

# 03-9042

**In the United States Court of Appeals for the Second Circuit**

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WESTCHESTER DAY SCHOOL,

*Plaintiff-Appellee,*

- against -

VILLAGE OF MAMARONECK, et al.,

*Defendants-Appellants.*

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF NEW YORK

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Brief *Amicus Curiae* of the Becket Fund for Religious Liberty, the Council for Christian Colleges and Universities, and the Association of Christian Schools International in Support of Plaintiff-Appellee and in Support of Affirmance

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THE BECKET FUND FOR RELIGIOUS LIBERTY  
Anthony R. Picarello, Jr.\*  
Roman P. Storzer  
Derek L. Gaubatz  
1350 Connecticut Avenue, NW, Suite 605  
Washington, DC 20036-1735  
Telephone: (202) 955-0095  
Facsimile: (202) 955-0090

*Attorneys for Amici Curiae*

\*Counsel of Record

## **CORPORATE DISCLOSURE STATEMENT**

Pursuant to Federal Rule of Appellate Procedure 26.1, *amici* state that none of the *amici* has a parent corporation, nor does any *amicus* issue any stock.

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## **INTEREST OF THE AMICI**

Pursuant to Fed. R. App. P. 29, the Becket Fund for Religious Liberty, the Council for Christian Colleges and Universities, and the Association of Christian Schools International respectfully submit this brief *amicus curiae* in support of Appellee Westchester Day School (the “School”) and affirmance. Counsel for all parties have consented to the filing of this brief. Fed. R. App. P. 29(a). *Amici* share a common interest in assuring that the Religious Land Use and Institutionalized Persons Act of 2000, 42 U.S.C. § 2000cc, *et seq.* (“RLUIPA”), is both upheld as constitutional and interpreted to address effectively the discretionary burdens that local governments so commonly impose on core religious activities – including religious education – through land-use laws. *Amici* believe that their collective experience as institutions that use land for religious educational purposes will offer the Court a perspective that is helpful in its resolution of this appeal. Appendix A contains additional information about each *amicus*.

## **SUMMARY OF ARGUMENT**

*Amici* submit this brief to address two points.

*First*, a threshold question in this case – as in all cases arising under § 2(a) of RLUIPA – is whether the government has imposed a substantial burden on religious exercise. The religious land-use cases make clear that, in assessing

whether a burden on religious exercise is “substantial,” courts should determine whether government action puts pressure on a religious institution to modify its religious behavior, or prevents it from engaging in religious conduct, in a way that is greater than a mere inconvenience. The lower court properly applied this test, finding that the Village’s flat rejection of the School’s application to expand its existing facility prevents the School from engaging in the full range of activities necessary to fulfill its religious mission: providing students a Jewish education.

Rather than seriously confront the burden that its prohibition has imposed on the School’s religious exercise, the Village mistakenly relies on an inapposite line of cases involving facial challenges to the requirement merely to apply for a zoning permit. However, the standard applicable to such facial challenges has never been applied to cases like this one, which involve as-applied challenges to the denial of a particular permit.

*Second*, this Court should join the overwhelming majority of cases to address the issue and hold that RLUIPA Section 2(a), as applied through Section 2(a)(2)(C), is a valid exercise of Congress’ Enforcement Clause power under *City of Boerne v. Flores*, 521 U.S. 507 (1997), and its progeny. First, these Sections precisely target, according to current Supreme Court precedent, state and local land-use laws that are unconstitutional. Second, to the extent these Sections “prevent” or “deter” constitutional injuries at all, they are amply justified by a

“history and pattern” of constitutional violations reflected in RLUIPA’s legislative history, and they employ “congruent” and “proportional” means to that end.

## ARGUMENT

### **I. The Village Fails to Correctly State or Apply the Standard for What Constitutes a Substantial Burden on Religious Exercise In Cases Like This One, Which Involve an As-Applied Challenge to the Denial of a Land-Use Permit.**

#### **A. Courts have consistently held, under both RLUIPA and the Free Exercise Clause, that land use regulations impose a “substantial” burden when they prohibit religious behavior, or apply pressure to modify such behavior, in a way that is greater than mere inconvenience.**

Courts routinely confront cases in which land-use regulations interfere with religious exercise. From that jurisprudence, a standard has emerged for assessing whether such burdens are “substantial” – a standard that this Court should apply here to affirm the court below. A court in this circuit has recently set forth the standard:

Substantial burden has been defined or explained in various ways by the courts. *See Thomas [v. Review Bd. Of Indiana Employment Sec. Div., 450 U.S. 707, 718 (1981)]* (exists where state “put[s] substantial pressure on an adherent to modify his behavior and to violate his beliefs”); *Sherbert [v. Verner, 374 U.S. 398, 404 (1963)]* (occurs when a person is required to “choose between following the precepts of her religion and forfeiting benefits, on the one hand, and abandoning the precepts of her religion . . . on the other”); *Bryant v. Gomez, 46 F.3d 948, 949 (9<sup>th</sup> Cir. 1995)* (state action “prevent[s] him or her from engaging in conduct or having a religious

experience that is central<sup>1</sup> to the religious doctrine.”); *Reese v. Coughlin*, No. 93 CIV. 4748 (LAP), 1996 WL 374166, \*6 (S.D.N.Y. July 3, 1996) (quoting *Davidson v. Davis*, No. 92 CIV. 4040 (SWK), 1995 WL 60732, \*5 (S.D.N.Y. Feb. 14, 1995)) (same). This burden must be more than an inconvenience to the plaintiffs, but the court’s “scrutiny extends only to whether a claimant sincerely holds a particular belief and whether the belief is religious in nature.” *Jolly v. Coughlin*, 76 F.3d 468, 476 (2d Cir. 1996).

*Murphy v. Town of New Milford*, 148 F. Supp. 2d 173 (D. Conn. 2001).

Another recent RLUIPA decision, *Guru Nanak Sikh Society v. Sutter County*, No. S-02-1785 (E.D. Cal. Nov. 19, 2003) (Ex. B to Appellee’s Br.), formulates the standard similarly:

To meet the “substantial burden” standard the governmental conduct being challenged must actually inhibit religious activity in a concrete way, and cause more than a mere inconvenience.

*Id.* at 25 (finding substantial burden where county denied congregation permit to build temple). *See also Cottonwood Christian Center v. Cypress*, 218 F. Supp. 2d 1203, 1226 (C.D. Cal. 2002) (quoting and adopting substantial burden standard set forth in *Murphy*, and finding substantial burden where municipality denied permit to church seeking to relocate from inadequate facility); *Shepherd Montessori*

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<sup>1</sup> Under both RLUIPA and the Free Exercise Clause, courts may not inquire into the “centrality” of a religious practice when assessing whether a burden on it is substantial. *See* RLUIPA § 8(7)(A) (defining “religious exercise” to include “any exercise of religion, whether or not compelled by, or central to, a system or religious belief.”); *Fifth Ave. Presbyterian v. City of New York*, 293 F.3d 570 (2d Cir. 2002) (“Because ‘[t]he free exercise of religion means, first and foremost, the right to believe and profess whatever religious doctrine one desires,’ courts are not permitted to inquire into the centrality of a professed belief to the adherent’s religion”) (quoting *Smith*, 494 U.S. at 886-87).

