Case No. 09-1188

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IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

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ROCKY MOUNTAIN CHRISTIAN CHURCH,
Plaintiff-Appellee

And

UNITED STATES OF AMERICA,
Intervenor Plaintiff-Appellee

v.

BOARD OF COUNTY COMMISSIONERS OF BOULDER COUNTY,
Defendants-Appellant

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On appeal from the United States District Court For the District of Colorado
The Honorable Robert E. Blackburn, District Judge
Civil Action No. 06-CV-00554-REB-BNB

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# AMICI CURIAE BRIEF IN SUPPORT OF PLAINTIFF-APPELLEE

and arguing in favor of affirming the judgment of the district court

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November 16, 2009

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**CORPORATE DISCLOSURE STATEMENT PURSUANT TO FED. R. APP. P. 26.1 AND FED. R. APP. P. 29(c)**

American Jewish Congress ("AJCongress") is a non-profit corporation organized pursuant to the laws of the State of New York. AJCongress does not have any parent corporations and does not issue any stock which is publicly held by anyone.

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The Queens Federation of Churches, Incorporated ("Queens Federation"), is a non-profit corporation organized pursuant to the laws of the State of New York. The Queens Federation does not have any parent corporations and does not issue any stock which is publicly held by anyone.

The General Conference of Seventh-day Adventists (the "General Conference") is a non-profit unincorporated association. The General Conference does not have any parent corporations and does not issue any stock which is publicly held by anyone.

The Union of Orthodox Jewish Congregations of America ("UOJCA") is a religious corporation organized pursuant to the laws of the State of New York.

UOJCA does not have any parent corporations and does not issue any stock which is publicly held by anyone.

The National Committee for Amish Religious Freedom ("NCARF") is a non-profit unincorporated association. NCARF does not have any parent corporations and does not issue any stock which is publicly held by anyone.

## INTEREST OF THE AMICI

Pursuant to Fed. R. App. P. 29, AJCongress, the National Council of Churches, the Queens Federation, the General Conference, the UOJCA and NCARF respectfully submit this brief *amici curiae* in support of Plaintiff-Appellee Rocky Mountain Christian Church ("RMCC") and affirmance. Counsel for all parties have consented to the filing of this brief. Fed. R. App. P. 29(a). *Amici* share a common interest in assuring that the Religious Land Use and Institutionalized Persons Act of 2000, 42 U.S.C. § 2000cc, *et seq.* ("RLUIPA"), is both upheld as constitutional and interpreted to address effectively the discretionary burdens that local governments so commonly impose on core religious activities—including religious education—through land-use laws. *Amici* believe that their collective experience as institutions that use land for religious purposes will offer the Court a perspective that is helpful in its resolution of this appeal. In addition, we note the following about the interest of each of the *Amici*:

AJCongress is a tax exempt organization of American Jews, founded in 1918 to protect the civil, political, economic and religious rights of American Jews and all Americans. It has taken a special interest in the protection of religious liberty and has filed briefs in cases involving that right in both federal and state courts. In furtherance of that organizational purpose, AJCongress played an important role in drafting and securing passage of the Religious Land Use and Institutionalized Persons Act of 2000, 42 U.S.C. § 2000cc, *et seq.* ("RLUIPA"), the constitutionality of which is at issue in this case.

The National Council of the Churches is a community of 35 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. 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 Queens Federation 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 390 local churches representing every major Christian denomination and many independent congregations participate in the Federation's ministry. The Queens Federation has appeared as *amicus curiae* previously in a variety of actions for the purpose of defending religious liberty. The Queens Federation and its member congregations are vitally concerned for the protection of the principle and practice of religious liberty and supports the direction of RLUIPA as aiding Courts in reaching fair results in balancing important needs of religious ministry with other worthy social goals.

The General Conference is the highest administrative level of the Seventh-day Adventist church and represents nearly 59,000 congregations with more than 15 million members worldwide. In the United States the North American Division of the General Conference oversees the work of more than 5,000 congregations with more than one million members. In addition to churches and related administrative offices, the denomination runs approximately 850 elementary schools, 114 secondary schools, and 13 institutions of higher learning. These institutions are in all fifty states and thousands of local towns, municipalities and school districts. The Seventh-day Adventist church has a strong interest in seeking clarification of its rights under RLUIPA and the U.S. Constitution.

The UOJCA is the largest Orthodox Jewish umbrella organization in the United States, representing nearly 1,000 synagogues throughout the United States.

Through its Institute for Public Affairs ("IPA"), the UOJCA represents the organization and its constituency on matters of law and public policy. The IPA researches public policy issues, provides educational briefings to government officials, and informs its membership of current issues relevant to the Orthodox Jewish community. The UOJCA also participates in federal and state court cases in which the values and/or interests of the Orthodox Jewish community are at stake, largely through the submission of *amicus* briefs.

NCARF was formed in 1967 to provide legal counsel to Amish people in religious liberty cases. NCARF has been actively involved in numerous defenses of the religious freedom, including most notably in *Wisconsin v. Yoder,* 406 U.S. 205 (1972). NCARF believes that the interpretation and application of RLUIPA is of great importance to the Amish, whose unusual religious beliefs are often subject to substantial burdens by the actions of state and local governments.

