Exhibit A

IN THE UNITED STATES DISTRICT COURT
FOR THE NOTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

SOCIETY OF AMERICAN BOSNIANS AND HERZEGOVINIANS and UNITED STATES OF AMERICA, ***Plaintiffs,*** **v.** **CITY OF DES PLAINES**, ***Defendant.***	**No. 13 CV 6594** **No. 15 CV 8628** **(Hon. Matthew F. Kennelly)**

BRIEF OF THE BECKET FUND FOR RELIGIOUS LIBERTY
AS *AMICUS CURIAE* IN SUPPORT OF PLAINTIFFS

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INTEREST OF *AMICUS CURIAE*

Amicus The Becket Fund for Religious Liberty (Becket) is a nonpartisan, non-profit, public interest legal and educational institute that protects the free expression of all faiths. It has represented Buddhists, Christians, Hindus, Jews, Muslims, Native Americans, Santeros, Sikhs, and Zoroastrians, among others, in lawsuits across the country and around the world. Becket is widely recognized as one of the nation's leading law firms handling land-use litigation under the Religious Land Use and Institutionalized Persons Act (RLUIPA), 42 U.S.C. § 2000cc. It successfully represented the plaintiffs in the first case resolved under the Act. *Haven Shores Cmty. v. Grand Haven, City of, et al.*, No. 1:00-cv-00175 (W.D. Mich. filed Mar. 3, 2000). Since then, Becket has litigated a host of RLUIPA land-use cases as plaintiffs' counsel.[1] Some of Becket's RLUIPA land-use cases have concluded by favorable settlement.[2] And Becket has filed a series of

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[1] *See, e.g.*, *Elijah Grp., Inc. v. City of Leon Valley, Tex.*, 643 F.3d 419 (5th Cir. 2011); *Rocky Mountain Christian Church v. Bd. of Cty. Comm'rs*, 613 F.3d 1229 (10th Cir. 2010); *Lighthouse Inst. for Evangelism v. City of Long Branch*, 510 F.3d 253 (3d Cir. 2007); *Elsinore Christian Ctr. v. City of Lake Elsinore*, 197 F. App'x 718 (9th Cir. 2006); *United States v. Rutherford Cty., Tenn.*, No. 3:12-cv-737, 2012 WL 2930076 (M.D. Tenn. July 18, 2012); *Redwood Christian Schs. v. Cty. of Alameda*, 3:01-cv-4292, 2007 WL 214317 (N.D. Cal. 2007); *Castle Hills First Baptist Church v. City of Castle Hills*, 5:01-cv-1149, 2004 WL 546792 (W.D. Tex. Mar. 17, 2004); *Congregation Kol Ami v. Abington Twp.*, 2:01-cv-1919, 2004 WL 1837037 (E.D. Pa. Aug. 17, 2004), *amended by*, 2004 WL 2137819 (E.D. Pa. Sept. 21, 2004); *United States v. Maui Cty.*, 298 F. Supp. 2d 1010 (D. Haw. 2003); *Cottonwood Christian Ctr. v. Cypress Redev. Agency*, 218 F. Supp. 2d 1203 (C.D. Cal. 2002); *Freedom Baptist Church v. Twp. of Middletown*, 204 F. Supp. 2d 857 (E.D. Pa. 2002); *Hale O Kaula Church* v. *Maui Planning Comm'n*, 229 F. Supp. 2d 1056 (D. Haw. 2002).