*Center v. Ann Arbor*, 2003 WL 22520439 (Mich. App. Nov. 6, 2003) (governmental regulation imposes substantial burden under RLUIPA if it “compel[s] action or inaction with respect to the sincerely held belief; mere inconvenience to the religious institution or adherent is insufficient.”).

In addition to these RLUIPA decisions, courts have defined “substantial burden” similarly in religious land-use cases brought under the Free Exercise Clause and RFRA. *See, e.g., Stuart Circle Parish v. Bd. of Zoning Appeals*, 946 F. Supp. 1225 (E.D. Va. 1996) (“[A] substantial burden on the free exercise of religion . . . is one that forces adherents of a religion to refrain from religiously motivated conduct, or inhibits or constrains conduct or expression that manifests a central tenet of a person’s religious beliefs,....”) (quoting *Mack v. O’Leary*, 80 F.3d 1175, 1178 (7<sup>th</sup> Cir. 1996)); *Jesus Center v. Farmington Hills*, 544 N.W.2d 698, 703 (Mich. Ct. App. 1996) (church shelter services flowing from church’s “religious beliefs . . . is an exercise of those beliefs,” so government limit on those services imposes substantial burden even if services could be provided elsewhere); *Alpine Christian Fellowship v. Cy. Comm’rs of Pitkin*, 870 F. Supp. 991, 994 (D. Colo. 1994) (holding that “[t]he first question under *Sherbert* is whether the County has placed a burden on conduct which is motivated by a sincerely held religious belief,” and finding that denying permit for operation of religious school imposed substantial burden).

In sum, the cases teach that the appropriate standard for determining whether a burden is “substantial” is to ask whether *government action puts pressure on a religious institution to modify its religious behavior, or prevents it from engaging in religious conduct, in a way that is greater than a mere inconvenience.*<sup>2</sup>

Here, application of this test to the undisputed facts readily supports the lower court’s holding that denying a special use permit to the School for a chapel, modern classrooms for religious and secular instruction, and sufficient facilities to accommodate additional students seeking a Jewish education is no mere inconvenience, but instead substantially burdens the School’s ability to carry out its religious mission. Put another way, the Village’s flat rejection of the School’s permit application—consigning the School to continue its religious exercise in inadequate, outmoded facilities—actually inhibits the School from engaging in the full range of activities necessary to carry out its religious mission to provide students a Jewish education.

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<sup>2</sup> The lower court’s formulation of the substantial burden standard was in accord with these other courts:

District court cases interpreting RLUIPA since its enactment delineate the difference between a “substantial burden” on religious exercise as opposed to an “inconvenience” on religious exercise. Consistent with the Supreme Court’s substantial burden test, district courts have concluded that the regulations must have a “chilling effect” on the exercise of religion to substantially burden religious exercise.

*Westchester Day School v. Village of Mamaroneck*, 280 F. Supp. 2d 230, 240 (S.D.N.Y. 2003).

**B. The Village fails to recognize the distinction between suits like this one, that challenge the denial of a particular use permit, and suits that facially challenge the general requirement to seek a permit.**

The Village's assertion that the School has not demonstrated a substantial burden falters at the outset by relying primarily on *Civil Liberties for Urban Believers v. City of Chicago*, 342 F.3d 752 (7<sup>th</sup> Cir. 2003) ("*C.L.U.B.*"). The Village notably omits that the *C.L.U.B.* decision falls into a distinct category of religious land use cases where courts generally hold there is no substantial burden: cases involving a *facial* challenge to the zoning permitting process, arguing that *merely having to apply* for a permit substantially burdens religious exercise. In sharp contrast, this case involves a challenge to a *particular denial* of a land use permit to engage in religious exercise. It is a firmly entrenched distinction in religious land-use cases that the general requirement to apply for a permit does *not* impose a substantial burden, but that the particular denial of such a permit may.

Courts evaluating the *denial* of permits (or similar, individualized, discretionary prohibitions) for religious institutions consistently hold that such denials may impose a substantial burden:

- *United States v. Maui*, \_\_ F. Supp. 2d \_\_, 2003 WL 23148864, \*5-6 (D. Haw. Dec. 29, 2003): Denial of conditional use permit; court held that denial of permit preventing church from relocating from existing inadequate facility involved system of individualized assessment and allegations of complaint concerning burden imposed on religious exercise were sufficient to withstand motion to dismiss.

- *Guru Nanak, supra*: Denial of conditional use permit for temple; court held that preventing construction of a new temple imposed a substantial burden.
- *Murphy v. New Milford*, 289 F. Supp. 2d 87 (D. Conn. 2003): Discretionary cease and desist order against religious meetings; court held that forbidding prayer group from meeting in home substantially burdened religious exercise.
- *Elsinore Christian Center v. Lake Elsinore*, 2003 WL 22724539, \*6 (C.D. Cal. Aug. 21, 2003): Denial of conditional use permit; court held that prohibiting use of property as church imposed a substantial burden.<sup>3</sup>
- *Cottonwood, supra*: Denial of conditional use permit and attempted taking; court held that preventing construction of new church needed to replace current inadequate facility imposed a substantial burden.
- *DiLaura v. Ann Arbor*, 30 Fed. Appx. 501 (6<sup>th</sup> Cir. 2002): Denial of a variance; court held that allegations of complaint were sufficient to show that denying permission to gather for prayer on religious institution's land may impose a substantial burden.
- *First Covenant Church v. Seattle*, 840 P.2d 174 (Wash. 1992): Designation of church property as "landmark"; court held that prohibiting church from altering structure's exterior was a substantial burden on religious exercise.
- *Alpine Christian Fellowship, supra*: Denial of special use permit; court held forbidding the operation of religious school imposed a substantial burden.
- *Jesus Center, supra*: Discretionary decision prohibiting homeless shelter; court held that prohibiting the operation of shelter imposed a substantial burden.

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<sup>3</sup> It is noteworthy that even the lone court to find RLUIPA § 2(a) unconstitutional acknowledged that the denial of a conditional use permit prohibiting the expansion of religious exercise imposed a substantial burden.

Consistent with this line of cases, the court below held that the Village’s denial of a special use permit – and consequent prevention of the School’s ability to make needed changes to address the quality of its religious educational experience – imposed a substantial burden.

On the other hand, *facial* challenges to zoning ordinances of the sort brought in *C.L.U.B.* often fail, as courts routinely hold that merely having to apply is not a substantial burden on religious exercise:<sup>4</sup>

- *C.L.U.B.*, 342 F.3d at 761: Challenge to permit requirement; court held that requirement of applying for a permit was not a substantial burden on churches because it did not render their religious exercise “effectively impracticable.”
- *Open Door Baptist Church v. Clark Cy.*, 995 P.2d 33 (Wash. 2000): Challenge to permit requirement; court held that the permit requirement did not substantially burden religious exercise, but that denial of such a permit would be subject to strict scrutiny.
- *Tran v. Gwinn*, 554 S.E.2d 63 (Va. 2001): Challenge to permit requirement; court held that there was no free exercise right to be free from permit requirement, but that denial of permit could be subject to strict scrutiny.
- *First Assembly of God of Naples v. Collier Cy.*, 20 F.3d 419 (11<sup>th</sup> Cir. 1994): Challenge to permit requirement; court held that being subjected to such a requirement did not substantially burden church’s religious exercise.

