No. 05-2309

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

_____

LIVING WATER CHURCH OF GOD d/b/a OKEMOS CHRISTIAN CENTER,

Plaintiff-Appellee

v.

MERIDIAN CHARTER TOWNSHIP, SUSAN MCGILLICUDDY, MARY HELMBRECHT, BRUCE HUNTING, JULIE BRIXIE, STEVE STIER, ANDREW SUCH, ANNE WOIWODE, in their official capacities as members of the Meridian Township Board,

Defendants-Appellants

_____

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MICHIGAN

_____

BRIEF FOR THE UNITED STATES AS *AMICUS CURIAE* SUPPORTING APPELLEES AND URGING AFFIRMANCE

_____

WAN J. KIM
Assistant Attorney General

JESSICA DUNSAY SILVER
DAVID WHITE
Attorneys
Department of Justice
Civil Rights Division
Appellate Section, Room 3724
950 Pennsylvania Avenue, N.W.
Washington, D.C. 20530
(202) 616-9405

TABLE OF CONTENTS

PAGE

TABLE OF CONTENTS (continued): **PAGE**

TABLE OF AUTHORITIES

CASES: **PAGE**

CASES (continued): **PAGE**

CASES (continued): **PAGE**

STATUTES:

LEGISLATIVE HISTORY: **PAGE**

RULE:

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 05-2309

LIVING WATER CHURCH OF GOD d/b/a OKEMOS CHRISTIAN CENTER,

Plaintiff-Appellee

v.

MERIDIAN CHARTER TOWNSHIP, SUSAN MCGILLICUDDY, MARY HELMBRECHT, BRUCE HUNTING, JULIE BRIXIE, STEVE STIER, ANDREW SUCH, ANNE WOIWODE, in their official capacities as members of the Meridian Township Board,

Defendants-Appellants

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MICHIGAN

BRIEF FOR THE UNITED STATES AS *AMICUS CURIAE* SUPPORTING APPELLEES AND URGING AFFIRMANCE

INTEREST OF THE UNITED STATES

The United States files this brief as *amicus curiae* pursuant to Federal Rule of Appellate Procedure 29. This case presents important questions regarding the interpretation of the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA), 42 U.S.C. 2000cc *et seq.* The United States Department of Justice is charged with enforcing RLUIPA, see 42 U.S.C. 2000cc-2(f), and the disposition of the issues in this case may bear upon the Department's enforcement.

STATEMENT OF THE CASE

The Living Water Church of God/Okemos Christian Center (Church) sued Meridian Charter Township (Township) alleging a violation of the RLUIPA, as well as other constitutional and statutory claims; the parties agreed to try the case on the single issue of whether the Township violated the Church's rights under RLUIPA. *Living Water Church of God* v. *Charter Twp. of Meridian*, 384 F. Supp. 2d 1123, 1125 n.1 (W.D. Mich. 2005). Following a bench trial, the district court concluded: (1) the denial of the Special Use Permit (SUP) to maintain a building in excess of 25,000 square feet constituted a land use regulation under RLUIPA, see 42 U.S.C. 2000cc-5(5); (2) the process for seeking a SUP is an individualized assessment under RLUIPA, see 42 U.S.C. 2000cc(a)(2)(C); (3) the Church's operation of the property for religious uses constituted the exercise of religion under RLUIPA, see 42 U.S.C. 2000cc-5(7)(A); (4) the denial of the SUP imposed a substantial burden on the Church's religious exercise, see 42 U.S.C. 2000cc(a)(2)(C); and (5) the Township did not use the least restrictive means to achieve a compelling governmental interest in denying the SUP, see 42 U.S.C. 2000cc(a)(1).[1] Accordingly, the district court issued a declaratory judgment that the Township violated RLUIPA and "enjoin[ed] the Township from preventing [the Church] from proceeding with the construction of a school and church building on its property in conformity with its 2003 request for a [SUP]." 384 F. Supp. 2d at 1136.

---

[1] The Township does not challenge the district court's rulings regarding: (1) the land use regulation; (2) the individualized assessment; and (3) religious exercise.

STATEMENT OF THE FACTS

1. The Church's Applications For Special Use Permits

The Church owns a six-acre parcel of land in Meridian Charter Township, Michigan. The parcel is zoned as single family residential, medium density. There is no place in the township in which a church or private school can build as of right. By ordinance, the Church was required to obtain a SUP for a religious or educational use and a separate SUP for any building in excess of 25,000 square feet. *Living Water Church of God* v. *Charter Twp. of Meridian*, 384 F. Supp. 2d 1123, 1126 (W.D. Mich. 2005). In 1995, the Church obtained a SUP from the Township to build a 10,925 square-foot building for use as a sanctuary and daycare center. When the Church sought the SUP, it discussed future plans with the Township zoning authorities, explaining that its initial construction represented only the first phase of a multi-phase building plan for the property. *Ibid.*

In the spring of 2000, the Church requested and obtained a SUP to increase enrollment at the daycare center to 72 children and to construct a 28,500 square-foot school building. 384 F. Supp. 2d at 1126.[2] Although the Church initially sought approval for enrollment of 360 students, it agreed to limit enrollment to 280 students. The Church also agreed to various other concessions, including delaying its start time, doing without athletic fields, and paying for construction of a deceleration lane for cars entering the property to lessen the impact on traffic. On

---

[2] The Township brief (Br. 39) misstates the size of the addition it had approved in 2000. The 2000 SUP permitted an *addition* of 28,500 square feet to the already existing building, not a total of 28,500 square feet, including the existing building. *Living Water*, 384 F. Supp. 2d at 1134.

approval, the Church began raising money for construction of the building.