[2] *See, e.g.*, *Church of Our Savior v. City of Jacksonville Beach, Florida*, 3:13-cv-1346 (M.D. Fla. filed Nov. 1, 2013) (Satisfaction of Judgment filed Nov. 2, 2015); *Living Faith Ministries v. Camden Cty. Improvement Auth.*, 1:05-cv-877 (D.N.J. filed Feb. 15, 2005) (Consent Order entered May 2, 2005); *Calvary Chapel O'Hare v. Vill. of Franklin Park*, 1:02-cv-3338 (N.D. Ill. filed May 9, 2002) (settlement agreement signed by parties Sept. 3, 2002); *Living Waters Bible Church v. Town of Enfield*, 1:01-cv-450 (D.N.H. filed Nov. 30, 2001) (Judgment entered Nov. 18, 2002); *Temple B'nai Sholom v. City of Huntsville*, 5:01-cv-1412 (N.D. Ala. filed June 1, 2001) (settlement agreement signed by parties June 2003; Stipulation of Dismissal entered July 24, 2003); *Refuge Temple Ministries v. City of Forest Park*, 1:01-cv-0958 (N.D. Ga. filed Apr. 12, 2001) (Consent Order entered Mar. 12, 2002); *Unitarian Universalist Church of Akron v. City of Fairlawn*, 5:00-cv-3021 (N.D. Ohio filed Dec. 4, 2000) (settlement approved by parties Oct. 1, 2001); *Haven Shores Cmty. Church v. City of Grand Haven*, 1:00-cv-175 (W.D. Mich. filed Mar. 13, 2000) (Consent Judgment entered Dec. 21, 2000); *Pine Hills Zendo v. Town of Bedford, N.Y. Zoning Bd. of Appeals*, No. 17833-01 (N.Y. Sup. Ct. filed Nov. 6, 2001) (settlement agreement allowing religious use and

amicus briefs in both land-use and prisoner cases involving RLUIPA.[3] Becket has often advocated for the rights of Muslim communities in such matters. *See, e.g.*, *Islamic Soc'y of Basking Ridge v. Twp. of Bernards.* 3:16-cv-01369 (D.N.J. filed Mar. 10, 2016); *United States v. Rutherford County, Tenn.*, 3:12-cv-737, 2012 WL 2930076 (M.D. Tenn. July 18, 2012); *Albanian Associated Fund v. Twp. of Wayne*, No. 06-cv-3217, 2007 WL 4232966 (D.N.J. Nov. 29, 2007). Recently, Becket successfully represented the petitioner in the first and only RLUIPA case resolved on the merits in the U.S. Supreme Court, *Holt v. Hobbs*, 135 S. Ct. 853 (2015), where the Court applied RLUIPA's protections for religious incarcerated persons to hold that a Muslim prisoner was denied the right to wear a religious beard. Through this experience, Becket is aware that despite RLUIPA's significant success in protecting religious exercise in the land-use context, RLUIPA is still significantly under-enforced, especially with respect to minority faiths. Because Becket has represented, and intends to continue to represent, individuals and organizations of all sincere faiths, it has a strong interest in ensuring that RLUIPA is properly interpreted and rigorously enforced.

INTRODUCTION

Congress unanimously enacted RLUIPA to remedy the widespread problem of unlawful restrictions on constitutional rights in the land-use and prison contexts. RLUIPA's land-use provisions protect religious exercise precisely because municipal zoning processes are highly

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paying plaintiffs' costs, Apr. 8, 2002); *Greenwood Cmty. Church v. City of Greenwood Vill.*, 02-cv-1426 (Colo. Dist. Ct. filed 2002) (permit granted Dec. 2, 2002).

[3] *See, e.g., Cutter v. Wilkinson*, 544 U.S. 709 (2005) (*amicus* brief filed Dec. 20, 2004); *River of Life Kingdom Ministries v. Vill. of Hazel Crest*, 611 F.3d 367 (7th Cir. 2010) (*en banc*) (*amicus* brief filed Nov. 19, 2009); *Westchester Day Sch.* v. *Vill. of Mamaroneck*, 504 F.3d 338 (2d Cir. 2007) (*amicus* brief filed Aug. 22, 2006); *Guru Nanak Sikh Soc'y v. Cty. of Sutter*, 456 F.3d 978 (9th Cir. 2006) (*amicus* brief filed June 9, 2004); *Midrash Sephardi, Inc. v. Town of Surfside*, 366 F.3d 1214 (11th Cir. 2004) (*amicus* brief filed Nov. 21, 2003); *San Jose Christian Coll. v. City of Morgan Hill*, 360 F.3d 1024 (9th Cir. 2004) (*amicus* brief filed Aug. 28, 2002); *Civil Liberties for Urban Believers v. City of Chicago*, 342 F.3d 752 (7th Cir. 2003) (*amicus* brief filed June 26, 2002).

