No. 06-1319

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

LIGHTHOUSE INSTITUTE FOR EVANGELISM, INC.,

Plaintiff-Appellant

v.

CITY OF LONG BRANCH,

Defendant-Appellee

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY
No. Civ. A. 00-3366

BRIEF FOR THE UNITED STATES AS *AMICUS CURIAE*

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INTEREST OF THE UNITED STATES

This case concerns the appropriate interpretation of the prohibitions in 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's protections. The United States files this brief as *amicus curiae* pursuant to Rule 29, Federal Rules of Appellate Procedure.

STATEMENT OF THE ISSUE

The United States will address the following issue:

Whether a claim brought under RLUIPA's equal terms provision, 42 U.S.C. 2000cc(b)(1), requires proof of a substantial burden on the plaintiff's religious exercise, as is required for a claim brought under RLUIPA's substantial burden provision, 42 U.S.C. 2000cc(a).

STATEMENT OF THE CASE

1. Historical Facts

Lighthouse Institute for Evangelism, which conducts business as Lighthouse Mission (the Mission) was formed in 1991 in order to "administer teachings of the bible to its congregation, operate a ministry school and operate benevolent services and agencies to the community." *Lighthouse Inst. for Evangelism* v. *City of Long Branch*, 406 F. Supp. 2d 507, 511 (D.N.J. 2005). The Mission began renting space at 159 Broadway in Long Branch, New Jersey on March 1, 1992. *Lighthouse Inst. for Evangelism* v. *City of Long Branch*, No. 00-3366 (D.N.J. Apr. 7, 2003), slip op. 5. On November 8, 1994, the Mission purchased the nearby property at 162 Broadway. *Ibid.* This property was located within the C-1 Central Commercial District, *Lighthouse Inst. for Evangelism*, 406 F. Supp. 2d at 511, which permitted a variety of uses including general merchandise, restaurants, governmental services, educational services, colleges, assembly halls, bowling alleys, motion picture theaters, and municipal buildings.

City of Long Branch Ordinance 20-6.13. Churches were not listed as a permitted use. City of Long Branch Ordinance 20-6.13.

On August 1, 1995, the Mission sought a use variance so it could use the property (i) to operate a soup kitchen, mission, job skills training program, counseling center and (ii) to hold Bible classes and life skills classes. *Lighthouse Inst. for Evangelism*, slip op. 6. The City of Long Branch (the City) advised the Mission that its application was incomplete because, *inter alia*, the Mission had not completely filled out the application and had not paid the required application fees. *Ibid.* The Mission did not submit a completed application. *Id.* at 6-10.

On April 26, 2000, the Mission submitted an application for a zoning permit to use the property as a church. *Lighthouse Inst. for Evangelism*, slip op. 10. The City denied this application on April 27, 2000, because that proposed use was not specifically permitted in the C-1 zone. *Ibid.* The City informed the Mission that its proposal would require a use variance and other approvals from the Zoning Board. *Ibid.* The Mission did not seek a variance. *Ibid.*

2. Initial Litigation

On June 8, 2000, the Mission filed suit in state court. *Lighthouse Inst. for Evangelism*, 406 F. Supp. 2d at 510. The City then removed the case to federal court. *Ibid.* On October 23, 2000, the Mission amended the complaint to allege violations of Section 2(a) and 2(b) of RLUIPA, claiming that the zoning ordinance violated RLUIPA both on its face and as applied. *Id.* at 510-511. On March 8, 2001, the City moved for summary judgment. *Lighthouse Inst. for Evangelism*,

slip op. 4. On March 14, 2001, the Mission cross-moved for summary judgment and for a preliminary injunction to compel Long Branch to allow the property to be used as a church, enjoin the City from further violations, and stay potential foreclosure against the Mission's property pending resolution of its claims. *Id.* at 4-5.