By letter of March 7, 2001, the Township notified the Church that the SUP would expire by May 2001, unless the Church obtained an extension. 384 F. Supp. 2d at 1126. Thereafter, the Township denied the Church's request for an extension, based on the advice of new legal counsel, even though such extensions had previously been granted. As a result of the unprecedented denial of the extension, the Church lost its initial investment of $35,000-$40,000 spent in the preparation of planning documents. *Ibid.*

In 2003, the Church applied for a SUP to construct a "Christian Education Building" with a proposed size of 34,989 square feet. 384 F. Supp. 2d at 1127. The 2003 proposal had more square footage than the 2000 proposal but the outward appearance of the buildings was substantially the same. The footprint of the building proposed in 2003 was 1,500 square feet smaller than the building approved in 2000 because the 2003 building had a larger basement. As a conciliatory gesture in the hopes of obtaining the 2003 SUP, the Church agreed to reduce further the school's enrollment from 280 to 125 students. After the Church's application for this construction was reviewed and approved by various township departments, the Meridian Planning Commission (Commission) approved the SUP to use the property for a school and recommended that the Meridian Township Board (Board) approve the SUP for a building in excess of 25,000 square feet. *Ibid.* The Church's application for this 2003 SUP "complied with every ordinance regulating lot coverage, setbacks, height, appearance, location and use once the SUP for a school was approved." *Ibid.*

The Commission provided the Board with a "Land Area to Building Ratio" table comparing the amount of land to the building size for public and private schools in Meridian Township. 384 F. Supp. 2d at 1127. This table was developed and prepared for the sole purpose of reviewing the Church's application for the SUP and "ha[s] not been applied to any other applicants since [its] creation." *Ibid.*

The Board affirmed the Commission's approval of the SUP for the school subject to the restrictions, but denied the SUP for construction of a building in excess of 25,000 square feet. 384 F. Supp. 2d at 1128. According to the Board, "the size of the proposed church and school facility in relationship to the size of the subject site is out of proportion to similarly situated schools and combined church and school facilities within the Township and inconsistent with those review criteria and standards for the granting of a special use permit contained in [the zoning ordinance]" *Ibid*. (quoting Board decision). In the past 10 years, the Board has only denied one other SUP for a building larger than 25,000 square feet. *Ibid.*

2. Impact Of The Township's Denial Of The 2003 Special Use Permit

The Church, in addition to being a house of worship, describes its mission as bringing its religious teaching to people of all ages and to all aspects of life. R.84:8; Pl. Ex. 6.[3] To that end, the Church provides various worship and other programs for adults and children. In addition to Sunday worship services, the Church provides mid-week services, weekly meetings of men's and women's

[3] "R.__:__" refers to the district court docket number and page number of that document. "Pl. Ex. __" refers to the plaintiff's exhibits filed in the district court. "Br. __" refers to defendant's opening brief to this Court.

groups, evening seminars for adults, classes for married couples, meetings for mothers of preschoolers, concerts and special events. 384 F. Supp. 2d at 1128; R.84:8,15; Pl. Ex. 6. The Church also has a variety of programs addressing the needs of children and teens. 384 F. Supp. 2d at 1128; Pl. Ex. 6.

According to the Church, it approaches education from a "Christian world view." 384 F. Supp. 2d at 1133; Pl. Ex. 6. It operated a Christian daycare program for eight years, which, at its peak, included 70 children. 384 F. Supp. 2d at 1128. Because of the importance of Christian education to the Church, it opened the Dominion Leadership Academy, for boys in junior and senior high school, in fall 2001. *Id.* at 1128, 1133. In accordance with the Church's belief that education is rooted in religious faith, it takes a Christian approach to education. Pl. Ex. 5. Also in accordance with the Church's beliefs, the school teaches "Biblical masculinity." R.84:130. As described by the Church, physical activity is an important component of this teaching because it is a means to direct the students' energy and instill values such as respect for authority, diligence, perseverance, team work, and discipline. R.84:131; Pl. Ex. 5.

The school has been operated offsite in several locations. The first, in Grand Ledge, was 25 miles from the church. Because of difficulties in transporting students that distance, the school was moved to a house in Okemos. That facility was too small. The school was then moved to an office building, but the school had to rent gym facilities at another location and the property was not zoned for a school. 384 F. Supp. 2d at 1128.

As a consequence of the denial of the SUP to construct a building in excess

of 25,000 square feet, the Church has been denied needed space at its current facility. The "current facility does not meet the needs of the current members, let alone provide space to add services and seating for new members." 384 F. Supp. 2d at 1128. Additional space is needed for the children's programs on Sunday morning and weekday evenings, weekly meetings of men's and women's groups, and evening seminars for adults. Because of lack of space, the Church was forced to choose among its programs. *Id.* at 1133. It had to close its daycare center, *ibid.*, and give up its midweek worship service. R.84:39. Moreover, "[h]alf of the church staff is occupying offices in a rented facility off site." 384 F. Supp. 2d at 1128. Although the Church's membership had doubled in recent years, *ibid.*, the Church has been "losing current and potential members due to the frustration and confusion caused by the space constraints," *id.* at 1129.

The same staff operates the church and the school and must travel between locations, limiting their time for teaching and disrupting classes. 384 F. Supp. 2d at 1133; R. 84:136, 160-161. Efforts to operate the school and church in separate locations have been "hampered by issues associated with transportation, cost and shared employees." 384 F. Supp. 2d at 1133. There is a "lack of programming" because of space constraints. The Church is "severely limited in its ability to recruit for the school because of the uncertainty about the future space." *Ibid.*

3. District Court Opinion

Based upon this detailed factual record, the district court found that the Church is "unable to practice its religious beliefs in its current location because the facilities are too small for the needs of the congregation and staff." 384 F. Supp.

