No. 05-2309

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

LIVING WATER CHURCH OF GOD, d/b/a OKEMOS CHRISTIAN CENTER, a Michigan Ecclesiastical Non-Profit Corporation,

Plaintiff-Appellee,

v.

MERIDIAN CHARTER TOWNSHIP, et al.,

Defendants-Appellants.

On Appeal From The United States District Court
For The Western District of Michigan
Honorable Robert Holmes Bell
Case No. 5:04-CV-06

Brief *Amici Curiae* of the National Council of the Churches of Christ in the USA, the Church of God, the American Jewish Congress, the Association of Christian Schools International, the Seventh-day Adventist Church, and the Queens Federation of Churches in Support of Plaintiff-Appellee and Supporting Affirmance

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, *amici curiae* state that none of *amici* are public corporations that issue stock.

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INTEREST OF *AMICI CURIAE*

Amici curiae are private, non-profit religious organizations dedicated to protecting religious liberties. *Amici* believe the elimination of undue constraints on religious exercise is a worthy and important goal that inures to the benefit not only of religious practitioners, but also to the wider society.

Amici submit this brief because the resolution of this case could help decide issues of vital importance to religious freedom in the United States, primarily, what it means for governmental action to impose a "substantial burden" on religious land uses under the Religious Land Use and Institutionalized Persons Act of 2000, Pub. L. 106-275, 114 Stat. 803, codified at 42 U.S.C. § 2000cc *et seq.* ("RLUIPA"). Protecting individuals and faith-related institutions from unwarranted "substantial burdens" on their religious exercise was the central goal of RLUIPA. Reflecting that fact, this critical phrase appears in all of the Act's operative provisions, which are designed to protect religious freedom in the prison context as well as in the land-use context. *See* 42 U.S.C. § 2000cc *et seq*. Accordingly, whether the Act fulfills its congressionally mandated mission depends to a great extent on a proper interpretation of that phrase. *Amici* therefore have a strong interest in this case and, in particular, how this Court interprets "substantial burden." This case also presents this Court with an initial opportunity to apply to RLUIPA the Supreme Court's recent articulation of the compelling

interest test in *Gonzales* v. *O Centro Espírita Beneficente Uniao do Vegetal*, 546 U.S. ___, No. 04-1084 (Feb. 21, 2006), which was delivered by the Court on the same day as the appellee's brief in this case.

Amici comprise a diverse, *ad hoc* coalition of the following national and local, Christian and Jewish, religious organizations:

The **National Council of the Churches of Christ in the USA**, more commonly known as the National Council of Churches, is a community of 36 Protestant, Anglican, Orthodox, historic African American and Living Peace member faith groups which include 45 million persons in more than 100,000 local congregations in communities across the nation. Its positions on public issues are taken on the basis of policies developed by its General Assembly, composed of some 270 members who are selected by member communions in numbers proportionate to their size. The National Council of Churches is a member of the coalition which helped create RLUIPA as a means of addressing religious discrimination in zoning and landmarking decisions which has been experienced both by member communions and other religious groups.

The **Church of God** is a worldwide Pentecostal Christian denomination with over 6 million members in almost 150 countries. Because of its wide-ranging mission, the Church of God has a keen interest in the protection of religious

liberties guaranteed by the United States Constitution and federal statutes such as RLUIPA.

The **American Jewish Congress** was founded in 1918 to further the religious, civil, political, and economic interests of American Jews. It played an important role in the drafting of RLUIPA.

The **Association of Christian Schools International** is a nonprofit, nondenominational, religious association providing support services to more than 3,900 Christian preschools, elementary schools, and secondary schools in the United States. More than four hundred of these schools are located within the states covered by the U.S. Court of Appeals for the Sixth Circuit. ACSI's headquarters is located in Colorado Springs, Colorado.

The **General Conference of Seventh-day Adventists** is the highest administrative level of the Seventh-day Adventist Church and represents nearly 54,000 congregations with more than 13 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 4,600 congregations in the United States with more than 918,000 members. As a growing denomination in a multitude of political jurisdictions each with its own zoning laws and ordinances, the Seventh-day Adventist Church would welcome

clarification by this Court of the church's rights under the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA) and the federal Constitution.

