02 -7073

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

FIFTH AVENUE PRESBYTERIAN CHURCH, GLADYS ESCALERA, NICHOLAS NESRON, WILLIAM P. RASMUSSEN, DONALD J. ROBINSON, VERONICA A. LESTER, ALFRED A. MCKENZIE, ALFRED BROWN, DENNIS PAIGE, PEABODY DENNIS, STEFAN PARY, AND MARGARET SHAFER,

Plaintiffs-Appellees,

-against

THE CITY OF NEW YORK, BERNARD KERIK, AND RUDOLPH GIULIANI Defendants-Appellants.

Appeal from the United States District Court
for the Southern District of New York

AMICUS CURIAE BRIEF OF THE BAPTIST JOINT COMMITTEE ON PUBLIC AFFAIRS; THE BECKET FUND FOR RELIGIOUS LIBERTY; THE CHRISTIAN LEGAL SOCIETY; CLIFTON KIRKPATRICK AS STATED CLERK OF THE GENERAL ASSEMBLY OF THE PRESBYTERIAN CHURCH (USA); THE COUNCIL OF CHURCHES OF THE CITY OF NEW YORK; THE GENERAL CONFERENCE OF SEVENTH-DAY ADVENTISTS; THE INTERFAITH ASSEMBLY ON HOMELESSNESS AND HOUSING; THE QUEENS FEDERATION OF CHURCHES; AND RUTGERS PRESBYTERIAN CHURCH, IN SUPPORT OF THE PLAINTIFFS-APPELLEES AND IN SUPPORT OF AFFIRMANCE

Eric W. Treene*
Anthony R. Picarello, Jr.
Roman P. Storzer Derek Gaubatz
The Becket Fund for Religious Liberty
1350 Connecticut Ave., N.W.
Suite 605
Washington, D.C. 20006
(202) 955-0095 Attorneys for Amici

March 15, 2002 *Counsel of Record

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, Amici state that none of the Amici has a parent corporation, nor does any Amicus issue any stock.

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INTEREST OF THE AMICI

Pursuant to Fed. R. App. P. 29, Amici the Baptist Joint Committee et al. respectfully submit this brief amicus curiae in support of Plaintiffs/Appellees. Pursuant to Fed R. App. P. 29(a), Amici state that all parties have consented to the filing of this brief.

The Baptist Joint Committee on Public Affairs is composed of representatives from various cooperating Baptist conventions and conferences in the United States. It deals exclusively with issues pertaining to religious liberty and church-state separation and believes that vigorous enforcement of both the Establishment and Free Exercise Clauses is essential to religious liberty for all Americans. The Baptist Joint Committee's supporting bodies include: Alliance of Baptists, American Baptist Churches in the U.S.A., Baptist General Association of Virginia, Baptist General Conference, Baptist General Convention of Texas, Baptist State Convention of North Carolina, Cooperative Baptist Fellowship, National Baptist Convention of America, National Baptist Convention U.S.A. Inc., National Missionary Baptist Convention, North American Baptist Conference, Progressive National Baptist Convention Inc., Religious Liberty Council, and Seventh Day Baptist General Conference. Because of the congregational autonomy of individual Baptist churches, the Baptist Joint Committee does not purport to speak for all Baptists.

The Becket Fund for Religious Liberty is a non-partisan and interfaith public interest law firm that defends the free expression of all religious traditions. The Becket Fund has represented Christians, Jews, Muslims, Sikhs, Native Americans, Buddhists, and Zoroastrians in religious liberty litigation in state and federal courts throughout the United States, both as primary counsel and as amicus curiae. The Becket Fund believes that the religious exercise and religious expression of the Plaintiffs in this case, under the United States Constitution and federal statutory law, may not be burdened by the government except upon demonstration of the most compelling reasons, and that it is imperative for the religious liberty of all New Yorkers that this principle be recognized in this case.

Clifton Kirkpatrick, as Stated Clerk of the General Assembly, is the senior continuing officer of the highest governing body of the Presbyterian Church (USA). The Presbyterian Church (USA) is the largest Presbyterian denomination in the United States, with approximately 2,500,000 active members in 11,500 congregations organized into 172 presbyteries under the jurisdiction of 16 synods. The general Assembly does not claim to speak for all Presbyterians, nor are its deliverances and policy statement binding on the membership of the Presbyterian Church. The General Assembly is the highest legislative and interpretive body of the denomination, and the final point of decision in all disputes. As such, its statements are considered worthy of the respect and prayerful consideration

of all the denomination's members. Presbyterians have long supported the autonomy of its churches. In its 1988 policy statement, God Alone is Lord of the Conscience, the 200th General Assembly expressed great concern about the increasingly common claim of compelling state interests by secular government over matters that are the responsibility of the Church. New York City's attempt to characterize the Plaintiffs' practice of their sincerely held beliefs as not religious "in any true sense" reaches deeply into the church's expression of religious belief and practice that is protected by the First Amendment's Free Exercise Clause as interpreted by longstanding Supreme Court precedent.