discretionary and often patently discriminatory, negatively impacting new, unpopular, or minority religious groups more acutely than other groups. RLUIPA's protections shield all religious organizations from discrimination that is overt or subtle, intentional or unintentional, and give courts greater authority to root out this unfair treatment. In its only decision addressing the merits of the Act, the Supreme Court has underscored RLUIPA's "very broad," "capacious[]," and "expansive protection for religious liberty." *Holt v. Hobbs*, 135 S. Ct. 853, 859-60 (2015). RLUIPA was enacted to address the very kind of unfair treatment that is present in this case.

ARGUMENT

I. In enacting RLUIPA, Congress focused on protecting minority faiths.

The history and animating purpose of RLUIPA provides a key to its present application. Just as the Civil Rights Act of 1964 cannot be read without the historical context of prejudice and discrimination that it was meant to combat, so too RLUIPA must be read in the context of municipal abuse of minority religious groups.

Like other federal civil rights statutes, RLUIPA was enacted to remedy a pattern of unlawful restrictions on constitutional rights. Specifically, Congress sought to end the pervasive use of highly discretionary, and often patently discriminatory, zoning laws to restrict, harass, and even exclude religious organizations seeking to rent, purchase, construct, or expand religious facilities within their communities. In examining the problem, Congress held nine hearings over a period of three years, amassing "massive evidence" that this free-exercise right was "frequently violated." 146 Cong. Rec. 16,698 (2000); *see also* 146 Cong. Rec. 16,622 (2000).

As a result of its hearings, Congress made several important findings. First, it recognized that religious organizations "cannot function without a physical space adequate to their needs and consistent with their theological requirements." 146 Cong. Rec. 16,698 (Joint Statement of Sens.

Hatch & Kennedy). Congress found that "[t]he right to build, buy, or rent such a space is an indispensable adjunct of the core First Amendment right to assemble for religious purposes." *Id.* Yet Congress also found that, despite these core rights, religious organizations were "frequently discriminated against on the face of zoning codes and also in the highly individualized and discretionary processes of land use regulation." *Id.* Zoning boards are typically controlled by "nonprofessionals" who have "essentially standardless discretion" and operate "without procedural safeguards." *Sts. Constantine & Helen Greek Orthodox Church, Inc. v. City of New Berlin*, 396 F.3d 895, 900 (7th Cir. 2005). When land use "codes permit churches only with individualized permission from the zoning board," local officials are susceptible to "use that authority in discriminatory ways." 146 Cong. Rec. 16,698. Compounding the problem, unlawful intent is difficult to prove and may "lurk[] behind such vague and universally applicable reasons as traffic, aesthetics, or 'not consistent with the city's land use plan.'" *Id.*

Congress concluded that the problem was especially acute for "new, small or unfamiliar churches," *id.*, finding them "greatly overrepresented in reported church zoning cases" due to "religious and racial bias associated with . . . land use determinations," 146 Cong. Rec. 16,701 (2000). One study showed that minority religions constituting less than 9% of the population accounted for 49% of cases regarding the right to locate religious buildings at a site.[4] When nondenominational or unclassified groups were included, that number rose to 68%. *Id.* Notably, the study found that smaller religious groups had roughly the same success rate in land-use

[4] *Religious Liberty Protection Act of 1998: Hearings Before the H. Comm. on the Judiciary on H.R. 4019*, 105th Cong. 136 (1998) (prepared statement of W. Cole Durham, Jr., Professor, Brigham Young University Law School); *see also Religious Liberty Protection Act of 1998: Hearing Before the S. Comm. on the Judiciary on S. 2148*, 105th Cong. 11 (1998).

litigation (66%) as larger religious groups (65%), indicating that smaller groups were not disproportionately likely to bring frivolous claims. *Id.*

Based on the evidence, Congress concluded that unjustifiable zoning restrictions against religious organizations required a federal remedy. RLUIPA was unanimously passed by Congress and signed into law by President Clinton to give "heightened protection" for the free exercise of religion in the arena of "land-use regulation." *Cutter v. Wilkinson*, 544 U.S. 709, 714, 715 (2005).

