Appeal No. 01-4030

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

C.L.U.B. (Civil Liberties for Urban Believers), Christ Center, Christian Covenant Outreach Church, His Word Ministries to All Nations, Christian Bible Church, Church on the "Way" Praise Center, and Monte De Sino (Mount Zion) Church,	)
Plaintiffs-Appellants,	)
v.	)
City of Chicago,	)
Defendant-Appellee.	)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS (NO. 94 c 6151)
THE HONORABLE WILLIAM J. HIBBLER, PRESIDING

AMICUS BRIEF OF CALVARY CHAPEL O'HARE AND THE BECKET FUND FOR RELIGIOUS LIBERTY IN SUPPORT OF APPELLANTS AND IN SUPPORT OF REVERSAL

Kevin J. Hasson*
Roman P. Storzer
Anthony R. Picarello, Jr.
THE BECKET FUND FOR RELIGIOUS LIBERTY
1350 Connecticut Ave., N.W., Suite 605
Washington, D.C. 20036
Telephone (202) 955-0095

**Counsel of record*

June 26, 2002

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CERTIFICATE OF INTEREST

The undersigned, counsel of record for *amici* Calvary Chapel O'Hare and The Becket Fund for Religious Liberty, furnishes the following list in compliance with Fed. R. App. P. 26.1 and Circuit Rule 26:1:

(1) The undersigned counsel, along with Kevin J. Hasson and Anthony R. Picarello, Jr. represents *amici* Calvary Chapel O'Hare and The Becket Fund for Religious Liberty.

(2) Calvary Chapel O'Hare and The Becket Fund are not-for-profit corporations, and have no parent corporation, nor do they have any stockholders.

(3) There are no law firms whose partners or associates have appeared or are expected to appear on behalf of Calvary Chapel O'Hare or The Becket Fund other than The Becket Fund itself in this matter.

_____ _____

Date

Roman P. Storzer
Counsel for *Amici*

TABLE OF AUTHORITIES

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INTEREST OF THE *AMICI*[1]

Amicus Calvary Chapel O'Hare is a is a nondenominational church located in Franklin Park, Illinois that currently consists of approximately 200 congregants—a population that has doubled in the last year and continues to grow—that its present facility cannot accommodate. As a result of Franklin Park's discriminatory Zoning Code, described below, Calvary Chapel has been unable to use real property (for which it has a purchase contract) for purposes of religious exercise. Calvary Chapel is currently in litigation in the Northern District of Illinois federal court, and the outcome of *C.L.U.B. v. City of Chicago* will profoundly affect the outcome of its own case. *Calvary Chapel O'Hare v. Village of Franklin Park*, Civ. No. 02-3338 (N.D. Ill. complaint filed May 9, 2002).

The Franklin Park, Illinois Zoning Code discriminates against religious land uses in violation of the First and Fourteenth Amendments and RLUIPA. Places of worship are not permitted in its commercial districts, even as a special or conditional use. *See generally* FRANKLIN PARK, ILLINOIS ZONING CODE § 9-5A *et seq*. By contrast, several nonreligious assembly uses are permitted as of right in commercial districts,[2] and many other assembly uses are permitted as a conditional use.[3] Franklin Park, as a matter of

[1] All parties have consented to the filing of this brief.

[2] Assembly uses permitted as of right in Franklin Park's commercial districts include Daycare centers, Governmental buildings, Restaurants, Art shops, Galleries, Banquet halls, Art studios, Clubs and lodges, Schools: music, dance, Libraries, Museums, Art galleries, Meeting halls, Gymnasiums, Theater, indoor, Ticket agencies, amusement, Drive-in establishments, Hotels and motels, Massage salons, Public baths, Schools, vocational or trade. *See* FRANKLIN PARK ZONING CODE §§ 9-5A-2, 9-5B-2, 9-5C-2. These permitted assembly uses are both for-profit and non-profit assemblies. *See id*. § 9-5B-2 ("Clubs and lodges, nonprofit and fraternal").

[3] Assembly uses that are permitted in Franklin Park's commercial districts subject to obtaining a conditional use permit include Parks, Libraries, Other public uses, Taverns, Cocktail lounges, Amusement center, Amusement establishments, Bowling alleys, Pool halls, Dance halls, Skating rinks, Recreation buildings, Community centers, Tanning salons, Shooting galleries,

municipal whim, has permitted certain other churches to locate in the commercial districts (contrary to its own Code), but has declined to extend the same latitude to Calvary Chapel, thus creating a system of discriminatory enforcement that also burdens the Church's religious exercise.

Amicus The Becket Fund for Religious Liberty is an interfaith, nonpartisan public interest law firm dedicated to protecting the free expression of all religious traditions, and the freedom of religious people and institutions to participate fully in public life. The Becket Fund litigates in support of these principles in state and federal courts throughout the United States, both as primary counsel and as *amicus curiae*. Accordingly, The Becket Fund has been heavily involved in litigation on behalf of a wide variety of religious ministers and institutions under the Constitution and the new Religious Land Use and Institutionalized Persons Act of 2000, 42 U.S.C. § 2000cc *et seq.* ("RLUIPA" or the "Act").[4] The Becket Fund also represents Calvary Chapel O'Hare in its litigation against Franklin Park.

Amusement parks, Permanent carnivals, Kiddie parks, Outdoor amusement facilities, Stadiums, Auditoriums, and Arenas. *See* FRANKLIN PARK ZONING CODE §§ 9-5A-3, 9-5B-3, 9-5C-3. These uses are both for-profit and non-profit uses. *See id.* § 9-5B-3 ("Recreation buildings and community centers, noncommercial").

