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**UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF CALIFORNIA**

VACAVILLE SEVENTH DAY  
ADVENTIST CHURCH and  
MARANATHA BROADCASTING,  
INC.,

Plaintiffs,

v.

SOLANO COUNTY, SOLANO  
COUNTY PLANNING COMMISSION,  
and DOES 1-10,

Defendants.

Case No: CIV S-02-0036 GEB JFM

**BRIEF OF *AMICI CURIAE* IN SUPPORT OF  
THE CONSTITUTIONALITY OF RLUIPA**

DATE: March 1, 2004

TIME : 9:00 a.m.

JUDGE: Morrison C. England

Dept: 3

TRIAL DATE: May 12, 2004

**BRIEF OF *AMICI CURIAE* THE BECKET FUND FOR RELIGIOUS LIBERTY, THE  
AMERICAN JEWISH CONGRESS, THE INTERFAITH RELIGIOUS LIBERTY  
FOUNDATION, AND THE SEVENTH-DAY ADVENTIST CHURCH STATE COUNCIL  
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## INTEREST OF THE AMICI

*Amicus curiae* The Becket Fund for Religious Liberty is an interfaith, bi-partisan 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 and public benefits. 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”).

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 California.<sup>1</sup> The Becket Fund also represents the plaintiffs in a host of RLUIPA cases outside California, including some that have resulted in published decisions,<sup>2</sup> and others that have concluded by favorable settlement.<sup>3</sup> In addition, we have filed a series of *amicus*

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<sup>1</sup> See, e.g., *San Jose Christian College v. City of Morgan Hill*, No. 02-15693 (9th Cir.) (brief *amicus curiae* filed Aug. 28, 2002); *Redwood Christian Schs. v. County of Alameda*, Civ. No. 01-4282 (N.D. Cal. filed Nov. 16, 2001); *Missionaries of Charity, Brothers v. City of Los Angeles*, Civ. No. 01-08511 (C.D. Cal. filed Sept. 19, 2001); *Cottonwood Christian Center v. City of Cypress*, 218 F. Supp. 2d 1203 (C.D. Cal. 2002).

<sup>2</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); *Freedom Baptist Church v. Township of Middletown*, 204 F. Supp. 2d 857 (E.D. Pa. 2002). See also *Benning v. Georgia*, App. No. 04-\_\_ (11<sup>th</sup> Cir.) (pending); *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); *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>3</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.

*curiae* briefs in both prisoner and land-use cases involving RLUIPA.<sup>4</sup> We 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.

*Amicus curiae* the American Jewish Congress is an organization of American Jews founded in 1918 to protect the civil, political, religious and economic rights of American Jews. It has taken a special interest in religious liberty issues, including litigation affecting prisoners

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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>4</sup> See, e.g., *Westchester Day School v. Village of Mamaroneck*, No. 03-9042 (2<sup>nd</sup> Cir.) (*amicus* brief on behalf of a broad coalition filed January 20, 2004); *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*, 355 F.3d 310 (4<sup>th</sup> Cir. 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 Chicago*, 342 F.3d 752 (7th Cir. 2003) (*amicus* brief filed June 26, 2002); *Open Homes Fellowship v. Orange County*, No. 6:03-CV-943-ORL-31 (M.D. Fla.) (*amicus* brief filed Jan. 2, 2004); *Murphy v. Town of New Milford*, 289 F. Supp. 2d 87 (D. Conn. 2003) (*amicus* brief filed Dec. 27, 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).

and houses of worship. It also played an important role in drafting RLUIPA, legislation which protects the interests of those two groups.

*Amicus curiae* the Interfaith Religious Liberty Foundation is a Sacramento, California based nonprofit educational organization that promotes religious liberty and church-state separation through the development of curriculum materials. It consists of clergy and faith leaders across a very broad spectrum of the faith community. Foundation members, especially those of minority faiths, have experienced discrimination from local government officials in land use decisions. They know first hand the importance of the Religious Land Use and Institutionalized Persons Act, and therefore join this brief to defend its constitutionality.

*Amicus curiae* the Seventh-day Adventist Church State Council is the oldest public policy organization in the western United States devoted exclusively to issues of religious freedom and the separation of church and state. The Council promotes religious freedom for everyone, regardless of their faith or lack thereof, through public education, issues advocacy and litigation. The Council has been working to protect religious land use since coordinating the sponsorship of a religious land use bill in California in 1999 by the California Interfaith Coalition for the Free Exercise of Religion, a broad coalition of faith groups that cross the religious and political spectrum.

*Amici* seek to clarify the complex issue of RLUIPA's constitutionality by informing the Court of the extensive history of litigation of that issue, and of the overwhelming consensus among courts that have addressed it.