II. RLUIPA gives broad protections that simplify the legal standards and ease the burdens of proof for religious claimants in the land-use context.

RLUIPA provides "very broad," "capacious[]," and "expansive protection for religious liberty." *Holt*, 135 S. Ct. at 859-60. Congress intended RLUIPA both to codify First Amendment rights and provide broad, prophylactic protections to deflect the threat of constitutional violations.

A. Congress passed RLUIPA to codify, and provide preventive enforcement of, First Amendment guarantees.

Congress' power to enforce the Free Exercise Clause extends beyond merely codifying existing jurisprudence: "Legislation which deters or remedies constitutional violations can fall within the sweep of Congress' enforcement power *even if in the process it prohibits conduct which is not itself unconstitutional*." *City of Boerne v. Flores*, 521 U.S. 507, 518 (1997) (emphasis added). This has important implications for RLUIPA's application.

First, RLUIPA's protections extend *beyond* Free Exercise jurisprudence to provide a buffer against potential infringement of core constitutional rights. Specifically, Congress identified factual circumstances where abuse is likely to occur and eased the burden of proof on religious organizations seeking relief in those contexts. *See* Douglas Laycock & Luke W. Goodrich, *RLUIPA: Necessary, Modest, and Under-enforced*, 39 Fordham Urb. L.J. 1021 (2012) ("RLUIPA has translated the majestic generality of the Free Exercise Clause into more specific standards tailored to the land-use context").

RLUIPA's history makes this clear. RLUIPA was passed in response to the now-familiar struggle between Congress and the Supreme Court over application of the Free Exercise Clause. *See Holt*, 135 S. Ct. at 859-60. Before 1990, the Supreme Court imposed strict scrutiny to *any* law that substantially burdened religious practices. *See, e.g.*, *Sherbert v. Verner*, 374 U.S. 398 (1963). But, in 1990, the Supreme Court cut back on this protection afforded by the Free Exercise Clause, concluding that "neutral laws of general applicability" are not subject to strict scrutiny. *Emp't Div., Dep't of Human Res. of Or. v. Smith*, 494 U.S. 872 (1990).

Disagreeing with *Smith*, Congress enacted the Religious Freedom Restoration Act of 1993 (RFRA), 42 U.S.C. §§ 2000bb-2000bb-4, which reimposed strict scrutiny for *any* law that substantially burdens a religious practice. But, in 1997, the Supreme Court struck down RFRA as applied to the States, concluding that RFRA exceeded Congress' Fourteenth Amendment enforcement power by forcing States to provide protections broader than what the Constitution requires without first having identified a threat to constitutional rights. *Boerne*, 521 U.S. 507 (1997). In response to *Boerne*, Congress set out to do what it had not done with RFRA: create a record documenting the pervasive abuses of free-exercise rights in the zoning context and tailor a remedial statute accordingly. RLUIPA was the result, and courts—including the Seventh Circuit—have uniformly upheld its constitutionality as a prophylactic enforcement of First Amendment rights. *See Sts. Constantine*, 396 F.3d at 897.[5]

This back-and-forth between Congress and the Supreme Court demonstrates that Congress did not enact RLUIPA merely to *codify* the Supreme Court's free-exercise jurisprudence, but also to

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[5] *See, e.g., Cutter*, 544 U.S. 709 (upholding RLUIPA's prisoner provisions against Establishment Clause challenge); *Westchester*, 504 F.3d at 353-56 (upholding land use provisions as a valid exercise of federal authority); *Guru Nanak*, 456 F.3d 978 (same); *Midrash*, 366 F.3d 1214 (same); *see also Sts. Constantine*, 396 F.3d at 897.

require protections greater than those provided by the First Amendment. Sarah Keeton Campbell, *Restoring RLUIPA's Equal Terms Provision*, 58 Duke L.J. 1071, 1098-99 (2009).

B. By its express terms, RLUIPA provides broad, expansive protection for religious organizations in the land-use context.