The Christian Legal Society, founded in 1961, is a nonprofit interdenominational association of Christian attorneys, law students, judges, and law professors with chapters in nearly every state and at over 140 accredited law schools. Since 1975, the Society's legal advocacy and information division, the Center for Law and Religious Freedom, has worked for the protection of religious belief and practice, as well as for the autonomy from the government of religion and religious organizations, in the Supreme Court of the United States and in state and federal courts throughout this nation.

The Council of Churches of the City of New York, Inc., is an ecumenical coalition of the major representative religious organizations representing the several Protestant, Anglican and Orthodox Christian denominations having ministry in the City of

New York. The Council continues, since 1968, the work of the former Protestant Council of the City of New York. It is governed by a Board of Directors which is comprised of the bishop or equivalent officer of each local diocese, association, synod, presbytery, conference or district of its member denominations and of the president and executive officer of the local councils of churches serving in each of the boroughs of the City of New York. The leadership represented by the Council of Churches of the City of New York is, by first hand experience, acutely aware of both the plight of the homeless and the need for congregations to be able to develop their ministry to the homeless on their property without subjecting either their guests or the Church itself to harassment by civil authorities.

The General Conference of Seventh-day Adventists is the highest administrative level of the Seventh-day Adventist Church and represents nearly 48,000 congregations with more than 11 million members worldwide. The North American Division of the General Conference administers the work of the church in the United States, Canada, and Bermuda, and represents more than 4,700 congregations in the United States with over 900,000 members. Seventh-day Adventist congregations in the United States support approximately 850 Community Service Centers that served more than 440,000 individuals, including the homeless, in the year 2000.

The Interfaith Assembly on Homelessness and Housing is a tax-exempt New York State religious corporation that counts over

50 New York City religious organizations of various denominations and faiths among its membership. Incorporated in 1986, the Assembly serves men and women who have experienced homelessness, through a series of life skills programs and referral and support services. The Assembly's Governing Council, which is elected at the Assembly's annual meeting by representatives of its member institutions, includes a number of formerly homeless men and women who have graduated from some of the Interfaith Assembly's programs.

The Queens Federation of Churches, Inc., was organized in 1931 and is an ecumenical association of Christian churches located in the Borough of Queens, City of New York. It is governed by a Board of Directors composed of equal number of clergy and lay members elected by the delegates of member congregations at an annual assembly meeting. Over 360 local churches representing every major Christian denomination and many independent congregations participate in the Federation's ministry. The Queens Federation of Churches has appeared as amicus curiae previously in a variety of actions for the purpose of defending religious liberty. The Queens Federation of Churches and its member congregations are vitally concerned with the protection of the principle and practice of religious liberty as manifest in the present action. The Queens Federation of Churches believes that the congregation's own definition of its religious ministry is based on a call from God and may not, under

religious liberty principles, be subject to regulation, definition or second-guessing by secular government.

Rutgers Presbyterian Church is a church located on the Upper West Side of Manhattan that has a strong social justice ministry. It operates a shelter that receives ten men referred by the Partnership For The Homeless three nights a week. The shelter is staffed by volunteers from Rutgers Presbyterian Church's congregation and two other churches.

The issue of the standard of review of government conduct to be applied in free exercise cases has caused considerable confusion among state and local governments in the wake of the Supreme Court's decision in Employment Div., Dept. of Human Resources of Oregon v. Smith, 494 U.S. 872 (1990). Amici therefore submit this brief, which is limited to the issue of why strict scrutiny should be applied in this case. Amici believe that this focus will aid the Court in its resolution of this case, and will not duplicate the briefs of the parties.

SUMMARY OF ARGUMENT

Amici submit this brief to demonstrate to the Court that both the Free Exercise Clause of the United States Constitution and the recently enacted Religious Land Use and Institutionalized Persons Act (RLUIPA) require that strict scrutiny be used to analyze the City's removal of the homeless from the Church's steps.