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<sup>4</sup> Courts have, however, struck down zoning ordinances that substantially burden religious exercise on their face as well. *See, e.g., Stuart Circle Parish, supra; Western Presbyterian Church v. Bd. of Zoning Adjustment*, 862 F. Supp. 538 (D.D.C. 1994) (ordinance preventing some religious activities at church imposed a substantial burden).

- *Area Plan Comm'n v. Wilson*, 701 N.E.2d 856 (Ind. App. 1998): Requirement of a zoning permit; court held that the mere requirement of having to apply was not a substantial burden, but that denial of the permit would be subject to strict scrutiny.
- *Petra Presbyterian Church v. Northbrook*, No. 03-1936, 2003 WL 22048089 (N.D. Ill. Aug. 29, 2003): Facial challenge to zoning ordinance; court held that ordinance declaring uses permitted or not permitted in various districts did not substantially burden religious exercise.
- *Korean Buddhist Dae Won Sa Temple v. Sullivan*, 953 P.2d 1315, 1320, 1344-47 (Haw. 1998): Challenge to code's height restriction; court held that prohibiting Temple from unilaterally raising roof height *without requesting permit* did not impose a substantial burden.

Plainly, the burden on the School's religious exercise imposed by the denial of the permit falls within the former group of cases, not the latter.

Indeed, closer examination of the facts in *C.L.U.B.* only heightens the contrast to this case. There, several Chicago churches facially challenged Chicago's requirement that churches obtain a permit to locate in certain zones. In particular, they argued that "the costs, procedural requirements, and inherent political aspects of [Chicago's] Special Use, Map Amendment, and Planned Development approval processes, impose . . . a substantial burden." *C.L.U.B.*, 342 F.3d at 761. The court rejected this challenge because the churches had not shown that their religious exercise was rendered "effectively impracticable," as all "plaintiff churches ha[d] successfully located within Chicago's city limit. That they expended considerable time and money so to do does not entitle them to

relief.” *Id.* Unlike *C.L.U.B.*, the School here is not challenging the permit requirement, but rather the denial of the permit it properly applied for.<sup>5</sup> Although the permitting process *alone* may not be a substantial burden, denying the permit is, because it inhibits the School from making changes necessary to fulfill the School’s religious educational mission.

Moreover, although the Village harps on the “effectively impracticable” language in *C.L.U.B.*, this standard cannot be divorced from the specific context of that case. Again, *C.L.U.B.* involved a facial challenge and notably did not involve the evaluation of even a single decision to deny a zoning permit (*i.e.*, no decision involving “individualized assessments”). Requiring plaintiffs to show their religious exercise would be rendered “effectively impracticable” is consistent with the normal burden for plaintiffs bringing a facial challenge to show that “no set of circumstances exists” in which the law can be applied constitutionally. *United States v. Salerno*, 481 U.S. 739, 745 (1987). Notably, the “effectively impracticable” standard has *never* been applied in cases challenging the individualized decision to deny a particular use permit. *See, e.g., Maui Cy.*, 2003 WL 23148864, at \*6 (holding that because *C.L.U.B.* involved a “facial challenge,” its standard did not apply to “an as-applied challenge” to denial of permit); *Guru Nanak*, slip op. at 28 (refusing to apply *C.L.U.B.* standard to as-applied challenge).

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<sup>5</sup> The School did not simply ignore the permit requirement, as did the plaintiffs in *Tran* and *Korean Buddhist*, *supra*.

## II. **RLUIPA Section 2(a), as Applied Through Section 2(a)(2)(C), Is a Legitimate Exercise of Congress’ Power Under the Enforcement Clause.**

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In *City of Boerne v. Flores*, 521 U.S. 507 (1997), the Court held that, as applied to the states, the Religious Freedom Restoration Act (“RFRA”) was an unconstitutional exercise of congressional authority under the Enforcement Clause of the Fourteenth Amendment. The Village argues that in enacting RLUIPA, Congress simply ignored *Boerne* and repeated its unconstitutional behavior.

Although RFRA and RLUIPA are similar in some respects—both were designed to strengthen the protection of religious liberty and both were passed overwhelmingly as a result of broad, bipartisan support—they are different in all respects relevant to the Enforcement Clause analysis in *Boerne* and its progeny.<sup>6</sup> This crucial difference is the result of a painstaking effort by legislators to *comply* with the requirements of *Boerne*—not, as the Village suggests, to usurp judicial authority to define constitutional violations. Accordingly, RLUIPA codifies *current* First and Fourteenth Amendment standards—based on *overwhelming* evidence in the legislative history demonstrating the need for better enforcement of those standards—and institutes eminently *proportional* remedies. Thus, by design,

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<sup>6</sup> In *Boerne*, the Court reaffirmed a long line of cases holding that Section 5 authorizes Congress to fashion legislation that “deters” or “prevent[s]” constitutional violations, “even if in the process it prohibits conduct which is not itself unconstitutional and intrudes into legislative spheres of autonomy previously reserved to the States.” *Boerne*, 521 U.S. at 518, 524 (internal quotations omitted).

RLUIPA respects the Court’s Enforcement Clause jurisprudence and falls squarely within the bounds of that enumerated power.

As illustrated below, RLUIPA Sections 2(a) and 2(a)(2)(C) satisfy the Supreme Court’s analysis under the Enforcement Clause. Far from redefining the substance of constitutional law, those Sections merely restate and codify that part of the “substantial burden” test from *Sherbert v. Verner*, 374 U.S. 398 (1963), that remains after it was distinguished in *Employment Div. v. Smith*, 494 U.S. 872 (1990). Because the statute does not extend beyond existing Free Exercise Clause protections, it requires no further justification under the Enforcement Clause. *See Bd. of Trustees of Univ. of Ala. v. Garrett*, 531 U.S. 356, 365 (2001) (noting that only “§ 5 legislation **reaching beyond** the scope of § 1’s actual guarantees must exhibit ‘congruence and proportionality....’”) (emphasis added).

But even if these provisions are deemed “preventive” or “deterrent”—that is, if they prohibit government action that is not **already** unconstitutional—they are eminently “congruent” and “proportional” to the harms that prompted their passage. RLUIPA’s legislative history contains an extensive factual record establishing the constitutional injuries that land-use authorities inflict frequently and nationwide, and the RLUIPA provisions at issue are carefully tailored to address only those injuries. *Boerne*, 521 U.S. at 520. Thus, Congress had ample

“reason to believe that many of the laws affected by [RLUIPA] have a significant likelihood of being unconstitutional.” *Id.* at 532.