The **Queens Federation of Churches** is an ecumenical fellowship of Christian churches that work together to create fellowship, to pool knowledge and resources with which to promote the responsible missionary, educational, and other tasks to which each communion is committed, and to seek to interpret the will of God in Jesus Christ for our times. The Queens Federation of Churches was organized in 1931 to call together the Christian churches of the Borough of Queens, New York, to embody the ecumenical vision. It is has been an active defender of the religious liberties of its members and other religious communities.[1]

SUMMARY OF ARGUMENT

1. The central legal issue in this case is the correct standard to apply when deciding whether a government land-use regulation imposes a substantial burden on religious exercise. Under section 2(a) of RLUIPA, a religious claimant must demonstrate that a government entity has imposed a "substantial burden" on his religious exercise. 42 U.S.C. § 2000cc(a). Under a proper reading of the statute, a "substantial burden" under RLUIPA is the same as a substantial burden in the non-statutory, constitutional context: a government regulation creates a

[1] Pursuant to Federal Rules of Appellate Procedure 29(a) and 29(c)(3), *amici* state that all parties have consented to the filing of this brief.

substantial burden whenever it has a "tendency to inhibit" religious exercise. *See Sherbert* v. *Verner*, 374 U.S. 398, 404 n.6 (1963); *Thomas* v. *Review Bd. of Ind. Employment Sec. Div.*, 450 U.S. 707 (1981). That reading is the only interpretation of RLUIPA's substantial burden provision that is fully consistent with RLUIPA's language and legislative history, both of which make clear that the phrase incorporates by reference the standard that the Supreme Court previously applied in determining whether government action imposes a "substantial burden" for purposes of a constitutional free exercise analysis.

This interpretation is also consistent with the decisions of other federal appellate courts that have addressed the issue of RLUIPA's substantial burden requirement in the land-use context. Indeed, a consensus is emerging in all of the federal circuits that have squarely addressed the issue that burdens that have a "tendency to inhibit," that is, to prohibit, forbid or thwart religious exercise are "substantial," while those that are mere inconveniences are not "substantial." *See Saints Constantine and Helen Greek Orthodox Church, Inc.* v. *City of New Berlin*, 396 F.3d 895, 901 (7th Cir. 2005) (finding "delay, uncertainty, and expense" of unnecessary further applications to be a substantial burden); *Midrash Sephardi, Inc.* v. *Town of Surfside*, 366 F.3d 1214, 1228 (11th Cir. 2004), *cert. denied*, 543 U.S. 1146 (2005) (finding that zoning ordinances requiring Orthodox Jews to walk "a few extra blocks" to attend services did not substantially burden religious

exercise); *San Jose Christian College* v. *City of Morgan Hill*, 360 F.3d 1024, 1035 (9th Cir. 2004) (finding a burden not to be substantial when it "imposes no restriction whatsoever on College's religious exercise; it merely requires College to submit a *complete* application"). Each of these decisions has applied the substantial burden requirement in a manner consistent with the Supreme Court's "tendency to inhibit" test, and *amici* urge the Sixth Circuit to join this consensus view of the substantial burden standard.

2. RLUIPA allows such a substantial burden on religious exercise to be justified only if it furthers a compelling governmental interest (and then only if it does so by the least restrictive means). The Supreme Court's recent decision in *Gonzales* v. *O Centro Espírita Beneficente Uniao do Vegetal* ("*UDV*"), 546 U.S. ____, No. 04-1084 (Feb. 21, 2006), makes clear that this compelling interest test requires the government to demonstrate a compelling interest specifically in burdening the particular religious exercise in question. The government may not simply invoke a broad categorical interest—such as the "quality of urban life" or the "benefits of zoning"—that is generally served by the relevant governmental restriction, *UDV*, No. 04-1084, slip op. at 9-10, as does the Meridian Charter Township ("Township"). Rather, consistent with the Supreme Court's recent unanimous opinion and the district court's findings, this Court should reject the Township's "broadly formulated interests justifying the general application of

government mandates" under RLUIPA's compelling interest test and instead focus its inquiry on "scrutiniz[ing] the asserted harms of granting specific exemptions to particular religious claimants." *Id.* at 10. Under such a contextualized inquiry, the Township's claims properly fail.

ARGUMENT

I. FOR PURPOSES OF RLUIPA, GOVERNMENT ACTION CREATES A SUBSTANTIAL BURDEN IF IT HAS A "TENDENCY TO INHIBIT" RELIGIOUS EXERCISE.

The concept of a "substantial burden" on religious exercise was treated extensively in the Supreme Court's constitutional rulings for decades before the passage of RLUIPA. Against that backdrop, the meaning of the phrase as elucidated in the Supreme Court jurisprudence must inform any interpretation of the statutory text. And that jurisprudence establishes that a "substantial burden" means anything that has a *tendency* to inhibit religious exercise, even if the resulting pressure does not actually make the religious exercise impossible.

