No. 13-1274

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

EAGLE COVE CAMP & CONFERENCE CENTER, INC., a Wisconsin non-stock corporation, ARTHUR G. JAROS, JR., individually, and as Co-trustee of the Arthur G. Jaros, Sr. and Dawn L. Jaros Charitable Trust, and as Trustee of the Arthur G. Jaros, Sr. Declaration of Trust, and as Trustee of the Dawn L. Jaros Declaration of Trust, WESLEY A. JAROS, as Co-trustee of the Arthur G. Jaros Sr. and Dawn L. Jaros Charitable Trust, RANDALL S. JAROS, individually, and as Co-trustee of the Arthur G. Jaros, Sr. and Dawn L. Jaros Charitable Trust, CRESCENT LAKE BIBLE FELLOWSHIP, and KIM WILLIAMSON,

Plaintiffs-Appellants,

v.

TOWN OF WOODBORO, Wisconsin, COUNTY OF ONEIDA, Wisconsin, and ONEIDA COUNTY BOARD OF ADJUSTMENT,

Defendants-Appellees.

Appeal from the United States District Court
for the Western District of Wisconsin
Case No 10-cv-118
The Honorable Judge William M. Conley

BRIEF OF *AMICI CURIAE* THE BECKET FUND FOR RELIGIOUS LIBERTY, CHRISTIAN LEGAL SOCIETY, AND CHRISTIAN CAMP & CONFERENCE ASSOCIATION IN SUPPORT OF PLAINTIFFS-APPELLANTS AND REVERSAL

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RULE 26.1 DISCLOSURE STATEMENT

(1) The full name of every party that the attorney represents in the case (if the party is a corporation, you must provide the corporate disclosure information required by Fed. R. App. P. 26.1 by completing item #3):

Amici Curiae The Becket Fund for Religious Liberty, Christian Legal Society, and Christian Camp & Conference Association

(2) The names of all law firms whose partners or associates have appeared for the party in the case (including proceedings in the district court or before an administrative agency) or are expected to appear for the party in this court:

The Becket Fund for Religious Liberty

(3) If the party or amicus is a corporation: (i) Identify all its parent corporations, if any; and (ii) List any publicly held company that owns 10% or more of the party's stock:

None of the *amici* have parent corporations or shares of stock.

Date: May 16, 2013

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INTEREST OF THE *AMICI*

Pursuant to Fed. R. App. P. 29, *amici* the Becket Fund for Religious Liberty, Christian Legal Society, and Christian Camp & Conference Association respectfully submit this brief *amicus curiae* in support of Appellant and reversal.[1]

Amici are interested in the application of the Religious Land Use and Institutionalized Persons Act of 2000, 42 U.S.C. § 2000cc, *et seq.* ("RLUIPA"), and wish to see that statute applied in the manner that best protects religious practice and worship. *Amici* believe that their diverse experiences with religious land use cases and assisting the ministries of Christian camps will provide the Court with a useful perspective as it considers this important case.

More information about each *amicus* can be found in Appendix A.

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[1] As required by Fed. R. App. P. 29(c)(5), Amicus states that no party's counsel authored the brief in whole or in part; no party or party's counsel contributed money that was intended to fund preparing or submitting the brief; and no person—other than Amicus, its members, or its counsel—contributed money that was intended to fund preparing or submitting the brief.

INTRODUCTION

The district court held that prohibiting a family from building a Bible camp on its land was not a substantial burden on their religious exercise. It did so in a callous manner, questioning "whether plaintiffs' utter lack of success to date is God's way of telling them—through admittedly-imperfect, secular institutions—to look elsewhere for a more acceptable location. Ultimately, only God knows if they should continue to knock at this particular door or look for an open window somewhere else." Dist. Ct. Slip Op. ("Op.") at 1. The district court was right that this particular choice was not its to make.

The district court made two critical errors in its substantial burden ruling. First, it applied the wrong substantial burden standard. The court incorrectly applied the *CLUB* standard—a standard that has been criticized by other courts of appeals and carefully limited by this court—to all of Eagle Cove's claims, even its challenge to the rezoning and permit denials. That is out of step with the decisions of this Court, which uses *Constantine*'s "expense, uncertainty, and delay" standard to assess such denials. After choosing the wrong standard, the court relied on the wrong facts—discounting the many facts showing that Eagle

Cove plans to engage in religious exercise, and that its exercise has been not only inhibited, but prevented entirely. This it cannot do on summary judgment.

This appeal is of great consequence in another way—it is, to our knowledge, the first RLUIPA case nationwide involving a religious camp. Other courts considering religious camp land use claims, both within the Seventh Circuit and outside it, will look to this Court's decision for guidance.

Eagle Cove's Christian camp is an important form of religious exercise. Religious retreats are a centuries-old religious practice, and in the modern day, they play an important role in many faiths, including Protestant Christianity. Eagle Cove's plans for the property are unquestionably religious, and worthy of protection under RLUIPA. *Amici* therefore submit this brief to urge the Court to recognize that religious camps like Eagle Cove should be protected under RLUIPA, and that the proper substantial burden standard is applied to religious exercise of all kinds within the Seventh Circuit.

ARGUMENT

I. The district court failed to apply the correct substantial burden standard.

The lower court's first error was applying the wrong standard to Eagle Cove's challenges to the rezoning and CUP denials. Eagle Cove challenged these denials under RLUIPA's "substantial burden" provision, 42 U.S.C. § 2000cc(2)(a). In order to determine whether the burden imposed on Eagle Cove's religious exercise was substantial, the district court relied upon the "effectively impracticable" standard of *Civil Liberties for Urban Believers v. City of Chicago*, 342 F.3d 752, 761 (7th Cir. 2003) (*CLUB*). But this Court has only used that standard in broad-based challenges to entire land use schemes or the power of annexation. The proper standard is the one this Court used in *Saints Constantine and Helen Greek Orth. Church, Inc. v. City of New Berlin*, 396 F.3d 895 (7th Cir. 2005), and *World Outreach Conference Ctr. v. City of Chicago*, 591 F.3d 531 (7th Cir. 2009). In both cases, the Court held that a substantial burden results from actions with a tendency to inhibit religious exercise, such as the delay, uncertainty, and expense inherent in multiple zoning applications. This standard is in harmony with the text of RLUIPA and the decisions of other circuits. The district

court wrongly limited this standard to cases of bad faith or discrimination, and thus failed to consider important evidence regarding Eagle Cove's religious exercise.