## STATEMENT OF ISSUES

Amici appear solely on the following issue: whether the substantial burden provision of RLUIPA is a constitutionally permissible accommodation of religious exercise.

## STATEMENT OF THE CASE AND STATEMENT OF FACTS

Amici adopt the Statement of the Case and Statement of Facts from the Appellee's Response Brief. *See* Appellee's Response Br. at 4-10.

## SUMMARY OF ARGUMENT

The substantial burden provision of RLUIPA closely tracks the settled substantial burden test that the Supreme Court articulated in its seminal decision in *Sherbert v. Verner*, 374 U.S. 398 (1963). Contrary to the arguments of the Appellants, the application of this test to individualized government land use assessments is entirely consistent with these long-standing constitutional norms. Congress considered it to be essential to apply strict scrutiny to such individualized government assessments because it found over the course of multiple hearings that such assessments have a long history of concealing cloaked discrimination in the context of religious organizations. Based on this record, Congress drafted RLUIPA to protect against the unacceptably high risks of anti-religious discrimination when local land use authorities make individualized land use decisions.

In this case, the Boulder County Land Use Code required the Rocky Mountain Christian Church ("RMCC") to undergo an individualized "special use review" by the Board of County Commissioners of Boulder County (the "County"). Such a special use review relies on a number of subjective criteria and represents the quintessentially intended application of RLUIPA because the County necessari-

ly must make individualized, subjective assessments in evaluating whether to grant any church's special use application.

RLUIPA represents "the latest of long-running congressional efforts to accord religious exercise heightened protection from government-imposed burdens, consistent with this Court's precedents." *Cutter v. Wilkinson*, 544 U.S. 709, 714 (2005). "By passing RLUIPA, Congress conclusively determined the national public policy that religious land uses are to be guarded from interference by local governments to the maximum extent permitted by the Constitution." *Cottonwood Christian Ctr. v. Cypress Redevelopment Agency*, 218 F. Supp. 2d 1203, 1229-30 (C.D. Cal. 2002); *see also* 42 U.S.C. § 2000cc-3(g) ("This chapter shall be construed in favor of a broad protection of religious exercise, to the maximum extent permitted by the terms of this chapter and the Constitution."). Moreover, as Congress's investigation found, land use decisions that are left to the discretion of local officials have historically been rife with discrimination against churches, often new or small churches—the precise wrong that the Free Exercise Clause and RLUIPA are intended to eliminate.

This brief first summarizes the First Amendment principles that undergird RLUIPA's substantial burden provision, and then describes how that provision of the statute essentially tracks those principles in the land-use context, pursuant to Section 5 of the Fourteenth Amendment. Finally, this brief discusses the historical

record of discrimination against disfavored religious exercise in the land use context as supporting the application of the *Sherbert* substantial burden test to individualized land use decisions.

## ARGUMENT

### I. THE SUBSTANTIAL BURDEN PROVISION OF RLUIPA IS A CONSTITUTIONALLY PERMISSIBLE ACCOMMODATION OF RELIGIOUS EXERCISE

#### A. Individualized Government Assessments Which Impact Religious Institutions Are Subject to Strict Scrutiny Under the Free Exercise Clause

The Supreme Court held in *Sherbert v. Verner*, 374 U.S. 398 (1963), that the Free Exercise Clause of the First Amendment requires strict scrutiny whenever the government imposes a "substantial burden" on religious exercise. As explained in *Sherbert*, that standard has two components. First, the burden imposed on religious exercise can only be justified by a "compelling state interest in the regulation of a subject within the State's constitutional power to regulate." *Id.* at 403 (citations omitted). Second, if the government can identify an interest within its power to regulate, it must "demonstrate that no alternative forms of regulation would [protect the stated interest] without infringing First Amendment rights." *Id.* at 407.

For almost thirty years following *Sherbert*, the Supreme Court applied the strict scrutiny standard in Free Exercise cases, notably in two cases involving individuals who were denied unemployment compensation. *See, e.g., Hobbie v. Un-*

*employment Appeals Comm'n,* 480 U.S. 136 (1987); *Thomas v. Review Bd.,* 450 U.S. 707 (1981). In 1990, in *Employment Div., Dep't. of Human Res. v. Smith,* the Supreme Court clarified that the strict scrutiny standard of *Sherbert* is not applicable in cases involving "neutral" laws "of general applicability," such as the across-the-board drug prohibition at issue in *Smith*. 494 U.S. 872 (1990). *Smith,* however, also made clear that it did not overrule *Sherbert* and that the *Sherbert* standard remains applicable where a law or governmental action is *not* neutral with respect to religion or is *not* generally applicable. *See id.*; *see also Corder v. Lewis Palmer School Dist.*, 566 F.3d 1219, 1232-33 (10th Cir. 2009) ("if a law that burdens a religious practice is not neutral or generally applicable, it is subject to strict scrutiny, and the burden on religious conduct violates the Free Exercise Clause unless it is narrowly tailored to advance a compelling governmental interest.").

