

IN THE SUPREME COURT OF THE STATE OF OREGON

CORPORATION OF THE PRESIDING
BISHOP OF THE CHURCH OF JESUS
CHRIST OF LATTER-DAY SAINTS,
Petitioner-Respondent and
PETITIONER ON REVIEW,

LUBA No. 2002-155

CA A122194

SC S 51504

v.

CITY OF WEST LINN,
Respondent-Petitioner and
RESPONDENT ON REVIEW,

and

UNITED STATES OF AMERICA,
Intervenor on Judicial Review,

and

ROBERT AND SUSAN FULTON,
WALTER AND KATHI SWANSON,
STEVEN WILKES, GREGG AND HOLLY
CRAWFORD, and DALE AND COLLEEN
KRUG,

Intervenors-Respondents at
LUBA.

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

On Review from the Decision of the
Court of Appeals on Petition from the
Land Use Board of Appeals

Bassham, Board Chair; Briggs and Holstun, Board Members

Court of Appeals' :
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Joining in Opinion : Landau, P.J., and
Armstrong, J.

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INTEREST OF THE *AMICUS*

Pursuant to ORAP 8.15, the Becket Fund for Religious Liberty respectfully submits this brief *amicus curiae* in support of Petitioner and reversal of the decision of the Court of Appeals. The Becket Fund for Religious Liberty is an interfaith, nonpartisan public interest law firm dedicated to protecting the free expression of all religious traditions, and the equal participation of religious people and institutions in public life and public benefits. The Becket Fund for Religious Liberty intends to present a position as to the correct rule of law that does not affect a private interest of its own. It shares a common interest with religious organizations nationwide in assuring that the Religious Land Use and Institutionalized Persons Act of 2000, 42 U.S.C. § 2000cc, *et seq.* (“RLUIPA”) is interpreted in a manner consistent with Congress’ intent, by reducing burdens frequently imposed on religious institutions by municipal land use regulation. The Becket Fund also represents plaintiffs in a host of RLUIPA cases across the nation.¹ In addition, we have filed a series of *amicus curiae*

¹ See, e.g., *United States v. Maui County*, 298 F. Supp. 2d 1010, (D. Haw. Dec. 29, 2003); *Hale O Kaula v. Maui Planning Comm’n*, 229 F. Supp. 2d 1056 (D. Haw. 2002); *Cottonwood Christian Center v. Cypress Redevelopment Agency*, 218 F. Supp. 2d 1203 (C.D. Cal. 2002); *Freedom Baptist Church v. Township of Middletown*, 204 F. Supp. 2d 857 (E.D. Pa. 2002). See also *Lighthouse Institute for Evangelism v. City of Long Branch*, 2004 WL 1179268 (3d Cir. May 28, 2004); *Castle Hills First Baptist Church v. City of Castle Hills*, 2004 WL 546792 (W.D. Tex. Mar. 17, 2004); *Redwood Christian Schs. v. County of Alameda*, Civ. No. 01-4282 (N.D. Ca. filed Nov. 16, 2001) (pending); *Missionaries of Charity, Brothers v. City of Los Angeles*, Civ. No. 01-08511 (C.D. Ca. filed Sept. 19, 2001) (pending); *Archdiocese of Denver v. Town of Foxfield*, Civ. No. 01-3299 (Colo. Dist. Ct., Arapahoe Cy., Div. 5) (pending); *Great Lakes Society v. Georgetown Charter Township*, No. 03-4599-AA (Mich. Cir. Ct., Ottawa Cy.) (pending); *Temple B’nai Sholom v. City of Huntsville*, Civ. No. 01-1412 (N.D. Ala. removed June 1, 2001) (settlement agreement signed June 2003); *Greenwood Comm’y Church v. City of Greenwood Village*, Civ. No. 02-1426 (Colo. Dist. Ct.) (permit granted Dec. 2, 2002); *Living Waters Bible Church v. Town of Enfield*, Civ. No. 01-450 (D.N.H.) (agreement for entry of judgment signed Nov. 18, 2002); *Calvary Chapel O’Hare v. Village of Franklin Park*, Civ. No. 02-3338 (N.D. Ill.) (settlement agreement signed Sept. 3, 2002); *Refuge Temple Ministries v. City of Forest Park*, Civ. No. 01-0958 (N.D. Ga. filed Apr. 12, 2001) (consent order signed Mar. 2002); *Unitarian Universalist Church of Akron v. City of Fairlawn*, Civ. No. 00-3021 (N.D. Ohio) (settlement approved Oct. 1, 2001); *Haven Shores Comm’y Church v. City of Grand Haven*, No. 1:00-

briefs in land-use cases involving RLUIPA.² This brief *amicus curiae* will present a unique perspective on the applicability of recent federal circuit court decisions—decisions found persuasive by the Court of Appeals—to the case at bar.

