

03-9329

In the United States Court of Appeals for the Second Circuit

ROBERT MURPHY AND MARY MURPHY,
Plaintiffs-Appellees,

- against -

THE ZONING COMMISSION OF THE TOWN OF NEW
MILFORD, GEORGE DORING, C. BROOKS TEMPLE, CHARLES
RAYMOND, LAWRENCE GREENSPAN, ELEANOR FLORIO,
PATRICIA McRAE, MONA TITO, and KATHY CASTAGNETTA,
Zoning Enforcement Officer for the Zoning Commission of the Town
of New Milford, in their official and individual capacities
Defendants-Appellants.

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

Brief *Amicus Curiae* of the Becket Fund for Religious Liberty
in Support of Plaintiffs-Appellees and 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 submits this brief *amicus curiae* in support of Appellees Robert and Mary Murphy (the “Murphys”) and affirmance. Counsel for all parties have consented to the filing of this brief. Fed. R. App. P. 29(a). The Becket Fund is an interfaith, nonpartisan 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 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 land-use and prisoner cases, from Alabama to New Hampshire to Hawaii – including cases within the Second Circuit.¹ The Becket Fund also represents the plaintiffs in a host of RLUIPA cases outside the Second

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); *Westchester Day School v. Village of Mamaroneck*, No. 03-9042 (2d Cir.) (*amicus* brief filed Jan. 20, 2004); *Murphy v. Town of New Milford*, 289 F. Supp. 2d 87 (D. Conn. 2003) (*amicus* brief filed Dec. 27, 2002).

Circuit, including some that have resulted in published decisions,² and others that have concluded by favorable settlement.³ In addition, we have filed a series of *amicus curiae* briefs in both prisoner and land-use cases involving RLUIPA.⁴ We

² See, e.g., *Castle Hills First Baptist Church v. City of Castle Hills*, Civ. No. 01-1149, ___ F. Supp. 2d ___, 2004 WL 546792 (W.D. Tex. Mar. 17, 2004); *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 *Lighthouse Institute for Evangelism v. City of Long Branch*, No. 03-2343 (3d Cir.) (pending); *Redwood Christian Schs. v. County of Alameda*, Civ. No. 01-4282 (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).

³ See, e.g., *Cotton v. Fla. Dept. of Corrections*, Civ. No. 02-22760 (S.D. Fla. filed Sept. 19, 2002) (settlement agreement signed Oct. 2003); *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).

⁴ See, e.g., *Midrash Sephardi v. Town of Surfside*, 366 F.3d 1214 (11th Cir. 2004) (*amicus* brief filed Nov. 21, 2003); *Cutter v. Wilkinson*, 349 F.3d 257 (6th Cir. 2003) (*amicus* brief in support of rehearing *en banc* filed on behalf of a broad coalition Dec. 19, 2003); *Madison v. Riter*, 355 F.3d 310 (4th Cir. 2003) (*amicus*

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.

SUMMARY OF ARGUMENT

Amicus offers three main points in support of affirmance. First, the Court should approach the Town's account of Free Exercise jurisprudence with great caution, as it contains a combination of overstatement and confusion that, if adopted, would do great harm to the law of this Circuit. In particular, the Court should assure that substantial burden claims and discrimination claims remain distinct theories of recovery under the Free Exercise Clause.

But in order to avoid this and other unnecessary, thorny issues – most especially the constitutionality of an Act of Congress – the Court should seek alternative grounds for affirmance. Specifically, the Court should sooner affirm

brief filed on behalf of a broad coalition June 6, 2003); *San Jose Christian College v. City of Morgan Hill*, No. 02-15693 (9th Cir.) (*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); *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); *Terrero v. Watts*, No. CV202-134 (S.D. Ga.) (RLUIPA constitutionality challenge pending); *Benning v. Georgia*, No. CV-602-139 (S.D. Ga.) (*amicus* brief filed Oct. 31, 2003); *Primera Iglesia Bautista Hispana v. Broward County*, No. 01-6530-CIV (S.D. Fla.) (*amicus* brief filed Apr. 18, 2003); *Konikov v. Orange County*, No. 6:02-CV-376-ORL-28-JGG (M.D. Fla.) (*amicus* brief filed Apr. 11, 2003); *Goodman v. Snyder*, Civ. No. 2000-948 (N.D. Ill.) (*amicus* brief filed Mar. 17, 2003); *Lighthouse Institute for Evangelism v. City of Long Branch*, Civ. No. 00-3366 (D.N.J.) (*amicus* brief filed May 7, 2001).

based either on Plaintiffs’ First Amendment claims, or on Plaintiffs’ claim under the Connecticut Act Concerning Religious Freedom.

Finally, if the Court reaches the constitutionality of RLUIPA, the Court should follow the overwhelming majority of cases that have gone before, and uphold the Act. Rather than restate the basic analysis under the Enforcement or Establishment Clause, *amicus* highlights certain flaws in the Town’s position on these issues, as set forth in its brief.

ARGUMENT

I. THE TOWN’S BRIEF THREATENS TO CREATE NEEDLESS CONFUSION IN THE FREE EXERCISE JURISPRUDENCE OF THIS CIRCUIT.

A. The Supreme Court Has Created and Refined Two Distinct Strands of Free Exercise Jurisprudence, One Prohibiting Religious Discrimination, and One Prohibiting Substantial Burdens Imposed Through Discretionary Systems.

