No. 04-2326

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

STS. CONSTANTINE & HELEN GREEK ORTHODOX CHURCH, INC. and JOHN W. DEMETROPOULOS,

Appellants

v.

CITY OF NEW BERLIN and TELESFORE WYSOCKI

Appellees

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WISCONSIN
Honorable J.P. Stadtmueller

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

R. ALEXANDER ACOSTA
Assistant Attorney General

JESSICA DUNSAY SILVER
KAREN L. STEVENS
Attorneys
Civil Rights Division
Department of Justice
Appellate Section - PHB 5022
950 Pennsylvania Avenue, N.W.
Washington, D.C. 20530
(202) 353-8621

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Plaintiffs-Appellants

v.

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Defendants-Appellees

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
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BRIEF FOR THE UNITED STATES AS *AMICUS CURIAE*

JURISDICTION

The appellants' statement of jurisdiction is complete and correct.

ISSUE PRESENTED

Whether a church's claim that the denial of a zoning application substantially burdens its religious exercise is subject to a per se rule that the church must demonstrate that there is no alternative location in the jurisdiction where its religious exercise is permissible.

INTEREST OF THE UNITED STATES

This case concerns the interpretation of the prohibitions of the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA), 42 U.S.C. 2000cc *et seq.* The Department of Justice is charged with enforcing RLUIPA, see 42 U.S.C. 2000cc-2(f), and therefore has an interest in how courts construe the statute. Pursuant to that authority, the Department opened an investigation of appellants' complaint against the City of New Berlin in October 2003.

In addition, defendants challenged the constitutionality of RLUIPA in the district court. Section 2403(a) of Title 28 provides that "[i]n any action, suit or proceeding in a court of the United States to which the United States * * * is not a party, wherein the constitutionality of any Act of Congress affecting the public interest is drawn in question, the court * * * shall permit the United States to intervene * * * for argument on the question of constitutionality." The United States thus intervened below to defend the constitutionality of RLUIPA, and will address that issue on appeal if it is again raised by defendants.

STATEMENT OF FACTS AND STATEMENT OF THE CASE

A. Background

This case involves a Greek Orthodox church's challenge to the denial of its application to rezone land for constructing a church. In 1995 and 1997, Saints Constantine and Helen Greek Orthodox Church ("Church" or "St. Constantine") purchased two contiguous parcels of land in New Berlin, Wisconsin in order to

build a church.[1] The Church's land, which totals approximately 40 acres, is adjacent to two other churches. At the time of purchase, both parcels were zoned as R-2, Rural Estate Single-Family Residential District. A church is a conditional use in an R-2 district. (App. 6).

On January 4, 2002, the Church applied to rezone a 14-acre parcel of its land from R-2 to an I-1 district (Institutional District). A church may be a principal use in an I-1 district. (App. 6). The City of New Berlin's Planning Department, consistent with its normal practices, reviewed the Church's application and prepared an analysis for the Planning Commission. That analysis expressed concern that rezoning the parcel to I-1 would allow the Church to sell its property to a third party, who could then erect a building for a use other than a church. In response, the Church proposed to rezone the parcel to I-1 and limit its use to church-related activities through a planned unit development ("PUD") overlay ordinance. (App. 7).

On April 1, 2002, the Planning Commission voted four to three to recommend that the New Berlin Common Council ("Council") deny the church's application. Shortly thereafter, New Berlin's mayor, Telesfore Wysocki, suggested that the church apply for a conditional use permit to build its church under the existing R-2 district. The Church argued that the one-year term for a conditional use permit was too short to raise funds, draft plans, obtain financing and begin

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[1] References to "Church Br. __" are to pages in the appellants' opening brief. References to "App. __" are to the Appendix filed with that brief.

construction. The City of New Berlin (City) claimed, however, that the Council had authority to extend the one-year term.[2] (App. 7-8, 14-15).

On April 26, 2002, the Council voted four to three to deny the Church's application. On May 28, the mayor wrote to the Church offering a second alternative. He proposed a PUD overlay ordinance restricting the use of the property to church and church-related uses under the existing R-2 district. (App. 8). The Church conceded that this proposal, if enacted, would have the same effect as the Church's earlier proposal to add a PUD overlay ordinance to the parcel rezoned I-1. However, the Church declined to pursue this alternative because it believed that an application for the overlay ordinance, which required a public hearing and city council vote, would, like its application for a PUD overlay on the I-1 zoning, be rejected despite the fact that it resolved all of the concerns identified by the Planning Commission. (App. 8, 15-16, Church Br. 23-24).