2d at 1133. Moreover, the court found that "[h]aving the church and the school in two separate locations is * * * not feasible." *Ibid.*

The district court found that an addition of another 14,000 square feet (for a total of 25,000), as permitted without a SUP, "would not resolve the space problems." 384 F. Supp. 2d at 1133. The Church's need for "classrooms, a gymnasium, a sanctuary, day care rooms, offices and meeting rooms" would not be satisfied in that increased space. *Ibid.*

In addressing whether the Church suffered a substantial burden in its exercise of religion, the district court reviewed the relevant caselaw. 384 F. Supp. 2d at 1132. Based upon its extensive findings, detailing the effect of the Township's actions on the religious exercise of the Church, the court rejected the Township's argument that the burden was "merely an inconvenience," and concluded that "[d]enial of the SUP is directly responsible for rendering [the Church's] ability to use its real property for its religious purposes effectively impracticable." *Id.* at 1134. The district court reviewed the history of dealings between the Township and the Church, and concluded that the Church "w[ould] incur delay, expense and uncertainty if it is required to reapply or search for another site" and, even if it does so, the Township could still deny a SUP. *Ibid.*

Having found that the Church proved a substantial burden on its religious exercise, the district court addressed whether the Township had demonstrated that its denial of the SUP for the Church served a compelling governmental interest and was the least restrictive means of serving that interest. 384 F. Supp. 2d at 1134-1135. The court recognized that maintaining a certain level of density because of

the "significant impact of development on adjacent property owners, neighborhoods, and public infrastructure" was a valid interest. But, the district court found, the Township had not shown that "its interest in density was a compelling interest *in this case*." *Id.* at 1135 (emphasis added). In 2000, the Township had approved a SUP for a building with less square footage but a larger footprint. The additional square footage was attributable to the addition of a basement. The court found that the Township failed to "show[] what negative impact the basement would have on the adjacent property owners, neighborhoods or infrastructure, particularly in light of the fact that enrollment under the 2003 proposal was reduced from the 280 students approved in 2000 to only 125 students." *Ibid.*

The district court found that the Township acted on the basis of a land-to-building ratio which was created for the purpose of reviewing the 2003 proposal and which has not been applied to any other proposal. 384 F. Supp. 2d at 1135. There is no standard in the ordinance or the Township's Comprehensive Development Plan as to what ratio is appropriate for a school, *id.* at 1128, or what ratio is too dense, *id.* at 1135. There were no guidelines as to what buildings or parts of buildings count toward the total square footage. The proposal was compared primarily to the land-building ratios for public schools, even though public schools are not subject to Township zoning ordinances, and ignored other churches, private schools, nursing homes, day care centers, and fraternity and sorority houses, which are subject to SUP requirements. And even as to the public schools, the Township officials who testified were not sure whether the square

footage included basements, bus garages, or portable classrooms. Most of the comparison schools have athletic fields, which would affect the amount of land required, even though the Church was required to agree not to have any athletic fields. *Ibid.*

The court discounted the National Education Association criteria referenced in the Comprehensive Development Plan for several reasons, including that they address only total land recommended for each type of school but do not address land-to-building ratio. 384 F. Supp. 2d at 1127. The district court held that the land-to-building ratio table was "meaningless," and its use to deny the SUP was "arbitrary," *Id.* at 1135. The court concluded that the Township failed to carry its burden of demonstrating that denial of the SUP was the least restrictive means to serve a compelling governmental interest. *Id.* at 1136.

ARGUMENT

I

DENIAL OF THE SUP CONSTITUTES A SUBSTANTIAL BURDEN ON THE CHURCH'S RELIGIOUS EXERCISE

A. Statutory Background

In enacting RLUIPA, Congress responded to a record of longstanding and widespread discrimination against religious institutions by state and local officials in land use decisions. 146 Cong. Rec. 16,698-16,699 (2000) ("Joint Statement"); H.R. Rep. No. 219, 106th Cong., 1st Sess. 21-24 (1999). To address that problem, Congress proceeded in two ways. First, it explicitly prohibited unequal treatment, intentional discrimination, and exclusion of religious institutions. See 42 U.S.C. 2000cc(b)(1-3).

Congress also enacted provisions which "backstop[ ] the explicit prohibition of religious discrimination." *Sts. Constantine & Helen Greek Orthodox Church* v. *City of New Berlin*, 396 F.3d 895, 900 (7th Cir. 2005). It is these provisions which govern this case. Section 2(a)(1) and 2(a)(2)(C), provide, in relevant part:

> 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 * * * is in furtherance of a compelling governmental interest[] and * * * is the least restrictive means of furthering that compelling governmental interest.

42 U.S.C. 2000cc(a)(1).

> (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)(2)(C).

These provisions were included in the statute because Congress recognized that land use decisions are often based, not on neutral generally applicable rules, but on individualized assessments that grant or deny permission for a particular use, often without any clear standards. Joint Statement at 16,699; H.R. Rep No., *supra*, at 20-21, 24. Because land use systems typically provide local regulators with "virtually unlimited discretion in granting or denying permits for land use," H.R. Rep No., *supra*, at 20[4], Congress found that such systems of individualized

[4] As the Supreme Court has recognized, zoning laws in fact grant officials a (continued...)

land use assessments readily lend themselves to discrimination against religious institutions. Joint Statement at 16,699; H.R. Rep No., *supra*, at 18-24. As the Seventh Circuit has recognized,

> [R]eligious institutions – especially those that are not affiliated with the mainstream Protestant sects or the Roman Catholic Church – [are vulnerable] 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.[5]

Sts. Constantine, 396 F.3d at 900; see also *Midrash Sephardi, Inc.* v. *Town of Surfside*, 366 F.3d 1214, 1225 (11th Cir. 2004), cert. denied, 543 U.S. 1146 (2005). Because it can be difficult to prove discrimination in such circumstances, Joint Statement at 16,699; H.R. Rep No., *supra*, at 18-24, Congress saw fit to subject individualized land use assessments which substantially burden religious exercise to the careful examination demanded by strict scrutiny.

> If a land use decision * * * imposes a substantial burden on religious exercise * * * and the decision maker cannot justify it, the inference arises that hostility to religion, or more likely to a particular sect, influenced the decision.

Sts. Constantine, 396 F.3d at 900 (citation omitted).

---

[4](...continued)
greater degree of discretion than do most laws. See, *e.g.*, *MacDonald, Sommer & Frates* v. *Yolo County*, 477 U.S. 340, 350 (1986) ("Local agencies charged with administering regulations governing property development are singularly flexible institutions.").

[5] Statements by supporters of the legislation point out that "[s]maller and less mainstream denominations are over-represented in reported land use disputes," H.R. Rep No., *supra*, at 24, and that "new, small, or unfamiliar churches in particular" suffer discrimination at the hands of zoning officials. Joint Statement at 16,698.

