04-6299(L)

04-6358 (X-AP)

THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

FIFTH AVENUE PRESBYTERIAN CHURCH, GLADYS ESCALERA, NICHOLAS NESRON, WILLIAM P. RASMUSSEN, DONALD J. ROBISON, VERONICA A. LESTER, ALFRED McKENZIE, ALFRED BROWN, DENNIS PAIGE, PEABODY DENNIS, STEFAN PARY and MARGARET SHAFER,

Plaintiffs-Appellees-Cross-Appellants,

v.

THE CITY OF NEW YORK, BERNARD KERIK, RUDOLPH GIULIANI, RAYMOND W. KELLY and MICHAEL R. BLOOMBERG,

Defendants-Appellants-Cross-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF OF *AMICI CURIAE* THE BECKET FUND FOR RELIGIOUS LIBERTY AND CLIFTON KIRKPATRICK AS STATED CLERK OF THE GENERAL ASSEMBLY OF THE PRESBYTERIAN CHURCH (USA) IN SUPPORT OF PLAINTIFFS-APPELLEES-CROSS-APPELLANTS

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, *Amici* state that they do not have a parent corporation, nor do they issue any stock.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

INTEREST OF THE *AMICI*

Pursuant to Fed. R. App. P. 29, *amici* The Becket Fund for Religious Liberty *et al* respectfully submit this brief *amicus curiae* in support of Plaintiffs-Appellees-Cross-Appellants (collectively "the Church"). Pursuant to Fed R. App. P. 29(a), *amici* state that all parties have consented to the filing of this brief.

The Becket Fund for Religious Liberty is an interfaith, non-partisan public interest law firm that defends the free expression of all religious traditions, and the freedom of religious people and institutions to participate fully in public life. The Becket Fund has represented Buddhists, Christians, Hindus, Jews, Muslims, Sikhs, Native Americans, and others in religious liberty litigation in state and federal courts throughout the United States, both as primary counsel and as *amicus curiae*.[1] The Becket Fund routinely represents those who, like the Church in this case, have had their religious

[1] The Becket Fund's litigation efforts have involved several cases before this Court, including the Defendants' prior appeal of the lower court's preliminary injunction ruling in this case. *See Fifth Avenue Presbyterian Church* v. *City of New York*, 293 F.3d 570 (2nd Cir. 2002). *See also Murphy* v. *New Milford Zoning Commission*, 402 F.3d 342 (2nd Cir. 2005); *Westchester Day School* v. *Village of Mamaroneck*, 386 F.3d 183 (2nd Cir. 2004); *Bronx Household of Faith* v. *Board of Educ. of the City of New York*, 331 F.3d 342 (2nd Cir. 2003).

exercise substantially burdened pursuant to a system of individualized assessments.

Clifton Kirkpatrick, as Stated Clerk of the General Assembly, is the senior continuing officer of the highest governing body of the Presbyterian Church (USA). The Presbyterian Church (USA) is the largest Presbyterian denomination in the United States, with approximately 2,500,000 active members in 11,500 congregations organized into 173 presbyteries under the jurisdiction of 16 synods. The general Assembly does not claim to speak for all Presbyterians, nor are its deliverances and policy statement binding on the membership of the Presbyterian Church. The General Assembly is the highest legislative and interpretive body of the denomination, and the final point of decision in all disputes. As such, its statements are considered worthy of the respect and prayerful consideration of all the denomination's members. Presbyterians have long supported the right of the church to govern itself and order its life and activity free of governmental intervention. In its 1988 policy statement, God Alone is Lord of the Conscience, the 200th General Assembly expressed that the government must assert a compelling interest and demonstrate an imminent threat to public safety before the right of autonomy may be set aside in specific instances and the government permitted to interfere with internal church activities. Neutral principles do

not apply in determining whether or not the city may restrict a congregation from engaging in its faith and witness in utilizing its property as shelter for persons who are homeless.

