No. _____

In The
Supreme Court of the United States

CITY OF SAN LEANDRO,

Petitioner,

versus

INTERNATIONAL CHURCH
OF THE FOURSQUARE GOSPEL,

Respondent.

**On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit**

PETITION FOR WRIT OF CERTIORARI

MARCI A. HAMILTON, ESQ.
Counsel of Record
36 Timber Knoll Drive
Washington Crossing, PA 18977
(215) 353-8984
hamilton.marci@gmail.com

JAYNE W. WILLIAMS, ESQ.
DEBORAH J. FOX, ESQ.
MEYERS NAVE
555 12th Street, Suite 1500
Oakland, CA 94607
(510) 808-2000
jwilliams@meyersnave.com

Counsel for Petitioner
City of San Leandro

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

In *Employment Div. v. Smith*, 494 U.S. 872 (1990), this Court held that, under the First Amendment's Free Exercise Clause, the "vast majority" of its precedents apply low-level scrutiny to neutral, generally applicable laws imposing a substantial burden on the free exercise of religious conduct. *Id.* at 884-85. This Court noted in dictum, however, that when a law is decided through a system of "individualized assessments," strict scrutiny applies. *Id.* at 884. Strict scrutiny requires the government to prove its law rests on a "compelling interest" and is narrowly tailored. *Church of Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 546 (1993).

Congress enacted the Religious Freedom Restoration Act ("RFRA"), 42 U.S.C. § 2000bb-1-4 (1993), to override this Court's free exercise doctrine. It was invalidated in *Boerne v. Flores*, 521 U.S. 507 (1997). In response, Congress enacted the Religious Land Use and Institutionalized Persons Act, 42 U.S.C. § 2000cc(a)(1) (2006) ("RLUIPA"), which is a conglomeration of (1) Congress's preferred standard for free exercise cases, which is intended to trump this Court's free exercise doctrine, and (2) concepts that are borrowed directly and intentionally from this Court's free exercise doctrine.

Three terms in RLUIPA, each of which was appropriated from this Court's free exercise doctrine, are now the subject of persisting and deepening splits in authority among numerous

federal circuit and state supreme courts. They are: "substantial burden," "individualized assessment," and "compelling interest." All three splits affect both First Amendment and RLUIPA free exercise cases, and each requires this Court's attention and clarification.

The questions presented are:

1. Whether cost and/or inconvenience can be sufficient for a religious landowner to prove that an adverse land use or zoning decision imposes a "substantial burden" under the Free Exercise Clause of the First Amendment and the Religious Land Use and Institutionalized Persons Act, 42 U.S.C. § 2000cc(a)(1) (2006).

2. Whether case-by-case analysis of a land use application constitutes an "individualized assessment" under the Free Exercise Clause and the Religious Land Use and Institutionalized Persons Act, 42 U.S.C. § 2000cc(a)(2)(C) (2006).

3. Whether neutral, generally applicable planning principles may be a "compelling interest" of local governments under the Free Exercise Clause and the Religious Land Use and Institutionalized Persons Act, 42 U.S.C. §2000cc(a)(1)(A) (2006).

PARTIES TO THE PROCEEDINGS BELOW

The following party was a defendant below and is petitioner here: City of San Leandro. Tony Santos, Surlene G. Grant, Diana M. Souza, Joyce R. Starosciack, Bill Stephens, Jim Prola (in their official capacities), John Jermanis, and Debbie Pollart (in their official and individual capacities) were defendants below until October 23, 2007, when the parties stipulated to the dismissal of the individual defendants from the suit. App. 47.

International Church of the Foursquare Gospel was the plaintiff below and is the respondent here.

TABLE OF CONTENTS

Page(s)

TABLE OF AUTHORITIES

Page(s)

CASES

TABLE OF AUTHORITIES — Continued

Page(s)

TABLE OF AUTHORITIES — Continued

Page(s)

TABLE OF AUTHORITIES — Continued

Page(s)

TABLE OF AUTHORITIES — Continued

Page(s)

TABLE OF AUTHORITIES — Continued

Page(s)

TABLE OF AUTHORITIES — Continued

Page(s)

TABLE OF AUTHORITIES — Continued

Page(s)

STATUTES

TABLE OF AUTHORITIES — Continued

Page(s)

OTHER AUTHORITIES

OPINIONS BELOW

The final, amended panel opinion, a statement describing the few amendments to the original panel opinion, and an order denying rehearing and rehearing en banc of the United States Court of Appeals for the Ninth Circuit, Certiorari Petition Appendix 1-29 [hereinafter "App."], are published at *Int'l Church of the Foursquare Gospel v. City of San Leandro*, No. 09-15163, slip op. (9th Cir. Apr. 22, 2011). The district court's opinion and order, App. 30-97, are published at 632 F. Supp. 2d 925 (N.D. Cal. 2008).

----------ϕ----------

JURISDICTION

The final, amended panel opinion and the order of the United States Court of Appeals for the Ninth Circuit denying rehearing and denying rehearing en banc were entered on April 22, 2011. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

----------ϕ----------

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This petition involves the First Amendment's Free Exercise Clause and the Religious Land Use and Institutionalized Persons Act ("RLUIPA"), 42 U.S.C. § 2000cc *et seq*. (2006). The Free Exercise Clause provides:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof.

U.S. Const. amend. I. The appendix to this petition reproduces RLUIPA in its entirety. App. 98-106.