B. Proceedings Below

The Church and John W. Demetropoulos filed suit against the City and the mayor alleging that the defendants violated RLUIPA's substantial burden, discrimination, and exclusion provisions – 42 U.S.C. 2000cc(a)(1), (b)(1), and (b)(3), respectively. The plaintiffs also claimed that the mayor violated their right

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[2] The Church's brief disputes the City's contention that the City Council could extend the deadline for a conditional use permit so as to allow the Church to build on its existing property. (Church Br. 21-23). The United States expresses no view on whether this qualifies as a genuine issue of material fact that would preclude summary judgment under Fed. R. Civ. P. 56(c).

to free exercise of religion in violation of 42 U.S.C. 1983. They sought damages and injunctive relief ordering the City to grant their rezoning application. (App. 5-6).

Defendants filed a motion challenging the constitutionality of RLUIPA. Plaintiffs filed a motion for partial summary judgment, and defendants filed a cross-motion for summary judgment. The United States intervened to defend the constitutionality of RLUIPA, urging the court to avoid the constitutional question. On September 30, 2003, the court dismissed the motions related to the constitutional question without prejudice, ruling that it would first decide the statutory questions. (App. 9 n.3).

On March 26, 2004, the district court denied the Church's motion and granted the defendants' motion for summary judgment. The district court gave two grounds for its decision denying the substantial burden claim. First, it ruled that a land-use regulation does not impose a substantial burden where those affected by the regulation could engage in their religious exercise by locating elsewhere in the jurisdiction. Here, the district court found that there was no evidence in the record suggesting that the Church could not build elsewhere in New Berlin, and therefore found that the denial did not impose a substantial burden. (App. 13).

Second, the district court found that the Church had not shown that the denial of its rezoning application foreclosed building a Church on its existing property. The district court found that the Church did not dispute the City's claim that the Council could extend the one-year term of a conditional use permit. Nor

did the Church provide evidence that the City's recommendation to seek a PUD overlay ordinance on the existing R-2 district was doomed to fail. (App. 16). On this basis, the district court held that the Church had not demonstrated that its religious exercise had been rendered "effectively impracticable" and therefore had not proved a substantial burden. (App. 18).

The district court further ruled that the Church had failed to make a showing sufficient to support its claims of discrimination and exclusion under Sections (b)(1) and (b)(3). (App. 18). The district court did not reach the constitutional question, and dismissed the free exercise claim without prejudice. (App. 9 n.3, 20-21).

The Church appealed. Following this Court's direction that it file a memorandum addressing the effect of the free exercise claim on the Court's appellate jurisdiction, the Church agreed to the unconditional dismissal of its free exercise claim.

SUMMARY OF ARGUMENT

The United States files as *amicus curiae* for the limited purpose of clarifying the appropriate standard for determining whether an adverse land use decision substantially burdens religious exercise in violation of section 2(a)(1) of RLUIPA.[3] The district court incorrectly concluded that this Court's decision in *Civil Liberties*

[3] The United States does not address the second part of the district court's holding, which held that plaintiffs failed to show that "building a church on the Church's existing property is foreclosed to the plaintiffs." (A.15).

for Urban Believers v. *City of Chicago*, 342 F.3d 752 (7th Cir. 2003) ("CLUB"), cert. denied, 124 S. Ct. 2816 (2004), required it to reject the Church's substantial burden claim. The district court mistakenly relied on the fact that the Church had not presented evidence demonstrating that there were no permissible alternative locations in the City. In fact, *CLUB*, which addressed a *facial* challenge to the City of Chicago's entire zoning scheme, requires no such result. Unlike *CLUB*, this case involves an *as-applied* challenge to a specific zoning decision about a particular location.

Courts should interpret "substantial burden" under RLUIPA consistently with the definition of that term under the Religious Freedom Restoration Act of 1993 (RFRA) and the Free Exercise Clause. The Supreme Court has found substantial burdens in violation of the Free Exercise Clause without a demonstration that plaintiffs have no other option for their religious exercise. And, in the context of as-applied challenges to zoning laws under the Free Exercise Clause, RFRA, and RLUIPA, courts have held that denying approval for a new house of worship constituted a substantial burden, even where an alternative location may have been available.

Requiring plaintiffs to exhaust alternatives may be a reasonable construction in the context of a facial challenge under RLUIPA. After all, in a facial challenge, the plaintiff must demonstrate that there is not a single set of circumstances where the law would be valid. But there is no such requirement in an as-applied challenge. The district court failed to draw this crucial distinction.

Moreover, applying CLUB's standard to as-applied challenges would violate the principle that a statute must be interpreted so as to give effect to each of its provisions. Forcing a church to prove that there was no other location in the jurisdiction where it could build would effectively require it to prove that the City had totally excluded or unreasonably limited religious exercise, the precise grounds for violating Subsection (b)(3) of RLUIPA.