A. Under Controlling Supreme Court Authority, Government Action That Has a "Tendency to Inhibit" Religious Exercise Creates a Substantial Burden.

Prior to the passage of RLUIPA, the Supreme Court had developed an extensive body of case law interpreting the concept of a substantial burden on religious exercise, principally in *Sherbert* and *Thomas*. Those cases and others

instruct that a substantial burden results from government action that has a "tendency to inhibit" religious exercise.

Sherbert is particularly instructive because it involved not an affirmative imposition on or prohibition of religious practice, but only a denial of unemployment benefits to a Seventh-day Adventist who refused to work on Saturday. 374 U.S. at 399-400. The Supreme Court squarely rejected the argument that, because all that was at issue was a government "benefit or privilege," there was no substantial burden. Instead, the Court observed that even "conditions and qualifications upon governmental privileges and benefits" frequently "have been invalidated because of their *tendency to inhibit* constitutionally protected activity." *Id.* at 404 n.6 (emphasis added).

Elsewhere, the Court explained that the substantial burden requirement did *not* mean that the plaintiff must show that the regulation imposed some great onus on her religious observance or otherwise made the observance especially difficult. It was enough, the Court held, that the rule will put "*pressure* upon her to forego [a religious] practice." *Id.* at 404 (emphasis added).

The same was true in *Thomas*, another case involving the denial of unemployment benefits to an individual who balked at performing work duties that conflicted with his religious beliefs. The Court reiterated that government action need not "*compel* a violation of conscience" to place a substantial burden on free

exercise. 450 U.S. at 717. All that is necessary is a "coercive impact" from, for example, "condition[ing] receipt of an important benefit" on the restraint of a religious practice, "thereby putting substantial pressure on an adherent to modify his behavior and to violate his beliefs." *Id.* at 717-18. The Court reiterated that, even though "the compulsion may be indirect, the infringement upon free exercise is nonetheless substantial." *Id.* at 718.

The Supreme Court reinforced this construction of "substantial burden" in *Hobbie* v. *Unemployment Appeals Comm'n of Fla.*, 480 U.S. 136 (1987), and *Hernandez* v. *Commissioner*, 490 U.S. 680 (1989). *Hobbie* involved an employee who was fired for refusing to work on her Sabbath and was denied unemployment benefits. 480 U.S. at 137. The Supreme Court found "no meaningful distinction" among the situations in that case, *Sherbert*, and *Thomas*. *Id*. at 141. Following *Sherbert* and *Thomas*, the Court held that "the forfeiture of unemployment benefits . . . brings unlawful coercion to bear on the employee[]," amounting to a substantial burden. *Id*. at 144. Similarly, *Hernandez* simply followed the articulation of the substantial burden test in *Hobbie* and *Thomas*. *See Hernandez*, 490 U.S. at 699 (citing *Hobbie*, *Thomas*, and *Wisconsin* v. *Yoder*, 406 U.S. 205 (1972)).[2]

[2] In citing the rule of *Hobbie*, *Thomas*, and *Yoder*, the *Hernandez* Court described the standard as follows: "The free exercise inquiry asks whether government has placed a substantial burden on the observation of a *central* religious belief or

To be sure, not every incidental burden on religious exercise will constitute a substantial burden. Having to submit regular and ordinary forms and filing fees in connection with land-use applications, for example, would not "tend to inhibit" (within the meaning of the controlling jurisprudence) a church from pursuing zoning approval for a new sanctuary. Similarly modest burdens—*e.g.*, stopping for traffic lights on the way to a religious service—would not satisfy the Supreme Court's substantial burden test because such inconveniences would have no tendency to inhibit a person's religious exercise. *Accord Midrash Sephardi*, 366 F.3d at 1228 (finding that zoning ordinances requiring synagogues to locate in areas where observant Orthodox Jews would have to walk "a few extra blocks" to attend services did not substantially burden religious exercise). On the other hand, governmental restrictions that directly limit a religious organization's ability to perform its mission will tend to inhibit religious exercises. For example, a zoning

