No. 03-1397

IN THE

Supreme Court of the United States

CHRIST CENTER, *ET AL. Petitioners,*
v.
CITY OF CHICAGO, *Respondent.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

MOTION FOR LEAVE TO FILE BRIEF AS *AMICI CURIAE* AND BRIEF OF *AMICI CURIAE* THE BECKET FUND FOR RELIGIOUS LIBERTY AND VARIOUS RELIGIOUS ORGANIZATIONS IN SUPPORT OF PETITIONERS

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On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

MOTION OF THE BECKET FUND FOR RELIGIOUS LIBERTY AND VARIOUS RELIGIOUS ORGANIZATIONS FOR LEAVE TO FILE BRIEF AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

Amici curiae The Becket Fund for Religious Liberty, the Muslim Community Center, the New Heritage Cathedral, the Great Lakes Society, Haven Shores Community Church, Pine Hill Zendo, Christ Church New Jersey, Adat Hatikvah, and Christian Assembly of Suburban Chicago respectfully request leave of this Court to file the following brief in the above-captioned matter. In support of this motion, *amici curiae* state as follows:

Petitioners have granted their consent to the filing of this brief. A consent letter from Petitioner is on file with the Court. However, respondent the City of Chicago informed *amici* on May 6 that it would deny consent to the filing of the

following brief, thus necessitating the Court's consideration of this motion.[1]

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

The Muslim Community Center (the "Center") was founded in 1969 to serve the needs of Muslims in Chicago Metropolitan Area. The Center's primary purpose is to provide a place for Muslims to worship together and pray. The Center is currently involved in contentious litigation regarding its plans to construct a mosque in the Village of Morton Grove, Illinois – plans that are essential to its religious mission.

The New Heritage Cathedral (the "Cathedral"), founded in 1986, is a 600-member church affiliated with the Assemblies of God. The Cathedral is located in Chicago,

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[1] The Solicitor General is listed on the Court's docket as "Attorney for Respondents." However, because the constitutionality of a federal statute is not at issue before this Court, as it was before the Court of Appeals for the Seventh Circuit, the United States has not yet determined whether it will be a respondent in this matter. It is the understanding of counsel for the *amici*, based on conversations with the Solicitor General's office, that the United States will either act as a respondent in this matter and then consent to the filing of briefs *amici curiae*, or the United States will not act as a respondent and will seek to withdraw its name from the Court's docket. However, the United States does not wish to consent to the filing of briefs *amici curiae* unless it decides to become a respondent.

Illinois, but it draws its congregation from several areas in and around Chicago, including the predominantly African-American Englewood neighborhood. The Cathedral is currently located in a former Catholic church. The Cathedral is keenly interested in Chicago's zoning ordinance, particularly its discriminatory effects on religious land uses within the city, because the Cathedral may need to expand or relocate in the future.

Great Lakes Society ("GLS") is a religious society organized under and pursuant to the laws of the State of Michigan as an ecclesiastical non-profit corporation, principally located in Georgetown Township, Ottawa County, Michigan. GLS is a religious group that ministers to people with chemical sensitivities and the disabled. GLS recently filed suit against Georgetown Township, charging violations of its own zoning law as well as the U.S. and Michigan Constitutions and the Religious Land Use and Institutionalized Persons Act of 2000 ("RLUIPA"). The lawsuit, filed in Ottawa County Circuit Court, appeals the Township's denial of the Society's application for a special use permit so that it could build a new church on its property.

Haven Shores Community Church is an organized congregation of the Holland Classis of the Reformed Church in America. This denomination has been faithfully serving in this country since the early 1500's. In the first case resolved under provisions of RLUIPA, this small church in western Michigan won the right to occupy a storefront property located in a business district where "places of assembly"—but not churches—were already permitted.