On April 7, 2003, the district court decided the RLUIPA claims. *Lighthouse Inst. for Evangelism*, 406 F. Supp. 2d at 511. It dismissed as unripe the claim that the City's zoning ordinance was unlawful as applied to the Mission. *Ibid.* As to the claim that the ordinance was facially invalid, the court denied the Mission's request for a preliminary injunction. *Ibid.* The Mission appealed the district court's order denying a preliminary injunction. *Ibid.*

3. Intervening Facts

While the suit was pending, the applicable zoning ordinance changed. On October 22, 2002, the City adopted a Redevelopment Plan that strictly limited the use of properties within the "Broadway Corridor" area — which included the Mission's property at 162 Broadway. City of Long Branch Ordinance 47-02; Broadway Redevelopment Plan. The "Broadway Redevelopment Plan" superceded Ordinance 20-6.13 as the land use regulation applicable to the property at 162 Broadway. *Lighthouse Inst. for Evangelism*, 406 F. Supp. 2d at 511; City of Long Branch Ordinance 47-02.

The Redevelopment Plan was adopted "in order to achieve redevelopment of an underdeveloped and underutilized segment of the City." Broadway

Redevelopment Plan ¶ 1. Specifically, the Plan was designed, *inter alia*, to "[s]trengthen retail trade and City revenues," "[i]ncrease employment opportunities," and "[a]ttract more retail and service enterprises." Broadway Redevelopment Plan ¶ 3. The goals for the design of the Broadway Redevelopment include "establish[ing] a center for the arts that will attract artists from the whole region," creating a "vital urban community," and "restor[ing] lower Broadway, traditionally the downtown of Long Branch, as the principle [sic] commercial district of the city." Broadway Redevelopment Plan Design Guidelines 4-6.

In the area where the Mission's property is located, the Redevelopment Plan allows, as primary uses, theaters, cinemas, culinary schools, dance studios, music instruction, theater workshops, fashion design schools, and art studios and workshops. Broadway Redevelopment Plan Design Guidelines 6. Secondary uses allowed in the zone include restaurants, bars and clubs, entertainment-related businesses, and specialty retail, including book and craft stores. Broadway Redevelopment Plan Design Guidelines 6. Churches are not listed as a permitted use. The Design Guidelines provide that "[a]ny use not specifically listed" is prohibited. Broadway Redevelopment Plan Design Guidelines 6.

The Redevelopment Plan created new application requirements for development within the covered area. *Lighthouse Inst. for Evangelism*, 406 F. Supp. 2d at 512. The first step in this new application process, termed "RFQ," requires applicants to describe the development team members' roles and previous

experience with the development objectives for the sector. *Id.* at 512 n.2. The second part of the process, termed "RFP," requires a detailed description of the project. *Ibid.* No property may be developed in the Redevelopment Area until the RPQ and RFP have been approved by the Long Branch Special Redevelopment Council. Broadway Redevelopment Plan ¶ 13.

Sometime after the district court's April 7, 2003, decision, the Mission submitted an RFQ and a request for a waiver to permit the 162 Broadway site to be used as a church. *Lighthouse Inst. for Evangelism*, 406 F. Supp. 2d at 512. On December 23, 2003, the Special Redevelopment Council rejected the Mission's RFQ application and its request for a waiver. *Id.* at 513. The Mission appealed to the City Council. *Ibid.* The City Council held an administrative hearing and, on May 11, 2004, voted to reject the Mission's application. *Ibid.*

4. Subsequent Litigation

In an opinion filed on June 25, 2004, this Court affirmed the district court's April 7, 2003, decision. *Lighthouse Inst. for Evangelism, Inc.* v. *City of Long Branch*, 100 Fed. Appx. 70 (3d Cir. 2004). This Court's opinion addressed Ordinance 20-6.13, noting that assembly halls were allowed as of right under that ordinance. *Lighthouse Inst. for Evangelism*, 100 Fed. Appx. at 74-75. This Court reasoned that "denial of the Mission's application as a 'church' does not establish whether the Mission's application would have been approved as an 'assembly hall.'" *Id.* at 74. This Court concluded that the record did not contain evidence that the City treats religious "assembly halls" worse than secular ones. *Id.* at 75.

