Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

CITY OF LAKE ELSINORE, et al.,
Petitioners,

vs.

ELSINORE CHRISTIAN CENTER, et al.,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Ninth Circuit erred in concluding, contrary to long-established principles of the local and neutral zoning authority of municipalities, that the land use portion of the Religious Land Use and Institutionalized Persons Act enacted by Congress constitutionally mandates religious accommodation.

PARTIES TO THE PROCEEDING

Pursuant to Rule 14.1(b), the following list identifies all of the parties appearing here and before the United States Court of Appeals for the Ninth Circuit.

The Petitioners here and appellees below are the City of Lake Elsinore; Lake Elsinore Redevelopment Agency; Robert A. Schiffner; Genie Kelly; Pamela Brinley; Daniel Metze; and Kevin Pape.

The Respondents here and appellants below are the Elsinore Christian Center and Gary Holmes.

The United States of America intervened in the case.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6, Petitioners state as follows:

Petitioner the City of Lake Elsinore is a municipal corporation and Petitioner the Lake Elsinore Redevelopment Agency is a municipal corporation.

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PETITION FOR WRIT OF CERTIORARI

Defendant the City of Lake Elsinore respectfully prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit decided August 22, 2006, and which was denied review by the Ninth Circuit on November 9, 2006.

OPINIONS BELOW

The United States Court of Appeals for the Ninth Circuit issued the Memorandum Decision on August 22, 2006 which is unpublished but may be found at 2006 WL 2456271 (9th Cir. Aug 22, 2006). Appendix A. The Court of Appeals Decision determined an interlocutory appeal reversing findings made by the United States District Court for the Central District of California which is reported at Elsinore Christian Center v. City of Lake Elsinore, 291 F. Supp. 2d 1083 (C.D. Cal. 2003). Appendix B.

STATEMENT OF JURISDICTION

The court of appeals decision was issued on August 22, 2006. On November 9, 2006, the court of appeals entered an order denying panel rehearing and rehearing en banc. This Petition is filed within 90 days of that order. This Court's jurisdiction is invoked under 28 U.S.C. Section 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

UNITED STATES CONSTITUTION, FIRST AMENDMENT

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

UNITED STATES CONSTITUTION, FOURTEENTH AMENDMENT, SECTION 1

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATUTORY PROVISION INVOLVED

At issue is the Religious Land Use and Institutionalized Persons Act of 2000, 42 U.S.C. § 2000cc, et seq. ("RLUIPA"). Section (a) of RLUIPA provides:

(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 can demonstrate that imposition of the burden on that person, assembly or institution—

(A) is in furtherance of a compelling governmental interest; and

(B) is the least restrictive means of furthering that compelling governmental interest.

(2) Scope of Application.

This subsection applies in any case in which—

(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; or

(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 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.

STATEMENT OF THE CASE

A. Introduction

The City of Lake Elsinore ("City") exercised its zoning authority in its denial of the Elsinore Christian Center's ("ECC") conditional use permit ("CUP") application for relocating to a larger property three blocks from its current downtown location. The City's Planning Commission denied the CUP, citing the loss of needed services provided by the existing grocery store and recycling business, loss of tax revenue, insufficient parking and the belief that the denial of the CUP would not work a substantial burden on the ECC, as it could continue to operate at its present downtown location. This Court should clarify that the City is empowered to legitimately regulate land use through generally applicable and neutral land use laws.

B. Background

The ECC appealed the CUP denial and the City Council unanimously agreed with the Planning Commission's decision. On May 30, 2001, the ECC and one of its members, Gary Holmes, (collectively, the "ECC") brought an action against the City of Lake Elsinore, the Lake Elsinore Redevelopment Agency, and five individual members of the City Council (collectively, the "City"), based on the denial of the CUP to operate a church at 217 Main Street in the City.

The action, filed in the United States District Court for the Central District of California, sought to enjoin the City

from enforcing its Municipal Code and land use regulations with respect to the ECC and to compel the City to issue a CUP without restrictions as to time and manner of permitted uses of the property. The ECC also sought monetary damages and attorneys' fees against the City.

The ECC's claims against the City are based in part on the Religious Land Use and Institutionalized Persons Act of 2000, 42 U.S.C. § 2000cc, et seq. ("RLUIPA"). The ECC argued that the denial of the CUP imposed a "substantial burden" on "religious exercise," without the necessary showing under RLUIPA that the CUP denial was the least restrictive means of furthering a compelling governmental interest. The ECC also alleged civil rights violations pursuant to 42 U.S.C. Section 1983 and other claims asserting constitutional violations with respect to freedom of speech and assembly, free exercise of religion and equal protection.