In 1963, the Supreme Court held in *Sherbert v. Verner*, 374 U.S. 398 (1963), that the Free Exercise Clause mandated strict scrutiny *whenever* the government imposed a “substantial burden” on religious exercise, even when the burden was incidental.

In 1990, the Supreme Court held in *Employment Division v. Smith*, 494 U.S. 872 (1990), that laws incidentally burdening religious exercise – that is, “neutral laws of general applicability” – *do not usually* trigger strict scrutiny, however substantial the burden they may impose.

Smith did not, however, eliminate entirely strict scrutiny for incidental, substantial burdens. Specifically, *Smith* **did not overrule** *Sherbert* or the “substantial burdens” line of cases that it spawned, but instead **distinguished** those cases as involving systems of “individualized governmental assessment of the reasons for the relevant conduct.” *Smith*, 494 U.S. at 884. Accordingly, even after *Smith*, strict scrutiny still applies to incidental, substantial burdens, but only when imposed through such systems of individualized assessment.

Smith also emphasized that, when applying the “substantial burdens” test, courts must avoid “[j]udging the centrality of different religious practices [because it] is akin to the unacceptable business of evaluating the relative merits of differing religious claims.” 494 U.S. at 887 (internal quotations omitted). *See also* *Hernandez v. Comm’r*, 490 U.S. 680, 699 (1989) (“It is not within the judicial ken to question the centrality of particular beliefs or practices to a faith, or the validity of particular litigants’ interpretations of those creeds.”); *McEachin v. McGuinnis*, 357 F.3d 197, 202 (2d Cir. 2004) (court must assess burden on religious practice “without passing judgment on ‘the centrality of different religious practices’”) (quoting *Smith*, 494 U.S. at 887).

In 1993, in *Church of the Lukumi Babalu Aye v. Hialeah*, 508 U.S. 520 (1993), the Court elaborated on the closely related requirements of “neutrality” and “general applicability.” In short, to fail either requirement is to engage in some

form of impermissible religious discrimination – that is, to impose a burden on religious exercise that is *not* incidental, but in some sense intentional or purposeful.

But in precisely what sense must the burdens be intentional? And how may a plaintiff prove the relevant purpose? Although the result in *Lukumi* was unanimous, these questions divided the Court. Justice Kennedy – joined only by Justice Stevens – concluded that the ultimate question is whether a law was motivated by impermissible *animus*, and that relevant evidence includes, among other things, expressions of religion-based *animus* by government officials. *See Lukumi*, 508 U.S. at 540-42 (Section II.A.2.).

But no other Justices signed onto this part of Justice Kennedy’s opinion, and Justices Scalia and Rehnquist concurred separately to emphasize their disagreement with it. *See Lukumi*, 508 U.S. at 558-59 (concurring opinion) (rejecting Section II.A.2. because it “consider[s] the subjective motivation of the *lawmakers*, *i.e.*, whether the Hialeah City Council actually *intended* to disfavor the religion of Santeria,” and concluding that even “pure-hearted” legislators violate the Free Exercise Clause by passing law that “**in fact** singles out a religious practice for special burdens”) (emphasis added). Indeed, these Justices questioned whether it was even *permissible* to consider the *animus* of individual legislators in assessing the purpose or intent of a law. *See id.*

In sum, after *Lukumi*, it was an open question whether expressions of religion-based hostility could be considered in evaluating “neutrality” or “general applicability,” but it was clear that, in any event, evidence of *animus* was unnecessary for a plaintiff to prevail. See Douglas Laycock, *The Supreme Court and Religious Liberty*, 40 CATH. LAWYER 25, 28 (2000) (“Whatever else it may be, *Lukumi* is not a motive case. The lead opinion explicitly relies on the city’s motive to exclude a particular religious group—and that part of the opinion has only two votes. So whatever the holding is, it is not a holding about motive.”).

Earlier this year, in *Locke v. Davey*, 124 S. Ct. 1307 (2004), the Court rejected the claim that a state scholarship program failed the “neutrality” requirement under the Free Exercise Clause, where the program excluded a student because he would have used the funds to pay for a major in the devotional study of religion.

In distinguishing *Lukumi*, the Court emphasized several important points. First, the Court made clear that it was only declining to extend *Lukumi*; the Court expressly disavowed overruling or otherwise curtailing *Lukumi*. See *Locke*, 124 S. Ct. at 1312 (refusing to accept plaintiff’s position because it “would extend the *Lukumi* line of cases well beyond not only their facts but their reasoning.”). Second, *Lukumi* involved state action preventing religious exercise, while *Locke* involved the historic practice (dating to the Founding) of denying state funds for

clergy training. *Id.* Third, *Lukumi* involved a showing of religion-based *animus*, but *Locke* did not. *Id.* at 1314 (describing state scholarship program as “[f]ar from evincing the hostility toward religion which was manifest in *Lukumi*”).

