No. _____

IN THE

Supreme Court of the United States

LIVING WATER CHURCH OF GOD,

Petitioner,

v.

CHARTER TOWNSHIP OF MERIDIAN, *ET AL.*,

Respondents.

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

PETITION FOR A WRIT OF CERTIORARI

STEVEN M. JENTZEN
STEVEN M. JENTZEN, P.C.
106 S. Washington
Ypsilanti, MI 48197
Telephone: (734) 482-5466

KEVIN J. HASSON
Counsel of Record
ERIC C. RASSBACH
LORI HALSTEAD WINDHAM
ROGER T. SEVERINO
THE BECKET FUND FOR RELIGIOUS LIBERTY
1350 Connecticut Ave., NW
Suite 605
Washington, DC 20036
Telephone: (202) 955-0095

Counsel for Petitioner

QUESTION PRESENTED

Whether a government's targeted application of its zoning regulations to prevent a church from providing religious education puts a "substantial burden" on that church's religious exercise under the federal Religious Land Use and Institutionalized Persons Act, Section 2(a), 42 U.S.C. § 2000cc(a).[*]

[*] A very similar question is currently pending before the Court on a petition for a writ of certiorari in *Greater Bible Way Temple of Jackson* v. *City of Jackson*, et al., No. 07-1080 (petition filed February 15, 2008).

PARTIES TO THE PROCEEDING

Petitioner Living Water Church of God was the plaintiff-appellee below. Respondents Charter Township of Meridian and Susan McGillicuddy, Mary Helmbrecht, Bruce D. Hunting, Julie Brixie, Steve Stier, Andrew J. Such, and Anne W. Woiwode, in their official capacities as members of the Meridian Township Board, were defendants-appellants below.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6, Petitioner Living Water Church of God states that it does not have a parent corporation, nor does it issue any stock.

TABLE OF CONTENTS

QUESTION PRESENTED i

PARTIES TO THE PROCEEDING ii

CORPORATE DISCLOSURE STATEMENT ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES vi

OPINIONS BELOW 1

JURISDICTION 2

STATUTORY PROVISIONS INVOLVED 2

INTRODUCTION 3

STATEMENT OF THE CASE 4

REASONS FOR GRANTING THE WRIT 11

I. The Court of Appeals' decision deepens a three-way split over RLUIPA's substantial burden standard 11

A. Six Courts of Appeals and two state supreme courts have created three different definitions of "substantial burden" 12

1. The "effectively impracticable" standard 12

2. The "coercion" standard 14

3. The *Constantine* standard.....15

4. The majority's decision deepens the split by adopting the coercion standard.....17

B. The decision below creates an intra-Michigan split 19

C. The Court of Appeals' interpretation of RLUIPA is rooted in confusion over the Free Exercise Clause 20

II. This case is an appropriate one for resolving the disarray 21

CONCLUSION.....23

APPENDIX 1a

Opinion of the United States Court of Appeals for the Sixth Circuit (December 10, 2007).....1a

Mandate of the United States Court of Appeals for the Sixth Circuit (January 7, 2008).....33a

Order of the United States Court of Appeals for the Sixth Circuit (December 13, 2007).....35a

Opinion of the United States District Court for the Western District of Michigan (August 23, 2005).....38a

Order and Judgment of the United States District Court for the Western District of Michigan (August 23, 2005).....65a

Opinion of the United States District Court for the Western District of Michigan (December 15, 2005).....67a

Order of the United States District Court for the Western District of Michigan (December 15, 2005).....73a

Religious Land Use and Institutionalized Persons Act of 2000, 42 U.S.C. § 2000cc *et seq.*.....75a