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practice, and, if so, whether a compelling governmental interest justifies the burden." *Hernandez*, 490 U.S. at 699 (emphasis added) (internal citation omitted). The addition of the word "central," however, did not thereby limit the First Amendment's protections to central or fundamental religious practices. To the contrary, any inquiry into the centrality of a religious practice would itself violate the First Amendment, because"[i]t is not within the judicial ken to question the centrality of particular beliefs or practices to a faith." *Id.*; *see also Thomas*, 450 U.S. at 716 ("Courts are not arbiters of scriptural interpretation."). Moreover, in the RLUIPA context, the centrality of a religious belief has no bearing on the substantial burden analysis whatever because Congress expressly followed the teaching of *Hernandez* and *Thomas* by forbidding such an inquiry. *See* 42 U.S.C. § 2000cc-5(7)(A) ("The term 'religious exercise' includes any exercise of religion, whether or not compelled by, or central to, a system of religious belief.").

decision that forces a religious organization to choose between two important ministries has a clear tendency to inhibit the organization's religious exercise. *See Living Water Church of God* v. *Charter Township of Meridian*, 384 F. Supp. 2d 1123, 1133 (W.D. Mich. 2005). Adopting a "substantial burden" standard that focuses on the tendency of government action to inhibit religious exercise will allow courts—in the course of actual litigation, with concrete factual records—to distinguish between mere trivial inconveniences and actual substantial burdens.

At bottom, the rule that emerges from *Sherbert*, *Thomas*, *Hobbie*, and *Hernandez* is that a government regulation imposes a substantial burden whenever it has a "tendency to inhibit" religious exercise. *Sherbert*, 374 U.S. at 404 n. 6.[3]

[3] Prior to RLUIPA, other circuits had construed the substantial burden standard in much the same way. For instance, in *Mack* v. *O'Leary*, 80 F.3d 1175 (7th Cir. 1996), *vacated on other grounds*, 522 U.S. 801 (1997), the Seventh Circuit examined Free Exercise law and identified three circumstances in which government imposes a "substantial burden" on religious exercise: "[A] substantial burden on the free exercise of religion, within the meaning of the Act, is one that [(1)] forces adherents of a religion to refrain from religiously motivated conduct," or "[(2)] inhibits or constrains conduct or expression that manifests a central tenet of a person's religious beliefs, or [(3)] compels conduct or expression that is contrary to those beliefs." *Id.* at 1179; *see also Jolly* v. *Coughlin*, 76 F.3d 468, 476-77 (2d Cir. 1996) (holding that "a substantial burden exists where the state 'put[s] substantial pressure on an adherent to modify his behavior and to violate his beliefs'") (quoting *Thomas*, 450 U.S. at 718) (alteration in original); *Islamic Center of Miss., Inc.* v. *City of Starkville*, 840 F.2d 293, 299 (5th Cir. 1988) (concluding that zoning laws that make religious assemblies "relatively inaccessible within the city limits" and thereby ensure that "churches, synagogues, and mosques [become] accessible only to those affluent enough to travel by private automobile" create an "obvious[] burden [on] the exercise of religion by the poor").

B. RLUIPA's Substantial Burden Standard Must Be Interpreted Consistently with the Supreme Court Precedents from Which It Was Drawn.

In light of these constitutional decisions, "substantial burden" in RLUIPA must be interpreted to apply to any government regulation that has a "tendency to inhibit" religious exercise. This is the only interpretation that conforms to the jurisprudential background of the term "substantial burden," and it is likewise the only interpretation that is fully consistent with Congressional intent expressed by the use of that term of art in RLUIPA.

There can be no doubt that "substantial burden" was a legal term of art when RLUIPA was passed. As the Supreme Court has long instructed, when Congress adopts a well-worn term of art to statutory use,

> it presumably knows and adopts the cluster of ideas that were attached to each borrowed word in the body of learning from which it was taken and the meaning its use will convey to the judicial mind unless otherwise instructed . . . . In such case, absence of contrary direction may be taken as satisfaction with widely accepted definitions, not as a departure from them.

Morrisette v. *United States*, 342 U.S. 246, 250 (1952). Moreover, "[i]n the absence of contrary indication, we assume that when a statute uses such a term, Congress intended it to have its established meaning." *McDermott Int'l, Inc.* v. *Wilander*, 498 U.S. 337, 342 (1991).

Thus, because RLUIPA's language employs a term of art—"substantial burden"—with a meaning that was well-recognized at the time of passage, that term must be given the same meaning in interpreting the statute. In other words, it must be deemed satisfied when a regulation has a "tendency to inhibit" religious exercise, and not limited to situations in which the regulation goes so far as to "compel a violation of conscience." *Thomas*, 450 U.S. at 717.