The issue of when the strict scrutiny standard of review applies in Free Exercise cases has, at times, caused considerable confusion among state and local governments in the wake of the Supreme Court's decision in *Employment Div.* v. *Smith*, 494 U.S. 872 (1990). *Amici* submit this brief to emphasize that the strict scrutiny standard of review continues to apply, post-*Smith*, where religious exercise is substantially burdened pursuant to a system of individualized assessments. *Amici* believe that their expertise in this area of the law and the narrow focus of this brief will aid the Court in its resolution of this case, and will not duplicate the briefs of the parties.

SUMMARY OF ARGUMENT

In *Employment Div.* v. *Smith*, 494 U.S. 872 (1990), the Supreme Court announced the general rule that laws burdening religious exercise trigger strict scrutiny only when they are not "neutral" with respect to religion, or not "of general applicability." *Id.* at 879. *Smith* did not, however, eliminate entirely strict scrutiny for incidental, substantial burdens. Specifically, *Smith* did not overrule *Sherbert* v. *Verner*, 374 U.S. 398 (1963), or the "substantial burdens" line of cases applying strict scrutiny that it spawned, but instead distinguished those cases as involving systems of "individualized governmental assessments of the reasons for the relevant conduct." *Smith*, 494 U.S. at 884. Accordingly, even after *Smith*, incidental, substantial burdens on religious exercise still trigger strict scrutiny under the Free Exercise Clause, so long as they are imposed pursuant to a system of individualized assessments.

The hallmark of a system of individualized assessments is that the decision of whether to allow or prohibit the particular conduct at issue rests on discretionary, case-by-case determinations as opposed to across-the-board prohibitions or objectively defined categories. Defendants' application of the common law of nuisance to prohibit the Church's homeless ministry is a quintessential example of a system of individualized

assessments. The very nature of the inquiry into whether particular conduct amounts to a "nuisance" is one of individualized, discretionary determinations by government officials of what conduct will be deemed permissible. That determination does not rest upon a mechanical application of objectively-defined criteria or across-the-board prohibitions, but instead varies with what government officials determine is reasonable in particular circumstances. Therefore, because Defendants substantially burdened the Church's religious exercise pursuant to a system of individualized assessments, the Church is entitled to prevail on its Free Exercise claim unless Defendants can satisfy the *Sherbert* rule of strict scrutiny.

ARGUMENT

I. Strict Scrutiny Applies When the Government Substantially Burdens Religious Exercise Pursuant to a System of "Individualized Assessments."

In 1963, the Supreme Court held in *Sherbert* v. *Verner*, that the Free Exercise Clause mandated strict scrutiny ***whenever*** the government imposed a "substantial burden" on religious exercise, even when the burden was incidental. 374 U.S. 398 (1963) (decision to deny unemployment benefits to Seventh-day Adventist who was terminated after refusing to work on the Sabbath impermissibly burdened religious exercise and could not satisfy strict scrutiny). For almost thirty years, the Court applied this standard throughout its Free Exercise cases, ruling in favor of Free Exercise claimants when the government decision to substantially burden religious exercise did not satisfy strict scrutiny. *See, e.g., Hobbie* v. *Unemplt. App. Comm'n,* 480 U.S. 136 (1987); *Thomas* v. *Review Bd.,* 450 U.S. 707 (1982); *Wisconsin* v. *Yoder,* 406 U.S. 205 (1972).

In *Employment Div.* v. *Smith,* 494 U.S. 872 (1990), however, the Supreme Court dramatically narrowed the range of cases where strict scrutiny applied under the Free Exercise Clause. *Smith* announced the general rule that laws burdening religious exercise trigger strict scrutiny only when they are not "neutral" with respect to religion, or not "of general

applicability." *Id.* at 879. Applying this rule, the Court held that an across-the-board criminal prohibition against ingesting peyote could be applied to burden the religious exercise of Native Americans who used the drug for sacramental purposes, with no recourse to the strict scrutiny test articulated in *Sherbert*.