Thus, although the Court *may* require a showing of religion-based *animus* to trigger strict scrutiny in a case like *Locke* (*i.e.*, where the state specially excludes clergy training from funding), the Court has *not* held that a similar showing is necessary in a case like *Lukumi* (*i.e.*, where the state specially targets worship for prohibition). Although the plaintiff in *Lukumi* happened to have provided evidence of religion-based *animus*, seven Justices in *Lukumi* treated that showing as unnecessary on those facts, and *Locke* does not purport to disrupt that ruling.

Finally, one other aspect of *Locke* is especially telling in reference to the “substantial burden” strand of Free Exercise jurisprudence. The Court cited with approval the *Sherbert* line of cases, confirming that they remain good law and have not been overruled. *Locke*, 124 S.Ct. at 1312-13. Indeed, the Court’s language confirms that *Sherbert* and its progeny remain viable ***precisely as substantial burden cases***: the Court describes them as cases where plaintiffs were forced to “choose between their religious beliefs and receiving a government benefit.” *Id.* This is the same formulation this Court has used to describe one of several forms of “substantial burden.” *See Jolly v. Coughlin*, 76 F.3d 468, 477 (1996) (substantial burden exists where “individual is forced to ‘choose between

following the precepts of her religion and forfeiting benefits”)(quoting *Sherbert*, 374 U.S. at 404).

Recently, however, this Court has hesitated to apply the “substantial burdens” test, suggesting in *dicta* that *Smith* may forbid it entirely. See *McEachin*, 357 F.3d at 202. But *Smith* only forbids judicial evaluation of a plaintiff’s claim that the burdened beliefs or practices are “central” to a plaintiff’s religious system. See *Smith*, 494 U.S. at 887; *Hernandez*, 490 U.S. at 699. For this very reason, RLUIPA’s definition of “religious exercise” expressly avoids any inquiry into “centrality.” See RLUIPA § 8(7)(A) (“The term ‘religious exercise’ includes any exercise of religion, whether or not compelled by, or central to, a system of religious belief.”).

Importantly, courts may assess “substantiality” in other ways – as this Court and other Courts of Appeals have – while still respecting the admonition to avoid assessing “centrality.” Specifically, in this Circuit, “a substantial burden exists where the state ‘put[s] substantial pressure on an adherent to modify his behavior and to violate his beliefs,’” *Jolly*, 76 F.3d at 477 (quoting *Thomas v. Review Bd.*, 450 U.S. 707, 718 (1981)).⁵ At the same time, the *Jolly* court took pains to avoid any impermissible evaluation of the plaintiff’s religious beliefs. See *Jolly*, 76 F.3d

⁵ *Amicus* notes that *Thomas* is one of the post-*Sherbert* substantial burden cases that the Supreme Court recently cited in *Locke* as precedent still in force, precisely as a substantial burden case.

at 476. *See also McEachin*, 357 F.3d at 202 (“[A] court must determine when an impediment to a religious practice is significant enough to warrant judicial intervention. But it must do this without passing judgment on ‘the centrality of different religious practices’”) (quoting *Smith*, 494 U.S. at 887).

The Eleventh Circuit has recently employed a similar definition of “substantial burden,” which also avoids any reference to “centrality.” *Midrash Sephardi v. Town of Surfside*, 366 F.3d 1214, 1227 (11th Cir. 2004) (defining “substantial burden” as “more than an inconvenience on religious exercise”; as “akin to a significant pressure which directly coerces the religious adherent to conform his or her behavior accordingly”; and as “result[ing] from pressure that tends to force adherents to forego religious precepts or from pressure that mandates religious conduct”).

B. The Town’s Brief Confuses the Relationship Between Substantial Burden Claims and Discrimination Claims.

Whether by accident or design, the Town’s discussion of the Free Exercise Clause and RLUIPA disregards or conflates important distinctions within that jurisprudence.

The Town claims that *Locke* somehow “made clear” that “the only sort of individualized exemption process that triggers strict scrutiny is that which appears to be grounded in ‘animus’ or ‘hostility.’” Town Br. 45. In fact, *Locke* is absolutely silent on the meaning of “individualized assessments,” and that doctrine

was used by the *Smith* Court to describe and distinguish “substantial burden” cases like *Sherbert* and *Thomas*.

The Town suggests that a showing of *animus* is required in *every* Free Exercise discrimination case – not just those involving the *funding of clergy education*, nor even *funding generally*, but also discriminatory *regulation*. Town Br. 30 (“A finding that there is no religious animus is, by definition, proof of neutrality.”). This is an impermissibly aggressive reading of *Locke*, because it would partially overrule *Lukumi*, contrary to the Court’s express statement that it was only declining to extend *Lukumi*. *Locke*, 124 S.Ct. at 1312. Even if *Lukumi* were somehow undermined by *Locke* – and it is not – this Court should still apply *Lukumi* to regulatory discrimination cases like this one, unless and until the Supreme Court expressly overrules it. *See Agostini v. Felton*, 521 U.S. 203 (1997) (“If a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions.”) (quotations omitted). And seven votes in *Lukumi* still say that, when challenging a regulatory law as lacking neutrality or general applicability, disparity of treatment across religious lines is sufficient alone to trigger strict scrutiny, and a showing of *animus* is not additionally required. *See Laycock, supra*, 40 CATH. LAWYER at 28.