RLUIPA's legislative history removes any doubt on this point. In taking up RLUIPA, Congress expressly considered the "Joint Statement of Senator Hatch and Senator Kennedy on the Religious Land Use and Institutionalized Persons Act of 2000," which summarized the voluminous legislative findings supporting the statute and the Congressional logic behind each provision. *See* 100 Cong. Rec. S7774-76 (daily ed. July 27, 2000) (Exhibit 1) ("Joint Statement"). According to the Joint Statement, "The Act does not include a definition of the term 'substantial burden' because it is not the intent of this Act to create a new standard for the definition of 'substantial burden' on religious exercise. Instead *that term as used in the Act should be interpreted by reference to Supreme Court jurisprudence*." *Id*. at S7776 (emphasis added).

This understanding is consistent with the Supreme Court's recent decision in *Gonzales* v. *O Centro Espírita Beneficente Uniao do Vegetal*, 546 U.S. ___, No. 04-1084, slip op. at 9, 15 (Feb. 21, 2006) ("*UDV*"), which notes that RLUIPA and

the Religious Freedom Restoration Act (RFRA) operate under the same standards and that these derive from *Sherbert* and its progeny. Numerous other courts, including the district court below, have also recognized Congress's intent for "substantial burden" to be interpreted in relation to Supreme Court jurisprudence existing at the time of RLUIPA's enactment. *See Living Water Church of God*, 384 F. Supp. 2d at 1132; *Civil Liberties for Urban Believers* v. *City of Chicago,* 342 F.3d 752, 760-61 (7th Cir. 2003), *cert. denied,* 541 U.S. 1096 (2004); *Midrash Sephardi*, 366 F.3d at 1226 ("The Supreme Court's definition of 'substantial burden' within its free exercise cases is instructive in determining what Congress understood 'substantial burden' to mean in RLUIPA.").

Under the "term of art" rule, in other words, Congress is presumed to have expressly adopted the "cluster of ideas" attached to the term of art "substantial burden" when it used that phrase in RLUIPA (a presumption that, as noted, is borne out by the statute's legislative history). And, as shown above, when that "cluster of ideas" is considered, it is clear that "substantial burden" means a "*tendency* to inhibit" religious exercise.

In sum, this Court should give effect to Congress's plain intention by looking to the relevant Supreme Court authority for the standards to apply RLUIPA's substantial burden requirement. And that authority, as shown above,

requires that "substantial burden" be interpreted to require only a *tendency* to inhibit religious exercise.

C. The "Tendency to Inhibit" Interpretation of RLUIPA's Substantial Burden Requirement Is Consistent with the Decisions of Other Federal Circuits And Should Therefore Be Adopted.

The "tendency to inhibit" interpretation also is consistent with the jurisprudence of other federal circuits. The Eleventh Circuit, for example, closely followed the familiar formulation from the Supreme Court's free exercise jurisprudence: a "substantial burden" is a burden that "place[s] more than an inconvenience on religious exercise" and can result from "*pressure* that *tends* to force adherents to forego religious precepts." *Midrash Sephardi*, 366 F.3d at 1227 (emphasis added).

The Seventh Circuit in *Saints Constantine and Helen Greek Orthodox Church, Inc.* v. *City of New Berlin*, 396 F.3d 895, 901 (7th Cir. 2005), likewise followed the Supreme Court's "tendency to inhibit" approach. The court concluded that the city's refusal to grant the church's application for rezoning amounted to a substantial burden because the need to search for other parcels of land or to file continued applications would have amounted to "delay, uncertainty, and expense." The court made clear that merely because a burden is not "insuperable" it does not mean that it is "insubstantial." *Id.* Tellingly, the court found support in the Supreme Court's *Sherbert* opinion:

> The plaintiff in the *Sherbert* case, whose religion forbade her to work on Saturdays, could have found a job that didn't require her to work then had she kept looking rather than giving up after her third application for Saturday-less work was turned down. But the Supreme Court held that the fact that a longer search would probably have turned up something didn't make the denial of unemployment benefits to her an insubstantial burden on the exercise of her religion.

Id. The Seventh Circuit's application of the substantial burden test in *Saints Constantine and Helen*, therefore, is clearly consistent with a standard that would simply require that governmental conduct have a tendency to inhibit religious exercise.