But *Smith* ***did not overrule*** *Sherbert* or the line of cases it spawned applying strict scrutiny where the government substantially burdened religious exercise. Instead, the Court ***distinguished*** the *Sherbert* line of cases as situations in which the government substantially burdened religious exercise pursuant to an "individualized governmental assessment of the reasons for the relevant conduct." *Smith*, 494 U.S. at 884. *Sherbert*, for example, involved an unemployment compensation provision that denied benefits if the worker refused work "without good cause." *Id*. This "good cause" inquiry, the *Smith* Court stated, "created a mechanism for individualized exemptions," that rested on the discretion of government officials *Id*. (quotation omitted). Thus, in contrast to "across-the-board prohibitions" like the drug laws, the unemployment compensation laws varied in their application upon the discretion of government officials. *See id.* at 884-85. Accordingly, the *Smith* Court explained, "where the State has in place a system of individual exemptions, it may not refuse to extend that

system to cases of 'religious hardship' without compelling reason." *Id.* at 884.[2]

Three years later, in *Church of the Lukumi Babalu Aye* v. *Hialeah*, 508 U.S. 520 (1993), the Court reaffirmed and applied the *Sherbert* individualized assessment doctrine to a law that burdened religious exercise. The Court concluded that a local animal sacrifice "ordinance represents a system of 'individualized governmental assessment of the reasons for the relevant conduct,' because it "requires an evaluation of the particular justification for the killing." *Id.* at 537 (quoting *Smith,* 494 U.S. at 884). The *Lukumi* Court held that such laws must "undergo the most rigorous of scrutiny," before the burdening of religious practice could be justified. *Id.*[3]

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[2] The *Smith* Court also stated that some of its prior decisions applying strict scrutiny to Free Exercise claims could be distinguished as "hybrid situation[s]" involving "the Free Exercise Clause in conjunction with other constitutional protections, such as freedom of speech and of the press, or the right of parents . . . to direct the education of their children." *Id.* at 881-82 (citations omitted). This Court, however, has declined to apply the hybrid-rights doctrine, concluding that the Supreme Court's attempt to distinguish its prior strict scrutiny cases as those involving hybrid rights was "dicta." *Leebaert* v. *Harrington*, 332 F.3d 134, 143-44 (2nd Cir. 2003). Therefore it appears that the Second Circuit only recognizes the "individualized assessment" doctrinal analysis of Free Exercise cases applying strict scrutiny prior to *Smith*.

[3] In both *Smith* and *Lukumi*, the Court used the terms "individualized assessment" and "individualized exemption" interchangeably. *Lukumi*, 508 U.S. at 537; *Smith*, 494 U.S. at 884.

Accordingly, the Supreme Court has made clear that even after its narrowing of Free Exercise protections in *Smith*, strict scrutiny still applies when the government substantially burdens religious exercise through a system of individualized assessments.

Since *Smith* and *Lukumi*, the lower courts have consistently recognized and treated "individualized assessments" (or "exemptions") claims as exceptions to the general rule announced in *Smith*. *See, e.g.*, *Axson-Flynn* v. *Johnson*, 356 F.3d 1277, 1294 (10th Cir. 2004) (systems of "individualized exemptions" are those "designed to make case-by-case determinations," and not those "contain[ing] express exceptions for objectively defined categories of persons"); *American Friends Serv. Comm. Corp.* v. *Thornburgh*, 951 F.2d 957, 961 (9th Cir. 1991) ("'where the State has in place a system of individual exemptions, it may not refuse to extend that system to cases of "religious hardship" without compelling reason.'") (quoting *Smith*, 494 U.S. at 884); *Fraternal Order of Police* v. *City of Newark*, 170 F.3d 359, 364 (3d Cir. 1999) (recognizing *Lukumi's* application of the "individualized assessments" doctrine). *See also Sts. Constantine & Helen Greek Orthodox Church, Inc.* v. *City of New Berlin*, 396 F.3d 895, 897 (7th Cir. 2005) (recognizing that *Sherbert*'s individualized assessment

doctrine continues to apply post-*Smith*, and that the codification of this doctrine in Section 2(a) of the Religious Land Use and Institutionalized Persons Act ("RLUIPA) was therefore an "uncontroversial use" of Congressional power).