The threshold question in this case is whether the practices of the Fifth Avenue Presbyterian Church (the "Church") at issue here are religious, a point that the Defendants (the "City") take great efforts to try to refute. The City, while acknowledging, as it must, that caring for the poor is a commonly recognized religious activity, takes issue with this particular church's manner of serving the poor. The City argues that allowing homeless people to sleep outside on the steps of the church is by definition "an act neither of compassion nor of hospitality." Def. Brf. at 17. The City believes that providing a place to sleep that lacks the common amenities of a shelter is not "civilized," Def. Brf. at 15, and therefore cannot be considered to be within the common understanding of religiously motivated care for the poor: "[t]he relevant point . . . is that by merely offering its steps as a sleeping place, the Church practices neither services nor charity in any true sense." Def. Brf. at 17.

But it is constitutionally irrelevant whether the Church's practices are religious in the eyes of the City, or whether the Church lives up to some common understanding of what faith-based

charity should be. What matters for constitutional purposes is whether the Church sincerely believes that it is engaging in religious activities. And the City has done nothing to counter the substantial evidence the Church has presented that its practice of permitting the homeless to sleep on its steps and its outreach activities to them are acts of religious devotion and expressions of religious conviction.

Since the Church's activities toward the homeless are religious in nature, the central issue of this case is whether the City's actions of forcibly clearing the homeless from the church steps, which completely forecloses the religious activity in question, must be justified by a compelling government interest that is pursued in the least restrictive manner. While the Supreme Court in Employment Div., Dept. of Human Resources of Oregon v. Smith, 494 U.S. 872 (1990), held that most cases involving religion-neutral, generally applicable laws would be viewed under a rational basis standard, this case does not involve the application of any generally applicable law. Rather than pointing to any law or regulation that bars the conduct in question, the City argues that allowing the homeless to sleep on the church steps fails to meet the three-part test in the zoning code for determining valid accessory uses. This test, the City argues, has been interpreted by courts to require that the use be "reasonably associated with the[ ] religious purposes." Def. Brf. at 21. This accessory-use test is thus legally indistinguishable from the "good cause" standard involved in Sherbert v. Verner, 374 U.S. 398 (1963), which, the Smith Court

found, amounted to a process of individualized assessment of the relevant conduct that rendered the unemployment laws at issue in that case non-generally applicable, thus triggering strict scrutiny.

A second, independent and sufficient ground to apply strict scrutiny to this case is that it involves religious exercise combined with other First Amendment interests, freedom of expression and freedom of association. The Smith Court noted that "The only decisions in which we have held that the First Amendment bars application of a neutral, generally applicable law to religiously motivated action have involved not the Free Exercise Clause alone, but the Free Exercise Clause in conjunction with other constitutional protections, such as freedom of speech and of the press." 494 U.S. at 881-882. The Court also noted that freedom of association would likely trigger heightened review. Id. The Plaintiffs have submitted substantial evidence that their practices involving the homeless are meant to impart a religious message to the surrounding community, and that their relationships with the homeless people who sleep on their steps is important to their ministry. This case thus is a "hybrid" case of Free Exercise interests coupled with other First Amendment interests that triggers strict scrutiny.

Third, strict scrutiny applies to this case under the terms of RLUIPA. RLUIPA applies because Defendant is relying on its zoning regulations as authority for removing the homeless from the Church's property.

ARGUMENT

I. THE CITY'S ATTEMPT TO CHARACTERIZE PLAINTIFFS' PRACTICE OF THEIR SINCERELY HELD RELIGIOUS BELIEFS AS NOT "CIVILIZED" AND NOT RELIGIOUS "IN ANY TRUE SENSE" AND THEREFORE CONSTITUTIONALLY UNPROTECTED IS AT ODDS WITH LONGSTANDING SUPREME COURT PRECEDENT

The threshold question in this case is whether the Church's practice of permitting the homeless to sleep on its steps and sidewalk is a religious practice that is potentially protected by the First Amendment's Free Exercise Clause and the Religious Land Use and Institutionalized Persons Act of 2000, 42 U.S.C. § 2000cc et seq. (RLUIPA).

The Church presented the District Court with an abundance of evidence that this practice is an expression of its religious beliefs. For example, Church member and outreach coordinator Margaret Shafer stated:

> For our church, our concern for the homeless is an inextricable part of our actual worship of God. . . . We believe that God views our acts of kindness, compassion, love, and concern for our neighbors as acts done toward God, and that in ministering to the homeless we are giving the love of God, to God incarnate in the homeless persons (whether they realize it or not), in the watchful presence of God Almighty. There is perhaps no higher act of worship for a Christian.

