No. 11-2176

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BETHEL WORLD OUTREACH MINISTRIES,
Plaintiff-Appellant,

v.

MONTGOMERY COUNTY COUNCIL and MONTGOMERY COUNTY, MARYLAND,
Defendants-Appellees.

On Appeal from the United States District Court
for the District of Maryland

BRIEF OF *AMICI CURIAE* THE BECKET FUND FOR RELIGIOUS LIBERTY AND VARIOUS RELIGIOUS ORGANIZATIONS IN SUPPORT OF PLAINTIFF-APPELLANT AND REVERSAL

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CORPORATE DISCLOSURE STATEMENT

Pursuant to FRAP 26.1 and Local Rule 26.1, *amici* The Becket Fund for Religious Liberty, Christ International Ministries, Families Across America, Inc., and Grace Missionary Society make the following disclosure:

1. None of the *amici* are a publicly held corporation or other publicly held entity;

2. None of the *amici* have any parent corporations;

3. No publicly held corporation owns 10% or more of the stock of *amici*;

4. In the knowledge of amici there is no other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of this litigation;

5. None of the *amici* are a trade association; and

6. This case does not arise out of a bankruptcy proceeding.

April 12, 2012

s/ Lori H. Windham
Lori H. Windham
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INTEREST OF THE AMICI

Pursuant to Fed. R. App. P. 29, the Becket Fund for Religious Liberty, Christ International Ministries, Families Across America, Inc., and Grace Missionary Society respectfully submit this brief *amicus curiae* in support of Appellant Bethel World Outreach Ministries and reversal.[1]

Amicus the Becket Fund for Religious Liberty has an interest in assuring that the Religious Land Use and Institutionalized Persons Act of 2000, 42 U.S.C. § 2000cc, *et seq.* ("RLUIPA"), is interpreted to effectively address the covert discrimination and heavy burdens that houses of worship so often suffer through highly discretionary land use laws. *Amicus* believes that its experience as counsel for a wide variety of houses of worship involved in RLUIPA claims will offer the Court a perspective that is helpful in its resolution of this appeal.

[1] As required by Fed. R. App. P. 29(c)(5), *Amicus* states that no party's counsel authored the brief in whole or in part; no party or party's counsel contributed money that was intended to fund preparing or submitting the brief; and no person—other than *Amicus*, its members, or its counsel—contributed money that was intended to fund preparing or submitting the brief.

The Becket Fund for Religious Liberty is a non-partisan, interfaith, public interest law firm dedicated to protecting the free expression of all religious traditions. The Becket Fund litigates in support of these principles in state and federal courts throughout the United States, both as primary counsel and as *amicus curiae*. Most recently, the Becket Fund was Supreme Court counsel to the church defendant in *Hosanna-Tabor Evangelical Lutheran Church and School* v. *EEOC,* 132 S. Ct. 694 (2012), prevailing in a unanimous decision in a novel area of First Amendment law.

As part of its defense of free exercise rights, the Becket Fund has been heavily involved in litigation on behalf of a wide variety of religious worshippers, ministers, and institutions under RLUIPA. The Becket Fund's RLUIPA cases run the gamut—as *amicus curiae* and as plaintiffs' counsel, in prisoner and land-use cases, from New Hampshire to Hawaii—including cases arising out of this Circuit.[2] The Becket Fund has also litigated a host of RLUIPA land-use cases as plaintiffs'

[2] *See, e.g., Madison* v. *Virginia*, 474 F.3d 118 (4th Cir. 2006) (amicus brief on behalf of broad coalition filed June 16, 2006); *Madison* v. *Riter*, 355 F.3d 310 (4th Cir. 2003) (*amicus* brief filed on behalf of a broad coalition June 6, 2003).

counsel outside the Fourth Circuit.[3] Some of its RLUIPA land-use cases have concluded by favorable settlement.[4] In addition, The Becket Fund has filed a series of *amicus* briefs in both land-use and prisoner cases

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[3] *See, e.g., Elijah Group, Inc.* v. *City of Leon Valley*, 643 F.3d 419 (5th Cir. 2011); *Lighthouse Institute 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., Aug. 22, 2006); *Congregation Kol Ami* v. *Abington Twp.*, 2004 WL 1837037 (E.D. Pa. Aug. 17, 2004); *Castle Hills First Baptist Church* v. *City of Castle Hills*, 2004 WL 546792 (W.D. Tex. Mar. 17, 2004); *United States* v. *Maui Cnty.*, 298 F. Supp. 2d 1010 (D. Haw. 2003); *Hale O Kaula Church* v. *Maui Planning Comm'n*, 229 F. Supp. 2d 1056 (D. Haw. 2002); *Cottonwood Christian Ctr.* v. *Cypress Redevelopment 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).