The district court denied the ECC's motion for preliminary injunction, and it invited the parties to file cross-motions for partial summary judgment addressing the ECC's substantial burden claim under Section 2(a) of RLUIPA. In its motion, the City argued that the CUP denial did not impose a substantial burden on religious exercise. In the alternative, the City argued that RLUIPA is unconstitutional and exceeds Congress' powers under Section 5 of the Fourteenth Amendment and the Commerce Clause, and violates the Establishment Clause, of the United States Constitution.

The United States of America intervened in the action to defend the constitutionality of RLUIPA, should the District Court reach that question.

By Order entered on August 22, 2003, the district court ruled that the CUP denial did place a substantial burden on religious exercise, but that Section 2(a) of RLUIPA is unconstitutional and beyond Congress' powers under Section 5 of the Fourteenth Amendment and the Commerce Clause. Elsinore Christian Ctr. v. City of Lake Elsinore, 291 F. Supp. 2d 1083 (C.D. Cal. 2003). Having decided that RLUIPA is unconstitutional on these grounds, the district court declined to reach the City's argument that Section 2(a) of RLUIPA violates the Establishment Clause.

The ECC sought interlocutory review of the district court's Amended Order pursuant to 28 U.S.C. Section 1292(b). On December 17, 2003, the district court granted the ECC's request to certify the question for interlocutory review. The ECC and Intervenor the United States then petitioned the Ninth Circuit for permission to bring the interlocutory appeal under section 1292(b), which this Court granted on February 23, 2004.

On September 29, 2004, the City moved to remand the case to the district court because, after granting interlocutory review on the constitutionality of RLUIPA in this case, the United States Court of Appeals for the Ninth Circuit decided the appeal of *San Jose Christian College v. City of Morgan Hill*, 360 F.3d 1024, 1034-35 (9th Cir. 2004). The City argued that the decision in *Morgan Hill* constituted an intervening change in law warranting

remand. The district court had rejected the RLUIPA "substantial burden" standard on which the trial court in *Morgan Hill* had relied, but the Ninth Circuit subsequently affirmed the *Morgan Hill* standard and adopted it as the law. The City sought remand so that the district court could reconsider its decision on the "substantial burden" issue in light of the *Morgan Hill* decision. On December 7, 2004, the motion for remand was denied.

On August 22, 2006, the panel consisting of Circuit Judges Dorothy W. Nelson, Johnnie B. Rawlinson and Carlos T. Bea issued an unpublished Memorandum reversing the decision issued by District Judge Stephen V. Wilson and remanding the matter to the United States District Court for the Central District of California. That Memorandum provided that "the argument that RLUIPA is unconstitutional was rejected by *Guru Nanak Sikh Society of Yuba City v. County of Sutter*, No. 03-17343, slip op. at 8592." The same panel issued the opinion in the Guru Nanak case 21 days prior to the issuance of this Memorandum.

On November 9, 2006, the Court of Appeals denied the City's motion for panel rehearing and rehearing en banc.

REASONS FOR GRANTING THE WRIT

> If the historic landmark on the hill in *Boerne* happened to be a museum or an art gallery owned by an atheist, it would not be eligible for an exemption from the city ordinances that forbid an enlargement of the structure. Because the landmark is owned by the Catholic Church, it is claimed that RFRA gives its owner a federal statutory entitlement to an exemption from a generally applicable, neutral civil law.

City of Boerne v. Flores, 521 U.S. 507, 537 (1997) (Stevens, J., concurring).

Just as the this Court considered the case *City of Boerne v. Flores*, which concerned RFRA, so too should this Court consider this case involving the land use provision in RLUIPA. This case presents important federal issues on which there are conflicts among federal courts. These issues require resolution of interpretive differences – Petitioners and Respondents both rely on the reasoning and opinions of this Court. The Writ should be granted to settle the debate, quell an outbreak of litigation and restore uniformity to municipalities' authority to apply zoning regulations.

The Court of Appeals Decision directly conflicts with the holdings of this Court and of the United States Courts of Appeals. This Court has visited RLUIPA before, but

expressly reserved judgment on the land use half of the Act.[1] This matter presents an important question of federal law that has not been, but should be settled by this Court. Therefore, this Court should resolve the conflict among the courts and give the Nation's courts and municipalities direction regarding the ability to apply generally applicable and neutral zoning laws to religious institutions.