Indeed, the Town would stretch *Locke* even further, suggesting that a showing of *animus* is required in “substantial burden” cases. *See* Town Br. 45 (characterizing *Sherbert* as a case “where the Court found that the exemption process was ‘hostile’ to religion.”); *id.* at 55 (“[T]he Free Exercise Clause does not mandate strict scrutiny in circumstances except where there is a showing of *animus* or hostility toward religion.”). Similarly, the Town argues that burdens on religious exercise must be “substantial,” even in discrimination cases. *See id.* at 17 (suggesting that, in order to make *any* claim under RLUIPA, plaintiffs “must prove that the land use law applied to them constitutes a ‘substantial burden’”).

But this would confuse the two distinct strands of the Supreme Court’s Free Exercise jurisprudence – substantial burden and discrimination – as discussed above. When burdens are discriminatory, they trigger strict scrutiny no matter what, and it is irrelevant whether the burden is also substantial. But when burdens are *not* discriminatory, they may *still* trigger strict scrutiny, but only if they are also both “substantial” (after *Sherbert*) and imposed pursuant to a system of “individualized assessments” (after *Smith*).⁶ As the Third Circuit has recognized, to graft the “substantiality” requirement onto religious discrimination claims “would make petty harassment of religious institutions and exercise immune from

⁶ *But see* Town Br. 32 (arguing (erroneously) that, on the District Court’s view, any law involving “individualized assessments” triggers strict scrutiny).

the protections of the First Amendment.” *Brown v. Borough of Mahaffey*, 35 F.3d 846, 849-50 (3d Cir. 1994).

Lower courts have consistently recognized that discrimination and substantial burden claims are two distinct types of Free Exercise claims. *See, e.g., Brown*, 35 F.3d at 849-50 (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”); *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). *See also Hartmann v. Stone*, 68 F.3d 973, 978 (6th Cir. 1995) (noting that *Smith* curtailed application of strict scrutiny where “purportedly neutral and generally applicable rules ... resulted incidentally in a burden on an individual’s practice of religion,” but the Court “never intended ... to affect the methodology of dealing with those laws or rules that directly burden religion because they are not neutrally and generally applicable.”).

Congress has also respected the distinction, codifying each line of jurisprudence in separate subsections of RLUIPA’s land-use provision. *Compare*

RLUIPA § 2(a) (substantial burdens), *with* § 2(b) (disparate treatment and impermissible *animus*).

In short, in deciding this case, this Court should avoid the doctrinal confusion that the Town invites by: (1) taking care to distinguish claims of discrimination (lack of “neutrality” or “general applicability”), from claims of incidental, “substantial burden” imposed pursuant to a system of “individualized assessments”; (2) rejecting any reading of *Locke* that would impose an *animus* requirement on every Free Exercise claim, or even every Free Exercise discrimination claim; and (3) rejecting any reading of *Smith* that would preclude all “substantial burden” claims.

C. The Town Accurately States the “Substantial Burden” Standard for This Circuit, but Then Applies a Different Standard from Another Circuit.

As noted above, in the Second Circuit, “a substantial burden exists where the state ‘put[s] substantial pressure on an adherent to modify his behavior and to violate his beliefs,’” *Jolly*, 76 F.3d at 477 (quoting *Thomas v. Review Bd.*, 450 U.S. 707, 718 (1981)). The Town has acknowledged that this is the controlling standard. *See* Town Br. 18. The Town has also recognized that at least one other Court of Appeals has articulated a similar “substantial burden” standard in the specific context of land-use law. *See id.* at 18-19 (quoting *Midrash Spehardi*).

But it is inaccurate for the Town then to claim that these standards are consistent with the “substantial burden” standards articulated by the Ninth and Seventh Circuits. *Town Br. 19*. Indeed, the Eleventh Circuit specifically declined to adopt the Seventh Circuit’s “effectively impracticable” standard from *C.L.U.B. v. City of Chicago*, 342 F.3d 752, 761 (7th Cir. 2003), and fairly criticized it because it “would render [Section 2(b)(3)]’s total exclusion prohibition meaningless.” *Midrash Spehardi*, 366 F.3d at 1227. By contrast, the Ninth Circuit has embraced the Seventh Circuit’s “effectively impracticable” standard as “entirely consistent with” its own “‘significantly great’ restriction or onus” standard. *San Jose Christian College v. City of Morgan Hill*, 360 F.3d 1024, 1035 (9th Cir. 2004).⁷

⁷ Moreover, although the Town harps on the “effectively impracticable” language in *C.L.U.B.*, this standard cannot be divorced from the specific context of that case. *C.L.U.B.* involved a facial challenge to the mere requirement of having to apply for a permit, and notably did not involve the evaluation of even a single decision to deny a zoning permit (*i.e.*, no decision involving “individualized assessments”). Requiring plaintiffs to show their religious exercise would be rendered “effectively impracticable” is consistent with the normal burden for plaintiffs bringing a facial challenge to show that “no set of circumstances exists” in which the law can be applied constitutionally. *United States v. Salerno*, 481 U.S. 739, 745 (1987). *San Jose Christian College* likewise involved a facial challenge to the requirement of having to obtain a permit. Notably, the “effectively impracticable” standard has *never* been applied in cases challenging the individualized decision to deny a particular use permit. *See, e.g., United States v. Maui Cy.*, 298 F.Supp.2d 1010, 1017 (D.Haw. 2003) (holding that because *C.L.U.B.* involved a “facial challenge,” its standard did not apply to “an as-applied challenge” to denial of permit); *Guru Nanak Sikh Society v. Sutter County*, No. S-