Instead, this Court should instruct the district court to consider all of the factors that influence the nature and the severity of the burden that this specific denial places on the Church's religious exercise. The existence of alternative locations is a relevant, but not determinative, consideration in that analysis.

STANDARD OF REVIEW

The district court's grant of summary judgment is reviewed *de novo*. *CLUB*, 342 F.3d at 759.

ARGUMENT

THE DISTRICT COURT INCORRECTLY APPLIED CLUB'S STANDARD FOR ASSESSING FACIAL VIOLATIONS OF RLUIPA'S SUBSTANTIAL BURDEN PROVISION TO THIS AS-APPLIED CHALLENGE

Section 2(a)(1) of RLUIPA provides that:

> No government shall impose or implement a land use regulation in a manner that imposes a substantial burden on the religious exercise of a person, including a religious assembly or institution, unless the government demonstrates that imposition of the burden on that person, assembly, or institution * * * is in furtherance of a compelling government interest [and] is the least restrictive means of furthering that compelling government interest.

42 U.S.C. 2000cc(a)(1). This provision is triggered in any of three ways – when the imposition of the burden is imposed in a program that receives federal financial assistance (Section 2(a)(2)(A), 42 U.S.C. 2000cc(a)(2)(A)), when the imposition or removal of the burden affects interstate commerce (Section 2(a)(2)(B), 42 U.S.C. 2000cc(a)(2)(B)), or when the burden is imposed in a system in which a government makes individualized assessments about how to apply a land use regulation (Section 2(a)(2)(C), 42 U.S.C. 2000cc(a)(2)(C)). The plaintiff here relied on the individualized assessments trigger in Section 2(a)(2)(C).

The statute defines "religious exercise" to include "any exercise of religion, whether or not compelled by, or central to, a system of religious belief," and specifies that the "use, building, or conversion of real property for the purpose of religious exercise shall be considered to be religious exercise of the person or entity that uses or intends to use the property for that purpose." 42 U.S.C. 2000cc-5(7). RLUIPA does not define the term "substantial burden." The issue in RLUIPA cases involving proposed siting of a house of worship is thus not whether it is religious exercise that is being burdened, but whether the burden is substantial.

1. Decisions Interpreting Substantial Burden Under The Free Exercise Clause And RFRA Inform The Definition Under RLUIPA

Congress enacted RLUIPA after the Supreme Court held its predecessor statute, the Religious Freedom Restoration Act of 1993 (RFRA), unconstitutional as applied to states and localities in *City of Boerne* v. *Flores*, 521 U.S. 507 (1997). With RLUIPA, "Congress resurrected RFRA's language, but narrowed the scope of

the act, limiting it to laws and regulations concerning institutionalized persons or land use." *Murphy* v. *Missouri Dep't of Corr.*, 372 F.3d 979, 987 (8th Cir. 2004) (citing 42 U.S.C. 2000cc & 2000cc-1).

RLUIPA, like RFRA, does not define the term "substantial burden." However, when "Congress adopts a new law incorporating sections of a prior law, Congress normally can be presumed to have had knowledge of the interpretation given to the incorporated law, at least insofar as it affects the new statute." *Lorillard* v. *Pons*, 434 U.S. 575, 581 (1978). See *Bragdon* v. *Abbott*, 524 U.S. 624, 645 (1998); *Cannon* v. *Univ. of Chicago*, 441 U.S. 677, 696-698 (1979); *United States* v. *Professional Air Traffic Contr. Org.*, 653 F.2d 1134, 1138 (7th Cir.) (in interpreting the legislative history of a statute, there is a presumption that Congress was aware of the judicial construction of existing law and thus, a newly-enacted statute is to be read in conjunction with the entire existing body of law), cert. denied, 454 U.S. 1083 (1981). Accordingly, earlier decisions defining "substantial burden" under RFRA and the Free Exercise Clause provide guidance for courts applying the substantial burden provisions of RLUIPA. See, *e.g.*, *Midrash Sephardi, Inc.* v. *Surfside*, 366 F.3d 1214 (11th Cir. 2004) (ascertaining the "ordinary or natural" meaning of substantial burden in RLUIPA by reference to other decisions defining or discussing substantial burden).

The legislative history of RLUIPA further demonstrates that Congress intended the term to be given the same meaning that it has been given in the Supreme Court's Free Exercise Clause cases. The Joint Statement of the sponsors of RLUIPA states:

> The Act does not include a definition of the term "substantial burden" because it 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. Nothing in this Act, including the requirement in Section 5(g) that its terms be broadly construed, is intended to change that principle. The term "substantial burden" as used in this Act is not intended to be given any broader interpretation than the Supreme Court's articulation of the concept of substantial burden or religious exercise.