TABLE OF AUTHORITIES

Cases

Bowen v. *Roy*, 476 U.S. 693 (1986)..... 20
Cambodian Buddhist Soc'y v. *Planning and Zoning Comm'n*, —A.2d—, 2008 WL 248053 (Conn. Feb. 12, 2008)..... 17
Church of the Lukumi Babalu Aye, Inc. v. *City of Hialeah*, 508 U.S. 520 (1993) 20
Civil Liberties for Urban Believers v. *City of Chicago*, 342 F.3d 752 (7th Cir. 2003) 9, 11, 12, 13
Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. *City of West Linn*, 111 P.3d 1123 (Or. 2005)..... 14
Ellis v. *Brotherhood of Railway, Airline & Steamship Clerks, Freight Handlers, Express & Station Employees*, 466 U.S. 435 (1984) 22
Employment Division v. *Smith*, 494 U.S. 872 (1990) 20
Fraternal Order of Police v. *City of Newark*, 170 F.3d 359 (3d Cir. 1999) 21
Grace United Methodist Church v. *City of Cheyenne*, 451 F.3d 643 (10th Cir. 2006)..... 17
Greater Bible Way v. *City of Jackson*, 733 N.W. 2d 734 (Mich. 2007) 10, 13, 19, 23
Guru Nanak Sikh Soc'y v. *County of Sutter*, 456 F.3d 978 (9th Cir. 2006)..... 9, 16
Korzan v. *City of Mitchell*, 708 N.W.2d (S.D. 2006) 19
Lighthouse Institute for Evangelism v. *City of Long Branch*, 100 Fed.Appx. 70 (3d Cir. 2004) 13

Living Water Church of God v. *Charter Township of Meridian*, 2007 WL 4455434 (6th Cir. Dec. 13, 2007)..... 1, 2
Living Water Church of God v. *Charter Township of Meridian*, 384 F.Supp.2d 1123 (W.D.Mich. 2005)..... 2, 4, 5, 6, 7
Lyng v. *Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439 (1988) 20
Midrash Sephardi v. *Town of Surfside*, 366 F.3d 1214 (11th Cir. 2004)..... 13, 14, 17
Petra Presbyterian Church v. *Village of Northbrook,* 489 F.3d 846 (7th Cir. 2007) 15
Sherbert v. *Verner*, 374 U.S. 398 (1963)..... 20
Spratt v. *Rhode Island Department of Corrections*, 482 F.3d 33 (1st Cir. 2007) 16
Constantine and Helen Greek Orthodox Church v. *City of New Berlin*, 396 F.3d 895, 899-900 (7th Cir. 2005) 12, 15, 18
Thomas v. *Review Board*, 450 U.S. 707 (1981)..... 16
Westchester Day School v. *Village of Mamaroneck*, 504 F.3d 338 (2d Cir. 2007)..... 10, 16, 18

Statutes

42 U.S.C. § 1292(a) 22
42 U.S.C. § 1988..... 2
Religious Land Use and Institutionalized Persons Act of 2000 ("RLUIPA"), 42 U.S.C. § 2000cc .. 2, 14

Rules

Supreme Court Rule 12.4 2
Supreme Court Rule 29.6 ii

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PETITION FOR A WRIT OF CERTIORARI

Living Water Church of God respectfully petitions for a writ of certiorari to review two judgments of the United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

The opinions of the Court of Appeals are not reported, but are available at 2007 WL 4322157 (merits appeal), 2007 WL 4455434 (fees appeal) and in the Appendix. Appendix ("App.") at 1a (merits

appeal) and App. 35a (fees appeal).[1] The opinions of the United States District Court for the Western District of Michigan are respectively reported at 384 F.Supp.2d 1123 (merits) and unreported but available at 2005 WL 3447668 (fees). Both are also reproduced in the Appendix. App. 38a (merits) and App. 67a (fees).

JURISDICTION

The Court of Appeals' judgment in the merits appeal was entered on December 10, 2007. App. 1a. Its judgment in the fees appeal was entered on December 13, 2007. App. 35a. Jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The Religious Land Use and Institutionalized Persons Act of 2000 ("RLUIPA"), 42 U.S.C. § 2000cc provides:

> (a) Substantial burdens
>
> (1) General rule

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[1] One appeal, No. 05-2309, concerned the merits of Living Water's RLUIPA claims, while a related appeal, No. 06-1210, concerned Living Water's application for attorneys' fees under 42 U.S.C. § 1988. The Court of Appeals consolidated the appeals on February 17, 2006. The Court of Appeals reversed the district court's fee award solely "because Living Water is no longer the prevailing party" on the merits. 2007 WL 4455434 at *1. Petitioner petitions for review of both judgments pursuant to Supreme Court Rule 12.4, but seeks only remand of the fees issue.

> 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.

App. 75a-76a.

INTRODUCTION

This case is an excellent example of why Congress found RLUIPA to be necessary and why it should be allowed to mean what it plainly says. In its 8-year odyssey to obtain a land use permit to operate a religious school, Living Water filed new permit applications when the Township asked it to, reduced its enrollment when the Township asked it to, shrank its building when the Township asked it to, and offered to pay for road improvements when the Township asked it to. But the Township's ever-more creative and targeted applications of its zoning regulations ensured that every one of these efforts at compromise came to a dead end. In fact, the Township's actions have forced the Church to shut down both its daycare and its school.