[4] *See, e.g., Living Faith Ministries* v. *Camden Cnty. Improvement Authority,* Civ. No. 05 cv 877 (D.N.J. filed Feb. 15, 2005) (consent order signed May 2, 2005); *Temple B'nai Sholom* v. *City of Huntsville*, Civ. No. 01-1412 (N.D. Ala. removed June 1, 2001) (settlement agreement signed June 2003); *Greenwood Cmty. Church* v. *City of Greenwood Vill.*, Civ. No. 02-1426 (Colo. Dist. Ct.) (permit granted Dec. 2, 2002); *Living Waters Bible Church* v. *Town of Enfield*, Civ. No. 01-450 (D.N.H.) (agreement for entry of judgment signed Nov. 18, 2002); *Calvary Chapel O'Hare* v. *Vill. of Franklin Park*, Civ. No. 02-3338 (N.D. Ill.) (settlement agreement signed Sept. 3, 2002); *Refuge Temple Ministries* v. *City of Forest Park*, Civ. No. 01-0958 (N.D. Ga. filed Apr. 12, 2001) (consent order signed Mar. 2002); *Unitarian Universalist Church of Akron* v. *City of Fairlawn*, Civ. No. 00-3021 (N.D. Ohio) (settlement approved Oct. 1, 2001); *Haven Shores Comty. Church* v. *City of Grand Haven,* No. 1:00-CV-175 (W.D. Mich.) (consent decree signed Dec. 20, 2000); *Pine Hills Zendo* v. *Town of Bedford, N.Y. Zoning Bd. of Appeals,* No. 17833-01 (N.Y. Sup. Ct.) (settlement agreement allowing religious use and paying plaintiffs' costs, Apr. 8, 2002).

involving RLUIPA.[5] The Becket Fund intends to continue filing lawsuits and *amicus curiae* briefs in RLUIPA cases in order to defend the rights of religious people and organizations to use their land without undue government interference.

Christ International Ministries is a Christian church located in Miami, Florida. Christ International Ministries has a vision to spread the gospel of Jesus Christ with the goal of making disciples using every means at our disposal. This may require the acquisition of property to provide a local place for Christian worship, training, and fellowship. It is for this reason that Christ International Ministries is interested to see Bethel World Outreach Ministries of Silver Springs, Maryland

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[5] *See, e.g., Cutter* v. *Wilkinson*, 125 S. Ct. 2113 (2005) (*amicus* brief on behalf of a broad coalition filed December 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. *Cnty. 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 on behalf of a broad coalition Aug. 28, 2002); *C.L.U.B.* v. *City of Chicago,* 342 F.3d 752 (7th Cir. 2003) (*amicus* brief filed June 26, 2002).

receive the authority to use the land that it purchased for its intended purpose.

Families Across America, Inc. (FAAI), is a faith-based 501(c)(3), national public charity headquartered in Atlanta, Georgia, and founded by Evelyn Peters-Washington.[6] FAAI is nonpartisan, nondenominational, nonviolent, and nonjudgmental. Passionate about strengthening the nuclear family unit by preserving traditional family values, for the purpose of making home a safe place for children to learn and grow. Our mission is driven by Biblical Principles, our work will leave an American legacy of stable families—build on the foundation of Character, Good Citizenship, Accountability, and Right Choices. For this reason, we are standing with Bishop Darlingston Johnson and his congregation for Bethel World Outreach Ministries because of the urgency of now to defend our American religious liberties and keep them from becoming withdrawn from our society.

Grace Missionary Society is a non-profit, non-denominational, religious organization supporting several local and international religious and humanitarian projects, including education, food

[6] http://www.familiesacrossamerica.org/

distribution programs, and elderly support services.[7] Grace Missionary Society has interest in this case because it addresses issues regarding the rights of all churches protected by the Religious Land Use and Institutionalized Persons Act of 2000 and the United States Constitution.

[7] http://www.gracego.com/Grace_Missionary/Welcome.html

SUMMARY OF THE ARGUMENT

This case is a textbook example of the kind of government mistreatment of minority religious groups that RLUIPA was enacted to prevent. Congress enacted RLUIPA's land use provisions in order to solve a widespread problem of municipal abuse of the zoning process to prevent religious groups from engaging in religious exercise.

The zoning process is highly discretionary, meaning that religious discrimination is easily masked. New, unpopular or minority-dominated houses of worship frequently have difficulty finding land to use for worship, and often encounter serious hurdles when they attempt to use that land. Congress investigated this problem in a series of hearings, collected evidence of widespread and frequent abuses, and acted to end those abuses. RLUIPA creates special protections for religious exercise precisely where such protections are needed.

What this special solicitude for religion means for this case is simple: the County violated RLUIPA. By singling out Bethel World Outreach Ministries—a church with many African-American members in a less diverse part of the County—the County violated the Free Exercise Clause under *Lukumi*, and therefore violated RLUIPA's

nondiscrimination provisions as well. But even were Bethel to fail in proving a constitutional violation, it should still prevail on its statutory substantial burden claims. Contrary to the district court's bench ruling, Bethel does *not* need to prove discrimination under *Lukumi* in order to prevail on its substantial burden claim. Indeed, the district court's failure to apply this basic tenet of RLUIPA litigation draws into question the reliability of its entire ruling.

Because Bethel discussed its substantial burden claims in detail in its brief, *Amicus* will focus on RLUIPA's nondiscrimination claims, specifically, its claims under § 2(b)(2) of RLUIPA. Bethel's discrimination claims should be reviewed with reference to *Lukumi* and the Supreme Court's Free Exercise jurisprudence. As explained below, those cases dictate reversal. Bethel has presented more than sufficient evidence to survive summary judgment.