The *Sherbert* strict scrutiny standard is properly applied in cases like *Hobbie* and *Thomas*—cases that involve systems of "individualized governmental assessment of the reasons for the relevant conduct." *Smith,* 494 U.S. at 884. As the 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 a compelling reason." *Id.* (citation omitted).[1] Thus, the Supreme Court has held that

[1] The *Smith* Court also distinguished cases in which strict scrutiny had been applied, but which did not involve an individualized government assessment, as "hybrid situation[s]" involving "the Free Exercise Clause in conjunction with other

state rules that conditioned the availability of unemployment benefits on an applicant's willingness to work under conditions that are forbidden by his religion are invalid. *Id.* at 883 (citations omitted).

With respect to the "substantial burdens" test, the Court in *Smith* emphasized that courts must avoid "[j]udging the centrality of different religious practices [because it] is akin to the unacceptable 'business of evaluating the relative merits of differing religious claims.'" 494 U.S. at 887; *see also Hernandez v. Comm'r,* 490 U.S. 680, 699 (1989) ("It is not within the judicial ken to question the centrality of particular beliefs or practices to a faith, or the validity of particular litigants' interpretations of those creeds.").

In 1993, the Supreme Court made clear that the application of the *Sherbert* strict scrutiny standard survived *Smith*, and that the standard would be applied outside of the unemployment context. *See Church of the Lukumi Babalu Aye v. City of Hialeah,* 508 U.S. 520, 537 (1993) (concluding that local animal sacrifice "ordinance represents a system of 'individualized governmental assessment of the reasons for the relevant conduct,'" because it "requires an evaluation of the particular justification for the killing") (quoting *Smith,* 494 U.S. at 884).

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constitutional protections, such as freedom of speech and of the press, or the right of parents…to direct the education of their children." *Id.* at 881 (citing, *inter alia*, *Wisconsin v. Yoder*, 406 U.S. 205 (1972) (invalidating compulsory school-attendance laws as applied to parents who refused to send their children to school on religious grounds)).

Since the decisions in *Smith* and *Hialeah*, several courts have applied strict scrutiny under the Free Exercise Clause where government action involved individualized assessments outside of the unemployment context. *See, e.g.*, *Axson-Flynn v. Johnson*, 356 F.3d 1277, 1297-99 (10th Cir. 2004) (university curriculum); *American Friends Serv. Comm. Corp. v. Thornburgh*, 951 F.2d 957, 960-61 (9th Cir. 1991) (immigration)[2]; *see also Fraternal Order of Police v. City of Newark*, 170 F.3d 359, 364 (3d Cir. 1999) (Alito, J.) (noting *Lukumi*'s application of "individualized governmental assessment[s]" outside unemployment context).

Thus, under well-established Free Exercise jurisprudence, where the government makes an individualized assessment that substantially burdens religious exercise, even under a facially neutral statute or regulation, the government's action must be justified by a compelling state interest in the regulation of a subject that is within the government's power to regulate, and the government must demonstrate that there are no alternative means to protect the government's interest that would be less burdensome on religion.

[2] In *Thornburgh* the Ninth Circuit applied the individualized assessment exception in the immigration context, and thus outside of the unemployment context, but ultimately rejected the plaintiff's claim because the facts did not actually involve "individualized assessments." *Thornburgh*, 951 F.2d at 961,

B. **The RLUIPA Substantial Burden Provision Is a Congruent And Proportional Response To Religious Discrimination In Land Use Decisions And Represents A Legitimate Exercise Of Congress' Enforcement Authority.**

The "substantial burden" provision of RLUIPA reflects the principles set out in *Sherbert*, *Smith*, and *Hialeah*. Sections 2(a)(1) and 2(a)(2)(C) of RLUIPA provide:

> Sec. 2. Protection Of Land Use As Religious Exercise.
>
> (a) Substantial Burdens—
>
> (1) General Rule- No government shall impose or implement a land use regulation in a manner that imposes a ***substantial burden*** on the religious exercise of a person, including a religious assembly or institution, unless the government demonstrates that imposition of the burden on that person, assembly, or institution—
>
> (A) is in furtherance of a ***compelling governmental interest***; and
>
> (B) is the ***least restrictive means*** of furthering that compelling governmental interest.
>
> (2) Scope Of Application- This subsection applies in any case in which—
>
> . . .
>
> (C) 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.

42 U.S.C. § 2000cc(a)(1), (a)(2)(C) (emphasis added).

Virtually every court that has examined these provisions has recognized Congress's unmistakable attempt to track existing "substantial burdens" jurisprudence under the Free Exercise Clause.[3] Indeed, the legislative history of RLUIPA