These provisions reflect the Supreme Court's interpretation of the Free Exercise Clause, in *Sherbert* v. *Verner*, 374 U.S. 398 (1963), and its progeny, which hold that laws burdening religious exercise that are not generally applicable, but rather that have "eligibility criteria [that] invite consideration of the particular circumstances" and lend themselves "to individualized governmental assessment of the reasons for the relevant conduct," are subject to heightened scrutiny. See *Employment Div*. v. *Smith*, 494 U.S. 872, 884 (1990); see also *Church of the Lukumi Babalu Aye, Inc*. v. *City of Hialeah*, 508 U.S. 520, 546 (1993) ("A law burdening religious practice that is not neutral or not of general application must undergo the most rigorous of scrutiny.").

The Congressional sponsors of RLUIPA took pains to point out that these provisions are not intended to "exempt religious uses from land use regulation." Joint Statement at 16,699. Instead, the statute sets a "standard that responds to facts and context." Joint Statement at 16,699.

B. RLUIPA'S Definition Of "Substantial Burden"

RLUIPA does not define the term "substantial burden." Rather, the term has its genesis in case law interpreting the Free Exercise Clause of the First Amendment, and the same term was used in the Religious Freedom Restoration Act (RFRA), 42 U.S.C. 2000bb *et seq*.[6] Prior precedents under the Free Exercise Clause and RFRA, therefore, provide guidance for defining "substantial burden"

---

[6] Under these circumstances, if "Congress adopts a new law incorporating sections of a prior law, Congress normally can be presumed to have had knowledge of the interpretation given to the incorporated law, at least insofar as it affects the new statute." *Lorillard* v. *Pons*, 434 U.S. 575, 581 (1978). Moreover, "Congress expects its statutes to be read in conformity with [Supreme Court] precedents." *United States* v. *Wells*, 519 U.S. 482, 495 (1997).

under RLUIPA. See, *e.g.*, *Sts. Constantine*, 396 F.3d at 897; *Adkins* v. *Kaspar*, 393 F.3d 559, 569-570 (5th Cir. 2004); *Midrash*, 366 F.3d at 1226.

In *Sherbert*, 374 U.S. at 404, the Supreme Court found a substantial burden under the Free Exercise Clause where Sherbert, a Seventh-day Adventist, was "force[d] * * * to choose between following the precepts of her religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of her religion in order to accept work, on the other hand." Sherbert's employer denied her unemployment benefits after discharging her because she refused to work on Saturdays, in contravention of her religious convictions. After being discharged from her job as a mill worker, Sherbert sought employment with three other mills but was unable to find full-time work that would permit her to observe her Saturday Sabbath. 374 U.S. at 399 n.2. The Court noted that "of the approximately 150 or more Seventh-day Adventists in the Spartanburg area, only appellant and one other have been unable to find suitable non-Saturday employment." *Ibid.* Despite the possibility that Sherbert might have found other suitable work, as others had, the Court focused on the burden placed on her by "condition[ing] the availability of benefits upon [her] willingness to violate a cardinal principle of her religious faith" with regard to the one job she left and the three she turned down, concluding that such a condition "effectively penalizes the free exercise of her constitutional liberties." *Id.* at 406. The government's action did not specifically prohibit religious practice, but had the effect of pressuring Sherbert to forego such practice by denying unemployment benefits.

Since Sherbert, the Supreme Court has expressed the meaning of substantial

burden in different ways. In *Lyng* v. *Northwest Indian Cemetery Protective Association*, 485 U.S. 439, 449 (1988), the Supreme Court found that a substantial burden exists if "the affected individuals [would] be coerced by the Government's action into violating their religious beliefs" or if "governmental action penalize[s] religious activity by denying any person an equal share of the rights, benefits, and privileges enjoyed by other citizens." In *Thomas* v. *Review Board of Indiana Employment Security Division*, 450 U.S. 707, 717-718 (1981), to be a substantial burden government action must have more than an incidental effect, it must "put substantial pressure on an adherent to modify his behavior and to violate his beliefs."

In interpreting RLUIPA, courts have endeavored to apply "the established guideposts of 'substantial burden' analysis in a new context." *Guru Nanak Sikh Soc'y* v. *County of Sutter*, 326 F. Supp. 2d 1140, 1152 n.5 (E.D. Cal. 2003) (appeal pending). For example, in *Midrash*, 366 F.3d at 1227, the Eleventh Circuit stated:

> The combined import of the [*Sherbert* line of cases] leads us to the conclusion that a 'substantial burden' must place more than an inconvenience on religious exercise; a 'substantial burden' is akin to significant pressure which directly coerces the religious adherent to conform his or her behavior accordingly. Thus, a substantial burden can result from pressure that tends to force adherents to forego religious precepts or from pressure that mandates religious conduct.

See *Cottonwood Christian Ctr.* v. *Cypress Redev. Agency*, 218 F. Supp. 2d 1203, 1226 (C.D. Cal. 2002) ("Preventing a church from building a worship site fundamentally inhibits its ability to practice its religion."). Thus, in interpreting substantial burden under RLUIPA, the question becomes whether denying a permit

for a particular land use "*actually inhibit[s]* religious activity in a concrete way." *Guru Nanak*, 326 F. Supp. 2d at 1152.

C. The Township's Denial Of The SUP Constitutes A "Substantial Burden"

1. The District Court Correctly Found That The Church Is Unable To Practice Its Religious Beliefs In Its Current Location

The record below amply demonstrates the many ill effects the Church has suffered because of the size of its current facilities, effects that inhibited its exercise of religion. The limited space is not enough to accommodate various religious programs, including adult education, children's activities, and outreach to the community. The Church was forced to choose among its programs and had to give up its daycare, midweek services, and youth ministry meetings. Although its membership rolls had doubled in recent years, the Church is now losing members and cannot recruit new members because of lack of space and uncertainty about future construction. The school, which is a significant part of the religious practice of the Church, cannot feasibly be operated at a separate location and the current facility cannot accommodate the school. The lack of a permanent, adequate place for the school has and continues to hurt the school's ability to recruit and keep students.