Pine Hill Zendo ("Zendo") is an authentic Rinzai Zen Buddhist temple situated right outside the hamlet of Katonah in northern Westchester, New York. It is closely associated with The Zen Studies Society and can be considered a sub temple of International Dai Bosatsu Zendo Kongo Ji

monastery in the Catskills. In 2001, the local zoning board denied Zendo's application for a special use permit, and Zendo subsequently filed suit pursuant to First Amendment jurisprudence and RLUIPA. Settlement was reached in 2002 and the special permit was issued.

Christ Church New Jersey (the "Church"), a nonprofit, New Jersey corporation, is a multi-racial, nondenominational Christian church founded in 1986. It has more than 5,000 active members residing in northern New Jersey and the New York metropolitan areas. The Church is currently seeking a conditional use permit to build a new campus on a large site in Rockaway Township, New Jersey, and it has faced considerable local opposition to the project. Although the Church's site is zoned to allow churches as conditional uses, the local Planning Board has delayed approval of the permit while it considers whether Christ Church is a "church" within the meaning of the conditional use ordinance. The Church has relied on the provisions of RLUIPA in its presentations to the Planning Board, and it is keenly interested in the proper enforcement of the statute.

Adat Hatikvah (the "Congregation") is a Messianic Jewish Congregation belonging to the Union of Messianic Jewish Congregations, with weekly attendance of 75 to 100. The Congregation believes a person can affirm Messiah Yeshua while maintaining his or her Jewish identity. It is located in a northern Chicago suburb with a large Jewish community, where, with considerable inconvenience, it currently shares space with two other churches by renting. It is actively seeking but has been unable to find a suitable property to purchase for its own use. The Congregation is concerned that when it finds a physically suitable building, it will be unable to obtain zoning permission due to the discretionary nature of zoning approvals and the reality that many people do not like Jewish believers in Jesus.

Christian Assembly of Suburban Chicago, founded in 1984, is a congregation of predominantly Chinese-Americans with average attendance of 200. It has been renting space in churches, seminaries, and hotels for the past 20 years because zoning laws have been a barrier to finding a suitable property for a new church in the western suburbs of Chicago, where its members reside. It is currently seeking to convert a building in an industrial district where churches are not a permitted use but other assembly uses and community centers are permitted.

The unique perspectives and arguments set forth in the brief following demonstrate that each of the *amici* will be able to "bring[ ] to the attention of the Court relevant matter not already brought to its attention by the parties" that will be "of considerable help to the Court." Rule 37.1.

For the foregoing reasons, the motion for leave to file the attached brief of *amici curiae* should be granted.

Respectfully submitted,

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BRIEF OF *AMICUS CURIAE* THE BECKET FUND FOR RELIGIOUS LIBERTY AND VARIOUS RELIGIOUS ORGANIZATIONS IN SUPPORT OF PETITIONERS

INTEREST OF THE *AMICI*

The Becket Fund for Religious Liberty respectfully submits this brief on behalf of itself, the Muslim Community Center, the New Heritage Cathedral, the Great Lakes Society, Haven Shores Community Church, Pine Hill Zendo, Christ Church New Jersey, Adat Hatikvah, and Christian Assembly of Suburban Chicago, as *amici curiae* in support of Petitioner pursuant to Rule 37.2 of this Court.[2]

The Becket Fund for Religious Liberty is an interfaith, bi-partisan, public interest law firm dedicated to protecting the free expression of all religious traditions and

[2] No counsel for any party authored this brief in whole or in part. No person or entity other than *amici* and their members made any monetary contributions to the preparation or submission of this brief.

the freedom of religious people and institutions to participate fully in public life. The Becket Fund litigates in support of these principles in state and federal courts throughout the United States, both as primary counsel and as *amicus curiae*.