Nevertheless, a divided panel majority for the United States Court of Appeals for the Sixth Circuit reasoned that the Church's religious exercise was not substantially burdened because it was not completely unable to engage in some sort of religious activity on its property. And because the Township hadn't banned the Church from all types of religious teaching, the majority reasoned, it was immaterial that the Church has had to stop most of it. This level of confusion over the substantial burden standard is by no means restricted to the panel majority here. In fact such confusion may be the most salient thing the otherwise-divided Courts of Appeals and state supreme courts to construe RLUIPA have in common. It merits this Court's attention.

STATEMENT OF THE CASE

Living Water Church of God is located in Meridian, a suburb of Lansing, Michigan, that doesn't let churches or religious schools locate anywhere within its borders without getting a special use permit ("SUP"). App. 60a; R.971.[2] SUPs are awarded after a case-by-case evaluation of a permit application. App. 52a-53a.

In 2000 the Church applied for an SUP to build a 28,500-square-foot building to house a full-service Christian school. App. 40a. At the City's request, the Church made a number of concessions to the Township, such as limiting school enrollment,

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[2] "R." citations are to the record in the case, specifically the joint appendix submitted to the Court of Appeals.

changing the school schedule to ease traffic, and funding road improvements. *Id.* After the Church agreed to these concessions, the Township initially granted the SUP in May 2000. *Id.*

But it soon changed its mind. In March 2001, while the Church was still in its pre-construction promotion and fundraising part of the project, the City notified the Church that its SUP would "expire" if it did not "beg[i]n substantial construction of the project" soon. App. 40a-41a. The Church filed for an extension the next day, R.674, and reasonably believed that an extension would be granted, because up until it considered the Church's SUP application, the Township had a uniform policy of granting extensions on ***all*** special use permits. App. 41a.

But eight weeks after the Church asked for an extension—and ten days before its permit was to expire—the Township suddenly announced that it had revoked its previous policy and denied the Church's SUP extension. App. 41a. A few days after that, the Township passed a resolution banning all SUP extensions, which effectively required the Church to file a second, full-blown SUP application. *Id*.

Meanwhile, the Church's school was forced to open at an offsite, temporary location while the Church revised its plans and prepared a new SUP application. App. 41a-42a, 45a-46a; R.751. As the district court found, despite the Township's "sudden[] abandon[ment]" of its prior policy, the Church "worked diligently and in good faith with the Township to address its concerns before submitting a

revised [SUP] proposal." App. 59a-60a. Rev. Dumont, the Church's pastor, met with Township planning staff and, at their direction, reduced the enrollment cap again, this time by more than 50%. *Id.* at 1126-27.

After "expend[ing] significant energy and funds" over two years to develop a new SUP proposal, App. 60a, the Church filed the new proposal on May 21, 2003, requesting approval for a building with a smaller footprint than the proposed building the Township had approved in 2000. *Id.* It also applied for a related SUP for school use of the property. App. 44a. The Planning Commission voted to approve both SUPs, but that approval was appealed by neighbors to the Township Board. App. 43a. At the public meeting, Township Counsel advised the Board that a partial denial—denying the SUP for the building, while approving the SUP for school use—would have the "practical effect" of killing the entire project. R.346, 986–87. The Township also could have approved both SUPs while placing conditions on approval, such as further limiting the square footage of the building.[3]

At its next meeting, the Board followed the "practical effect" strategy—it permitted school to use the site, but denied the SUP that would allow it to build. App. 43a-44a. It claimed to base the denial on land-area-to-building-size ratios, ratios that are not part of the Township's zoning ordinance. App. 45a,

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[3] *See* App. 44a (SUP issued with conditions); R.53-55 (SUP issued with numerous construction conditions including new landscaping plan, parking plan, and playground location).

51a-52a. When it submitted its application, the Church had no way to know that the Township would consider these ratios in making its decision. *See* App. 51a-52a.

After the permit denial, the Church filed suit in state court against the Township, alleging, among other things, violation of RLUIPA 2(a). App.8a. The Township removed the case to federal court and moved for summary judgment on all counts; the District Court denied that motion in its entirety. R.4, 7, 10. The court held a 2-day bench trial and rendered an opinion granting declaratory and injunctive relief for the church. App. 39a, 65a-66a.