On the basis of this evidence, the district court found as a fact that the Church "is unable to practice its religious beliefs in its current location because the facilities are too small for the needs of the congregation and staff," 384 F. Supp. 2d at 1133, and further that "[d]enial of the SUP is directly responsible for rendering [the Church's] ability to use its real property for its religious purposes effectively impracticable." *Id.* at 1134.

The Township does not challenge these findings as clearly erroneous.[7] Instead, it contends (Br. 38) that the effect of denying the SUP was not to substantially burden the Church's religious exercise, but only to burden its use of its current property. But that argument misses the point.

RLUIPA defines "religious exercise" to include "any exercise of religion, whether or not compelled by, or central to, a system of religious belief," and specifies that religious exercise includes the "use, building, or conversion of real property for the purpose of religious exercise * * * of the person or entity that uses or intends to use the property for that purpose." 42 U.S.C. 2000cc-5(7). This definition reflects Congress's determination that "places of assembly are needed to facilitate religious practice." *Midrash*, 366 F.3d at 1226; *Cottonwood*, 218 F. Supp. 2d at 1226 ("Preventing a church from building a house of worship means that numerous religious services cannot be performed.").

As this Court has recognized, it is precisely the "religious *use* of land" that "is the core concept protected by [RLUIPA]." *DiLaura* v. *Ann Arbor Charter Twp.*, 30 Fed. Appx. 501, 507 (6th Cir. 2002) (*DiLaura I*).[8] In *DiLaura I*, this

---

[7] "[A] district court's findings of fact should not be reversed unless clearly erroneous. Clear error will lie only when the reviewing court is left with the definite, firm conviction that a mistake has been made." *Isabel* v. *City of Memphis*, 404 F.3d 404, 411 (6th Cir. 2005) (citation omitted). If, as in the present appeal, factual findings are based on live testimony and credibility determinations, appellate courts "afford great deference to the district court's factual finding." *Lindstrom* v. *A.C. Prod. Liab. Trust*, 424 F.3d 488, 492 (6th Cir. 2005).

[8] The United States believes that this unpublished decision and a subsequent decision in the same case have precedential value in relation to a material issue in this case and it has been unable to find any published opinion of this Court applying RLUIPA's substantial burden provision to land use. Sixth Circuit Rule 28(g).

Court found that denying a zoning variance to allow the plaintiffs to use a particular property as a religious retreat imposed a substantial burden on religious exercise. *Id.* at 510; see also *Murphy* v. *Zoning Comm'n*, 148 F. Supp. 2d 173 (D. Conn. 2001) (granting preliminary injunction to permit use of private home for group worship).[9]

The Township argues (Br. 40) that the Church suffers no substantial burden because it can still operate as a place of worship and a school at its current location and characterizes the impact of denying the SUP as minor inconvenience. The Township's contention that the Church is merely inconvenienced by the lack of space flies in the face of the district court's factual findings (see pp. 8-9 *supra*) and must be rejected. The term "inconvenience" suggests no real impediment to the exercise of religious beliefs. For example, in *Williams Island Synagogue* v. *Aventura*, 358 F. Supp. 2d 1207, 1216 (S.D. Fla. 2005), the court found that there was no substantial burden where the problem could be solved by rearranging

---

[9] The Township's reliance on this Court's decision in *Lakewood, Ohio Congregation of Jehovah's Witnesses* v. *City of Lakewood*, 699 F.2d 303 (6th Cir.), cert. denied, 464 U.S. 815 (1983), is unavailing. That decision pre-dated Supreme Court decisions in Free Exercise cases, dispensing with a "centrality" of religious belief requirement. *Hernandez* v. *CIR*, 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."); *Employment Div.*, 494 U.S. at 887 ("Repeatedly and in many different contexts, we have warned that courts must not presume to determine the place of a particular belief in a religion or the plausibility of a religious claim."). In any event, *DiLaura* clearly holds that, under RLUIPA, "[t]he use of the land [to house a religious assembly] does not have to be a 'core religious practice'" to be protected by the statute. 30 Fed. Appx. at 508-509; see also *Midrash Sephardi, Inc.*, 366 F.3d at 1226 (stating that "RLUIPA obviates the need for [a centrality] analysis by providing a statutory definition of 'religious exercise'" which unlike the previous case law "does not have to be 'compelled by, or central to, a system of religious belief'") (quoting 42 U.S.C. 2000cc-5(7)(A)).

seating and shifting positions during worship. Here, as the district court found, the Church is being forced to forego religious practice.

The argument that there is no substantial burden because the church and school can continue to operate in the current location fares no better. While it is true that the Church can add 14,000 square feet to its building without obtaining a SUP, the district court found that the addition of such space would be inadequate to serve the religious needs of the Church.

Although the denial of a SUP to expand to over 25,000 square feet does not prevent all religious practice by the Church, that is not the test of substantial burden. This Court and others have found a substantial burden where zoning officials permit some religious uses but prevent others. On remand from this Court's decision in *DiLaura I,* the township approved the property for some religious use. In the second appeal, *DiLaura* v. *Ann Arbor Charter Township*, 112 Fed. Appx. 445 (6th Cir. 2004) (*DiLaura II*), this Court upheld the district court finding of substantial burden because the permit imposed conditions (including prohibiting serving lunch, dinner and alcohol) that inhibited other religious activity and, the court found, effectively prevented use of the property as a religious retreat. In *Murphy*, which this Court cited in *DiLaura*, the district court granted a preliminary injunction of a municipal zoning code requirement that meetings in private homes not exceed 25 persons. The town did not contend that the property could not be used for religious purposes, but sought to limit the number of people who could attend. The court found that the 25 person limitation would substantially burden plaintiffs' exercise of religion because requiring plaintiffs to