[4] *See e.g.*, *Haven Shores Community Church* v. *City of Grand Haven*, 1:00-CV-175 (W.D. Mich.) (consent decree signed Dec. 20, 2000); *Congregation Kol Ami* v. *Abington Township*, 161 F. Supp. 2d 432 (E.D. Pa. 2001); *Freedom Baptist Church v. Township of Middletown*, 2002 WL 927804 (E.D. Pa. May 8, 2002) (upholding RLUIPA's constitutionality); *Refuge Temple Ministries* v. *City of Forest Park*, Civ. No. 01-0958 (N.D. Ga. filed Apr. 12, 2001); *Unitarian Universalist Church of Akron* v. *City of Fairlawn*, Civ. No. 00-3021 (N.D. Ohio filed Dec. 4, 2000); *Missionaries of Charity, Brothers v. City of Los Angeles*, Civ. No. 01-08511 (C.D. Cal. filed Sept. 19, 2001); *Cottonwood Christian Center v. City of Cypress*, Civ. No. 02-60 (C.D. Cal. filed Jan. 15, 2002); *Pine Hills Zendo v. Town of Bedford, N.Y. Zoning Bd. of Appeals*, No. 17833-01 (N.Y. Sup. Ct. filed Nov. 6, 2001); *Castle Hills First Baptist Church v. City of Castle Hills*, Civ. No. 01-1149 (W.D. Tex. removed Dec. 14, 2001); *Redwood Christian Schools v. County of Alameda*, Civ. No. 01-4282 (N.D. Cal. filed Nov. 16, 2001); *Temple B'Nai Sholom v. City of Huntsville*, Civ. No. 01-1412 (N.D. Ala. removed June 1, 2001); *Hale O Kaula v. Maui Planning Comm'n*, Civ. No. 01-615 (D. Haw. filed Sept. 19, 2001); *Living Waters Bible Church*

This brief is limited to whether a Zoning Ordinance that, on its face, treats religious assembly uses of land worse than a myriad of other nonreligious assembly uses of land violates the Free Exercise and Free Speech Clauses of the First Amendment, the Equal Protection Clause of the Fourteenth Amendment, and the Equal Terms provision of RLUIPA. We have reviewed the Appellants' brief on file, and we believe that our brief does not repeat matters in that brief.

INTRODUCTION

Fundamental constitutional rights—those of free exercise of religion, free expression, and freedom of association, along with equal protection and due process of the laws—are under dire threat from municipalities that unduly burden, discriminate against, and even eliminate entirely from their borders places of worship[5] through the use of their land use laws. Governments have been emboldened by a patchwork of lower court decisions[6] within this Circuit, whose little guidance is often contradictory. Even the recent codification of these protections of religious exercise by the United States Congress and the Illinois legislature has yet to have the desired effect of stemming the

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v. Town of Enfield, Civ. No. 01-450 (D.N.H. removed Nov. 30, 2001); *Greenwood Comm'y Church v. City of Greenwood Village*, Civ. No. 02-1426 (Colo. D.C. filed 2002).

[5] The terms "place of worship," "religious institution," and "church" are used interchangeably in this Brief. The City of Chicago uses the term "Church" to designate the use of land for religious assembly. *See* CHICAGO ZONING ORDINANCE § 11.10-7.5; CITY OF CHICAGO BUILDING CODE § 13-56-070.

[6] *Compare Al-Salam Mosque Fdn. v. City of Palos Heights*, 2001 WL 204772 (N.D. Ill. 2001) (holding that "preventing a group from purchasing land to be used as a mosque is a burden on the exercise of religion") (attached as Exhibit A), *Love Church v. City of Evanston*, 671 F. Supp. 515 (N.D. Ill. 1987) (holding that discriminatory ordinance requiring churches to obtain special permit violated equal protection clause), *vacated on other grounds*, 896 F.2d 1082 (7th Cir. 1990), *and Vineyard Christian Fellowship v. City of Evanston*, Civ. No. 00-798 (N.D. Ill. 2000) (granting preliminary injunction permitting church to conduct worship services) (attached as Exhibit B), *with International Church of the Foursquare Gospel v. City of Chicago Heights*, 955 F. Supp. 878 (N.D. Ill. 1996) (denying church preliminary injunction); *and C.L.U.B. v. City of Chicago*, 157 F. Supp. 2d 903 (N.D. Ill. 2001).

tide. The lower court decision in the case at bar, perhaps the example most hostile to free exercise rights, must be reversed to leave room for the traditional and critical role that churches perform in our society. Governments at all levels must know that they *cannot*:

- Discriminate against religious uses of land, while permitting a host of other land uses involving assemblies of people with similar external effects;
- Substantially burden religious land use—an integral part of associative religious exercise—through systems of individualized assessments unless the burden is the least restrictive means of achieving a compelling governmental interest;
- Subject the right of places of worship even to exist to the political whims of its bureaucrats;
- Define the "proper" church as one that exists only in residential (or only commercial) areas; or
- Otherwise subject places of worship to unreasonable or irrational regulation.

Through the patent hostility exhibited to religious institutions in its Zoning Ordinance, the City of Chicago's land use authorities have managed to violate all of these prohibitions. This brief only addresses the first issue: preventing municipalities from treating the use of land for religious assembly worse than the use of land for nonreligious assembly, as codified by RLUIPA's "Equal Terms" provision.

ARGUMENT

"At a minimum, the protections of the Free Exercise Clause pertain if the law at issue discriminates against some or all religious beliefs or regulates *or prohibits conduct because it is undertaken for religious reasons*." *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 532 (1993). A "church" or "place of worship" is the use of land for the purpose of religious exercise.[7] As described *infra*, The City of Chicago

[7] *See generally* AMERICAN PLANNING ASSOCIATION, A SURVEY OF ZONING DEFINITIONS 10 (T. Burrows, ed. 1989) (defining "church or place of religious worship" as "An institution that

specifically targets religious assemblies for inferior treatment in relation to a host of nonreligious assemblies. This discrimination violates RLUIPA and the constitutional prohibitions it serves to codify.