### **ARGUMENT**

The Defendants and their *amici* claim that the Substantial Burdens provision of RLUIPA, 42 U.S.C. § 2000cc(a) ("Section 2(a)"), is unconstitutional on its face and as applied, on five substantive grounds: (1) it violates the Establishment Clause; (2) it violates the Tenth

Amendment; (3) it violates Separation-of-Powers principles, (4) it exceeds Congress' enumerated power under the Enforcement Clause; and (5) it exceeds Congress' enumerated power under the Commerce Clause. As detailed further below, the Ninth Circuit has already rejected the first three challenges, and the overwhelming majority of courts to address the remaining two issues – including this court – have rejected them, in both the land-use<sup>5</sup> and prison contexts.<sup>6</sup> Because Defendants' challenges do not even *begin* to overcome the strong

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<sup>5</sup> See, e.g., *Guru Nanak Sikh Society v. County of Sutter*, No. S-02-1785 (E.D. Cal. Nov. 19, 2003) (rejecting Enforcement Clause challenge) (attached as Ex. A); *United States v. Maui County*, \_\_\_ F. Supp. 2d \_\_\_ (D. Haw. Dec. 29, 2003); *Murphy v. Town of New Milford*, 289 F. Supp. 2d 87 (D. Conn. 2003) (rejecting Enforcement and Establishment Clause challenges); *Westchester Day Sch. v. Village of Mamaroneck*, 280 F. Supp. 2d 230 (S.D.N.Y. 2003) (rejecting Enforcement, Commerce, and Establishment Clause, and Tenth Amendment challenges); *Life Teen, Inc. v. Yavapai County*, No. Civ. 01-1490-PCT-RCB (D. Ariz. Mar. 26, 2003) (rejecting Enforcement, Commerce, and Establishment Clause, Separation-of-Powers, and Tenth Amendment challenges) (attached as Ex. B); *Christ Universal Mission Church v. City of Chicago*, No. 01-C-1429, 2002 U.S. Dist. LEXIS 22917, at \*24 (N.D. Ill. Sept. 11, 2002) (rejecting constitutionality challenge, adopting reasoning of *Freedom Baptist Church, infra*); *Freedom Baptist Church v. Township of Middletown*, 204 F. Supp. 2d 857 (E.D. Pa. 2002) (rejecting Enforcement, Commerce, and Establishment Clause challenges). See also *Hale O Kaula v. Maui Planning Comm'n*, 229 F. Supp. 2d 1056, 1072 (D. Haw. 2002) (declining to address constitutionality of RLUIPA in detail, but concluding that “jurisdictional element” of § 2(a)(2)(B) precludes Commerce Clause challenge, and that § 2(a)(2)(C) “codifies the ‘individualized assessments’ doctrine”); *Cottonwood Christian Center v. City of Cypress*, 218 F. Supp. 2d 1203, 1221 n.7 (C.D. Cal. 2002) (noting that “RLUIPA would appear to have avoided the flaws of its predecessor RFRA, and be within Congress’s constitutional authority,” citing *Freedom Baptist Church*). But see *Elsinore v. City of Lake Elsinore*, 291 F. Supp. 2d 1083 (C.D. Cal. 2003) (sustaining Enforcement Clause and Commerce Clause challenges to RLUIPA § 2(a)).

<sup>6</sup> See, e.g., *Madison v. Riter*, 355 F.3d 310 (4<sup>th</sup> Cir. 2003) (rejecting Establishment Clause challenge); *Charles v. Verhagen*, 348 F.3d 601 (7<sup>th</sup> Cir. 2003) (rejecting Establishment Clause, Tenth Amendment, and Spending Clause challenges); *Mayweathers v. Newland*, 314 F.3d 1062 (9<sup>th</sup> Cir 2002) (rejecting Establishment Clause, Separation-of-Powers, Spending Clause, Tenth Amendment, and Eleventh Amendment challenges) (rejecting Establishment Clause, Enforcement Clause, Commerce Clause, and Tenth Amendment challenges to RLUIPA § 3) *cert. denied sub nom. Almeida v. Mayweathers*, 124 S. Ct. 66 (2003); *Benning v. Georgia*, No. 602-CV-139 (S.D. Ga. Jan. 8, 2004) (rejecting Establishment Clause challenge) ((attached as Ex. C); *Williams v. Bitner*, 285 F. Supp. 2d 593 (M.D. Pa. 2003) (rejecting Establishment Clause, Spending Clause, Tenth Amendment, and Eleventh Amendment challenges); *Goodman v. Snyder*, 2003 WL 22765047 (N.D. Ill. Nov. 20, 2003) (rejecting Separation of Powers challenge);

presumption of constitutionality that this Court should afford an Act of Congress, they should be rejected.<sup>7</sup>

**I. RLUIPA Section 2(a) Does Not Violate the Establishment Clause.**

**A. Controlling Ninth Circuit Authority – Which the Defendants and Their Amici Inexplicably Fail to Cite – Precludes Their Establishment Clause Challenge.**

In their almost ninety pages of collective briefing, the Defendants and their *amici* fail to cite *even once* the controlling decision of the Ninth Circuit in *Mayweathers v. Newland*, 314 F.3d 1062 (9<sup>th</sup> Cir. 2002)(rejecting Establishment Clause, Tenth Amendment, Separation-of-Powers, Eleventh Amendment, and Spending Clause challenges to RLUIPA Substantial Burdens provision in prison context), *cert. denied sub nom. Alameida v. Mayweathers*, 124 S. Ct. 66 (2003).

Although Defendants and their *amici* certainly should have had notice of this opinion, they would still waste the Court’s time—or worse, attempt to lead it into error—by raising an

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*Sanabria v. Brown*, No. 99-4699 (D.N.J. June 5, 2003) (rejecting Establishment Clause, Separation-of-Powers, Spending Power, Tenth Amendment, and Eleventh Amendment challenges) (attached as Ex. D); *Gordon v. Pepe*, No. 00-10453, 2003 WL 1571712 (D. Mass. Mar. 6, 2003) (rejecting Establishment Clause, Spending Power, Commerce Power, Tenth Amendment, and Eleventh Amendment challenges); *Johnson v. Martin*, 223 F. Supp. 2d 820 (W.D. Mich. 2002) (rejecting Commerce, Spending, and Establishment Clause, and Tenth Amendment challenges) *rev’d by Cutter, infra*; *Love v. Evans*, No. 2:00-CV-91 (E.D. Ark., Aug. 8, 2001) (rejecting constitutionality challenges to RLUIPA § 3 based on *Mayweathers* district court decision) (attached as Ex. E); *Mayweathers v. Terhune*, 2001 WL 804140 (E.D. Cal. July 2, 2001) (rejecting Establishment Clause, Commerce Clause, Spending Clause, Separation of Powers, and Tenth Amendment challenges). *But see Cutter v. Wilkinson*, 349 F.3d 257 (6<sup>th</sup> Cir. 2003), *petition for rehearing en banc pending*.

