* *Cutter v. Wilkinson*, 125 S. Ct. 2113 (2005) (*amicus* brief on behalf of a broad coalition filed December 20, 2004); *Guru Nanak Sikh Soc'y v. County of Sutter*, App. No. 03-17343 (9<sup>th</sup> Cir.) (*amicus* brief filed June 9, 2004); *Feagans v. Norris*, No. 4:03CV00172 (E.D. Ark.) (*amicus* brief filed September 2004); *Murphy v. Town of New Milford*, 402 F.3d 342 (2d Cir. 2005) (*amicus* brief filed June 28, 2004); *Konikov v. Orange County*, 410 F.3d 1317 (11<sup>th</sup> Cir. 2005) (*amicus* brief filed on behalf of a broad coalition Apr. 15, 2004); *Midrash Sephardi v. Town of Surfside*, 366 F.3d 1214 (11<sup>th</sup> Cir. 2004) (*amicus* brief filed Nov. 21, 2003); *Madison v. Riter*, 355 F.3d 310 (4<sup>th</sup> Cir. 2003) (*amicus* brief filed on behalf of a broad coalition June 6, 2003); *San Jose Christian College v. City of Morgan Hill*, 360 F.3d 1024 (9<sup>th</sup> Cir. 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 (7<sup>th</sup> Cir. 2003) (*amicus* brief filed June 26, 2002); *Open Homes Fellowship v. Orange County*, No. 6:03-CV-943-ORL-31 (M.D. Fla.) (*amicus* brief filed Jan. 2, 2004); *Williams v. Bitner*, 285 F. Supp. 2d 593 (M.D. Pa. 2003) (*amicus* brief filed Apr. 16, 2002); *Johnson v. Martin*, 223 F. Supp. 2d 820, 822 (W.D. Mich. 2002) (noting Becket Fund intervention in defense of constitutionality of RLUIPA); *Murphy v. Town of New Milford*, 289 F. Supp. 2d 87 (D. Conn. 2003) (*amicus* brief filed Dec. 27, 2002); *Goodman v. Snyder*, 2003 WL 22765047 (N.D. Ill. Nov. 20, 2003) (*amicus* brief filed Mar. 17, 2003).

affirm the erroneous interpretation of state and local law by the Town of Mount Pleasant (the “Town”): (1) that disallowing the Legion’s religious conference, education, and training activities on the same property where IBM’s secular conference, education, and training activities were permitted as of right violates the “equal terms” provision of RLUIPA, Section 2(b)(1); and (2) that disallowing the Legion’s religious conference, education, and training activities would impose a “substantial burden” on the Legion’s religious exercise, which burden is not the “least restrictive means” of serving a “compelling governmental interest.” *See* Br. 29-42.

The purpose of this brief is to clarify and reinforce those claims by respectfully submitting the following two propositions: (1) that Sections 2(a) and 2(b) of RLUIPA operate independently of each other, so that “strict scrutiny” analysis should not be grafted onto the Legion’s Section 2(b)(1) claim; and (2) that recent decisions confirm that, under the Legion’s distinct Section 2(a) claim, the burden imposed here is “substantial” and that the Town’s showing on “strict scrutiny” is inadequate.

*Amicus* notes at the outset, however, that if this Court corrects the errors below in the application of state and local law, it need not reach any RLUIPA questions at all.

**I. Because RLUIPA Sections 2(a) and 2(b) Operate Independently, Strict Scrutiny Analysis Is Misplaced Under Section 2(b).**

RLUIPA’s “Equal Terms” provision, Section 2(b)(1), provides in its entirety that, “No government shall impose or implement a land use regulation in a manner that treats a religious assembly or institution on less than equal terms with a nonreligious assembly or institution.” 42 U.S.C. § 2000cc(b)(1). Unlike the distinct “Substantial Burdens” provision of Section 2(a), neither Section 2(b)(1), nor any other subsection of the “Discrimination and Exclusion” provision of Section 2(b), includes a strict scrutiny “tail.” Congress knew how to add strict

scrutiny language to these antidiscrimination protections, but simply chose not to. Accordingly, this Court should not read Section 2(b)(1) to include any strict scrutiny component, but instead as a flat ban, as its plain language commands.

Section 2(b)(1) was designed by Congress to enforce overlapping constitutional protections under the Free Exercise, Establishment, and Equal Protection Clauses against a particular species of religious discrimination, namely, preference for the secular over the religious (even more particularly, in the application of state and local land-use regulation). And those bare constitutional protections are not generally flat bans on that type of religious discrimination, but instead generally trigger strict scrutiny. *See Church of the Lukumi Babalu Aye 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.*”) (emphasis added); *Epperson v. Arkansas*, 393 U.S. 97, 104 (1968) (“The First Amendment mandates governmental neutrality between religion and religion, *and between religion and nonreligion.*”) (emphasis added); *City of New Orleans v. Dukes*, 427 U.S. 297, 303 (1976) (classification triggers strict scrutiny under Equal Protection Clause if it “is drawn upon inherently suspect distinctions such as race, religion, or alienage”). *See generally Midrash Sephardi, Inc. v. Town of Surfside*, 366 F.3d 1214, 1238-39 (11<sup>th</sup> Cir. 2004) (surveying jurisprudence codified in Section 2(b)(1)).