turn away people "whom plaintiffs believe can and should be helped by the group's prayer forces them to modify their religious practices" or face sanctions. 148 F. Supp. 2d at 189. See *Westchester Day Sch.* v. *Village of Mamaroneck*, No. 02-6291, 2006 WL 538248, at *61 (S.D.N.Y. Mar. 2, 2006) (finding a substantial burden where religious school prevented from constructing facilities needed to provide an adequate education); *Castle Hills First Baptist Church* v. *City of Castle Hills*, No. 01-1149, 2004 WL 546792, at *9 (W.D. Tex. Mar. 17, 2004) (denial of permit to use more of church property for religious education classes imposed a substantial burden); *Alpine Christian Fellowship* v. *County Comm'rs*, 870 F. Supp. 991, 994-995 (D. Colo. 1994) (substantial burden where county denied permit to operate religious school in church); *Western Presbyterian Church* v. *Board of Zoning Adjustment*, 862 F. Supp. 538, 546 (D.D.C. 1994) (holding that a church's inability to offer food to homeless on its premises constituted a substantial burden); *Jesus Ctr*. v. *Farmington Hills Zoning Bd. of Appeals*, 544 N.W.2d 698 (Mich. Ct. App. 1996) (substantial burden under RFRA where a zoning board denied a congregation permission to operate a shelter for the poor in its church).

Moreover, space limitations which threaten a religious institution's ability to retain and attract congregants and students may constitute a substantial burden. *Westchester Day Sch.*, 2006 WL 538248, at *61-*62 (students and faculty); *Cottonwood*, 218 F. Supp. 2d at 1212 (congregants).

This case is not just a dispute about space; it is about whether the Church can carry out its religious program in the space permitted by township ordinance without a SUP. The Township's decision means that the Church cannot add even

one square foot over 25,000. Despite the Township's repeated statements to the contrary, the district court has found conclusively that 25,000 square feet is not adequate space for the Church's religious practice.

The Township argues that the school can be built at a separate location where there is more land. But operation of the school is part of the Church's religious practice and the district court found that separating the church and school was "not feasible" in light of the interconnections between their activities and personnel. Courts have rejected arguments similar to that made by the Township.

In *Cottonwood*, a church sought to build a facility for its growing congregation which would include a 4,700 seat auditorium and surrounding buildings for use in its religious programs. The church needed a large facility because it was "compelled to continually seek growth in the size of [the] congregation and [its] ministries" and because it believed the congregation should worship together as one body. 218 F. Supp. 2d at 1212.

> Simply put, its Los Alamitos facility cannot handle the congregation's large and growing membership, and its small quarters prevent Cottonwood from meeting as a single body, as its beliefs counsel.

Id. at 1226. Given the religious importance of "meeting in one location at one time, [and] providing numerous ministries," the court concluded that the plaintiff had shown a religious need to have a "large and multi-faceted church." *Id.* at 1227.

In *Jesus Center*, the court found a substantial burden under RFRA where a zoning board denied a congregation permission to operate a shelter for the poor in its church. While noting that the zoning board argued that there were other locations where the church could operate a homeless shelter, the court held that

relocating the shelter would be an economic burden on the church and would detract from the mission of the church to combine worship and social service. 544 N.W.2d at 704. See also *Alpine Christian Fellowship*, 870 F. Supp. at 994 (importance of operating religious school *in* church); *Western Presbyterian*, 862 F. Supp. at 546 (importance of feeding homeless *on* church premises); *Greater Bible Way Temple of Jackson* v. *City of Jackson*, 708 N.W.2d 756 (Mich. Ct. App. 2006) (substantial burden to deny rezoning to permit construction of assisted living complex for elderly and disabled near church).

2. The Township's Decision Should Be Viewed In Context

The Township argues that the Church is not substantially burdened because there are alternative locations. The existence of alternative locations, however, is a relevant, but not determinative, consideration in assessing substantial burden. For example, in *Islamic Center of Mississippi, Inc.* v. *City of Starkville*, 840 F.2d 293, 300 (5th Cir. 1988), the Fifth Circuit found a substantial burden under the Free Exercise Clause where a proposed mosque sought to locate near a university. The city ordinance required that all houses of worship obtain special exception permits, and the city denied the proposed mosque's formal permit application, as well as rebuffed four informal site proposals. The court held that although sites distant from the university were available, "[b]y making a mosque relatively inaccessible within the city limits to Muslims who lack automobile transportation, the City burdens their exercise of religion." *Id.* at 299. Courts have found substantial burdens under RLUIPA where jurisdictions bar expansion of existing religious facilities, without requiring a showing that the church or school could have moved

to another location. See, *e.g.*, *Castle Hills*, 2004 WL 546792, at *9 (denial of church expansion needed for religious education classes imposed a substantial burden); *Shepherd Montessori Ctr. Milan* v. *Ann Arbor Charter Twp.*, 675 N.W.2d 271, 282 (Mich. Ct. App. 2003) (holding that was a dispute of material fact on the issue of substantial burden where a religious day care center sought to lease adjacent property for operation of religious school; determinative factors would include administrative feasibility of operating two separate sites, convenience to parents, and availability and nature of alternative sites).[10]

Moreover, even where there are apparent alternatives, pursuing them may be unrealistic, see *Cottonwood,* 218 F. Supp. 2d at 1226 (impractical for church to move to another location, given the large site it needed and the fact that acquiring the Cottonwood Property was a five year project) or unduly burdensome, see *Sts. Constantine*, 396 F.3d at 901; *Guru Nanak*, 326 F. Supp. 2d at 1152-1154. As the court held in *Constantine*, "[t]hat the burden [of pursuing alternatives] would not be insuperable would not make it insubstantial." 396 F.3d at 901.