<sup>7</sup> *See United States v. Morrison*, 529 U.S. 598, 606 (2000) (“Due respect for the decisions of a coordinate branch of government demands that we invalidate a congressional enactment only upon a plain showing that Congress has exceeded its constitutional bounds.”). *See also Walters v. Nat’l Ass’n of Radiation Survivors*, 473 U.S. 305, 319 (1985) (“Judging the constitutionality of an Act of Congress is properly considered the gravest and most delicate duty that this Court is called upon to perform.”) (internal quotations omitted).

argument for which there is no good faith basis in this Circuit.<sup>8</sup> See FED. R. CIV. P. 11(b)(1), (b)(2). Even the *Elsinore* court—which, as explained more fully below, knowingly disregarded current Free Exercise jurisprudence in so many ways—acknowledged that *Mayweathers* “forestalled” an Establishment Clause challenge. See *Elsinore Christian Ctr. v. City of Lake Elsinore*, 270 F. Supp. 2d 1163, 1183 n.11 (C.D. Cal. 2003).

It is similarly significant that the hyper-separationist argument advanced by the Defendants has been rejected *in every single case, including by the Ninth Circuit*, in which it was raised against RFRA, RLUIPA’s broader predecessor, both before and after RFRA was struck down on other grounds in *Boerne*.<sup>9</sup> And only a single decision, which relied on two now-overruled district court opinions and thus is now itself the subject of a pending *en banc* petition,<sup>10</sup> stands against the otherwise uniform weight of authority that rejects Establishment Clauses challenges to RLUIPA.<sup>11</sup> Nowhere do Defendants or their *amici* attempt to discuss or

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<sup>8</sup> The omission is all the more conspicuous because the Defendants and *amici* have elsewhere cited materials that include citations to *Mayweathers*. See, e.g., Defs. Br. at 48 (citing *Elsinore*, which rejected an Establishment Clause challenge based on *Mayweathers*); Brief of *Amici Curiae* of National League of Cities *et al.* at 19 (same).

<sup>9</sup> See, e.g., *Mockaitis v. Harcleroad*, 104 F.3d 1522, 1530 (9th Cir.) (rejecting Establishment Clause challenge to RFRA), *overruled on other grounds*, 521 U.S. 507 (1997); *In re Young*, 141 F.3d 854, 861–63 (8th Cir.) (rejecting Establishment Clause and Separation of Powers challenges to RFRA), *cert. denied*, 525 U.S. 811 (1998); *Sasnett v. Sullivan*, 91 F.3d 1018, 1022 (7th Cir. 1996) (same), *vacated on other grounds*, 521 U.S. 1114 (1997); *E.E.O.C. v. Catholic Univ. of America*, 83 F.3d 455, 470 (D.C. Cir. 1996) (same); *Flores v. City of Boerne*, 73 F.3d 1352, 1364 (5th Cir. 1996) (same), *rev’d on other grounds*, 521 U.S. 507 (1997).

<sup>10</sup> *Cutter v. Wilkinson*, 349 F.3d 257 (6<sup>th</sup> Cir. 2003) (citing *Madison v. Riter*, 240 F. Supp. 2d 566 (W.D. Va. 2003), *overruled by Madison v. Riter*, 355 F.3d 310 (4<sup>th</sup> Cir. 2003), and *Al Ghashiyah v. Wis. Dept. of Corrections*, No. 01-C-10, 2003 WL 1089526 (E.D. Wis. Mar. 4, 2003), *overruled by Charles v. Verhagen*, 348 F.3d 601 (7<sup>th</sup> Cir. 2003)). Not surprisingly, *Cutter* is itself the subject of a pending rehearing *en banc* petition.

<sup>11</sup> See, e.g., *Madison v. Riter*, 355 F.3d 310 (4<sup>th</sup> Cir. 2003) (rejecting Establishment Clause challenge to RLUIPA); *Charles v. Verhagen*, 348 F.3d 601 (7<sup>th</sup> Cir. 2003) (same); *Mayweathers v. Newland*, 314 F.3d 1062 (9th Cir. 2002) (same); *United States v. Maui County*, No. 03-00362 (D. Haw. Dec. 29, 2003) (same); *Murphy v. Town of New Milford*, \_\_\_ F. Supp. 2d \_\_\_ (D. Conn.

distinguish any of these cases rejecting Establishment Clause challenges to RLUIPA, which address *the very question* before the court. Little wonder, then, that the Defendants and their *amici* also fail to cite, discuss, or attempt to distinguish three decisions of federal Courts of Appeals that have rejected Establishment Clause challenges to local land-use laws that have the purpose and effect of alleviating burdens on religious exercise, and *only* religious exercise.<sup>12</sup>

In light, then, of the controlling decision in *Mayweathers*, and the overwhelming weight of authority from other jurisdictions, this Court should summarily reject Defendants' Establishment Clause challenge.