On remand, the district court granted the Mission's motion to reinstate the RLUIPA claims previously dismissed as unripe and granted the Mission leave to file an amended complaint. *Lighthouse Inst. for Evangelism*, 406 F. Supp. 2d at 511.

The parties again filed cross-motions for summary judgment. On December 27, 2005, the district court rejected the Mission's RLUIPA claims and granted summary judgment for the City. *Lighthouse Inst. for Evangelism*, 406 F. Supp. 2d at 524. The court determined that proof of substantial burden on religious exercise for purposes of Section 2(b)(1), 42 U.S.C. 2000cc(a)(1), "requires a showing that the burden prevents adherents from conducting or expressing their religious beliefs or causes them to forgo religious precepts." *Id.* at 515. Applying that standard to the facts, the court then found that requiring "plaintiffs to find a location outside the narrowly drawn Broadway Redevelopment Zone, simply does not amount to a substantial burden," because "suitable alternative venues are available to the Mission in 90% of the rest of the City of Long Branch." *Id.* at 515-516. Although the court did not believe it needed to reach the issue, it found that "Long Branch's stated interest in creating an artistic and 'dynamic commercial center' in place of what has been a deteriorating downtown is a legitimate and compelling governmental interest." *Id.* at 516. The court reasoned that "[t]he presence of a church within this limited zone [created by the Redevelopment Plan] would most likely not contribute" to the City's goal of revitalizing the downtown "by developing a performing art and artistic center,

supported by restaurants, cafes, bars and specialty retail stores." *Ibid.* The court also noted that "a state ordinance prohibiting the sale of alcohol within two hundred feet of a religious organization and a local ordinance prohibiting the sale of alcohol within one thousand feet of a religious organization[1] would further restrict development on the block." *Ibid.*

Turning to the equal terms claim under subsection (b)(1), the court rejected the Eleventh Circuit's conclusion in *Midrash Sephardi, Inc.* v. *Town of Surfside*, 366 F.3d 1214 (11th Cir. 2004), cert. denied, 543 U.S. 1146 (2005), that "section (b) operates independently from section (a)." Instead, the court concluded that proof of substantial burden – a requirement under subsection (a) – is also an element of an "equal terms" violation under subsection (b)(1). *Lighthouse Inst. for Evangelism*, 406 F. Supp. 2d at 516-517 (citing *Midrash Sephardi*). In addition, the court determined that the Mission was not similarly situated with permitted nonreligious assemblies. In reaching that conclusion, the court first pointed to the "state and local laws [which] prohibit[] the sale of alcohol within a certain distance of churches." In addition, the court noted that there was no secular "counterpart" contemplated by the Redevelopment Plan that would engage in the

---

[1] The district court appears to rely on the direct testimony of the Long Branch assistant planning director in describing the local ordinance. On cross-examination, the assistant planning director admitted that the local ordinance prohibited establishments *with liquor licences* from locating within one thousand feet of *each other*, and did not apply to the zone in which the Mission's property is located.

same "combination of uses" – house of worship, religious plays, a religious store, and a soup kitchen – that the Mission had proposed. *Id.* at 518. Finally, because the Mission was treated on equal footing with the many nonreligious assemblies also excluded from the zone, the court concluded that RLUIPA's equal terms provision was not violated. *Ibid.*

SUMMARY OF ARGUMENT

The district court erred by requiring the Mission to prove a substantial burden on its religious exercise in order to prevail on its subsection (b)(1) equal terms claim.