But in crafting enforcement legislation, “Congress is not limited to mere legislative repetition of this Court’s constitutional jurisprudence,” but may also prohibit “a somewhat broader swath of conduct.” *Bd. of Trustees of Univ. of Ala. v. Garrett*, 531 U.S. 356, 365 (2001). A classic example of this is Title VII of the Civil Rights Act of 1964, which prohibits discrimination in employment along racial, religious, and other lines, but does not allow state or local government actors to whom it applies to avoid its prohibition by satisfying strict scrutiny.

*Varner v. Illinois State Univ.*, 226 F.3d 927 (7<sup>th</sup> Cir. 2000) (upholding application of Title VII's flat ban on employment discrimination against Enforcement Clause challenge).

That is exactly what Congress has done in passing Section 2(b)(1) (and indeed, all the other subsections of Section 2(b), none of which provide for strict scrutiny). *See C.L.U.B.*, 342 F.3d at 762 (“the substantial burden and nondiscrimination provisions are operatively independent of one another”). The language and structure of Section 2(b)(1) – which contains no strict scrutiny language immediately after a distinct provision that does – evinces congressional intent to provide a more nearly thorough enforcement of the underlying, constitutional antidiscrimination protections by eliminating the additional burden on plaintiffs of having to defend against a strict scrutiny showing. This incremental measure of remedial and deterrent protection against religious discrimination is well within the broad authority of Congress to provide under its Enforcement Clause power. *See Midrash Sephardi, Inc. v. Town of Surfside*, 366 F.3d 1214, 1231 n.14 (11<sup>th</sup> Cir. 2004); *Freedom Baptist Church v. Township of Middletown*, 204 F.Supp.2d 857, 874 (E.D. Pa. 2002) (“To the extent that, conceivably, the RLUIPA may cover a particular case that is not on all fours with an existing Supreme Court decision, it nevertheless constitutes the kind of congruent and, above all, proportional remedy Congress is empowered to adopt under § 5 of the Fourteenth Amendment.”).

This Court should therefore decline to amend Section 2(b) by interpretation – needlessly curtailing Congress’ “broad power indeed” to formulate remedies for patterns of constitutional violation, *see Tennessee v. Lane*, 124 S. Ct. 1978, 1985 (2004) – as the Eleventh Circuit has apparently done in its otherwise excellent Equal Terms decisions. *See Konikov v. Orange Cy., Fla.*, 410 F.3d 1317 (11<sup>th</sup> Cir 2005); *Midrash Sephardi, Inc. v. Town of Surfside*, 366 F.3d 1214 (11<sup>th</sup> Cir. 2004).

## **II. Recent Decisions Confirm the Legion’s Position on Substantial Burden and Strict Scrutiny.**

Two recent lower court decisions applying “substantial burden” under RLUIPA Section 2(a) warrant the particular attention of this Court, as does a recent decision of the U.S. Supreme Court applying the “strict scrutiny” language of the Religious Freedom Restoration Act, 42 U.S.C. § 2000bb (“RFRA”), which is virtually identical to RLUIPA’s Section 2(a)’s strict scrutiny language. *Compare* 42 U.S.C. § 2000bb-1(b)(1)-(2) (strict scrutiny language in RFRA), *with id.* § 2000cc(a)(1)(A)-(B) (strict scrutiny language in RLUIPA’s land use provision).

First, the Southern District of New York recently issued its decision on remand and after a full trial in *Westchester Day School v. Village of Mamaroneck*, \_\_\_ F. Supp. 2d \_\_\_, 2006 WL 538248 (S.D.N.Y. March 2, 2006), and held that the village substantially burdened the plaintiff’s religious exercise by “seriously impeding” that exercise and having a “chilling effect” upon it. *Id.* at \*61. The village imposed the burden at issue by denying the school a special permit to renovate its religious school facilities, forcing it to continue operating in inadequate facilities that inhibited its religious mission:

By precluding the construction of much needed facilities, defendants significantly interfered with WDS’ ability to provide an adequate and effective dual curriculum of Judaic and general studies education, and so limited its ability to retain and attract students and faculty as to imperil its continued existence.

*Id.* Importantly, the plaintiff in *Westchester Day School* was not precluded entirely from practicing its beliefs, but was still unable to do so adequately. *Id.* at \*8.