A. Resolution Is Necessary to Resolve the Conflict of Decisions Regarding the Application of Strict Scrutiny to Neutral and Generally Applicable Zoning Regulations

In the Court of Appeals' decision, the court stated that RLUIPA is constitutional. However, RLUIPA calls for the application of strict scrutiny every time a governmental entity makes any sort of "individual assessment" in regard to a particular parcel of land. This is in direct conflict with current Free Exercise Clause jurisprudence. Specifically, the decision conflicts with the United States Supreme Court's decisions in *Employment Division Department of Human Resources v. Smith*, 494 U.S. 872, 883 (1990), and *City of Boerne v. Flores*, 521 U.S. 507 (1997), and the Tenth Circuit's decision in *Grace United Methodist Church v. City of Cheyenne*, 451 F.3d 643, 652 (10th Cir. 2006) which collectively impart that zoning laws may be "generally applicable" and neutral notwithstanding that they may have individualized procedures for obtaining

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[1] *See Cutter v. Wilkinson*, 544 U.S. 709, 715 n.3 (2005) (stating that Section 2, the land use portion of RLUIPA, "is not at issue here" and that the Court "therefore express[es] no view on the validity of that part of the Act.")

special use permits or variances. And strict scrutiny is not appropriate in examining those generally applicable and neutral laws.

Current Free Exercise Clause jurisprudence permits strict scrutiny to a generally neutral law only when the government "substantially burdens" the free exercise of religion based on "assessments" or "exemptions" of religious practice. See *Smith*, 494 U.S. at 883; *Sherbert v. Verner*, 374 U.S. 398, 406 (1968) (stating that strict scrutiny applies to state's "substantial infringement" of free exercise rights). The relevant governmental conduct in cases regarding "substantial burden" on "religious practice" is whether the burden is central to one's religious belief or practice. *Hernandez v. Commissioner of Internal Revenue*, 490 U.S. 680, 699 (1989).

Smith and *Sherbert* involved situations where strict scrutiny applied to a facially neutral law because the government substantially burdened the free exercise of religion based on "assessments" of religious motives that were central to the litigant. The use of strict scrutiny in these cases is in accord with existing Free Exercise Clause jurisprudence because a government decision maker was allowed to consider a proffered religious justification when deciding whether to subject the litigant to a facially neutral law, and thus created the potential for discrimination against religiously motivated conduct.

In contrast, RLUIPA does not codify current Free Exercise Clause jurisprudence because it mandates strict scrutiny in *every* situation in which the government makes

an "individualized assessment" regarding the "religious use of land," even if the government's action does not infringe upon central religious beliefs. Prior to the enactment of RLUIPA, strict scrutiny was applied only to general neutral laws when the government was given discretion to make "individualized exemptions" based on religious beliefs. With the enactment of RLUIPA, strict scrutiny must be applied every time there is a "substantial burden" on religion, even if that burden is incidental to one's religious beliefs. This is in direct contrast to, rather than a codification of, existing Free Exercise Clause jurisprudence.

In 2006, the Tenth Circuit considered zoning regulation application and the question of application of strict scrutiny. In *Grace United Methodist Church*, the court stated that "[t]he cumulative teachings of *Smith*, *City of Hialeah*, *Swanson*, *Messiah Baptist*, and *Axson-Flynn* support the conclusion that the City's zoning code does not amount to a system of individualized exemptions triggering strict scrutiny." *Grace United Methodist Church*, 451 F.3d at 654.[2] Further, the court explained that "several 'federal courts have held that land use regulations, i.e., zoning ordinances, are neutral and generally applicable notwithstanding that they may have individualized procedures for obtaining special use permits or variances." *Id.* at 652 (quoting *Grace United Methodist Church*, 235 F. Supp. 2d at 1200.)

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[2] The court is referring to the following decisions: *Smith*, 494 U.S. 872; *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993); *Swanson v. Guthrie Indep. Sch. Dist. No. I-L*, 135 F.3d 694 (10th Cir. 1998); *Messiah Baptist Church v. County of Jefferson*, 859 F.2d 820 (10th Cir. 1988); and *Axson-Flynn v. Johnson*, 356 F.3d 1277, 1299 (10th Cir. 2004).