**A. RLUIPA Section 2(a) precisely targets, according to current Supreme Court precedent, state and local land-use laws that are unconstitutional.**

RLUIPA § 2(a), when applied through § 2(a)(2)(C), affects only unconstitutional land-use laws, because those RLUIPA provisions were designed to do little (if anything) more than codify current Free Exercise substantial burden jurisprudence. Specifically, where a land-use regulation involving “individualized assessments of the proposed uses for ... property” imposes a “substantial burden on ... religious exercise,” these provisions require a showing that the law furthers “a compelling governmental interest” using the “least restrictive means.” RLUIPA §§ 2(a)(1), 2(a)(2)(C). This is precisely what remains of the “substantial burdens” test after *Smith*, except that it is further limited to the land-use context. The *Smith* Court ***did not overrule*** the cases applying the “substantial burdens” test—such as *Sherbert, Hobbie v. Unemplt. App. Comm’n*, 480 U.S. 136 (1987), and *Thomas v. Review Bd.*, 450 U.S. 707 (1982)—but instead ***distinguished them*** as cases involving systems of “individualized governmental assessment of the reasons for the relevant conduct.” *Smith*, 494 U.S. at 884.<sup>7</sup>

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<sup>7</sup> See, e.g., *Cottonwood*, 218 F. Supp. 2d at 1222 (*Smith* “left undisturbed the application of a strict scrutiny test to situations where there are ‘individualized governmental assessment[s].’”); *Freedom Baptist.*, 204 F. Supp. 2d at 873 (*Smith*

Although the *Smith* Court suggested that the “substantial burdens” test was *additionally* limited to the unemployment context, the only other Free Exercise decision by the Supreme Court since *Smith* expressly relied on the rationale of *Sherbert*, as narrowed by *Smith*, to invalidate a government action *outside the unemployment context*:

Further, because [the animal sacrifice law at issue] requires an evaluation of the particular justification for the killing, this ordinance represents a system of “individualized governmental assessment of the reasons for the relevant conduct.”

*Church of the Lukumi Babalu Aye v. Hialeah*, 508 U.S. 520, 537 (1993) (quoting *Smith*, 494 U.S. at 884).

As the Village is forced to concede, with the sole exception of *Elsinore*, every court to examine RLUIPA § 2(a) has recognized Congress’ unmistakable attempt to codify, rather than flout or expand, existing Free Exercise jurisprudence.<sup>8</sup> Indeed, Congress made absolutely explicit in the legislative history

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“distinguished neutral laws of general applicability from those ‘where the State has in place a system of individual exemptions.’”

<sup>8</sup> See, e.g., *Guru Nanak*, slip op. at 40 (“In limiting its applicability outside of the Spending and Commerce Clauses to those cases where governments make ‘individualized assessments,’ [RLUIPA] draws the very line *Smith* itself drew when it distinguished neutral laws of general applicability from those ‘where the State has in place a system of individualized exemptions,’ but nevertheless ‘refuse[s] to extend that system to cases of ‘religious hardship’” (quoting *Smith*, 494 U.S. at 884); *Hale O Kaula*, 229 F. Supp. 2d at 1072 (“Section [2(a)(2)](c) codifies the ‘individualized assessments’ doctrine, where strict scrutiny applies.”) (quoting *Lukumi*, 508 U.S. at 537); *Maui County*, slip op. at 13 (same); *Murphy*, 289 F. Supp. 2d at 119 (same); *Westchester Day*, 280 F. Supp. 2d at 236 (same);

its purpose to codify this especially common form of Free Exercise Clause violation in order to facilitate enforcement.<sup>9</sup> Similarly, *Elsinore* is anomalous in its refusal to acknowledge that the Supreme Court *itself* has applied “individualized assessments” doctrine outside the unemployment context. *See, e.g., Fraternal Order of Police v. City of Newark*, 170 F.3d 359, 364 (3d Cir. 1999) (recognizing Supreme Court’s application of “individualized assessments” doctrine outside unemployment context in *Lukumi*); *Life Teen*, slip op. at 27 (argument that individualized assessment exception applies only in unemployment compensation context is “not reasonable”). The *Elsinore* court is also unique in overlooking the fact that numerous lower courts applying Free Exercise doctrine after *Smith* have

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*Life Teen v. Yavapai Cy.*, No. 01-1490 at 28 (D.Ariz. Mar. 26, 2003) (Ex. D to Appellee’s Br.); *Cottonwood*, 218 F. Supp. 2d at 1221 (same); *Christ Universal Mission v. City of Chicago*, No. 01C1429, 2002 U.S. Dist. LEXIS 22917 (N.D.Ill. Sept. 11, 2002) (same); *Freedom Baptist*, 204 F. Supp. 2d at 868 (same).

<sup>9</sup> *See, e.g.*, 146 CONG. REC. S7775 (daily ed. July 27, 2000) (“The hearing record demonstrates a widespread practice of individualized decisions to grant or refuse permission to use property for religious purposes. These individualized assessments readily lend themselves to discrimination, and they also make it difficult to prove discrimination in any individual case.”); H.R. REP. NO. 106-219, at 17 (“Local land use regulation, which lacks objective, generally applicable standards, and instead relies on discretionary, individualized determinations, presents a problem that Congress has closely scrutinized and found to warrant remedial measures under its section 5 enforcement authority.”). *See also* 146 CONG. REC. S7775 (“Each subsection closely tracks the legal standards in one or more Supreme Court opinions, codifying those standards for greater visibility and easier enforceability.”).

applied the individualized assessments doctrine outside the unemployment context, and have done so with particular frequency inside the land-use context.<sup>10</sup>

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<sup>10</sup> See, e.g., *Guru Nanak*, slip op. at 41 n.10 (“it is beyond cavil that zoning decisions such as the [conditional use permit application] at issue in this case are properly described as individualized assessments”); *Hale O Kaula*, 229 F. Supp. 2d at 1073 (holding that special permit “provisions are a system of ‘individualized exemptions’ to which strict scrutiny applies” under Free Exercise Clause); *Cottonwood*, 218 F. Supp. 2d at 1222 (holding that City’s “land-use decisions . . . are not generally applicable laws,” and that refusal to grant church’s “CUP ‘invite[s] individualized assessments of the subject property and the owner’s use of such property, and contain mechanisms for individualized exceptions.’”); *Freedom Baptist*, 204 F. Supp. 2d at 868 (“no one contests” that land use laws “by their nature impose individualized assessment regimes”); *Al-Salam Mosque Fdn. v. Palos Heights*, 2001 WL 204772, at \*2 (N.D. Ill. 2001) (holding “free exercise clause prohibits local governments from making discretionary (*i.e.*, not neutral, not generally applicable) decisions that burden the free exercise of religion, absent some compelling governmental interest. . . . Land use regulation often involves ‘individualized governmental assessment of the reasons for the relevant conduct,’ thus triggering *City of Hialeah* scrutiny.”); *Tran*, 554 S.E.2d at 68 (distinguishing between generally applicable requirement to seek special use permit and “procedure requiring review by government officials on a case-by-case basis for a grant of a special use permit,” and holding that latter “may support a challenge based on a specific application of the special use permit requirement”); *Korean Buddhist*, 953 P.2d at 1344-45 n.31 (“The City’s variance law clearly creates a ‘system of individualized exceptions’ from the general zoning law.”); *Wilson*, 701 N.E.2d at 862 (holding that requirement to seek special use was neutral and generally applicable, but “denial of a special permit will be subject to strict review”); *Keeler v. Mayor of Cumberland*, 940 F. Supp. 879, 885 (D. Md. 1996) (holding that landmark ordinance “has in place a system of individualized exemptions”); *Alpine*, 870 F. Supp. at 994-95 (holding that denial of special use permit triggered strict scrutiny because determination was made under discretionary “appropriate[ness]” standard); *W. Presbyterian Church*, 862 F. Supp. at 545, 547 (recognizing that “[t]he Supreme Court’s decision in [*Smith*], . . . cut back to a certain level the scope of the compelling interest test,” but concluding that zoning action prohibiting feeding ministry “substantially burden[ed] their right to free exercise of religion” under First Amendment); *First Covenant*, 840 P.2d at 181 (holding that landmark ordinances “invite individualized assessments of the

Before *Smith*, “substantial burdens” on religious exercise triggered strict scrutiny *in every case*; after *Smith*, “substantial burdens” trigger strict scrutiny *only* in cases where the burden is imposed pursuant to a system of “individualized assessments.” To repeat, *Smith did not overrule* the prior “substantial burden” cases, but only limited the application of that test to the “individualized assessments” context. Because “individualized assessments” are especially common in decisions regarding particular land-use permits, Congress saw fit to enshrine this strand of *current* Free Exercise jurisprudence in RLUIPA § 2(a), when applied through § 2(a)(2)(C).