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[3] *See, e.g.*, *Guru Nanak Sikh Society of Yuba City* v. *County of Sutter*, 456 F.3d 978, 993 (9th Cir. 2006) ("RLUIPA targets only 'individualized governmental assessment[s]' subject to strict scrutiny under the Supreme Court's free exercise jurisprudence."); *Church of the Hills v. Twp of Bedminster*, No. 05-3332, 2006 WL 462674, at *7 (D. N.J. Feb. 24, 2006) ("Zoning regulation, like the ones at issue in this case, impose individual assessment regimes" under both RLUIPA and the Free Exercise Clause); *Castle Hills First Baptist Church v. City of Castle Hills*, No. SA-01-CA-1149, 2004 WL 546792, at *19 (W.D. Tex. Mar. 17, 2004) ("RLUIPA's § 2(a) codifies existing Supreme Court 'individualized assessment' jurisprudence."); *Murphy v. Zoning Comm'n of New Milford*, 289 F. Supp. 2d 87, 119 (D. Conn. 2003) ("[S]ubsection (a)(2)(c) limits subsection (a)(1)'s 'compelling interest' / 'least restrictive means' standard to cases involving 'individualized assessments' – a limitation implicitly approved in *Smith* and explicitly confirmed in *Lukumi*."), *rev'd on other grounds*, 402 F.3d 342 (2d Cir. 2005); *Westchester Day Sch. v. Vill. of Mamaroneck*, 280 F. Supp. 2d 230 (S.D.N.Y. 2003) ("individual assessments" limitation on substantial burden claims "draws the very line *Smith* itself drew when it distinguished neutral laws of general applicability from those 'where the State has in place a system of individual exemptions,' but nevertheless 'refuse[s] to extend that system to cases of 'religious hardship.'"), *rev'd on other grounds*, 386 F.3d 183 (2d Cir. 2004); *Hale O Kaula Church v. Maui Planning Comm'n*, 229 F. Supp. 2d 1056, 1072 (D. Haw. 2002) ("Section [2(a)(2)](c) codifies the 'individualized assessments' doctrine, where strict scrutiny applies."); *Cottonwood*, 218 F. Supp. 2d at 1221 ("To the extent that RLUIPA is enacted under the Enforcement Clause [of the Fourteenth Amendment], it merely codifies numerous precedents holding that systems of individualized assessments, as opposed to generally applicable laws, are subject to strict scrutiny."); *Freedom Baptist Church v. Twp. of Middleton*, 204 F. Supp. 2d 857, 868 (E.D. Pa. 2002) ("What Congress manifestly has done in this subsection [2(a)(1) and 2(a)(2)(C)] is to codify the individualized assessments jurisprudence in Free Exercise cases that originated with the Supreme Court's decision in *Sherbert*"); *see also Elsinore Christian Ctr. v. City of Lake El-*

makes clear that Congress intended to codify this form of Free Exercise Clause violation in order to facilitate enforcement. *See, e.g.*, 146 Cong. Rec. S7775 (daily ed. July 27, 2000) (joint statement of Sen. Hatch and Sen. Kennedy) (hereafter *Joint Statement*) ("The hearing record demonstrates a widespread practice of individualized decisions to grant or refuse permission to use property for religious purposes. These individualized assessments readily lend themselves to discrimination, and they also make it difficult to prove discrimination in any individual case."); H.R. Rep. No. 106-219, at 17 (1999) ("Local land use regulation, which lacks objective, generally applicable standards, and instead relies on discretionary, individualized determinations, presents a problem that Congress has closely scrutinized and found to warrant remedial measures under its section 5 enforcement authority.").

The substantial burden provision of RLUIPA thus is closely aligned with existing constitutional jurisprudence. Under RLUIPA, when the government makes an individualized assessment in implementing a land use regulation, and that assessment imposes a substantial burden on religious exercise, the government action must (1) be justified by a compelling state interest and (2) represent the least restrictive means of furthering that interest. In other words, such individualized as-

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*sinore*, 197 Fed. App'x. 718 (9th Cir. 2006) (reversing decision striking down RLUIPA land use provision).

sessments are subject to strict scrutiny under RLUIPA, just as they are under the Free Exercise Clause under *Smith*, *Lukumi* and their progeny.

Moreover, the substantial burden provision of RLUIPA represents a legitimate exercise of congressional power under Section 5 of the Fourteenth Amendment. As the Supreme Court has stated, "[l]egislation which deters or remedies constitutional violations can fall within the sweep of Congress' enforcement power [under the Fourteenth Amendment] even if in the process it prohibits conduct which is not itself unconstitutional . . . ." *City of Boerne v. Flores*, 521 U.S. 507, 518 (1997). Thus, in crafting enforcement legislation, "Congress is not limited to mere legislative repetition of this Court's constitutional jurisprudence," but may also prohibit "a somewhat broader swath of conduct." *Bd. of Trustees of Univ. of Ala. v. Garrett*, 531 U.S. 356, 365 (2001).[4]

In order to justify preventive action under Section 5, the legislative record must demonstrate "a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end." *City of Boerne*, 521 U.S. at 520. In this instance, the legislative record establishes a history of discrimina-

[4] A classic example of this is Title VII of the Civil Rights Act of 1964, which prohibits discrimination in employment along racial, religious, and other lines, but does not allow state or local government actors to whom it applies to avoid its prohibition by satisfying strict scrutiny. *Varner v. Illinois State Univ.*, 226 F.3d 927 (7th Cir. 2000) (upholding application of Title VII's flat ban on employment discrimination against Enforcement Clause challenge).

tion against religious exercise in land use decisions,[5] and the remedy closely tracks the Supreme Court's Free Exercise jurisprudence. Consequently, RLUIPA clearly reflects a "congruent" and "proportional" response to the injury to be prevented, and reflects a proper exercise of Congress' authority under Section 5 of the Fourteenth Amendment. *See, e.g.*, *Sts. Constantine & Helen Greek Orthodox Church v. City of New Berlin*, 396 F.3d 895, 897 (7th Cir. 2005) ("*Boerne* reaffirmed *Sherbert* insofar as that case holds that a state that has a system for granting individual exemptions from a general rule must have a compelling reason to deny a religious group an exemption that is sought on the basis of hardship . . . and so the creation of a federal judicial remedy for conduct contrary to its doctrine is an uncontroversial use of section 5." (citation and internal quotation marks omitted).[6]

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[5] *See* discussion in Part II.A *infra*.