Accordingly, the Becket Fund has been heavily involved in litigation on behalf of a wide variety of religious worshippers, ministers, and institutions under the new Religious Land Use and Institutionalized Persons Act of 2000, 42 U.S.C. § 2000cc, *et seq.* ("RLUIPA" or "the Act"). The Becket Fund's RLUIPA cases run the gamut – as *amicus curiae* and as plaintiffs' counsel, in prisoner and land-use cases, from New Hampshire to Hawaii – including cases arising in the Chicago area.[3] The Becket Fund is also litigating a host of RLUIPA land-use cases as plaintiffs' counsel outside Chicago, including some that have resulted in published decisions.[4] Some of our RLUIPA land-use cases have concluded by favorable settlement.[5] In addition,

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[3] *See, e.g., C.L.U.B.* v. *City of Chicago,* 342 F.3d 752 (7th Cir. 2003) (*amicus* brief filed June 26, 2002); *St. John's United Church of Christ* v. *City of Chicago,* No. 03-C-3726 (N.D. Ill. filed May 30, 2003); *Calvary Chapel O'Hare* v. *Village of Franklin Park*, Civ. No. 02-3338 (N.D. Ill.) (settlement agreement signed Sept. 3, 2002).

[4] *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,* 298 F. Supp. 2d 1010 (D. Haw. 2004); *Hale O Kaula* v. *Maui Planning Comm'n,* 229 F. Supp. 2d 1050 (D. Haw. 2002); *Cottonwood Christian Center* v. *City of Cypress*, 218 F. Supp. 2d 1203 (C.D. Cal. 2002); *Freedom Baptist Church* v. *Township of Middletown*, 204 F. Supp. 2d 857 (E.D. Pa. 2002). *See also Redwood Christian Schs.* v. *County of Alameda*, Civ. No. 01-4282 (N.D. Ca. filed Nov. 16, 2001); *Missionaries of Charity, Brothers* v. *City of Los Angeles*, Civ. No. 01-08511 (C.D. Ca. filed Sept. 19, 2001); *Archdiocese of Denver* v. *Town of Foxfield*, Case No. 01-CV-3299 (Colo. D.Ct.).

[5] *See, e.g., Temple B'nai Sholom* v. *City of Huntsville*, Civ. No. 01-1412 (N.D. Ala.) (settlement approved June 26, 2003); *Greenwood Comm'y Church* v. *City of Greenwood Village*, Civ. No. 02-1426 (Colo. D.Ct.) (permit granted Dec. 2, 2002); *Living Waters Bible Church* v.

we have filed a series of *amicus* briefs in both land-use and prisoner cases involving RLUIPA.[6] We intend to continue filing lawsuits and *amicus curiae* briefs under RLUIPA until the jurisprudence under the law, as well as its constitutionality, is established beyond reasonable dispute.

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

The Becket Fund believes that its experience in this area of the law will enable it to aid the Court in understanding the extent of division among lower courts – and the human cost of that division – for purposes of deciding whether to grant the writ in this case.

Town of Enfield, Civ. No. 01-450 (D.N.H.) (agreement for entry of judgment signed Nov. 18, 2002); *Pine Hills Zendo* v. *Town of Bedford, N.Y. Zoning Bd. of Appeals,* No. 17833-01 (N.Y. Sup. Ct.) (settlement agreement allowing religious use and paying plaintiffs' costs, Apr. 8, 2002); *Refuge Temple Ministries* v. *City of Forest Park*, Civ. No. 01-0958 (N.D. Ga.) (consent order signed Mar. 14, 2002); *Unitarian Universalist Church of Akron* v. *City of Fairlawn*, Civ. No. 00-3021 (N.D. Ohio) (settlement approved Oct. 1, 2001); *Haven Shores Comm'y Church* v. *City of Grand Haven,* 1:00-CV-175 (W.D. Mich.) (consent decree signed Dec. 20, 2000).

[6] *See, e.g., Williams* v. *Bitner,* 285 F. Supp. 2d 593, 598 (M.D. Pa. 2003) (noting Becket Fund intervention in defense of constitutionality of RLUIPA); *Johnson* v. *Martin,* 223 F. Supp. 2d 820, 822 (W.D. Mich. 2002) (same); *San Jose Christian College* v. *City of Morgan Hill,* 360 F.3d 1024 (9th Cir. 2004) (*amicus* brief filed Aug. 28, 2002); *Fifth Avenue Presbyterian Church* v. *City of New York,* 293 F.3d 570 (2d Cir. 2002) (*amicus* brief filed Mar. 15, 2002).