----------ϕ----------

STATEMENT OF THE CASE

Nature of the Case

San Leandro, California, ("San Leandro" or "City") has a significant history of carefully planning its zoning and land use law to serve the people of San Leandro. As with all good land use plans, the San Leandro General Plan affords many uses, and seeks to keep complementary uses together and conflicting uses apart to ensure a proper land use balance addressing the various competing interests of San Leandro and its citizens.

This Court, and the lower courts following this Court's doctrine, have held consistently that local land use priorities are most appropriately decided by local government. *Kelo v. City of New London*, 545 U.S. 469, 484 (2005); *Solid Waste Agency of N. Cook Cnty v. U.S. Army Corps of Eng'rs*, 531 U.S. 159, 174 (2001); *Hess v. Port Auth. Trans-Hudson Corp.*, 513 U.S. 30, 44 (1994); *Williamson Cnty Reg'l Planning Comm'n v. Hamilton Bank*, 473 U.S. 172, 187-91 (1985); *FERC v. Miss.*, 456 U.S. 742, 767 n.30 (1982); *Schad v. Borough of Mt. Ephraim*, 452 U.S. 61, 68 (1981); *Lake Country Estates, Inc. v. Tahoe Reg'l Planning Agency*, 440 U.S. 391, 402 (1979); *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 265-66 (1977); *Vill. of Belle Terre v. Boraas*, 416 U.S. 1, 8 (1974); *Gorieb v. Fox*, 274 U.S. 603, 608-09 (1927); *Murphy v. New Milford Zoning Comm'n*, 402 F.3d 342, 348 (2d Cir. 2005); *Congregation Kol Ami v. Abington Twp.*, 309 F.3d 120, 135 (3d Cir. 2002); *Sameric Corp. v. City of Phila.*, 142 F.3d 582, 598 (3d Cir. 1998); *Taylor Inv., Ltd. v. Upper Darby Twp.*, 983 F.2d 1285, 1291 (3d Cir. 1993), *cert. denied*, 510 U.S. 914 (1993); *Hoehne v. Cnty of San Benito*, 870 F.2d 529, 532 (9th Cir. 1989); *Spence v. Zimmerman*, 873 F.2d 256, 262 (11th Cir. 1989); *Littlefield v. City of Afton*, 785 F.2d 596, 607 (8th Cir. 1986).

Local land use regulation is a crucial element of the federalism that is a fundamental basis of the United States' constitutional structure. *Boerne v. Flores*, 521 U.S. 507, 536 (1997) (RFRA "contradicts vital principles necessary to maintain separation of

powers and the federal state balance."). If there is anything that is truly local, it is land use.

Congress ran roughshod over this Court's doctrine on local land use when it enacted the land use provisions of the Religious Land Use and Institutionalized Persons Act ("RLUIPA"), 42 U.S.C. §2000cc *et seq*., which have invited federal courts to micromanage local land use for a decade. RLUIPA applies the heavy hand of the federal government to create new and special privileges for religious landowners to override local priorities and interests. It is a "free exercise" statute that too often strong-arms local governments to prioritize a particular religious applicant's private vision over all other interests in the community. Few cases illustrate this shortcoming better than this case.

After this Court invalidated the Religious Freedom Restoration Act ("RFRA"), 42 U.S.C. § 2000bb-1-4 (1993), in *Boerne*, 521 U.S. 507, some members of Congress sought to enact the Religious Liberty Protection Act ("RLPA"), H.R. 1691, 106th Cong. (1999), which was nearly as broad in scope as RFRA had been. RLPA, however, was opposed by numerous groups and incapable of being passed. In turn, RLUIPA was a stripped-down version of RLPA, covering only land use and state institutions.[1]

---

[1] RLUIPA was a contested bill and was not passed unanimously. Rather, it was passed by "unanimous consent," after all members in opposition, and most other members as well, had left for the summer break. Unanimous consent is a procedure by which the leadership brings bills to the floor with few members present. To label RLUIPA's passage as

RLUIPA is a conglomeration of (1) Congress's preferred standard for free exercise cases, which is intended to trump this Court's free exercise doctrine, and (2) terms that are borrowed directly from this Court's free exercise doctrine.

This case brings to the forefront three terms from RLUIPA's land use provisions that, according to Congress, were supposed to track this Court's constitutional free exercise doctrine: "substantial burden," "individualized assessment," and "compelling interest." While many courts have endeavored to follow this Court's interpretations, many other courts have not faithfully applied free exercise doctrine in RLUIPA cases. The result is a deep and wide split in authority that requires this Court's involvement now.

The term "substantial burden" in RLUIPA,[2] was intended to track this Court's use of the term in its free exercise doctrine. This is explicit in

---

either a "unanimous vote" or even a "unanimous voice vote" would be incorrect and misleading.

[2] (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. 42 U.S.C. § 2000cc(a)(1). App. 98. *See also,* 42 U.S.C. § 2000cc(a)(2) (defining RLUIPA's "Scope of application"). App. 98-99.

RLUIPA's legislative history:

> 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. Nothing in this Act, including the requirement in Section 5(g) that its terms be broadly construed, is intended to change that principle. The term 'substantial burden' as used in this Act is not intended to be given any broader interpretation than the Supreme Court's articulation of the concept of substantial burden or religious exercise.

146 Cong. Rec. § 7774-01, Ex. 1, 7776 (July 27, 2000) (joint statement of Sen. Hatch & Sen. Kennedy on the Religious Land Use and Institutionalized Persons Act of 2000).