RLUIPA's text makes clear that subsection (a) and subsection (b) are separate and distinct provisions. Subsection (a) creates a claim when a government's land use regulation imposes a substantial burden on religious exercise. Separately, subsection (b) grants three distinct protections. At issue here, the "equal terms" provision, defined by subsection (b)(1), protects religious assemblies and institutions from land use regulations that treat them "on less than equal terms with a nonreligious assembly or institution." Subsection (b)(1) makes no reference to a substantial burden requirement, and nothing else in the text or structure of RLUIPA suggests that subsection (b)(1) applies only when religious exercise is substantially burdened. Indeed, if subsection (b)(1) included the very same substantial burden requirement that gives rise to a claim under subsection (a), as the district court concluded, subsection (b)(1) would be entirely superfluous.

Furthermore, RLUIPA's equal terms provision was enacted to enforce the Supreme Court's Free Exercise jurisprudence in the land use context. That jurisprudence makes clear that a law that imposes *any* burden on religious exercise because of its religious character must withstand strict scrutiny. Accordingly, the equal terms provision applies to any actions that burden religious exercise, not merely those that impose a substantial burden.

Moreover, contrary to the district court's finding, RLUIPA's legislative history supports the conclusion that subsection (b) does not require a showing of substantial burden on religious exercise.

ARGUMENT

THE EQUAL TERMS PROVISION OF RLUIPA DOES NOT CONTAIN A SUBSTANTIAL BURDEN REQUIREMENT

The text, structure, purpose, and legislative history of RLUIPA demonstrate that there is no requirement that a plaintiff asserting a claim under subsection (b) prove the challenged land use regulation imposes a substantial burden on religious exercise.

RLUIPA provides:

> (a) Substantial burdens
>
> > (1) General rule
> > 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–
> >
> > > (A) is in furtherance of a compelling governmental interest; and

(B) is the least restrictive means of furthering that compelling governmental interest.

(2) Scope of application
This subsection applies in any case in which–

(A) the substantial burden is imposed in a program or activity that receives Federal financial assistance, even if the burden results from a rule of general applicability;

(B) the substantial burden affects, or removal of that substantial burden would affect, commerce with foreign nations, among the several States, or with Indian tribes, even if the burden results from a rule of general applicability; or

(C) the substantial burden is imposed in the implementation of a land use regulation or system of land use regulations, under which a government makes, or has in place formal or informal procedures or practices that permit the government to make, individualized assessments of the proposed uses for the property involved.

(b) Discrimination and exclusion

(1) Equal terms
No government shall impose or implement a land use regulation in a manner that treats a religious assembly or institution on less than equal terms with a nonreligious assembly or institution.

(2) Nondiscrimination
No government shall impose or implement a land use regulation that discriminates against any assembly or institution on the basis of religion or religious denomination.

(3) Exclusions and limits
No government shall impose or implement a land use regulation that–

(A) totally excludes religious assemblies from a jurisdiction; or

(B) unreasonably limits religious assemblies, institutions, or structures within a jurisdiction.

42 U.S.C. 2000cc.

A. Under RLUIPA's Plain Language, The Equal Terms Provision In Subsection (b)(1) Does Not Require Proof Of A Substantial Burden On Plaintiff's Religious Exercise

Subsection (b)(1), the equal terms provision states, "[n]o government shall impose or implement a land use regulation in a manner that treats a religious assembly or institution on less than equal terms with a nonreligious assembly or institution." Clearly, the elements of an equal terms claim, as described in the statute, do not include proof of a substantial burden on religious exercise.

Moreover, the structure of the statute confirms the conclusion that the equal terms provision contains no substantial burden requirement. Subsection (a) of 42 U.S.C. 2000cc, is entitled "Substantial burdens," implying that the "substantial burden" requirement is what makes this subsection distinct. Further, the subsection contains three "jurisdictional" hooks which apply only to "this subsection." Indeed, each alternative basis for jurisdiction repeats the "substantial burden" requirement. It is only in these three circumstances that a plaintiff has a cause of action based on a showing of substantial burden on religious exercise. Where Congress intended there to be a substantial burden requirement it made that clear in the statutory language.