Amicus believes that its experience in this otherwise divisive area of the law will assist the Court in its resolution of this appeal, and that its Brief does not duplicate the efforts of the other parties to this litigation.

ARGUMENT

Few church-state issues have caused greater debate in recent decades than the scope of local government power to regulate religious activity through land use law. In addition to litigation across the Nation, Congress passed a statute specifically designed to address this widespread problem: The Religious Land Use and Institutionalized Persons Act (“RLUIPA”), 42 U.S.C. § 2000cc *et seq.*

The reason for this conflict is unmistakable: in no other context does government regulate group religious activity so closely,³ and few rights matter more to religious assemblies than simply having a place to assemble. Land use regulation has been used to prevent religious organizations from educating their youth, providing access to their handicapped members, feeding and clothing the poor, expanding their ministries, or, as in

CV-175 (W.D. Mich.) (consent decree signed Dec. 20, 2000).

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

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

this case, even establishing any permanent home. Courts have confronted time and time again the question of what limits the First Amendment places on such regulation, and when such limits substantially burden religious exercise.

The court below relied on two federal circuit court decisions, *Civil Lib. For Urban Believers v. City of Chicago*, 342 F.3d 752 (7th Cir. 2003) (“*CLUB*”), and *San Jose Christian College v. City of Morgan Hill*, 360 F.3d 1024 (9th Cir. 2004) (“*SJCC*”), to reach the conclusion that Petitioner’s religious exercise was not made “effectively impracticable,” *Corporation of Presiding Bishop of Church of Jesus Christ of Latter-Day Saints v. City of West Linn*, 192 Or. App. 567, 599, 11 P.3d 1140, 1157 (2004), and therefore was not substantially burdened under RLUIPA. However, both cases involved a challenge to a zoning ordinance’s requirement to pursue a complete application for a discretionary permit, and not a challenge to the denial of a permit itself. Both cases establish a standard for facial challenges to land use regulation. They are therefore inapplicable to actions such as the case at bar.

In *CLUB*, the Seventh Circuit’s decision focused solely on a challenge to a zoning ordinance requirement that churches apply for and obtain special use permits in certain zoning districts. 342 F.3d at 761. In *SJCC*, the Ninth Circuit Court of Appeals decided that simply requiring a religious institution to submit a complete zoning application did not “substantially burden” its religious exercise. *Id.* at 1035. In doing so, it left open the question of the legal effect of a denial of such an application. *See id.* (“Should College comply with this request, it is not at all apparent that its re-zoning application will be denied.”). This Court is faced with the very question left open in *CLUB* and *SJCC*: When does a denial of a discretionary land use permit (as opposed to the mere requirement of a permit) to build a church substantially burden the religious institution’s religious exercise?

I. *SAN JOSE CHRISTIAN COLLEGE AND CIVIL LIBERTIES FOR URBAN BELIEVERS V. CITY OF CHICAGO DO NOT CONTROL CHALLENGES TO DENIALS OF DISCRETIONARY LAND USE PERMITS.*

In ruling on Petitioner’s substantial burden claim, the Appellate Court’s conclusion does not follow from its analysis. It engaged in a thorough review of authorities, and determined that this case—which it acknowledged was factually similar to other, “as-applied” challenges, 192 Or. App. at 597, 86 P.3d at 1156—should be analyzed under the standard set forth in “facial”⁴ challenges. The court’s application of the Seventh Circuit’s “effectively impracticable” standard should therefore be reversed, and the traditional Free Exercise principles outlined in *Sherbert v. Verner*, 374 U.S. 398 (1963), *Thomas v. Rev. Bd. Of Ind. Employment Sec. Div.*, 450 U.S. 707 (1981), and *Hobbie v. Unemployment Appeals Comm’n of Fla.*, 480 U.S. 136 (1987), should instead be applied.⁵

The lower court failed to recognize the critical factual distinction between facial challenges (such as *SJCC* and *CLUB*) on one side, and challenges to denials of discretionary land use permits on the other: the former involve broad-based challenges to the requirement to participate appropriately in the zoning process, while the latter deal with denials of

⁴ For purposes of this Brief, the term “facial challenge” refers to challenges to zoning ordinance requirements themselves, and “as-applied” refers to the application of such ordinances through the denial of a discretionary land use permit.