The undisputed facts show that the County violated RLUIPA § 2(b)(2) in two ways. First, it discriminated against disfavored churches in general, taking a series of actions which fell most heavily on a handful of churches trying to locate in the RDT zone. Second, it discriminated against Bethel in particular, erecting new and ever-

higher bureaucratic hurdles for the church to leap, and finally prohibiting its ability to build a church altogether.

RLUIPA prohibits the County from using these Kafkaesque zoning procedures to keep Bethel and other disfavored religious minorities from worshipping freely. The Court should reverse and remand.

ARGUMENT

I. RLUIPA is a civil rights statute designed to protect minority religious groups like Bethel.

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

Like many other federal civil rights statutes, RLUIPA was enacted—with broad, bi-partisan support—to remedy a pattern of unconstitutional restrictions on religious exercise through highly discretionary or patently discriminatory land-use laws. Congress held a series of nine separate hearings over a three-year period to examine the problem. At the end of this exhaustive process, Congress determined

that such restrictions are all too common and required a federal remedy.

A. Congress passed RLUIPA to address the all-too-common problem of discrimination against houses of worship in a highly discretionary system.

Congress determined that religious organizations "are frequently discriminated against on the face of zoning codes and also in the highly individualized and discretionary processes of land use regulation." Joint Statement of Sens. Hatch & Kennedy, 146 Cong. Rec. S7774 (daily ed. July 27, 2000) ("Sponsors' Statement"). Congress also found that religious organizations "cannot function without ***a physical space adequate to their needs*** and consistent with their theological requirements. The 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.* (emphasis added). In response to these findings, Congress carefully crafted RLUIPA § 2, the land-use part of the Act. *See* Pub. L. No. 106-274, § 2, Sept. 22, 2000, 114 Stat. 804, 42 U.S.C.A. § 2000cc-1.

The various distinct provisions of § 2 are designed to enforce constitutional protections for religious speech, assembly, and worship.

Section 2(b), with its three "nondiscrimination" provisions, protects houses of worship from discrimination, both overt and subtle. Section 2(a), the "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."[8] *Sts.*

[8] Proof of discrimination is not necessary to prove a violation of RLUIPA's substantial burden provision. If it were, the "substantial burden" provision would offer no protection beyond that of the nondiscrimination provisions, rendering it mere surplusage. This violates a cardinal principle of statutory construction. *See TRW Inc.* v. *Andrews*, 534 U.S. 19, 31 (2001) ("It is a cardinal principle of statutory construction that 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.") (internal quotation omitted). No doubt such evidence may be *sufficient* to establish a burden, but that does not mean it is a *necessary* component of a substantial burden claim. *See, e.g., Westchester Day Sch.,* 504 F.3d at 350 (finding substantial burden while noting "[t]he arbitrary application of laws to religious organizations may reflect bias or discrimination against religion"); *Constantine,* 396 F.3d at 900 (substantial burden provision is justified by "the vulnerability of religious institutions . . . to subtle forms of discrimination when, as in the case of the grant or denial of zoning variances, a state delegates essentially standardless discretion to nonprofessionals operating without procedural safeguards"). Therefore the district court erred by holding that no substantial burden

Constantine and Helen Greek Orthodox Church, Inc. v. *City of New Berlin,* 396 F.3d 895, 900 (7th Cir. 2005).

Congress found that RLUIPA was necessary because the land use process contains inherent dangers through systems where "a state delegates essentially standardless discretion to nonprofessionals operating without procedural safeguards." *Id.* Such systems create problems because "the codes permit churches only with individualized permission from the zoning board, and zoning boards use that authority in discriminatory ways." Sponsors' Statement at S7774. 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.*

The problem is especially acute for "new, small, or unfamiliar churches," who are "frequently discriminated against on the face of zoning codes and also in the highly individualized and discretionary processes of land use regulation." *Id.* And this danger is redoubled for

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existed simply because the court concluded the church was not targeted by the challenged regulations. *See* J.A. 176-77.

racial and religious minorities; Congress noted a special danger for African-American churches. *Id.*

As set forth in Sections II and III below, this case represents exactly what Congress targeted with RLUIPA § 2(b)—a discretionary zoning process denying an adequate place to assemble for religious exercise. The lower court therefore erred by granting summary judgment.

B. Congress passed RLUIPA to both codify and enforce First Amendment guarantees.

The Circuits are in agreement that RLUIPA is a constitutional exercise of Congressional enforcement authority under Section Five of the Fourteenth Amendment. *See Guru Nanak,* 456 F.3d at 992-95 (upholding RLUIPA on Enforcement Clause grounds); *Midrash Sephardi,* 366 F.3d at 1238-40 (same). This determination has important implications for RLUIPA's application.[9]

[9] As these cases explain, RLUIPA was enacted under Congress' Fourteenth Amendment enforcement power. As the Supreme Court explained in *Boerne*, 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).