I. Chicago's Zoning Ordinance, On Its Face, Prefers Nonreligious Assembly Land Uses Over Religious Assembly Land Uses.

The City of Chicago's own Building Code both defines and lists "assembly" uses of land:

> Buildings, or parts thereof, designed or used for the assembly of persons for civic, political, educational, *religious*, social, recreational or other similar activities shall be classified as Class C, Assembly Units. Class C, Assembly Unites shall include, among others, the following:
>
> | | | |
> |---|---|---|
> | Amphiteaters | Concert halls | Passenger stations |
> | Aquariums | Convention halls | Planetariums |
> | Armories | Court rooms | Playhouse-in-the-round |
> | Art galleries | Dance halls | Radio and T.V. studios |
> | Assembly halls | Exhibition areas | Recreation halls |
> | Auditoriums | Field houses | Restaurants |
> | Ballrooms | Funeral parlor | Rinks |
> | Banquet halls | Gymnasium | Schools |
> | Boards of trade | Lecture halls | Stadiums (indoor) |
> | Bowling alleys | Libraries | Swimming pools (indoor) |
> | Churches | Motion picture houses | Taverns |
> | Community houses | Museums | Theaters |
> | Community theatrical center | Night clubs | |

CITY OF CHICAGO BUILDING CODE § 13-56-070. What is remarkable about this list is that, throughout its Zoning Ordinance, *Chicago treats most of the nonreligious assembly*

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people regularly attend to participate in or hold religious services, meetings, and other activities. The term 'church' shall not carry a secular connotation and shall include buildings in which the religious services of any denomination are held."); AMERICAN PLANNING ASSOCIATION, A GLOSSARY OF ZONING, DEVELOPMENT, AND PLANNING TERMS 62 (M. Davidson & F. Dolnick, eds. 1999) (defining "church" as "A building wherein person regularly assemble for religious worship and which is maintained and controlled by a religious body organized to sustain public worship, together with all accessory buildings and uses customarily associated with such primary purpose. Includes synagogue, temple, mosque, or other such place for worship and religious activities.").

uses better than churches. For example, in the C-4 zones churches are prohibited, but nonreligious assembly uses such as "Lodges," "Offices of Labor Organizations," "Restaurants," and "Taverns" are permitted by right. CHICAGO ZONING ORDINANCE §§ 9.3-4(B), 9.4-4. In the M zones churches are also prohibited, but nonreligious assembly uses such as "Recreation Buildings or Community Centers," "Taverns," and "Offices of Labor Organizations" are permitted by right and "Stadiums," and "Auditoriums," are permitted as special uses. CHICAGO ZONING ORDINANCE §§ 10.3-1, 10.4-1. Similarly, in the other C zones and in B zones, churches are permitted by special use (and thus are subject to local political pressure and vast bureaucratic discretion) while a myriad of nonreligious assembly uses are permitted as of right. The following are uses *listed by Chicago's own Building Code as assembly uses* that are treated more favorably—either as a permitted use when churches are special uses or as a permitted or special use when churches are forbidden—than religious assemblies (as evidenced by the cited Zoning Ordinance provision):

- Amphitheaters: *see* "Theaters," *infra*;
- Art galleries: § 8.3-2(B)(4) ("Art Galleries"); § 8.3-4(B)(3) (same); § 10.4-1(14);
- Auditoriums: § 10.4-1(8);
- Ballrooms and banquet halls: *see* "Hotels," *infra*;
- Bowling alleys: § 8.3-4(B)(2) ("bowling alleys");
- Community houses: § 9.3-1(B)(37) ("Community Homes");
- Community theatrical center: *see* "Theaters," *infra*; § 10.3-1(12a) ("Municipal or Privately-owned Recreation Buildings or Community Centers");
- Dance halls: § 8.3-4(B)(2) ("dance halls");
- Field houses: § 9.4-4(7) ("Recreation Center"); § 10.3-1(12a) ("Municipal or Privately-owned Recreation Buildings or Community Centers");
- Funeral parlor: § 8.3-4(B)(43) ("Funeral Parlors");
- Gymnasium: § 8.3-2(B)(45) ("Gymnasiums"); § 8.3-4(B)(2) (same); § 8.3-6(B)(12) (same);
- Lecture halls: *see* "Schools," *infra*;
- Libraries: § 8.3-1(B)(9a) ("public libraries");
- Motion picture houses: *see* "Theaters," *infra*;

- Night clubs: *see* "Taverns," *infra*;
- Playhouse-in-the-round: *see* "Theaters," *infra*;
- Radio and T.V. studios: § 10.4-1(6) ("Radio and Television Broadcasting Stations and Offices");
- Recreation halls: § 9.4-4(7) ("Recreation Center"); § 10.3-1(12a) ("Municipal or Privately-owned Recreation Buildings or Community Centers");
- Restaurants: § 8.3-2(B)(49) ("Restaurants"); § 8.3-4(B)(33) (same); § 8.3-6(B)(15) (same); § 8.3-7(B)(8) (same); § 9.3-1(B)(35) (same); § 9.3-4(B)(18) (same); § 10.3-1(15) (same);
- Rinks: § 8.3-4(B)(2) ("skating rinks");
- Schools: § 8.3-1(B)(4) ("Colleges and Universities); § 8.3-2(B)(51) ("Schools, music, dance or business"); § 8.3-4(B)(34) ("Schools, commercial or trade"); § 8.3-6(B)(17) ("Schools—music, dance, business, or trade"); § 10.3-1(18) ("Trade Schools");
- Stadiums (indoor): § 10.4-1(8);
- Swimming pools (indoor): § 8.3-4(B)(2) ("swimming pools");
- Taverns: § 8.3-7(B)(8) ("Taverns"); § 9.3-1(B)(35) (same); § 9.3-4(B)(20); (same); § 10.3-1(17) (same);
- Theaters: § 8.3-4(B)(38) ("Theaters"); § 8.3-6(B)(23) ("Theatres presenting live stage performances"); § 9.4-5(5); § 10.4-1(9) ("Theaters, Automobile Drive-in");