⁵ Such a conclusion is also unreasonable in light of RLUIPA’s text. The court interpreted the substantial burdens section, 42 U.S.C. § 2000cc-1(a)(1), in such a way to make it completely redundant with its “Exclusions” provision. 42 U.S.C. § 2000cc-1(b)(3) (“No government shall impose or implement a land use regulation that—(A) totally excludes religious assemblies from a jurisdiction; or (B) unreasonably limits religious assemblies, institutions, or structures within a jurisdiction.”). It suggested that where a church may continue to repeatedly apply and reapply for a religious land use permit, its religious exercise is not burdened if its application is first denied. 192 Or. App. at 598, 86 P.3d at 1157 (“we conclude that the denial of the church’s first and only application here, and the resulting need by the church to submit a second application, does not constitute such a burden.”). This mirrors RLUIPA’S “Exclusions” section, *supra*. See *Midrash Sephardi v. Town of Surfside*, 366 F.3d 1214, 1227 (11th Cir. 2004) (such an interpretation “would render [subsection (b)’s] total exclusion prohibition meaningless.”).

particular applications for land use permits after complete participation in a discretionary process, *i.e.*, in a system of “individualized assessments.”⁶ “Effectively impracticable”

⁶ In the context at issue here—the denial of a discretionary use permit—courts have held time and time again that such a system is a “system of individualized assessments” within the meaning of RLUIPA and the Free Exercise Clause, and thus subject to strict scrutiny review:

- *Hale O Kaula v. Maui Planning Comm’n*, 229 F. Supp. 2d 1056 (D. Haw. 2002) (Christian association attempting to build church in agricultural zone): Zoning “provisions are a system of ‘individualized exemptions’ to which strict scrutiny applies” under the Free Exercise Clause. *Id.* at 1073.
- *Castle Hills First Baptist Church v. City of Castle Hills*, 2004 WL 546792 at *10 (W.D. Tex. Mar. 7, 2004): Holding that zoning actions were individualized assessments.
- *Murphy, infra*: Cease and desist order to discontinue prayer meetings was “specifically about individualized governmental assessments.”
- *Shepherd Montessori Center*, 675 N.W.2d at 276: Denial of plaintiff’s petition for variance was accomplished pursuant to a system of individualized assessments.
- *Corporation of Presiding Bishop of Church of Jesus Christ of Latter-Day Saints v. City of West Lynn*, 86 P.3d 1140, 1148 (Or. App. 2004): Denial of conditional use permit for church was “subjective in nature,” and therefore a “system of individualized assessments.”
- *Westchester Day School, supra*: “In limiting [RLUIPA’s] applicability . . . to those cases where governments make ‘individual assessments,’ the statute draws the very line *Smith* itself drew when it distinguished neutral laws of general applicability from those ‘where the State has in place a system of individual exemptions,’ . . .” *Id.* at 236 (quoting *Smith*) (footnote omitted).
- *United States v. Maui County, supra*: “If, as the Court finds here, RLUIPA codified existing precedent regarding when to apply the strict scrutiny test (*i.e.*, if a generally applicable and neutral law also contains exceptions based upon ‘individualized assessments’ which can be used in a pretextual manner—as is the special use permit process) then it is Constitutional.” *Id.* (emphasis added).
- *Cottonwood Christian Center, supra* (granting preliminary injunction in favor of church seeking to use property as worship center): “Defendants’ land-use decisions here are not generally applicable laws. . . . [T]he City’s refusal to grant Cottonwood’s application for a CUP ‘invite[s] individualized assessments of the subject property and the owner’s use of such property, and contain mechanisms for individualized exceptions.’ 840 P.2d at 181.” *Id.* at 1222-23.
- *Freedom Baptist Church v. Tp. of Middletown, supra*: “No one contests that zoning ordinances must by their nature impose individual assessment regimes. That is to say, land use regulations through zoning codes necessarily involve case-by-case evaluations of the propriety of proposed activity against extant land use

regulations. They are, therefore, of necessity different from laws of general applicability which do not admit to exceptions on Free Exercise grounds. *See Smith*, 494 U.S. at 890” *Id.* at 868 (emphasis added).