Because the Village relies on *Elsinore* as the sole example of a court finding RLUIPA § 2(a) to be unconstitutional, *amici* note some additional flaws in that decision. For example, the *Elsinore* court concluded that RLUIPA departs from existing Free Exercise jurisprudence by omitting judicial evaluation of the “centrality” of a burdened religious practice in determining whether the burden is “substantial.”<sup>11</sup> But RLUIPA omits the “centrality” inquiry precisely to *comply*

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subject property and the owner’s use of such property, and contain mechanisms for individualized exceptions”).

<sup>11</sup> 2003 WL 22724539, at \*6 (faulting RLUIPA for “explicitly prescribing that the centrality of a religious belief is immaterial to whether or not that belief constitutes ‘religious exercise’); *id.* at \*13 (emphasizing that the burdened activity in *Lukumi* was “central to the adherents’ religion,” as opposed to burdens on religious land use, which the opinion considers rarely to be “a ‘substantial burden’ on central religious practice under the Free Exercise Clause.”). *See* RLUIPA

with the Supreme Court’s admonition to avoid it.<sup>12</sup> This Court and countless lower courts since *Smith* have observed this limitation on the “substantial burden” inquiry.<sup>13</sup>

The *Elsinore* court also finds that RLUIPA’s “definitionally equating land use with ‘religious exercise,’” 2003 WL 22724539, at \*5-6, similarly attempts a revolution in Free Exercise jurisprudence. RLUIPA, however, does not equate

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§ 8(7)(A) (defining “religious exercise” to include “any exercise of religion, whether or not compelled by, or central to, a system of religious belief.”).

<sup>12</sup> *Smith*, 494 U.S. at 886-87 (“It is no more appropriate for judges to determine the ‘centrality’ of religious beliefs before applying a ‘compelling interest’ test in the free exercise field, than it would be for them to determine the ‘importance’ of ideas before applying a ‘compelling interest’ test in the free speech field.”); *Hernandez v. Comm’r*, 490 U.S. 680, 699 (1989) (“It is not within the judicial ken to question the centrality of particular beliefs or practices to a faith.”).

<sup>13</sup> See, e.g., *Fifth Ave. Presbyterian v. City of New York*, 293 F.3d 570 (2d Cir. 2002) (“Because ‘[t]he free exercise of religion means, first and foremost, the right to believe and profess whatever religious doctrine one desires,’ courts are not permitted to inquire into the centrality of a professed belief to the adherent’s religion”)(quoting *Smith*, 494 U.S. at 886-87); *Church of Scientology v. Clearwater*, 2 F.3d 1514, 1549 (11<sup>th</sup> Cir. 1993)(inquiry into centrality foreclosed by Supreme Court precedent); *Kreisner v. San Diego*, 1 F.3d 775, 781 (9<sup>th</sup> Cir. 1993)(same); *Salvation Army v. Dept. of Comm’y Affairs*, 919 F.2d 183, 189 n.4 (3d Cir. 1990)(same); *Cottonwood*, 218 F. Supp. 2d at 1227 n.12 (same); *McBride v. Shawnee Cy.*, 71 F. Supp. 2d 1098, 1101 (D. Kan. 1999)(same); *Warner v. Boca Raton*, 64 F. Supp. 2d 1272, 1284 (S.D. Fla. 1999)(same); *Al-Amin v. City of New York*, 979 F. Supp. 168, 171 (E.D.N.Y. 1997)(same); *Blanken v. Ohio Dept. of Rehab.*, 944 F. Supp. 1359, 1365 (S.D. Ohio 1996)(same); *Estep v. Dent*, 914 F. Supp. 1462, 1466-67 (W.D. Ky. 1996)(same); *Muslim v. Frame*, 891 F. Supp. 226, 230 (E.D. Pa. 1995)(same); *Religious Tech. Ctr. v. F.A.C.T.NET*, 907 F. Supp. 1468, 1472 (D. Colo. 1995)(same); *Luckette v. Lewis*, 883 F. Supp. 471, 478 (D. Ariz. 1995)(same); *Phipps v. Parker*, 879 F. Supp. 734, 736 (W.D. Ky. 1995)(same); *Campos v. Coughlin*, 854 F. Supp. 194, 211 (S.D.N.Y. 1994)(same).

“religious exercise” with *just any* use of land, but instead with the *religious* use of land. See RLUIPA § 8(7)(B) (“The use, building, or conversion of real property *for the purpose of religious exercise* shall be considered to be religious exercise....”) (emphasis added). And that modest proposition is difficult to deny: the only time religious exercise is not *also* religious land use is when it occurs on a boat or a plane.

Thus, what the Village and the *Elsinore* decision claim are vast disparities between RLUIPA and current “substantial burden” jurisprudence under the Free Exercise Clause are, in fact, not disparities at all. Instead, Sections 2(a) and 2(a)(2)(C) so closely track that constitutional standard that Congress did not just have a “reason to believe” – *but knew* – that not just “many” – *but virtually all* – of the state laws affected by these provisions did not just “have a significant likelihood of being” – *but actually were* – unconstitutional. *Boerne*, 521 U.S. at 532. The tight correspondence of legislative and constitutional standards puts to rest any claim that these RLUIPA provisions “alter the meaning of the Free Exercise Clause,” as RFRA did. *Id.* at 519. See *Freedom Baptist*, 204 F. Supp. 2d at 873 (RLUIPA “cannot be regarded as in any way hostile to *Smith*,” because “the statute draws the very line *Smith* itself drew”). Thus, the Enforcement Clause analysis may end here.