In conflict with these decisions, RLUIPA requires courts to apply "strict scrutiny" to neutral, generally applicable regulations. The effect is that "strict scrutiny" is to be applied to general zoning laws that do not even mention religion. However, laws that are generally neutral and do not expressly discriminate cannot be deemed presumptively unconstitutional.

RLUIPA is not directed at religious observance, but it addresses a religious institution's ability to impose its logistical decisions concerning location, parking and construction on the surrounding community regardless of the community's concerns expressed through its elected leaders. Although a church's beliefs are afforded broad protections under the United States Constitution, a church's preferences related to parking, lighting and location are not. To preclude a city from the ability to apply its zoning laws to a church's use permit application where those laws apply to secular businesses results in a conflict with existing free exercise jurisprudence, and amounts to the religious establishment.

Land use regulations are not automatically considered "individualized assessments" and RLUIPA mandates that "strict scrutiny" be applied when a religious institution is involved. Zoning laws are "generally applicable" and neutral and free exercise jurisprudence calls for a lesser level of scrutiny. Because the decision conflicts with Free Exercise jurisprudence, consideration by this Court is warranted to create uniformity of decisions.

B. Review Is Necessary to Settle the Difference Between "Individualized Assessments" And "Individualized Exemptions"

To be constitutional, RLUIPA's "Individualized Assessments" jurisdictional trigger must codify the "Individualized Exemptions" doctrine established in Free Exercise Clause jurisprudence – but it does not. Rather, current Free Exercise Clause jurisprudence requires the application of strict scrutiny to a generally neutral law only in the limited circumstance where the government "has in place a system of individualized exemptions," not assessments as used in land use regulation. *Smith*, 494 U.S. at 884. Assessments made by local land use officials, with no reference to an entity's religious beliefs, do not warrant strict scrutiny.

The "individualized exemptions" doctrine stems from unemployment compensation cases such as *Sherbert*, and *Hobbie v. Unemployment Appeals Commission of Florida*, 480 U.S. 136 (1987). It applies only where: (1) the government creates, by statute, categorical exemptions for individuals with a secular objection to a law, but not for individuals with a religious objection; or (2) where evidence of overt discrimination against religious beliefs is present. *Fraternal Order of the Police, Newark Lodge v. City of Newark*, 170 F.3d 359, 364-65 (3d. Cir. 1999).

By reading the "individualized assessment" test as a codification of the "individualized exemptions" doctrine, Congress and the Ninth Circuit have broadened the scope of the "individualized assessments" doctrine and

misconstrued dictum found in *Smith*. The Supreme Court held in *Smith* that the Free Exercise Clause requires a compelling governmental interest only "where the State has in place a system of individualized exemptions" but "refuses to extend that system to cases of 'religious hardship.'" *Smith*, 494 U.S. at 884. Appellants have misinterpreted Section (a)(2)(C) of RLUIPA's reference to "individualized *assessments*" as codification of *Smith's* dictum that unemployment schemes held unconstitutional under *Sherbert* deserved strict scrutiny, because they permitted "individualized *exemptions*." *Id.* In the land use context, "assessments" are not "exemptions."

Unlike the unemployment cases, the land use context does not concern an evaluation of the religious motivations of applicants. Moreover, the City's zoning ordinance is neutral and generally applicable, and contains no exceptions to its terms which allow the City to "assess" or "evaluate" aspects of an applicant's religion. Because there is no discriminatory characteristic to the land use decisions, the regulations cannot be said to be a codification of the "individualized exemptions" doctrine. If the "individualized exemptions" test applied every time a local agency exercised land use regulation via its legislative discretion to grant or deny a permit application, "strict scrutiny" would apply in every such case involving a religious institution.

The Ninth Circuit's decision has resulted in a need to resolve this issue of federal law and to restore uniformity where there is currently a conflict with Free Exercise jurisprudence.

CONCLUSION

Just as in RLUIPA's predecessor RFRA: "Whether the Church would actually prevail under the statute or not, the statute has provided the Church with a legal weapon that no atheist or agnostic can obtain. This governmental preference for religion, as opposed to irreligion, is forbidden by the First Amendment." *Boerne*, 521 U.S. at 537 (Stevens, J., concurring) (citing *Wallace v. Jaffree*, 472 U.S. 38, 52-55 (1985)).

For the reasons set forth above, it is respectfully requested that this Court grant a petition for a writ of certiorari to review this important case.

Dated this 6th day of February, 2007.

Respectfully submitted,

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