The interests of *amici* the Muslim Community Center, the New Heritage Cathedral, the Great Lakes Society, Haven Shores Community Church, Pine Hill Zendo, Christ Church New Jersey, Adat Hatikvah, and Christian Assembly of Suburban Chicago are set forth in the accompanying motion for leave to file a brief as *amici curiae*.

SUMMARY OF THE ARGUMENT

The term "individualized assessments" in this Court's Free Exercise jurisprudence has confused and divided lower courts since its first appearance in a majority opinion in *Employment Division* v. *Smith,* 494 U.S. 872 (1990). Religious groups – especially religious minorities – have paid a heavy price for that confusion – especially in land-use permitting decisions.

The confusion surrounds the following questions. First, in general, what is a "system of individualized assessments," and in particular, does it include discretionary systems for deciding whether to grant zoning permits to religiously motivated land uses?

Second, what is the legal consequence of finding that a "system of individualized assessments" is operative in a particular case? Does such a system trigger strict scrutiny because it is a certain type of discriminatory law (*i.e.,* one that is not "neutral" or not "generally applicable")? Or would such a system trigger strict scrutiny when it is applied to impose a "substantial burden" on religious exercise, even without a showing of discrimination?

These questions are not only sharply divisive but exceptionally important. The confusion surrounding them has left religious communities especially vulnerable to the type of discrimination that may be concealed easily within discretionary decision-making processes.

Nine congressional hearings over three years have revealed that this type of discrimination occurs frequently and nationwide in the context of zoning permit decisions; is directed against small, unfamiliar, or otherwise locally unpopular religious groups even more frequently; and is especially difficult to prove in court. As a result, Congress passed the Religious Land Use and Institutionalized Persons Act of 2000 ("RLUIPA"), including Section 2(a)(1) and Section 2(a)(2)(C), which together apply strict scrutiny to land-use regulations that impose "substantial burdens" on religious exercise pursuant to systems of "individualized assessments." *See* 42 U.S.C. § 2000cc-a.

The experience of *amici* since the passage of RLUIPA confirms that the phenomenon Congress identified is widespread and persistent. Accordingly, the questions surrounding the meaning and consequence of "individualized assessments" represent issues of exceptional importance. In other words, *amici's* experience confirms that, unless the courts uniformly recognize discretionary land-use permitting processes as "systems of individualized assessments" – and unless "substantial burdens" imposed through such systems trigger strict scrutiny without having to prove discrimination (which is extremely difficult in that context) – this especially insidious form of discrimination will continue unchecked.

In sum, the exceptional confusion regarding the term "individualized assessments" in Free Exercise jurisprudence – and the exceptionally important, real-world effects of this confusion – together represent yet another strong reason to grant the writ in this case.

REASONS FOR GRANTING THE WRIT

I. IN ADDITION TO THE QUESTIONS PRESENTED BY PETITIONERS, THIS COURT'S REVIEW IS NEEDED TO RESOLVE CONFUSION AMONG THE LOWER COURTS REGARDING THE

MEANING AND CONSEQUENCE OF THE TERM "INDIVIDUALIZED ASSESSMENTS."

Petitioners have raised, but not at length, the conflict among Courts of Appeals and state Supreme Courts regarding the term "individualized assessments" within this Court's Free Exercise Clause jurisprudence. Pet. 23 n.8. Because this term has created several fault lines among the lower courts, it represents an additional and important reason for granting the writ in this case.

In *Employment Division* v. *Smith,* 494 U.S 872 (1990), this Court announced the general rule that laws burdening religious exercise trigger strict scrutiny only when they are not "neutral" or not "generally applicable." Notably, however, this Court did *not* overrule its prior decisions that applied strict scrutiny to even incidental burdens on religious exercise, so long as the burdens were "substantial."