146 Cong. Rec. S7776 (daily ed. July 27, 2000).

The Supreme Court recognized in *Boerne* that Congress "enacted RFRA in direct response to the Court's decision in *Employment Div., Dept. of Human Resources of Oregon* v. *Smith*, 494 U.S. 872 (1990)," 521 U.S. at 512, and was seeking to revive the pre-*Smith* "substantial burden" test. *Id.* at 529. Since the Supreme Court tied the RFRA standard to that of the Free Exercise Clause pre-*Smith*, it follows that the Court similarly would look to the Free Exercise Clause and RFRA case law in evaluating the contours of the rights created in RLUIPA.

B. The Supreme Court Has Not Required Plaintiffs Claiming A Substantial Burden Under The Free Exercise Clause To Demonstrate They Had No Alternative But The Course Of Action Creating The Conflict

The trial court's imposition of a rule that a substantial burden on religion may only be found where a plaintiff has exhausted all possible alternatives is in conflict with Supreme Court precedent. In *Sherbert* v. *Verner*, 374 U.S. 398, 404 (1963), the Supreme Court held that it was a substantial burden on a Seventh-day Adventist to deny her unemployment benefits after being discharged for refusing to work on Saturdays. The Court observed that "of the approximately 150 or more Seventh-day Adventists in the Spartanburg area, only appellant and one other have been unable to find suitable non-Saturday employment." *Id.* at 399 n.2. After being discharged from her job, the plaintiff sought employment with three other mills but was unable to find full-time work that would permit her to observe her Saturday Sabbath. *Ibid.* Despite the possibility that she eventually might have found suitable work, as other Seventh-day Adventists in the area had, the Court focused on the burden placed on her when she was "force[d] * * * to choose between following the precepts of her religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of her religion to accept work, on the other hand." *Id.* at 404. She did not have to show that she had no other work alternative but the one that created the conflict. No Supreme Court decision on the

issue of substantial burden under the Free Exercise Clause has imposed a blanket rule that plaintiffs must demonstrate that they had no other alternatives before they can demonstrate a substantial burden. See, *e.g.*, *Thomas* v. *Review Bd.*, 450 U.S. 707 (1981); *Hobbie* v. *Unemployment Appeals Comm'n of Fla.*, 480 U.S. 136 (1987).

3. CLUB Involved A Facial Challenge And Therefore Does Not Require Plaintiffs Bringing As-Applied Challenges To Demonstrate That There Is No Location Where They Can Conduct Their Religious Exercise

The district court's order granting summary judgment for the City relied heavily on this Court's decision in *Civil Liberties for Urban Believers* v. *City of Chicago*, 342 F.3d 752 (7th Cir. 2003) ("*CLUB*"), cert. denied, 124 S. Ct. 2816 (2004). (App. 9, 11-15). *CLUB* rejected a facial challenge under RLUIPA brought by several churches to Chicago's overall scheme of zoning ordinances. The district court read *CLUB* as requiring that in order for a plaintiff to demonstrate a substantial burden under RLUIPA, it must show that it cannot locate elsewhere in the jurisdiction. (App. 9, 11-15). But this case involves an as-applied challenge to a denial at a specific location, not a facial challenge to an entire zoning scheme like *CLUB*. No court of appeals has treated the existence of an alternative location as sufficient grounds for denying an as-applied substantial burden claim. The district

court failed to make this crucial distinction, and incorrectly applied *CLUB* to this case.

1. CLUB Was A Facial Challenge

In *CLUB,* this Court recognized that Congress intended for courts to interpret "substantial burden" by reference to RFRA and First Amendment jurisprudence. 342 F.3d at 760-761. The Court thus considered an earlier RFRA case holding that a substantial burden "is one that forces adherents of a religion to refrain from religiously motivated conduct, inhibits or constrains conduct or expression that manifests a central tenet of a person's religious beliefs, or compels conduct or expression that is contrary to those beliefs." *Id.* at 761 (quoting *Mack* v. *O'Leary*, 80 F.3d 1175, 1179 (7th Cir. 1996) (vacated on other grounds)). However, because RLUIPA's protections are not limited to exercise "central" to a person's religious beliefs, the Court declined to craft a RLUIPA standard from the language in *Mack*. Instead, without citing other authority, the Court held that "a land-use regulation that imposes a substantial burden on religious exercise is one that necessarily bears direct, primary, and fundamental responsibility for rendering religious exercise * * * effectively impracticable." *CLUB*, 342 F.3d at 761.

