No. 11-106

In The
Supreme Court of the United States

CITY OF SAN LEANDRO,

Petitioner,

versus

INTERNATIONAL CHURCH
OF THE FOURSQUARE GOSPEL,

Respondent.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

REPLY TO THE BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

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INTRODUCTION

Pursuant to Sup. Ct. R. 15.6, Petitioner City of San Leandro ("San Leandro" or "the City") respectfully submits this Reply to Respondent International Church of the Foursquare Gospel ("Church") Brief in Opposition to San Leandro's Petition for Writ of Certiorari.

ARGUMENT

I. There Is a Split in Authority on the Definition of "Substantial Burden" That Requires This Court's Attention and This Case Is an Ideal Vehicle for That Consideration

The Respondent does not argue that there is no actual split in authority on the interpretation of "substantial burden" in free exercise land use cases. Indeed, the Ninth Circuit noted such a split. Pet. at App. 23 (9th Cir. 2011) [hereinafter *ICFG II*]. Rather, the Respondent concedes that the Second, Seventh, and Ninth Circuits have indicated that cost and convenience are relevant to "substantial burden." Brief in Opposition to Petition for Certiorari at 4, *City of San Leandro v. International Church of the Foursquare Gospel*, No. 11-106 (U.S. Aug. 25, 2011) [hereinafter "Resp. Opp."]. Yet, Respondent does not acknowledge those circuits that have rejected cost and convenience as relevant criteria for free exercise analysis, even though they were cited in the Petition. *See* Petition for Writ of Certiorari at 15-19, *City of San Leandro v. International Church of the Foursquare Gospel*, No. 11-106 (U.S. July 11, 2011) [hereinafter

"Pet."] (citing *Grace United Methodist Church v. City Of Cheyenne*, 451 F.3d 643, 660 (10th Cir. 2006); *Konikov v. Orange County*, 410 F.3d 1317, 1323-24 (11th Cir. 2005); *Midrash Sephardi, Inc. v. Town of Surfside*, 366 F.3d 1214 (11th Cir. 2004), *cert. denied*, 543 U.S. 1146 (2005); *Henderson v. Kennedy*, 253 F.3d 12, 17 (D.C. Cir. 2001), *cert. denied*, *Henderson v. Mainella*, 535 U.S. 986 (2002); *Branch Ministries v. Rossotti*, 211 F.3d 137, 142-44 (D.C. Cir. 2000); *Messiah Baptist Church v. County of Jefferson*, 859 F.2d 820, 825 (10th Cir. 1988); *Grosz v. City of Miami Beach*, 721 F.2d 729, 739 (11th Cir. 1983); *Lakewood, Ohio Congregation of Jehovah's Witnesses, Inc. v. City of Lakewood*, 699 F.2d 303, 306, 309 (6th Cir. 1983)).

Instead of meeting head-on the existence of the split in authority on the interpretation of "substantial burden," the Respondent tries to deflect from the obvious split by constructing an argument that this case is not a good vehicle for this Court to address the issue. Respondent's arguments are misleading and misplaced. This case is an ideal vehicle procedurally and factually for this Court's consideration of this critical issue.

The Respondent claims that the Ninth Circuit's interpretation of "substantial burden" does not rest on cost or convenience. Respondent's attempt to minimize the relevance of cost and convenience to the decision cannot be taken seriously. The Ninth Circuit reasoned that it is not enough for the government to create capacious zoning for religious uses. According to the Ninth Circuit, a religious entity has a right to

overcome contrary zoning if properly zoned properties are not currently on the market when the church is looking, which is the ultimate in convenience for any developer. *ICFG II*, Pet. at App. 21. The Ninth Circuit also followed the Second Circuit's and Seventh Circuit's reasoning that "'delay, uncertainty, and expens[e],'" can be sufficient to prove a substantial burden. *Id.* at App. 22-24. Again, this is using cost and convenience as criteria to determine substantial burden.

The Respondent also tries to shoehorn this case into *Church of Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520 (1993), by asserting that the Ninth Circuit found that there was discrimination, targeting, hostility, or animus by San Leandro. Resp. Opp. at 3, 6, 13, 16, 17. This is incorrect. The record simply does not support such a finding, which is why neither the District Court nor the Ninth Circuit found any of the above.