**B. RLUIPA Section 2(a) Satisfies All Three Elements of the *Lemon* Test.**

If the Court nonetheless wishes to undertake the Establishment Clause analysis in detail, RLUIPA's accommodation of religious exercise readily satisfies the *Lemon* test.

First, RLUIPA was passed for the secular government purpose of "protect[ing] the free exercise of religion from unnecessary government interference." 146 CONG. REC. E1234, E1235 (daily ed. July 14, 2000) (statement of Rep. Canady); *Mayweathers*, 314 F.3d at 1068. As the

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2003) (same); *Westchester Day Sch. v. Village of Mamaroneck*, 280 F. Supp. 2d 230 (S.D.N.Y. 2003) (same); *Williams v. Bitner*, 285 F. Supp. 2d 593 (M.D. Pa. 2003) (same); *Sanabria v. Brown*, No. 99-4699 (D. N.J. June 5, 2003) (same); *Life Teen, Inc. v. Yavapai County*, No. Civ. 01-1490-PCT-RCB (D. Ariz. Mar. 26, 2003) (same); *Gordon v. Pepe*, No. Civ. A-00-10453-RWZ, 2003 WL 1571712 (D. Mass. Mar. 6, 2003) (same); *Christ Universal Mission Church v. City of Chicago*, No. 01-C-1429, 2002 U.S. Dist. LEXIS 22917, at \*24 (N.D. Ill. Sept. 11, 2002) (same); *Freedom Baptist Church v. Township of Middletown*, 204 F. Supp. 2d 857 (E.D. Pa. 2002) (same).

<sup>12</sup> See *Ehlers-Renzi v. Connelly School of the Holy Child*, 224 F.3d 283, 291 (4th Cir. 2000) (upholding county zoning ordinance exempting from special exception requirement parochial schools located on land owned by religious organization); *Boyajian v. Gatzunis*, 212 F.3d 1 (1st Cir. 2000) (upholding state law and town by-law prohibiting municipal authorities from excluding religious uses of property from any zoning area); *Cohen v. Des Plaines*, 8 F.3d 484 (7th Cir. 1993) (upholding zoning ordinance that allowed churches to operate day-care centers in single-family residential districts, while requiring other operators of day-care centers to obtain special use permits).

Supreme Court has repeatedly made clear, it is a “*proper purpose* [to] lift[] a regulation that burdens the exercise of religion.” *Corporation of Presiding Bishop of Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327, 338 (1987) (emphasis added); *id.* at 339 (noting the “permissible purpose of limiting governmental interference with the exercise of religion”).

Indeed, the Court further admonished that the requirement of a secular purpose “does not mean that the law’s purpose must be unrelated to religion—that would amount to a requirement that the government show a callous indifference to religious groups, and the Establishment Clause has never been so interpreted.” *Amos*, 483 U.S. at 335. Thus, “the government may (and sometimes must) accommodate religious practice and . . . it may do so without violating the Establishment Clause.” *Id.* at 334. *See also Zorach v. Clauson*, 343 U.S. 306, 314 (1952) (accommodating religious exercise “follows the best of our traditions. For it then respects the religious nature of our people and accommodates the public service to their spiritual needs.”).

Moreover, legislation like RLUIPA that has the permissible purpose of lifting burdens on religious exercise is all the more common—and necessary—since the Supreme Court’s decision in *Employment Division v. Smith* made clear that people of faith should turn in the first instance to the political branches, rather than the courts, for the protection of religious liberty:

Values that are protected against government interference through enshrinement in the Bill of Rights are not thereby banished from the political process. Just as a society that believes in the negative protection accorded to the press by the First Amendment is likely to enact laws that affirmatively foster the dissemination of the printed word, so also *a society that believes in the negative protection accorded to religious belief can be expected to be solicitous of that value in its legislation as well.*

*Smith*, 494 U.S. at 890 (emphasis added). *See also Madison*, 355 F.3d at 321-22 (“Our society has a long history of accommodation with respect to matters of belief and conscience. If Americans may not set their beliefs above the law, there must be room to accommodate belief and faith within the law.”).

Thus, for example, while the Court in *Smith* rejected the claim that the Free Exercise Clause mandated an exemption to drug laws, the Court noted with approval that accommodations of peyote use for religious use (and only religious use) have been made by legislation. *Smith*, 494 U.S. at 890 (noting that “a number of States have made an exception to their drug laws for sacramental peyote use.”). Such accommodations are constitutional, even though others wishing to use peyote for secular reasons are not offered the exemption.<sup>13</sup>

Similarly, after the Supreme Court ruled in *Goldman v. Weinberger*, 475 U.S. 503 (1986), that an Air Force psychotherapist had no right under the Free Exercise Clause to wear a yarmulke while on duty, Congress responded by statutorily enacting such a right in the National Defense Authorization Act for Fiscal Years 1988 and 1989, 10 U.S.C. § 774, a permissible accommodation of the religious liberty of service members.<sup>14</sup> RLUIPA thus falls squarely within the enduring American tradition of laws enacted for the permissible purpose of lifting burdens on religious exercise.

Second, RLUIPA satisfies *Lemon*’s second element, because alleviating burdens on religious exercise—here, on houses of worship and other religious land uses—does not have the principal or primary effect of advancing religion. It merely reduces intrusion and oversight by the government as to how religious individuals and institutions carry out their missions. While

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<sup>13</sup> See *Lee v. Weisman*, 505 U.S. 577, 628–29 (1992) (Souter, J., concurring) (“[I]n freeing the Native American Church from federal laws forbidding peyote use, see . . . 21 C.F.R. § 1307.31 (1991), the government conveys no endorsement of peyote rituals, the Church, or religion as such; it simply respects the centrality of peyote to the lives of certain Americans.”).

