No. 11-106

In the Supreme Court of the United States

CITY OF SAN LEANDRO, CALIFORNIA,
Petitioner,

v.

INTERNATIONAL CHURCH OF THE FOURSQUARE GOSPEL,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR THE NATIONAL LEAGUE OF CITIES, THE INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION, THE LEAGUE OF CALIFORNIA CITIES, AND THE CALIFORNIA STATE ASSOCIATION OF COUNTIES AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF *AMICI CURIAE*[1]

This brief *amici curiae* in support of petitioner is filed on behalf of the following *amici*:

The National League of Cities

("NLC") is the oldest and largest organization representing municipal governments throughout the United States. Its mission is to strengthen and promote cities as centers of opportunity, leadership and governance. Working in partnership with 49 State municipal leagues, NLC serves as a national advocate for the more than 19,000 cities, villages and towns it represents. As such, NLC monitors cases of national import and has identified this case as one deserving of this Court's review.

National League of Cities on behalf of its members asks this Court to grant the Petition of the City of San Leandro to end the inconsistency among and between the lower Courts and thereby to provide sound, rational bases for land use planning and implementation where religious land owners are involved.

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[1] Counsel of record for all parties received notice at least ten days prior to the due date of the *amici*'s intention to file this brief. The parties have consented to the filing of this brief. No counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No persons other than the *amici* or their counsel made a monetary contribution to this brief's preparation or submission.

The International Municipal Lawyers Association

("IMLA") is a non-profit, nonpartisan, professional organization consisting of more than 3,500 members that has been serving local government attorneys since 1935. The membership is comprised of local government entities, including cities and counties, and their subdivisions, as represented by their chief legal officers; state municipal leagues; and the individual attorneys who represent municipalities, counties and other local government entities. Since its establishment, IMLA has advocated for the rights and privileges of local governments and the attorneys who represent them, through its Legal Advocacy Program. IMLA has appeared as amicus curiae on behalf of its members before the United States Supreme Court, in the United States Courts of Appeals and in state supreme and appellate courts. IMLA has determined that the issues presented by the Petition of the City of San Leandro are of critical importance to its membership and, on behalf of its members also asks this Court to grant the Petition of the City of San Leandro to end the inconsistency among and between the lower Courts and thereby to provide sound, rational bases for land use planning and implementation where religious land owners are involved.

The League of California Cities

("LCC") is an association of 466 California cities dedicated to protecting and restoring local control to provide for the public health, safety and welfare of their residents, and to enhance the quality of life for all Californians. The LCC is advised by its Legal Advocacy Committee, which is comprised of 24 city

attorneys from all regions of the State. The Committee monitors litigation of concern to municipalities and identifies those cases that are of statewide or nationwide significance. The Committee has identified this case as being of such significance. LCC on behalf of its members also asks this Court to grant the Petition of the City of San Leandro to end the inconsistency among and between the lower Courts and thereby to provide sound, rational bases for land use planning and implementation where religious land owners are involved.

The California State Association of Counties

("CSAC") is a non-profit corporation. The membership consists of the 58 California counties. CSAC sponsors a Litigation Coordination Program, which is administered by the County Counsels' Association of California and is overseen by the Association's Litigation Overview Committee, comprised of county counsels throughout the state. The Litigation Overview Committee monitors litigation of concern to counties statewide and has determined that this case is a matter affecting all counties. CSAC on behalf of its members also asks this Court to grant the Petition of the City of San Leandro to end the inconsistency among and between the lower Courts and thereby to provide sound, rational bases for land use planning and implementation where religious land owners are involved.

STATEMENT OF THE FACTS

Collectively, the *amici* set forth above represent directly or indirectly every governmental unit - States, counties, municipalities, towns, townships and

boroughs, that is or potentially is, affected by the land use provisions of the Religious Land Use and Institutionalized Persons Act ("RLUIPA"), 42 U.S.C. § 2000cc *et seq*. (2006).

As of 2007, there were 3033 county governments and 36,011 municipal, town or township governmental units nationwide. U.S. Census Bureau, *Census of Governments*, Vol. 1, No. 1, Gov't. Organization, Series GC07 (1)-1, quinquennial. In California alone, there were 57 counties and 478 incorporated cities. (*Id*.).

As RLUIPA has been interpreted and applied over the years, conflicting interpretations and applications have arisen among the federal circuits, within the circuits and among the state high courts and appellate courts. These conflicts have arisen in three areas pertinent to the Petition filed by the City of San Leandro: (1) Whether cost and/or inconvenience are sufficient to constitute a "substantial burden" on religious landowners in Free Exercise cases; (2) Whether "individualized assessment" means nothing more than a case-by-case analysis and is thus applicable to every land use decision by a governmental unit; or means that a law, that is neutral and generally applicable to all applicants, does not constitute an "individualized assessment"; (3) Whether neutral, generally applicable planning principles can constitute a "compelling interest" in Free Exercise cases.