A. The district court erred when it applied the *CLUB* substantial burden standard, rather than the *Constantine* standard.

The district court incorrectly held that a burden is "substantial" only if it "'necessarily bears direct, primary, and fundamental responsibility for rendering religious exercise . . . *effectively impracticable*.'" Op. 34 (quoting *CLUB*, 342 F.3d at 761) (emphasis added). Relying on *CLUB*, the court held that "'[s]carcity of affordable land,'" the "'inherent political aspects' of zoning and planning decisions," and the expenditure of "'considerable time and money'" do not constitute substantial burdens because none of them "render the use of real property for religious exercise 'impracticable.'" *Id*.

The court's reliance on *CLUB* is misplaced for several reasons. First, this Court limited *CLUB* in *Constantine*, 396 F.3d at 901, where it made clear that burdens need not be "insuperable" in order to be substantial under RLUIPA. The Court instead found a substantial burden based on the "delay, uncertainty, and expense" resulting from

multiple zoning applications. *Id.* This Court confirmed that limitation by applying the *Constantine* standard in *World Outreach*, where it found a substantial burden without any suggestion that the city's actions had rendered religious exercise "effectively impracticable."

Second, the district court mistakenly applied *CLUB*'s "effectively impracticable" standard because the case was mentioned in *Vision Church v. Vill. of Long Grove*, 468 F.3d 975, 997 (7th Cir. 2006), a case post-dating *Constantine*. The district court held that *Vision Church* reinstated the *CLUB* standard for all RLUIPA substantial burden challenges: "Regardless of whether plaintiffs[] experienced 'delay, uncertainty and expense,' the Seventh Circuit reiterated in *Vision Church* . . . the test first announced in *CLUB*: that a substantial burden is one that renders religious exercise 'effectively impracticable.'" Op. 37. But the district court was wrong. This Court has only applied the *CLUB*/*Vision Church* standard to a narrow subset of RLUIPA substantial burden challenges.

CLUB and *Vision Church* involve broad-based attacks on an entire zoning scheme or annexation powers, rather than the specific denial of particular land use permits. *CLUB* involved a RLUIPA challenge to

Chicago's entire "zoning scheme," *CLUB*, 342 F.3d at 759–61, and *Vision Church* applied the *CLUB* standard only in the portion of its opinion that addressed the Church's challenge to the city's powers of annexation generally. *Vision Church*, 468 F.3d at 996-1000. When this Court has considered specific denials of a particular rezoning request or permit application, it has applied the more flexible *Constantine* standard. That standard should control Eagle Cove's challenges to its rezoning denial and the denial of its CUP application.[2]

In *Constantine*, the Church filed multiple zoning applications to help allay the city's concerns about possible future uses of the subject property. Specifically, when the city worried that rezoning might permit undesirable uses if the church ever left, the church offered to rezone in

[2] This Court has not yet specifically adopted the Eleventh Circuit's distinction between facial and as-applied RLUIPA challenges. *See Primera Iglesia Bautista Hispana of Boca Raton, Inc. v. Broward Cnty.,* 450 F.3d 1295, 1308–11 (11th Cir. 2006) (making this distinction under RLUIPA's Equal Terms provision). But this Court has recognized that ordinances can be facially defective under RLUIPA. *See River of Life Kingdom Ministries v. Vill. of Hazel Crest,* 611 F.3d 367, 382 (7th Cir. 2010) (*en banc*) (describing "rather obvious facial violation of RLUIPA's equal-terms provision"). As in constitutional law, facial-type challenges like *CLUB* and *Vision Church* are rightly harder to prove than as-applied challenges.

a way that would "limit the parcel to church-related uses." 396 F.3d at 898. But the city rejected that compromise.

In finding that the city had imposed a substantial burden on the Church's religious exercise, this Court distinguished *CLUB*'s narrow definition of "substantial burden." *Id.* The decision made clear that burdens need not be "insuperable" in order to be substantial under RLUIPA:

> The Church . . . complains instead about having either to sell the land that it bought in New Berlin and find a suitable alternative parcel or ***be subjected to unreasonable delay by having to restart the permit process*** . . . .
>
> The burden here was substantial. ***The Church could have searched around for other parcels of land . . . or it could have continued filing applications with the City***, but in either case there would have been ***delay, uncertainty, and expense***.
>
> ***That the burden would not be insuperable would not make it insubstantial.*** The plaintiff in the *Sherbert* case, whose religion forbade her to work on Saturdays, could have found a job that didn't require her to work then had she kept looking rather than giving up after her third application for Saturday-less work was turned down. But the Supreme Court held that the fact that a longer search would probably have turned up something didn't make the denial of unemployment benefits to her an insubstantial burden on the exercise of her religion.

Constantine, 396 F.3d at 900-901 (emphasis added).

Here, the district court refused to apply the *Constantine* standard based on this Court's use of *CLUB*'s "effectively impracticable" language

in *Vision Church*, 468 F.3d at 997. But the district court's view that *Vision Church* reinstated the *CLUB* standard for all RLUIPA substantial burden challenges is incorrect.

In *Vision Church*, the city involuntarily annexed the church's property to gain jurisdiction over it. *Id.* at 983. The city also enacted an ordinance that limited the size of the Church and its religious services. *Id.* at 983-84. The Church brought substantial burden claims challenging (1) the city's annexation powers and assembly ordinance generally; and (2) the specific conditions applied to the Church. *Id.* at 997-99. This Court applied the *CLUB* standard only with respect to the first type of claim. *Id.* That is, *Vision Church* limited its use of the *CLUB* standard to the Church's attack on the city's annexation power and ordinance. By contrast, it said *CLUB* was "instructive," as opposed to binding, on the church's challenge to its permit denial and conditions on its use. Instead, the Court applied the "significant pressure" formulation to those actions. *See id.* at 999 (citing *Midrash Sephardi, Inc. v. Town of Surfside*, 366 F.3d 1214, 1227 (11th Cir. 2004)).