The purpose of concealing these differences soon becomes apparent: the Town claims that all of these standards are similar in order to justify applying the stricter ones of the group here, as if they were the law of this Circuit, which actually calls for a more lenient standard. *See* Town Br. 19 (concluding that “[i]n light of these principles,” the zoning enforcement action here imposed no substantial burden, because it “did not make the practice of [plaintiffs’] religious beliefs *impracticable*.”) (emphasis added). *But see McEachin*, 357 F.3d at 202 (“demonstrating such a [substantial] burden is not a particularly onerous task”).

Here again, when assessing substantial burden in this case, the Court should be careful to apply the law of this Circuit – and not inconsistent, stricter standards from other Circuits that the Town would smuggle in.⁸

II. THIS COURT MAY EASILY AVOID THE QUESTION WHETHER RLUIPA SECTION 2(A) IS CONSTITUTIONAL.

This Court has at least two ways to avoid deciding whether RLUIPA Section 2(a) is constitutional, while still ruling in favor of the Plaintiffs.

02-1785, slip op. at 28 (E.D. Cal. Nov. 19, 2003) (refusing to apply *C.L.U.B.* standard to as-applied challenge).

⁸ In connection with the proper standard for evaluating “substantial burdens,” *amicus* also respectfully directs this Court’s attention to Part I of the brief that *amicus* filed with this Court in *Westchester Day School v. Village of Mamaroneck*, No. 03-9042 (2d Cir.) (*amicus* brief filed Jan. 20, 2004) (available at www.becketfund.org/litigate/WestchesterAmicus.pdf).

A. If the Court Upholds the Decisions Below Regarding Free Exercise or Freedom of Assembly, It Need Not Address the Constitutionality of RLUIPA.

“Considerations of propriety, as well as long-established practice, demand that [courts] refrain from passing upon the constitutionality of an act of Congress unless obliged to do so” *Ashwander v. TVA*, 297 U.S. 288, 341 (1936) (Brandeis, J., concurring). This is so in part because “[j]udging the constitutionality of an Act of Congress is properly considered ‘the gravest and most delicate duty that this Court is called upon to perform.’” *Walters v. Nat’l Ass’n of Radiation Survivors*, 473 U.S. 305, 319 (1985) (quoting *Rostker v. Goldberg*, 453 U.S. 57, 64 (1981) (quoting *Blodgett v. Holden*, 275 U.S. 142, 148 (1927))).

In this case, the Court may easily avoid the question whether RLUIPA Section 2(a) is constitutional by affirming the court below on either of two First Amendment grounds: that the Town’s zoning enforcement action lacked either neutrality or general applicability under the Free Exercise Clause, *see Murphy v. Town of New Milford*, 289 F. Supp. 2d 87, 104-07 (D. Conn. 2003), or that it violated Plaintiffs’ right to peaceable assembly. *See id.* at 102-03. At least one other court has followed a similar approach. *See Hale O Kaula Church v. Maui Planning Comm’n*, 229 F. Supp. 2d 1056, 1071-72 (D. Haw. 2002) (mooting constitutionality of RLUIPA by deciding to apply strict scrutiny under Free

Exercise Clause). Moreover, if the Court decides that the law at issue is either non-neutral or not generally applicable, the Court may also avoid the questions surrounding the “substantial burden” test, as discrimination claims do not require a finding of substantial burden. *See Brown*, 35 F.3d at 849-50.

B. If the Court Upholds the Decisions Below Under the CACRF, It Would Decide the Easiest Constitutional Issues Raised, and Avoid Addressing the Constitutionality of RLUIPA.

The Connecticut Act Concerning Religious Freedom (“CACRF”) is a state-level protection of religious freedom that provides broader coverage than RLUIPA, and is not subject to federalism-based constitutionality challenges. The sole challenges to this claim are therefore very weak: that there is no violation because the government action here does not impose any burden *at all* on religious exercise, *Town Br. 22*, and that, if there is a violation of the CACRF, it violates the Establishment Clause. *See id.* at 24-25 n.6, 55-60. By deciding these issues first and affirming, the Court could eliminate the need to address the more sensitive question whether RLUIPA Section 2(a) is constitutional. Here again, this approach would also keep the Court from having to address the various questions surrounding “substantiality” of burden.

III. IF THE COURT WERE TO ADDRESS THE QUESTION, IT SHOULD FIND THAT RLUIPA SECTION 2(A) IS CONSTITUTIONAL.

If the Court feels compelled to address the constitutionality of RLUIPA, it should join the overwhelming weight of authority upholding the Act. Rather than repeat the full analysis of these issues set forth by the Plaintiffs, the United States, and other *amici* in support of Plaintiffs, this brief simply responds to certain discrete points within each challenge.⁹

A. **RLUIPA Section 2(a) Is a Legitimate Exercise of Congress' Enumerated Power Under the Enforcement Clause.**

First, *amicus* notes that the Supreme Court's recent decision in *Tennessee v. Lane*, 124 S. Ct. 1978 (2004), represents the Court's second decision in as many years to reject an Enforcement Clause challenge to federal civil rights legislation. Although the Town would read it to impose all manner of new requirements to satisfy the Enforcement Clause analysis, *see* Town Br. 34, 41-43, it does nothing of the sort. The structure and elements of the analysis remain the same; the only difference now is that more statutes are surviving that analysis.