The same is true for nonreligious assembly uses that Chicago does not specifically identify as such:

- "Lodges": § 9.3-4(B)(11);
- "Offices of Labor Organizations": § 9.3-4(B)(11); § 10.3-1(19b);
- "Day care centers": § 8.3-1(B)(9); § 8.3-2(B)(39a); § 8.3-6(B)(5); § 8.3-7(B)(2a); § 9.3-1(B)(38); § 10.4-1(16);
- "Parks": § 8.3-1(B)(9b); § 9.3-5(B)(6); § 9.4-4(3); § 10.4-1(3);
- "Playgrounds": § 8.3-1(B)(9b); § 9.3-5(B)(6); § 9.4-4(3); § 10.4-1(3);
- "any non-commercial open space utilized for recreational activities": § 8.3-1(B)(9b);
- "Public Baths": § 8.3-2(B)(45); § 8.3-6(B)(12);
- "Pool Halls": § 8.3-4(B)(2);
- "Arcades": § 8.3-4(B)(2A); § 9.3-1(B)(3);
- "Auction Rooms": § 8.3-4(B)(3); § 8.3-6(B)(2);
- "Hotels": § 8.3-6(B)(7); § 8.3-7(B)(7); § 9.3-3(B)(3); § 9.3-4(B)(10)
- "bingo halls when operated by not-for-profit or charitable organizations": § 9.3-1(B)(3);
- "other similar indoor amusement facilities": § 9.3-1(B)(3);
- "Outdoor Amusement Establishments": § 9.4-5(4); § 10.4-1(12);
- "Flea Markets": § 9.3-1(B)(39);
- "Arenas": § 10.4-1(8);

- "Fair Grounds": § 10.4-1(12);
- "Permanent Carnivals": § 10.4-1(12);
- "Kiddie Parks": § 10.4-1(12);
- "Other Similar Amusement Centers, and including places of assembly devoted thereto such as stadiums and arenas": § 10.4-1(12);
- "Adult Uses": § 10.4-1(17).

Thus, on the face of the Chicago Zoning Ordinance, places of worship are disfavored among assembly uses.

II. Zoning Codes That Prefer Nonreligious Assembly Land Uses over Religious Assembly Land Uses Violate the Free Exercise Clause.

The Supreme Court has repeatedly held that the Free Exercise Clause requires "neutrality" with respect to religion. *Employment Div. v. Smith*, 494 U.S. 872, 877-80 (1990) (describing bans on "assembling with others . . . only when they are engaged in for religious reasons" as unconstitutional). In *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993), the Court held that a law "lacks facial neutrality if it refers to a religious practice *without a secular meaning discernable from the language or context*." *Id.* at 533.[8] In rejecting Appellants' free exercise claims, the court below held simply that "these laws are neutral because the object of the Zoning Ordinance and

[8] The Supreme Court has stressed that, "[a]t a minimum, the protections of the Free Exercise Clause pertain if the law at issue discriminates against some or all religious beliefs or regulates *or prohibits conduct because it is undertaken for religious reasons*." *Id*. at 532 (emphasis added). The Court has also noted that:

> the "exercise of religion" often involves not only belief and profession but the performance of (or abstention from) physical acts: assembling with others for a worship service, ... It would be true . . . that a State would be "prohibiting the free exercise [of religion]" if it sought to ban such acts or abstentions only when they are engaged in for religious reasons, ... It would doubtless be unconstitutional, for example, to ban the casting of "statues that are to be used for worship purposes" . . . .

Smith, 494 U.S. at 877-78. Likewise, it is unconstitutional to ban the assembling of people for worship purposes.

special use provisions is to regulate land use and development." This *non sequitur* did not persuade the Supreme Court in *City of Hialeah*, *see* 508 U.S. at 535-39 (rejecting city's interests in "protecting the public health and preventing cruelty to animals"), and should not be persuasive here. Regulating churches—a land use where "people regularly attend to participate in or hold religious services, meetings, and other activities," *supra* note 7—clearly "refers to a religious practice." 508 U.S. at 533. Moreover, those categories exist to subject churches, and not similar assembly uses of land, to more rigorous constraints. Therefore, Chicago's ordinance is *neither* neutral *nor* generally applicable. *See City of Hialeah*, 508 U.S. at 543 ("The ordinances are underinclusive for those ends. They fail to prohibit nonreligious conduct that endangers these interests in a similar or greater degree than Santeria sacrifice does.").

In holding that the denial of a special use permit to a religious organization in a business district was arbitrary and capricious, the Illinois Supreme Court reasoned:

> [B]usiness continuity would likewise be interrupted by a *dance hall*, crematory, mausoleum or *trade school*, all uses permitted in this B4 district. We are unable to see how the use as a church is more harmful to adjacent stores than the aforementioned permitted uses.
>
> The arguments advanced by defendants, if followed, would be sufficient to bar all religious worship from the commercial areas of Chicago. Such arbitrary prohibition is not consonant with the constitutional guarantees of freedom of religion, nor do we believe it is consistent with the intent of the ordinance.

Columbus Park Congregation of Jehovah's Witnesses, Inc. v. Board of Appeals of the City of Chicago, 25 Ill. 2d 65, 73, 182 N.E.2d 722, 726 (1962) (emphasis added). Likewise, both dance halls and trade schools are permitted as of right in some of Chicago's B and C zones, but not churches. *See also Grosz v. City of Miami Beach*, 721 F.2d 729, 740 (11th Cir. 1983) (holding, in the context of a Free Exercise challenge to a

zoning ordinance, that "[g]overnment may regulate place and manner of religious expression *as long as there is no content classification* . . . ." (emphasis added)); *Fraternal Order of Police Newark Lodge No. 12 v. City of Newark*, 170 F.3d 359 (3d Cir.), *cert. denied*, 528 U.S. 817 (1999) (holding that that a Newark police department policy that prohibited religious officers from wearing beards, but allowed an exception for health reasons, violated the Free Exercise Clause); *W. Presbyterian Church v. Bd. of Zoning Adjustment*, 862 F. Supp. 538, 546 (D.D.C. 1994) ("It seems rather incongruous that no objection could be raised if a needy person can buy his or her food, but it becomes inappropriate if that needy individual can obtain food at no cost from a benevolent source."). Similarly, it is equally incongruous that people can gather and meet in Chicago's B, C and M zones for a variety of commercial or noncommercial reasons, but not for religious ones.