<sup>14</sup> See *Texas Monthly v. Bullock*, 489 U.S. 1, 18 (1989) (plurality opinion of Brennan, Marshall, and Stevens) (“[I]f the Air Force provided a sufficiently broad exemption from its dress requirements for servicemen whose religious faiths commanded them to wear certain headgear or other attire, see *Goldman v. Weinberger*, . . . that exemption would not be invalid under the Establishment Clause even though this Court has not found it to be required by the Free Exercise Clause.” (citation omitted)).

this may enable those entities to advance their religious purposes, the Supreme Court has held this to be a permissible effect:

A law is not unconstitutional simply because it allows churches to advance religion, which is their very purpose. For a law to have forbidden “effects” under *Lemon*, it must be fair to say that the government itself has advanced religion through its own activities and influence. As the Court observed in *Walz*, “for the men who wrote the Religion Clauses of the First Amendment the ‘establishment’ of a religion connoted sponsorship, financial support, and active involvement of the sovereign in religious activity.”

*Amos*, 483 U.S. at 337 (quoting *Walz v. Tax Comm’r*, 397 U.S. 664, 668 (1970)).

Surprisingly, Defendants and their *amici* fail even to mention the controlling analysis of *Amos*, not to mention distinguish its binding holding, in discussing the effects prongs. Instead, the Defendants, parroting the argument accepted by the Sixth Circuit in *Cutter*, assert that RLUIPA is invalid because it extends protections to religious landowners without also giving benefits to other, secular land owners. Def. Br. at 50. The short answer to this assertion is that the Supreme Court—and the litany of lower courts willing to follow it—have squarely rejected this very same argument, over and over again.<sup>15</sup>

Moreover, if Defendants’ argument were taken seriously and laws accommodating religious exercise were permissible only if they were enacted in lockstep with laws affording accommodations for secular motivations, the Establishment Clause would run amok, invalidating

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<sup>15</sup> See, e.g., *Amos*, 483 U.S. at 338 (“Where . . . government acts with the proper purpose of lifting a regulation that burdens the exercise of religion, we see no reason to require that the exemption comes packaged with benefits to secular entities.”); *Mayweathers*, 314 F.3d at 1069 (under *Amos*, RLUIPA “does not violate the Establishment Clause just because it seeks to lift burdens on religious worship in institutions without affording corresponding protection to secular activities or to non-religious prisoners.”); *Madison*, 355 F.3d at 318 (“The mere fact that RLUIPA seeks to lift government burdens on a prisoner’s religious exercise does not mean that the statute must provide commensurate protections for other fundamental rights.”) (discussing *Amos*); *In re Young*, 141 F.3d at 863 (rejecting the reasoning of Justice Stevens’ solitary concurrence in *Boerne* that RFRA is impermissible because it accommodates the religious without also providing a benefit for atheists as a viewpoint “in direct contradiction” to the majority opinion in *Amos*.).

wholesale the legion acts of the political branches—legislative and executive, federal, state, and local—whose *sole* purpose and effect is to accommodate religious exercise. This includes, among many others, the *federal statutory* accommodations of religious peyote use and religious headwear in the military discussed *supra*; *state constitutional* provisions that provide stronger protections for religious exercise (and only religious exercise) than the federal Free Exercise Clause;<sup>16</sup> *state statutes* that provide broader protection to religious exercise (and only religious exercise) than required by the federal or state constitution;<sup>17</sup> and *government chaplaincy programs* in Congress, the armed forces, and in prisons that facilitate religious exercise (and

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<sup>16</sup> See also *Arizona v. Evans*, 514 U.S. 1, 8 (1995) (“state courts are absolutely free to interpret state constitutional provisions to accord greater protection to individual rights than do similar provisions of the United States Constitution”). Since the Supreme Court’s *Smith* decision, the courts of at least *eleven* states have held that their state constitutions provide broader protection for religious exercise (and only religious exercise) than the federal *Smith* rule. See, e.g., *Humphrey v. Lane*, 728 N.E.2d 1039 (Ohio 2000); *In re Browning*, 476 S.E.2d 465, 124 N.C. App. 190 (North Carolina 1996); *State v. Miller*, 549 N.W.2d 235, 202 Wis. 2d (Wis. 1996); *Attorney Gen. v. Desilets*, 636 N.E.2d 233, 418 Mass. 316 (Mass. 1994); *Swanner v. Anchorage Equal Rights Comm’n*, 874 P.2d 274 (Alaska 1994); *Rourke v. N.Y. State Dep’t of Corr. Servs.*, 603 N.Y.S.2d 647 (N.Y. Sup. Ct. 1993), *aff’d*, 615 N.Y.S.2d 470 (N.Y. App. Div. 1994); *Rupert v. City of Portland*, 605 A.2d 63 (Me. 1992); *St. John’s Lutheran Church v. State Comp. Ins. Fund*, 830 P.2d 1271, 252 Mont. 516 (Mont. 1992); *First Covenant Church of Seattle v. City of Seattle*, 840 P.2d 174, 120 Wash. 2d 203 (Wash. 1992); *State v. Evans*, 796 P.2d 178, 14 Kan. App. 2d 591 (Kan. 1990); *State v. Hershberger*, 462 N.W.2d 393 (Minn. 1990).