In contrast to these broad challenges, both *Constantine* and this case challenge the denial of a specific permit (rezonings and conditional use

permits). These narrower challenges are not subject to the *CLUB*/*Vision Church* "effectively impracticable" standard. Instead, the *Constantine* standard applies. The Court later confirmed this distinction by applying the *Constantine* standard to permit denials in *World Outreach*, 591 F.3d at 533.

Separate from the fact that the "effectively impracticable" standard was applied in *Vision Church* only because of the broad challenges at issue, the *Constantine* standard controls because of the factual similarities between *Constantine* and this case. Both cases involve rezonings, whereas *Vision Church* involved a very different situation: the city's forcible annexation of the church's property. 468 F.3d 975.

This Court should also choose the *Constantine* standard over the *CLUB/Vision Church* one because the latter has been either expressly or implicitly rejected by numerous Circuit Courts. Extending the "effectively impracticable" standard raises the textual and practical concerns noted by other circuits, whereas the *Constantine* standard—which has been cited with approval by other Circuit Courts—helps avoid them.

B. The *CLUB* standard should be carefully limited to comply with circuit precedent, Supreme Court precedent and RLUIPA's text.

This Court has applied the *CLUB* standard only in narrow circumstances, and for good reason. If applied to all zoning application denials, the "effectively impracticable" standard would read the substantial burden provision out of the statute. This standard conflicts with the text and history of RLUIPA, and has been criticized by other circuits on these grounds.

Other Courts of Appeals have recognized the difficulties in applying the *CLUB* standard to all RLUIPA substantial burden challenges. In *Midrash Sephardi*, 366 F.3d at 1227, the Eleventh Circuit declined to adopt the highly restrictive *CLUB* standard because it would render RLUIPA's total exclusion provision "meaningless." Relying on the Supreme Court's formulation of "substantial burden" in other contexts, it defined it as "akin to significant pressure which directly coerces the religious adherent to conform his or her behavior accordingly." *Id.*[3] Instead of requiring the religious adherent to show that the challenged

[3] This is the language *Vision Church* quoted in its assessment of the conditions on the church's property. *See supra* p.13. This confirms that *Vision Church* was not reinstating the *CLUB* standard for all types of challenges.

restrictions rendered religious exercise impracticable, the Eleventh Circuit's rule requires only that the restrictions pressure adherents to forego religious exercise.

Similarly, in *Guru Nanak Sikh Soc'y of Yuba City v. County of Sutter*, 456 F.3d 978 (9th Cir. 2006), the Ninth Circuit found a substantial burden even in the absence of government restrictions that made religious exercise impracticable. Explicitly rejecting the *CLUB* formulation, the Ninth Circuit defined a substantial burden as "significantly great restriction or onus upon such exercise." *Guru Nanak*, 456 F.3d at 988; *see also id.* n.12 (rejecting *CLUB*). In that case, a Sikh group sought a permit to build a temple on two different parcels of land in the county. Each permit was denied, with the County citing conflicting reasons. *Id.* at 981-84. The Ninth Circuit held that the county had substantially burdened religious exercise because its actions in denying a conditional use permit (CUP) had "to a significantly great extent lessened the possibility that future CUP applications would be successful." *Id.* at 989. Such uncertainty over whether the temple could ever obtain a CUP had a tendency to inhibit religious exercise. *Id.* at 991.

The Second Circuit in *Westchester Day Sch. v. Vill. of Mamaroneck*, 504 F.3d 338, 349 (2d Cir. 2007) (*WDS III*), relied on *Constantine* in holding "that a burden need not be found insuperable to be held substantial." The court affirmed the district court's decision that denial of a special use permit to expand a religious school with inadequate facilities was a substantial burden on its religious exercise. The decision was based on the fact that the denial was "absolute," with the government refusing to permit the use subject to conditions and choosing "instead to deny the application in its entirety." *Id.* at 352. As the court explained, "[w]hen the school has no ready alternatives, or where the alternatives require substantial 'delay, uncertainty, and expense,' a complete denial of the school's application might be indicative of a substantial burden." *Id.* at 349.

Likewise, the Fourth Circuit in *Bethel World Outreach Ministries v. Montgomery County Council*, 706 F.3d 548, 557-58 (4th Cir. 2013), also relied on *Constantine*. In that case, the court held that "the 'delay, uncertainty, and expense' of selling the current property and finding a new one are themselves burdensome." *Id.* at 557-58 (quoting *Constantine*, 396 F.3d 895, 899-901).

These less difficult substantial burden standards hew closer to Supreme Court precedent. In *Sherbert v. Verner*, 374 U.S. 398, 399-400 (1963), the Supreme Court held that the government's denial of unemployment benefits to a Sabbatarian who refused to take a job on Saturday imposed a substantial burden on religious exercise in violation of the Free Exercise Clause. Although the regulation did not specifically prohibit religious practice, the Court rejected the argument that there was no burden merely because all that was at issue was denial of a governmental "benefit or privilege." *Id.* at 404. Instead, the Court held that the relevant inquiry for substantial burden was whether the government action had a "*tendency to inhibit* constitutionally protected activity." *Id.* at 404 & n.6 (emphasis added). In Sherbert's case, the Court held that there was such a "tendency to inhibit" because withholding employment benefits put "pressure upon her to forego [a religious] practice." *Id.* at 404.

Subsequent Supreme Court cases reaffirmed and amplified *Sherbert*'s "tendency to inhibit" standard. For example, in *Thomas v. Review Bd.*, 450 U.S. 707, 717 (1981), the Court again emphasized that although government action that "compel[led] a violation of conscience"

would be a substantial burden, this was not the only way to meet the standard. Instead, the Court held it is sufficient to demonstrate a "coercive impact." *Id.* Accordingly, the Court held that "condition[ing] receipt of an important benefit" on the restraint of religious practice was a serious burden because although government "compulsion may be indirect, the infringement upon free exercise is nonetheless substantial." *Id.* at 717-18. *See also Hobbie v. Unemployment Appeals Comm'n*, 480 U.S. 136, 141 (1987) (substantial burden exists where government "put[s] substantial pressure on an adherent to modify his behavior.") (citations omitted); *Lyng v. Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439, 450 (1988) (substantial burden exists where government's policy has a "*tendency* to coerce individuals into acting contrary to their religious beliefs.") (emphasis added).