Particularly relevant to the Defendants' attempts to limit the Church's use of its own land in this case, judicial findings of systems of individualized assessments have been especially common in the land-use context where local laws extend governmental decision-makers vast discretion to make determinations about permissible uses of property.[4] Although this Court has

[4] *See Guru Nanak Sikh Society* v. *County of Sutter*, 326 F. Supp. 2d 1140, 1160 n.10 (E.D.Cal. 2003) ("[I]t is . . . beyond cavil that zoning decisions such as the [conditional use permit application] at issue in this case are properly described as individualized assessments."); *Hale O Kaula Church* v. *Maui Planning Commission*, 229 F. Supp. 2d 1056, 1073 (D. Haw. 2002) (holding that state special permit "provisions are a system of 'individualized exemptions' to which strict scrutiny applies"); *Cottonwood Christian Center* v. *City of Cypress*, 218 F. Supp. 2d 1203, 1222 (C.D.Cal. 2002) (holding that City's "land-use decisions . . . are not generally applicable laws," and that refusal to grant church's "CUP 'invite[s] individualized assessments of the subject property and the owner's use of such property, and contain mechanisms for individualized exceptions.'"); *Freedom Baptist Church* v. *Township of Middletown*, 204 F. Supp. 2d 857, 868 (E.D.Pa. 2002) ("no one contests" that land use laws "by their nature impose individualized assessment regimes"); *Al-Salam Mosque Fdn.* v. *Palos Heights*, 2001 WL 204772, at *2 (N.D.Ill. 2001) ("[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

not had occasion to apply it in a concrete factual circumstance, it has also recognized the applicability of the "individualized assessments" doctrine to land use decisions. *See Murphy* v. *New Milford Zoning Commission*, 402 F.3d 342, 352 (2nd Cir. 2005) (noting issues that would have a "particular bearing on a Free Exercise . . . individualized assessments analysis.").

In sum, even after *Smith*, incidental, substantial burdens on religious exercise still trigger strict scrutiny under the Free Exercise Clause, so long as they are imposed pursuant to a system of individualized assessments.

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reasons for the relevant conduct,' thus triggering *City of Hialeah* scrutiny."); *Keeler* v. *Mayor of Cumberland*, 940 F. Supp. 879, 885 (D.Md. 1996) (landmark ordinance involves "system of individualized exemptions"); *Alpine Christian Fellowship* v. *Cy. Comm'rs of Pitkin*, 870 F. Supp. 991, 994-95 (D.Colo. 1994) (special use permit denial triggered strict scrutiny because decision made under discretionary "appropriate[ness]" standard); *Korean Buddhist Dae Won Sa Temple* v. *Sullivan*, 953 P.2d 1315, 1344-45 n.31 (Haw. 1998) ("The City's variance law clearly creates a 'system of individualized exceptions' from the general zoning law."); *First Covenant Church* v. *Seattle*, 840 P.2d 174, 181 (Wash. 1992) (landmark ordinances "invite individualized assessments of the subject property and the owner's use of such property, and contain mechanisms for individualized exceptions"). *See also Tran* v. *Gwinn*, 554 S.E.2d 63, 68 (Va. 2001) (distinguishing between generally applicable requirement to seek special use permit and "procedure requiring review by government officials on a case-by-case basis for a grant of a special use permit," and holding that latter "may support a challenge based on a specific application of the special use permit requirement").

II. Defendants' Application of the Common Law of Nuisance to Prohibit the Church's Homeless Ministry Is a Paradigmatic Example of Religious Exercise Being Substantially Burdened Pursuant to a System of Individualized Assessments.