III. Zoning Codes That Prefer Nonreligious Assembly Land Uses over Religious Assembly Land Uses Violate the Free Speech Clause.

Chicago's discriminatory Ordinance also violates the Free Speech Clause. The court below erroneously concluded that "the operation of a house of worship does not equate with 'religious speech,' any more than the operation of a shoe store equates with commercial speech." 157 F. Supp. 2d at 915. However, the object of the law is *not* "unrelated to expression," *id.*, but rather targets worship activities specifically. The Appellant churches may purchase any property that exists in Chicago's business and commercial districts. They may leave it vacant, or use it for a number of other assembly activities, such as a dance hall, lodge, recreation center or library. But if they use the property for worship services, they run afoul of Chicago's Ordinance and are subject to

greater constraints. The lower court's error is obvious: as described below, the Supreme Court has repeatedly held both that land use regulations that restrict expressive activity implicate the protections of the Free Speech Clause, and that the government may not favor nonreligious speech over equivalent religious speech. Combined, these prohibitions bar land use laws that prefer nonreligious assembly uses over religious assembly uses.

Land use laws that regulate expressive activity[9] are subject to the constraints of the First Amendment. *See, e.g., City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986); *Schad v. Borough of Mt. Ephraim*, 452 U.S. 61 (1981). Applying the Free Speech Clause to the zoning context, the Supreme Court has held that an ordinance prohibiting nudity on drive-in movie screens as a traffic regulation was unconstitutionally overbroad. *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 214-15 (1975) ("There is no reason to think that a wide variety of other scenes in the customary screen diet, ranging from soap opera to violence, would be any less distracting to the passing motorist."). Likewise, there is absolutely no basis to assume that the other permitted uses in Chicago's commercial zones would have a less pronounced effect on any asserted governmental interest than places of worship.

At a minimum, zoning laws must not be based on the content of the expression they suppress. *See Renton*, 475 U.S. at 48; *Erznoznik*, 422 U.S. at 215; *Young v. American Mini Theaters, Inc.*, 427 U.S. 50, 68 (1976) (noting general First Amendment "prohibition of regulation based on the content of protected communication"); *Police*

[9] It is indisputable that churches, at least as much as adult entertainment uses, involve expressive activity. *See* A SURVEY OF ZONING DEFINITIONS, *supra* n.2 (defining "church or place of religious worship" as "An institution that people regularly attend to *participate in or hold religious services, meetings, and other activities.*" (emphasis added)).

Dept. of Chicago v. Mosley, 408 U.S. 92, 95 (1972) ("[A]bove all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content."). Laws directed at "churches" certainly regulate on the basis of a particular subject matter—religious fellowship and worship.

In a recent string of cases, the Supreme Court has found that restrictions on expression that are based on religion violate the Free Speech Clause because they are based on viewpoint rather than subject-matter. *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98 (2001) (holding that it disagrees "that something that is quintessentially religious or decidedly religious in nature cannot also be characterized properly as the teaching of morals and character development from a particular viewpoint."); *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819 (1995); *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384 (1993).

The Supreme Court has also repeatedly and unequivocally stated that religious expression holds a place at the core of the type of speech that the First Amendment was designed to protect. *See Capitol Square Review & Advisory Board v. Pinette*, 515 U.S. 753, 760 (1995) ("[G]overnment suppression of speech has so commonly been directed precisely at religious speech that a free-speech clause without religion would be Hamlet without the prince."). This reasoning was set forth with great particularity in this Court's recent opinion in *DeBoer v. Village of Oak Park*, 267 F.3d 558 (7th Cir. 2001), where it held that permitting the use of a village hall for a "civic program or activity" but prohibiting its use by a prayer group was an impermissible viewpoint-based restriction on speech. *Id.* at 569-70.

A review of the permitted uses demonstrates the patent irrationality of Chicago's speech restriction. More specifically, they draw a distinction along religious lines: people may assemble to watch a wedding scene performed in a theater or hold a wedding in a hotel ballroom, but a church that holds wedding ceremonies is prohibited unless local officials, in their discretion, choose to allow it (or without exception, as in the C-4 and M zones). Similarly, while a Church's funeral service suffers from the same handicaps, such activity is expressly permitted as of right in a funeral parlor. Weekly attendance at a religious service is prohibited, while a weekly lodge meeting is expressly permitted. *See Vineyard Christian Fellowship of Evanston v. City of Evanston*, Civ. No. 00-0798, slip op. at 3 (preliminary inj. granted Dec. 14, 2000) ("Although Vineyard could host an assembly of the same number of persons, play music, dance, sing, chant, listen to a lecture or converse, it may not engage in worship activities. In short, Vineyard members are free to party, but are not free to pray." (emphasis added)). In these examples, the number of people involved, their outward conduct, and their potential impact on surrounding properties are virtually identical. The prohibitions of the Ordinance thus turn entirely on the religious content of the expression and the religious motivation of the participants. Since (1) zoning laws which regulate expressive activity implicate the Free Speech Clause, and (2) favoring nonreligious speech over religious speech represents impermissible content-based discrimination, Chicago's Ordinance violates C.L.U.B.'s Free Speech rights.

IV. The Equal Protection Clause Requires, *At a Minimum*, Equal Treatment Between Religious and Nonreligious Assembly Land Uses.