The Ninth Circuit's remand order was not for the purpose of determining whether there was targeting or discrimination, but rather whether there is a substantial burden on Respondent. "There is no evidence whatsoever that the City 'targeted' the Church for anti-religious discrimination, or that the City has taken any action to interfere with the Church's exercise of religion at the Church's current location." Pet. at App. 82 (N.D. Cal. Dec. 22, 2008) [hereinafter *ICFG I*]; *see also ICFG II*, Pet. at App. 1-29 (nowhere explaining that discrimination or hostility

formed any part of its decision); *ICFG I*, Pet. at App. 56 (stating "no evidence of intentional discrimination or arbitrary conduct toward the Church, and that the record instead reflects a good faith effort by the City to actually expand opportunities for religious assembly uses"); *Id.* at App. 64.

Respondent also has tried to rewrite the record, arguing that this case involves a "gerrymander" against a religious entity. Resp. Opp. at 16. Respondent has put the cart before the horse. When Respondent requested a zoning amendment to the Code to change the zoning from industrial use to assembly use, San Leandro was faced with a legislative decision. San Leandro took seriously the suggestion that it should expand religious uses. At the same time, it was constrained by the legal reality that it must enact zoning laws that are neutral and generally applicable. The City followed standard planning principles and greatly expanded opportunities for religious use by 196 properties, each of which met the General Plan's requirements and principles, and all eight of the neutral planning criteria to ensure the most appropriate fit between the General Plan's goals, the community's needs, and the intent to open more opportunities to religious entities. *See ICFG I*, Pet. at App. 41-43; *ICFG II*, Pet. at App. 12. The City applied the same rules to every industrial and commercial property in the City to expand religious uses and arrived at the addition of 196 parcels for which all eight criteria were met. *See id.*

When those neutral criteria were applied to Respondent's property, it failed two of the criteria and, therefore, the zoning change was denied. Further, there is no finding or proof anywhere in the record that the Respondent's "evangelism and corporate worship practices were rendered useless." *ICFG II*, Pet. at App. 8. The Respondent has thrived in San Leandro for decades, even at its current location. *See id.* at App. 5 (describing significant growth and development of church membership and activities at current location); *ICFG I*, Pet. at App. 32-33 (describing the same). There was no evidence that anybody actually was turned away because of congestion issues and no declarations from anyone who went elsewhere, nor any showing of decline in numbers or membership.

Nothing in the record supports a claim that there is no other location for the Respondent's religious activity. Respondent's inflammatory statement that it "would be forced to move out of the jurisdiction in order to maintain its principles," Resp. Opp. at 8, is contradicted by the record. While the Ninth Circuit set the bar at a remarkable level to the benefit of religious entities, thereby taking a clear side in the split in authority over "substantial burden," it did not hold that Respondent has no other options in San Leandro. Rather, its holding was that a church's real estate agent might be able to establish that there are no other properties currently available and, therefore, there could be a substantial burden. *See ICFG II*, Pet. at App. 21.

The Ninth Circuit's extreme interpretation of "substantial burden," which made the government responsible for the operation of the real estate market, still did not go so far as to support Respondent's attempt to leap frog the record to a finding of exclusion. The Assembly Use ("AU") Overlay District created by San Leandro to expand religious uses added 196 properties and over 200 acres. *See ICFG I*, Pet. at App. 39; *ICFG II*, Pet. at App. 12. In fact, the AU Overlay District was only one of two options contemplated by the City. Option 1, conditionally permitting assembly uses in all Industrial Limited ("IL") zoned areas, would have increased the areas in which assemblies were allowed by only 94 acres. *See ICFG I*, Pet. at App. 38. The second option, the AU Overlay District, increased opportunities by over double that amount. *See id.* at App. 38-39. The City chose the option which gave more opportunities to a growing church like Respondent. Moreover, there is no evidence in the record whatsoever showing that the Respondent cannot locate in San Leandro or intends to move its current campus location out of the City.