The Ninth Circuit took a different approach in *San Jose Christian College* v. *City of Morgan Hill*, 360 F.3d 1024 (9th Cir. 2004), and focused on the plain meaning of the words "substantial burden" rather than on how that phrase had been interpreted in Supreme Court jurisprudence. On the particular facts of that case, however, there was no material difference between its formulation and the Supreme Court's "tendency to inhibit" standard. The court concluded that a "substantial burden on religious exercise must impose a significantly great restriction or onus upon such exercise." *Id.* at 1034 (internal quotation marks omitted). The ordinance in question required the plaintiff to provide additional information to complete its rezoning application, but it was "not at all apparent" that the plaintiff's rezoning request would be denied if it provided the additional

information. *Id.* at 1035. The court therefore concluded that the ordinance "impose[d] no restriction whatsoever" on the plaintiff's religious exercise. *Id.* Obviously, an ordinance that imposed no restriction whatsoever on religious exercise would have no "tendency" to inhibit such exercise. The ordinance therefore did not impose a substantial burden under RLUIPA.

The only outlier from these circuit court decisions was another Seventh Circuit case that predates *Saints Constantine and Helen.*[4] In *Civil Liberties for Urban Believers* v. *City of Chicago*, 342 F.3d 752, 761 (7th Cir. 2003), *cert. denied*, 541 U.S. 1096 (2004) ("*CLUB*"), in disregard of the Supreme Court's "tendency to inhibit" cases, a divided Seventh Circuit panel refused to find a substantial burden where a government regulation "inhibits or constrains the use, building, or conversion of real property for the purpose of religious exercise." Instead, the court held that "a land-use regulation that imposes a substantial burden on religious exercise [under RLUIPA] is one that necessarily bears direct, primary,

[4] The Second Circuit's decision in *Westchester Day School* v. *Village of Mamaroneck*, 386 F.3d 183 (2d Cir. 2004), did not squarely address the interpretation of "substantial burden" in RLUIPA. The appeals court reversed and remanded the district court's grant of summary judgment in favor of a religious school because it found that the factual record, when viewed in the light most favorable to the municipality, did not compel the conclusions reached by the district court that the zoning board's decision amounted to a "complete denial" of the school's proposal or that the board did not have a compelling interest in its denial. *Id.* at 187-92. The appeals court mused about the constitutionality of the district court's application of RLUIPA, but conceded that its discussion of the substantial burden test was dicta given its other holdings. *Id.* at 190.

and fundamental responsibility for rendering religious exercise—including the use of real property for the purpose thereof within the regulated jurisdiction generally—effectively impracticable." *Id.*

CLUB's "effectively impracticable" formulation, however, has not found support among other circuits and its holding was significantly altered by the Seventh Circuit's own recent application of the substantial burden standard in *Saints Constantine and Helen*.[5] The Eleventh Circuit, for example, expressly rejected *CLUB's* "effectively impracticable" standard. *See Midrash Sephardi*, 366 F.3d at 1227; *see also Guru Nanak Sihk Society of Yuba City* v. *County of Sutter*, 326 F. Supp. 2d 1140, 1153-54 (E.D. Cal. 2003) (rejecting *CLUB*'s "effectively impracticable" standard and concluding that it "reads quite a bit more into the word 'substantial' than is warranted by the text, purpose or history of the statute").[6] And

[5] The only plausible explanation for the rigor of *CLUB*'s test is that it involved a rather rare facial challenge to a zoning code, rather than an as-applied challenge to a specific permit denial. *Saints Constantine and Helen* noted this distinction, distinguishing *CLUB* because "the Church in [this] case doesn't argue that *having to apply* for what amounts to a zoning variance to be allowed in a residential area is a substantial burden." 396 F.3d at 900 (emphasis added); *see also United States* v. *Maui County*, 298 F. Supp. 2d 1010, 1017 (D. Haw. 2003) (holding that *CLUB*'s "facial challenge" standard was not applicable to "an as-applied challenge" to a permit denial); Appellee's Br. at 49–52.

[6] A moderate approach to the substantial burden standard does not nullify the word "substantial" in RLUIPA. All courts agree that something more than a mere inconvenience is necessary for a substantial burden. *See, e.g.*, *Midrash Sephardi*, 366 F.3d at 1227. Certainly, state action can "put[] substantial pressure on an adherent to modify his [religious] behavior," *Thomas*, 450 U.S. at 717-18, without making religious exercise "effectively impracticable." *CLUB* ignores this nuance.