The court below spent a substantial portion of its opinion arguing that the Equal Protection Clause requires rational basis review—as opposed to strict scrutiny—of land use laws that disfavor places of worship. 157 F. Supp. 2d at 909-11. The court held that "owners of 'churches' are operators of the physical structure in which people gather to celebrate and are not a suspect class," *id.* at 910, and that "the Zoning Ordinance at issue does not infringe upon a fundamental right." *Id.* at 911. Whether or not strict scrutiny should apply here—and it certainly should,[10] the Supreme Court has held that zoning laws that treat similarly situated land uses (even those that do not implicate fundamental rights) unequally, such laws fail rational basis scrutiny.[11]

City of Cleburne v. Cleburne Living Center, Inc., 473 U.S. 432 (1985), lays out the inquiry a court should undertake in assessing whether a zoning regulation

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[10] Specifically, the Equal Protection Clause generally prohibits government action infringing fundamental rights or based on suspect classifications such as religion. *City of New Orleans v. Dukes*, 427 U.S. 297, 303 (1976) (classification is presumptively unconstitutional if it "trammels fundamental personal rights or is drawn upon inherently suspect distinctions such as race, religion, or alienage"); *see J.W. v. City of Tacoma*, 720 F.2d 1126 (9th Cir. 1983) ("Constitutional scrutiny of zoning regulations is heightened, however, when the regulations infringe a fundamental interest, or discriminate against a suspect class.") (citations omitted). Here, though mere use of the term "church" does not a suspect classification make, differential treatment of assembly uses based on religion certain does. And the rights to religious exercise, speech, and assembly constrained here by the City's zoning laws are unmistakably fundamental. *Johnson v. Robison*, 415 U.S. 361, 375 n.14 (1974) ("Unquestionably, the free exercise of religion is a fundamental constitutional right.").

[11] That zoning laws must, at a minimum, be rational is black letter law. This reasonableness requirement codifies the fundamental constitutional test, enshrined in both the Due Process and Equal Protection Clauses, that all laws regulating land use must (at a minimum) be rational. *See Freedom Baptist Church v. Township of Middletown*, 2002 WL 927804, slip op. at 25 (E.D. Pa. May 8, 2002) (attached as Exhibit C); *Seattle Title Trust Co. v. Roberge*, 278 U.S. 116, 121 (1928) (Due Process Clause); *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 395 (1926) (land use restrictions violate due process if they are "clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare."); *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 440 (1985) (Equal Protection Clause).

unreasonably limits religious land uses. In *Cleburne*, the Court considered a challenge to a city ordinance that required a special use permit to operate a group home for the mentally retarded in a residential district, but did not require such permits for many similar residential uses. *See id*. at 447. In assessing the rationality of the challenged land use regulation, the Court dictated that the relevant inquiry was whether the home for the mentally retarded "would threaten legitimate interests of the city in a way that other permitted uses such as boarding houses and hospitals would not." *Id*. at 448. Examining each of the City's asserted interests, the Court concluded that the permitted uses of property posed an equal or greater threat to those interests. Accordingly, the Court held it was irrational to allow the permitted uses to locate freely in the City, but not the home for the mentally retarded. *See id*.

Cleburne has been extended to religious uses of land. In *Cornerstone Bible Church v. City of Hastings*, 948 F.2d 464 (8th Cir. 1991), the Eighth Circuit applied *Cleburne* when considering constitutionality of ordinance allowing certain non-commercial uses, but not churches, in a particular district, *id.* at 471 (quoting *Cleburne*, 473 U.S. at 450), and held that "the Church has established a relevant similarity between itself and permitted non-commercial entities. It now is incumbent on the City to provide the rational basis for this apparent unequal treatment of similarly situated entities." *Id.*

The Ninth Circuit's decision in *Christian Gospel Church v. City and County of San Francisco*, 896 F.2d 1221 (9th Cir. 1990), *cert. denied*, 498 U.S. 999 (1990), agrees. In that case, a church challenged an ordinance requiring "all places of public assembly," including churches, to obtain a conditional use permit. *Christian Gospel*, 896 F.2d at 1225-26. The court held that no Equal Protection violation was shown, but only because

"[t]he Church was treated no differently than a school or community center would have been." *Id*. The court reasoned that because "all forms of public assembly" had the potential to bring "noise and traffic problems to the neighborhood," it was permissible under the Equal Protection clause to treat a church identically to all other public assemblies. *Id*. Of course, both schools and community centers are preferred over churches in Chicago.

Cleburne was recently applied to a religious land use in a similar factual context in *Congregation Kol Ami v. Abington Township*, 161 F. Supp. 2d 432 (E.D. Pa. 2001). In that case, the Township sought to defend an ordinance forbidding a church, but not a range of secular entities, from locating within a certain district on the grounds that the church "would cause traffic, light pollution, and noise to increase." *Id.* at 437. Following the inquiry laid out in *Cleburne*, the court found that those same concerns existed for permitted property uses, such as "a train station, bus shelter, municipal administration building, police barrack, library, snack bar, pro shop, club house, [or] country club." *Id.* Accordingly, the court held that that the ordinance was unlawful because "there can be no rational reason" to forbid a church, but not the other permitted uses. *See id*.