First, RLUIPA should be interpreted with reference to Free Exercise jurisprudence. Its legislative history is clear on this point. *See, e.g.,* Sponsors' Statement at S7774 (noting that the Equal Terms and Nondiscrimination provisions "enforce the Free Exercise Clause rule against laws that burden religion and are not neutral and generally applicable"). The courts interpreting RLUIPA have followed this instruction. *See, e.g., Lovelace* v. *Lee,* 472 F.3d 174, 186-87 (4th Cir. 2006) (relying on Free Exercise precedent to analyze § 3(a) claim); *Midrash,* 366 F.3d at 1231-35 (relying on Free Exercise jurisprudence to guide analysis of § 2(b)(1) claim). Therefore, actions which violate the Free Exercise Clause, particularly under *Lukumi,* will likely violate RLUIPA. [10]

[10] *See* Ira C. Lupu & Robert W. Tuttle, *The Forms and Limits of Religious Accommodation: The Case of RLUIPA*, 32 Cardozo L. Rev. 1907, 1924-25 (2011) ("Subsection 2, which prohibits discrimination 'on the basis of religion or religious denomination,' tracks the requirements of the Constitution and, therefore, should be considered a constitutionally mandatory basis for relief, rather than a permissive accommodation. If a jurisdiction burdens or disfavors a religious use because the use is religious, or because the use is by a particular faith, such treatment would almost certainly violate the Free Exercise Clause.").

Second, RLUIPA's protections extend *beyond* Free Exercise jurisprudence. With RLUIPA, Congress intended to ease the burdens of proof on certain religious claimants. Its history makes this clear.

RLUIPA was passed in response to the now-familiar struggle between Congress and the Supreme Court over the application of the Free Exercise Clause. *See Lovelace*, 472 F.3d at 185-86 (describing history of RLUIPA); *Riter,* 355 F.3d at 314-15 (same). Specifically, before 1990, the Supreme Court interpreted the Free Exercise Clause to require strict scrutiny for *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 the Free Exercise Clause, concluding that "neutral laws of general applicability" are not subject to strict scrutiny. *Employment Div.* v. *Smith*, 494 U.S. 872 (1990).

Disagreeing with *Smith*, Congress enacted the Religious Freedom Restoration Act of 1993 (RFRA), Pub.L. No. 103-141, 107 Stat. 1488 (1993) (codified at 42 U.S.C. §§ 2000bb-2000bb-4), which again required strict scrutiny for *any* law that substantially burdened religious practices. But in 1997, the Supreme Court struck down RFRA as applied to the states, concluding that RFRA exceeded Congress'

Fourteenth Amendment enforcement power. *Boerne*, 521 U.S. 507. In response to *Boerne*, Congress set out to do what it had not done with RFRA: create a record documenting pervasive and widespread abuses of free exercise rights, and tailor a statute accordingly. The result was RLUIPA—which Congress passed unanimously in 2000, and President Clinton signed. Courts have uniformly upheld RLUIPA's constitutionality.[11]

This back-and-forth shows that Congress did not enact RLUIPA merely to *codify* the Supreme Court's free exercise jurisprudence; rather, Congress sought to develop a "proportional[]" and "congruen[t]" mechanism for *enforcing* the Free Exercise Clause. *See Boerne*, 521 U.S. at 533. As RLUIPA's sponsors explained, RLUIPA creates "*prophylactic rules* to simplify the *enforcement* of constitutional standards in land use regulation of churches." Sponsors' Statement at S7774 (emphasis added). Simply put, Congress enacted RLUIPA not merely to codify the

[11] *See, e.g.*, *Cutter,* 544 U.S. 709 (upholding RLUIPA against Establishment Clause challenge); *Riter*, 355 F.3d 310 (same); *Guru Nanak*, 456 F.3d 978 (upholding land use provisions under Congressional enforcement power); *Midrash*, 366 F.3d 1214 (same).

Free Exercise Clause, but "as prophylactic legislation" to go beyond it and enforce it. *Lighthouse*, 510 F.3d at 288 n.36 (Jordan, J., dissenting).

What this means, in practical terms, is that RLUIPA's text will sometimes require protections even greater than those provided by the First Amendment.[12] For instance, most courts to examine the question agree that, unlike the Free Exercise Clause, RLUIPA § 2(b) does not provide a strict scrutiny "escape hatch" for violators. *See, e.g., Centro Familiar Cristiano Buenas Nuevas* v. *City of Yuma*, 651 F.3d 1163, 1171-72 (9th Cir. 2011); *River of Life,* 611 F.3d at 370-71; *Lighthouse,* 510 F.3d at 268-69. *But see Midrash,* 366 F.3d at 1231 (holding, based upon *Lukumi, t*hat strict scrutiny applies). And sometimes courts will find that actions violate RLUIPA, even if they do not violate the Free Exercise Clause. *See Rocky Mountain Christian Church* v. *Bd. of Cnty. Comm'rs of Boulder Cnty.*, 612 F. Supp. 2d 1163 (D. Colo. 2009) (upholding jury verdict finding RLUIPA violation, but no Free Exercise violations), *aff'd sub nom. Rocky Mountain Christian Church* v. *Bd. of*

[12] This fact is further confirmed by RLUIPA's text, particularly 42 U.S.C. §§ (a)(2)(A)-(B), which make clear that the substantial burden provision applies "even if the burden results from a rule of general applicability."