[6] Indeed, as noted in Appellee's Response Brief, every court to address the issue, with one exception (later reversed) has found RLUIPA to be a valid prophylactic legislation. *See* Appellee's Response Br. at 57.

## II. INDIVIDUALIZED LAND USE DECISIONS SHOULD BE SUBJECT TO THE *SHERBERT* SUBSTANTIAL BURDEN TEST BECAUSE THE DISCRETION INVOLVED IN SUCH DECISIONS INCREASES THE POTENTIAL FOR DISCRIMINATION AGAINST DISFAVORED RELIGIOUS GROUPS

### A. The Historical Record Establishes That Individualized Land-Use Decisions Are Especially Susceptible to Discrimination Against Disfavored Religious Exercise

The historical record shows that land use decisions often have been made in a manner that discriminates against religious exercise and disfavored religious groups. As one scholar has noted:

> The original advocates of zoning believed that local legislatures would create fixed plans of development that zoning officials would have little discretion in implementing. Modern zoning, however, is far removed from its theoretical underpinnings. In place of substantive planning, municipalities have adopted a "wait and see" approach to zoning, designed to maintain flexibility and to allow localities to deal with property owners on an individual basis. Under this modern approach, local zoning officials, who generally lack any training or experience with land use planning, have no objective standards against which to measure individual zoning requests. Thus, in most jurisdictions, standard zoning decisions are made through subjective, case-by-case assessments of the proposed use of the property.

Ashira Pelman Ostrow, *Judicial Review of Local Land Use Decisions: Lessons from RLUIPA*, 31 Harv. J.L. & Pub. Pol'y 717, 721 (2008) (hereafter *Ostrow*). While neutral and generally applicable laws and regulations are entitled to substantial judicial deference, zoning ordinances and other local land-use rules by their nature call for individualized, case-by-case judgments and confer a high degree of

discretion on the local officials charged with making those judgments. "The application of a zoning ordinance in a particular case requires more meaningful judicial review because a subjective system of individualized assessments readily lends itself to abuse." *Ostrow*, *supra* at 724.

Before enacting RLUIPA, moreover, Congress conducted extensive hearings into actual practices by local zoning officials. Over a three year period, two congressional committees[7] conducted nine separate hearings.[8] As a result of those hearings, Congress found, among other things, that

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[7] The Senate Committee on the Judiciary and the House Subcommittee on the Constitution.

[8] *See Congress' Constitutional Role in Protecting Religious Liberty: Hearings Before the S. Comm. on the Judiciary*, 105th Cong. (1997); *Protecting Religious Freedom after* Boerne v. Flores*: Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 105th Cong. (1997); *Congress, the Court, and the Constitution: Hearings Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 105th Cong. (1998); *Protecting Religious Freedom after* Boerne v. Flores *(Part II): Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 105th Cong. (1998); *Protecting Religious Freedom after* Boerne v. Flores *(Part III): Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 105th Cong. (1998); *Religious Liberty Protection Act of 1998: Hearings Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 105th Cong. (1998); *Religious Liberty Protection Act of 1998: Hearings Before the S. Comm. on the Judiciary*, 105th Cong. (1998); *Religious Liberty Protection Act of 1998: Hearings Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 106th Cong. (1999); *Religious Liberty: Hearings Before the S. Comm. on the Judiciary*, 106th Cong. (1999) . The County's suggestion that there were no additional hearings on RLUIPA is true, Appellant's Opening Br. at 18, but it entirely neglects the substantial record that Congress had already amassed as it attempted to craft a law that both protected religious institutions and complied with the Supreme Court's interpretations.

> [s]ome [land use regulations] deliberately exclude all new churches from an entire city, others refuse to permit churches to use existing buildings that non-religious assemblies had previously used, and some intentionally change a zone to exclude a church. For example, churches who applied for permits to use a flower shop, a bank, and a theater were excluded when the land use regulators rezoned each small parcel of land into a tiny manufacturing zone.

146 Cong. Rec. E1235 (daily ed. July 14, 2000) (statement of Rep. Canady).

The legislative record also "demonstrate[d] a widespread practice of individualized decisions to grant or refuse permission to use property for religious purposes" and that "[t]hese individualized assessments readily lend themselves to discrimination, and they also make it difficult to prove discrimination in any individual case." *Joint Statement* at S7775. For example, "[c]hurches in general, and new, small, or unfamiliar churches in particular, are frequently discriminated against on the face of zoning codes and also in the highly individualized and discretionary processes of land use regulation[,]" and such discrimination often "lurks behind such vague and universally applicable reasons as traffic, aesthetics, or 'not consistent with the city's land use plan.'" *Id*. at S7774.