Second, the Town has omitted the first part of the Enforcement Clause analysis, which is "to identify with some precision the scope of the constitutional

⁹ In addition, *amicus* has already set forth the basic argument in response to an Enforcement Clause challenge to RLUIPA Section 2(a) in Part II of a brief previously filed with this court in *Westchester Day School v. Village of Mamaroneck*, No. 03-9042 (2d Cir.) (*amicus* brief filed Jan. 20, 2004) (available at www.becketfund.org/litigate/WestchesterAmicus.pdf).

right at issue.” *Board of Trustees of Univ. of Alabama v. Garrett*, 121 S. Ct. 955, 963 (2001); *see id.* at 965 (“Once we have determined the metes and bounds of the constitutional right in question,” then the Court will examine “history and pattern” evidence); *see, e.g., Nanda v. Bd. of Trustees of the Univ. of Ill.*, 303 F.3d 817, 828 (7th Cir. 2002) (beginning application of Enforcement Clause test by examining constitutional rights to be enforced). Little wonder, for this step reveals just how faithfully Congress has restated current “individualized assessments” jurisprudence under the Free Exercise Clause in RLUIPA Section 2(a) – a fact that both deflates Defendants’ overblown rhetoric of congressional overreach, *see, e.g., Town Br.* 48-54, and highlights just how modest a remedy Section 2(a) really is. *See Freedom Baptist Church*, 204 F. Supp. 2d at 873 (concluding that, because “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,’” RLUIPA Section 2(a) “cannot be regarded as in any way hostile to *Smith*, as the RFRA undoubtedly was.”).

Third, the Town’s emphasis on the number of judicial decisions specifically finding the type of free exercise violations targeted by the statute is misplaced. *See, e.g., Town Br.* 41-42. To begin with, although this kind of evidence is certainly not necessary, it may be helpful in supporting an Enforcement Clause defense. Second, among many other forms of evidence before Congress was a

study of almost 200 judicial decisions involving similar issues. And finally, enforcement remedies are often needed precisely because the constitutional injuries don't often result in published decisions, because the constitutional violation is hard to prove in court, or because the problem otherwise suffers from a low profile. *See Freedom Baptist Church*, 240 F. Supp. 2d. at 867 (“Whatever the true percentage of cases in which religious organizations have improperly suffered at the hands of local zoning authorities, we certainly are in no position to quibble with Congress’s ultimate judgment that the undeniably low visibility of land regulation decisions may well have worked to undermine the Free Exercise rights of religious organizations around the country.”)

Fourth, the Town claims that “not a single court has found that any city under attack by RLUIPA acted out of discriminatory or hostile purposes.” Town Br. 48. Even if this is technically true (and it probably is not), it is certainly misleading. A few examples from the recent past suffice to refute any suggestion that, notwithstanding all the evidence before Congress, the Town knows better, and religious “hostility is extremely rare” in land-use law. *Id.*

- In *Cottonwood Christian Center v. City of Cypress*, 218 F. Supp. 2d 1203, 1255 (C.D. Cal. 2002), the Court found that plaintiffs had a likelihood of success on their Free Exercise claim of discrimination, based on hostility to the church.
- In *Hale O Kaula v. Maui Planning Comm’n*, No. 01-0615-SPK, slip op. (D. Haw. Mar. 24, 2003), the Court found that the factual record precluded

summary judgment for defendants on plaintiffs' claim of religious discrimination in the application of the zoning ordinance.

- In *C.L.U.B. v. City of Chicago*, 342 F.3d 752 (7th Cir. 2003), the City had amended its ordinance to avoid a conspicuous constitutional problem of disparate treatment across religious lines. *See id.* at 772 (Posner, J., dissenting) (noting that ordinance “was amended in 2000 in virtual acknowledgment that its predecessor was in violation of the Constitution”).

For these, and the reasons set forth by the Plaintiffs, the United States, and Plaintiffs' other *amici*, the Court should reject the Town's Enforcement Clause challenge.

B. RLUIPA Section 2(a) Is Consistent with the Establishment Clause.

First, *amicus* would underscore just how crushing is the weight of authority against the Town's Establishment Clause position. With only one exception,¹⁰ the same arguments have been rejected *in every single reported case* where they have been raised, not only against RLUIPA,¹¹ but against RLUIPA's broader

¹⁰ *Cutter v. Wilkinson*, 349 F.3d 257 (6th Cir. 2003) (citing *Madison v. Riter*, 240 F. Supp. 2d 566 (W.D. Va. 2003), *overruled by Madison v. Riter*, 355 F.3d 310 (4th Cir. 2003), and *Al Ghashiyah v. Wis. Dept. of Corrections*, No. 01-C-10, 2003 WL 1089526 (E.D. Wis. Mar. 4, 2003), *overruled by Charles v. Verhagen*, 348 F.3d 601 (7th Cir. 2003)). The petition for *certiorari* in *Cutter* is now in the process of being briefed.