**B. RLUIPA’s legislative history reflects a “history and pattern” of constitutional violations caused by state and local land-use laws.**

The legislative history of RLUIPA reveals that Congress “compiled massive evidence,” 146 CONG. REC. S7774—based on nine hearings over a period of three years—that clearly establishes what the RFRA record did not: a “widespread pattern of religious discrimination in this country” in land-use regulation, including “examples of legislation enacted *or* enforced due to animus or hostility to the burdened religious practices.” *Boerne*, 521 U.S. at 531 (emphasis added). The congressional record reflects that land-use laws are commonly *both* enacted *and* enforced out of hostility to religion. *See Murphy*, 289 F. Supp. 2d at 118.<sup>14</sup> Congress found that discriminatory *application* of zoning laws is particularly common because, as here, zoning laws across the country are overwhelmingly discretionary; in other words, the systems of “individualized assessments”

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<sup>14</sup> Compare 146 CONG. REC. S7774 (“Churches in general, and new, small, or unfamiliar churches in particular, are frequently discriminated against *on the face* of zoning codes.”) (emphasis added), and Laycock, *State RFRA’s and Land Use Regulation*, 32 U.C. DAVIS L. REV. 755, 773 (1999) (discussing examples from congressional record of “evidence of discrimination *in the zoning codes themselves*”) (emphasis added), with 146 CONG. REC. S7774 (“Sometimes, zoning board members or neighborhood residents explicitly offer race or religion as the reason to exclude a proposed church, especially in cases of black Churches and Jewish shuls and synagogues. More often, discrimination lurks behind such vague and universally applicable reasons as traffic, aesthetics, or ‘not consistent with the city’s land use plan.’”).

described in *Smith* are especially common in the land-use context. *See id.* at 118 n. 31.<sup>15</sup>

These findings were backed by evidence presented to Congress in various forms, which were cumulative and mutually reinforcing. Some evidence was *statistical*, including national surveys of churches, zoning codes, and public attitudes.<sup>16</sup> Some was *judicial*, including “decisions of the courts of the States and

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<sup>15</sup> *See* 146 CONG. REC. S7775 (daily ed. July 27, 2000) (“The hearing record demonstrates a widespread practice of individualized decisions to grant or refuse permission to use property for religious purposes. These individualized assessments readily lend themselves to discrimination, and they also make it difficult to prove discrimination in any individual case.”); H.R. REP. NO. 106-219, at 17 (“Local land-use regulation, which lacks objective, generally applicable standards, and instead relies on discretionary, individualized determinations, presents a problem that Congress has closely scrutinized and found to warrant remedial measures under its section 5 enforcement authority.”). *See also Cottonwood*, 218 F. Supp. 2d at 1224 (noting that once the city “vest[ed] absolute discretion in a single person or body ...” “[t]hat decision-maker would then [be] free to discriminate against religious uses and exceptions with impunity, without any judicial review.”).

<sup>16</sup> The record contains at least four such studies. *See, e.g., Protecting Religious Freedom after Boerne v. Flores (III), Hearing Before the Subcomm. on the Constitution of the House Comm. on the Judiciary*, 105th Cong., 2d Sess., at 127-54 (Mar. 26, 1998) (statement of Von Keetch, Counsel to Mormon Church, <[http://commdocs.house.gov/committees/judiciary/hju57227.000/hju57227\\_of.htm](http://commdocs.house.gov/committees/judiciary/hju57227.000/hju57227_of.htm)>) (“Keetch Statement”) (summarizing and presenting findings of Brigham Young University study of religious land use conflicts); *Religious Liberty Protection Act of 1998: Hearing on H.R. 4019 Before the Subcomm. on the Constitution of the House Comm. on the Judiciary*, 105<sup>th</sup> Cong., 2d Sess., at 364-75 (June 16 and July 14, 1998) (“June-July 1998 House Hearings”) (statement of Rev. Elenora Giddings Ivory, Presbyterian Church (USA), <[http://commdocs.house.gov/committees/judiciary/hju59929.000/hju59929\\_of.htm](http://commdocs.house.gov/committees/judiciary/hju59929.000/hju59929_of.htm)>) (discussing survey by Presbyterian Church (USA) of zoning problems within that denomination); *id.* at 405, 415-16 (statement of Prof. Douglas Laycock, Univ. Texas Law Sch.)

... the United States [reflecting] extensive litigation and discussion of the constitutional violations.”<sup>17</sup> *Garrett*, 121 S. Ct. at 968 (Kennedy, J., concurring). Some was *anecdotal* evidence *paired with* testimony by experienced witnesses indicating that the anecdotes were representative.<sup>18</sup> *Cf. Garrett*, 121 S. Ct. at 965 (finding “half a dozen examples from the record” insufficient *by themselves* to establish pattern of constitutional violation).<sup>19</sup> *The Village*, like the *Elsinore*

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(discussing Gallup poll data indicating hostile attitudes toward religious minorities) (“Laycock Statement”); John W. Mauck, *Tales from the Front: Municipal Control of Religious Expression Through Zoning Ordinances*, at 7-8 (July 9, 1998) (statement submitted to Congress, <<http://www.house.gov/judiciary/mauck.pdf>>, to supplement live testimony of June 16, 1998) (“Mauck Statement”) (compiling zoning provisions affecting churches in 29 suburbs of northern Cook County).

<sup>17</sup> See Keetch Statement, at 131-53 (listing numerous state and federal zoning cases involving religious assemblies).

<sup>18</sup> See, e.g., Mauck Statement, at 1-5 (describing 22 representative cases based on 25 years experience representing churches in land-use disputes); June-July 1998 House Hearings, at 360-64 (statement of Bruce D. Shoulson, attorney) (describing experiences representing Jewish congregations in land-use disputes, and concluding that “the implications of these examples, which I believe are not unique, are obvious, and the need for assurances to Americans of all faiths that they will be free to exercise their religions should be equally obvious”); 146 CONG. REC. E1564-E1567 (Sept. 22, 2000) (listing 19 additional instances of land-use burdens on religious exercise arising since conclusion of hearings).

<sup>19</sup> *Amicus* notes here a small sample of the evidence presented to Congress:

- The BYU study indicated that religious minorities are vastly over-represented in religious land use litigation, even controlling for the merits of the case. Specifically, religious minorities representing 9% of the population are involved in 49% of reported religious land-use disputes over a principal use, but win in court at the same rate as mainline religious groups. For example, self-identified Jews of all denominations represent about 2.2% of the population, but were involved in 20% of reported

opinion cited throughout its brief, would conceal the depth and breadth of this hearing record by describing part of it and claiming it is the whole.<sup>20</sup>

This Court should acknowledge that the *entire* legislative record preceding RLUIPA reflects a “widespread pattern” of likely constitutional violations that could justify vastly more prophylaxis than RLUIPA Sections 2(a) and 2(a)(2)(C) represent. *Nevada Dept. of Human Res. v. Hibbs*, 123 S. Ct. 1972, 1981 (2003)

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principal use cases. See Keetch Statement at 118, 127-30; Laycock Statement at 411.

- This pattern of land-use decisions reflects broader public attitudes to religious minorities, as reported in the Gallup poll presented to Congress. Specifically, 86% of Americans admit mostly unfavorable or very unfavorable attitudes toward religions they categorize as “sects ” or “cults,” and 45% of Americans hold mostly or very unfavorable opinions of those termed “fundamentalists.” When asked whether they would want to have these same groups as neighbors, 62% and 30% of Americans, respectively, would not. Laycock Statement at 415.
- According to John Mauck, a leading religious land-use attorney in Chicago, 30% of all cases before the city’s Zoning Board of Appeals involved houses of worship, even though that type of use does not remotely approach 30% of the land uses in Chicago. Laycock Statement at 414.