Similarly, Congress "heard testimony regarding a study conducted at Brigham Young University finding that Jews, small Christian denominations, and non-denominational churches are vastly over represented in reported church zoning cases." H.R. Rep. No. 106-219, at 20. Congress also found evidence that local governments frequently excluded "churches in places where they permit[ted] thea-

ters, meeting halls, and other places where large groups of people assemble for secular purposes," *Joint Statement* at S7774, and that zoning boards often exercised their authority to grant variances to churches "in discriminatory ways." *Id*.

Moreover, Congress found that the land use decision-making process was particularly susceptible to religious discrimination because it typically lacks objective and generally applicable standards, thus giving government officials "virtually unlimited discretion in granting or denying permits for land use and in other aspects of implementing zoning laws." H.R. Rep. No. 106-219, at 20.

The historical record thus amply shows the significant potential for religious discrimination when zoning officials are given discretion to make subjective individualized assessments, and that such discrimination is commonplace, especially with respect to small, new or unfamiliar churches. It perhaps is not surprising that relatively unfamiliar or disfavored religious groups or churches would receive unfavorable treatment at the hand of officials who are given little guidance or training and entrusted with substantial discretion to make case-by-case decisions. Thus, as Judge Posner explained, writing for a unanimous panel of the Seventh Circuit, courts should construe Section 2(a) of RLUIPA with an awareness of "the vulnerability of [especially minority] 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." *Sts. Constantine & Helen Greek Orthodox Church*, 396 F.3d at 900.

The vulnerability of which Judge Posner speaks is the reason that RLUIPA cabins the discretion allowed for individualized local land use decisions. That is why, as discussed below, the decisions of this Court and other courts compel application of RLUIPA's strict scrutiny standard to the County's land use code at issue in this case.

### B. **The Courts Have Consistently Applied the *Sherbert* Substantial Burden Test to Case-By-Case Decisions Made in the Land Use Context**

Many courts have recognized that zoning and other land use ordinances constitute systems of individualized determinations and exemptions which therefore are subject to strict scrutiny under *Smith* and its progeny—both in cases decided

under the Free Exercise Clause after *Smith* but before the enactment of RLUIPA,[9] and in numerous cases decided since RLUIPA was enacted.[10]

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[9] *See, e.g., Keeler v. Mayor & City Council of Cumberland*, 940 F. Supp. 879, 885 (D. Md. 1996) (landmark ordinance involves "system of individualized exemptions"); *Alpine Christian Fellowship v. County Comm'rs of Pitkin*, 870 F. Supp. 991, 994-95 (D. Colo. 1994) (special use permit denial triggered strict scrutiny because decision made under discretionary "appropriate[ness]" standard); *Korean Buddhist Dae Won Sa Temple v. Sullivan*, 953 P.2d 1315, 1344-45 n.31 (Haw. 1998) ("The City's variance law clearly creates a 'system of individualized exceptions' from the general zoning law."); *First Covenant Church v. City of Seattle*, 840 P.2d 174, 181 (Wash. 1992) (en banc) (landmark ordinances "invite individualized assessments of the subject property and the owner's use of such property, and contain mechanisms for individualized exceptions.").

[10] *See, e.g., Guru Nanak*, 456 F.3d at 985 (holding conditional use permit decision was an "individualized assessment"); *Midrash Sephardi, Inc. v. Town of Surfside*, 366 F.3d 1214, 1225 (11th Cir. 2004) (finding individualized assessments where zoning "officials may use their authority to individually evaluate and either approve or disapprove of churches and synagogues in potentially discriminatory ways"); *DiLaura v. Ann Arbor Charter Twp.*, 30 Fed. App'x. 501, 510 (6th Cir. 2002) (denial of variance was "clearly" a system of "individualized assessments"); *Westchester Day School v. Vill. of Mamaroneck*, 417 F. Supp. 2d 477, 542 (S.D.N.Y. 2006) (denial of permit to build religious school based upon "subjective" criteria involved system of individualized assessments); *Castle Hills First Baptist Church*, 2004 WL 546792, at *15 (special use permit application is a system of individualized assessments); *Hale O Kaula*, 229 F. Supp. 2d at 1073 (holding that state special permit "provisions are a system of 'individualized exemptions' to which strict scrutiny applies"); *Cottonwood*, 218 F. Supp. 2d at 1222-23 (holding that City's "land-use decisions . . . are not generally applicable laws," and that refusal to grant church's "CUP 'invite[s] individualized assessments of the subject property and the owner's use of such property, and contain mechanisms for individualized exceptions.'"); *Freedom Baptist Church*, 204 F. Supp. 2d at 868 ("no one contests" that land use laws "by their nature impose individualized assessment regimes"); *Al-Salam Mosque Found. v. City of Palos Heights*, No. 00-C-4596, 2001 WL 204772, at *2 (N.D. Ill. March 1, 2001) ("[F]ree exercise clause prohibits local governments from making discretionary (i.e., not neutral, not generally applicable) decisions that burden the free exercise of religion, absent some compelling governmental interest….Land use regulation

Courts have explained that burdens imposed through systems of "individualized assessment"—particularly in the zoning context—trigger strict scrutiny not because zoning decisions are inherently or even typically discriminatory, but because the subjective, case-by-case, and highly discretionary nature of such assessments creates an unacceptable risk of cloaked discrimination. *See*, *e.g.*, *Sts. Constantine & Helen Greek Orthodox Church*, 396 F.3d at 900 (noting vulnerability of religious institutions to discrimination when a state delegates "standardless discretion to nonprofessionals operating without procedural safeguards."). Thus, "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." *Id.* (emphasis added).