The district court found "[t]he ratios were developed for the purpose of reviewing Plaintiff's application and they have not been applied to any other applicants since their creation." App. 43a. The denial was based "on arbitrary grounds that were not contained in the ordinance." App. 60a.

The district court concluded that because the Township denied the Church's application for a special use permit, the Church is "unable to practice its religious beliefs in its current location because the facilities are too small for the needs of the congregation and staff." App. 58a.

The district court also found that the denial had a number of serious consequences for the Church. It lost current and potential members. App. 46a. Due to the challenges of sharing many ministries in the sanctuary space, the Church was forced to close down the Christian daycare it had operated for eight years.

Id. Other ministries were severely restricted due to lack of space. *Id.*

The court found that "[h]aving the Church and the school in two separate locations is … not feasible." App. 59a. "The Church is severely limited in its ability to recruit for the school because of the uncertainty about the future space and the current lack of programming associated with the lack of space." App. 46a-47a. Many families who expressed interest in the school were unwilling to commit until space constraints and uncertainty over its permanent home were resolved. *Id.*; R.814, 874–77.

Finally, because both churches and religious schools are not a permitted use anywhere in the Township, the district court held that the Church would need two SUPs to locate a church and school of any size anywhere in the Township, not to mention one large enough to meet the needs of this particular ministry. App. 60a. Accordingly, as the district court found, there is "no guarantee that the school and church could build anywhere else in the Township." *Id.* This was especially true in light of the Township's prior denial based upon an arbitrary "density of the land to building area ratio," for which "the Township has no guidelines specifying what is an acceptable ratio and what ratio is too dense." App. 61a-62a.

The district court concluded that the Church's religious exercise was substantially burdened because the Church would "incur delay, expense and uncertainty if it is required to reapply or search for another site." App. 60a. Moreover, "[d]enial of the

SUP is directly responsible for rendering Plaintiff's ability to use its real property for its religious purposes effectively impracticable." *Id.*[4]

On an interlocutory appeal from the order granting injunctive and declaratory relief, the Court of Appeals reversed.[5] App. 2a. A majority of the panel crafted its own test for RLUIPA substantial burden claims, while Judge Moore concurred in the judgment only and argued for adopting the standard the Seventh Circuit used in *CLUB* v. *City of Chicago*, 342 F.3d 752 (7th Cir. 2003). App. 31a-32a.

To construe the term "substantial burden," the majority scanned this Court's use of the term, as well as "several opinions of our sister circuits, which have defined 'substantial burden' in a variety of ways." App. 14a. The majority reviewed the different standards in the Fourth, Seventh, Ninth[6] and Eleventh Circuits. App. 14a-16a. The majority did not "purport to commit to any one particular definition" of substantial burden, App. 31a, but summarized its new standard in this way: "does the government action place substantial pressure on a religious institution to violate its religious beliefs or

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[4] Although not part of the record on appeal, the Church was forced to shut down the school for three years while the appeal was pending, due to difficulties in recruiting for a school in a temporary location separate from the Church, and the uncertainty inherent in the long appeals process.

[5] The parties disputed below whether the appeal was interlocutory or not. *See* n.12 below.

[6] Remarkably, the majority failed to discuss the Ninth Circuit's process-focused standard in *Guru Nanak* v. *County of Sutter*, 456 F.3d 978 (9th Cir. 2006).

effectively bar a religious institution from using its property in the exercise of its religion?" App. 19a.

The majority "recognize[d] that the Township's decision burdens Living Water in several ways." App. 23a. But it characterized these burdens as "mere inconvenience," theorizing that the church could simply build a 14,000-square-foot addition and get by without the need for an SUP, despite the district court's explicit factfinding to the contrary. *Id.*; *see* App. 58a-59a (finding that "[a]dding a 14,000 square feet addition…would not resolve the space problems."). The majority also found that the Township's procedural irregularities and use of "arbitrary grounds that were not contained in the ordinance," App. 60a, were irrelevant even if the denial "could be said to be arbitrary". App. 27a-28a. The court said these facts were not relevant because the Church failed to prove any animus underlying them and because the denial itself did not "impose a substantial burden on the church's religious exercise." App. 26a-28a.