Cnty. Comm'rs, 613 F.3d 1229 (10th Cir. 2010), *cert. denied*, 131 S. Ct. 978 (U.S. Jan. 10, 2011) (No. 10-521).

Given the special solicitude RLUIPA is designed to show towards religious land use, Montgomery County's treatment of Bethel easily falls within the prohibitions of the law.

II. The County violated RLUIPA by discriminating against disfavored churches in general.

Montgomery County makes it exceedingly difficult to find land to build a church, and then uses its regulations and law-making authority in arbitrary ways against disfavored categories of churches. These actions violate RLUIPA Section 2(b)(2) by discriminating on the basis of religion.

RLUIPA prohibits governments from "impos[ing] or implement[ing] a land use regulation that discriminates against any assembly or institution on the basis of religion or religious denomination." 42 U.S.C. § 2000cc-2(b)(2). As its sponsors explained, § 2(b) "prohibit[s] various forms of discrimination against or among religious land uses. These sections enforce the Free Exercise Clause rule against laws that burden religion and are not neutral and generally applicable." Sponsors'

Statement at S7776. Given the statute's language and legislative history, courts should look to Free Exercise Clause precedent—particularly *Lukumi*—for guidance on how to determine whether a regulation discriminates against houses of worship.

The Supreme Court held in *Church of the Lukumi Babalu Aye, Inc.* v. *City of Hialeah,* 508 U.S. 520 (1993), that laws which are not neutral or generally applicable violate the Free Exercise Clause. The Court's opinion outlines multiple ways in which the ordinances at issue—there, city and state regulations prohibiting animal slaughter—failed the tests of neutrality and general applicability, and thereby discriminated against the plaintiffs' religious practice of animal sacrifice. *Id.* at 525-46. *See also Stormans, Inc.* v. *Selecky*, C07-5374RBL, 2012 WL 600702, at *32-55 (W.D. Wash. Feb. 22, 2012) (discussing the multiple ways that a regulation may violate the Free Exercise Clause under *Lukumi*).

Because RLUIPA § 2(b)(2) is intended to enforce constitutional protections under *Lukumi*, actions which are not neutral or generally applicable under *Lukumi* are also violations of RLUIPA. Several such violations occurred in this case.

When examining the evidence of discrimination under § 2(b)(2), it is important to note that the burdens of proof and persuasion are placed squarely on the County. RLUIPA says, "[i]f a plaintiff produces prima facie evidence to support a claim alleging a violation of the Free Exercise Clause or a violation of section 2000cc of this title, the government shall bear the burden of persuasion ***on any element of the claim*** . . . ." 42 U.S.C. § 2000cc-2(b) (emphasis added). The only exception is for proof of a substantial burden. This provision governs the Church's claims under RLUIPA's nondiscrimination provisions.[13] Because the Church made out a prima facie case of discrimination, the onus is now on the County to explain its actions.

[13] Legislative history indicates that this provision was included in order to mirror Free Exercise jurisprudence. *See Protecting Religious Liberty: Hearings on H.R. 1691 Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 106th Cong. 211 (1999) (testimony of Prof. Douglas Laycock, University of Texas Law School) ("Section 3(a) provides that if a claimant demonstrates a prima facie violation of the Free Exercise Clause, the burden of persuasion then shifts to the government on all issues except burden on religious exercise. No element of the Court's definition of a free exercise violation is changed, but in cases where a court is unsure of the facts, the risk of nonpersuasion is placed on government instead of on the claim of religious liberty. This provision facilitates enforcement of the constitutional right as the Supreme Court has defined it.").

A. The ordinances are discriminatory because they function as a "religious gerrymander."

Under the Supreme Court's decision in *Lukumi*, laws may prove discriminatory in several ways. One of those ways is if the law is not neutral because "the effect of [the] law in its real operation" is to accomplish a "religious gerrymander." 508 U.S. at 535. *Lukumi* is an extreme case; it was a unanimous decision, and the Court said that the ordinances fell "well below" the minimum constitutional standard. *Id.* at 543. Thus, a free exercise violation need not be as extreme as *Lukumi* for a plaintiff to prevail. But *Lukumi* offers important guidance on how to determine whether a particular ordinance or web of ordinances creates a religious gerrymander.

There, to determine whether the law accomplished a religious gerrymander, the Court examined three primary factors: (a) whether "the burden of the ordinance, in practical terms, falls on [religious objectors] but almost no others" (*id.* at 536); (b) whether "the interpretation given to the ordinance by [the government]" favors secular conduct (*id.* at 537); and (c) whether the laws "proscribe more religious conduct than is necessary to achieve their stated ends" (*id.* at

538). Importantly, to make out a religious gerrymander claim, the plaintiff does not have to provide direct proof of discriminatory intent. Instead it is the "effect of the law in its real operation"—an objective test—that determines the existence of a religious gerrymander. Applying that objective test, the rule speaks for itself – there has been a religious gerrymander.