The *CLUB* plaintiffs, a church association and five individual churches, argued that the scarcity of affordable land in zones where churches were permitted

as of right, together with the costs, procedural requirements and political approval required to obtain a special use permit in other districts, imposed a substantial burden on acquiring or developing land for church use. The Court of Appeals dismissed these conditions as "incidental to any high density urban land use." Furthermore, the conditions "[did] 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." *Id*. at 761. In fact, despite initial difficulties and expense, each of the individual plaintiff churches had successfully located within Chicago's city limits. *Ibid.* The Seventh Circuit therefore concluded that, on its face, Chicago's zoning ordinance did not impose a substantial burden.

Two other circuits have also concluded, in facial challenges under RLUIPA, that plaintiffs must demonstrate that they have no alternative sites in order to establish a substantial burden. See *San Jose Christian Coll.* v. *Morgan Hill*, 360 F.3d 1024, 1035 (9th Cir. 2004); *Lighthouse Inst., Inc.* v. *Long Branch*, No. 03-2343, 2004 WL 1179268, at *4 (3d Cir. May 28, 2004) (unpublished opinion) ("[I]t is undisputed that the Mission could have operated as a church by right in other districts in the City."); see also *Daytona Rescue Mission, Inc.* v. *City of Daytona Beach*, 885 F. Supp. 1554, 1560 (M.D. Fla. 1995) (no substantial burden in facial challenge under RFRA where plaintiffs seeking to locate ministry and homeless

shelter had sought approval from city for only one site, looked at only one additional site, and facilities housing the homeless were located elsewhere in the city).

2. *The District Court Erred In Applying CLUB's Standard To This As-Applied Challenge*

The *CLUB* decision involved a facial challenge to Chicago's zoning scheme in its entirety. See *CLUB*, 342 F.3d at 761. In facial challenges to laws, "the challenger must establish that no set of circumstances exists under which the [law] would be valid." *City of Chicago* v. *Morales*, 527 U.S. 41, 78-79 (1999) (quoting *United States* v. *Salerno*, 481 U.S. 739, 745 (1987)). Exhaustion of alternatives is thus a reasonable construction in the context of a facial challenge under RLUIPA.

This case, in contrast, involves a challenge to a specific zoning decision about a particular property, not a facial challenge to the City's zoning scheme. And decisions in as-applied challenges to zoning decisions reveal a more flexible view of the meaning of substantial burden under RLUIPA, RFRA, and the Free Exercise Clause. The existence of alternative locations may inform the inquiry into whether a specific zoning decision imposes a substantial burden on plaintiff's religious exercise, but it is not by itself dispositive. For that reason, *CLUB* is distinguishable and does not bar finding a substantial burden in this case.

1. In As-Applied Challenges, A Substantial Burden May Exist Even Where An Alternative Location Is Available

Denying approval for a new house of worship may be a substantial burden, even if there is an alternative location. In *Islamic Center of Mississippi, Inc.* v. *City of Starkville*, 840 F.2d 293, 300 (5th Cir. 1988), the Fifth Circuit found a substantial burden under the Free Exercise Clause where a proposed mosque sought to locate near a university. The ordinance required that all houses of worship obtain special exception permits. The City denied the proposed mosque's formal permit application, and city officials rebuffed four informal site proposals. The court held that, although sites distant from the university were available, "[b]y making a mosque relatively inaccessible within the city limits to Muslims who lack automobile transportation, the City burdens their exercise of religion." *Id.* at 299.

Similarly, in *Cottonwood Christian Center* v. *Cypress Redevelopment Agency*, 218 F. Supp. 2d 1203, 1226 (C.D. Cal. 2002), the court held that, while a burden under RLUIPA must be "more than an inconvenience" in order to be "substantial," "[p]reventing a church from building a worship site fundamentally inhibits its ability to practice its religion." The court thus held that a church that had pieced together a large plot of land to build a new church for its growing congregation was substantially burdened by a city's denial of zoning approval.

The court in *Guru Nanak Sikh Society* v. *County of Sutter*, No. 02-1785, 2003 WL 23676118 (E.D. Cal. Nov. 19, 2003) (appeal pending), likewise held that there was no requirement that a congregation exhaust all possible locations before it could show a substantial burden from a denial of a special use permit. The court held that "substantial burden" means more than a "mere inconvenience," 2003 WL 23676118, at *11, and that the challenged land-use decision must "actually inhibit[] religious practice." *Id*. at *12. The court then found that a county's denial of a special use permit to build a house of worship on a plot of land a congregation bought in an agricultural district, after previously being denied a special use permit for a plot it had bought in a residential district, was a substantial burden where all zones in the county open to houses of worship by special use permit were either agricultural or residential. *Ibid*; cf. *Murphy* v. *Zoning Comm'n*, 148 F. Supp. 2d 173, 189 (D. Conn. 2001) (barring large prayer meetings in home in residential district was substantial burden on religious exercise under RLUIPA).