<sup>20</sup> For a fuller summary of the evidence presented to Congress, *amici* respectfully direct this Court’s attention to Douglas Laycock, *State RFRA’s and Land Use Regulation*, 32 U.C. DAVIS L. REV. 755, 769-83 (1999), and *Protecting Religious Liberty: Hearings Before the Senate Comm. on the Judiciary*, 106<sup>th</sup> Cong., 2d Sess. (Sept. 9, 1999), (statement of Prof. Douglas Laycock, Univ. Texas Law Sch., <<http://www.senate.gov/~judiciary/9999dlay.htm>>). In addition, the BYU study presented to Congress in the Keetch Statement has been published at Von G. Keetch & Matthew K. Richards, *The Need for Legislation to Enshrine Free Exercise in the Land Use Context*, 32 U.C. DAVIS L. REV. 725 (1999).

(concluding that legislative record “is weighty enough to justify the enactment of *prophylactic* § 5 legislation”) (emphasis added). *See also id.* at 1983 (“[I]n light of the evidence before Congress, a statute ... that simply mandated gender equality in the administration of leave benefits, would not have achieved Congress’ remedial object.”).

**C. To the extent RLUIPA Section 2(a) “prevents” or “deters” constitutional injuries at all, it employs “congruent” and “proportional” means to that end.**

The prohibitions of RLUIPA based on the Enforcement Clause—including § 2(a) in conjunction with § 2(a)(2)(C)—correspond so closely to current First and Fourteenth Amendment jurisprudence that they require no justification as “preventive” or “deterrent” measures that trigger the congruence / proportionality inquiry. *See Garrett*, 531 U.S. at 365 (noting that only “§ 5 legislation *reaching beyond* the scope of § 1’s actual guarantees must exhibit ‘congruence and proportionality....’”) (emphasis added). Rather than “prohibit[] conduct which is not itself unconstitutional,” *Boerne*, 521 U.S. at 518, § 2(a) merely restates a frequently violated constitutional standard and provides familiar judicial remedies for violations of that standard.

Specifically, RLUIPA provides a federal cause of action for “appropriate relief,” including attorneys’ fees, RLUIPA § 4(a), (d). Even the burden shifting provision of the Act, RLUIPA § 4(b), reflects existing Supreme Court

jurisprudence regarding the respective burdens of plaintiff and defendant once strict scrutiny is triggered.<sup>21</sup> Notably, none of these remedies remotely “alters the meaning of the Free Exercise Clause.” *Boerne*, 521 U.S. at 519.

Moreover, these remedies apply only in the area of “land use regulation,” which the statute defines quite narrowly as “a zoning or landmarking law,” RLUIPA § 8(5), and where enforcement is amply justified by the congressional record. *See supra* Section II.B. RFRA, by contrast, applied to all areas of law, and so was faulted for “[s]weeping coverage ... displacing laws and prohibiting official actions of almost every description and regardless of subject matter.” *Boerne*, 521 U.S. at 532. *See also Hibbs*, 123 S. Ct. at 1983 (contrasting disproportionate statutes “which applied broadly to every aspect of state employers’ operations,” with one that “is narrowly targeted ... precisely where [impermissible employment discrimination] has been and remains strongest – and affects only one aspect of the employment relationship.”).

Also unlike RFRA, RLUIPA applies the compelling interest test pursuant to the Enforcement Clause power *only* where land-use laws impose substantial burdens pursuant to systems of “individualized assessments,” *i.e.*, *only* where the

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<sup>21</sup> *See, e.g., Republican Party of Minn. v. White*, 122 S. Ct. 2528, 2535 (2002) (“Under the strict-scrutiny test, [the defendants] have the burden to prove that the [challenged action] is (1) narrowly tailored, to serve (2) a compelling state interest.”); *Miller v. Johnson*, 515 U.S. 900, 920 (1995) (“To satisfy strict scrutiny, the State must demonstrate that its [action] is narrowly tailored to achieve a compelling interest.”).

compelling interest standard *already applies*. Compare RLUIPA § 2(a)(2)(C), with *Lukumi*, 508 U.S. at 537. Codifying the Supreme Court’s constitutional standard to facilitate its enforcement simply cannot be a disproportionate means of enforcing that standard. See 146 CONG. REC. S7775 (“Each subsection closely tracks the legal standards in one or more Supreme Court opinions, codifying those standards for greater visibility and easier enforceability.”). But even if RLUIPA occasionally prohibits more land-use regulation than the Constitution already does, that would not jeopardize the constitutionality of the Act.<sup>22</sup>

In sum, having identified widespread and substantial constitutional injuries to religious liberty in the area of land-use regulation, Congress passed RLUIPA to codify those precise constitutional standards and to provide judicial remedies for violations of those standards. To the extent RLUIPA’s provisions are “preventive” or “deterrent” at all, they are “congruent” and “proportional” to the constitutional

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<sup>22</sup> See, e.g., *Murphy*, 289 F. Supp. 2d at 120 (even if “RLUIPA extends slightly beyond the proscriptions of § 1 of the Fourteenth Amendment, it is acceptable as a prophylactic rule,” because the Act is designed “to ensure the full vindication of constitutional rights (for example, by easing difficult proof requirements in order to facilitate enforcement)”); *Freedom Baptist*, 204 F. Supp. 2d at 874 (“To the extent that, conceivably, the RLUIPA may cover a particular case that is not on all fours with an existing Supreme Court decision, it nevertheless constitutes the kind of congruent and, above all, proportional remedy Congress is empowered to adopt under § 5 of the Fourteenth Amendment.”). See also *Hibbs*, 123 S. Ct. at 1977 (“Congress may enact so-called prophylactic legislation that proscribes facially constitutional conduct, in order to prevent and deter unconstitutional conduct.”); *Garrett*, 121 S. Ct. at 963 (“Congress is not limited to mere legislative repetition of this Court’s constitutional jurisprudence,” but may also prohibit “a somewhat broader swath of conduct”).

injuries targeted. RLUIPA thus contrasts sharply with RFRA's "sweeping coverage," and so fits comfortably within the boundaries of Congress' Enforcement Clause authority, as defined in *Boerne* and its progeny.

### **CONCLUSION**

For the foregoing reasons, the District Court's order should be affirmed.

Respectfully submitted,

January 20, 2004

THE BECKET FUND FOR RELIGIOUS LIBERTY

By: \_\_\_\_\_

Anthony R. Picarello, Jr.\*

Roman P. Storzer

Derek L. Gaubatz

1350 Connecticut Avenue, NW, Suite 605

Washington, DC 20036-1735

Telephone: (202) 955-0095

Facsimile: (202) 955-0090

Attorneys for *Amici Curiae*

\*Counsel of Record

**CERTIFICATE OF COMPLIANCE**

I hereby certify that the foregoing brief is 7,494 words in length and complies with Federal Rules of Appellate Procedure 32(a)(7)(B) and (C).

By: \_\_\_\_\_  
Anthony R. Picarello, Jr.

## **APPENDIX A**

### **Additional Information About the *Amici***

*Amicus curiae* 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 worshippers, ministers, and institutions under the Religious Land Use and Institutionalized Persons Act of 2000, 42 U.S.C. § 2000cc, *et seq.* (“RLUIPA” or “the Act”).