Similarly, the Eleventh Circuit has explained that a zoning process that "results in a case-by-case evaluation of the proposed activity of religious organizations, carries the concomitant ***risk*** of idiosyncratic application" of zoning standards." *Midrash Sephardi, Inc. v. Town of Surfside*, 366 F.3d 1214, 1225 (11th

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often involves 'individualized governmental assessment of the reasons for the relevant conduct,' thus triggering *City of Hialeah* scrutiny."). *See also Tran v. Gwinn*, 554 S.E.2d 63, 68 (Va. 2001) (distinguishing between generally applicable requirement to seek special use permit and "procedure requiring review by government officials on a case-by-case basis for a grant of a special use permit," and holding that latter "may support a challenge based on a specific application of the special use permit requirement").

Cir. 2004) (emphasis added). That discretion, in turn, allows local government officials to "use their authority to individually evaluate and either approve or disapprove of churches and synagogues in ***potentially*** discriminatory ways." *Id.* (em- (emphasis added).

Thus, courts have consistently found that burdens imposed through zoning prohibitions are imposed pursuant to systems of "individualized assessments."[11] When considered in light of the historical evidence that individualized government decisions in the land use context have led to discrimination against religious exercise, the need to subject such assessments to strict scrutiny in order to protect the Constitutional values reflected in the Free Exercise Clause becomes readily apparent. The decisions of this Court support this view.

In *Grace United Methodist Church v. City of Cheyenne*, this Court rejected a per se rule "requiring that any land use regulation which permits any secular exception satisfy a strict scrutiny test to survive a free exercise challenge." 451 F.3d

[11] Indeed, in an earlier decision in the *Smith* case, the Supreme Court noted that government regulation of religious activities generally had been upheld when the conduct regulated has "invariably posed some substantial threat to public safety, peace or order." *Employment Div., Dep't. of Human Res. v. Smith*, 485 U.S. 660, 670 n.13 (1988) (quoting *Sherbert* at 402-03). Most land use regulation does not involve substantial threats to public safety, peace or order, as compared to the regulation of controlled substances that was upheld in *Smith*. Thus, the implementation of individualized assessments under a facially neutral land use regulation does not implicate the same kinds of concerns with public safety that underlie the *Smith* Court's decision to give deference to the neutral and generally applicable controlled substances laws at issue in that case.

643, 651 (10th Cir. 2006). The reasoning of the *Grace* decision, however, as well as the Court's decision in *Axson-Flynn*, support the application of strict scrutiny to the County's land use code at issue in this case.

First, as the Court noted in *Axson-Flynn*, under well-settled controlling precedent, even a facially neutral rule will be subject to strict scrutiny if it "contains a system of individualized exemptions." 356 F.3d at 1295. Thus, the facial neutrality of a land use ordinance does not end the inquiry. The issue is whether the ordinance contains a system of individualized exemptions, or provides for individualized assessments.[12]

Second, in *Grace* this Court indicated that, in determining whether a state rule contains a system of individualized assessments, the key question is whether it permits subjective, discretionary judgments. Thus, this Court stated:

> To ensure that individuals do not suffer unfair treatment on the basis of religious animus, subjective assessment systems that "invite consideration of the particular circumstances" behind an applicant's actions, such as the government benefits regime in *Sherbert*, trigger strict scrutiny.

*Grace*, 451 F.3d at 651 (quoting *Smith*, 494 U.S. at 884).

Similarly, the Court stated in *Axson-Flynn*:

> *Smith*'s "individualized exemption" exception is limited, then, to systems that are designed to make case-by-case determina-

[12] The Supreme Court has used the terms "individualized assessment" and "individualized exemption" interchangeably. *See Lukumi*, 508 U.S. at 537; *Smith*, 494 U.S. at 884.

> tions. The exception does not apply to statutes that, although otherwise generally applicable, contain express exceptions for *objectively defined categories of persons*.

*Axson-Flynn*, 356 F.3d at 1298 (emphasis added).

In *Grace*, the Court held that the facially neutral land use regulation at issue did not contain a system of individualized exemptions, at least with respect to the particular facts presented. In that case, the land use ordinance prohibited the operation of a daycare center with more than twelve children in an area zoned for residential use. *See Grace*, 451 F.3d at 648. Despite this prohibition, the Grace United Methodist Church sought a license to operate a day care facility for 100 children within a residential zone. *See id.* at 647-48. Because of the prohibition in the ordinance, the City of Cheyenne denied the Church's request for a license. *See id.* at 648.