In contrast, subsection (b) is entitled "Discrimination and exclusion." It has three parts, prohibiting (1) treatment of a religious assembly or institution on less than equal terms than a nonreligious assembly or institution, (2) discrimination on the basis of religion or religious denomination, and (3) exclusion of, or

unreasonable limitation on, religious assemblies or institutions in a jurisdiction. 42 U.S.C. 2000cc(b). Congress' differentiation between the two classes of claims in subsection (a) and subsection (b) indicates a deliberate distinction in the elements of proof. The district court's conclusion that the prohibition in subsection (b)(1) is only applicable when religious exercise has been substantially burdened cannot be squared with the language of the statute.

The district court's reading of the statute defies logic, as well as principles of statutory construction. The court reads the statute to say that (1) a substantial burden on religious exercise alone creates a cause of action, and (2) a substantial burden on religious exercise creates a cause of action when religious assemblies or institutions are treated worse than nonreligious ones. Under this interpretation, subsection (b)(1) is rendered superfluous and provides no additional protection of religious exercise. This result runs contrary to a basic principle of statutory construction that every part of a statute be given meaning. See *Duncan* v. *Walker*, 533 U.S. 167, 174 (2001) ("[A] statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant.") (quoting *Market Co.* v. *Hoffman*, 101 U.S. 112, 115 (1879)). Moreover, if proof of a violation under subsection (b)(1) necessarily entailed proof of a violation of subsection (a), plaintiffs would have no reason to bring claims under subsection (b)(1).

Courts have avoided rendering subsection (b)(1) superfluous by applying the equal terms provision without requiring the plaintiff to demonstrate a

substantial burden on religious exercise. See, *e.g.*, *Konikov* v. *Orange County*, 410 F.3d 1317, 1327-1329 (11th Cir. 2005) (determining that, though the zoning code did not impose a substantial burden on plaintiff's religious exercise, it violated RLUIPA's equal terms provision because it was enforced in a way that treated religious organizations on less than equal terms with nonreligious ones); *Midrash Sephardi, Inc. v. Town of Surfside*, 366 F.3d 1214, 1229-1235 (11th Cir. 2004) (finding that a zoning ordinance prohibiting churches in a certain district did not impose a substantial burden on the plaintiffs but nonetheless violated RLUIPA's equal terms provision); *Hollywood Community Synagogue, Inc.* v. *City of Hollywood*, No. 04-61212-CIV, 05-60687-CIV, 2006 WL 1320044, at *21-23 (S.D. Fla. May 10, 2006) (holding that "[p]laintiffs need not allege a substantial burden to state claims under RLUIPA §§ (b)(1) and (b)(2)"); *Vision Church, United Methodist* v. *Village of Long Grove*, 397 F. Supp. 2d 917, 930 (N.D. Ill. 2005) (determining that a zoning ordinance did not impose a substantial burden on plaintiff, but not finding that determination dispositive on the plaintiff's equal terms claim, and denying that claim because there was no evidence that any nonreligious group received more favorable treatment); *Williams Island Synagogue, Inc.* v. *City of Aventura*, 358 F. Supp. 2d 1207 (S.D. Fla. 2005) (rejecting plaintiff's substantial burden claim, but going on to separately analyze plaintiff's equal terms claim and rejecting it because plaintiff was actually treated on equal terms with nonreligious institutions); see also *Saints Constantine & Helen Greek Orthodox Church, Inc.* v. *City of New Berlin*, 396 F.3d 895, 900 (7th

Cir. 2005) (emphasizing that the equal terms provision is a "*separate* provision of the Act" which is distinct in its operation from the substantial burden provision); *Civil Liberties for Urban Believers* v. *City of Chicago*, 342 F.3d 752, 762 (7th Cir. 2003) ("the substantial burden and nondiscrimination provisions are operatively independent of one another"), cert. denied, 541 U.S. 1096 (2004).