"Several provisions of RLUIPA underscore its expansive protection for religious liberty." *Holt*, 135 S. Ct. at 860. RLUIPA broadly defines the scope of protected religious exercise as "any exercise of religion, whether or not compelled by, or central to, a system of religious belief" and including "[t]he use, building, or conversion of real property for the purpose of religious exercise." 42 U.S.C. § 2000cc-5(7)(A)-(B). Congress adopted this definition in "an obvious effort to effect a complete separation" from more limited definitions of religion found in pre-existing First Amendment cases. *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2762 (2014); *see also Civil Liberties for Urban Believers ("C.L.U.B.") v. City of Chicago*, 342 F.3d 752, 760 (7th Cir. 2003). Instead, Congress mandated that the concept of "religion" 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). For example, the fact that a land-use restriction limits only some, and not all, forms of religious exercise is not a defense to a RLUIPA claim. *Holt*, 135 S. Ct. at 862 (noting that focus is on whether a religious exercise has been burdened, "not whether the RLUIPA claimant is able to engage in other forms of religious exercise").

The express terms of RLUIPA's substantive provisions similarly reinforce that religious organizations should be afforded broad protection in the land-use context. RLUIPA includes five distinct provisions protecting against various forms of abuse. Four of those provisions—found in Section 2(b)—provide guarantees of equal treatment for "religious assembl[ies] or institution[s]" and prohibit their total exclusion or unreasonable limitation from or within "a jurisdiction." 42 U.S.C. § 2000cc(b)(1), (b)(3)(A)-(B). These protections shield religious organizations against various forms of discrimination, both overt and subtle, intentional and unintentional. Specifically, Section 2(b)(1), the Equal Terms provision, forbids the government from treating religious assemblies or institutions on "less than equal terms" with *non*religious assemblies and institutions. *Id.* § 2000cc(b)(1). Section 2(b)(2) bars discrimination against any assembly or institution "on the basis of religion or religious denomination." *Id.* § 2000cc(b)(2). And Section 2(b)(3) bars the government from totally excluding or unreasonably limiting houses of worship. *Id.* § 2000cc(b)(3). In addition to these provisions, a fifth provision—Section 2(a)—prohibits the government from imposing a "substantial burden" on religious land use unless the government satisfies strict scrutiny. *Id.* § 2000cc(a)(1). This "'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." *Sts. Constantine*, 396 F.3d at 900 (citations omitted).

"The substantial-burden and equal-terms provisions have been the most important and generated the most litigation." Laycock & Goodrich, Fordham Urban L.J. at 1023. The broad protections of these two provisions are discussed in greater detail below.

<u>Substantial Burden provision</u>

In one early decision, the Seventh Circuit articulated a narrower definition of substantial burden, stating that a land-use restriction does not cause such a burden unless it "bears direct, primary, and fundamental responsibility for rendering religious exercise . . . effectively impracticable." *C.L.U.B.*, 342 F.3d at 761. Subsequent Seventh Circuit and Supreme Court decisions, however, have abrogated this standard. *See, e.g.*, *World Outreach Conference Ctr. v. City of Chicago*, 591 F.3d 531, 537–39 (7th Cir. 2009) (omitting the "effectively impracticable" standard in its substantial burden analysis); *Sts. Constantine*, 396 F.3d at 900-01. Most importantly, the Seventh Circuit has correctly recognized that *Holt v. Hobbs*, 135 S. Ct. 853 (2015) and *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014) articulate a substantial burden standard that is "much easier to satisfy" than the Seventh Circuit's original "effectively impracticable" standard. *Schlemm v. Wall*, 784 F.3d 362, 364 (7th Cir. 2015). Accordingly, the Seventh Circuit concluded that the "effectively impracticable" standard "did not survive *Hobby Lobby* and *Holt*." *Id.* The City does not cite this controlling precedent at all, relying instead on the abrogated "effectively impracticable" standard.