- *Korean Buddhist Dae Won Sa Temple v. Sullivan*, 953 P.2d 1315 (Haw. 1998): “The City’s variance law clearly creates a ‘system of individualized exceptions’ from the general zoning law.” *Id.* at 1344-45 n.31.
- *Keeler v. Mayor and City Council of Cumberland*, 940 F. Supp. 879 (D. Md. 1996) (denial of a land use permit): Landmark ordinance “has in place a system of individualized exemptions.” *Id.* at 885.
- *Al-Salam Mosque Fdn. v. Palos Heights*, 2001 WL 204772 (N.D. Ill.): “[F]ree exercise clause prohibits local governments from making discretionary (*i.e.*, not neutral, not generally applicable) decisions that burden the free exercise of religion, absent some compelling governmental interest. . . . Land use regulation often involves ‘individualized governmental assessment of the reasons for the relevant conduct,’ thus triggering *City of Hialeah* scrutiny.” *Id.* at *2.
- *Greater Bible Way Temple of Jackson v. City of Jackson*, Civ. No. 01-003614, slip op. (Mich. Cir. Ct. Feb. 25, 2003) (ministry to build housing for the elderly): “There is no question that the City of Jackson’s review of Plaintiff’s request for rezoning was an individualized assessment.”
- *First Covenant Church of Seattle v. Seattle*, *supra*: Landmark ordinances “invite individualized assessments of the subject property and the owner’s use of such property, and contain mechanisms for individualized exceptions.” *Id.* at 181.
- *Alpine Christian Fellowship v. Cy. Comm’rs of Pitkin*, 870 F. Supp. 991 (D. Colo. 1994) (religious school): Special use permit denial triggered strict scrutiny because determination was made under discretionary “appropriate[ness]” standard. *Id.* at 994.
- *Oblates of St. Joseph v. Nichols*, Civ. No. 01-2349, slip op. at 12 n.9 (E.D. Cal. Apr. 26, 2002) (expansion of parking lot at religious shrine): Recognizing that, in religious land use cases, “[g]iven the individualized determinations necessary in land use cases, . . . it may very well be that plaintiffs’ claim does not concern a generally applicable law and thus is subject to First Amendment constraints.”
- *Open Door Baptist Church v. Clark Cy.*, *supra*: “Precedent makes it clear that *closure* of a church would require a compelling state interest.” *Id.*
- *Area Plan Comm’n of Evansville and Vanderbilt Cy. v. Wilson*, *supra*: “Furthermore, we have previously held that a zoning board’s denial of a special permit will be subject to strict review. *See Board of Zoning Appeals v. Schulte*, 241 Ind. 339, 172 N.E.2d 39, 43 (1961).” *Id.* at 862.

arguably makes some sense in the context of a facial challenge to a land use regulation under RLUIPA.⁷ However, prohibiting religious activity on one’s own land—the practical effect of a permit denial—should be judged under traditional Free Exercise principles. It would be no answer to tell a child wishing to observe a religious holiday that there is no substantial burden on her religious exercise because she could simply attend a different school, or to tell a government employee requesting permission to wear a turban that he can find another job. Nor should municipalities be able to tell religious land use permit applicants that they can simply try elsewhere, and only when it is “effectively impracticable” to locate anywhere in the jurisdiction can they challenge its actions.

The cases bear this out, with the decision below appearing as an anomaly. Even more peculiar is the fact that the court restated the relevant facts of many of the prior decisions that acknowledge the distinction between as-applied and facial challenges under RLUIPA. For example, the Ninth Circuit recognized this distinction in *SJCC*:

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

360 F.3d at 1035 (emphases added); *see also id.* at 1028 (“Upon receipt and review of the initial application ‘for completeness and accuracy of filing,’ the City informed College that its application was ‘incomplete,’ and outlined ‘the additional information needed to make the application complete.’”). If the “re-zoning application [would] be denied,” the opinion

⁷ However, there is strong dispute as to whether the made-from-whole-cloth “effectively impracticable” standard is even the proper guide for facial challenges. *See, e.g., Midrash Sephardi, Inc. v. Town of Surfside*, 366 F.3d 1214, 1227 (11th Cir. 2004) (where the 11th Circuit explicitly rejected the “effectively impracticable” standard, holding that such a standard “would render b(3)’s [RLUIPA’s] total exclusion prohibition meaningless.”).

suggests, the institution’s religious exercise may well have been substantially burdened. *Id.* at 1035. The Court of Appeals below recognized that *SJCC* was a facial challenge, and recognized the character of the burden asserted. 192 Or. App. at 592, 86 P.3d at 1153 (describing *SJCC*’s holding as “city’s denial of college’s application for rezoning of property purchased for religious educational use did not impose a substantial burden under RLUIPA because it merely required college to comply with requirements applicable to other applicants” (emphasis added)). Petitioner here did comply with the City’s Conditional Use Permit (CUP) requirements and the City’s own planning staff recommended approval of the CUP application.