In determining whether a land use decision imposes a substantial burden on a religious institution, context is important. The Township attempted below to confine the district court's review to the 2003 SUP application in isolation, *Living Water*, 384 F. Supp. 2d at 1134, and now argues that the course of dealings with

---

[10] Cf. *Keeler* v. *Mayor & City Council of Cumberland*, 940 F. Supp. 879 (D. Md. 1996) (substantial burden under RFRA to bar Catholic Archdiocese from demolishing monastery to build more modern facilities that would better meet its needs); *First Covenant Church of Seattle* v. *City of Seattle*, 840 P.2d 174, 219 (Wash. 1992) (landmarking of church created substantial burden under the Free Exercise Clause because it reduced value of property and subjected alteration to government review).

the Church and the facts surrounding its decision are irrelevant to a determination of substantial burden. The district court correctly rejected that argument. Evidence of context is significant for two reasons. First, it bears on whether the Church should be expected to apply for more permits or pursue alternative sites or whether doing so would simply expose the Church to further burden. That is particularly true where, as here, there is no place a religious institution can locate, as of right. In addition, when the actions of local officials, exercising standardless discretion, have a "whiff of bad faith," *Sts. Constantine*, 396 F.3d at 901, that evidence heightens the suspicion that a church is being targeted for unfair treatment.[11] Even though it is not necessary for a plaintiff to prove discrimination to make out a violation of Section 2(a)(1), there can be no question that such evidence is relevant in evaluating the relative positions of the parties.[12]

In *Sts. Constantine*, the Seventh Circuit relied on such evidence. There, the church applied for rezoning on a tract of land it owned. 396 F.3d at 898. The church sought to replace its existing building in another town with a larger building to accommodate its growing congregation. *Ibid.* The defendant city's only stated concern was that if the church decided not to build, the rezoning would permit the church to sell the land for some other institutional use in what was a residential

---

[11] In proving that land use decisions reflect discriminatory motive, "[r]elevant evidence includes, among other things, the historical background of the decision under challenge, the series of events leading to the enactment or official policy in question, and the legislative or administrative history, including contemporaneous statements made by members of the decisionmaking body." *City of Hialeah*, 508 U.S. at 540.

[12] That is not to say that such evidence is necessary to establish substantial burden. But where such evidence exists, it should be considered as part of the substantial burden inquiry.

zone. *Ibid.* Although the church proposed that the city enact an ordinance that would permit the church to build, but prevent other institutional uses, the city rejected that solution and proposed other alternatives, which the court of appeals found unnecessary and likely to result in delay. *Id.* at 899-900. The choice that confronted the church was "to sell the land it bought in New Berlin and find a suitable alternative parcel or be subjected to unreasonable delay by having to restart the permit process to satisfy [the city] about a contingency for which the church had already provided complete satisfaction." *Id.* at 900. Even though the church "could have searched around for other parcels of land" or continued filing applications with the city, the court concluded that, in the circumstances of that case, the "delay, uncertainty, and expense" contributed to a substantial burden in its exercise of religion. *Id.* at 901.

The history of dealings between the parties was also important in *Guru Nanak*. The district court found that denial of a use permit to build a sikh temple amounted to a substantial burden on plaintiff's exercise of religion. There, churches could locate in only six of 22 zones and only with a use permit. 326 F. Supp. 2d at 1146. Plaintiff had undertaken great efforts to place its temple at a location and to build in a manner that would satisfy the defendants. *Id.* at 1142-1143. Plaintiff purchased land in a residential zone, but defendants denied a use permit because of citizen concerns regarding traffic and noise. *Id.* at 1142. Plaintiff then purchased land in a general agricultural district where such concerns would not be present and applied a second time for a use permit. The county planning staff and the planning commission recommended approval, with

conditions that would not adversely impact the agricultural uses of neighboring land owners, and plaintiff agreed to those conditions. *Id.* at 1143. The defendant board of supervisors denied the permit, citing only general objections. *Id.* at 1145-1146. The court found that, given this history, plaintiff was not required to continue to purchase property and apply for permits. After reciting the sequence of events, the court noted that the county's decision "at least raises an inference of possible discrimination." *Id.* at 1153. The court found it unnecessary to decide the question, however, because "RLUIPA's 'substantial burden' test does not require that plaintiff actually establish discrimination." *Ibid.*

Here, as in *Sts. Constantine* and *Guru Nanak,* context is important. When the Church first applied for a SUP in 1994, it made clear that it intended to expand. In 2000, the Township granted a SUP for construction of a 28,500 square-foot addition. On the eve of that SUP's expiration, after inviting the Church to apply for an extension, the Township "suddenly abandoned its long practice of allowing extensions of SUPs," resulting in a loss to the Church of $35,000-$40,000 in expenses for preparation of planning documents. *Living Water*, 384 F. Supp. 2d at 1134. Thereafter, the Church worked "diligently and in good faith" to address the Township's expressed concerns, expending "significant energy and funds" in creating a revised 2003 proposal. *Ibid*.

The Township then rejected the 2003 application for a building with "substantially the same" "outward appearance" as the earlier approved design. In fact, although the 2003 proposal had more square footage, it had a footprint 1,500 square feet *smaller* than the building approved in 2000. 384 F. Supp. 2d at 1127.

Moreover, the 2003 proposal went farther than the previously approved 2000 plan in addressing the Township's concerns about enrollment. *Id*. at 1134. The 2003 proposal was reviewed and approved by a whole host of township and zoning officials, as well as the Commission. Nevertheless, the Board rejected the 2003 application "on arbitrary grounds that were not contained in the ordinance" and that the Township had not used before or since. *Ibid.* This evidence suggests possible targeting of a religious institution of the type RLUIPA was designed to prevent. This type of irrational, inconsistent and arbitrary conduct has "the whiff of bad faith" about it and buttresses the conclusion that there is a substantial burden here. Cf. *City of Hialeah*, 508 U.S. at 526-529.

As in *Sts. Constantine*, the district court here found that, the Church would "incur delay, expense and uncertainty if it is required to reapply or search for another site." *Living Water*, 384 F. Supp. 2d at 1134.

> If [the Church] reduces the size of the proposed building the building plans will have to be redone and resubmitted. Although there may be larger lots of residential zoned land available in the Township, the Township no longer renews SUPs, so [the Church] would have to resubmit an application for use of the property for a school. Because private schools are not a permitted use anywhere in the Township, there is no guarantee that [the Church] will receive permission to build a school, regardless of size, at this location or anywhere else within the Township.