B. The Equal Terms Provision Enforces The Supreme Court's Free Exercise Jurisprudence In the Land Use Context And Therefore Does Not Require A Showing That Plaintiff's Religious Exercise Is Substantially Burdened

By requiring proof of substantial burden, the district court interprets RLUIPA's equal terms provision to provide less protection for religious assemblies than the protection already afforded by the Constitution. The interpretation therefore conflicts with RLUIPA's instruction that it "shall be construed in favor of a broad protection of religious exercise, to the maximum extent permitted by the terms of this chapter and the Constitution." 42 U.S.C. 2000cc-3(g).

Subsection (b)(1), like other provisions of RLUIPA, codifies Supreme Court jurisprudence protecting religious liberty. See *Midrash Shephardi* v. *Town of Surfside*, 366 F.3d 1214, 1232 (11th Cir. 2004) ("RLUIPA's equal terms provision codifies the *Smith-Lukumi* line of precedent"). Indeed, the joint statement of RLUIPA's Senate sponsors, Senators Hatch and Kennedy, states that subsections (b)(1) and (b)(2) "enforce the Free Exercise Clause rule against laws that burden religion and are not neutral and generally applicable." 146 Cong. Rec. S7774

(July 27, 2000). Therefore, subsection (b)(1) must be interpreted by reference to the Supreme Court's Free Exercise jurisprudence.

In *Employment Division* v. *Smith*, 494 U.S. 872, 885 (1990), the Supreme Court held that the First Amendment does not require governments to grant exemptions based on religion from laws that are generally applicable. The Court also explained that laws must be neutral toward religion and, therefore, may not permit conduct engaged in for secular reasons while prohibiting that conduct when it is "engaged in for religious reasons." *Id.* at 877. In *Church of the Lukumi Babalu Aye* v. *City of Hialeah*, 508 U.S. 520 (1993), the Court summarized the Free Exercise Clause rule of *Smith* stating, "our cases establish the general proposition that a law that is neutral and of general applicability need not be justified by a compelling governmental interest even if the law has the incidental effect of burdening a particular religious practice." *Id.* at 531 (citing *Smith*). *Lukumi* articulated the converse principle that where a law burdening religious practice is not neutral or generally applicable, it "must be justified by a compelling governmental interest and must be narrowly tailored to advance that interest." *Id.* at 531-532. In *Lukumi*, the Court measured neutrality and general applicability by examining the relationship between the purported governmental interests achieved by the laws at issue and the actual coverage of those laws. *Id.* at 537-546. The Court found that the laws were not generally applicable because "[t]hey fail to prohibit nonreligious conduct that endangers [the City's claimed interests of protecting the public health and preventing cruelty to animals] [to] a similar or

greater degree than Santeria sacrifice [the religious exercise at issue in the case.]" *Id.* at 543. Thus, *Lukumi* interprets the Free Exercise Clause to prohibit laws that burden religious activities but do not burden nonreligious activities that have a similar effect on the claimed interests the law is designed to achieve.

The opinion in *Lukumi* never uses the term "substantial burden." Nor does it suggest that strict scrutiny applies to laws that are not neutral and generally applicable only when those laws substantially burden religious practice. *Smith* and *Lukumi* stand for the proposition that a law that imposes a burden on religious exercise *because* of its religious character must be narrowly tailored to a compelling governmental interest. That is because the injury comes from the fact of disparate treatment itself, apart from its practical impact on religious exercise. Because subsection (b)(1) was enacted to enforce the rule of *Smith* and *Lukumi* in the land use context, Congress could not have intended to engraft a substantial burden requirement onto a claim that a religious assembly is not being treated on equal terms with a secular assembly.