Instead, *Smith* distinguished those cases in two ways. Where substantial burdens had triggered strict scrutiny in the unemployment compensation context, the Court distinguished the cases as involving "systems of individualized governmental assessment of the reasons for the relevant conduct." *Id.* at 884. For all other applications of strict scrutiny to substantial burdens, the Court distinguished those cases as involving "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).

Three years later, in *Church of the Lukumi Babalu Aye, Inc.* v. *City of Hialeah,* 508 U.S. 520 (1993), the Court applied *Smith's* "individualized assessments" language outside the unemployment compensation context, and in the

course of assessing whether the local ordinances at hand were "neutral":

> [B]ecause it requires an evaluation of the particular justification for the killing, this ordinance represents a system of "individualized governmental assessment of the reasons for the relevant conduct." As we noted in *Smith,* in circumstances in which individualized exemptions from a general requirement are available, the government "may not refuse to extend that system to cases of 'religious hardship' without compelling reason." Respondent's application of the ordinance's test of necessity devalues religious reasons for killing by judging them to be of lesser import than nonreligious reasons. Thus, religious practice is being singled out for discriminatory treatment.

Id. at 537-38 (citations omitted). The *Lukumi* Court also noted that "[n]eutrality and general applicability are interrelated, and … failure to satisfy one requirement is a likely indication that the other has not been satisfied." *Id.* at 531.

In light of these decisions, federal Courts of Appeals and state Supreme Courts have been unable to agree on two basic questions. First, what kinds of laws are systems of "individualized assessments"? More specifically, and more relevant to the case at bar, does the term include discretionary zoning processes for determining whether religious exercise will be permitted on a particular property?

Second, what are the legal consequences that flow from finding such a system at work in a particular case? Are "systems of individualized assessments" laws to which the pre-*Smith* "substantial burden" test still applies, because *Smith* did not overrule the substantial burden cases fitting that description? Or are "systems of individualized

assessments" a subspecies of discriminatory law – whether not "neutral" or not "generally applicable" – that does not require a showing of substantial burden to trigger strict scrutiny?

The opinion below typifies this confusion. The panel did not offer a more specific definition of "individualized assessments," but did suggest that the City of Chicago's zoning ordinance is such a system. *C.L.U.B.,* 342 F.3d at 764. Even so, the panel found that strict scrutiny did *not* apply in this case, because the City's mechanisms for individualized exemptions – such as Special Use, Map Amendment, or Planned Development approval – *had* been extended to the Plaintiff churches in two respects. First, the churches were able (in fact, required) to apply for the discretionary exemptions offered under the system. Second, the churches that sought the available exemptions were ultimately granted them. The panel concluded that the zoning scheme was therefore "generally applicable." Although the panel did not use the precise term "substantial burden," it noted that a related element in the Free Exercise analysis would be whether the "burdens incidental to [the] churches' seeking" exemptions would "amount to 'religious hardship' within the meaning of … *Hialeah*." In short, the Seventh Circuit did not explain (or perhaps did not know) whether systems of "individualized assessments" generate discrimination problems, substantial burden problems, or both.

In contrast, the Eleventh Circuit recently held in *Midrash Sephardi* v. *Town of Surfside,* No. 03-13858, ___ F.3d ___, 2004 WL 842527 (11th Cir. Apr. 21, 2004), that "individualized assessments" in zoning permit decisions trigger a substantial burden inquiry, because such systems invoke a high risk of hidden discrimination. Applying RLUIPA Sections 2(a) and 2(a)(2)(C), the court found that the process of applying for a conditional use permit ("CUP")

was a system of "individualized assessments," because it "results in a case-by-case evaluation of the proposed activity of religious organizations, [and] carries the concomitant risk of idiosyncratic application of SZO standards." *Id.* at *6. The court added that local "officials may use their authority to individually evaluate and either approve or disapprove of churches and synagogues in potentially discriminatory ways." *Id.* at *6.