Courts also have found substantial burdens in as-applied RLUIPA challenges when jurisdictions have barred expansion of existing religious facilities, without requiring a showing that the church or school could have moved to larger facilities somewhere else in the jurisdiction. See *Castle Hills First Baptist Church* v. *City of Castle Hills*, No. 01-1149, 2004 WL 546792, at *9 (W.D. Tex. 2004) (denial of

church expansion needed for religious education classes imposed substantial burden under RLUIPA); *Shepherd Montessori Ctr. Milan* v. *Ann Arbor Charter Township*, 675 N.W.2d 271, 282 (Mich. Ct. App. 2003) (holding there was dispute of material fact on substantial burden issue under RLUIPA where religious day care center sought to lease adjacent property for operation of religious school; determinative factors would include administrative feasibility of operating two separate sites, convenience to parents, and availability and nature of alternative sites). Cf. *Keeler* v. *Mayor & City Council of Cumberland*, 940 F. Supp. 879 (D. Md. 1996) (substantial burden under RFRA to bar Catholic Archdiocese from demolishing Monastery to build more modern facilities that would better meet its needs); *First Covenant Church of Seattle* v. *City of Seattle*, 840 P.2d 174, 219 (Wash. 1992) (landmarking of church created substantial burden under the Free Exercise Clause because it reduced value of property and subjected alteration to government review).

Courts similarly have found substantial burdens where churches were denied the ability to engage in accessory uses such as providing social services or operating religious schools in existing facilities. See *Alpine Christian Fellowship* v. *County Comm'rs*, 870 F. Supp. 991, 994-995 (D. Colo. 1994) (school); *Western Presbyterian Church* v. *Board of Zoning Adjustment*, 862 F. Supp. 538, 546

(D.D.C. 1994) (feeding program for homeless). In *Jesus Center* v. *Farmington Hills Zoning Board of Appeals*, 544 N.W.2d 698 (Mich. Ct. App. 1996), the court found a substantial burden under RFRA where a zoning board denied a congregation permission to operate a shelter for the poor in its church. While noting that the zoning board argued that there were other locations where the church could operate a homeless shelter, the court held that relocating the shelter would be an economic burden on the church and would detract from the mission of the church to combine worship and social service. *Id.* at 704.

2. Even Decisions Rejecting Substantial Burden Claims Illustrate That An Alternative Location Is Relevant, But Not Determinative, In As-Applied Challenges

The Eleventh Circuit recently decided an as-applied challenge to a zoning denial under RLUIPA. That decision illustrates that the existence of an alternative location in the jurisdiction is a relevant, but not determinative, consideration in analyzing an as-applied substantial burden claim. In *Midrash*, two Orthodox synagogues challenged the denial of their applications to rent space in the two-block business district of Surfside, Florida. Surfside permitted houses of worship in only one of its seven types of zoning districts, and there only by grant of a conditional use permit. 366 F.3d at 1219. Because Orthodox Judaism forbids adherents to use cars or other means of transportation during the Sabbath,

adherents prefer synagogues within walking distance of their homes. *Id*. at 1221. The synagogues claimed that the RD-1 district, the only district in which synagogues were permitted, was too far from significant numbers of its members to permit walking on the Sabbath. Plaintiffs also claimed that they would not be able to find land or facilities sufficient to accommodate their congregations in the RD-1 district. *Ibid*.

The court of appeals rejected the plaintiffs' claim after considering the particular burden imposed on these congregations by requiring them to locate in a district "a few blocks from their current location." *Id*. at 1228. That this alternative existed did not end the analysis. Rather, the relevant inquiry was "whether and to what extent this particular requirement burdens the congregations' religious exercise." *Ibid*. The court concluded that "walking a few extra blocks" was not substantial as the term was used in RLUIPA and by the Supreme Court. The RD-1 district was in the geographic center of the municipality, and testimony established that Orthodox congregants customarily move to areas near their synagogue, rather than expecting the synagogue to move to them. *Ibid*.