There appears to be little dispute that Defendants' application of the common law of nuisance to shut down the Church's homeless ministry substantially burdens the Church's religious exercise. Accordingly, the relevant inquiry is whether the strict scrutiny rule of *Sherbert* or the rational basis rule of *Smith* applies to the Defendants' decision to burden the Church's religious exercise. Because the determination of whether particular conduct (like the Church's homeless ministry) constitutes a "nuisance" is a quintessential example of a system of "individualized assessments," the Church is entitled to prevail on its Free Exercise claim unless Defendants can satisfy strict scrutiny.

The Supreme Court's teachings in *Sherbert*, *Smith*, and *Lukumi*, make clear that systems of individualized assessments (or exemptions) are those "designed to make case-by-case determinations," and not those "contain[ing] express exceptions for objectively defined categories of persons." *Axson-Flynn*, 356 F.3d at 1298. In other words, like the "good cause" inquiry in *Sherbert*, the hallmark of a system of individualized assessments is that the decision of whether to allow or prohibit the particular conduct at issue rests on discretionary, case-by-case determinations as opposed to across-the-

board prohibitions or objectively defined categories. *See, e.g.*, *Thornburgh*, 951 F.2d at 961 (emphasizing lack of "across-the-board … prohibitions on a particular form of conduct"); *Axson-Flynn*, 356 F.3d at 1298 (emphasizing lack of "objectively defined categories").

Like the "good cause" inquiry in the unemployment context at issue in *Sherbert*, the very nature of the inquiry into whether particular conduct amounts to a "nuisance" is one of individualized, discretionary determinations by government officials of what conduct will be deemed permissible. That determination does not rest upon a mechanical application of objectively-defined criteria, but instead varies with what government officials determine is reasonable in particular circumstances. *See, e.g., New York Trap Rock Corp.* v. *Town of Clarkstown*, 299 N.Y. 77, 80 (1949) (holding that no set formula governs the nuisance inquiry but that whether conduct "constitutes a public nuisance must be determined as a question of fact under all the circumstances.").

Indeed, as the lower court in this case observed, an open-ended standard of "***reasonableness*** permeates the law of nuisance." *Fifth Ave. Presbyterian Church* v. *City of New York*, No. 01 Civ. 11493, 2004 WL 2471406, at *9 (S.D.N.Y. Oct. 29, 2004) (citing *County of Westchester* v. *Town of Greenwich*, 76 F.3d 42, 45 (2d Cir. 1996) (emphasis added). *See*

also, e.g., *Destefano* v. *Emergency Housing Group, Inc.*, 722 N.Y.S.2d 35, 37 (N.Y.App.Div. 2001) (nuisance exists where there "is clear and convincing evidence [of] a substantial and ***unreasonable*** interference with the public right.") (emphasis added); *Graceland Corp.* v. *Consolidated Laundries Corp.*, 180 N.Y.S.2d 644, 646 (N.Y.App.Div. 1958) (obstruction of public sidewalk constitutes nuisance only if obstruction extends beyond "***reasonable*** uses permitted to abutting owner") (emphasis added). The discretion inherent in such a standard is a far cry from an across-the-board prohibition on a particular form of conduct.

Moreover, New York nuisance cases addressing factors that may enter into the equation of "reasonableness" only magnify the discretionary and inexact nature of the nuisance inquiry. For example, the nature of the location where the conduct at issue is occurring is a factor in the reasonableness inquiry. *See, e.g., Domen Holding Co.* v. *Aranovich*, 753 N.Y.S.2d 57, 61 (N.Y.App.Div. 2003). Thus, nuisance law grants discretion to government officials to decide that conduct that is permissible in one location may be a nuisance if done in another. Similarly, citizen complaints and community opinion (which certainly may vary from one location to another even though the same conduct is at issue) are considered probative

evidence in determining whether conduct amounts to a nuisance. *See, e.g*, *State* v. *Monoco Oil Co.*, 713 N.Y.S.2d 440, 444-45 (N.Y.Sup.Ct. 2000).