Having concluded that this was "quintessentially an 'individual assessment' regime," the court proceeded to the substantial burden inquiry.[7] *Id.* at *6. The court did not discuss the concepts of neutrality and general applicability in connection with "individualized assessments," but instead in connection with principles of discrimination and equal treatment across religious lines. *Id.* at *14. In sum, in accordance with the structure of RLUIPA, but in contrast to the *C.L.U.B.* decision, the *Midrash* court treated the term "system of individualized assessments" solely as a category of substantial burden cases that *Smith* did not overrule.

In *San Jose Christian College* v. *City of Morgan Hill,* 360 F.3d 1024 (9th Cir. 2004), the Ninth Circuit simply ignored the term "individualized assessments." Because it found no substantial burden under RLUIPA Section 2(a)(1), it never reached the question of whether the "individualized assessments" jurisdictional element of Section 2(a)(2)(C) was satisfied. *Id.* at 1035. And in discussing applicable Free Exercise principles, the panel omitted any mention whatsoever of the "individualized assessments" language of

[7] Notably, the *Midrash* court's finding of a system of individualized assessments was based in part on the fact that every church or synagogue was subject to that requirement. *Id.* at *6. In *C.L.U.B.,* by contrast, that same fact was invoked in support of the conclusion that the zoning system was "generally applicable." *C.L.U.B.*, 342 F.3d at 764.

Smith and *Lukumi*, but did discuss neutrality, general applicability, and hybrid rights. *Id.* at 1030-32.

Notably, the Ninth Circuit has recognized and applied the term "individualized assessments" as one of two "exception[s]" – along with hybrid rights – "to the rule in *Smith*" that only neutral and generally applicable laws trigger strict scrutiny. *See American Friends Serv. Comm. Corp.* v. *Thornburgh*, 951 F.2d 957, 961 (9th Cir. 1991). The *Thornburgh* court rejected plaintiff's individualized assessments claim, because the exceptions at issue "exclude[d] entire, objectively-defined categories of employees from the scope of the statute," and involved "no procedures whereby anyone 'applies' for any of these exemptions." *Id.* The court's discussion gives no indication whether "systems of individualized assessments" trigger the substantial burden inquiry, or describe a form of discrimination.

In *First Covenant Church of Seattle* v. *City of Seattle,* 840 P.2d 174 (Wash. 1992), the Washington Supreme Court relied on *Thornburgh* in concluding that a discretionary landmarking ordinance represented "a system of individualized exceptions." *Id.* at 181. Although the court concluded that such a system was not "generally applicable," the court did not reach that conclusion based on a discussion of equal treatment or discrimination principles. Nor, on the other hand, does the court discuss substantial burden. As in *Thornburgh,* the relationship between "individualized assessments" on the one hand, and discrimination and substantial burden on the other, is left unclear.

Likewise, in *Korean Buddhist Dae Won Sa Temple of Hawaii* v. *Sullivan*, 953 P.2d 1315, 1344 (Haw. 1998), the Hawaii Supreme Court found a discretionary variance procedure to represent a system of individualized assessments, also citing *Thornburgh.*

"Individualized assessments" cases outside the land-use permitting process reflect the same confusion. Like the Ninth Circuit in *Thornburgh,* at least two other Courts of Appeals have focused on discretion and lack of objective standards as the touchstone of a "system of individualized assessments." In *Intercommunity Ctr. for Justice & Peace* v. *INS*, 910 F.2d 42 (2d Cir. 1990), the Second Circuit equated a "system of individualized assessments" with "a discretionary exemption that is applied in a manner that fails to accommodate free exercise concerns." *Id.* at 45.

Similarly, in *Axson-Flynn* v. *Johnson,* 356 F.3d 1277 (10th Cir. 2004), the Tenth Circuit recently reiterated its definition of "a system of individualized exemptions [as] one that 'give[s] rise to the application of a subjective test,' … one in which case-by-case inquiries are routinely made." *Id.* at 1297 (quoting *Swanson* v. *Guthrie Indep. Sch. Dist. No. I-L,* 135 F.3d 694, 701 (10th Cir. 1998)). Also like *Thornburgh*, but unlike *First Covenant, Axson-Flynn* described "individualized assessments" as one of two "exceptions" to the general rule of *Smith,* rather than as a type of law that is not "generally applicable."