To end the inconsistency and thereby to provide sound, rational bases for land use planning and implementation where religious land owners are involved, the *amici curiae* request this Court grant the Petition for Certiorari of the City of San Leandro.

SUMMARY OF ARGUMENT

There are inter and intra-circuit inconsistencies regarding the interpretation and application of "substantial burden," "individualized assessment," and "compelling interest" under Free Exercise and RLUIPA jurisprudence. These inconsistencies leave governmental units at every level and in every jurisdiction in a state of uncertainty and confusion in their efforts to govern and plan local land use. This uncertainty and confusion puts these governmental units at risk for extraordinary litigation costs, including the religious landowner's attorneys' fees and potential damages. For these reasons this Court should grant the Petition of the City of San Leandro and provide the definitive interpretation of these terms.

ARGUMENT

SUBSTANTIAL BURDEN

The "substantial burden" provision of RLUIPA provides that "[n]o government shall impose or implement a land use regulation in a manner that imposes a substantial burden on the religious exercise of a person, ..." unless the government demonstrates a compelling governmental interest and that the mechanism is the least restrictive means of furthering that governmental interest. 42 U.S.C. § 2000cc(a)(1).

The *San Leandro* case itself demonstrates graphically the split among the Circuits and indeed the split within the Ninth Circuit on the issue of whether cost and inconvenience constitute a substantial burden. In a number of instances, the

Ninth Circuit has held that cost and inconvenience are not sufficient to prove substantial burden in the land use context. *Guru Nanak Sikh Soc'y of Yuba City v. Cnty. of Sutter*, 456 F.3d 978, 988 (9th Cir. 2006) (laws must place more than mere inconvenience on free exercise to constitute substantial burden); *San Jose Christian Coll. v. City of Morgan*, 360 F.3d 1024, 1035-36 (9th Cir. 2004) (no substantial burden under RLUIPA where other options for building were available to religious entity). Other Circuits have similarly held: *See*, *Civil Liberties for Urban Believers v. City of Chi*., 342 F.3d 752, 761 (7th Cir. 2003), *cert. denied*, 541 U.S. 1096 (2004) (That churches "expended considerable time and money" to locate within Chicago city limits, "does not entitle them to relief under RLUIPA's substantial burden provision."); *Petra Presbyterian Church v. Vill. of Northbrook*, 489 F.3d 846, 851 (7th Cir. 2007), *cert. denied*, 128 S. Ct. 914 (2008) ("The ban on churches in the industrial zone cannot in itself constitute a substantial burden on religion, because then every zoning ordinance that did not permit churches everywhere would be a prima facie violation of RLUIPA.") *Midrash Sephardi v. Town of Surfside*, 366 F.3d 1214, 1227 (11th Cir. 2004), *cert. denied*, 543 U.S. 1146 (2005) ("...'substantial' burden requires more than an incidental effect on religious exercise." ... "a 'substantial burden' must place more than an inconvenience on religious exercise; a 'substantial burden' is akin to a significant pressure which directly coerces the religious adherent to conform his or her behavior accordingly.") *The Lighthouse Inst. for Evangelism, Inc. v. City of Long Branch*, 510 F.3d 253, 275 (3d Cir. 2007), *cert. denied*, 128 S. Ct. 2503 (2008) ("While we do not require a plaintiff to show the burden is *substantial* because we eschew intrusion into

the religious realm, we do expect a plaintiff to articulate why it is a burden *on its religious exercise* (as opposed, for instance, to its pocketbook or its convenience.")) (Emphasis in original).

In *San Leandro* the Ninth Circuit disavowed its earlier precedent and separated itself explicitly from certain Seventh Circuit precedent set forth in *Urban Believers*, that government action must render "religious exercise ... effectively impracticable" in order to qualify as a substantial burden under RLUIPA (*San Leandro* at Pet. App. 23, citing *Urban Believers* at 761). In support of this separation, the Ninth Circuit cited yet another Seventh Circuit case holding that denial of a church's zoning application was a substantial burden where "there would have been delay, uncertainty and expense". *See*, *Sts. Constantine and Helen Greek Orthodox Church, Inc. v. City of New Berlin*, 396 F.3d 895, 901 (7th Cir. 2005).