First, the "the burden of the ordinance, in practical terms, falls on [houses of worship] but almost no others." Religious organizations are the only assemblies targeted by ZTA 7-07. Although the ZTA purports to regulate Public Institutional Facilities ("PIF"), a category which includes houses of worship, statements by the County demonstrate that it was really only concerned with churches. *See, e.g.*, J.A. 1423 ("Council members expressed a great concern about larger churches"); J.A. 1435:19-21 (County's witness testifying: "Q: Are you aware of any concerns related to any non religious PIF uses. A: Specifically, no.") Numerous other statements by County officials regarding both ZTA 7-07 and the Knapp Cap demonstrate that they equated these regulations with the regulation of houses of worship. For instance:

- Numerous statements of Council members on the record identifying "PIFs" with churches and referring specifically to Bethel. *See, e.g.,* J.A. 491, 528, 532-37, 548-52 ("Unfortunately Bethel has kind of become ground zero for this debate….").
- County documents concerning proposed PIF legislation include handwritten notes and other references to Bethel and Derwood Bible Church. J.A. 1617-1630, 1631, 1633, 1660-74.
- Those documents also reference "sanctuary seat[s]," and "maximum worship seats," with specific mention of "Church Size RDT." *Id.*
- County witnesses testified that churches were the main consideration for ZTA 05-15. J.A. 1207-1208.
- Other legislative documents have notes showing that the County considered the impact on Bethel, including one document which notes, "Bethel, 120 acres, 4 units?, 2400 max cap 3000 3600." J.A. 1633; *see also* J.A. 1564.
- Another document refers to a "comprehensive inventory of churches," J.A. 1660.
- An email from Evans, head of the local agricultural group, to the County states: "I started a list of places of worship, PIFs and asked for more ideas. Is the data I'm asking for what you had in mind? What would be most helpful to provide comparisions [sic] of size and scope? Thanks for meeting with us, it was very helpful." J.A. 1719.

The County's statements and actions make it clear that the changes to its PIF, water and sewer regulations were designed to disfavor certain churches. Discussions of the policy changes included references to "churches" (including specific churches), "worship seats," "comprehensive inventory of churches," and "sanctuary seats." These

references demonstrate that the County's regulations in the RDT zone, culminating in ZTA 07-07, target churches. Therefore these land use regulations discriminate on the "basis of religion."

Second, "the interpretation given to the ordinance by [the government]" favors secular conduct. Here, the government has engaged in stalling and delay tactics with at least two churches, delaying their water and sewer applications so that it could change the rules governing those applications. *See* Br. 7-11. With *Bethel,* it used this tactic twice, once to institute the "Knapp Cap," which made its original application impossible, and once again to pass ZTA 7-07, which prohibited church use on its property outright. *Id.* Meanwhile, it has permitted multiple residential uses near the church's property, even though such uses are not agricultural. *See* J.A. 946, 1002-03 (detailing nearby residential uses); J.A. 1066-70 (detailing planned additional residential uses). This demonstrates a clear pattern of interpreting the rules to favor secular residential development over houses of worship.

Third, the ordinances "proscribe more religious conduct than is necessary to achieve their stated ends." Prior to adopting ZTA 7-07, the County considered and rejected two other regulations which would

achieve its water regulation goals while permitting some churches to build. *See* J.A. 1149-50, 1575-80; J.A. 1581-85 (original draft of policy, which would have permitted Bethel to build); J.A. 1152:10-12 (County's 30(b)(6) witness doesn't know why this legislation was changed); J.A. 1145:5-19 (County considered alternative which would allow churches like Bethel to apply for permits to build). The County rejected those ordinances in favor of the most extreme version, a version which made the Church's proposed use impossible. It is particularly telling that, despite its adoption of a restrictive water and sewer policy, the County has never undertaken nor required any kind of study to assess the Church's actual impact upon water systems and water quality. *See* J.A. 1263:21-1264:6, 1276:12-A1277:1. This is a clear example of proscribing more religious conduct than necessary to achieve a goal.

Taken together, these factors demonstrate that the Knapp Cap and ZTA 7-07 function as a "religious gerrymander" prohibiting the construction of disfavored churches in the RDT zone. The County's web of regulations disfavor church uses in operation, are interpreted to delay and stall church uses, and proscribe more church land users than necessary to achieve the stated goals. At a bare minimum, these facts

show that the church is entitled to a trial to determine whether the County's actions violated RLUIPA § 2(b)(2).

B. The ordinances are discriminatory because evidence shows that they were intended to target certain church uses.

In addition to religious gerrymanders, ordinances can violate the Free Exercise Clause (and by extension, RLUIPA) if the ordinances were motivated by an intent to discriminate against religion. In other words, discrimination happens when an ordinance is "enacted 'because of,' not merely 'in spite of,' [its] suppression of" religious conduct. *Lukumi*, 508 U.S. at 540. Under this analysis, "[r]elevant evidence includes, among other things, the historical background of the decision under challenge, the specific series of events leading to the enactment or official policy in question, and the legislative or administrative history, including contemporaneous statements made by members of the decisionmaking body." *Id.*[14] *See also Locke* v. *Davey*, 540 U.S. 712,

[14] This portion of the opinion was not joined by a majority of the Court, but cases following *Lukumi* have treated evidence of animus as relevant to RLUIPA and Free Exercise claims. *See, e.g.*, *St. John's United Church of Christ* v. *City of Chicago*, 502 F.3d 616, 633 (7th Cir. 2007) (court must examine "the 'historical background of the decision under challenge, the specific series of events leading to the enactment . . . and

723-25 (2004) (examining both "*the history* [and] text" of a law to probe for "anything that suggests animus toward religion.") (emphasis added).