(A 102). The Church operates a homeless shelter for ten men inside the Church, but also over the years was presented with numerous homeless people who gathered on their steps, and the church decided that they must engage them and could not ignore them (A 108). The Church permits

them to sleep, allows them to

use the lavatory at specified periods, engages in a "befriending ministry" of luncheons and dinners at which Church members and Homeless Neighbors can interact, engages in counseling of the Homeless Neighbors, and invites them to worship services and classes (A 58-59) .

The religious nature of the reasons compelling the Church to engage the homeless and the religious nature of the interactions was explained in a recent sermon by the Church's pastor:

> We have ten homeless men who stay inside, but we've got about 25 or 30 who sleep outside the building. . . . But these homeless friends are part of our ministry. They are not homeless; they're our friends. . . . Outside on our signboard there's a sign that says, <u>This is God's House, All Are Welcome,</u> all are welcome and we mean it.
>
> . . .
>
> The question is, if Jesus were to come back today, would we make room? Would we make room in the church, on the steps, in the bays, in the sanctuary? You see, I think Jesus comes to us disguised as a nuisance, as a bother, as a homeless person. Cause Jesus knows if he'd come as the King of kings and Lord of lords, we'd say, "Oh, Jesus, welcome." But when he comes as a little baby, when he comes disguised as a homeless person, a homeless friend. Then Jesus can really see, well, are those the kind of people that would really make any room in their heart?

(A 116-117).

The Church's welcoming of the homeless who choose to sleep on their steps is also an act of expression to the community. As Margaret Shafer explained, "We are commanded to practice compassion and provide hospitality to everyone who comes to us. . . . We are not to be co-opted by the standards of 'worthiness' which may be practiced by the community around us. The homeless present a kind of creche scene, telling the world that the poor

and the homeless are welcome and not forgotten even in the midst of a world that is deeply concerned with prosperity." (A 103).

The City, in response to such clear indications that the Church and its members are pursuing what they believe to be their religious obligations to the homeless, does not try to show that the Church is being insincere. Rather, the City takes the tack that the church is doing a poor job of pursuing its religious mission and falls below societal standards of compassion. While Amici believe that the church is in fact acting compassionately, whether they are or not is irrelevant to the legal issue here. The only relevant issue is whether the Church is acting out of sincere religious conviction. And the City has presented nothing to suggest that the Church is not.

The City admits that serving the poor is a commonly held religious mandate, saying that it "do[es] not quarrel with the principle . . . that service to the homeless falls within the ambit of the First Amendment." Def. Brf. at 12. Its argument, however, is that the Church does not meet some standard of religious conduct that the City has in mind. The City states: "we do insist that, under standards enshrined in law, relegating homeless persons to the Church steps at night is an act neither of compassion nor of hospitality." Id. at 17. The City insists that the Church has not provided "the minimal amenities that define a civilized place of shelter," Id. at 16, and that "[t]he relevant point . . . is that by merely offering its steps as a sleeping place, the Church practices neither services nor charity in any true sense."

The City urges this Court to second-guess the Church's beliefs and find that the Church and its members really are not ministering to the poor as they believe they are. This is something courts may not do, however. As the Supreme Court made clear in Thomas v. Review Bd., 450 U.S. 707, 714 (1981), "religious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection." While the City may claim that it believes the Church's religious practice to be not "civilized," lacking in "compassion," and not "charity in any true sense," this does nothing to contradict the abundant evidence the Church and its members presented that their actions are, for them, religious. As the Supreme Court observed in Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520 (1993), the fact that some may even find a practice "abhorrent" does not matter to the determination of whether it is religious or not. Id. at 531. Indeed, to permit the government to determine what is proper religious conduct and what is not would violate the very core of the religion clauses.

This Court has repeatedly upheld this principle. As this Court explained in Patrick v. LeFevre, 745 F.2d 153 (2d Cir. 1984)(holding that prisoner raised genuine issue that group he belonged to was religious and entitled to recognition by prison officials), "the blessings of our democracy are ensconced in the first amendment's unflinching pledge to allow our citizenry to explore diverse religious beliefs in accordance with the dictates of their conscience." Id. at 157. The Court thus held that it

could not inquire into the correctness of a claimant's religious views, but only into "whether the beliefs professed by a [claimant] are sincerely held and whether they are, in his own scheme of things, religious." Id. (quoting United States v. Seeger, 380 U.S. 163 (1965))(alteration in original). Similarly, in Jolly v. Coughlin, 76 F.3d 468 (2d Cir. 1996)(upholding preliminary injunction protecting right of prisoner to resist tuberculosis test on religious grounds), this Court held that "courts are not permitted to ask whether a particular belief is appropriate or true--however unusual or unfamiliar the belief may be." Id. at 476.