The Becket Fund’s RLUIPA cases run the gamut – as *amicus curiae* and as plaintiffs’ counsel, in land-use and prisoner cases, from Alabama to New Hampshire to Hawaii – including cases within the Second Circuit.<sup>23</sup> The Becket Fund also represents the plaintiffs in a host of RLUIPA cases outside the Second Circuit, including some that have resulted in published decisions,<sup>24</sup> and others that

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<sup>23</sup> See, e.g., *Fifth Avenue Presbyterian Church v. City of New York*, 293 F.3d 570 (2d Cir. 2002) (*amicus* brief filed on behalf of broad coalition, Mar. 15, 2002); *Murphy v. Town of New Milford*, 289 F. Supp. 2d 87 (D. Conn. 2003) (*amicus* brief filed Dec. 27, 2002).

<sup>24</sup> See, e.g., *United States v. Maui County*, \_\_ F. Supp. 2d \_\_, 2003 WL 23148864 (D. Haw. Dec. 29, 2003); *Hale O Kaula v. Maui Planning Comm’n*, 229 F. Supp. 2d 1056 (D. Haw. 2002); *Cottonwood Christian Center v. City of*

have concluded by favorable settlement.<sup>25</sup> In addition, we have filed a series of *amicus curiae* briefs in both prisoner and land-use cases involving RLUIPA.<sup>26</sup> We

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*Cypress*, 218 F. Supp. 2d 1203 (C.D. Cal. 2002); *Freedom Baptist Church v. Township of Middletown*, 204 F. Supp. 2d 857 (E.D. Pa. 2002). See also *Lighthouse Institute for Evangelism v. City of Long Branch*, No. 03-2343 (3d Cir.) (pending); *Castle Hills First Baptist Church v. City of Castle Hills*, Civ. No. 01-1149 (W.D. Tex. removed Dec. 14, 2001) (pending); *Redwood Christian Schs. v. County of Alameda*, Civ. No. 01-4282 (N.D. Ca. filed Nov. 16, 2001) (pending); *Missionaries of Charity, Brothers v. City of Los Angeles*, Civ. No. 01-08511 (C.D. Ca. filed Sept. 19, 2001) (pending); *Archdiocese of Denver v. Town of Foxfield*, Civ. No. 01-3299 (Colo. Dist. Ct., Arapahoe Cy., Div. 5) (pending); *Great Lakes Society v. Georgetown Charter Township*, No. 03-4599-AA (Mich. Cir. Ct., Ottawa Cy.) (pending).

<sup>25</sup> See, e.g., *Cotton v. Fla. Dept. of Corrections*, Civ. No. 02-22760 (S.D. Fla. filed Sept. 19, 2002) (settlement agreement signed Oct. 2003); *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 Comm'y Church v. City of Greenwood Village*, 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); *Calvary Chapel O'Hare v. Village of Franklin Park*, Civ. No. 02-3338 (N.D. Ill.) (settlement agreement signed Sept. 3, 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 Comm'y Church v. City of Grand Haven*, No. 1:00-CV-175 (W.D. Mich.) (consent decree signed Dec. 20, 2000).

<sup>26</sup> See, e.g., *Midrash Sephardi v. Town of Surfside*, No. 03-13858-CC (11<sup>th</sup> Cir.) (*amicus* brief filed Nov. 21, 2003); *Cutter v. Wilkinson*, 349 F.3d 257 (6<sup>th</sup> Cir. 2003) (*amicus* brief in support of rehearing *en banc* filed on behalf of a broad coalition Dec. 19, 2003); *Madison v. Riter*, No. 03-6362, \_\_ F.3d \_\_, 2003 WL 22883620 (4<sup>th</sup> Cir. Dec. 8, 2003) (*amicus* brief filed on behalf of a broad coalition June 6, 2003); *Fifth Avenue Presbyterian Church v. City of New York*, 293 F.3d 570 (2d Cir. 2002) (*amicus* brief filed on behalf of broad coalition, Mar. 15, 2002); *San Jose Christian College v. City of Morgan Hill*, No. 02-15693 (9<sup>th</sup> Cir.) (*amicus* brief filed on behalf of a broad coalition Aug. 28, 2002); *C.L.U.B. v. City of*

intend to continue filing lawsuits and *amicus curiae* briefs under RLUIPA until the jurisprudence under the law, as well as its constitutionality, is established beyond reasonable dispute.

The Council for Christian Colleges and Universities is an association of 106 accredited colleges and universities in North America and 63 affiliates in 24 countries. The Council represents more than 25 denominational traditions. This case and a proper interpretation of RLUIPA is of enormous import for all of faith-based higher education, especially our members that have property within the Second Circuit.

The Association of Christian Schools International (“ACSI”) is a nonprofit, non-denominational, religious association providing support services to more than 3,800 Christian preschool, elementary, and secondary schools in the United States. One hundred twenty of these schools are located within the boundaries of the Second Circuit. Accordingly, this case, particularly as it addresses issues

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*Chicago*, 342 F.3d 752 (7th Cir. 2003) (*amicus* brief filed June 26, 2002); *Williams v. Bitner*, 285 F. Supp. 2d 593 (M.D. Pa. 2003) (*amicus* brief filed Apr. 16, 2002); *Johnson v. Martin*, 223 F. Supp. 2d 820, 822 (W.D. Mich. 2002) (noting Becket Fund intervention in defense of constitutionality of RLUIPA); *Terrero v. Watts*, No. CV202-134 (S.D. Ga.) (RLUIPA constitutionality challenge pending); *Benning v. Georgia*, No. CV-602-139 (S.D. Ga.) (*amicus* brief filed Oct. 31, 2003); *Primera Iglesia Bautista Hispana v. Broward County*, No. 01-6530-CIV (S.D. Fla.) (*amicus* brief filed Apr. 18, 2003); *Konikov v. Orange County*, No. 6:02-CV-376-ORL-28-JGG (M.D. Fla.) (*amicus* brief filed Apr. 11, 2003); *Goodman v. Snyder*, Civ. No. 2000-948 (N.D. Ill.) (*amicus* brief filed Mar. 17, 2003); *Lighthouse Institute for Evangelism v. City of Long Branch*, Civ. No. 00-3366 (D.N.J.) (*amicus* brief filed May 7, 2001).

concerning the constitutionality of RLUIPA and the interpretation of its provisions is of great importance to ACSI.

**CERTIFICATE OF SERVICE**

I hereby certify that two true and correct copies of the above and foregoing Brief *Amicus Curiae* was sent this 20th day of January, 2004 via First Class Mail to each of the following:

Joel C. Haims, Esq.  
Morrison & Foerster LLP  
1290 Avenue of the Americas  
New York, NY 10104  
*Counsel for Plaintiff - Appellee*

Kevin J. Plunkett, Esq.  
Thacher Proffitt & Wood, LLP  
50 Main St.  
5<sup>th</sup> Floor  
White Plains, NY 10606  
*Counsel for Defendant – Appellant*

Joseph C. Messina, Esq.  
Law Office of Joseph C. Messina  
424 Mamaroneck Avenue  
Mamaroneck, NY 10543  
*Counsel for Defendant – Appellant*

Riele J. Morgiewicz, Esq.  
Law Offices of Riele J.  
Morgiewicz, Esq.  
119 Washington Ave.  
Albany, NY 12210  
*Counsel for Amicus Curiae New York  
State Conference of Mayors and  
Municipal Officials*

Michael D. Zarin  
81 Main Street, Suite 415  
White Plains, NY 10601  
*Counsel for Amicus Curiae  
“SOUND”*

By: \_\_\_\_\_  
Anthony R. Picarello, Jr.