In *Hobby Lobby*, the Supreme Court defined "substantial burden" in terms of "the ability of the objecting parties to conduct business in accordance with *their religious beliefs*." 134 S. Ct. at 2778. "[T]he availability of alternative means of practicing religion" is not a "relevant consideration." *Holt*, 135 S. Ct. at 862. Nor is the reasonableness of the asserted religious belief or conduct. *Hobby Lobby*, 134 S. Ct. at 2778. If government regulation "seriously" impairs a religious individual's or organization's ability to carry their religious beliefs, the standard is "easily" met. *Holt*, 135 S. Ct. at 862. Few cases have applied this standard in the land use context since *Hobby Lobby* and *Holt* were decided, but earlier decisions from the Seventh Circuit and other courts of appeals provide meaningful insight. In *World Outreach*, for example, the Seventh Circuit found a substantial burden where a church was subjected to unfair dealing by city officials. As in this case, the city prevented a church from continuing a non-conforming use of newly purchased property, eventually rezoning the property so that the church had no opportunity to apply for a special use permit. *Id.* at 535-538. In finding the burden substantial, the court emphasized that there was "no possible justification" for the city's decision. *Id.* at 538. Similarly, in *Saints Constantine*, the Seventh Circuit found a substantial burden based on the "delay, uncertainty, and expense" resulting from multiple zoning applications, together with the "whiff of bad faith arising from the [city's] rejection of a [compromise] solution." 396 F.3d at 901. Specifically, when the city worried that rezoning might permit undesirable uses if the church ever left, the church offered to rezone in a way that would "limit the parcel to church-related uses." *Id.* at 898. But the city rejected that compromise, and the court thus found a substantial burden. *Id.* at 901.

Other circuits also offer insight on the meaning of "substantial burden." Several have found it relevant when the government acts in an arbitrary fashion, rejects proposed compromises, or bases its decision on findings that are "not supported by substantial evidence." *Westchester Day School v. Village of Mamaroneck*, 504 F.3d 338, 351 (2nd Cir. 2007). In *Westchester*, for example, the Second Circuit found a substantial burden where the village denied a permit to a religious school arbitrarily, noting that the village "based its decision on speculation . . . without a basis in fact." *Id.* Likewise, in *Guru Nanak Sikh Soc'y of Yuba City v. County of Sutter*, 456 F.3d 978 (9th Cir. 2006), the Ninth Circuit found a substantial burden where the county had significantly "lessened the prospect of Guru Nanak being able to construct a temple in the future." 456 F.3d at 992.

In short, even before *Hobby Lobby* and *Holt*, the Seventh Circuit had abrogated the "effectively impracticable" standard from *C.L.U.B.* Now that the Supreme Court has agreed, there is no justification for the City's reliance upon it.

<u>Equal Terms provision</u>

The Equal Terms provision is a strict liability offense. As one court of appeals has explained: "Since the Substantial Burden section includes a strict scrutiny provision and the Discrimination and Exclusion section does not . . . this 'disparate exclusion' was part of the intent of Congress and not an oversight." *Lighthouse*, 510 F.3d at 269 (citing *Russello v. United State*s, 464 U.S. 16, 23 (1983); *see also River of Life Kingdom Ministries v. Village of Hazel Crest, Ill.*, 611 F.3d 367 (7th Cir. 2010) (*en banc*) (adopting strict liability approach). Because the Equal Terms provision is a strict liability offense, once unequal treatment is shown, any justifications the government might offer are irrelevant. Laycock & Goodrich, 39 Fordham Urb. L.J. at 1058.

The Equal Terms provision also simplifies the comparative analysis that must take place. "The express language of the equal terms provision indicates that Congress was concerned with the differential treatment of religious assemblies or institutions compared to secular assemblies or institutions." Campbell, 58 Duke L.J. at 1099-1100. Because "Congress defined the appropriate comparison group, . . . courts need not look any further to determine if unequal treatment exists." *Id.* at 1100. If a "religious assembly" is treated differently than a "secular assembly," no further analysis as to whether the two assemblies are similarly situated is required. *See Konikov v. Orange County*, 410 F.3d 1317, 1324 (11th Cir. 2005) ("[T]he standard for determining whether it is proper to compare a religious group to a nonreligious group is not whether one is 'similarly situated' to the other, as in our familiar equal protection jurisprudence."). Under this plain reading of the Equal Terms provision, a municipality still "can place any restrictions on churches it wants *as long as it places the same restriction on nonreligious assemblies*." Laycock & Goodrich, 39 Fordham Urb. L. J. at 1063 (emphasis added). The focus is "on the equality of 'terms'—the legal rules and government decisions to which places of assembly are subject." *Id.*