In yet another approach, the Sixth Circuit has focused on whether a system of "individualized exemptions" is applied in a "religion-neutral" way, and especially whether there is "any evidence of discriminatory intent against religion." *Vandiver* v. *Hardin County Bd. of Educ.*, 925 F.2d 927, 934 (6th Cir. 1991). This discrimination focus is especially odd, because the court emphasizes, almost simultaneously, that "individualized assessments" doctrine does *not* fall within the categories of neutrality or general applicability (or hybrid rights). *Id.* at 933 ("[W]e note that *Smith* does appear to leave open a small crack for free exercise challenges to generally applicable, religion-neutral

laws even when such challenges are not joined with an alleged infringement of another constitutional interest.").

At least two other appellate courts similarly emphasize discrimination in their discussions of "individualized assessments." Recently, the California Supreme Court read this term to trigger strict scrutiny "where (1) there is a mechanism of exemptions open to unfettered discretionary interpretation, and (2) the bureaucratic discretion is enforced in a discriminatory manner against religion." *Catholic Charities of Sacramento, Inc.* v. *Superior Court,* 109 Cal. Rptr. 2d 176, 192 (2004). By contrast to the Ninth and Tenth Circuits, however, discretion and subjectivity are not strictly necessary to trigger strict scrutiny on this view; *Catholic Charities* would also apply strict scrutiny to a law creating categorical (*i.e.,*, non-individualized) exceptions for secular conduct, without extending the exception to comparable religious conduct. *Id.* at 193.

The Third Circuit has likewise "held that the neutrality principle applies with equal force when government creates categorical, as opposed to individualized, exceptions for secularly motivated conduct." *Tenafly Eruv Ass'n* v. *Borough of Tenafly,* 309 F.3d 144, 166 (3d Cir. 2002) (citing *Fraternal Order of Police* v. *City of Newark,* 170 F.3d 359, 365 (3d Cir. 1999)). *See also Tenafly,* 309 F.3d at 166 n.27 (noting Third Circuit's difference with Ninth and Tenth Circuits in strictly scrutinizing categorical, as well as individualized, exemptions).

The Third Circuit's view of "individualized assessments" is not only strongly discrimination oriented, it is strongly opposed to leaving any room for a "substantial burden" analysis after *Smith*. *See Id.* at 170 & n.31 (emphasizing "the Supreme Court's admonition in *Smith* against judicial inquiries into the centrality of religious

practices," but citing cases from other jurisdictions assessing whether burden is "substantial"). This conflicts directly with at least the Fourth Circuit, which has acknowledged that the "substantial burden," unemployment compensation cases involving "individualized assessments" were not overruled by *Smith,* and so remain good law. *See Goodall by Goodall* v. *Stafford County Sch. Bd.,* 60 F.3d 168, 173 (4th Cir. 1995). Adding to the confusion, *Goodall* describes these "individualized assessments" cases – where the substantial burdens test still applies – as involving laws that are not "generally applicable." *Id.*

In sum, the Courts of Appeals and state Supreme Courts are all over the lot when it comes to the meaning and legal consequence of the term "system of individualized governmental assessments" within this Court's Free Exercise jurisprudence. That is more than reason enough to grant the writ in this particular case, which raises that question and exemplifies that confusion.

II. THE CONFUSION OVER THE QUESTIONS PRESENTED BY PETITIONERS, AS WELL AS THE MEANING AND CONSEQUENCE OF "INDIVIDUALIZED ASSESSMENTS," IS NOT AN ABSTRACT PROBLEM, BUT INSTEAD BEARS SEVERE CONSEQUENCES FOR RELIGIOUS COMMUNITIES NATIONWIDE, AND ESPECIALLY FOR RELIGIOUS MINORITIES IN THE LAND-USE PERMITTING CONTEXT.

A. Congress Recently Heard "Massive Evidence" That Discretionary Zoning Processes Routinely Enforce the Covert Religious Biases of Local Government Officials and Private Citizens.