The majority made a brief attempt to distinguish the Second Circuit's recent decision on very similar facts in *Westchester Day School* v. *Village of Mamaroneck,* 504 F.3d 338 (2d Cir. 2007). According to the majority, the difference was that Westchester Day's "existing facilities are deficient," its effectiveness "has been significantly hindered" and "the school's enrollment has declined since 2001." App. 29a-30a. The majority did not explain how those facts differ from the facts in this case. *See id.* Nor did the majority mention the Michigan Supreme Court's decision in *Greater Bible Way* v. *City of*

Jackson, 733 N.W. 2d 734 (Mich. 2007), despite receiving Rule 28(j) letters from the parties. The majority admitted, however, that the Church would incur delay and expense. App. 28a.

Ultimately, the majority said its particular interpretation of the substantial burden standard was required by this "Court's 'Free Exercise' jurisprudence," App. 28a n.6, concluding that the term "substantial burden" in RLUIPA must be entirely congruent with that term in Free Exercise analysis. Otherwise, RLUIPA would become "vulnerable to attack under the Court's 'Establishment Clause' jurisprudence." *Id.*

Judge Moore concurred in the judgment, but wrote separately to note her disagreement with the majority's substantial burden standard: "No other circuit has advanced this precise standard, and I think this formulation is inadvisable." App. 31a. Instead, Judge Moore "would adopt the substantial-burden standard established by the Seventh Circuit in *Civil Liberties for Urban Believers* v. *City of Chicago,* 342 F.3d 752 (7th Cir. 2003)." App. 31a-32a.

REASONS FOR GRANTING THE WRIT

I. The Court of Appeals' decision deepens a three-way split over RLUIPA's substantial burden standard.

The decision below only adds further confusion to an already chaotic legal landscape. In fact, it not only broadens the divergence among the lower courts, it

actually deepens it, by creating a divergence between the federal and state courts within Michigan itself.

A. Six Courts of Appeals and two state supreme courts have created three different definitions of "substantial burden."

Before the Court of Appeals rendered its decision in this case, five different Courts of Appeals and two state supreme courts had defined "substantial burden" under RLUIPA's land use provisions. Those decisions have followed three different schools of thought:

1. The "effectively impracticable" standard.

In *Civil Liberties for Urban Believers* v. *City of Chicago*, 342 F.3d 752 (7th Cir. 2003) ("*CLUB*"), the Seventh Circuit defined a substantial burden as a law which "necessarily bears direct, primary, and fundamental responsibility for rendering religious exercise—including the use of real property for the purpose thereof within the regulated jurisdiction generally—effectively impracticable." *Id.* at 761. *CLUB* involved a broad RLUIPA challenge to an entire zoning code that permitted churches in some districts, but required them to obtain permits or rezonings in others. *CLUB*, 342 F.3d at 761. The Seventh Circuit has since limited *CLUB* to those facts—that is, to cases where the religious organization is not simply challenging the denial of its individual permit, but rather is challenging the permitting process as a whole. *See Sts. Constantine and Helen Greek Orthodox Church* v. *City of New*

Berlin, 396 F.3d 895, 899-900 (7th Cir. 2005) (limiting *CLUB*).

Nevertheless, *CLUB's* "effectively impracticable" standard has taken on a life of its own, notably in the Third Circuit, and now in the Michigan Supreme Court. In *Lighthouse Institute for Evangelism* v. *City of Long Branch*, 100 Fed.Appx. 70 (3d Cir. 2004), the Third Circuit held that where a church could rent space elsewhere or "could have operated as a church by right in other districts," there could be no substantial burden in denying it the right to function at the particular property it owned. *Id.* at 76-77 (citing *CLUB*, 342 F.3d at 761). By applying the *CLUB* standard to the denial of an individual permit, the Third Circuit has turned RLUIPA's substantial burden protection into a reiteration of RLUIPA's separate prohibition on total exclusion, RLUIPA § 2(b)(3)(A).[7]

The Michigan Supreme Court has made the same error. It has applied the effectively impracticable standard to the denial of the Church's individual rezoning application, holding that "the city's refusal to rezone the property so plaintiff can build an apartment complex does not constitute a 'substantial burden'" on plaintiff's religious exercise. *Greater Bible Way,* 733 N.W. 2d at 750. Why not? Because, the Court explained, the "city is not forbidding plaintiff from building an apartment complex; it is simply regulating where that apartment complex can

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[7] The Eleventh Circuit rejected the *CLUB* standard for precisely this reason. *Midrash Sephardi* v. *Town of Surfside*, 366 F.3d 1214, 1227 (11th Cir. 2004).

be built. If plaintiff wants to build an apartment complex, it can do so; it just has to build it on property that is zoned for apartment complexes." *Id.* This interpretation, like the Third Circuit's, makes RLUIPA Section 2(a) a redundancy.