<sup>17</sup> Since the Supreme Court’s *Smith* decision, the political branches of at least *twelve* states have, either by statute or constitutional amendment, adopted state religious freedom provisions that provide broader protection for religious exercise (and only religious exercise) than the federal *Smith* rule. Those twelve states are Alabama, see ALA. CONST. amend. 622; Arizona, see ARIZ. REV. STAT. ANN. §§ 41-1493 *et seq.* (West 2003); Connecticut, see CONN. GEN. STAT. ANN. § 52-571b (West 2003); Florida, see FLA. STAT. ANN. §§ 761.01-761.04 (West 2003); Idaho, see IDAHO CODE §§ 73-401 *et seq.* (Supp. 2002); Illinois, see 775 ILL. COMP. STAT. ANN. §§ 35/1 -35/99 (West 2002); New Mexico, see N.M. STAT. ANN. §§ 28-22-1 to 28-22-5 (Michie 2002); Oklahoma, see OKLA. STAT. ANN. tit. 51, §251 (West 2003); Pennsylvania, see 71 PA. CONS. STAT. ANN. 2401 *et seq.*; Rhode Island, see R.I. GEN. LAWS §§ 42-80.1-1 to 42-80.1-4 (2001); South Carolina, see S.C. STAT. ANN. § 1-32-10 (Law. Co-op. 1999); and Texas, see TEX. CIV. PRAC. & REM. CODE ANN. §§ 110.001 *et seq.* (West 2003).

only religious exercise).<sup>18</sup> Correspondingly, going forward, the Defendants' approach would impose on the political branches the requirement of formalistic symmetry between the protection of religious exercise and of other fundamental rights, making any enhanced protection of fundamental rights practically impossible.<sup>19</sup>

Third, RLUIPA does not foster an excessive government entanglement with religion. Defendants complain that RLUIPA creates such an entanglement by allegedly requiring land-use officials to become religious experts as they consider whether their regulations substantially burden religious exercise. Def. Br. at 50. But this argument proves too much for then government could never take account of religious belief for the purpose of accommodation, as the Ninth Circuit has observed. *See Mockaitis*, 104 F.3d at 1530 (“Of course, application of RFRA, like the application of the First Amendment itself and any objection made under this amendment, requires a court to determine what is a religion and to define an exercise of it. There is no excessive entanglement.”). This would contradict not only common sense, but the Supreme Court’s emphasis that “[t]here is ample room under the Establishment Clause for ‘benevolent neutrality which will permit religious exercise to exist without sponsorship and without interference.’” *Amos*, 483 U.S. at 334.

Indeed, the purpose and effect of RLUIPA is precisely to *minimize* the entanglement of government officials in religious exercise; RLUIPA’s deregulation of religion is the *exact*

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<sup>18</sup> *See Mockaitis*, 104 F.3d at 1530 (concluding that RFRA does not impermissibly promote religion anymore than “[t]he creation of chaplaincies in Congress and in the armed forces [which are] particularly striking promotions of religion.”).

<sup>19</sup> *See Madison*, 355 F.3d at 320 (“Congress would have to make determinations in every instance of what fundamental rights are at risk and to what degree they are at risk, and it would be able only to heighten protection for fundamental rights in a symmetric fashion according to these assessments. The byzantine complexities that such compliance would entail would likely cripple government at all levels from providing any fundamental rights with protection above the Constitution's minimum requirements.”); *Mockaitis*, 104 F.3d at 1529 (describing similar Establishment Clause challenge as “deadly in its implications for religious liberty”).

*opposite* of entanglement. As in *Amos*, “[i]t cannot be seriously contended that [the statutory accommodation of religious exercise] impermissibly entangles church and state; the statute effectuates a more complete separation of the two and avoids the kind of intrusive inquiry into religious belief” that the Constitution prohibits. *Id.* at 339.

Similarly, far from increasing entanglement, RLUIPA’s definition of “religious exercise” tends to decrease it. To begin with, defining “religious exercise” to “include any exercise of religion, whether or not compelled by, or central to, a system of religious belief,” RLUIPA § 8(7)(A), precisely tracks Supreme Court precedent, and so entails no greater entanglement problem than the ordinary application of Free Exercise doctrine. Moreover, that doctrine itself is designed to minimize entanglement by precluding inquiry into the rationality of a belief, or its centrality to a religious system. *See, e.g., Hernandez v. Commissioner*, 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, or the validity of particular litigants’ interpretations of those creeds.”); *Thomas v. Review Bd. of Ind.*, 450 U.S. 707, 714 (1981) (“[R]eligious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection.”); *id.* at 716 (“Courts are not arbiters of scriptural interpretation.”). Thus, RLUIPA’s definition of religious exercise, like Free Exercise doctrine itself, tends to avoid rather than create excessive government entanglements with religion.

In sum, because RLUIPA—like RFRA before it, as well as a broad range of legislative accommodations of religion “follow[ing] the best of our traditions,” *Zorach*, 343 U.S. at 314—satisfies all three elements of the *Lemon* test, Defendants’ Establishment Clause challenge should be rejected.