In *Lukumi*, the portion of the opinion addressing discriminatory intent focused on three types of evidence. First, the Court relied on "the events preceding [the ordinances'] enactment"—in particular, the fact that "the city council made no attempt to address the supposed problem" until "just weeks after the Church announced plans to open." *Id.* at 540-41. Second, the Court relied on "statements by members of the city council" expressing opposition to Santeria. *Id.* at 541. Third, the Court relied on "hostility exhibited by residents" during the legislative process, and comments by unrelated city officials (such as a police chaplain, a city attorney, and a deputy city attorney). *Id.* at 541-42.

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the [act's] legislative or administrative history'") (quoting *Lukumi*); *Wirzburger* v. *Galvin*, 412 F.3d 271, 281-82 (1st Cir. 2005) (considering, on free exercise challenge, "evidence of animus against Catholics in Massachusetts in 1855 when the [law] was passed," "the wide margin by which the [law] passed," and the convention's "significant Catholic representation"); *Children's Healthcare Is a Legal Duty, Inc.* v. *Min De Parle*, 212 F.3d 1084, 1090 (8th Cir. 2000) ("the law's legislative history" is relevant); *Stormans,* 2012 WL 600702, at *49 (in Free Exercise challenge, "considering the historical background of a law is the best approach, for several reasons . . .").

Taken together, the events and comments showed that the purpose of the ordinances was to target Santeria sacrifice. *Id.* at 542.

So too, here, the events preceding the regulations' enactment, statements by County officials, and hostility from local residents show that the purpose of the regulations was to target religious land use.

First, "the events preceding [the ordinances'] enactment" show an intent to target church uses. In particular, the fact that the County Board "made no attempt to address the supposed problem" until "after the Church announced plans to open." In 2004, when Bethel filed an application to build its worship center—a use permitted as of right—the Board suddenly decided to amend the water and sewer plans governing the property. Br. 10-11. When Bethel filed a scaled-down application, consistent with the new plan, that application, too, was held in abeyance for further action on the water and sewer plans. Br. 11-12. Finally, the County adopted a new ordinance which prohibited church use altogether. *Id*. The fact that the County chose not to address these needs prior to the submission of the Church's plans, coupled with its decision to delay those submissions pending the passage of new

regulations, demonstrates that church uses were targeted in violation of RLUIPA.

Second, members of the county council made statements which show opposition to the Church's application. County officials made statements during the legislation process which demonstrate that they were particularly interested in the impact the new regulations would have on the applications of Bethel and at least one other church.

For instance, County documents quoted above show that the County specifically considered the effect of ZTA 7-07 and the Knapp Cap on church uses. *See supra* 22-23; *see also* J.A. 1564 (handwritten notes on a copy of a memorandum regarding the Knapp Cap that read "GL will work with Derwood [Church] as I am [sic] with Bethel.") The record also contains numerous statements of Council members identifying "PIFs" with churches and referring specifically to Bethel. *See, e.g.*, J.A. 491, 528, 532-37, 548-52 ("Unfortunately Bethel has kind of become ground zero for this debate…."). Even so, the County proceeded to pass a zoning amendment which effectively prohibited Bethel's land use in the RDT zone. This evidence, at a minimum, raises a fact issue for a jury as to

whether the County targeted church uses with the passage of these ordinances.

Third, County residents expressed hostility toward the Church's application, and that hostility was enacted into law. Specifically, a local preservation organization spearheaded the effort to pass both the Knapp Cap and ZTA 7-07, and County officials did as they were told. *See, e.g.,* J.A. 1865, 1137:19-A1138:6 (admitting that the limitation of uses based on the existence of easements was "direction . . . from the ag preservation group."); J.A. 1156:3-A1158:2 (same with specific reference to head of the group). A County official even sought guidance from the agricultural group in drafting the policy. *See* J.A. 1721-22, 1832-33, 1842-49. That organization had a history of opposing church uses in the RDT zone. *See, e.g.,* J.A. 1376:14-17 (group was "strongly opposed" to Bethel's application); J.A. 1855, 1857-59, 1865, 1867, 1872.

This is not only a violation of *Lukumi*, but also just what the Supreme Court condemned in *City of Cleburne* v. *Cleburne Living Center*, 473 U.S. 432 (1985). There, a home for the mentally retarded sought a special use permit under a zoning ordinance. But the city denied the permit in response to the "negative attitudes" and "fear" of

neighbors. *Id.* at 448. The Supreme Court struck down the enforcement of the ordinance as unconstitutional: "Private biases may be outside the reach of the law," the Court said, "but the law cannot, directly or indirectly, give them effect." *Id.* (quotation omitted). The County has given effect to private biases by passing a law directly targeted at disfavored houses of worship.