Despite the plain language of the Act, the Seventh Circuit has added a non-statutory requirement that comparators under an Equal Terms claim must be similarly situated with respect to an "accepted zoning criteria." *River of Life*, 611 F.3d 367. The Seventh Circuit rejected a similar standard from the Third Circuit, which requires comparators to be similarly situated with respect to a zoning law's "regulatory purpose." *Id.* at 371. The Seventh Circuit rejected this language because it would essentially defeat the purposes of the Equal Terms provision by "invit[ing] speculation concerning the reason behind exclusion of churches; invit[ing] self-serving testimony by zoning officials and hired expert witnesses; facilitat[ing] zoning classifications thinly disguised as neutral but actually systematically unfavorable to churches (as by favoring public reading rooms over other forms of nonprofit assembly); and mak[ing] the meaning of 'equal terms' in a federal statute depend on the intentions of local government officials." *Id.*

Notably, the Seventh Circuit conceded that its own version of this added standard is "less than airtight," risking some of the same concerns. Moreover, in issuing its decision, the Court upheld two prior rulings where it had emphasized that comparators need not be similar "in *all* relevant respects," *Vision Church v. Vill. of Long Grove*, 468 F.3d 975, 1003 (7th Cir. 2006); *River of Life*, 611 F.3d at 369, and refused to distinguish comparators on the grounds that religious assemblies were given additional zoning rights under the applicable code, *Digrugilliers v. Consol. City of Indianapolis*, 506 F.3d 612, 615, 616 (7th Cir. 2007); *River of Life*, 611 F.3d at 369, 371. This suggests that, although the Seventh Circuit imposes a "similarly situated" requirement, it must be applied with a light hand, and only where there is "objective" evidence of explicit "criteria." *Id.* at 371. Where, as here, exclusion is based on *ad hoc* and vague concerns about traffic and sufficient parking, courts should adhere to the express language of RLUIPA's Equal Terms provision to allow all comparisons between religious and secular "assemblies." Any other approach would "allow[] for an individualized, discretionary administration of land-use regulation, and consequently, a high potential for discrimination—the exact outcomes Congress was trying to eliminate." Laycock & Goodrich, 39 Fordham Urb. L.J. at 1061.

<u>No "animus" or "hostility" requirement</u>

Neither Section 2(a) nor 2(b) requires a showing of discriminatory animus or intent. Once a RLUIPA plaintiff has demonstrated that a zoning authority has violated the express terms of RLUIPA, it "need not prove *why* the [zoning authority] did so." *Church of Our Savior v. City of*

Jacksonville Beach, 69 F. Supp. 3d 1299, 1317 (M.D. Fla. 2014), *reconsideration denied*, 108 F. Supp. 3d 1259 (M.D. Fla. 2015). In this regard, RLUIPA is similar to the Free Exercise Clause, which also does not include an "animus" requirement. The Free Exercise Clause "has been applied numerous times when government officials interfered with religious exercise not out of hostility or prejudice, but for secular reasons, such as saving money, promoting education, obtaining jurors, facilitating traffic law enforcement, maintaining morale on the police force, or protecting job opportunities." *Shrum v. City of Coweta, Okla.*, 449 F.3d 1132, 1144–45 (10th Cir. 2006) (internal footnotes and citations omitted). While "[p]roof of hostility or discriminatory motivation may be sufficient" to show a violation of the Establishment Clause, plaintiffs are "not confined to actions based on animus." *Id.* It follows that RLUIPA's prophylactic provisions also cannot be so confined, especially considering that Congress omitted any explicit animus requirement. RLUIPA protects religious organizations against *any* unequal, unreasonable, or burdensome treatment in the land-use context, regardless of whether it is motivated by religious hostility, a "Not In My Back Yard" mentality, concerns over lost tax revenues, or any other commercial, social, or political considerations. Laycock & Goodrich, 39 Fordham Urb. L.J. 1021 (2012). In the zoning context, religious hostility often "lurks behind such vague and universally applicable reasons as traffic, aesthetics, or 'not consistent with the city's land use plan.'" 146 Cong. Rec. 16,698. That is precisely why Congress gave RLUIPA prophylactic scope, rather than merely codifying Free Exercise rights. Daniel N. Lerman, *Taking the Temple: Eminent Domain and the Limits of RLUIPA*, 96 Geo. L.J. 2057, 2079 (2008).