The Seventh Circuit’s *CLUB* decision is similar:

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

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

recognize this distinction: “In *CLUB*, an association of churches challenged a City of Chicago zoning ordinance, [T]he court concluded that the ordinances did not impose a substantial burden on religious exercise” 192 Or. App. at 590-91, 86 P.3d at 1152-53.

SJCC and *CLUB* are examples from a long line of cases distinguishing facial challenges to zoning ordinances/procedures from as-applied challenges to actual permit denials. Cases involving the latter consistently hold that land use permit denials may, in fact, substantially burden the institution’s religious exercise (based on the particular facts of the case), and have not required a showing that such religious exercise is “effectively impracticable” anywhere within the jurisdiction. The Court of Appeals cited the following cases in its opinion, none of which applied the facial “effectively impracticable” standard; rather they acknowledged their as-applied character:

- *Westchester Day School v. Village of Mamaroneck*, 280 F. Supp. 2d 230, 240 (S.D.N.Y. 2003): Holding that denial of special permit to religious school to build a *shul*, modern classrooms, other instruction rooms, and a cafeteria, was a substantial burden on religious exercise. *See id.* at 241-42 (“It is the burden on the quality of the religious education that concerns us here. While it is true that the students of WDS may still, without the special permit modification gather to pray and be educated, their religious experience is limited by the current size and condition of the school buildings.”). 192 Or. App. at 594, 86 P.3d at 1154 (“The local authority denied the application [for a land use permit] in its entirety”).
- *Elsinore Christian Center v. City of Lake Elsinore*, 291 F. Supp. 2d 1083 (C.D. Cal. Aug. 21, 2003): Denial of a conditional use permit; court held that prohibiting use of property as church was a substantial burden on religious exercise. 192 Or. App. at 593, 86 P.3d at 1154 (“city denied the church’s application for a conditional use permit”).
- *Murphy v. Zoning Comm’n of the Town of New Milford*, 289 F. Supp. 2d 87 (D. Conn. 2003): Discretionary cease and desist order against religious meetings; court held that forbidding prayer group from meeting in home substantially burdened group’s religious exercise. 192 Or. App. at 593-94, 86 P.3d at 1154 (“a local government ordered the owners of a single-family dwelling in a residential zone to cease and desist”).
- *Cottonwood Christian Center v. Cypress Redevelopment Agency*, 218 F. Supp. 2d 1203 (C.D. Cal. 2002): Denial of a conditional use permit and attempted exercise of eminent domain powers; court held that preventing the

construction of new church needed to replace current inadequate facility was substantial burden on religious exercise. The Ninth Circuit cited *Cottonwood Christian Center* favorably in *SJCC* in its discussion of the substantial burden standard, and did not criticize its holding. 360 F.3d at 1024. 192 Or. App. at 594, 86 P.3d at 1154 (“involved a governmental entity’s denial of a church’s application for a conditional use permit”).

- *Shepherd Montessori Center Milan v. Ann Arbor Charter Tp.*, 675 N.W.2d 271, 281 (Mich. App. 2003): Denial of petition to operate religious school; holding that governmental regulation may impose a substantial burden under RLUIPA if it “compel[s] action or inaction with respect to the sincerely held belief; mere inconvenience to the religious institution or adherent is insufficient.” 192 Or. App. at 595, 86 P.3d at 1155 (“plaintiff applied for a permit to expand its religious daycare facility”).