Saints Constantine and Helen makes clear that whatever a substantial burden might be, it is certainly not, as the *CLUB* decision suggests, an insurmountable obstacle. 396 F.3d at 901 ("That the burden would not be insuperable would not make it insubstantial.").[7]

The Sixth Circuit has not expressly articulated an interpretation of RLUIPA's substantial burden requirement. This Court's most recent published opinion on the potential burden on religious exercise by a land-use regulation predates the passage of RLUIPA by almost twenty years. *See Lakewood, Ohio Congregation of Jehovah's Witnesses, Inc.* v. *City of Lakewood*, 699 F.2d 303 (6th Cir. 1983). And *Lakewood*'s discussion of the required burden on religious exercise is not instructive because its free exercise holding is entirely dependent on

[7] As the Eleventh Circuit noted in *Midrash Sephardi*, the *CLUB* "effectively impracticable" standard would have rendered meaningless another of RLUIPA's provisions. Specifically, in addition to the substantial burden test in RLUIPA's § 2(a), RLUIPA also contains an "exclusions and limits" provision in § 2(b)(3), which provides that "[n]o government shall impose or implement a land use regulation that—(A) totally excludes religious assemblies from a jurisdiction; or (B) unreasonably limits religious assemblies, institutions, or structures within a jurisdiction." 42 U.S.C. § 2000cc(b)(3).

CLUB's definition of "substantial burden" cannot be correct because it "would render § [2]b(3)'s total exclusion prohibition meaningless." *Midrash Sephardi*, 366 F.3d at 1227. The fact that there is additional protection in § 2(b)(3)'s exclusions and limits provision requires that the substantial burden provision be interpreted to prohibit some land use regulations that fall short of totally excluding religious groups from a jurisdiction. To interpret the substantial burden requirement as did the *CLUB* majority renders § 2(a) a nullity and violates "the canon of statutory construction that discourages courts from adopting a reading of a statute that renders any part of the statute mere surplusage." *United States* v. *Coatoam*, 245 F.3d 553, 558 (6th Cir. 2001).

a narrow interpretation of "religious exercise" that is expressly rejected by RLUIPA. The *Lakewood* court held that, because the building of a church was not a "fundamental tenet" or a "cardinal principle" of the Jehovah's Witnesses' religion and was "purely a secular act," there was no unconstitutional burden on the church by the city's zoning ordinance, which prohibited the building of churches in virtually all residential areas. *Id.* at 306-307. Such an interpretation, however, is flatly contrary to the definition of "religious exercise" found in RLUIPA, which plainly states that "religious exercise" need not be "compelled by, or central to, as system of religious belief," 42 U.S.C. § 2000cc-5(7)(A), and that "religious exercise" includes the "use, building, or conversion of real property for the purpose of religious exercise ," § 2000cc-5(7)(B) . For these reasons, the decision in *Lakewood* is inapposite and does not assist this Court in determining the appropriate standard for a "substantial burden" under RLUIPA. [8]

Since *Lakewood*, this Court has addressed the substantial burden standard under RLUIPA only in unpublished opinions. Most notably, in *DiLaura* v. *Township of Ann Arbor*, 112 Fed. Appx. 445 (6th Cir. 2004),[9] this Court affirmed the district court's judgment in favor of RLUIPA plaintiffs in the land-use context.

[8] RLUIPA's definition of religious exercise follows post-*Lakewood* Supreme Court decisions, which make clear that the centrality of religious practices "is not within the judicial ken to question." *Hernandez*, 490 U.S. at 699; *see supra* note 2.

[9] Because this Court's decision in *DiLaura* goes directly to the central issue in this case and there are no published opinions in the Circuit on this issue, *amici* believe that citation to this case is appropriate under Sixth Circuit Rule 28(g).

The court held that the township's refusal to grant the plaintiffs a zoning variance constituted a substantial burden on their exercise of religion because it had the tendency to inhibit the plaintiffs' ability to operate a religious retreat on a particular parcel of land in the manner they saw fit. *Id.* at 446. There is no discussion in the case of whether the plaintiffs could have feasibly operated their retreat elsewhere, and the Court does not question the religiosity of the plaintiffs' desire to provide for their guests free lodging and three meals a day (activities that the township's zoning decision would have prohibited). *Id.* Instead, the court simply recognized that the plaintiffs' use of the property had a religious purpose and then assessed whether the governmental action "substantially limit[ed] the plaintiffs' intended use of the property." *Id.* While this case did not expressly articulate a test, this Court's application of the substantial burden requirement in *DiLaura* is entirely consistent with the "tendency to inhibit" standard. This Court should follow its precedent in *DiLaura* and expressly adopt the "tendency to inhibit" test.

In light of Congress's direction to construe RLUIPA "in favor of a broad protection of religious exercise, to the maximum extent permitted by [the statute] and the Constitution," 42 U.S.C. § 2000cc-3(g), this Court should join the other Circuits to have addressed the issue and follow the interpretation of "substantial burden" in *Midrash Sephardi*, *Saints Constantine and Helen*, and *DiLaura*.