This less restrictive substantial burden standard flows better from the text and structure of RLUIPA. RLUIPA itself directs that "This chapter shall be construed in favor of a broad protection of religious exercise, to the maximum extent permitted by the terms of this chapter and the Constitution." 42 U.S.C.A. § 2000cc-3(g). And as the Eleventh Circuit in *Midrash* pointed out, the *CLUB* standard renders others

parts of RLUIPA "meaningless." 366 F.3d at 1227. In addition to the substantial burden provision, § 2000cc(a)(2)(A), RLUIPA has a separate provision, § 2000cc(b)(3)(A), which prevents governments from imposing regulations that "totally exclude[] religious assemblies from a jurisdiction." *CLUB*'s "effectively impracticable" standard equates the substantial burden provision (§ 2000cc(a)(2)(A)) with RLUIPA's total exclusion provision (§ 2000cc(b)(3)(A)). Under the *CLUB* standard, both sections would target only those regulations that "exclude" religious institutions entirely, either directly—by prohibiting religious exercise—or indirectly—by rendering religious exercise "impracticable." Section 2000cc(b)(3)(A) thus would be mere surplusage. *See Scherr v. Marriott Int'l, Inc.*, 703 F.3d 1069, 1077 (7th Cir. 2013) (this Court will construe a statute in a way that will "'avoid rendering [words] meaningless, redundant, or superfluous'") (quoting *In re Merchants Grain, Inc.,* 93 F.3d 1347, 1353–54 (7th Cir.1996)).

Indeed, *CLUB*'s exacting standard "reads quite a bit more into the word 'substantial' than is warranted by the text, purpose or history of the statute." *Guru Nanak Sikh Soc'y of Yuba City v. County of Sutter*, 326 F. Supp. 2d 1140, 1153 (E.D. Cal. 2003). The standard can be

exceedingly difficult to prove, as it "would potentially allow cities to defend by always pointing to Eldorado—someplace else, perhaps real and identified, but more likely vague and theoretical, where the church might someday, somehow, be allowed to locate." Douglas Laycock and Luke W. Goodrich, *RLUIPA: Necessary, Modest, and Under-Enforced*, 39 Fordham Urb. L.J. 1021, 1056 (May 2012).

In sum, the district court's use of the "effectively impracticable" standard in this case is incompatible with not just the precedents of this Court, other Circuit Courts, and the Supreme Court, but also with the statutory text and structure. This Court's holding in *Constantine* provides a substantial burden standard that is more appropriate. 396 F.3d at 900.

C. The district court erred by requiring evidence of bad faith.

The district court failed to use the more appropriate standard for another reason—it misread *Constantine*. The district court held that *Constantine* requires evidence that "the government's action in denying the requested accommodation" was "arbitrary, unreasonable, or even in bad faith." Op. at 35. But, while such evidence exists in this case (*see infra* at II.A.4), a showing of bad faith is not necessary.

Bad faith on the part of the government is relevant—and in most cases, sufficient[4]—to meet the substantial burden standard, but *requiring* it is contrary to RLUIPA and the holdings of this Court. "A 'substantial burden' on a religious assembly might also be discriminatory in violation of subsection (b)(2). But each of RLUIPA's land-use subsections captures a distinct kind of free-exercise harm and must be given its own force and effect." *River of Life Kingdom Ministries v. Vill. of Hazel Crest, Ill.,* 611 F.3d 367, 382 (7th Cir. 2010) (*en banc*). This holding echoes those of both *CLUB* and *Constantine*, which held that the substantial burden and discrimination provisions were "operatively independent of one another." *CLUB*, 342 F.3d at 762; *see Constantine,* 396 F.3d at 900 (The "substantial burden" provision, "backstops the explicit prohibition of religious discrimination in the later section of the Act, much as the disparate-impact theory of employment discrimination backstops the prohibition of intentional

[4] *See, e.g., WDS III,* 504 F.3d at 350 (finding substantial burden while noting "[t]he arbitrary application of laws to religious organizations may reflect bias or discrimination against religion"); *Constantine,* 396 F.3d at 900 (substantial burden provision is justified by "the vulnerability of religious institutions . . . 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").

discrimination"). If the sections are operatively independent, then discrimination cannot be the hallmark of a substantial burden violation.

Discrimination, including discrimination that appears in the guise of arbitrariness or bad faith, is already prohibited by RLUIPA § 2(b). *See* 42 U.S.C. § 2000cc(b)(2). In addition to § (b)(2)'s explicit prohibition on religious discrimination, § (b)(3)(b) prohibits actions which "unreasonably limit[] religious assemblies, institutions, or structures within a jurisdiction." Outright discrimination is thus prohibited by § (b)(2), and unreasonable or arbitrary limitations by §(b)(3)(b). While it is true that arbitrary actions may also be burdensome, *see WDS III,* 504 F.3d at 350, to require proof of discrimination or arbitrary and capricious action would render RLUIPA's substantial burden provision a nullity. This is why other circuits have rejected the district court's formulation: "RLUIPA's substantial burden provision says nothing about targeting . . . the substantial burden provision protects against non-discriminatory, as well as discriminatory, conduct that imposes a substantial burden on religion." *Bethel*, 706 F.3d at 556-57. The Ninth Circuit echoed this reasoning, rejecting the argument that neutral and generally applicable laws were immune from the substantial burden

provision: such a conclusion "effectively writes RLUIPA's substantial burden provision out of RLUIPA." *Int'l Church of Foursquare Gospel v. City of San Leandro*, 673 F.3d 1059, 1067 (9th Cir. 2011), *cert. denied*, 132 S. Ct. 251 (2011). RLUIPA itself states that it applies "even if the burden results from a rule of general applicability." 42 U.S.C. §2000cc(a)(2)(A),(B). Therefore the provision applies even to laws that do not discriminate against religion, nor single it out for distinctive treatment. The district court therefore erred in requiring a showing of bad faith.

D. The district court erred by requiring proof that no alternative properties existed.

Finally, the district court also dismissed the burden on Appellant's religious exercise based on potential "alternative sites [that] could accommodate a Bible Camp." Op. 37. But the court was mistaken in its analysis. The mere existence of (often hypothetical) alternatives sites is not determinative. And even if it were, Eagle Cove has raised an issue of material fact regarding whether any such sites exist.[5]

This Court has rejected the argument that to satisfy the substantial burden requirement, "the Church would have to show that there was *no*

[5] *See* Appellants' Br. 29-30.

other parcel of land on which it could build its church." *Constantine,* 396 F.3d at 899 (emphasis added). To the contrary: "The burden here was substantial. ***The Church could have searched around for other parcels of land*** . . . but in either case there would have been delay, uncertainty, and expense." *Id.* at 901 (emphasis added).