In *Fraternal Order of Police Newark Lodge No. 12 (FOP)* v. *City of Newark*, 170 F.3d 359 (3d Cir.), cert. denied, 528 U.S. 817 (1999), this Court applied the *Smith-Lukumi* line of precedent. In *FOP*, this Court held that the police department was required to provide a religious exemption to its prohibition against beards because it already provided a medical exemption. *Id.* at 364-367. *FOP* reasoned that "the medical exemption raises concern because it indicates that the [Police] Department has made a value judgment that secular (*i.e.*, medical)

motivations for wearing a beard are important enough to overcome its general interest in uniformity but that religious motivations are not." *Id.* at 366. This Court stated that "when the government makes a value judgment in favor of secular motivations, but not religious motivations, the government's actions must survive heightened scrutiny." *Ibid.* Applying that test, this Court determined that the Police Department's proffered justifications for the distinction were invalid. *Id.* at 366-367. *FOP* did not require a showing that the Police Department's "no beards policy" created a substantial burden on plaintiffs' religious exercise. Moreover, in a subsequent Free Exercise case, this Court explicitly held that "[u]nder *Smith* and *Lukumi*[,] * * * there is no substantial burden requirement when government discriminates against religious conduct." *Tenafly Eruv Ass'n* v. *Borough of Tenafly*, 309 F.3d 144, 170 (3d Cir. 2002) (defendant violated the Free Exercise Clause by requiring the plaintiff to remove religiously significant items called *lechis* from utility poles when the defendant allowed individuals to affix things to the poles for secular purposes), cert. denied, 539 U.S. 942 (2003). See also *Blackhawk v. Pennsylvania*, 381 F.3d 202 (3d Cir. 2004) (state could not refuse to grant a hardship waiver of the $50 fee for keeping a wild animal to a Native American who kept a bear for religious reasons when zoos and circuses were exempt from the fee, because exemptions for zoos and circuses undermined the interests served by the fee provision to at least the same degree as would an exemption for the plaintiff).

The district court's opinion cannot be squared with the precedent of the Supreme Court and this Court. Under the district court's interpretation, a government could explicitly disfavor a religious assembly or institution so long as it did not create a substantial burden on the religious exercise of the assembly or institution. The flawed results of the district court's reasoning may be even more obvious with respect to RLUIPA's nondiscrimination provision in subsection (b)(2). If plaintiffs bringing an action under subsection (b)(2) are required to show a substantial burden on religious exercise, governments could discriminate on the basis of religion or against a particular religious denomination without running afoul of RLUIPA, as long as the denomination is not substantially burdened. Under this interpretation, a municipality could create a zone in which, for example, Christian churches may build on one acre lots but Hindu temples must build on five acre lots, unless a Hindu congregation can show that this rule substantially burdens its religious exercise.[2]

C. RLUIPA's Legislative History Does Not Support The District Court's Conclusion That A Subsection (b)(1) Equal Terms Claim Requires Proof Of A Substantial Burden On Plaintiff's Religious Exercise

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[2] The district court also erred by focusing on whether any secular assembly performing the same functions as the Mission also was excluded by the redevelopment plan. The question is whether the zoning regulation permits a secular assembly to operate while excluding a religious assembly, even though the religious assembly poses no different harm to the government's interests than the secular assembly. In other words, when religious and secular assemblies are similarly situated with respect to their impact on land use planning and policies, a government may not selectively favor one or more secular interests while excluding religious ones. See *FOP*, 170 F.3d at 366-367.