These results are not anomalous. Several other courts not cited by the Court of Appeals also agree:

- *Midrash Sephardi v. Town of Surfside*, 366 F.3d 1214, 1227 (11th Cir. Apr. 21, 2004): Rejecting “effectively impracticable” standard for as-applied challenge; holding that “‘substantial burden’ requires something more than an incidental effect on religious exercise.” *Midrash Sephardi* was decided prior to the Court of Appeals’ decision.
- *Williams Island Synagogue v. City of Aventura*, 2004 WL 1059798 at *5 (S.D. Fla. May 6, 2004): Denial of conditional use permit for synagogue may be a substantial burden on religious exercise where City “prevent[ed] Plaintiff from relocating to a facility which may allow its increased membership to worship more consistently with the requirements of Orthodox Judaism.”
- *U.S. v. Maui County, supra*: Denial of a conditional use permit; court holding that allegations of complaint concerning burden imposed on church’s religious exercise were sufficient to withstand motion to dismiss.
- *Castle Hills First Baptist Church v. City of Castle Hills*, 2004 WL 546792 (W.D. Tex. Mar. 17, 2004): Holding that refusal to accept application to use real property for religious exercise was a “substantial burden” on religious exercise, and that denial of such permission “would likely be” a substantial burden.
- *First Covenant Church of Seattle v. City of Seattle*, 840 P.2d 174 (6th Cir. 2002): Designation of church property as “landmark”; court held that prohibiting church from altering structure’s exterior was a substantial burden on religious exercise.
- *Alpine Christian Fellowship v. Cy. Comm’rs of Pitkin Cy.*, 870 F. Supp. 991 (D. Colo. 1994): Denial of special use permit; court held that forbidding the operation of religious school was a substantial burden on religious exercise.

- *Jesus Center v. Farmington Hills Zoning Bd. of Appeals*, 544 N.W. 2d 698 (Mich. App. 1996): Discretionary decision prohibiting homeless shelter; court held that prohibiting the operation of shelter was a substantial burden on church's religious exercise.

On the other hand, cases such as *SJCC* and *CLUB*—facial challenges to zoning ordinances—often fail for lack of substantial burden.⁸ The lower court mentioned two others in addition to *SJCC* and *CLUB*:⁹

- *Petra Presbyterian Church v. Village of Northbrook*, Civ. No. 03-1936, 2003 WL 22048089 (N.D. Ill. Aug. 29, 2003): Facial challenge to zoning ordinance; court held that ordinance declaring uses permitted or not permitted in various districts did not substantially burden religious exercise.
- *Vineyard Christian Fellowship v. City of Evanston*, 250 F. Supp. 2d 961 (N.D. Ill. 2003): Described by appellate court as a “RLUIPA challenge to a city ordinance prohibiting churches in certain zones, including a business zone in which the plaintiff church had purchased property.” 192 Or. App. at 592, 86 P.3d at 1153.

Other courts that have examined this question also agree:

- *Open Door Baptist Church v. Clark Cy.*, 995 P.2d 33, 48 n.16 (Wash. 2000): Requirement of zoning permit; court held that the permit requirement did not substantially burden church's religious exercise, but that denial of such a permit would trigger strict scrutiny.
- *Tran v. Gwinn*, 554 S.E.2d 572 (Va. 2001): Requirement of a zoning permit; court held that religious organization had no free exercise right to be free from the requirement to apply for a permit, but that denial of a permit could be subject to strict scrutiny.
- *First Assembly of God of Naples, Fla. v. Collier Cy.*, 20 F.3d 419 (11th Cir. 1994): Requirement of a zoning permit; court held that a requirement to seek a permit did not substantially burden church's religious exercise.
- *Area Plan Comm'n of Evansville and Vanderbilt Cy.*, 701 N.E.2d 856 (Ind.

⁸ On occasion however, courts have struck down zoning ordinances that substantially burden religious exercise on their face as well. *See, e.g., Stuart Circle Parish v. Bd. of Zoning Appeals*, 946 F. Supp. 1225 (E.D. Va. 1996); *Western Presbyterian Church v. Bd. of Zoning Adjustment of D.C.*, 862 F.Supp. 538 (D.D.C. 1994) (ordinance which prevented some religious activities at church was a substantial burden on church's religious exercise).

⁹ The single exception to this rule is *Konikov v. Orange County*, 302 F. Supp. 2d 1328 (M.D. Fla. 2004), which was decided prior to the Eleventh Circuit's decision in *Midrash Sephardi, supra*.

App. 1998) : The court held that a requirement to apply for a zoning permit was not a substantial burden, but that denial of the permit would be subject to strict scrutiny.