Other Circuits have adopted this Court's analysis: "[G]overnmental action impeding the building of that church may impose a substantial burden . . . even though other suitable properties might be available, because the 'delay, uncertainty, and expense' of selling the current property and finding a new one are themselves burdensome." *Bethel*, 706 F.3d at 557-58 (quoting *Constantine*, 396 F.3d at 901).[6] In *Int'l Church of Foursquare Gospel*, the Ninth Circuit ruled on facts strikingly similar to those here: the city was granted summary judgment because it produced evidence that many alternative properties were available, but the district court ignored plaintiff's

[6] *See also WDS III*, 504 F.3d at 349 (quoting *Constantine*, 396 F.3d at 901) ("where the alternatives require substantial 'delay, uncertainty, and expense,' a complete denial of the school's application might be indicative of a substantial burden").

evidence showing that none of the proffered properties was suitable, and few were on the market.[7]

This Court explained the outer boundaries of this rule in *World Outreach*. 591 F.3d at 539. There, a church wanted to demolish a building on its property and construct another in its place that would better serve the church's needs. *Id.* But the city thwarted the church's plans when it designated the building a landmark. *Id.* This Court held that the landmark designation did not impose a substantial burden because there was a lot on the Church's campus that could easily be used to construct the desired facility. *Id.* And the City committed to granting the necessary permits for that construction. *Id.* As such, while the substantial burden determination is generally not dependent on the existence of alternative sites, *World Outreach* demonstrates the sensible limit on that rule.

In sum, the district court erred by applying the *CLUB* substantial burden standard, requiring proof of bad faith, and treating potential

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[7] *See* 673 F.3d at 1068 ("Here, the district court erred by dismissing the Church's realtor's assertions out of hand. The Church's realtor presented significant evidence that no other suitable properties existed. . . ."); Appellants' Br. 29-30 (evidence showed alternative properties were not suitable and not on the market).

alternative sites as determinative. The ruling below should be reversed based upon the failure to apply the proper standard.

II. Under either standard, the plaintiffs should prevail.

Summary judgment was inappropriate under *either* substantial burden standard. The Defendants' actions imposed a substantial burden under *Constantine* by inhibiting Eagle Cove's religious exercise and imposing delay, uncertainty and expense on its religious land use. But the trouble does not stop there. The dual rezoning and CUP denials impose a substantial burden even under the *CLUB* standard, making Eagle Cove's religious exercise effectively impracticable in the jurisdiction. Summary judgment on this count was improper under any standard recognized by this Court.

A. The plaintiffs satisfy the "tendency to inhibit" standard.

Eagle Cove suffers a substantial burden as defined by *Constantine*, *World Outreach Center*, and the decisions of other circuits. The existence of a substantial burden is a question of fact. *See World Outreach*, 591 F.3d at 539 ("We shall assume that determining whether a burden is substantial (and if so whether it is nevertheless justifiable) is ordinarily an issue of fact . . . ."). Reading the undisputed facts in

favor of Eagle Cove, they leave no question that summary judgment for the Defendants was improper.

1. Eagle Cove's use of the property is protected religious exercise.

A Bible camp is religious exercise protected by RLUIPA. The statute defines religious exercise this way: "The use, building, or conversion of real property for the purpose of religious exercise shall be considered to be religious exercise of the person or entity that uses or intends to use the property for that purpose." 42 U.S.C. § 2000cc-5. Eagle Cove plans to use and build upon its land for the purpose of religious exercise—a Bible camp. Appellants' Br. 4-6. An expert report testifies to the importance of Bible camps within the evangelical Christian community. Dkt. 77-10. As the plaintiffs and their experts explained below, a Christian camp of this sort is a religious exercise, a common offering for many denominations modeled upon both history and Biblical example. *See, generally,* Dkt. 77-10 (expert report on the nature of Bible camps); Appellants' Br. 4-6 (plaintiffs' proposed use). Camps provide a place where individuals may free themselves from everyday experiences and social pressures, worship together, take Biblical classes, study, pray, and learn from Christian mentors. *See* Appx. 77-10; Appellants' Br. 4-6.

Eagle Cove's land use plans are designed for one purpose—religious exercise. The plaintiffs plan to build a chapel for worship services, classrooms for religious education, living quarters for spiritual retreats, and even perform baptisms on the lakeshore. Appellants' Br. 4-6. There is no question that Eagle Cove plans to engage in religious exercise on the property.

2. Eagle Cove's religious exercise has been inhibited, and Eagle Cove suffers delay, uncertainty, and expense.

There is likewise no question that Eagle Cove's religious exercise is substantially burdened under the "tendency to inhibit" standard used in *Constantine* and *World Outreach*. Eagle Cove "could have searched around for other parcels of land . . ., or it could have continued filing applications with the [defendants], but in either case there would have been delay, uncertainty, and expense." *Constantine*, 396 F.3d at 901.

Eagle Cove has experienced delay, uncertainty, and expense. The camp's operation has been delayed—Eagle Cove's owners have pursued various applications for nine years, to no avail. *See* Dkt. 77-1 at 55 (plaintiffs have been attempting to convert the land for Bible camp use since 2004)).

Eagle Cove has also borne serious expenses. In order to complete its ill-fated CUP application, Eagle Cove had to not only pay the "extensive" costs of the permitting process, but also additional amounts for several site-specific permits at the County's request. *See* Dkt. 63-57 at 2; Dkt. 148-2. Eagle Cove has suffered at least as much "delay, uncertainty, and expense" as the *Constantine* plaintiffs.[8]

Eagle Cove continues to experience uncertainty. The defendant's reasons for the denials mean that Eagle Cove cannot locate as a Bible camp anywhere within the jurisdiction. *See* Appellant's Br. 29-34. When a series of land use decisions "to a significantly great extent lessened the prospect of [plaintiff] being able to construct a [religious site] in the future, the County has imposed a substantial burden" on the plaintiff's religious exercise. *Guru Nanak*, 456 F.3d at 992. As Eagle Cove explained in its brief, the use denials have left it without any certainty of ever operating a Bible camp in the jurisdiction.