2. The "coercion" standard.

The Eleventh Circuit has expressly rejected *CLUB*'s "effectively impracticable" standard. *Midrash Sephardi* v. *Town of Surfside*, 366 F.3d 1214, 1227 (11th Cir. 2004). *Midrash* instead defined a substantial burden as something "akin to significant pressure which directly coerces the religious adherent to conform his or her behavior accordingly." *Id.* at 1227. It ruled that exclusion from a particular district (where the plaintiff synagogues rented property) was not in and of itself a substantial burden. *Id.* at 1228. In short, under this standard, a "substantial burden" is something more than exclusion from a particular piece of property, but something less than exclusion from the entire jurisdiction. *Id.*

Similarly, the Supreme Court of Oregon has held that "government regulation imposes a substantial burden on religious exercise only if it 'pressures' or 'forces' a choice between following religious precepts and forfeiting certain benefits, on the one hand, and abandoning one or more of those precepts in order to obtain the benefits, on the other." *Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints* v. *City of West Linn*, 111 P.3d 1123, 1130 (Or. 2005) (en banc).

3. The *Constantine* standard.

The Second, Seventh, and Ninth Circuits have all settled on broader, more flexible standards. The leading case for this faction is *Sts. Constantine and Helen Greek Orthodox Church* v. *City of New Berlin*, 396 F.3d 895 (7th Cir. 2005) (Posner, J.). *Constantine* focused more on the government's treatment of the religious applicant than on any resulting coercion or on the availability of alternatives. It held that the fact "[t]hat the burden would not be insuperable would not make it insubstantial," and that substantial burdens may result from the "delay, uncertainty, and expense" of multiple land use applications. *Constantine*, 396 F.3d at 901. The court noted that, while broad, the definition was appropriate in situations where the "state delegates essentially standardless discretion to nonprofessionals operating without procedural safeguards." *Id.* at 900. "[T]he 'substantial burden' provision backstops the explicit prohibition of religious discrimination in the later section of the Act, much as the disparate-impact theory of employment discrimination backstops the prohibition of intentional discrimination." *Constantine*, 396 F.3d at 900. Likewise, in *Petra Presbyterian Church* v. *Village of Northbrook*, 489 F.3d 846, 851 (7th Cir. 2007) (Posner, J.), the Court held that having the "reasonable expectation of obtaining a permit" but failing to receive one could constitute a substantial burden.

The Ninth Circuit has adopted a similarly fact- and history-based approach, describing a substantial burden as a government restriction that "to a

significantly great extent lessened the possibility that future [land use] applications would be successful." *Guru Nanak Sikh Soc'y* v. *County of Sutter*, 456 F.3d 978, 989 & n.12 (9th Cir. 2006). In *Guru*, the history of the Sikh temple's attempts to find a place to build its house of worship, and the expectation that it would be denied again, were crucial to finding a substantial burden. *Id.* at 989.

The Second Circuit has also embraced a fact-based approach to the substantial burden question. In one instance it found a substantial burden where "the arbitrary, capricious, or unlawful nature of a defendant's challenged action suggest[ed] that a religious institution received less than even-handed treatment." *Westchester Day School* v. *Village of Mamaroneck*, 504 F.3d 338, 351 (2d Cir. 2007). The court did not limit substantial burdens to such circumstances, suggesting it also might find burdens where an absolute permit denial might "place substantial pressure on [a religious organization] to change its behavior," so long as there is "a close nexus between the coerced or impeded conduct and the institution's religious exercise." *Id.* at 350.[8]

Finally, two other Circuits have referred to the substantial burden standard in *dicta* but have not yet chosen sides. *See Spratt* v. *Rhode Island Department of Corrections*, 482 F.3d 33, 38 (1st Cir. 2007) (assuming, *arguendo*, that the "substantial

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[8] After the Second Circuit's decision, the parties settled the case for $4,750,000.00. *See Westchester Day School* v. *Village of Mamaroneck*, Civ. No. 02-06291, Dkt. No. 100, Stipulation Consent Judgment (S.D.N.Y. Feb. 6, 2008).

pressure" formulation of *Thomas* v. *Review Board*, 450 U.S. 707 (1981) applies); *Grace United Methodist Church* v. *City of Cheyenne*, 451 F.3d 643, 661-63 (10th Cir. 2006) (noting that RLUIPA altered the court's earlier definition of "substantial burden," but not articulating a new definition). And recently the Connecticut Supreme Court questioned the entire premise of RLUIPA's substantial burden provisions. *See Cambodian Buddhist Soc'y* v. *Planning and Zoning Comm'n*, —A.2d—, 2008 WL 248053 (Conn. Feb. 12, 2008). That court stated that "the provision reasonably cannot be characterized as plain and unambiguous," noted the Circuit split, *id.* at *9-14, and then disposed of the case on other grounds. *Id.* at *14.