The district court's articulation and application of this standard was entirely correct and its factual findings amply support the findings of a substantial burden under the tendency to inhibit standard.

II. THE TOWNSHIP'S MERE INVOCATION OF A BROAD GOVERNMENTAL INTEREST CANNOT SATISFY THE COMPELLING INTEREST TEST.

Although not available to the district court, the Supreme Court's recent decision in *Gonzales* v. *O Centro Espírita Beneficente Uniao do Vegetal*, 546 U.S. ___, No. 04-1084 (Feb. 21, 2006) ("*UDV*"), entirely supports its analysis of the Township's further failure to meet its burden under the compelling interest test.

UDV involves an American branch of a Christian Spiritist sect, O Centro Espírita Beneficente Uniao de Vegetal (UDV), which sought to import a sacramental tea called *hoasca* from Brazil. *UDV*, No. 04-1084, slip op. at 4. A shipment of the substance was intercepted by customs officials under the Controlled Substances Act. *Id*. UDV brought suit to avoid federal prosecution alleging, *inter alia*, that its use of *hoasca* was protected under RFRA. *Id.* The government conceded that UDV had shown a *prima facie* RFRA violation, but contended that imposition of a substantial burden on UDV's religious exercise was justified by a compelling governmental interest. *Id.* at 7.

In a unanimous decision by Chief Justice Roberts, the Supreme Court rejected the government's position on the compelling interest test and provided

significant warnings about the facial acceptance of categorical invocations of broad interests by the government. Specifically, the Court rejected the government's overly broad articulation of the compelling interest at stake, namely, the general interest served by the Controlled Substance Act itself. *Id.* at 9-11. Relying on the text of RFRA (which has the same operative standard as RLUIPA), as well as *Sherbert* and its progeny, the Court held that a "more focused inquiry" requires the government to "demonstrate that the compelling interest test is satisfied through application of the challenged law 'to the person'—the particular claimant whose sincere exercise of religion is being substantially burdened." *Id.* at 9, 11, 15 (quoting 42 U.S.C. § 2000bb-1(b)). Courts must "look[] beyond broadly formulated interests justifying the general applicability of government mandates and scrutinize[] the asserted harm of granting specific exemptions to particular religious claimants." *Id.* at 10. In other words, in applying the compelling interest test in the area of religious free exercise "context matters." *Id.* Under this standard, the Court held that even invocation of the unquestionable general importance of the Controlled Substances Act in promoting health and safety "cannot carry the day." *Id.* at 11.

As in *UDV*, the governmental actor in this case attempts to justify its burdening of religious exercise by appealing to a broad, general formulation of its supposedly compelling interest. The Township invokes a general interest "in land

use and zoning regulations to protect the public health, safety, and welfare interests of their citizens by ensuring compatible use of land and preserving a wholesome urban environment that is not marred by too much density." Appellants' Br. at 45. Nowhere, however, does the Township "demonstrate that the compelling interest test is satisfied through application of the challenged law [to the Church]." *UDV*, No. 04-1084, slip op. at 9. While the Township no doubt has a general interest in enforcing its zoning laws, it must show it has a compelling interest that cannot be satisfied without burdening the particular religious exercise of this church. As the district court held in expressly rejecting the Township's broad justifications as applied to the facts of this case, the Township has plainly failed to shoulder this burden. Specifically, the district court held the Township's supposed interest in land-use density was undermined by the facts that the Township had previously approved the Church's proposal for expansion with an even larger footprint and that the density ratio used to justify the Township's denial was wholly "arbitrary" and had "not been applied to any other proposal." 384 F. Supp. 2d at 1135. Furthermore, as the Township has not challenged any of the district court's factual findings, this Court's analysis of the context-specific requirements of the compelling interest test must be based on the facts as the district court found them.

Just as a broad appeal to the federal government's interest in upholding the Controlled Substance Act did not "carry the day" in *UDV*, 04-1084, slip op. at 11,

the Township's broad appeal to a general interest in maintaining its zoning laws does not satisfy the government's burden of demonstrating a compelling governmental interest in this case.

CONCLUSION

For the foregoing reasons, and those stated by the appellee, this Court should affirm the decision below.

Respectfully submitted,

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February 28, 2006

CERTIFICATE OF COMPLIANCE

I certify pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C) and Sixth Circuit Rule 32(a) that the foregoing brief is proportionately spaced, has a typeface of 14 points or more, and contains 6057 words.

Dated: February 28, 2006 SIDLEY AUSTIN LLP

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