Eagle Cove's religious exercise has been not only inhibited, but also prevented entirely by the land use denials. Complete denials like this are more likely to impose substantial burdens. *See Bethel*, 706 F.3d at

[8] *See also World Outreach*, 591 F.3d at 537 (noting as relevant the fact that World Outreach "incurred substantial legal expenses as well").

558 ("Moreover, we find it significant that the County has completely prevented Bethel from building any church on its property, rather than simply imposing limitations on a new building."). The Town's zoning will not permit any sort of Bible camp on the property. *See* Appellants' Br. 8-10. The uses permitted by the zoning code cannot be squared with Eagle Cove's religious exercise. That exercise is as a Bible camp—a place for worship, prayer, study, and Christian education. Appellants' Br. 4. Its plan is to minister year-round to both adults and children: children through summer youth camps, when students are out of school, and adults through adult retreats and experiences the rest of the year. Appellants' Br. 4-6. There is a need for such facilities, since options for adults during the off-season are limited. Dkt. 77-1 at 168. Eagle Cove would also offer 2-week retreats designed for pastors. *Id.* at 114. And Eagle Cove would fulfill a serious need by ministering to children with serious medical conditions. Appellants' Br. 6. Eagle Cove's planned religious exercise is a camp, not some other sort of facility. Its religious exercise is therefore not just limited, but prohibited entirely by the permit denials.

3. Eagle Cove's facilities are integral to its religious mission.

The district court also erred by concluding that Eagle Cove's religious exercise was not burdened because portions of its plan—including transportation and recreational facilities—were "'secular' in nature." Op. 37-38. That is directly contrary to binding precedent. This Court recognizes that "recreational and living facilities" are protected under RLUIPA, if they are part of the group's religious mission. In *World Outreach,* this Court ruled in favor of a planned building, even though it was not a house of worship:

> The building is not a church as such. The premises mainly contain recreational and living facilities. But there is also space for religious services, and there is no doubt that even the recreational and other nonreligious services provided at the community center are integral to the World Outreach's religious mission, just as the rehabilitation centers operated by the Salvation Army are integral to the Salvation Army's religious mission.

World Outreach, 591 F.3d at 535.

Eagle Cove's religious mission is a Christian camp, where people may retreat from everyday life for times of spiritual reflection and prayer, meet together for worship, and engage in recreation both as a

form of religious exercise and as a service to the community, as in the case of disabled campers. *See* Appellants' Br. 4-6.

The planned facilities are all integral to this religious mission. The lodge building would provide sleeping facilities necessary to a spiritual retreat center, as well as classrooms for religious instruction, a multi-purpose area where dramas and entertainment related to the camp's mission would take place, and a chapel for worship services. Dkt. 64 at 3-4; Dkt. 65 at 3-4. The railcar planned for the site would make it easier to serve mobility-impaired young people, which is part of the camp's religious mission.[9] *Id.* The lakeshore, too, is part of the camp's religious exercise. Not only does it give Eagle Cove the ability to offer traditional Bible camp activities, it is also the location planned for baptisms. Appellants' Br. 4-6, 29 & n.11. The same is true for the outdoor recreational spaces. A critical component of the Bible camp is to experience and explore nature, since nature is God's creation and can instill reverence for and inspire worship of God. *See* Dkt. 77-1 at 50-55;

[9] The district court also found the parking lots to be secular in nature. Op. 37-38. Although religious buildings commonly have parking lots, Amici are unaware of any case holding that a facility is secular in nature simply because it provides parking for worshippers.

Dkt. 77-10. Every part of the property and facilities would be used to further Eagle Cove's religious mission.

The district court erred as a matter of both law and fact when it held these camp facilities to be secular in nature. At minimum, Eagle Cove should have the opportunity to present facts showing how its various camp facilities further its religious mission. In *Westchester,* the lower court engaged in extensive fact-finding to determine that even seemingly secular facilities, like a science lab or multi-purpose room, were integral to the religious mission of an Orthodox Jewish school.[10] There, "the district court conducted the proper inquiry. It made careful factual findings that each room the school planned to build would be used at least in part for religious education and practice . . . ." *WDS III,* 504 F.3d at 348. Eagle Cove should be entitled to the opportunity to make the same showing. As described above, Eagle Cove's facilities are,

[10] *See Westchester Day Sch. v. Vill. of Mamaroneck*, 417 F. Supp. 2d 477, 502 (S.D.N.Y. 2006) (*WDS II*), *aff'd,* 504 F.3d 338 (2d Cir. 2007) ("that the multi-purpose room may at times be used for non-religious assemblies does not obviate the fact that it also will be used primarily and/or extensively for religious assemblies, which WDS otherwise could not hold."); *id.* at 496-97 (science labs and general classrooms religious: "Religious instruction is integrated, to varying degrees, in general studies classes . . . .").

if anything, even more steeped in religious purpose than the buildings of a full-service K-12 day school like the one in *Westchester*.[11]

4. Eagle Cove need not prove bad faith, but the facts indicate that the Defendants acted improperly.

The district court also erred by ruling there was no evidence of bad faith on the part of the Town or County. Although such evidence is not necessary to a finding of substantial burden, *see supra* at I.C, it is telling when it occurs. Here, the County denied multiple permits based upon conflicting rationales.

Eagle Cove first petitioned for a rezoning. During that process, it offered to enter into restrictive covenants to allay fears about changes in the use of the land after rezoning. Dkt. 77-1 at 62. Only after the plaintiffs went to the trouble and expense of the rezoning procedure did the County deny the rezoning, telling them that they could accomplish most of their goals under current zoning. Dkt. 77-1 at 63-66; Appellants' Br. 12.

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[11] Indeed, the district court's approach is in strong tension with the Supreme Court's decision in *Hosanna-Tabor* last year, which disapproved of attempts to sort the activities of religious people into arbitrary "secular" and "religious" categories. *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. E.E.O.C.*, 132 S. Ct. 694, 709 (2012) (issue "not one that can be resolved by a stopwatch").