## **II. RLUIPA Section 2(a) Does Not Violate the Tenth Amendment.**

*Mayweathers* also disposes of the Defendants’ Tenth Amendment challenge. *See Mayweathers*, 314 F.3d at 1069 (rejecting Tenth Amendment challenge to RLUIPA § 3 because “RLUIPA does not usurp the regulation of a core state function in violation of the Tenth Amendment”). *See also United States v. Jones*, 231 F.3d 508, 515 (9<sup>th</sup> Cir. 2000) (“[I]f Congress acts under one of its enumerated powers, there can be no violation of the Tenth Amendment.”). The Defendants’ argument is nonetheless useful to illustrate the pervasive mindset among many local governments that RLUIPA was designed precisely to counter-act: that zoning officials are free to disregard federal free exercise protections simply because they are operating in the local arena of land use. Def. Br. at 48-49. The Supreme Court and lower courts routinely reject the kind of federalist-themed hyperbole reflected in the briefs of Defendants, their *amici*, and nearly identically worded briefs we have encountered elsewhere, claiming that RLUIPA is somehow unique among federal laws in regulating local activity.<sup>20</sup> A recent district court opinion pointedly rejected an identical Tenth Amendment challenge:

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<sup>20</sup> *See Franchise Tax Bd. of California v. Hyatt*, \_\_\_ U.S. \_\_\_, 123 S. Ct. 1683, 1689 (2003) (rejecting “as ‘unsound in principle and unworkable in practice’ a rule of state immunity from federal regulation under the Tenth Amendment that turned on whether a particular state government function was ‘integral’ or ‘traditional.’”) (quoting *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528, 546-47 (1985)); *Fidelity Fed. Sav. & Loan Ass’n v. de la Cuesta*, 458 U.S. 141, 153 (1982) (addressing preemption of state real property law, and concluding that “‘The relative importance to the State of its own law is not material when there is a conflict with a valid federal law, for the Framers of our Constitution provided that the federal law must prevail.’”) (quoting *Free v. Bland*, 369 U.S. 663, 666 (1962)); *Schad v. Borough of Mt. Ephraim*, 452 U.S. 61, 68 (1981) (concluding, in connection with federal judicial review of zoning law under First Amendment, that “the standard of review is determined by the nature of the right assertedly threatened or violated rather than by the power being exercised or the specific limitation imposed.”); *Groome Resources*, 234 F.3d at 215 (rejecting “incantation of ‘local zoning’ and ‘traditional’ authority,” because “it does not serve the balance of federalism to allow local communities to discriminate”); *USCOC of Virginia RSA#3, Inc.*, 245 F. Supp. 2d at 834 (when Congress acts within its Commerce Clause authority, “[i]t is completely irrelevant that land use decisions are an important and traditionally local matter.”); *Freedom Baptist Church*, 204 F. Supp. 2d at 867 (“[T]he mere fact that zoning is traditionally a local matter does not answer Congress’s undoubtedly broad authority after *Wickard* to regulate economic activity

Although RLUIPA does "intrude" to some extent on local land use decisions, there is nothing about it that violates principles of federalism (i.e., federal intrusion into state matters) *if* the federal statute is otherwise grounded in the Constitution. RLUIPA is not federal zoning of county land; it is federal enforcement of federal rights. Here, assuming for the moment that RLUIPA is a proper exercise of either the Commerce Clause or Section 5 of the Fourteenth Amendment (or both), then the federal government would be constitutionally permitted to regulate some aspects of land use. Just as the federal Fair Housing Act (enacted under the Commerce Clause) functions in part to regulate local land use, RLUIPA also functions to regulate in an area of traditional local concern. One can think of many other valid federal statutes that incidentally or substantially impact on local land use or zoning regimes. *See, e.g.*, Title II of the Americans with Disabilities Act, 42 U.S.C. § 12312, regarding public accommodations; or the Telecommunications Act of 1996, 47 U.S.C. § 332(c)(7)(B), regarding federal regulation of local zoning requests of wireless service providers. Such federal statutes properly apply to municipal zoning decisions. *See, e.g., Forest City Daly Housing, Inc. v. Town of North Hempstead*, 175 F.3d 144, 151 (2d Cir. 1999).

*Maui County*, 2003 WL 23148864, at \*4 (emphasis in original). In sum, the sky will not fall (and the Tenth Amendment will not be violated) if RLUIPA continues to be upheld and applied widely; instead, free exercise protections that, for the most part, *already apply to these local officials* will simply be enforced more routinely and consistently.

### **III. RLUIPA Section 2(a) Does Not Violate the Separation of Powers.**

Like their Establishment Clause and Tenth Amendment challenges, Defendants' Separation-of-Powers challenge is also foreclosed by *Mayweathers*, 314 F.3d at 1070 (rejecting Separation of Powers challenge to RLUIPA § 3 because "RLUIPA does not erroneously review or revise a specific ruling of the Supreme Court. . . . Rather, RLUIPA provides *additional* protection for religious worship, respecting that *Smith* set only a constitutional floor—not a ceiling—for the protection of personal liberty.") (emphasis added). *See also Guam v. Guerrero*, 290 F.3d 1210, 1220 (9th Cir. 2002) (rejecting Separation of Powers challenge to RFRA as

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even when it is primarily intrastate in nature."). *See also Camps Newfound / Owatonna*, 520 U.S. at 574-75 (rejecting argument that dormant Commerce Clause cannot invalidate discriminatory state real estate tax because Congress cannot impose real estate tax itself).

applied to the federal government); *United States v. Marengo Cy. Comm'n*, 731 F.2d 1546, 1562 (11th Cir.), *cert. denied*, 469 U.S. 976 (1984) (“[C]ongressional disapproval of a Supreme Court decision does not impair the power of Congress to legislate a different result, as long as Congress had that power in the first place.”).