The term "individualized assessment"[3] also was borrowed from this Court's free exercise

---

[3] (2) Scope of application. This subsection applies in any case in which--

(A) the substantial burden is imposed in a program or activity that receives Federal financial assistance, even if the burden results from a rule of general applicability;

(B) the substantial burden affects, or removal of that substantial burden would affect, commerce with foreign nations, among the several States, or with Indian tribes, even if the burden results from a rule of general applicability; or

(C) the substantial burden is imposed in the

doctrine. According to a House Report regarding RLPA, the term

> tracks the *Smith* opinion's explanation that, where governmental bodies possess authority to make "individualized assessments" of the reasons for certain conduct, those bodies may not substantially burden a person's free exercise activities without a compelling interest. Section 3(b)(1)(A) advances this very proposition, requiring a compelling state interest 'in any system of land use regulation or exemption,' in which 'a government has the authority to make individualized assessments of the proposed uses to which real property would be put,' and thus protects free exercise as interpreted by the *Smith* Court.

H. Comm. on the Judiciary, 106th Cong., 1st Sess., Religious Liberty Protection Act of 1999 (Report to Accompany H.R. 1691) (106 H. Rpt. 219) (July 1, 1999). *See also*, 146 Cong. Rec. § 7774-01, Ex. 1, 7776 (July 27, 2000) (joint statement of Sen. Hatch & Sen. Kennedy). As this passage implies, the term "compelling interest" also was derived from this Court's constitutional nomenclature.

---

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)(2). App. 98-99.

The lower courts, however, have not confined themselves to this Court's free exercise definitions or principles. There is a split over the meaning of each of these three terms – "substantial burden," "individualized assessment," and "compelling interest" – among the federal circuit courts and the state supreme courts. These splits affect not only RLUIPA cases, but also all free exercise cases. This case is the best recent example of a federal court employing RLUIPA to alter this Court's free exercise principles.

Relevant Proceedings Below

The United States Court of Appeals for the Ninth Circuit in this case chose interpretations of critical free exercise terms that depart far from this Court's free exercise doctrine.

The state of California requires all cities to create a General Plan,[4] and to implement good planning practices. San Leandro has done so through neutral and generally applicable principles, and accommodates a wide range of commercial, residential, and institutional uses, including many houses of worship. App. 63.

---

[4] *See,* Cal. Gov't Code § 65302 (2011) (defining "General Plan" as "a statement of development policies and shall include a diagram . . . and text setting forth objectives, principles, standards, and plan proposals.") It must also include designated elements. *Id*. Local zoning laws must conform to a General Plan. *Neighborhood Action Group v. City of Calaveras*, 203 Cal. Rptr. 401, 406 (Cal. Ct. App. 1984).

The International Church of the Foursquare Gospel ("ICFG" or "Church") has worshipped and flourished in San Leandro since 1947. The ICFG grew from 65 people to over 1,700. App. 32. According to the record, it holds three religious services each Sunday and runs numerous programs. App. 32. The ICFG therefore sought a larger property for its church campus.

When ICFG began to search for a suitable property, the General Plan afforded ICFG substantial opportunities to locate in all residential districts, which cover a majority of the City. App. 34. The Zoning Code also divided assembly uses at that time into "religious assembly" and "clubs and lodges." App. 41.

In February 2006, the ICFG found two adjacent parcels at 14600 and 14850 Catalina Street ("Catalina property"). The Catalina property is located in the City's Industrial Park ("IP") and in the "West San Leandro Focus Area," which was set aside in the San Leandro General Plan to preserve an environment for high-tech industrial and technological activity. App. 33. The property is next to several manufacturing plants and surrounded by numerous other industrial and light-industrial uses. App. 33.

The Catalina property was not zoned for religious use. Nevertheless, on March 24, 2006, ICFG chose to sign a purchase and sales agreement. The ICFG also chose to alter the agreement by deleting the existing contingency on obtaining the zone change needed to place a

religious facility campus on the Catalina property. App. 58. As part of the agreement into which ICFG freely entered, ICFG paid $ 50,000.00 as half of a nonrefundable fee, which was to be applied to the purchase price of $ 5.375 million. App. 34.

Several months later, on May 3, 2006, ICFG met with City Planning Staff to discuss the Church's desire to locate at the Catalina property. Planning Staff informed ICFG that the property was not zoned for the intended use by ICFG and that if ICFG wanted to move forward with this site, it would need to get the property rezoned—a legislative act. City staff pointed out the prospect of accomplishing such a change through a zone change from IP to Industrial Limited ("IL") and then a zoning amendment to the Plan to permit assembly uses in the IL zone, but gave no assurances. App. 34-35.

In early May 2006, ICFG applied for a zoning change. App. 35. Once Staff received the application and upon reflection, they expressed concern over the planning policy implications for the General Plan if the City were to allow assembly use in a light industrial or commercial zone. They were concerned in part because such a change for ICFG would have ramifications beyond this particular application. If the City were to grant ICFG's zoning amendment request to permit assembly use in the IL zone, every property zoned IL would have to accommodate an assembly use. According to Planning Staff, that was a major modification to the San Leandro General Plan. App. 35-36.

When informed of the ICFG request, the City's initial reviewing entity, the City Council's Business Development Subcommittee, expressed a strong interest in expanding opportunities for religious uses, and directed City Planning Staff to investigate appropriate planning strategies so that houses of worship would have more opportunities to locate in San Leandro, while retaining and serving the public purposes of the General Plan. App. 36, 39.

Accordingly, Planning Staff warned ICFG in a letter dated June 29, 2006, that the request for rezoning required careful analysis by Staff, consideration at public hearings by numerous civic advisory bodies, the Planning Commission, the Board of Zoning Adjustments, and, ultimately, the City Council, to ensure that any such change was consistent with the General Plan. Staff then instituted an in-depth analysis to determine how best to expand opportunities for assembly uses, including houses of worship, while staying consistent with the General Plan.