Thus, *San Leandro* not only establishes the split among Circuits on this issue, but illustrates the split within the Seventh Circuit as well. Absent clarification on whether cost and inconvenience in the land use context constitute a substantial burden, government entities cannot know with any certainty whether their land use decisions pertaining to religious landowners will result in extraordinary litigation costs, including an assessment of attorneys' fees and potential damages.

INDIVIDUALIZED ASSESSMENTS

RLUIPA applies the strict scrutiny standard to land use determinations derived through "individualized assessments." 42 U.S.C.

§ 2000cc(a)(2)(C). RLUIPA further dictates the procedures local governments must apply when the land use applicant is religious. Local governments need guidance on the Court's interpretation of "individualized assessment" whether under the First Amendment or RLUIPA. Traditionally, a law that is neutral and generally applicable to all applicants does not constitute an individualized assessment. See Emp't Div. v. Smith, 494 U.S. 872 878-80, 883-84 (1990). This principle has been followed in religious land use cases. (*See Lighthouse*, 510 F.3d 253, 275-77 (3d Cir. 2007) ("'although zoning laws may permit some individualized assessment for variances, they are generally applicable if they are motivated by secular purposes and impact equally all land owners in the city seeking variances.'") (quoting *Grace United Methodist Church v. City of Cheyenne*, 451 F.3d 643, 653-54 (10th Cir. 2006); *Guru Nanak*, 456 F.3d at 987 ("By its own terms, it appears that RLUIPA does not apply directly to land use regulations, such as the Zoning Code here, which typically are written in general and neutral terms."); *Urban Believers*, 342 F.3d at 764 (Where there was neither the policy nor the practice of refusing to extend to churches its system of individualized exemptions from a zoning ordinance, the zoning ordinance was a generally applicable system of land-use regulation.).

To the contrary, the Ninth Circuit in the *San Leandro* case, though recognizing that the zoning scheme at issue was neutral and generally applicable, held that "the individualized assessment that the City made to determine that the Church's rezoning ... request should be denied, is not." (Pet. App. at 17). The Eleventh Circuit has also followed this approach. (*See Konikov v. Orange Cnty.*, 410 F.3d 1317, 1323 (11th

Cir. 2005); *Midrash Sephardi*, 366 F.3d at 1225, 1229, 1236).

Local governments need this Court's guidance in order to allow for practical, reasonable and predictable land use planning and to help cash strapped local governments and taxpayers avoid the costs and burdens already arising from RLUIPA. This guidance is particularly critical in the context of "individualized assessment" as it goes directly to neutral and generally applicable procedures local governments must institute and follow.

COMPELLING INTEREST

Under RLUIPA, where a religious landowner demonstrates a substantial burden, the government is then required to establish that its actions furthered a "compelling governmental interest" and that the mechanism employed is the "least restrictive means" of furthering that compelling governmental interest. 42 U.S.C. § 2000cc(a)(1).

In most instances courts applying the compelling government interest test engage in an in-depth analysis of the interests asserted by the government entity in order to reach a conclusion as to whether those interests are indeed compelling, and then whether those interests are furthered in the least restrictive manner. *See e.g., 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*, 410 F.3d at 1329.

The Ninth Circuit in *San Leandro* has now taken at least two categories of possible government interest,

i.e., revenue generation and preservation of commercial/industrial use, and eliminated them as compelling interests as a matter of law. (Pet. App. at 27-29). This holding illustrates the necessity for an interpretation of compelling interest that can be applied uniformly to guide governmental units as to what are, and what are not, compelling interests.

Because the interpretation of the term "compelling interest" and its application, are inconsistent among jurisdictions, the *amici* request this Court grant the Petition of the City of San Leandro to clarify the law and settle the inconsistencies.

CONCLUSION

RLUIPA subjects every government unit charged with making a land use decision affecting a religious entity to the possibility of having to pay litigation costs and potentially the applicant's attorneys' fees, costs and damages. Ultimately, of course, the taxpayers are saddled with this burden.

This possibility and the conflicts among the various courts interpreting and applying RLUIPA not only deposits the weight and might of the federal government directly onto a decision-making process that is uniquely and necessarily local, but makes land use planning of even the most benign nature a gamble when it comes to religious landowner applications. Cities' interests in protecting their citizens' interests in chosen planning goals - open space, quiet enjoyment of residential neighborhoods, maintaining property values, preservation of historic districts, delineation of commercial districts - all are potentially stymied by the current confusion over the state of the applicable

principles of law. The Ninth Circuit's split from other jurisdictions in *San Leandro* on the three areas of law noted above, compel this Court to grant San Leandro's Petition to provide guidance to the consistent application of these legal principles to land use cases involving religious entities.

For the reasons stated above and for the reasons identified by petitioner, the Court should GRANT the petition for a writ of certiorari.

Respectfully submitted,

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