4. The majority's decision deepens the split by adopting the coercion standard.

The majority's decision here sharpens the split by creating another variant of the coercion standard. The standard it has chosen defines a substantial burden as government action that "place[s] substantial pressure on [the claimant] to violate its religious beliefs or effectively bar[s] the church from using its property in the exercise of religion." App. 24a. As Judge Moore pointed out, no other court has adopted this precise standard, App. 31a, although the language mimics somewhat the Eleventh Circuit's language in *Midrash*. *See* App. 15a-16a (quoting *Midrash* at length). The majority, however, seemed unconcerned with the split it was furthering, stating its differences with the other Circuits, but glossing over them.

This is particularly true of the Second Circuit's decision in *Westchester Day*. The facts of this case and those in *Westchester Day* are almost identical. Both cases involve religious schools operating in inadequate facilities which need to expand; both involve "arbitrary" decisions and procedural irregularities in obtaining permits.[9] The *Westchester Day* court focused heavily on the procedural irregularities and agreed with the district court's factfindings regarding the need for additional space for religious exercise. *Westchester Day,* 504 F.3d at 351-52. The majority here ignored the district court's factfindings and stated that procedural irregularities, "even if" they "could be said to be arbitrary," were irrelevant. App. 23a, 27a.

The Court also repudiated the standard used by the Seventh Circuit. The Seventh Circuit's standard focuses upon "delay, uncertainty, and expense." *Constantine*, 396 F.3d at 901. The court here agreed that the permit denial "will certainly result in additional expense and delay for Living Water," but went on to find no substantial burden. App. 28a. These disparate decisions cannot be reconciled.

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[9] *Compare* App. 45a-46a (describing inadequate school facilities) *and* App. 60a ("arbitrary" decision by Township) *with Westchester Day*, 504 F.3d at 346-46 (describing inadequate school facilities) *and id.* at 351-52 (village's permit denial was "arbitrary and unlawful").

B. The decision below creates an intra-Michigan split.

The majority also ignored the intra-Michigan split it was creating, despite the parties' 28(j) letters informing the Court of the Michigan Supreme Court's decision in *Greater Bible Way*. Since the Michigan Supreme Court adopted the "effectively impracticable" standard in that case, a plaintiff in Michigan state court can prevail on a substantial burden claim only if it can show that there is nowhere within the entire municipality where it can engage in religious exercise. *See Greater Bible Way,* 733 N.W. 2d at 750. This "effectively impracticable" standard makes it in fact effectively impracticable for a RLUIPA plaintiff to win any substantial burden claim unless the defendant municipality has banished religious institutions altogether.

If that same plaintiff brings its claim in Michigan federal court, however, it will not have to prove that there is nowhere in the municipality where it could engage in religious exercise. Instead it need only show that the defendant's land use regulations make it impossible for it to engage in any religious exercise *on its property*. *See* App. 19a. Though the majority's standard is hardly generous, it is better than the Michigan Supreme Court's. RLUIPA plaintiffs will have a strong—and unwarranted—incentive to bring their claims in federal rather than state court. By the same token, since RLUIPA is sometimes raised as an affirmative defense in state court proceedings, *see*, *e.g.*, *Korzan* v. *City of Mitchell*, 708 N.W.2d 683 (S.D. 2006), plaintiffs seeking to avoid the defense would bring their lawsuits in state court.

C. The Court of Appeals' interpretation of RLUIPA is rooted in confusion over the Free Exercise Clause.

On the way to deepening the Circuit split, the panel majority also demonstrated—and increased—the confusion surrounding the scope and meaning of the Free Exercise Clause under *Employment Division* v. *Smith*, 494 U.S. 872 (1990) and *Church of the Lukumi Babalu Aye*, *Inc.* v. *City of Hialeah*, 508 U.S. 520 (1993).