Despite Staff disclosure of the process necessary for consideration of what ICFG proposed, ICFG proceeded with the purchase of the property before the City could complete the process and, therefore, before ICFG could know whether its desire to alter the zoning from IP to IL with assembly use could be approved. On December 31, 2006, ICFG paid an additional $ 50,000.00 nonrefundable fee for the property. App. 40. ICFG completed the purchase on Jan. 2, 2007.

Planning Staff ultimately concluded that the greatest number of opportunities to expand religious and other assembly uses could be afforded by (1) collapsing "religious uses" and "clubs and lodges" into a single category; and (2) adopting an overlay approach for all non-residential properties to benefit assembly uses.

Following public hearings, San Leandro substantially expanded opportunities for religious uses by adopting both proposals. "Assembly use" became one category, [5] and an Assembly Use Overlay ("AU Overlay") was established, which opened numerous properties zoned industrial or commercial to assembly use so long as eight neutral, generally applicable criteria were satisfied.[6]

---

[5] The new definition of "Assembly Uses," includes: "Meeting, recreational, social facilities of a private or non-profit organization primarily for use by member of guests, or facilities for religious worship and incidental religious education (but not including schools as defined in this section). This classification includes union halls, social clubs, fraternal organizations, and youth centers." San Leandro, Cal. Ord. No. 2007-005 (Apr. 2, 2007).

[6] The eight criteria are as follows:

(1) the site is not located along a major commercial corridor;

(2) the site is not located within certain General Plan Focus Areas (Downtown, Bayfair, Marina Blvd./SOMAR, or West San Leandro);

(3) the site is not located in regional-serving retail area (Greenhouse Marketplace, Westgate, Marina Square, or "old" Target site);

(4) the site is not located inside the one-half mile study area identified for Downtown Transit-Oriented Development Strategy;

Staff then analyzed all industrial and commercial zoned properties in San Leandro to determine how many could be available for assembly uses through the AU Overlay addition to the Plan. They concluded that nearly 200 properties, App. 41, would be newly available for assembly use.

ICFG applied for rezoning of the Catalina property following adoption of the AU Overlay. The Planning Commission and, on appeal, the City Council unanimously concluded that the ICFG application did not satisfy the requirements of the AU Overlay, because it failed two of the eight neutral and generally applicable criteria: the property is located within one of the General Plan Focus Areas-the West San Leandro Business District (in violation of criteria 2); and the property does not abut or is not located within .25 miles of an arterial street (in violation of criteria 5). App. 42-43.

---

(5) the site abuts or is within one-quarter mile of an arterial street;

(6) the site is not located in a Residential zone;

(7) the site is not considered public land, and is not zoned Public Service, Open Space, or Commercial Recreation; is not owned by an Exempt Public Agency or leased/owned by a public utility;

and (8) the overlay area must allow a contiguous area greater than or equal to two acres.

App. 41-42.

After the denial, the City offered to assist ICFG to find an alternative site within the City's AU Overlay District, and ICFG agreed to work with the City to that end in the context of settlement negotiations. ICFG apparently accepted the offer, but nevertheless filed the present lawsuit on July 12, 2007. The District Court ruled in favor of the City.

The Ninth Circuit reversed, with the decision resting primarily on its interpretation of the terms, "substantial burden," "individualized assessment," and "compelling interest." The court held that it is not enough under RLUIPA to provide, through neutral, generally applicable standards, numerous opportunities for a large and busy house of worship to locate. On the Ninth Circuit's reasoning, local governments may be required under RLUIPA to ensure that the real estate marketplace produces a property that the church desires when it desires it. App. 21-24. This reasoning, taken to its logical end, would mean that a city might have to exercise its power of eminent domain to force the transfer of a property to a religious landowner to avoid RLUIPA liability, including attorneys' fees. App. 21-24. No free exercise decision at this Court ever has imposed such an obligation on local government or handed religious entities such privileges in the real estate market. Both constitutional and statutory free exercise doctrine were distorted by the Ninth Circuit's interpretation of free exercise terminology.

----------ϕ----------

REASONS FOR GRANTING THE WRIT

I. The Federal Circuit Courts and State Supreme Courts Are Split Over Whether Cost and/or Inconvenience Are Sufficient to Constitute a "Substantial Burden" on Religious Landowners in Free Exercise Cases

Before RFRA and RLUIPA were enacted, free exercise claims were limited to the First Amendment's Free Exercise Clause. In that era, courts routinely held that a religious claimant could not prove a "substantial burden" on the free exercise of religion simply on evidence that the land use process imposes either cost or inconvenience. *See*, *e.g.*, *Christian Gospel Church, Inc. v. City and Cnty of S.F.*, 896 F.2d 1221, 1224 (9th Cir.1990); *Rector, Wardens, & Members of Vestry of St. Bartholomew's Church v. The City of N.Y.*, 914 F. 2d 348, 352, 359 (2d Cir. 1990), *cert. denied,* 111 S.Ct. 1103 (1991); *Messiah Baptist Church v. Cnty of Jefferson*, 859 F.2d 820, 825 (10th Cir.1988); *Grosz v. City of Miami Beach*, 721 F.2d 729, 739 (11th Cir.1983); *Lakewood, Ohio Congregation of Jehovah's Witnesses, Inc. v. City of Lakewood*, 699 F.2d 303, 306, 309 (6th Cir.1983); *Seward Chapel, Inc. v. City of Seward*, 655 P.2d 1293, 1297, 1302 (Alaska 1982); *Abram v. City of Fayetteville*, 661 S.W.2d 371, 373 (Ark.1983); *Bd. of Zoning v. Decatur Ind. Co. of Jehovah Witnesses*, 117 N.E.2d 115, 118 (Ind. 1954); *Hope Evangelical Lutheran Church v. Iowa Dep't of Revenue*, 463 N.W.2d 76, 82