These decisions are only the most recent in a long line upholding this basic principle of equal treatment. *See* 8 E. MCQUILLIN, THE LAW OF MUNICIPAL CORPORATIONS, § 25.131.30, at 489 (3d ed. 2000) ("a zoning ordinance requiring a special use permit to operate a church when it does not require such permits to operate community centers, meeting halls, and other establishments similarly situated" violates equal protection); *Love Church v. City of Evanston*, 671 F. Supp. 515, 518-19 (N.D. Ill. 1987), *vacated on other grounds*, 896 F.2d 1082 (7th Cir. 1990) (holding that, because

meeting halls and theaters were preferred in Evanston's zoning ordinance, it "distinguishes between religious assembly uses and non-religious assembly uses, it classifies on the basis of religion"); *North Shore Unitarian Soc'y v. Plandome*, 109 N.Y.S.2d 803, 804 (N.Y. Sup. Ct. 1951) (ordinance unreasonably prohibits churches while allowing "village and municipal buildings, railroad stations, public schools, and clubhouses"); *Cam v. Marion County*, 987 F. Supp 854, 859 (D. Or. 1997) (no "legitimate or rational . . . state interest" advanced for prohibiting regular use of agricultural building for religious worship, but allowing other secular assemblies).

This Court should join the Eighth and Ninth Circuits (and several lower courts) in recognizing that the relevant question before the Court is whether the proposed land uses of Appellants' churches threaten any of Chicago's stated interests more than other permitted uses in the commercial and business zones. As Appellants have clearly demonstrated, the answer to this inquiry is clearly "no." Appellants Brief at 42-44. It is self-evident that any governmental interest allegedly threatened by a church would be equally threatened by some of the favored assembly uses, both for-profit and not for profit.[12]

[12] The court below argued that the "remaining allegedly similar uses (e.g., restaurants, taverns, theaters) . . . have a commercial character that separates them from churches and makes those uses more appropriate . . . ." 157 F. Supp. 2d at 912. The court ignored the other preferred uses, which are decidedly not commercial in character, including lodges, offices of labor organizations, parks, playgrounds, "bingo halls when operated by not-for-profit or charitable organizations," colleges, universities, community centers, public libraries, etc. Zoning Ordinance §§ 8.3-1(B)(9b); 8.3-1(B)(4); 8.3-1(B)(9a); 9.3-1(B)(3); 9.3-4(B)(11); 9.3-5(B)(6); 9.4-4(3); 10.3-1(12a); 10.3-1(19b); 10.4-1(3).

V. Zoning Codes That Prefer Nonreligious Assembly Land Uses over Religious Assembly Land Uses Violate the Equal Terms Provision of RLUIPA.

The City of Chicago's Zoning Ordinance also violates Appellants' rights under RLUIPA's "Equal Terms" provision, which codifies the Constitution's various requirements of neutrality.[13] The plain text of this section sets forth a clear standard:

> (1) EQUAL TERMS- No government shall impose or implement a land use regulation in a manner that treats a religious assembly or institution on less than equal terms with a nonreligious assembly or institution.

The Act's legislative history sheds additional light on this clear and unequivocal legislative mandate. Examples of nonreligious assemblies that the legislative history identifies as comparable to religious assemblies include "banquet halls, clubs, community centers, funeral parlors, fraternal organizations, health clubs, gyms, places of amusement, recreation centers, lodges, libraries, museums, municipal buildings, meeting halls, and theaters," H. REP. 106-219, 106th Cong., 1st Sess. 19 (1999); and "recreation centers, health clubs, backyard barbeques and banquet halls," 146 CONG. REC. S7774-01 at S7777 (daily ed. July 27, 2000).

The Joint Statement of Senators Hatch and Kennedy described the need for RLUIPA's Equal Terms provision: "Zoning codes frequently exclude churches in places where they permit theaters, meeting halls, and other places where large groups of people assemble for secular purposes." 146 CONG. REC. at S7775 (Statement of Sen. Hatch). A similar statement appears in the legislative history of the House bill. *Protecting Religious Liberty: Hearings on H.R. 1691 Before the Subcomm. on the Constitution of the House*

[13] *See generally* R. Storzer & A. Picarello, *The Religious Land Use and Institutionalized Persons Act of 2000: A Constitutional Response to Unconstitutional Zoning Practices*, 9 GEO. MASON. L. REV. 929, 976-1000 (2001).

Comm. on the Judiciary, 106th Cong., 1st Sess. (1999) (testimony of Prof. Douglas Laycock, University of Texas Law School) ("[T]hese subsections implement this rule as applied to land use regulation that permits secular assemblies while excluding churches."). *See also Religious Liberty Protection Act: Hearings on the Religious Liberty Protection Act of 1998 H.R. 4019 Before the Subcomm. on the Constitution of the House Comm. on the Judiciary*, 105th Cong., 2nd Sess. (1998) (testimony of Prof. W. Cole Durham, Jr., B.Y.U. Law School) ("[I]n accordance with prior law, a community may not . . . deprive religious assemblies of equal access to areas where non-religious assemblies are permitted."); *Religious Freedom, Hearing on the Religious Liberty Protection Act of 1998 H.R. 4019 Before the Subcomm. on the Constitution of the House Comm. on the Judiciary*, 105th Cong., 2nd Sess. (1998) (testimony of Steven T. McFarland, Director, Center for Law and Religious Freedom) ("First, *equal access* should be assured. Wherever a community allows places of assembly, like meeting halls, community centers, theaters, schools, or arenas, it must allow churches as a permitted use. Government must not discriminate on the basis of the nature of the assembly."); *Protecting Religious Liberty: Hearing on Legislation to Protect Religious Liberty Before Senate Comm. on the Judiciary*, 106th Cong., 1st Sess. (1999) (testimony of Prof. Douglas Laycock) ("[T]his Committee and the House Subcommittee on the Constitution have compiled a massive record of individualized assessment of land use plans, of discrimination against churches as compared to secular places of assembly, ...").

Chicago's Zoning Ordinance itself played a key part in the testimony preceding the passage of RLUIPA:

> The details vary, but uses such as banquet halls, clubs, community centers, funeral parlors, fraternal organizations, health clubs, gyms, recreation centers, lodges,

> libraries, museums, municipal buildings, meeting halls, and theaters are often permitted as of right in zones where churches require a special use permit, or permitted on special use permit where churches are wholly excluded.
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> . . . .
>
> . . . . John Mauck described twenty-two cases of apparent discrimination in his written statement. He spends nearly all his professional time handling such cases in the Chicago area, ... He described several cases where churches were refused permission to meet in [a building that] had been used for secular assemblies—a Masonic temple, a VFW hall, a funeral home, a theater, an auditorium in an office building. He described cases in which cities preferred nightclubs to churches, ...