The City has offered no evidence to refute the Church's demonstrated conviction that permitting the homeless to sleep on its steps and reaching out to and including them in their ministry are religious actions. The City's protestations that the quality of the service provided by the Church falls below the standard of civility, charity, and compassion that the City believes the Church should follow is simply irrelevant to the inquiry. The Church has thus shown that its allowing the homeless to sleep on its steps and the related outreach activities are religious practices.

II. THE CITY'S ACTIONS BURDENING THE RELIGIOUS EXERCISE OF THE PLAINTIFFS TRIGGER STRICT SCRUTINY.

Since the long-standing practice of the Church and its members permitting the homeless to sleep on their steps is a religious practice, and the City could not seriously contend that

the forcible removal of the homeless from the steps is not a substantial burden on that practice, the central issue in this case is whether strict scrutiny applies. If it does, then the City must show a compelling interest, pursued in a narrowly tailored manner, for burdening the Church's practices. As set forth below, there are three, independently sufficient reasons for this Court to apply strict scrutiny to this case: the laws cited by the City for its actions are not "generally applicable" laws as defined by the Supreme Court's Free Exercise jurisprudence; the right of religious practice, association, and expression implicated in this case are "hybrid rights" entitled to strict scrutiny under the Free Exercise Clause; and RLUIPA requires strict scrutiny.

A. The City's Actions Removing the Homeless from the Church Are Not Pursuant to Any Generally Applicable Law and Thus Strict Scrutiny Applies.

The Supreme Court in Smith ruled that laws that are religion-neutral and generally applicable ordinarily are not subject to strict scrutiny under the Free Exercise Clause. The Court thus held that a criminal prohibition against ingesting peyote could be applied to a Native American who used the drug for sacramental purposes, with no recourse to the compelling interest test articulated in Sherbert v. Verner, 374 U.S. 398 (1963). The Court distinguished Sherbert, a case involving a Seventh-day Adventist who sought unemployment benefits after being terminated for refusing to work on the Sabbath. Sherbert,

the Smith Court noted, "was developed in a context that lent itself to individualized governmental assessment of the reasons for the relevant conduct," namely, it involved an unemployment compensation provision that denied benefits if the worker refused work "without good cause." Smith, 494 U.S. at 884. This "good cause" inquiry thus "created a mechanism for individualized exemptions." Id. (quotation omitted). Thus, in contrast to "across-the-board prohibitions" like drug laws, the unemployment compensation laws were not generally applicable. See id. at 88485. And, the Smith Court explained, "where the State has in place a system of individual exemptions, it may not refuse to extend that system to cases of 'religious hardship' without compelling reason." Id. at 884.

On the heels of the Smith decision, the Court in 1993 in Hialeah struck down animal cruelty ordinances that barred ritual sacrifice. It did so on two independent grounds, each of which was sufficient to trigger heightened scrutiny: first, that they were not religion-neutral because they "had as their object the suppression of religion," 508 U.S. at 542, and second, the grounds applicable to this case, that the ordinances were not generally applicable. Observing that under Smith "laws burdening religious practice must be of general applicability," the Court held that the animal cruelty ordinance was not of general application since it barred ritual killing while other types of killing such as fishing, euthanasia of strays, and pest extermination "are either not prohibited or approved by express provision," id. at 543. The Hialeah Court thus held that the

laws must "undergo the most rigorous of scrutiny," before the burdening of religious practice could be justified. Id.

The zoning law that the City seeks to apply to the Church in this case is, like the unemployment law in Sherbert and the ordinances in Hialeah, not generally applicable and thus subject to strict scrutiny. The City relies on no across-the-board prohibition to bar the homeless from sleeping on the Church's steps. Rather, the city appeals to an argument that allowing sleeping on the steps is not a permissible "accessory use" under § 12-10 of the City zoning resolution. By the City's own admission, § 12-10 does not directly bar the religious practice of permitting the homeless to sleep on the steps. Instead, the City argues that "Section 12-10 of the New York City Zoning Resolution sets forth a three-prong test for determining whether a use qualifies as accessory." Def. Brf. at 21.

The prong at issue here is the second: whether the accessory use is "clearly incidental, to and customarily found in connection with" the principal use. Id. The City then points to case law permitting religious institutions to operate "facilities for such social, recreational, athletic and other accessory uses as are reasonably associated with their educational or religious purposes." Id. Then, remarkably, the City repeats its argument that the Church's actions are not really religious at all, saying "because the use of the Church steps as an [sic] night-time encampment serves no actual religious function, it fails to qualify as accessory use and is an improper use of Church

property." Id.