III. RLUIPA remains under-enforced, to the detriment of minority faiths.

Despite Congress' efforts to provide broad protections in the land use context, RLUIPA remains under-enforced, particularly for religious minorities. *See generally* Laycock & Goodrich, 39 Fordham Urb. L.J. 1021 (2012). In 2011, the Pew Research Center issued a report of a threeyear study of RLUIPA, which "documented community resistance to thirty-seven different mosques or Islamic centers," often expressed "in terms of concerns about traffic, parking, noise, or property values," but often with "overtly anti-Islamic" sentiments.[6] More recently, undersigned counsel's analysis of all reported RLUIPA cases shows that, of 191 total cases, there have been 25 Jewish plaintiffs and 11 Muslim plaintiffs, comprising 19% of all cases, even though those religions only comprise around 3% of the total U.S. population. Looking at only the most recent complete years from 2014 to 2015, of the 23 total RLUIPA cases, 5 were brought by Jewish organizations and 5 by Muslim organizations, comprising 44% of RLUIPA land-use decisions.

A 2016 Department of Justice report confirms these findings, noting that "minority groups have faced a disproportionate level of discrimination in zoning matters."[7] Reflecting this disparity, 67% of the Department's ninety-six RLUIPA cases have involved minority religions or Christian congregations made up primarily of racial minorities. *Id.* at 4-5. Particularly relevant here, the report finds that "the most significant development" has been the "increase in Muslim cases," most of which have "included allegations of intentional religion-based discrimination under RLUIPA Section 2(b)(2)." *Id.* at 6. Although Muslims make up only about 1% of the country's population,[8] Muslim mosques and schools have represented 38% of the Department's investigations over the last six years. U.S. Dep't of Justice, Update at 4. Finally, the report emphasizes that "[w]hile 84% of non-Muslim investigations opened by the Department resulted in a positive resolution without

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[6] Laycock & Goodrich, Fordham Urban L.J. at 1023 (citing Pew Research Ctr., *Controversies Over Mosques and Islamic Centers Across the U.S.*, Forum on Religion & Public Life (Sept. 27, 2012), http://www.pewforum.org/2012/09/27/controversies-over-mosques-and-islamic-centers-across-the-u-s-2/ (last visited Sept. 26, 2016)).

[7] U.S. Dep't of Justice, Update on the Justice Department's Enforcement of the Religious Land Use and Institutionalized Persons Act: 2010–2016, at 4 (2016).

[8] Besheer Mohamed, *A New Estimate of the U.S. Muslim Population*, Pew Research Center (Jan. 6, 2016), http://www.pewresearch.org/fact-tank/2016/01/06/a-new-estimate-of-the-u-s-muslim-population/.

the United States or private parties filing suit, in mosque and Islamic school cases, only 20% have resulted in a positive resolution without the filing of a RLUIPA suit." *Id.* at 6. The report concludes, "[w]hile it is encouraging that so many RLUIPA cases are resolved once a local government is informed of its obligations under RLUIPA, the sharp disparity between Muslim and non-Muslim cases in this regard is cause for concern." *Id.* These current statistics demonstrate that the need for RLUIPA is particularly acute in the context of land-use disputes involving mosques.

CONCLUSION

In enacting RLUIPA, Congress unanimously sought to afford small and minority faiths greater protection from the highly discretionary, individualized decision-making that characterizes state and local zoning regulations. The Court should adhere to the Act's plain terms to ensure that Congress' intention is carried out.

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Respectfully submitted,

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