III. The County violated RLUIPA by discriminating against Bethel in particular.

Not only does the County discriminate against disfavored churches in general, it has discriminated against Bethel World Outreach Ministries in particular. The protracted and arbitrary decision-making process by the County, coupled with the comments of its officials, make it clear that the County acted to prevent Bethel—a church with many African-American members in a less diverse part of the County (J.A. 807)—from building on its property. This is exactly the kind of discrimination RLUIPA was passed to prevent. As the Second Circuit said, RLUIPA violations are more likely "where land use restrictions are imposed on the religious institution arbitrarily, capriciously, or unlawfully. The arbitrary application of laws to religious organizations

may reflect bias or discrimination against religion." *Westchester Day Sch.*, 504 F.3d at 350. Arbitrary or capricious zoning actions give rise to an inference of hostility toward religion generally, or one church in particular.[15]

Those actions seem particularly arbitrary when Bethel's treatment is contrasted with the treatment of the nearby project by the Archdiocese of Washington. The Archdiocese is being permitted to move ahead with a large church and school construction project, despite the County's own admissions that the Archdiocese's plans undermine its supposedly-important interests in preserving agricultural land. *See* J.A. 1251:4-18,

[15] This portion of the Second Circuit's opinion discusses RLUIPA's substantial burden provision. The court pointed out that indicia, but not definite proof, of discrimination is often sufficient to make out a substantial burden claim, even if insufficient to prove a § 2(b)(2) claim. *See id.* In this case, the evidence is strong enough to survive summary judgment on the § 2(b)(2) claim. But even if the Court did not reverse the § 2(b)(2) ruling, it should consider this arbitrary treatment to be powerful evidence of a substantial burden under § 2(a). *Cf. Guru Nanak*, 456 F.3d at 991-92 ("The net effect of the County's two denials—including their underlying rationales and disregard for Guru Nanak's accepted mitigation conditions—is to shrink the large amount of land theoretically available to Guru Nanak under the Zoning Code to several scattered parcels that the County may or may not ultimately approve."); *Constantine,* 396 F.3d at 899-900 (finding substantial burden where the "decision maker cannot justify" its zoning decisions and "repeated legal errors by the City's officials casts doubt on their good faith").

1382:11-1383:18, 1385:11-13. By contrast, when Bethel applied to build a church nearby, the County delayed its applications twice, and twice enacted new regulations which prohibited Bethel's proposed use. ZTA 7-07 is particularly pernicious, since it impacted Bethel and *no other pending application*. *See* J.A. 1076-77, 1374:17-75:1 (Bethel's was the only pending application impacted by ZTA 7-07). This is not to say that the County was wrong to approve the Archdiocese's project—far from it—but only to show that the County has not treated Bethel fairly or faithfully pursued its purported interest in preserving agricultural land.

The County's actions here run afoul of the Free Exercise Clause's prohibition on laws which are not generally applicable. *See Smith,* 494 U.S. at 879-80. Laws fail the general applicability requirement when they prohibit a particular type of religious conduct, but fail to prohibit other types of conduct which pose the same risks. *See Lukumi,* 508 U.S. at 542-46. In *Lukumi,* the City claimed that it was necessary to prohibit Santeria sacrifice in order to prevent animal cruelty and protect against health risks related to animal slaughter and consumption. *Id.* at 543-45. But a closer look at the city's ordinances revealed that it permitted a variety of conduct that posed the very same risks: laboratory animal

testing, poisoning of vermin, hunting, fishing, and consumption of uninspected meat. *Id.* at 543-46.

The same is true here. The County's regulations are not generally applicable because they prohibit a particular religious use (the Church's), but permit other land uses which pose the same—or even greater—threats to its supposed interests. The County ostensibly prohibited Bethel's use in order to protect agricultural lands and water quality. But its actions do not hold up to scrutiny. It has permitted nearby agricultural land to become residential, *see* J.A. 946, 1002-03, 1066-70 (detailing nearby residential uses); it permits church uses (other than Bethel's) in the RDT zone as of right, *see* Br. 35-36, J.A. 835-36, 1453; and it has permitted the Archdiocese's project to proceed, even though it poses a greater threat to water quality. *See* Br.49-50, J.A. 1-74, 1076-77 (existing cemetery and new project are in a more environmentally sensitive watershed). "The Free Exercise Clause 'protect[s] religious observers against unequal treatment,'" but unequal treatment is precisely what the Church has received here. *Lukumi,* 508 U.S. at 542 (citing *Hobbie* v. *Unemployment Appeals Comm'n of Fla.*, 480 U.S. 136, 148 (1987)).

The County's actions, at the very least, merit the scrutiny of a full trial on the merits.

CONCLUSION

For the foregoing reasons, the decision below should be reversed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 6,904 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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April 12, 2012

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Fourth Circuit by using the appellate CM/ECF system on April 12, 2012.

I certify that counsel for Appellant and Appellees, as listed below, are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

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