The City's "no actual religious function" argument is, for the reasons set forth in Section I, not religion-neutral since it second-guesses the validity of the Church's beliefs. This alone is enough to merit strict scrutiny under Hialeah. See 508 U.S. at 542. But even were the City to withdraw this argument, the three-prong test of accessory use in the zoning law is also a quintessential non-generally applicable law. Like the "good cause" inquiry in the unemployment context at issue in Sherbert, it examines in a value-laden manner just what activities will be deemed "reasonably associated with . . . religious purposes."

The case cited by the City to explain what "reasonably associated" with a church might mean only magnifies the subjectivity and takes the zoning law even further away from any semblance of an "across-the-board" prohibition. The City, quoting New York Botanical Garden v. Board of Standards and Appeals, 91 N.Y.2d 413, 419 (1998), states: "Whether a proposed accessory use is clearly incidental to and customarily found in connection with the principal use depends on an analysis of the nature and character of the principal use of the land in question in relation to the accessory use, taking into consideration the over-all character of the particular area in question." Def. Brf. at 22. This is as subjective as the "good cause" inquiry in Sherbert, and potentially as full of exceptions as the ordinances in Hialeah. This is not to say that the City is powerless to block accessory uses for churches. But under Sherbert, Smith, and Hialeah, because the law is not generally applicable, they

may only do so for compelling reasons and in a narrowly tailored fashion. The City's further argument that "equitable standards of minimum habitability" prohibit the church's practices is even more subjective.

The decisions of other courts support the conclusion that the City is not applying a generally applicable law to the Church here.[1] Most directly on point is Keeler v. Mayor & City Council of Cumberland, 940 F. Supp. 879 (D. Md. 1996), in which the court found that a historic preservation ordinance with exemptions for "undue financial hardship to the owner," and for building demolitions determined to be in the "best interest of a majority of persons in the community," was significantly different from the "across-the-board criminal prohibition on a particular form of conduct" at issue in Smith. Id. at 886. The Court held: "where the government enacts a system of exemptions, and thereby acknowledges that its interest in enforcement is not paramount, then the government 'may not refuse to extend that system [of exemptions] to cases of "religious hardship" without compelling reason.' Accordingly, the City's zoning regulation is not entitled to enforcement under the principles set forth in Smith."

1 Although this Court applied the rational-basis test of Smith to a landmarking challenge in Rector, Wardens, and Members of Vestry of St. Bartholomew's Church v. City of New York, 914 F.2d 348 (2d Cir. 1990), that case involved the validity of the entire landmarking law rather than the accessory use provisions of the zoning law at issue here. But more importantly, nothing in the St. Bartholomew's opinion suggests that this Court had been presented with the argument that the landmarking law was not generally applicable under the holding of Sherbert as explained in Smith. Moreover, this Court did not have the benefit of the Supreme Court's explication of Sherbert and Smith provided in the Hialeah decision in 1993, nor for that matter did it have the

Id. at 884 (quoting Bowen v. Roy, 47 U.S. 693, 708 (1986)).

Similarly, in Ayon v. Gourley, 47 F. Supp. 2d 1246 (D. Colo. 1998), the court held that the Smith rule of rational basis review for generally applicable laws did not apply to common law claims of outrageous conduct and negligent hiring and supervision against church officials, since "[t]hose claims, by definition, require much more subjective judgment on the appropriateness of the conduct than the across-the-board prohibition in Smith." Id. at 1249.

And in Alpine Christian Fellowship v. County Commissioners of Pitkin County, 870 F. Supp. 991, 994 (D.Colo. 1994), a case that, like this one, dealt with government review of accessory uses, the court held that a county's denial of a special review permit for a church to be allowed to operate a school on its premises as an accessory use should be reviewed under the Sherbert strict scrutiny test. See also Fraternal Order of Police v. City of Newark, 170 F.3d. 359 (3d Cir. 1999)(police department's no-beards policy held not generally applicable for Free Exercise purposes since officers with medical reasons for not shaving could obtain exemptions); Rader v. Johnston, 924 F. Supp. 1540 (D. Neb. 1996)(university housing policy requiring freshmen to live on campus not generally applicable since it exempted students for various enumerated reasons or upon a showing of hardship, and thus compelling interest test applied to denial of permission for student to live off-campus in religious community); Black Hawk v. Commonwealth of Pennsylvania, 114 F.

benefit of the holding in Hialeah.

Supp.2d 327 (M.D. Pa. 2000)(rabies law requiring dissection of heads of all wild animals that bite humans but which permitted the Secretary of Health to grant exceptions was not generally applicable law for Free Exercise purposes and strict scrutiny applied) .