¹¹ *See, e.g., Madison v. Riter*, 355 F.3d 310 (4th Cir. 2003) (rejecting Establishment Clause challenge to RLUIPA); *Charles v. Verhagen*, 348 F.3d 601 (7th Cir. 2003) (same); *Mayweathers v. Newland*, 314 F.3d 1062 (9th Cir. 2002) (same); *Castle Hills First Baptist Church v. City of Castle Hills*, ___ F. Supp. 2d ___, 2004 WL 546792 (W.D. Tex. Mar. 17, 2004) (same); *United States v. Maui County*, 298 F. Supp. 2d 1010 (D. Haw. 2003) (same); *Westchester Day Sch. v. Village of Mamaroneck*, 280 F. Supp. 2d 230 (S.D.N.Y. 2003) (same); *Williams v.*

predecessor, RFRA, both before and after RFRA was struck down on other grounds in *City of Boerne*.¹² These arguments have suffered the same fate as challenges to religious accommodations within local zoning laws themselves.¹³

Second, the core argument of *Cutter v. Wilkinson* – that the Establishment Clause forbids legislative accommodations of religious exercise if they accommodate only religious exercise – is deeply flawed for several reasons. For starters, the Supreme Court—and the litany of lower courts willing to follow it—have squarely rejected this very same argument, over and over again.¹⁴

Bitner, 285 F. Supp. 2d 593 (M.D. Pa. 2003) (same); *Sanabria v. Brown*, No. 99-4699 (D. N.J. June 5, 2003) (same); *Life Teen, Inc. v. Yavapai County*, No. Civ. 01-1490-PCT-RCB (D. Ariz. Mar. 26, 2003) (same); *Gordon v. Pepe*, No. Civ. A-00-10453-RWZ, 2003 WL 1571712 (D. Mass. Mar. 6, 2003) (same); *Freedom Baptist Church v. Township of Middletown*, 204 F. Supp. 2d 857 (E.D. Pa. 2002) (same).

¹² See, e.g., *Mockaitis v. Harclerod*, 104 F.3d 1522, 1530 (9th Cir.) (rejecting Establishment Clause challenge to RFRA), *overruled on other grounds*, 521 U.S. 507 (1997); *In re Young*, 141 F.3d 854, 861–63 (8th Cir.) (rejecting Establishment Clause and Separation of Powers challenges to RFRA), *cert. denied*, 525 U.S. 811 (1998); *Sasnett v. Sullivan*, 91 F.3d 1018, 1022 (7th Cir. 1996) (same), *vacated on other grounds*, 521 U.S. 1114 (1997); *E.E.O.C. v. Catholic Univ. of America*, 83 F.3d 455, 470 (D.C. Cir. 1996) (same); *Flores v. City of Boerne*, 73 F.3d 1352, 1364 (5th Cir. 1996) (same), *rev'd on other grounds*, 521 U.S. 507 (1997).

¹³ See *Ehlers-Renzi v. Connelly School of the Holy Child*, 224 F.3d 283, 291 (4th Cir. 2000); *Boyajian v. Gatzunis*, 212 F.3d 1 (1st Cir. 2000); *Cohen v. Des Plaines*, 8 F.3d 484 (7th Cir. 1993).

¹⁴ See, e.g., *Corporation of Presiding Bishop of Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327, 338 (1987) (“Where . . . government acts with the proper purpose of lifting a regulation that burdens the exercise of religion, we see no reason to require that the exemption comes packaged with benefits to secular entities.”); *Mayweathers*, 314 F.3d at 1069 (under *Amos*, RLUIPA “does

Moreover, if the Town’s argument prevailed, the Establishment Clause would run amok, invalidating wholesale the legion acts of the political branches—legislative and executive, federal, state, and local—whose *sole* purpose and effect is to accommodate religious exercise. This includes, among many others, the *federal statutory* accommodations of religious peyote use and religious headwear in the military;¹⁵ *state constitutional* provisions that provide stronger protections for religious exercise (and only religious exercise) than the federal Free Exercise

not violate the Establishment Clause just because it seeks to lift burdens on religious worship in institutions without affording corresponding protection to secular activities or to non-religious prisoners.”); *Madison*, 355 F.3d at 318 (“The mere fact that RLUIPA seeks to lift government burdens on a prisoner’s religious exercise does not mean that the statute must provide commensurate protections for other fundamental rights.”) (discussing *Amos*); *In re Young*, 141 F.3d at 863 (rejecting the reasoning of Justice Stevens’ solitary concurrence in *Boerne* that RFRA is impermissible because it accommodates the religious without also providing a benefit for atheists as a viewpoint “in direct contradiction” to the majority opinion in *Amos*).