Here, the burden is that much more substantial than in *Westchester Day School*, because if the Legion’s use is denied on the property at issue, the Town will have precluded the use entirely within the jurisdiction. As the trial court found and Legion has emphasized (Legion Br. 36-37), there is no other zone in the jurisdiction where the Legion could engage in the range of religious activities contemplated by its conference center use. Indeed, for this same reason, the

Town's denial of the Legion's use would even satisfy the maximally demanding (and increasingly discredited) "effectively impracticable" standard of *C.L.U.B. v. City of Chicago*, 342 F.3d 752 (7<sup>th</sup> Cir. 2003), upon which the Appellate Division relied. *See Sts. Constantine & Helen v. New Berlin*, 396 F.3d 895, 900 (7<sup>th</sup> Cir. 2005) (limiting *C.L.U.B.*'s "effectively impracticable" standard to cases where plaintiffs claim burden in merely "having to apply" for a zoning permit). *See also Midrash Sephardi*, 366 F.3d at 1227 ("we decline to adopt the Seventh Circuit's definition [of "substantial burden" as "effectively impracticable"] -- which would render [Section 2(b)](3)'s total exclusion prohibition meaningless").

Second, in *Living Water Church v. Charter Township of Meridian*, 384 F. Supp. 2d 1123 (W.D. Mich. 2005), the court applied the Seventh Circuit's refined substantial burden standard as enunciated in *Sts. Constantine & Helen*. In *Living Water Church*, the burden at issue was the township's denial of a special use permit for an addition to an existing church building, where the church could carry out various ministries that were impossible in its present, inadequately sized facility:

[The church] is unable to practice its religious beliefs in its current location because the facilities are too small for the needs of the congregation and staff. Lack of adequate space has already forced the Plaintiff to choose between its daycare ministry and its Christian Education ministry. Plaintiff is severely limited in its ability to recruit for the school because of the uncertainty about future space and the current lack of programming.

384 F. Supp. 2d at 1134. The court also emphasized that, because religious schools were not permitted as of right anywhere in the township, the church would face the same discretionary process if it reapplied at another property. Lack of assurance that the church could carry out its religious exercise anywhere in the township accentuated the burden resulting from the permit denial. *Id.*

Once again, the burden at issue in this case is even more substantial, because the downside of the denial for the Legion's religious exercise is even more severe and definite. This is not a situation where the Legion could simply find another property in the Town and obtain permission for its conference center use by an expensive, protracted, and uncertain special permitting process – though that would certainly be bad enough. *See, e.g., Sts. Constantine & Helen*, 396 F.3d at 901. Instead, the Legion's proposed use is not permitted anywhere in the Town – even by special permit (*see* Legion Br. 39) – except in the zone narrowly drawn around the property at issue, where it is permitted as of right.

Third and finally, the recent decision of the United States Supreme Court in *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 126 S. Ct. 1211 (2006) (hereinafter “*UDV*”), reinforces the position of the Legion regarding the demanding character of the strict scrutiny standard under federal religious freedom protection statutes like RLUIPA. There, the question was whether congressional findings that a controlled substance was unhealthy under any circumstances was sufficient alone to satisfy the demands of strict scrutiny under RFRA. By a margin of 8-0, the Court answered that question with a resounding “no.” The Court emphasized that, in order to satisfy strict scrutiny under RFRA, a government defendant must provide a thorough evidentiary showing that explains why the particular exemption at issue cannot be accommodated -- general assertions by the legislature are insufficient. 126 S. Ct. at 1220-23.

This principle applies with equal force to the strict scrutiny demands of RLUIPA Section 2(a). And the situation here regarding strict scrutiny bears a striking resemblance to that in *UDV*. Here, the very strongest governmental interest that the Town can muster is that making religious accommodation exceptions to general rules threatens the welfare of the entire community. *See* Legion Br. 41. Thus, just as in *UDV*, the government's argument

rests not so much on the particular statutory program at issue as on slippery-slope concerns that could be invoked in response to any RFRA claim for an exception to a generally applicable law. The Government's argument echoes the classic rejoinder of bureaucrats throughout history: If I make an exception for you, I'll have to make one for everybody, so no exceptions. But RFRA [just like RLUIPA Section 2(a)] operates by mandating consideration, under the compelling interest test, of exceptions to "rule[s] of general applicability." 42 U.S.C. § 2000bb-1(a).

126 S. Ct. at 1223. Accordingly, if this court reinstates the trial court's finding of a "substantial burden," it should similarly reject any claim by the Town that it has satisfied the "strict scrutiny" language of RLUIPA.

### **CONCLUSION**

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

Dated: Washington, DC  
March 17, 2006

Respectfully submitted,

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