The County then engaged Eagle Cove in a protracted CUP process, requiring Eagle Cove to obtain two state permits, only to deny that CUP on the basis of the zoning classification. Appellants' Br. 12-14. Eagle Cove acted in good faith throughout the CUP process—it voluntarily redesigned its lodge building to suit the expressed desires of County personnel. *See* Dkt. 77-1 at 62-63. The Defendants' self-contradictory statements and conflicting actions leave Eagle Cove in an untenable position. Multiple denials based upon conflicting reasoning are a hallmark of the type of bureaucratic bad faith that can contribute to a substantial burden. *See Guru Nanak,* 456 F.3d at 992.

The district court's brief dismissal of these facts was improper, particularly since the record should be read in Eagle Cove's favor. *See* Op. 35-36; *Int'l Church of Foursquare*, 673 F.3d at 1068 (on summary judgment, "the district court erred by dismissing the Church's [witness's] assertions out of hand"). The court pointed to a particular statement in a staff report for this conclusion, but failed to take into account the statements of the actual decision-makers, the context, or the protracted CUP process. *See* Op. 35-36. Eagle Cove explained at length how and why it believed that the camp would be permitted with

a CUP. *See* Dkt. 91 at 48-54 (response to Defendants' arguments on summary judgment). That argument was not premised upon only the staff report, but upon the statements of government officials who had the power to approve or deny the land use. *See id.* The district court overlooked much of Eagle Cove's evidence when making its determination on this point. This was an improper resolution of disputed facts.

B. Eagle Cove satisfies the *CLUB* standard.

Even if the lower court had not erred in its selection of the *CLUB* standard, it erred in its application. Defendants were not entitled to summary judgment—even under the *CLUB* standard—because they have rendered Eagle Cove's religious exercise effectively impracticable within the County's jurisdiction.

As Eagle Cove explained at length in its brief, the Town's and County's land use ordinances, working together, prohibit Bible camps. *See* Appellants' Br. 17-20. They prohibit them not only on the subject property, but also anywhere within the Town. *See id.* Worse yet, they prohibit Bible camps anywhere in the County. *See id.* at 9-10, 29-34. Compare this to *CLUB*, where each of the churches challenging

Chicago's zoning ordinance had located property and successfully obtained permits to use that property for religious worship before filing their complaint. *CLUB*, 342 F.3d at 756-58, 761. Chicago's land use ordinances, onerous as they might be, did not bar any of the plaintiffs from locating suitable land within the jurisdiction. *Id.*

By contrast, Eagle Cove cannot find suitable property anywhere within the jurisdiction. A Bible camp is recognized under the recreational zoning district, but there is no such zoning district within the Town. Appellants' Br. 8-9. In fact, there is not a single religious land use currently located within the Town's borders. Dkt. 88 at 30 (30(b)(6) deposition for Town). The zoning laws make it effectively impracticable to run a Bible camp within the Town of Woodboro.

The same is true for Oneida County. No land in the County is zoned for Bible Camps. Appellants' Br. 9-10. Eagle Cove's use would not be permitted as of right anywhere in the County, meaning it would always be subject to the County's highly discretionary permitting procedures. *Id.* at 29-30. And the interpretation the County has given its ordinances rules out the remaining parcels, since they would be adjacent to residential uses, incompatible with land use plans, or otherwise

unsuitable for camp use. *Id.* at 32-34. In fact, the County's zoning regulations are so restrictive that no new camps have received zoning permits in more than fifty years. *Id.* at 34.

Eagle Cove has satisfied the *CLUB* standard.

* * * * *

The district court's opinion is layered with errors. It provokes a circuit split by applying the *CLUB* standard outside its narrow bounds. It misapplies this Court's law by failing to apply the governing RLUIPA substantial burden standard. It fails to consider facts showing that Eagle Cove's religious exercise has been substantially burdened by any measure.

Summary judgment for the Defendants was improper. The undisputed facts show that Eagle Cove has suffered a substantial burden, and deserves its day in court.

CONCLUSION

For the foregoing reasons, the district court's decision should be reversed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 6,986 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2007 in Century Schoolbook 14-point typeface.

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May 16, 2013

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on May 16, 2013, a true and correct copy of the foregoing Appellant's Brief was served electronically on the counsel named below via the CM/ECF system.

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APPENDIX A

STATEMENTS OF THE *AMICI*

Amicus **The Becket Fund for Religious Liberty** has an interest in assuring that the Religious Land Use and Institutionalized Persons Act of 2000, 42 U.S.C. § 2000cc, *et seq.* ("RLUIPA"), is interpreted to effectively address the heavy burdens that houses of worship so often suffer through highly discretionary land use laws. *Amicus* believes that its experience as counsel for a wide variety of houses of worship involved in RLUIPA claims will offer the Court a perspective that is helpful in its resolution of this appeal.

The Becket Fund for Religious Liberty is a non-partisan, interfaith, public interest law firm dedicated to protecting the free expression of all religious traditions. 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*. Most recently, the Becket Fund was Supreme Court counsel to the church defendant in *Hosanna-Tabor Evangelical Lutheran Church and Sch. v. EEOC,* 132 S. Ct. 694 (2012), prevailing in a unanimous decision in a novel area of First Amendment law.

The Becket Fund has been heavily involved in litigation on behalf of a wide variety of religious worshippers, ministers, and institutions under RLUIPA. The Becket Fund's RLUIPA cases run the gamut—as *amicus curiae* and as plaintiffs' counsel, in prisoner and land-use cases, from New Hampshire to Hawaii—including cases arising out of this Circuit.[12] The Becket Fund has also litigated a host of RLUIPA land-use cases as plaintiffs' counsel outside the Seventh Circuit.[13] Some of its

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[12] *See, e.g., River of Life Kingdom Ministries v. Vill. of Hazel Crest*, 611 F.3d 367 (7th Cir. 2010) (*en banc*) (*amicus* brief filed Nov. 19, 2009); *Civil Liberties for Urban Believers v. City of Chicago,* 342 F.3d 752 (7th Cir. 2003) (*amicus* brief filed June 26, 2002); *Calvary Chapel O'Hare v. Vill. of Franklin Park*, Civ. No. 02-3338 (N.D. Ill.) (settlement agreement signed Sept. 3, 2002).