In determining whether the individualized assessment exception to *Smith* applied, this Court focused on the fact that the decision whether to grant the Church a license did not involve a subjective judgment on the part of the City, but rather a determination of whether the request was covered by an *objective* exception category in the ordinance. In this regard, the Court noted that "all daycare centers are prohibited from the residential zone where the Church resides." *Id.* at 654. The Court further noted that "[t]here is no evidence that secular daycare centers have been permitted to operate regardless of the zoning ordinance, while reli-

gious organizations like the church have been denied such an exception." *Id.* In addition, the Court noted that the "the fact that the Board [of Adjustment] decided to hold a hearing to determine whether the church's use fell into an objective exception category does not lead us automatically to conclude the Board was engaged in a system of subjective individualized assessments." *Id.* Finally, the Court stated that "[a]lthough the City of Cheyenne's zoning ordinance allows for limited objective exceptions in the [residential] zone (such as churches, schools, and other similar uses) the regulation bars any organization or individual from operating a daycare center in this residential zone, for either secular or religious reasons." *Id.*

In this case, unlike in *Grace*, the County's land use code clearly contains a system of individualized assessments. As the District Court stated, the County's land use code

> requires that any church with an occupancy load of more than 100, or meeting certain other criteria, to obtain special review from the Board of County Commissioners of Boulder County. . . . [A] church with an occupancy load of more than 100 cannot be developed in any zone district in Boulder County as a use by right. Rather, such a church must go through a discretionary review process known as a special use review.

*Rocky Mountain Christian Church v. Bd. of County Comm'rs of Boulder County*, 481 F. Supp. 2d 1213, 1216 (D. Colo. 2008).

Thus, in order for a church with an occupancy load of more than 100 to develop any property, for any purpose, in the County, it must go through a special use review that involves a case-by-case inquiry that essentially "invites considerations of the particular circumstances" of the church's request. *Grace*, 451 F.3d at 651. As this Court noted in *Grace*, such inquiries are precisely the type that constitute individualized government assessments that are subject to strict scrutiny. *See id*. (citing *Smith*, 494 U.S. at 884).

Importantly, unlike the objective exceptions that were at issue in *Grace*, the County's land use code also contains a number of subjective criteria, including whether the proposed use:

- is in harmony with the character of the neighborhood and compatible with the surrounding area;
- furthers the goals of the County's Comprehensive Plan (which describes the County's view of how future development should occur);
- will result in an over-intensive use of land or excessive depletion of natural resources;
- will result in undue traffic congestion or traffic hazards; and
- will be adequately landscaped, buffered and screened.

*See* Boulder County Land Use Code, § 4.601.A. Such considerations of "harmony," alignment with vague goals, consideration of whether usage will be "exces-

sive" or "undue," as well as the aesthetic adequacy of landscaping are inherently subjective.

Thus, unlike the City of Cheyenne, the County here is not merely determining whether a church meets some objective criteria, but necessarily also must make a subjective value judgment whether to grant or deny the church's request. Further, under the County's land use code, if the County conditionally approves a proposed use, it has the discretion to impose additional conditions, not stated in the land use code, "to insure compliance with the requirements, standards, and conditions" of the code, *see* Boulder County Land Use Code, § 4.601.B, which gives the County further leeway to make value judgments and impose subjective conditions on a religious assembly's request. As Congress documented in its hearings prior to the passage of RLUIPA, such value judgments create a risk of discrimination against religious exercise, particularly against new, small or unfamiliar religious groups.

The evidence in this case illustrates that risk (and reality) of discrimination. The jury in this case found that the RMCC was treated on less than equal terms as compared to a secular school. *See Rocky Mountain Christian Church v. Bd. of County Comm'rs of Boulder County*, 612 F. Supp. 2d 1163, 1168 (D. Colo. 2008). As this Court recognized in *Grace*, evidence that secular institutions are favored over religious institutions, or that the government made a "value judgment in favor

of secular motivations, but not religious motivations," supports the application of strict scrutiny. *Grace*, 451 F.3d at 654 (quoting *Fraternal Order of Police*, 170 F.3d at 365) (Alito, J.)).

In sum, the County's land use code clearly contains a system of individualized assessments—the special use review process—that are mandated for any house of worship with a load occupancy of more than 100. Those individualized assessments involve subjective judgments that are made on a case-by-case basis. The Supreme Court in *Sherbert*, *Smith* and *Lukumi*, this Court in both *Axson-Flynn* and *Grace*, and the other courts in decisions cited above, have held these are exactly the types of individualized assessments that must be subject to strict scrutiny under the Free Exercise Clause, because they are easily susceptible to discrimination against religious exercise. In enacting RLUIPA, Congress established a record that recognizes the concern that giving government officials unbridled discretion in making such individualized assessments can, and does, lead to discrimination and the jury's findings below further support the legitimacy of that concern.

Accordingly, *Amici* respectfully assert that this Court should apply the *Sherbert* strict scrutiny test, as enforced under the substantial burden provisions of RLUIPA, to the decisions made by the County in response to the RMCC's special use application, and affirm the decision of the District Court.

## CONCLUSION

For the foregoing reasons, this Court should affirm the decision below.

Respectfully submitted,

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## CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(C), the attached brief is proportionately spaced, uses Times New Roman 14-point typeface, and contains 6,238 words of text, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii). Counsel for Amici used Microsoft Word 2007 to prepare this brief.

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Pursuant to the Tenth Circuit General Order filed on March 18, 2009, I certify that a copy of the foregoing Amici Curiae Brief in Support of Plaintiff-Appellee, as submitted in Digital Form, is an exact copy of the written document filed with the Clerk and served on opposing counsel. No privacy redactions were required. I further certify that the file of the electronic version of this brief was scanned for viruses using McAfee VirusScan Enterprise 8.5.0i, and that no virus was detected.

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