Since the City's actions against the Church are not pursuant to a generally applicable law, strict scrutiny is triggered. As the Supreme Court held in Hialeah: "A law burdening religious practice that is not neutral or not of general application must undergo the most rigorous of scrutiny. To satisfy the commands of the First Amendment, a law restrictive of religious practice must advance 'interests of the highest order' and must be narrowly tailored in pursuit of those interests." 508 U.S. at 546.

B. Strict Scrutiny Also is Appropriate Because the Church's Claim Is a Hybrid Claim as Contemplated by the Smith Decision.

While the fact that the zoning law the City seeks to apply is not a generally applicable law within the meaning of the Smith decision alone is sufficient to trigger strict scrutiny under the Free Exercise Clause, there is a second, independently sufficient reason: this case involves what the Smith Court termed a "hybrid right" of free exercise coupled with free speech and freedom of association interests.

Under Smith, government regulation--even if religion neutral and generally applicable--that impinges on both religious

activity and expressive rights must be evaluated under the "compelling interest" standard:

> The only decisions in which we have held that the First Amendment bars application of a neutral, generally applicable law to religiously motivated action have involved not the Free Exercise Clause alone, but the Free Exercise Clause in conjunction with other constitutional protections, such as freedom of speech and of the press.

494 U.S. at 881. The Court also stated that freedom of association interests that were religious in nature would likewise be subject to strict scrutiny: "And it is easy to envision a case in which a challenge on freedom of association grounds would likewise be reinforced by Free Exercise Clause concerns." Id. at 882.

This Court, in Intercommunity Center for Justice and Peace v. INS, 910 F.2d 42, 44 (2d Cir. 1990), employed the Smith hybrid-rights analysis, but found that a group of nuns' claim for a Free Exercise exemption from compliance with laws barring hiring of undocumented aliens did not amount to a hybrid right: "Unlike the cases applying strict scrutiny to invalidate a law on free exercise grounds, this case does not involve a hybrid claim in which other constitutional concerns bolster the free exercise claim." But in Krafchow v. Town of Woodstock, 62 F. Supp. 2d 698 (N.D.N.Y. 1999), the court held that a Jewish man who was barred from reading Tarot cards to people in the town square, which he did in part to teach them about Jewish mysticism, stated a "hybrid" case of free exercise in

conjunction with free speech, which was thus subject to strict scrutiny. Id. at 712.

Other courts have similarly applied the "hybrid rights" analysis. Most applicable to the present facts is the decision of the Washington Supreme Court in First Covenant Church of Seattle v. City of Seattle, 840 P.2d 174 (Wa. 1992), where it analyzed the symbolic speech of a church's appearance:

> The church's claim is "hybrid" because [landmark] designation not only violates First Covenant's right to freely exercise religion, it infringes on First Covenant's rights to free speech.
>
> "Speech" includes nonverbal conduct if the conduct is "sufficiently imbued with elements of communication." Whether conduct constitutes speech depends on the nature of the activity, combined with the factual context and environment in which the activity is undertaken. There must be "[an] intent to convey a particularized message" and a great "likelihood . . . that the message would be understood by those who view it."
>
> First Covenant claims, and no one disputes, that its church building itself "is an expression of Christian belief and message" and that conveying religious beliefs is part of the building's function. First Covenant reasons that when the State controls the architectural "proclamation" of religious belief inherent in its church's exterior it effectively burdens religious speech. We agree with First Covenant's reasoning. The relationship between theological doctrine and architectural design is well recognized. . . . When, as in this case, [the interior and exterior of the building] are "freighted with religious meaning" that would be understood by those who view it, then the regulation of the church's exterior impermissibly infringes on the religious organization's right to free exercise and free speech.

Id. at 182 (footnote and citations omitted). See also Cornerstone Bible Church v. City of Hastings, 948 F.2d 464 (8th Cir. 1991) (ordering District Court on remand to consider hybrid

claim of free speech and free exercise infringement in action challenging city's barring of churches from commercial district); Reich v. Shiloh True Light Church of Christ, 1996 WL 228802 (4th Cir. 1996)(per curiam) (district court properly applied compelling interest test to church's hybrid rights claim); Alabama and Coushatta Tribes of Texas v. Trustees of Big Sandy Ind. Sch. Dist., 817 F. Supp. 1319 (E.D.Tex. 1993) (holding that Native American students wearing long hair were entitled to injunction under "hybrid rights" claims of religious exercise combined with speech and religious exercise combined with parental rights); Chalifoux v. New Caney Indep. Sch. Dist., 976 F. Supp. 659, 671 (S.D.Tex. 1997)(students barred from wearing rosaries stated hybrid claim of religious exercise and free speech).[2]