The conflict among the lower courts regarding "individualized assessments" and related issues has given rise to a problem of national importance. As Congress learned during the three years of hearings that prompted the passage of RLUIPA, the kind of religious discrimination that may be hidden behind discretionary processes – especially in the local land-use permitting context – is widespread and unchecked. The failure of the lower courts since *Smith* to strictly scrutinize substantial burdens imposed through such freewheeling processes exacerbates the problem.

The Senate legislative history of RLUIPA summarizes the matter well:

> …. The hearing record compiled massive evidence that this right [to assemble for religious purposes] is frequently violated. Churches in general, and new, small, or unfamiliar churches in particular, are frequently discriminated against on the face of zoning codes *and also in the highly individualized and discretionary processes of land use regulation.* Zoning codes [often] … permit churches *only with individualized permission from the zoning board, and zoning boards use that authority in discriminatory ways.*
>
> Sometimes, zoning board members or neighborhood residents explicitly offer race or religion as the reason to exclude a proposed church, especially in cases of black churches and Jewish shuls and synagogues. *More often, discrimination lurks behind such vague and universally applicable reasons as traffic, aesthetics, or "not consistent with the city's land use plan."* Churches have been excluded from residential zones because they generate too much traffic, and from commercial zones because they don't generate enough traffic. Churches

> have been denied the right to meet in rented storefronts, in abandoned schools, in converted funeral homes, theaters, and skating rinks – in all sorts of buildings that were permitted when they generated traffic for secular purposes.
>
> The hearing record contains much evidence that these forms of discrimination are very widespread. Some of this evidence is statistical – from national surveys of cases, churches, zoning codes, and public attitudes. Some of it is anecdotal, with examples from all over the country. Some of it is testimony by witnesses with wide experience who say that the anecdotes are representative. This cumulative and mutually reinforcing evidence is summarized in the report of the House Committee on the Judiciary (House Rep. 106-219) at 18-24, in the testimony of Prof. Douglas Laycock to the Committee on the Judiciary 23-45 (Sept. 9, 1999), and in Douglas Laycock, *State RFRAs and Land Use Regulation,* 32 U.C. DAVIS L. REV. 755, 769-83 (1999).
>
> *This discrimination against religious uses is a nationwide problem.* It does not occur in every jurisdiction with land use authority, but it occurs in many such jurisdictions throughout the nation. *Where it occurs, it is often covert.* It is impossible to make separate findings about every jurisdiction, or to legislate in a way that reaches only those jurisdictions that are guilty.

146 CONG. REC. S7774-75 (daily ed. July 27, 2000) (Exh. 1, Joint Statement of Senator Hatch and Senator Kennedy on the Religious Land Use and Institutionalized Persons Act of 2000) (emphasis added).

Fractured opinions among lower courts struggling to interpret a single term is more than sufficient reason to grant the writ. But where, as here, that doctrinal confusion has worsened a deficit in civil rights enforcement – a deficit documented before Congress – the need for this Court's guidance becomes even more acute.

B. The Experience of *Amici* Under RLUIPA Has Confirmed the Evidence Presented to Congress.

Amici are a public interest law firm and various religious organizations that have participated frequently and directly in disputes over the discretionary denial of zoning permits to use land for religious exercise. Their experience since the passage of RLUIPA confirms that those denials occur frequently, often imposing severe restrictions on religious exercise, often for vague or otherwise dubious reasons, and often with expressions of animus which, unfortunately, are insufficient alone to make out a claim of discrimination. That experience is summarized in the attached appendices, which list some recent challenges to discretionary denials of permits to use land for religious exercise. Appendix A lists disputes that are documented in judicial decisions, and Appendix B lists disputes that are pending or have settled without decision. This experience underscores that the confusion regarding whether "individualized assessments" should be construed to cover fact patterns like these has concrete and urgent consequences in the lives of thousands, if not millions, of Americans.

CONCLUSION

For the foregoing reasons, the writ should be granted.

Respectfully submitted,

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