- *Korean Buddhist Dae Won Sa Temple of Hawaii v. Sullivan*, 953 P.2d 1315, 1320, 1344-47 (Haw. 1998): Enforcement of height restriction; court held that prohibiting Temple from raising roof height *without requesting permit* from Building Department did not substantially burden religious exercise.

This case does not involve a church refusing to adhere to a zoning requirement to seek a permit. Rather, it involves the church applying for zoning permission, staff recommending approval of that application because it complies with relevant standards, and the elected officials denying such a permit. The burden suffered by Petitioner—the denial of permission to worship on its land—is different in kind from the burdens discussed in *SJCC* and *CLUB*, and should not be judged under the “effectively impracticable” standard.¹⁰

¹⁰ Additionally, the lower court’s alternative basis—that there is no substantial burden on the Petitioner’s religious exercise because “the record does not reflect that its members are unable at present to engage in worship services—one aspect of religious exercise—at the existing location” that was “in an adjoining town”—flatly violates a constitutional prohibition against such limits on First Amendment activity. 192 Or. App. at 586, 597, 86 P.3d at 1150, 1156. But the Supreme Court has rejected just such an argument in another challenge to a zoning law:

The Borough nevertheless contends that live entertainment in general and nude dancing in particular are amply available in close-by areas outside the limits of the Borough. Its position suggests the argument that if there were countywide zoning, it would be quite legal to allow live entertainment in only selected areas of the county and to exclude it from primarily residential communities, such as the Borough of Mount Ephraim. This may very well be true, but the Borough cannot avail itself of that argument in this case. There is no countywide zoning in Camden County, and Mount Ephraim is free under state law to impose its own zoning restrictions, within constitutional limits. . . . [T]he ordinance excluding live entertainment from the commercial zone cannot constitutionally be applied to appellants so as to criminalize the activities for which they have been fined. “[O]ne is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place.” *Schneider v. State*, 308 U.S., at 163, 60 S.Ct., at 151.

Schad v. Borough of Mt. Ephraim, 452 U.S. 61, 76-77 (1981) (emphasis added). “Localities may not bar religious uses on the ground that they had not met a burden of proving that suitable location elsewhere could not be found.” ARDEN H. RATHKOPF & DAREN A. RATHKOPF, *THE LAW OF ZONING AND PLANNING* 20-4 (4th ed. 1975); *see also Freedom Baptist Church v. Township of Middletown*, 204 F. Supp. 2d 857, 871 (E.D. Pa. 2002)

This Court has an alternative: It can, and should, apply the traditional Free Exercise principles that existed prior to RLUIPA’s passage, and that Congress intended to apply to substantial burden claims under the Act: “[I]t is not the intent of this Act to create a new standard for the definition of ‘substantial burden’ on religious exercise. Instead, that term as used in the Act should be interpreted by reference to Supreme Court jurisprudence.” 146 CONG. REC. S7774, S7776 (daily ed. July 27, 2000). As described above, sufficient guidance is provided by *Thomas*, *Hobbie*, and *Sherbert*, and this Court need not look to the Seventh Circuit’s novel post-RLUIPA development—especially irrelevant to as-applied challenges—in this area of law, especially when such development stands in opposition to RLUIPA’s clear legislative history.

CONCLUSION

For the foregoing reasons, the decision of the Court of Appeals should be reversed.

Respectfully submitted,

September 21, 2004

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(“[O]ne is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place”) (quoting *Schad*); *Church of Jesus Christ of Latter-Day Saints v. Jefferson County*, 741 F. Supp. 1522, 1534 (N.D. Ala. 1994) (“Allowing churches to go only where they are welcome smacks of an unreasonable burden.”); *Community Synagogue v. Bates*, 136 N.E.2d 488, 496 (N.Y. 1956) (“[I]f the municipality has the unfettered power to say that the ‘precise spot’ selected is not the right one, the municipality has the power to say eventually which is the proper ‘precise spot.’”); *State ex rel. Synod of Ohio of United Lutheran Church v. Joseph*, 39 N.E. 2d 515, 525 (Ohio 1942) (rejecting argument that because “sites in the business district were still available” it was permissible to deny churches from locating in residential districts).

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CERTIFICATE OF FILING

I hereby certify that on this 21st day of September, 2004, I served the above and foregoing *Amicus Curiae* Brief of The Becket Fund for Religious Liberty in Support of Petitioner-Respondent by sending one original and twenty copies of same via Prepaid First Class Mail, addressed to the court as follows:

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