(Iowa 1990); *State ex rel. O'Sullivan v. Heart Ministries, Inc.*, 607 P.2d 1102, 1112 (Kan. 1980). *See generally, San Jose Christian Coll. v. City of Morgan Hill*, 360 F. 3d 1024, 1035, 1036 (9th Cir. 2004); *Korean Buddhist Dae Won Sa Temple v. Sullivan*, 953 P.2d 1315, 1346 (Haw. 1998). Burdens in the form of cost and convenience are generally recognized as "incidental," not substantial. *San Jose Christian Coll.* 360 F. 3d at 1031-32; *Rector, Wardens, & Members*, 914 F. 2d at 352; *Grosz,* 721 F.2d at 739; *Lakewood,* 699 F.2d at 306.

In the one case this Court has decided that involves religious practices and restrictions on land, the Court made it very clear that even a severe incidental burden does may not establish a substantial burden on free exercise. *Lyng v. Nw. Indian Cemetery Protective Ass'n*, 485 U.S. 439, 449-450, 451 (1988) (rejecting free exercise claim to halt development of federal lands on land considered sacred even where the burden may be "extremely grave").

This Court's free exercise cases not involving land also have followed the principle that cost and inconvenience are insufficient to establish a "substantial burden" for purposes of the Free Exercise Clause. *Boerne*, 521 U.S. at 535 (1997); *Jimmy Swaggart Ministries v. Bd. of Equalization*, 493 U.S. 378, 389, 390 (1990); *Hernandez v. Comm'r*, 490 U.S. 680, 699, 700 (1989); *Bowen v. Roy*, 476 U.S. 693, 703 (1986); *Bob Jones Univ. v. U. S.*, 461 U.S. 574, 603, 604 (1983); *Braunfeld v. Brown*, 366 U.S. 599, 606, 607 (1961).

Thus, at the time that RLUIPA was enacted, the vast majority of First Amendment-based free exercise cases had held that cost and/or inconvenience are insufficient to prove substantial burden. A split in authority on the issue in land use cases was developing, however, with a small number of lower courts holding that cost and/or inconvenience could be sufficient to establish a substantial burden. *Islamic Ctr. of Miss., Inc. v. City of Starkville*, 840 F.2d 293, 302 (5th Cir. 1988); *Bureau of Motor Vehicles v. Pentecostal House of Prayer, Inc.,* 380 N.E.2d 1225, 1228 (Ind. 1978); *Blount v. Dep't of Educ. & Cultural Serv.*, 551 A.2d 1377, 1380 (Me. 1988*); Jewish Protectionist Synagogue v. Vill. of Roslyn Harbor*, 342 N.E.2d 534, 540 (N.Y. 1975); *Stajkowski v. Carbon Cnty Bd. of Assessm't & Revision of Taxes*, 541 A.2d 1384, 1386-87 (Pa. 1988); *Munns v. Martin*, 930 P.2d 318, 324-25 (Wash. 1997).

After RLUIPA was injected into the free exercise mix, the incipient split in authority became a perplexing and persisting split. At this point, it is difficult for local governments to be certain what their liabilities and obligations with respect to religious applicants in land use cases, because of the split on the sufficiency of cost and/or inconvenience to prove substantial burden.

A number of courts have followed the dominant doctrine and held that cost and inconvenience are not sufficient to prove substantial burden in the land use context. *World Outreach Conf. Ctr. v. City of Chi.*, 591 F.3d 531, 538-39 (7th Cir. 2009); *Petra Presbyterian Church v. Vill. of Northbrook,* 489

F.3d 846, 851 (7th Cir. 2007), *cert. denied,* 128 S. Ct. 914 (2008); *Vision Church v. Vill. of Long Grove*, 468 F.3d 975, 999 (7th Cir. 2006), *cert. denied,* 552 U.S. 940 (2007); *Civil Liberties for Urban Believers v. City of Chi.,* 342 F.3d 752, 761 (7th Cir. 2003), *cert. denied,* 541 U.S. 1096 (2004); *Navajo Nation v. U.S. Forest Serv.*, 535 F.3d 1058, 1091-92, 1097, 1106 (9th Cir. 2008), *cert. denied,* 2009 U.S. LEXIS 4206 (2009); *Guru Nanak Sikh Soc. of Yuba City v. Cnty of Sutter*, 456 F.3d 978, 988 (9th Cir. 2006); *San Jose Christian Coll.,* 360 F. 3d at 1035-36; *Grace United Methodist Church v. City Of Cheyenne*, 451 F.3d 643, 660 (10th Cir. 2006); *Konikov v. Orange Cnty*, 410 F.3d 1317, 1323-24 (11th Cir. 2005); *Midrash Sephardi, Inc. v. Town of Surfside,* 366 F.3d 1214 (11th Cir. 2004), *cert. denied,* 543 U.S. 1146 (2005); *Henderson v. Kennedy*, 253 F.3d 12, 17 (D.C. Cir. 2001), *cert. denied*, *Henderson v. Mainella*, 535 U.S. 986 (2002); *Branch Ministries v. Rossotti*, 211 F.3d 137, 142-44 (D.C. Cir. 2000); *Roman Cath. Bishop v. City of Springfield*, 760 F. Supp. 2d 172, 188 (D. Mass. 2011); *W. Presbyterian Church v. Bd. of Zoning Adjustm't*, 862 F. Supp. 538, 544-57 (D.D.C. 1994); *Swanner v. Anchorage Equal Rights Comm'n*, 874 P.2d 274, 283-84 (Alaska 1994); *Korean Buddhist,* 953 P.2d at 1346; *Flynn v. Maine Emp't Sec. Comm'n*, 448 A.2d 905, 910-11 (Me. 1982); *Trinity Assembly of God of Balt. City, Inc. v. People's Counsel for Balt. Cnty*, 962 A.2d 404, 428 (Md. 2008); *Greater Bible Way Temple of Jackson v. City of Jackson,* 733 N.W.2d 734, 751 (Mich. 2007), *cert. denied,* 128 S. Ct. 1894 (2008); *Sheridan Rd. Baptist Church v. State of Mich.*, 396 N.W.2d 373, 496 (Mich. 1986); *McDonough v. Alyward*, 500 S.W.2d 721, 723 (Mo. 1973); *State of Mont. v. King*