Applying a similar approach, the Eleventh Circuit rejected an earlier as-applied challenge to a zoning action under the Free Exercise Clause. In *Grosz* v. *City of Miami Beach*, 721 F.2d 729, 739 (11th Cir. 1983), cert. denied, 469 U.S. 827

(1984), the court of appeals found no violation where a family barred from holding prayer meetings open to the public in its home could conduct the same exercise "in suitably zoned areas, either by securing another site away from their current house or by making their home elsewhere in the city." *Id*. at 739. As in *Midrash*, the Court considered not just the existence of an alternative location, but its close proximity to the plaintiff's current location and the degree of burden that would be imposed by either moving the prayer meetings or limiting those sessions to family and friends, which would have been permitted in the single family district in which plaintiffs resided. *Ibid.* (noting zones allowing religious institutions covered one half of City's territory, including one within four blocks of plaintiff's home); but see *Vineyard Christian Fellowship of Evanston, Inc.* v. *City of Evanston*, 250 F. Supp. 2d 961, 986-987 (N.D. Ill. 2003) ("monetary and logistical burdens" imposed by years-long search for suitable space did not rise to level of a substantial burden; "when churches are permitted in some municipal zoning areas but not others, a congregation does not have a constitutional right to build its house of worship in any area it chooses.").

3. Applying CLUB's Standard To As-Applied Challenges Would Render Subsection (b)(3)'s Prohibition On Excluding Or Unreasonably Limiting Religious Structures Meaningless

Accepted canons of statutory interpretation counsel against construing a statute so as to make any provision superfluous. But the district court's broad reading of *CLUB* would produce just such a result.

Subsection (b)(3) of RLUIPA provides that "[n]o 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." 42 U.S.C. 2000cc-(b)(3)(A) & (B). Congress intended this provision to codify long-standing Supreme Court cases prohibiting both total and effective exclusions of First Amendment activity from an entire jurisdiction, as well as unreasonable restrictions on non-First Amendment activities in that jurisdiction. See, *e.g.*, *Board of Airport Comm'rs* v. *Jews for Jesus, Inc.*, 482 U.S. 569 (1987); *Schad* v. *Borough of Mount Ephraim*, 452 U.S. 61 (1981); *City of Cleburne* v. *Cleburne Living Ctr.*, 473 U.S. 432 (1985). See generally 146 Cong. Rec. at S7775 (daily ed. July 27, 2000); House Judiciary Committee Report, *Religious Liberty Protection Act of 1999*, H.R. Rep. No. 219, 106th Cong., 1st Sess. 17 (1999).

The basis of section 2(b)(3)(B)'s prohibition on "unreasonably limit[ing]" religious exercise is the Supreme Court's Equal Protection analysis of land use regulations. The Equal Protection Clause of the Fourteenth Amendment commands that no State shall "deny to any person within its jurisdiction the equal protection of the law," which is essentially a directive that a state must treat alike all persons similarly situated. See *Plyler* v. *Doe*, 457 U.S. 202, 216 (1982).

In *Cleburne*, the Supreme Court reviewed a city's land use regulation that required the operators of a home for the mentally retarded to obtain a special use permit in an area which allowed, as of right, apartment houses, multiple dwellings, boarding and lodging houses, fraternity or sorority houses, dormitories, apartment hotels, hospitals, sanitariums, nursing homes, private clubs, fraternal orders, and other specified uses. See 473 U.S. at 447. The Court held that, although the mentally retarded as a group "are different from others not sharing their misfortune," the difference was irrelevant unless the group home and its occupants "would threaten legitimate interests of the city in a way that other permitted uses such as boarding houses and hospitals would not." *Id*. at 448. Finding no evidence in the record that revealed "any rational basis" for believing that the group home would pose any threat to the city's legitimate interests, the Court struck down application of the ordinance against the home. *Ibid*. Congress enacted RLUIPA

Section 2(b)(3)(B) to codify the above-described equal protection principles by prohibiting land use regulations that unreasonably limit assemblies, institutions, or structures within a jurisdiction. See *Freedom Baptist Church* v. *Middletown*, 204 F. Supp.2d 857, 871 (E.D. Pa. 2002).

To hold that a substantial burden claim must fail absent proof that there is no alternative location in the jurisdiction where plaintiff could conduct its exercise would, in essence, require a plaintiff to prove that the jurisdiction has effectively excluded religious uses. But this is precisely the grounds for a claim of total exclusion under Subsection (b)(3)(A), making the substantial burden provision in Section 2(a)(1) superfluous. It also comes very close to a claim under Subsection (b)(3)(B) that the jurisdiction is unreasonably limiting religious exercise.