The discretionary and inexact nature of the nuisance inquiry is further evidenced by the particular facts of this case. Specifically, the Church sent the New York Police Commissioner a letter in November 1999 informing him of the Church's ministry of allowing the homeless to sleep on the Church's property. *Fifth Avenue*, 2004 WL 2471406, at *7. In addition, over the course of the next two years, members of the police actually observed the homeless sleeping on the Church steps. *Id*. But it was not until November 2001 that the Defendants suddenly determined that the conduct they had known about for two years constituted a public nuisance. That the police could decide in November 2001 that the Church's ministry was a nuisance, even though the exact same conduct had been ongoing for the previous two years with their full knowledge, further demonstrates that the nuisance inquiry is not an inquiry characterized by objectively defined criteria and across-the-board rules.

In sum, by definition, the inquiry into what constitutes a nuisance requires individualized assessments concerning the appropriateness of the conduct in a way that bears no resemblance to the across-the-board prohibition in *Smith*. *Cf. Ayon* v. *Gourley*, 47 F. Supp. 2d 1246, 1249 (D.

Colo. 1998) (reasonableness inquiry necessary to resolve common law claim of negligent hiring and supervision against church officials was not an across-the-board rule within the meaning of *Smith*). Therefore, because Defendants substantially burdened the Church's religious exercise pursuant to a system of individualized assessments, the lower court correctly applied the *Sherbert* rule of strict scrutiny to this case.[5]

[5] To carry its burden of proof under the strict scrutiny test, Defendants must do more than simply assert a compelling government interest; instead they must produce competent evidence to ***prove*** the existence of that interest and that they have employed the least restrictive means of advancing that interest. "To survive strict scrutiny ... a State must do more than ***assert*** a compelling state interest, it must *demonstrate* that its law is necessary to serve the asserted interest." *Burson* v. *Freeman*, 504 U.S. 191, 199 (1992). *See also Hobbie*, 480 U.S. at 141 (1987) (state laws burdening religions "must be subjected to strict scrutiny and could be justified only by ***proof*** by the State of a compelling interest") (emphasis added); *Adarand Constructors, Inc.* v. *Pena*, 515 U.S. 200, 224 (1995) (government bears burden of "***justify[ing***]" classification subject to strict scrutiny) (emphasis added); *Fulani* v. *Krivanek*, 973 F.2d 1539, 1542-43 (11th Cir. 1992) ("Under strict- scrutiny analysis, once a plaintiff has demonstrated the burden . . . the state must ***show*** 'that the law advances a compelling interest and is narrowly tailored to meet that interest.'") (emphasis added); *Stiles* v. *Blunt*, 912 F.2d 260, 263 (8th Cir. 1990) ("[T]he strict scrutiny test requires the government to ***prove*** that it has a compelling interest.") (emphasis added). For the reasons stated in the Church's brief, *amici* agree that Defendants have not carried their burden of satisfying strict scrutiny in this case.

CONCLUSION

The district court's grant of summary judgment in favor of the Plaintiffs should be affirmed.

Dated: April 25, 2005

THE BECKET FUND FOR RELIGIOUS LIBERTY

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CERTIFICATE OF COMPLIANCE

I hereby certify that pursuant to FED. R. APP. P. 32(a)(7)(C), the foregoing brief is proportionally spaced, has a typeface of 14 points or more, and contains 3,476 words, as calculated by Microsoft Word.

Dated: April 25, 2005

Derek L. Gaubatz

CERTIFICATE OF SERVICE

I, Derek L. Gaubatz, attorney for *Amici Curiae*, hereby certify that I am duly authorized to make this certification—that on the 25th day of April, 2005, I did cause two (2) true and correct copies of the foregoing Brief *Amici Curiae* in support of Plaintiffs-Appellees-Cross-Appellants to be delivered by First-Class U.S. Mail to the following:

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