In fact, the Ninth Circuit did not find that the Respondent had carried its burden of proving a substantial burden, but rather sent the case back to the District Court for a trial on this issue. This is the most appropriate time in this case for this Court to take the question of what is appropriately relevant to proof of "substantial burden," as a time-consuming, expensive trial for both sides on "substantial burden"

is only worthwhile if there is a clear standard to be applied to the facts.[1]

Finally, Respondent's Opposition offers no answer to the fact that the burden imposed on it was self-inflicted when Pastor Gary Mortara signed an agreement to buy millions of dollars of property with the contingency for a zoning change deleted. Pet. at 9-10. The Respondent, appropriately, has conceded that "the marketplace in the City welcomed them." *ICFG II*, Pet. at App. 16. It now expects the federal courts to save it from its ill-considered financial decisions with a capacious interpretation of "substantial burden." This case squarely presents the question of the proper interpretation of "substantial burden," the issue was fully briefed below, the decisions below addressed the issue, and thousands of cities, counties, and states, as well as federal and state courts, would welcome this Court's clarification of this threshold free exercise concept.

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[1] The National League of Cities, International Municipal Lawyers Association, and other local government associations have asked this Court to take this case in order to ameliorate the high cost of uncertainty regarding the definition of "substantial burden." *See generally* Brief for the National League of Cities, the International Municipal Lawyers Association, The League of California Cities, and the California State Association of Counties as Amici Curiae in Support of Petitioner, *City of San Leandro v. International Church of the Foursquare Gospel*, No. 11-106 (U.S. Aug. 25, 2011).

II. There Is a Split on the Interpretation of "Individualized Assessment"

The Respondent has no answer to the fact of a split over the interpretation of "individualized assessment." The Respondent repeatedly asserts that the consideration of its application was "individualized." Resp. Opp. at 10, 13, 14. Respondent also quotes the holding of *Guru Nanak Sikh Society of Yuba City v. County of Sutter*, 456 F.3d 978 (9th Cir. 2006), as though pointing out an earlier Ninth Circuit interpretation somehow eliminates contrary interpretations in other circuits. *See* Resp. Opp. at 12-13. But Respondent is simply embracing one side of the split, the side that treats "individualized assessment" as meaning nothing more than "case-by-case" analysis. *See, e.g.*, *Konikov v. Orange County,* 410 F.3d 1317, 1323 (11th Cir. 2005); *Midrash Sephardi, Inc. v. Town of Surfside,* 366 F.3d 1214, 1225, 1229, 1236 (11th Cir. 2004); *Trinity Assembly of God of Baltimore City, Inc. v. People's Counsel for Baltimore County,* 962 A.2d 404, 424-26 (Md. 2008).

On Respondent's reasoning, any case decided by any court would be "individualized," because it involves the application of law to a particular applicant, and, therefore, strict scrutiny should apply. It is a nonsensical interpretation of a legal term of art, and no answer to the fact of a split in authority on the proper interpretation of "individualized assessment" among the courts. Pet. at 10-13.

Respondent attempts to dispel the split with its confident assertion that the text and history of the Religious Land Use and Institutionalized Persons Act ("RLUIPA"), 42 U.S.C. §§ 2000cc *et seq.* (2006) support its definition of "individualized assessment," and the City is somehow mistaken in "rel[ying] on legislative history from a bill that was never enacted, the Religious Liberty Protection Act." Resp. Opp. at 10. The Respondent omits a key piece of RLUIPA's history. There were no RLUIPA hearings; the RLPA hearings addressing land use law were the only hearings for RLUIPA. *See* Marci A. Hamilton, *Federalism and the Public Good: The True Story Behind the Religious Land Use and Institutionalized Persons Act*, 78 IND. L.J. 311, 334 (2003).