As this Court has stated, "[s]tatutory construction is a holistic endeavor and, at a minimum we must account for a statute's full text, language as well as punctuation, structure, and subject matter." Courts therefore have a "deep reluctance to interpret a statutory provision so as to render superfluous other provisions in the same enactment." *In re Lifschultz Fast Freight Corp.*, 63 F.3d 621, 628 (7th Cir. 1995) (quoting *Pennsylvania Dep't of Pub. Welfare* v. *Davenport*, 495 U.S. 552, 562 (1990)). In light of this principle, this Court should avoid interpreting "substantial burden" in a manner that would give it no effect

beyond Section (b)(3). Cf. *Midrash*, 366 F.3d at 1227 (to follow *CLUB* and equate substantial burden with "rendered effectively impracticable" "would render section (b)(3)'s total exclusion prohibition meaningless").[4]

D. Courts Analyzing As-Applied Claims Must Examine All Of The Relevant Circumstances To Determine The Degree Of Burden Imposed On Religious Exercise

This Court should adopt a more flexible standard for evaluating as-applied challenges under RLUIPA than the standard set forth for facial challenges in *CLUB*. In particular, the assessment of an as-applied challenge should consider the totality of the circumstances surrounding the zoning denial and the nature and severity of the burden imposed on plaintiff's religious exercise by that denial. The existence of an alternative location would be a relevant, but not determinative, consideration in that assessment.

For example, in *Guru Nanak*, the district court held that, in order to qualify as substantial, the burden on plaintiff's religious exercise must be more than a

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[4] This conflict further suggests that, as two judges have noted, the exclusion and unreasonable limit provisions of RLUIPA are a more effective vehicle for bringing and analyzing facial challenges to a zoning scheme. See *CLUB*, 342 F.3d at 768 (argument that Chicago's zoning ordinance violates Equal Protection Clause by treating well-established sects more favorably than newer, storefront churches "seems to me to be the strongest ground of the appeal") (Posner, J., dissenting); *Guru Nanak*, 2003 WL 23676118 at *14 n.7 (citing dissenting opinion in *CLUB* to note that plaintiff might be able to make a "serious" facial challenge under Subsection (b)(3)).

"mere inconvenience" and must "actually inhibit religious practice." 2003 WL 23676118 at *11-12. There, the plaintiff society's sustained and determined "good faith" efforts, *id.* at *12, to obtain property for religious worship, only to be barred from using its property for religious purposes, demonstrated that the zoning denial was more than an inconvenience and could be said to actually inhibit its religious practice. Here, the district court could engage in a similar inquiry into whether, given the total context, the denial of the Church's permit actually inhibited the congregation's religious practice, or whether it was simply an inconvenience.

Similarly, in *Islamic Center of Mississippi*, the Fifth Circuit opined that "[r]egulatory statutes or ordinances that affect religious activity are constitutional so long as they impose no undue burden on the ability of the church or its members to carry out the observances of their faith." 840 F.2d at 298. The court of appeals considered all of the relevant circumstances surrounding the plaintiff mosque's attempt to locate near the university and concluded that, because the denial of the use permit made the mosque "relatively inaccessible" to many of its potential congregants, the denial imposed a substantial burden that violated the Free Exercise Clause. *Id.* at 299. Here, the court could determine whether the denial of the permit would make a Greek Orthodox church "relatively inaccessible" to the Greek Orthodox community in the area. Both of these formulations allow consideration

of all of the relevant factors that determine the degree of the burden imposed on religious exercise.

CONCLUSION

This Court should vacate the district court's judgment on the Church's substantial burden claim to the extent it holds that *CLUB* requires a plaintiff to demonstrate that there is no alternative location for its religious exercise.

Respectfully submitted,

R. ALEXANDER ACOSTA
Assistant Attorney General

_____
DAVID K. FLYNN
ERIC W. TREENE
KAREN L. STEVENS
Attorneys
U.S. Department of Justice
Civil Rights Division
950 Pennsylvania Ave. NW, PHB 5022
Washington, D.C. 20530
(202) 353-8621

CERTIFICATE OF COMPLIANCE

I certify, pursuant to Fed. R. App. P. 29(d), that the attached Brief for the United States as Amicus Curiae is proportionally spaced, has a typeface of 14 points, and contains 6351 words.

August 13, 2004

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KAREN L. STEVENS

Attorney

CERTIFICATE OF SERVICE

I hereby certify that on August 13, 2004, two copies of the Brief For The United States As Amicus Curiae and an electronic disk containing a PDF version of the Brief were served upon counsel of record via Federal Express next-day service at the addresses listed below:

Daniel W. Hildebrand, Esq.
DeWitt, Ross & Stevens
Two E. Mifflin Street, Suite 600
Madison, WI 53703

Ann C. Wirth, Esq.
Kevin P. Reak, Esq.
Gunta & Reak
219 N. Milwaukee Street
Milwaukee, WI 53202

_____
KAREN L. STEVENS
Attorney