[13] *See, e.g., Elijah Group, Inc. v. City of Leon Valley*, 643 F.3d 419 (5th Cir. 2011); *Rocky Mountain Christian Church v. Bd. of Cnty. Comm'rs*, 613 F.3d 1229, 1232 (10th Cir. 2010); *Lighthouse Inst. for Evangelism v. City of Long Branch*, 510 F.3d 253 (3d Cir. 2007); *Elsinore Christian Ctr. v. City of Lake Elsinore*, 197 F. App'x 718 (9th Cir., Aug. 22, 2006); *Congregation Kol Ami v. Abington Twp.*, 2004 WL 1837037 (E.D. Pa. Aug. 17, 2004); *Castle Hills First Baptist Church v. City of Castle Hills*, 2004 WL 546792 (W.D. Tex. Mar. 17, 2004); *United States v. Maui Cnty.*, 298 F. Supp. 2d 1010 (D. Haw. 2003); *Hale O Kaula Church v. Maui Planning Comm'n*, 229 F. Supp. 2d 1056 (D. Haw. 2002); *Cottonwood Christian Ctr. v. Cypress Redevelopment Agency*, 218 F. Supp. 2d 1203 (C.D. Cal. 2002); *Freedom Baptist Church v. Twp. of Middletown*, 204 F. Supp. 2d 857 (E.D. Pa. 2002).

RLUIPA land-use cases have concluded by favorable settlement.[14] In addition, The Becket Fund has filed a series of *amicus* briefs in both land-use and prisoner cases involving RLUIPA.[15] The Becket Fund intends to continue in order to defend the rights of religious people and organizations to use their land without undue government interference.

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[14] *See, e.g., Living Faith Ministries v. Camden Cnty. Improvement Authority,* Civ. No. 05 cv 877 (D.N.J. filed Feb. 15, 2005) (consent order signed May 2, 2005); *Temple B'nai Sholom v. City of Huntsville*, Civ. No. 01-1412 (N.D. Ala. removed June 1, 2001) (settlement agreement signed June 2003); *Greenwood Cmty. Church v. City of Greenwood Vill.*, Civ. No. 02-1426 (Colo. Dist. Ct.) (permit granted Dec. 2, 2002); *Living Waters Bible Church v. Town of Enfield*, Civ. No. 01-450 (D.N.H.) (agreement for entry of judgment signed Nov. 18, 2002); *Refuge Temple Ministries v. City of Forest Park*, Civ. No. 01-0958 (N.D. Ga. filed Apr. 12, 2001) (consent order signed Mar. 2002); *Unitarian Universalist Church of Akron v. City of Fairlawn*, Civ. No. 00-3021 (N.D. Ohio) (settlement approved Oct. 1, 2001); *Haven Shores Comty. Church v. City of Grand Haven,* No. 1:00-CV-175 (W.D. Mich.) (consent decree signed Dec. 20, 2000); *Pine Hills Zendo v. Town of Bedford, N.Y. Zoning Bd. of Appeals,* No. 17833-01 (N.Y. Sup. Ct.) (settlement agreement allowing religious use and paying plaintiffs' costs, Apr. 8, 2002).

[15] *See, e.g., Cutter v. Wilkinson*, 125 S. Ct. 2113 (2005) (*amicus* brief on behalf of a broad coalition filed December 20, 2004); *Westchester Day Sch. v. Vill. of Mamaroneck*, 504 F.3d 338 (2d Cir. 2007) (*amicus* brief filed Aug. 22, 2006); *Guru Nanak Sikh Soc'y v. Cnty. of Sutter*, 456 F.3d 978 (9th Cir. 2006) (amicus brief filed June 9, 2004); *Midrash Sephardi, Inc. v. Town of Surfside,* 366 F.3d 1214 (11th Cir. 2004) (*amicus* brief filed Nov. 21, 2003); *San Jose Christian Coll. v. City of Morgan Hill,* 360 F.3d 1024 (9th Cir. 2004) (*amicus* brief filed on behalf of a broad coalition Aug. 28, 2002).

Christian Legal Society ("CLS") is a nonprofit, nondenominational association of Christian attorneys, law students, and law professors with chapters in nearly every state and at approximately 90 public and private law schools. CLS's legal advocacy and information division, the Center for Law and Religious Freedom, works for the protection of religious belief and practice, as well as for the autonomy from the government of religion and religious organizations, in state and federal courts throughout this nation. The Center for Law and Religious Freedom strives to preserve religious freedom in order that men and women might be free to do God's will. As the founding instrument of this nation acknowledges, it is a "self-evident truth" that all persons are divinely endowed with rights that no government may abridge nor any citizen waive. Among such inalienable rights is the right of religious liberty.

In the wake of the Supreme Court's decision in *City of Boerne v. Flores*, 521 U.S. 507 (1997), CLS played a leading role in a coalition formed to support new religious freedom legislation. *See Religious Liberty Protection Act: Hearing on H.R. 1691 Before the Subcomm. on the Constitution of the House Comm. on the Judiciary*, 106th Cong. 225–

313 (2000) (statement of Steven T. McFarland, Director, Center for Law and Religious Freedom, Christian Legal Society). The efforts of CLS and numerous other religious liberty organizations led to congressional passage of the Religious Land Use and Institutionalized Persons Act of 2000, 42 U.S.C. §§ 2000cc, *et seq.* ("RLUIPA"). Since its enactment, CLS has participated as *amicus curiae* in numerous RLUIPA cases.

Christian Camp and Conference Association, International ("CCCA") is a nonprofit, nondenominational association of Christian camps and conference centers and those engaged in such ministry. CCCA provides valuable resources for leaders in Christian camp/conference ministry, and for people seeking a Christian camping experience. Our Mission: CCCA exists to maximize the ministry for member camps and conference centers. CCCA proclaims the power and benefits of the Christian camp and conference experience, and provides leaders at member organizations with ongoing encouragement, professional training and timely resources.

CCCA's focused interest in this case and purpose in joining on this *amicus curiae* brief is its commitment to and knowledge of Christian camping as a significant religious activity. Christian camp and

conference center facilities and property are integral to the spiritual activity and religious mission of proclaiming Jesus Christ in an outdoor setting, recognizing and enjoying God's creation, and unique opportunity of ministering to spiritual needs of campers in this setting. Christian camp and conference center ministry is a religious exercise and should be recognized as such by the Court.