Plaintiffs submitted substantial evidence to the District Court that their practice of permitting the homeless to sleep on their steps, and to engage in outreach activities to them, is an act not only of religious compassion but of religious expression as well. As outreach coordinator Margaret Shafer stated, allowing the homeless to sleep on the church steps is "an act of

2 Cf. Swanson ex rel. Swanson v. Guthrie Indep. Sch. Dist. No. IL, 135 F.3d 694 (10th Cir. 1998) (applying hybrid rights analysis but determining that there was no colorable claim of parental rights to direct upbringing of child involved); American Friends Serv. Comm. Corp. v. Thornburgh, 951 F.2d 957, 960 (9th Cir. 1990) (holding right to employ coupled with Free Exercise Clause not a hybrid right contemplated in Smith); Brown v. Hot, Sexy and Safer Productions, Inc., 68 F.3d 525, 539 (1st Cir. 1995) (holding parents' claims did not "fall[ ] within the 'hybrid' exception recognized by Smith"); Hill-Murray Fed. of Teachers v. HillMurray High Sch., 487 N.W.2d 857, 862-63 (Minn. 1992) (religious employer's claims against application of labor law were

public witness, a visible testimony to the different way in which God looks upon the world." (A 102-03). The homeless on the church stairs "present a kind of crèche scene, telling the world that the poor and the homeless are welcome and not forgotten even in the midst of a world that is deeply concerned with prosperity." (A 103). The Church similarly submitted substantial evidence of the religious importance of the relationships they develop with the homeless through outreach activities. (A 69-71; A 104-106; A 116-117). The Church's claims thus present a classic hybrid situation as set forth in the Smith decision, both because they combine religious practice with speech and because they combine religious practice with associational interests, and strict scrutiny therefore applies.

C. The Religious Land Use and Institutionalized Persons Act of 2000 Requires That Strict Scrutiny Apply

Congress in 2000 enacted RLUIPA in an effort to protect religious institutions from discriminatory and unduly burdensome application of zoning laws. See R. Storzer & A. Picarello, The Religious Land Use and Institutionalized Persons Act of 2000: A Constitutional Response to Unconstitutional Zoning Practices, 9 Geo. Mason L. Rev. 929, 931-944 (2001).

The provision applicable here is Section 2(a)(1), which states:

> 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
distinguishable from hybrid claims).

> 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.

Subsection (a)(2)(C) provides that this standard, a codification of Sherbert, is to be applied when "the substantial burden is imposed in the implementation of a land use regulation or system of land use regulations, under which a government makes, or has in place formal or informal procedures or practices that permit the government to make, individualized assessments of the proposed uses for the property involved." As set forth in Section II (A), above, the New York Zoning regulations' threepart "accessory use" inquiry is a process of "individualized assessment" of the reasonableness of accessory uses. It thus triggers the protections of RLUIPA. Therefore, the City may only clear the homeless from the Church's steps if it can demonstrate that it is doing so in furtherance of a compelling interest, and that this is the least restrictive means to accomplish such a compelling interest.

* * *

The City has made no showing that its removal of the homeless from the Church's steps is supported by any compelling government interest, nor has it met the further requirement that its actions be the least restrictive means of pursuing that interest. Such a showing is required, as demonstrated above, under both the Free Exercise Clause and RLUIPA. Thus the District Court properly granted an injunction against the City.

CONCLUSION

For the foregoing reasons, the District Court's order should be affirmed.

Respectfully submitted,

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THE BECKET FUND FOR RELIGIOUS LIBERTY

By:
Eric W. Treene*
Anthony R. Picarello, Jr.
Roman P. Storzer Derek Gaubatz
1350 Connecticut Ave., N.W.
Suite 605
Washington, D.C. 20036
Counsel for Amici

* Counsel of Record

CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing brief is 6,647 words in length and complies with Federal Rule of Appellate Procedure 32 (a) (7) (B) and (C) .

Eric W. Treene
Counsel for Amici

CERTIFICATE OF SERVICE

I hereby certify that two true and correct copies of the above and foregoing Amicus Brief was sent this 15th day of March, 2002 via Federal Express to each of the following:

Michael A. Cardozo, Esq.
Corporation Counsel of the City of New York
60 John Street, 15th Floor,
New York, NY 10038

Carter G. Phillips
Sidley Austin Brown & Wood LLP
1501 K Street, NW
Washington, D.C. 20005

Eric W. Treene