The majority held that its coercion standard was a straightforward application of the Free Exercise Clause as interpreted by *Sherbert* v. *Verner*, 374 U.S. 398 (1963) and *Lyng* v. *Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439 (1988). App. 11a-13a.[10] But the coercion standard it derives from those cases is ***narrower*** than even the *Smith* standard RLUIPA responded to. That's because the *Smith* standard, as further explained in *Lukumi*, makes a cardinal distinction between government decisions based on generally applicable rules and government decisions based on case-by-case determinations, that is, cases where the government takes into account the specific identity and characteristics of the person affected. Thus "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.'" *Lukumi*, 508 U.S. at 537 (quoting *Smith*, 494 U.S. at 884). This is so because "refusal to extend an exemption to an instance of

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[10] The majority cites neither *Smith* nor *Lukumi*.

religious hardship suggests a discriminatory intent." *Bowen* v. *Roy*, 476 U.S. 693, 708 (1986) (plurality op.); *see Smith,* 494 U.S. at 884 (adopting this reasoning). *See also Fraternal Order of Police* v. *City of Newark*, 170 F.3d 359, 364-66 (3d Cir. 1999) (Alito, J.).

The district court held[11] and the Court of Appeals did not contest,[12] that zoning regulations like those at issue here are "case-by-case" assessments that epitomize systems of "individualized exemptions" discussed in *Smith*, *Lukumi,* and *Bowen*. But the majority ignores this crucial distinction, as well as the ample evidence in the record that the Township targeted the Church for special disfavor just like Hialeah targeted Santeria worshippers.

The problem with RLUIPA is thus an echo of the lower courts' confusion over what *Smith* and *Lukumi* mean in the land use context—another good reason to bring clarity to RLUIPA and perhaps also its roots in the Free Exercise Clause.

II. This case is an appropriate one for resolving the disarray.

This case gives the Court as clear a shot as it will ever get at the RLUIPA substantial burden standard. There are no predicate or subsidiary questions for the Court to address. In particular, RLUIPA's constitutionality is not at issue. The only question before the Court would be the question presented.

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[11] App. 53a.

[12] App. 10a.

And there is a good factual foundation for the Court to build a decision on. The record from a 2-day bench trial on the merits is ample. Since the Court of Appeals did not find any error in the district court's factfinding, the district court's findings are definitive.

The case will also remain a live controversy. Although the Church has obtained property in another town as a backup option and temporary location for the school, it has resolved to wait for the outcome of this litigation before deciding how to use that property on a permanent basis, especially since moving there would require uprooting the Church and starting over in a new town. Moreover, the Church still has both a damages claim under RLUIPA and non-RLUIPA claims that the district court has not yet ruled on. *See*, *e.g.*, *Ellis* v. *Brotherhood of Railway, Airline & Steamship Clerks, Freight Handlers, Express & Station Employees*, 466 U.S. 435, 441-43 (1984) (existence of damages claim maintained live controversy).[13] The Court of

[13] The parties disputed below, and will no doubt dispute here, whether the Sixth Circuit properly had the Church's damages claim before it and was issuing a final judgment on all claims (Respondents' position) or was entertaining an interlocutory appeal (Petitioner's position). Unfortunately that court neglected to definitively resolve the issue. There is, however, little practical difference for this case. First, neither side disputes that the Court of Appeals had jurisdiction over the claims at issue here. And second, under either theory, a reversal by this court would result in a remand for a hearing on damages under the RLUIPA claim, and any other disposition would surely result in, at most, a purely ministerial dismissal by the district court of the RLUIPA claims.

Appeals' reversal of injunctive and declaratory relief on interlocutory appeal has an obvious effect on those remaining claims.

In addition, the Court can usefully contrast the facts and procedural posture here with those in the pending petition in *Greater Bible Way Temple of Jackson* v. *City of Jackson*, No. 07-1080 (petition filed February 15, 2008), in which undersigned counsel also represents the petitioner. The Court could consider both cases together. Alternatively, the Court should grant one petition and hold the other.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

KEVIN J. HASSON
Counsel of Record
ERIC C. RASSBACH
LORI HALSTEAD WINDHAM
ROGER T. SEVERINO
THE BECKET FUND FOR
RELIGIOUS LIBERTY
1350 Connecticut Avenue, NW
Suite 605
Washington, DC 20036-1735
Telephone: (202) 955-0095

March 10, 2008 *Counsel for Petitioners*