Colony Ranch, 350 P.2d 841, 843-44 (Mont. 1960); *State v. Fass*, 175 A.2d 193, 195-96, 203 (N.J. 1961); *Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter Day Sts. v. City of W. Linn*, 111 P.3d 1123, 1130 (Or. 2005); *Emp't Div. v. Rogue Valley Youth for Christ*, 770 P.2d 588, 592-93 (Or. 1989); *Salem Coll. & Acad., Inc. v. Emp't Div.*, 695 P.2d 25, 34-35 (Or. 1985); *Tran v. Gwinn*, 554 S.E.2d 63, 66-67 (Va. 2001); *City of Woodinville v. Northshore United Church of Christ*, 211 P.3d 406, 411 (Wash. 2009); *Open Door Baptist Church v. Clark Cnty*, 995 P.2d 33, 43-44, 46-48 (Wash. 2000).

Other courts, however, have held that mere cost and inconvenience in the land use context can be sufficient to prove substantial burden in RLUIPA cases, including the court in this case. *Int'l Church of the Foursquare Gospel v. City of San Leandro,* App. 19-26; *Westchester Day School v. Vill. of Mamaroneck*, 504 F.3d 338, 349 (2d Cir. 2007); *Blackhawk v. Pa.*, 381 F.3d 202, 212 (3d Cir. 2004); *DiLaura v. Twp. of Ann Arbor*, 112 Fed. Appx. 445, 446 (6th Cir. 2004); *Sts. Constantine & Helen Greek Orthodox Church, Inc. v. City of New Berlin*, 396 F.3d 895, 901 (7th Cir. 2005); *Reaching Hearts Int'l, Inc. v. Prince George's Cnty,* 584 F. Supp. 2d 766, 786 (D. Md. 2008), *aff'd*, 368 Fed. Appx. 370 (4th Cir. 2010); *Barr v. City of Sinton*, 295 S.W.3d 287, 297-98, 300-05 (Tex. 2009).

Moreover, in circuits where the issue has arisen repeatedly, there are even intra-circuit splits. *Compare Petra Presbyterian Church v. Vill. of Northbrook*, 489 F.3d 846 (7th Cir. 2007), *cert. denied,*128 S. Ct. 914 (2008) (finding no substantial

burden where other land was available), *and Vision Church v. Vill. of Long Grove*, 468 F.3d 975 (7th Cir. 2006), *cert. denied*, 552 U.S. 940 (2007) (rejecting inconvenience as factor to prove substantial burden), *with Sts. Constantine & Helen Greek Orthodox Church, Inc. v. City of New Berlin*, 396 F.3d 895, 901 (7th Cir. 2005) (finding substantial burden where zoning laws would have required church to look for other land and process could cause "delay, uncertainty, and expense"). *Compare Int'l Church of the Foursquare Gospel v. City of San Leandro*, App. 19-26 (paying lip service to principle against finding substantial burden based on "inconvenience" but finding potential for substantial burden where there were no properties currently on market available to church), *with San Jose Christian Coll. v. City of Morgan Hill*, 360 F. 3d 1024 (9th Cir. 2004) (finding no substantial burden under RLUIPA because other options for building were available to religious group and burden must be more than mere inconvenience), *and Guru Nanak Sikh Soc. of Yuba City v. Cnty of Sutter*, 456 F.3d 978 (9th Cir. 2006) (noting laws must place more than mere inconvenience on free exercise to constitute substantial burden).

Whether cost and/or inconvenience can be sufficient to prove a substantial burden in land use cases is an important issue for every city, town, village, municipality, county, state, and locality in the United States. Cost and convenience are factors that affect every land use applicant, whether religious or not. If cost and/or inconvenience are sufficient to trigger free exercise protection, local governments need to know it.

If the Ninth Circuit's standard in this case were held to be correct, cities would need to consider instituting expedited procedures for religious applicants in order to avoid damages and attorneys' fees, and hiring professionals to manipulate the real estate market to make properties available to religious applicants when they demand them. They would also undoubtedly face Establishment Clause challenges if they do institute such systems.

If the Ninth Circuit's standard in this case is rejected, religious applicants need to understand that when they enter the land use process, they must bear the ordinary burdens every other land use applicant must shoulder, and like all other developers, need to make informed and careful financial decisions in the real estate market or suffer the consequences. Only this Court can clear up the current confusion.