In addition to making clear that subsection (b)(1) was intended to enforce the *Smith-Lukumi-FOP* line of cases, RLUIPA's legislative history supports the conclusion that subsection (b) does not require a showing of substantial burden on religious exercise. The analysis of the Act, submitted in the House by chief sponsor Congressman Canady, states that subsection (a)(2) confines the General Rule of subsection (a)(1) to "cases within Congress's constitutional authority under the Commerce Clause, the Spending Clause or Section 5 of the Fourteenth Amendment * * * [in] cases in which the government has authority to make individualized assessments of the uses to which the property is put." 146 Cong. Rec. E1563-01 (Sept. 21, 2000). The plain meaning of this statement is that the substantial burden test only applies when one of the three jurisdictional requirements of subsection (a)(2) is met. Therefore, the substantial burden test does not apply to claims under subsection (b), which do not require satisfaction of any of the jurisdictional requirements of subsection (a)(2). Additionally, the House and Senate sponsors' analyses, 146 Cong. Rec. E1563 and 146 Cong. Rec. S7774, treat subsection (b) as independent of subsection (a) and do not mention the phrase "substantial burden" in their discussions of subsection (b).

The district court purported to find support in RLUIPA's legislative history for its conclusion that the substantial burden requirement of subsection (a) applies also to subsection (b). The court stated "that sections (b)(1) and (b)(2) 'enforce the Free Exercise Clause rule against laws that burden religion and are not neutral

and generally applicable.'" *Lighthouse Inst. for Evangelism, Inc.* v. *City of Long Branch*, 406 F. Supp. 2d 507, 519 (D.N.J. 2005) (quoting 146 Cong. Rec. S7774-7776). The court does not make clear why it believes this statement supports the notion that subsection (b)(1) contains a substantial burden requirement. As explained *supra* 15-18, this statement actually shows that Congress intended to enforce the Court's Free Exercise jurisprudence, which clearly supports the contrary conclusion.

The second phrase from the legislative history on which the district court relied is from the Joint Statement of Senator Hatch and Senator Kennedy under the section heading "Burden of persuasion," and states, "the party asserting a violation of this Act shall in all cases bear the burden of proof that the governmental action in question constitutes a substantial burden on religious exercise." 146 Cong. Rec. S7774. The language, however, addresses *who* has the burden of proof when substantial burden must be proven, not *when* it must be proven. The language in the statute confining the substantial burden requirement to cases brought under subsection (a) makes this clear. See 42 U.S.C. 2000cc(a).

The last phrase from the legislative history cited by the district court states that subsection (b) "directly address[es] some of the more egregious forms of land use regulation, and provide[s] more precise standards than the substantial burden

and compelling interest tests."[3] This phrase offers no support for the district court's reading of the statute. Indeed, it supports the position that proof of a substantial burden on religious exercise is not required in order to state a claim under subsection (b). It means that in addition to creating a cause of action for substantial burden on religious exercise, the Act also includes more specific standards for discriminatory land use regulation — including regulation that treats religious assemblies or institutions on less than equal terms with similarly situated secular ones.

* * * * *

It is clear from the text, structure, purpose and legislative history of RLUIPA that subsections (a) and (b) operate independently and there is no substantial burden requirement for proof of a violation of subsection (b)(1). The district court's decision is wrong and could curtail significantly the operation of the statute by imposing an additional barrier to relief that Congress did not prescribe.

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[3] The district court incorrectly cites this as 146 Cong. Rec. S7774-7776. In fact the phrase comes from 146 Cong. Rec. E1563.

CONCLUSION

This Court should reverse the district court's ruling insofar as it holds that a plaintiff must show a substantial burden on religious exercise to prove a violation of 42 U.S.C. 2000cc(b)(1).

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CERTIFICATE OF COMPLIANCE

I certify that this BRIEF FOR THE UNITED STATES AS *AMICUS CURIAE* complies with the type-volume limitation set forth in Fed. R. App. P. 29(d) and Rule 32(a)(7). This brief contains 5310 words, as calculated by the WordPerfect 12 word-count system. The typeface is Times New Roman, 14-point font.

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Date: June 7, 2006

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I certify that on June 7, 2006, two copies of the foregoing BRIEF FOR THE UNITED STATES AS *AMICUS CURIAE* were sent by overnight mail, postage prepaid, on June 7, 2006, to the following counsel:

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