The Respondent also misleads this Court with its reference to the phrases "uniquely important" or "unique importance" in the record. Resp. Opp. at 13, 17-18. Respondent implies that the Catalina property is uniquely suited to itself, but that is not how this phrase has been employed in this case. To the contrary, the City has argued consistently that the Catalina property is particularly important to this high-tech industrial district. It is unique, because it is the only industrial zoned land in the entire City that can service high-tech industrial users. That is what makes it unique and weighs in favor of the denial of the requested zoning change, along with the application of the obviously neutral and generally applicable eight criteria. *ICFG I*, Pet. at App. 59 ("The City notes that while it may not have a compelling interest in

preserving every industrially zoned parcel for industrial uses, it has a compelling interest in preserving some land for industrial use. The Catalina property site historically employed some 400 people, and the City contends that the site is uniquely important by virtue of its location and current accommodations to the preservation of a viable industrial base in the City. The City asserts that denial of the rezoning request was indisputably the only practical – and therefore least restrictive – means of achieving the City's legitimate goal."); *see also ICFG II*, Pet. at App. 27-29.

III. There Is Confusion Whether There Can Be a "Compelling Interest" in a General Plan and Planning Principles

As the amicus brief by local land use planners establishes, there are strong reasons for a court to find that a General Plan and planning principles can establish a compelling interest. *See* Brief of Amicus Curiae The California Chapter of the American Planning Ass'n in Support of Petitioner at 11-17, 19-20, *City of San Leandro v. International Church of the Foursquare Gospel*, No. 11-106 (U.S. Aug. 24, 2011). *See also ICFG II*, Pet. at App. 7-8. Respondent's argument that a General Plan and planning values can never constitute a compelling interest is an extreme interpretation of RLUIPA that turns RLUIPA into a tool by the federal government to nullify that which is the "bastion" of local control and community character. *See Congregation Kol Ami v. Abington Township,* 309 F.3d 120, 135 (3rd Cir. 2002)

("Indeed, land use law is one of the bastions of local control, largely free of federal intervention."). While the confusion on this issue among the courts is not as pronounced as that surrounding "substantial burden" or "individualized assessment," the issue is part and parcel of land use cases. The parties, all local and state governments, and the courts would benefit from clarification on this central point raised in many free exercise land use cases.

The Ninth Circuit acknowledged, but failed to give adequate weight to, the difficulties local governments face in situating uses throughout a community in complementary fashion. Local and state governments must weigh many criteria at once to reach the optimal results for their communities. In this case, Planning Director Debbie Pollart

> was particularly concerned about the potential for conflict between industrial and assembly uses. She felt there was a need to protect assembly uses from unacceptable impacts such as noise, dust, or constant truck traffic. Pollart similarly wanted to protect industrial uses from complaints by assembly uses. Pollart was equally concerned that industrial and commercial uses could be displaced by assembly uses, which could hurt the City's industrial and economic base.

ICFG II, Pet. at App. 7-8. These complex and good faith concerns, based on settled planning principles, received short shrift from the Ninth Circuit, which was more than willing to replace the City's balance of interests with its own.

The Respondent reduces all of the City's concerns to "arbitrary economic" concerns. Resp. Opp. at 4. The record and the opinions below establish, however, that significantly more was at work for San Leandro than economics. Yet, Petitioner does not intend to concede that economic concerns can never be compelling. In this era of fiscal difficulty, and for some communities, disaster, holding onto an industrial base, jobs, and a reasonable tax base is a compelling interest of the first order. While religious organizations often treat fiscal concerns as merely "worldly," they are compelling interests for many local and state governments in this era.

The Ninth Circuit also exhibited little respect for the professional effort and expense cities and local governments invest in plans and zoning decisions. It even went so far as to find that a commercial property on the market for a mere seven months showed that the property was "unable to sustain the use preferred by the City." *ICFG II*, Pet. at App. 29. The Ninth Circuit ignored San Leandro's long history of diligently fostering industrial and employment uses to serve the people. The Ninth Circuit's reasoning is a recipe for federal control of local economies as well as community character and values at the most local level. It is hard to imagine a more striking interference with long-recognized federalism principles. Pet. at 3.

CONCLUSION

For the foregoing reasons and those in the Petition, Petitioner respectfully requests that the Petition for a Writ of Certiorari is GRANTED so that the persisting and widespread confusion regarding key free exercise terms can be dispelled by this Court.

Respectfully submitted,

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Dated: September 2, 2011

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