This case presents the issue squarely, and the procedural posture is appropriate for a grant. The Ninth Circuit ruled that cost and market availability, which is a variation on inconvenience, could be sufficient to prove a substantial burden and sent the case back to the district court for a trial on whether San Leandro imposed a substantial burden on ICFG. Before any trial goes forward, however, the trial court needs to know the governing standard. A trial without this Court's review would be governed by the Ninth Circuit's questionable and extreme interpretation of substantial burden, and might well be a waste of time and resources. This Court's guidance on the proper standard is crucial at this stage in these

proceedings, but more importantly, at this stage of the development of constitutional and statutory free exercise doctrine in the United States.

II. There Is a Split in Authority Over the Interpretation of "Individualized Assessment" in Free Exercise Cases

Twenty-one years ago, this Court decided *Emp't Div. v. Smith*, 494 U.S. 872 (1990), in which the majority held that neutral, generally applicable laws are subject to low-level scrutiny under the Free Exercise Clause. *Id.* at 878-80. This Court contrasted the neutral, generally applicable state laws at issue in that case with laws that involve "individualized assessments." *Id.* at 883-84. The Court explained:

> Even if we were inclined to breathe into *Sherbert* some life beyond the unemployment compensation field, we would not apply it to require exemptions from a generally applicable criminal law. The *Sherbert* test, it must be recalled, was developed in a context that lent itself to individualized governmental assessment of the reasons for the relevant conduct. As a plurality of the Court noted in *Roy*, a distinctive feature of unemployment compensation programs is that their eligibility criteria invite consideration of the particular circumstances behind an applicant's unemployment: "The statutory conditions [in *Sherbert* and *Thomas*] provided that a person was not eligible for

> unemployment compensation benefits if, 'without good cause,' he had quit work or refused available work. The 'good cause' standard created a mechanism for individualized exemptions." *Bowen* v. *Roy, supra*, at 708 (opinion of Burger, C. J., joined by Powell and Rehnquist, JJ.). See also *Sherbert, supra*, at 401, n.4 (reading state unemployment compensation law as allowing benefits for unemployment caused by at least some "personal reasons"). As the plurality pointed out in *Roy*, our decisions in the unemployment cases stand for the proposition that 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. *Bowen* v. *Roy, supra*, at 708.

Id. at 884. This Court thus sharply contrasted neutral, generally applicable laws from laws that permit an individualized assessment as that term was illustrated by *Sherbert v. Verner*, 374 U.S. 398 (1963).

Three years after this Court's decision in *Smith*, in 1993, Congress enacted the Religious Freedom Restoration Act to override and reverse this Court's free exercise jurisprudence. RFRA was intended to displace the *Smith* standard (and every other free exercise case decided by this Court that had not applied strict scrutiny) through the imposition of strict scrutiny on all laws, including those that are neutral and generally applicable. It

explicitly imposed strict scrutiny on laws that "substantially burden a person's exercise of religion even if the burden results from a rule of general applicability." 42 U.S.C. § 2000bb-1(a).

Seven years after RFRA was enacted, and three years after it was invalidated, *Boerne*, 521 U.S. 507, Congress again attempted to displace this Court's First Amendment jurisprudence by enacting RLUIPA, which imposes strict scrutiny on rules of "general applicability" when the religious claimant is the recipient of federal funds or when the substantial burden on free exercise affects commerce. 42 U.S.C. § 2000cc(a)(2)(A), (B). Neither of these provisions is relevant to this case, where the Church has not pled that it has received federal funds, or that its application affects commerce.

RLUIPA, by its language, also applies strict scrutiny to land use determinations derived through "individualized assessments," 42 U.S.C. § 2000cc(a)(2)(C), which is the basis of this lawsuit. Because the term "a rule of general applicability" is excluded from RLUIPA's "individualized assessments" provision, it would appear that the two terms – "general applicability" and "individualized assessments" – are mutually exclusive, as this Court treated them in *Smith*. As discussed *supra*, the term was intended by Congress to reflect this Court's free exercise doctrinal use of the term. 145 Cong. Rec. H. 5580, 5588 (July 15, 1999) (statement of Rep. Canady).

The courts are split on what "individualized assessment" means in both First Amendment and

RLUIPA free exercise cases. Many courts have interpreted the term as this Court did in *Smith*: A law that is neutral and generally applicable to all applicants does not constitute an "individualized assessment." Conversely, a law that permits the government to employ discretion that permits secular reasons and not religious reasons for exemption, is an "individualized assessment." This interpretation can be found in cases that do not involve land use. *Blackhawk*, 381 F.3d at 207-10, 212; *FOP Newark Lodge No. 12 v. City of Newark*, 170 F.3d 359, 362, 364-65 (3d Cir. 1999), *cert. denied*, 528 U.S. 817 (1999); *Adams v. Comm'r*, 170 F.3d 173, 181 n.10 (3d Cir. 1999), *cert. denied*, 528 U.S. 1117 (2000); *Swanson by & Through Swanson v. Guthrie Indep. Sch. Dist. No. I-L*, 135 F.3d 694, 701 (10th Cir. 1998); *NLRB v. Hanna Boys Center*, 940 F.2d 1295, 1305 (9th Cir. 1991); *Am. Friends Serv. Comm. Corp. v. Thornburgh*, 951 F.2d 957, 961 (9th Cir. 1991); *Swanner,* 874 P.2d at 282-84.