Ibid. See *Westchester Day Sch.*, 2006 WL 538248, at *63 (where motives of zoning officials are suspect, religious school should not be required to incur the expense, uncertainty, and delay of filing further applications). Indeed, the burden may be even greater here as the Church is "a small church with limited funds"

which has already invested resources in constructing its existing building, which it might be unable to recoup if it tried to move to a different location. Even then, there is no reason to think it would be more successful in obtaining the necessary approval. Given the history of arbitrary and irrational treatment by the Township, the denial of the SUP to construct a building in excess of 25,000 square feet on the Church's property imposed a substantial burden.[13]

II

THE TOWNSHIP DID NOT USE THE LEAST RESTRICTIVE MEANS TO SERVE A COMPELLING GOVERNMENTAL INTEREST

The district court recognized that controlling density through use of a land-

---

[13] The Township relies on *Civil Liberties for Urban Believers (CLUB)* v. *City of Chicago*, 342 F.3d 752 (7th Cir. 2003), cert. denied, 541 U.S. 1096 (2004), and *San Jose Christian Coll.* v. *City of Morgan Hill*, 360 F.3d 1024 (9th Cir. 2004), cases involving facial challenges to zoning ordinances. But those cases are irrelevant to a decision in this case. The *CLUB* plaintiffs argued that the scarcity of affordable land in zones where churches were permitted as of right, together with the costs, procedural requirements and political approval required to obtain a special use permit in other districts, imposed a substantial burden on acquiring or developing land for church use. The Seventh Circuit found that the zoning restrictions and permitting requirements did not "render impracticable the use of real property in Chicago for religious exercise, much less discourage churches from locating or attempting to locate in Chicago." 342 F.3d at 761. Viewing the land use scheme as a whole, the court concluded that it did not impose such a burden. *Ibid*. However, the Seventh Circuit, in *Sts. Constantine*, distinguished *CLUB* from a case, such as this, where the religious institution is not challenging the permitting process itself. As in *Sts. Constantine*, the Church does not argue that "having to apply" for a SUP is itself a substantial burden. 396 F.3d at 900. Similarly, in *San Jose*, the Ninth Circuit turned down a challenge to the zoning ordinance itself, rather than a particular denial. 360 F.3d at 1035 ("It appears that [the] College is simply adverse to complying with the [zoning] ordinance's requirements.").

to-building ratio can be a valid governmental interest, but that such interest was not served here. The district court found that the land ratio table was created exclusively for use against the Church, was not applied to any other applications for SUPs, and was rife with flaws that precluded meaningful use. The Township did not explain how, in light of its purported interest, it could approve the 2000 SUP for a building with a larger footprint and higher enrollment and disapprove the 2003 SUP for a smaller footprint and fewer students.

The Township contends (Br. 44) that it was simply enforcing a neutral zoning regulation regarding density and that local governments have a compelling interest in enforcing such regulations. But that argument fails for two reasons. First, there is no neutral zoning regulation at issue in this case. This suit does not challenge the Township ordinance requiring a SUP for any building over 25,000 square feet. It seeks to set aside the Township's denial of a particular SUP based on a rationale which the district court found "meaningless" and "arbitrary." Moreover, the question is not whether regulating density can be a compelling interest. Instead, the correct inquiry is whether, as applied to the Church's 2003 proposal,[14] the Township's asserted interest is compelling. This question is easily answered in the negative. As the district court's findings make clear, the Township's rationale for denying the SUP was not even rational, much less compelling.

---

[14] Section 2(a)(1) refers to the imposition of a substantial burden on the religious exercise of "a person," "religious assembly," or "religious institution."

In *Cottonwood Christian Center* v. *Cypress Redevelopment Agency*, 218 F. Supp. 1203 (C.D. Cal. 2002), the city denied zoning approval on the ground that it wanted to purchase the site for redevelopment. The court questioned the city's motives:

> For nearly a decade, the Cottonwood Property sat vacant. Despite having been declared a blight, having been the subject of [various redevelopment plans] and being under the authority of the Redevelopment Agency, no improvements were made. * * * Once Cottonwood purchased the land, however, the City became a bundle of activity and developed [specific plans].

Id. at 1225. Finding that the city's concern about blight "rings hollow," the court expressed concern that the city was "simply trying to keep Cottonwood out of the City, or at least from the use of its own land." *Id.* at 1225. As in *Cottonwood*, here the Township failed to prove that regulating density was its true purpose.

CONCLUSION

The judgment of the district court should be affirmed.

Respectfully submitted,

WAN J. KIM
Assistant Attorney General

_____
JESSICA DUNSAY SILVER
DAVID WHITE
Attorneys
Department of Justice
Civil Rights Division
Appellate Section, Room 3724
950 Pennsylvania Avenue, N.W.
Washington, D.C. 20530
(202) 616-9405

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), I certify that the attached brief is proportionately spaced, has a typeface of 14 points and contains 8,530 words.

March 15, 2006

_____
DAVID WHITE
Attorney
Department of Justice
Civil Rights Division
Appellate Section, Room 3724
950 Pennsylvania Avenue, N.W.
Washington, D.C. 20530
(202) 616-9405

CERTIFICATE OF SERVICE

I certify that on March 15, 2006, two copies of the foregoing BRIEF FOR THE UNITED STATES AS AMICUS CURIAE were sent by first-class mail, postage prepaid, on the following counsel of record:

Mary Ross, Esq.
Plunkett & Cooney
535 Griswold Street
Suite 2400
Detroit, MI 48226

Steven Jentzen, Esq.
106 South Washington Avenue
Ypsilanti, MI 48197

David Otis, Esq.
325 East Grand River Avenue
Suite 250
East Lansing, MI 48823

Derek Gaubatz, Esq.
The Becket Fund for Religious Liberty
1350 Connecticut Avenue, N.W.
Suite 605
Washington, DC 20036

_____
DAVID WHITE
Attorney
Department of Justice
Civil Rights Division
Appellate Section, Room 3724
950 Pennsylvania Avenue, N.W.
Washington, D.C. 20530
(202) 616-9405