¹⁵ See *Lee v. Weisman*, 505 U.S. 577, 628–29 (1992) (Souter, J., concurring) (“[I]n freeing the Native American Church from federal laws forbidding peyote use, see . . . 21 C.F.R. § 1307.31 (1991), the government conveys no endorsement of peyote rituals, the Church, or religion as such; it simply respects the centrality of peyote to the lives of certain Americans.”); *Texas Monthly v. Bullock*, 489 U.S. 1, 18 (1989) (plurality opinion of Brennan, Marshall, and Stevens) (“[I]f the Air Force provided a sufficiently broad exemption from its dress requirements for servicemen whose religious faiths commanded them to wear certain headgear or other attire, see *Goldman v. Weinberger*, [475 U.S. 503 (1986)] . . . that exemption would not be invalid under the Establishment Clause even though this Court has not found it to be required by the Free Exercise Clause.” (citation omitted)).

Clause;¹⁶ *state statutes* that provide broader protection to religious exercise (and only religious exercise) than required by the federal or state constitution;¹⁷ and

¹⁶ See also *Arizona v. Evans*, 514 U.S. 1, 8 (1995) (“state courts are absolutely free to interpret state constitutional provisions to accord greater protection to individual rights than do similar provisions of the United States Constitution”). Since the Supreme Court’s *Smith* decision, the courts of at least *eleven* states have held that their state constitutions provide broader protection for religious exercise (and only religious exercise) than the federal *Smith* rule. See, e.g., *Humphrey v. Lane*, 728 N.E.2d 1039 (Ohio 2000); *In re Browning*, 476 S.E.2d 465, 124 N.C. App. 190 (North Carolina 1996); *State v. Miller*, 549 N.W.2d 235, 202 Wis. 2d (Wis. 1996); *Attorney Gen. v. Desilets*, 636 N.E.2d 233, 418 Mass. 316 (Mass. 1994); *Swanner v. Anchorage Equal Rights Comm’n*, 874 P.2d 274 (Alaska 1994); *Rourke v. N.Y. State Dep’t of Corr. Servs.*, 603 N.Y.S.2d 647 (N.Y. Sup. Ct. 1993), *aff’d*, 615 N.Y.S.2d 470 (N.Y. App. Div. 1994); *Rupert v. City of Portland*, 605 A.2d 63 (Me. 1992); *St. John’s Lutheran Church v. State Comp. Ins. Fund*, 830 P.2d 1271, 252 Mont. 516 (Mont. 1992); *First Covenant Church of Seattle v. City of Seattle*, 840 P.2d 174, 120 Wash. 2d 203 (Wash. 1992); *State v. Evans*, 796 P.2d 178, 14 Kan. App. 2d 591 (Kan. 1990); *State v. Hershberger*, 462 N.W.2d 393 (Minn. 1990).

¹⁷ Since the Supreme Court’s *Smith* decision, the political branches of at least *twelve* states have, either by statute or constitutional amendment, adopted state religious freedom provisions that provide broader protection for religious exercise (and only religious exercise) than the federal *Smith* rule. Those twelve states are Alabama, see ALA. CONST. amend. 622; Arizona, see ARIZ. REV. STAT. ANN. §§ 41-1493 *et seq.* (West 2003); Connecticut, see CONN. GEN. STAT. ANN. § 52-571b (West 2003); Florida, see FLA. STAT. ANN. §§ 761.01-761.04 (West 2003); Idaho, see IDAHO CODE §§ 73-401 *et seq.* (Supp. 2002); Illinois see 775 ILL. COMP. STAT. ANN. §§ 35/1 -35/99 (West 2002); New Mexico, see N.M. STAT. ANN. §§ 28-22-1 to 28-22-5 (Michie 2002); Oklahoma, see OKLA. STAT. ANN. tit. 51, §251 (West 2003); Pennsylvania, see 71 PA. CONS. STAT. ANN. 2401 *et seq.*; Rhode Island, see R.I. GEN. LAWS §§ 42-80.1-1 to 42-80.1-4 (2001); South Carolina, see S.C. STAT. ANN. § 1-32-10 (Law. Co-op. 1999); and Texas, see TEX. CIV. PRAC. & REM. CODE ANN. §§ 110.001 *et seq.* (West 2003).

government chaplaincy programs in Congress, the armed forces, and in prisons that facilitate religious exercise (and only religious exercise).¹⁸

Thus, the Town’s approach would impose on the political branches the requirement of formalistic symmetry between the protection of religious exercise and of other fundamental rights, making any enhanced protection of fundamental rights practically impossible.¹⁹ This must be rejected.

CONCLUSION

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

¹⁸ See *Mockaitis*, 104 F.3d at 1530 (concluding that RFRA does not impermissibly promote religion anymore than “[t]he creation of chaplaincies in Congress and in the armed forces [which are] particularly striking promotions of religion.”).

¹⁹ See *Madison*, 355 F.3d at 320 (“Congress would have to make determinations in every instance of what fundamental rights are at risk and to what degree they are at risk, and it would be able only to heighten protection for fundamental rights in a symmetric fashion according to these assessments. The byzantine complexities that such compliance would entail would likely cripple government at all levels from providing any fundamental rights with protection above the Constitution’s minimum requirements.”); *Mockaitis*, 104 F.3d at 1529 (describing similar Establishment Clause challenge as “deadly in its implications for religious liberty”).

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing brief is 6,869 words in length and complies with Federal Rules of Appellate Procedure 32(a)(7)(B) and (C).

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