Religious Liberty Protection Act: Hearings on H.R. 4019 Before the Subcomm. on the Constitution of the House Comm. on the Judiciary, 105th Cong., 2nd Sess. (1998) (testimony of Prof. Douglas Laycock). *Cf. id.* ("Marc Stern . . . . described a case in Clifton, New Jersey, where officials said they preferred an art group to a church; . . . ."); ("Rabbi Rubin described how the City of Los Angeles . . . permitted other places of assembly in Hancock Park, including schools, recreational uses, embassy parties, and a law school within walking distance of Rabbi Rubin's shul!"); ("Californians now have a statutory right to assemble children for [] group childcare in their homes, despite zoning or restrictive covenants to the contrary, but no right to assemble for prayer in their homes."); *Protecting Religious Liberty: Hearing on Legislation to Protect Religious Liberty Before Senate Comm. on the Judiciary*, 106th Cong., 1st Sess. (1999) (testimony of Prof. Douglas Laycock) ("The suburban Chicago zoning code survey also showed that places of secular assembly are often not subject to the same rules as churches."). Other federal courts have also provided examples of nonreligious assembly uses. The Supreme Court has listed as examples of "any place of assembly": a "theater, town hall, opera house, as well as a public market place." *Doran v. Salem Inn, Inc.*, 422 U.S. 922, 933

(1975). *See also Love Church v. City of Evanston*, 671 F. Supp. 515, 517-19 (N.D. Ill. 1987) (identifying community centers, schools, meeting halls, and theaters as assemblies of people).

Given its plain text, the intent of Congress, the evidence before it during RLUIPA's passage, and the cases that have addressed this question, it is unquestionable that Chicago's Zoning Ordinance fails to meet RLUIPA's Equal Terms standard. Churches are treated worse than many assembly uses in *every* commercial, business, or manufacturing district.

Finally, in its memorandum opinion responding to Appellant churches' Motion to Alter or Amend the Judgment, the lower court addressed the churches' Equal Terms argument in a cursory fashion, holding that, since churches may exist as a permitted use in Chicago's residential districts, they are treated "as well, if not better than similar, non-religious assembly uses." *C.L.U.B. v. City of Chicago,* No. 94-6151, 2002 WL 485380 at *2 (N.D. Ill. 2002). But being able to locate in a residential district cannot be considered "equal treatment" for churches. (For example, in *DeBoer, supra,* the Village could not be heard to defend its unconstitutional policy of prohibiting the use of a hall by a prayer group by arguing that the prayer group could simply have met elsewhere.) This conclusion only increases Chicago's constitutional violation: it creates and enforces a model of the "proper" church, one that belongs in residential districts. However, in order to fulfill what they believe is required by their faith, some churches *must* locate in business or commercial districts in order to minister to the community found there. *See, e.g., O'Hair v. Andrus*, 613 F.2d 931 (D.C. Cir. 1979) (recognizing that "the multitude of storefront churches . . . operate . . . vigorously in the American scene." (quoting Jamison,

Religions on the Christian Perimeter, I RELIGION IN AMERICAN LIFE 162 (J. Smith & A. Jamison eds. 1961))); *Int'l Church of the Foursquare Gospel*, 955 F. Supp. 878, 879 (N.D. Ill. 1996) (noting that church desired commercial property in part because site was "a very visible location, a matter of some interest to the Church."). Churches have also been singularly effective in combating today's urban problems, as is well-established in the social scientific literature.[14] The principle that separate treatment is equivalent to equal treatment has long been rejected in the racial context, and this Court should likewise refuse to accept it in the religion context—particularly where it lacks any basis in First Amendment jurisprudence.

[14] *See, e.g.*, S. Lang, *Neighborhood Disorder, Individual Religiosity, and Adolescent Use of Illicit Drugs: A test of Multilevel Hypotheses*, 39 CRIMINOLOGY 116 (2001); B. Johnson, *The 'Invisible Institution' and Black Youth Crime: The Church as an Agency of Local Social Control*, 29 JOURNAL OF YOUTH AND ADOLESCENCE 492 (2000); B. Johnson, *Escaping From the Crime of Inner Cities: Church Attendance and Religious Salience Among Disadvantaged Youth*, 17 JUSTICE QUARTERLY 386 (2000).

CONCLUSION

For the foregoing reasons, the decision of the court below should be reversed.

Respectfully submitted,

By: _____

THE BECKET FUND FOR RELIGIOUS LIBERTY
Kevin J. Hasson*
Roman P. Storzer
Anthony R. Picarello, Jr.
1350 Connecticut Ave., N.W., Suite 605
Washington, D.C. 20036
Telephone: (202) 955-0095
Facsimile: (202) 955-0090

**Counsel of record* *Attorneys for* Amici

RULE 32(a)(7) CERTIFICATION

I certify that this brief conforms to the type-volume limitations imposed by Federal Rule of Appellate Procedure 32 and Circuit Rule 32 for a brief produced using the following font:

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Dated this 26th day of June, 2002

_____

ROMAN P. STORZER
Attorney for *Amici*

CERTIFICATE OF SERVICE

I hereby certify that two true and correct copies of the above and foregoing Amicus Brief, and one copy on digital media, was sent this 26th day of June, 2002 via Federal Express to each of the following:

John W. Mauck
Johnathan P. Gundlach
MAUCK & BAKER
One North LaSalle, Suite 2001
Chicago, IL 60602

Mara S. Georges
OFFICE OF THE CORPORATION COUNSEL
Appeals Division
30 N. LaSalle Street
Chicago, IL 60602

_____
Roman P. Storzer