This interpretation is also present in land use cases. *Lighthouse Inst. for Evangelism, Inc. v. City of Long Branch*, 510 F.3d 253, 275-77 (3d Cir. 2007), *cert. denied*, 128 S. Ct. 2503 (2008); *Westchester Day*, 504 F.3d at 347, 353-54; *Grace United*, 451 F.3d at 650-53; *Guru Nanak*, 456 F.3d at 985-87; *Urban Believers*, 342 F.3d at 764; *Cornerstone Bible Church v. Hastings*, 948 F.2d 464, 472 (8th Cir. 1991); *Cambodian Buddhist Soc'y of Conn., Inc. v. Planning & Zoning Comm'n of Town of Newton*, 941 A.2d 868, 882, 884-85, 890-93 (Conn. 2008); *Greater Bible Way*, 733 N.W.2d at 737, 739, 742-44; *Tran*, 554 S.E.2d at 67-68.

In contrast, a significant number of other courts have read the language divorced from this Court's explanation in *Smith*, and instead interpreted "individualized assessment" to mean nothing more than case-by-case analysis. The Court in this case followed this approach. *Int'l Church of the Foursquare Gospel v. City of San Leandro*, App. 17-18. *See also, Konikov*, 410 F.3d at 1323; *Midrash Sephardi,* 366 F.3d at 1225, 1229, 1236; *Trinity Assem. of God*, 962 A.2d at 424-26.

As with the interpretation of "substantial burden," the interpretation of "individualized assessment" impacts both First Amendment free exercise and statutory free exercise cases. Cities, municipalities, states, and religious believers require this Court's guidance on the proper interpretation of "individualized assessment." The issue is squarely presented in this case.

III. There Is a Split in Authority Over Whether Neutral, Generally Applicable Planning Principles Can Constitute a "Compelling Interest" in Free Exercise Cases

When enacting RLUIPA, Congress also borrowed this Court's doctrinal term, "compelling interest." 42 U.S.C. § 2000cc(a)(1)(A). This is the standard terminology of strict scrutiny in constitutional cases involving severe constitutional violations. There is no indication that Congress intended the term in RLUIPA to be strict in theory, but fatal in fact in land use cases. Yet, some courts, like the Ninth Circuit in this case, have concluded

that, as a matter of law, land use values and principles cannot satisfy the compelling interest test.

A majority of courts – whether interpreting the Free Exercise Clause or RLUIPA – have considered the compelling interest test in land use cases on the basis of the facts of the particular case. *St. John's United Church of Christ v. City of Chi.*, 502 F.3d 616, 635 (7th Cir. 2007); *Petra Presbyterian*, 489 F.3d at 852; *Konikov*, F. Supp. 2d at 1329; *Christian Gospel Church,* 896 F.2d at 1224; *Rector, Wardens, & Members*, 914 F. 2d at 357 n.6; *Grosz*, 721 F.2d at 738-739; *Reaching Hearts,* 584 F. Supp. 2d at 787-789; *Vietnamese Buddhism Study Temple In Am. v. City of Garden Grove*, 460 F. Supp. 2d 1165, 1175 (C.D. Cal. 2006); *Elsinore Christian Ctr. v. City of Lake Elsinore,* 291 F. Supp. 2d 1083, 1093-95 (C.D. Cal. 2003) *rev'd on other grounds,* 197 Fed. Appx. 718 (9th Cir. 2006); *Murphy v. Zoning Comm'n of the Town of New Milford,* 289 F. Supp. 2d 87, 108-09 (D. Conn. 2003), *vacated on other grounds,* 402 F.3d 342 (2d Cir. 2005); *Vineyard Christian Flwshp. of Evanston, Inc. v. City of Evanston*, 250 F. Supp. 2d 961, 977 (N.D. Ill. 2003); *Town v. State ex rel. Reno*, 377 So.2d 648, 652 (Fla. 1979); *Decatur Ind. Co. of Jehovah Witnesses*, 117 N.E.2d at 118, 119-121; *Greater Bible Way*, 733 N.W.2d at 751-752; *Open Door*, 995 P.2d at 47.

Others, like the Ninth Circuit in this case, have paid only lip service to local land use values and principles, instead treating them as though they are interests that are predestined to be fatal

under strict scrutiny. *Int'l Church of the Foursquare Gospel v. City of San Leandro*, App. 27; *First Cov. Church of Seattle v. City of Seattle*, 840 P.2d 174, 177-178 (Wash. 1992); *City of Sumner v. First Baptist Church of Sumner*, 639 P.2d 1358, 1361-64 (Wash. 1982).

This issue is squarely presented in this case, and, once again, requires this Court's attention, because the constitutional term borrowed by Congress is not being interpreted by the courts consistently across RLUIPA and First Amendment free exercise cases.

----------ϕ----------

CONCLUSION

The Religious Land Use and Institutionalized Persons Act is a conglomeration of (1) Congress's preferred standard for free exercise cases, which is intended to trump this Court's free exercise doctrine, and (2) concepts that are borrowed directly and intentionally from this Court's free exercise doctrine. There is now widespread confusion over central doctrinal terms in free exercise cases, whether decided under RLUIPA or the Free Exercise Clause. Petitioner asks this Court to GRANT the Petition so that it can definitively interpret three important free exercise principles appropriated by Congress -- "substantial burden," "individualized assessment," and "compelling interest." This Court's involvement is necessary to settle the persisting

and deepening splits in authority on the proper interpretation of all three free exercise concepts.

Respectfully submitted,

Marci A. Hamilton, Esq.
Counsel of Record
36 Timber Knoll Drive
Washington Crossing, PA 18977
(215) 353-8984
hamilton.marci@gmail.com

Jayne W. Williams, City Attorney
Deborah J. Fox, Esq.
Meyers Nave
555 12th Street, Suite 1500
Oakland, CA 94607
(510) 808-2000
jwilliams@meyersnave.com
dfox@meyersnave.com
Counsel for Petitioner
City of San Leandro