**IV. As This Court Has Already Found, RLUIPA Section 2(a), as Applied Through Section 2(a)(2)(C), Is a Legitimate Exercise of Congress’ Enumerated Power Under the Enforcement Clause of the Fourteenth Amendment.**

In *City of Boerne v. Flores*, 521 U.S. 507 (1997), the Supreme 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. Despite the fact that this Court has already an Enforcement Clause challenge to RLUIPA § 2(a), *see Guru Nanak Sikh Society v. County of Sutter*, No. S-02-1785, at 35-44 (E.D.Cal. Nov. 19, 2003) (rejecting Enforcement Clause Challenge to RLUIPA § 2(a)), Defendants reassert the very same argument in this case that Congress simply ignored *Boerne* in enacting RLUIPA 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>21</sup> This crucial difference is the result of a painstaking effort by legislators to *comply* with the requirements of *Boerne*—not, as Defendants suggest, to usurp judicial authority to define constitutional violations. Accordingly, RLUIPA codifies *current*

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<sup>21</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).

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, unlike RFRA, RLUIPA was carefully crafted so as to fall within Congress’ remedial power under Section 5 of the Fourteenth Amendment.” *Guru Nanak*, slip op. at 44.

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 these provisions do not extend beyond existing Free Exercise Clause protections, they require 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. Unempl. 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>22</sup>

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.”

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<sup>22</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* “distinguished neutral laws of general applicability from those ‘where the State has in place a system of individual exemptions.’”).

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

Although Defendants and their *amici* do not mention it, 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>23</sup> Indeed, as this Court has noted, Congress made absolutely explicit in the legislative history its purpose to codify this especially common form of Free Exercise Clause violation in order to facilitate enforcement. *See 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 § 2(a)(C)] 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).<sup>24</sup>

Similarly, in the face of overwhelming authority to the contrary, Defendants and their *amici* simply parrot the *Elsinore* court's anomalous refusal to acknowledge that the Supreme Court *itself* has applied “individualized assessments” doctrine outside the unemployment

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<sup>23</sup> *See also 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); *Life Teen*, slip op. at 28; *Cottonwood*, 218 F. Supp. 2d at 1221 (same); *Christ Universal Mission*, *supra* (same); *Freedom Baptist*, 204 F. Supp. 2d at 868 (same).

<sup>24</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.”).

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 applied the individualized assessments doctrine outside the unemployment context. *See, e.g., Axson-Flynn v. Johnson*, \_\_\_ F.3d \_\_\_, 2004 WL 198304, at \* 16 (10th Cir. Feb. 3, 2004) (applying individualized assessments doctrine to claim that student should have received a religious exception to university curricular requirement where university had in place “a discretionary system of making individualized case-by-case determinations”).

Indeed, as this Court has noted, courts have applied the individualized assessments doctrine with particular frequency in the land-use context precisely because zoning permitting decisions frequently involve inherently subjective and discretionary factors (*e.g.*, whether the religious use of the property is in the public interest or will adversely impact the neighborhood) that are akin to the “good cause” inquiry that the Supreme Court identified in *Sherbert* as emblematic of a system of individualized assessments. *See 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.”).<sup>25</sup>

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<sup>25</sup> *See also 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

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).

Rather than give Congress credit for following *Boerne* and crafting statutory language that adheres to the constitutional standard—as ordinary judicial deference would require—Defendants assert that the statute should not be read to merely codify the constitutional

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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 v. Gwinn*, 554 S.E.2d 63, 68 (Va. 2001) (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 Dae Won Sa Temple v. Sullivan*, 953 P.2d 1315, 1344-45 n.31 (Haw. 1998) (“The City’s variance law clearly creates a ‘system of individualized exceptions’ from the general zoning law.”); *Area Plan Comm’n v. Wilson*, 701 N.E.2d 856, 862 (Ind. App. 1998) (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 Christian Fellowship v. Cy. Comm’rs of Pitkin*, 870 F.Supp. 991, 994-95 (D.Colo. 1994) (holding that denial of special use permit triggered strict scrutiny because determination was made under discretionary “appropriate[ness]” standard); *Western Presbyterian Church v. Bd. of Zoning Adjustment*, 862 F. Supp. 538, 545, 547 (D.D.C. 1994) (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 Church v. Seattle*, 840 P.2d 174, 181 (Wash. 1992) (holding that landmark ordinances “invite individualized assessments of the subject property and the owner’s use of such property, and contain mechanisms for individualized exceptions”).

requirement that strict scrutiny is required where religious exercise is burdened pursuant to a system of individualized assessments. Defendants instead argue that RLUIPA must be read to impose an unconstitutional standard, because the statute would be “meaningless or surplusage” if it “did no more than codify prior case law.” Defs. Br. at 47. As an initial matter, this argument turns on its head one of the most venerable canons of statutory construction, *i.e.*, that “where a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided, our duty is to adopt the latter.” *United States v. Delaware & Hudson Co.*, 213 U.S. 366, 408 (1909). But even aside from this, Defendants’ novel argument overlooks that codification alone is a way for Congress to ensure that general First Amendment principles that *should* be applied in the land-use context actually *will* be applied in the land-use context. *See* 146 CONG. REC. S7775 (“Each subsection [of RLUIPA § 2] closely tracks the legal standards in one or more Supreme Court opinions, codifying those standards *for greater visibility and easier enforceability.*”) (emphasis added).

Because Defendants rely 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>26</sup> But RLUIPA omits the “centrality” inquiry precisely to

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<sup>26</sup> 291 F. Supp. 2d at 1091 (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 1098 (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 § 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.”).

*comply* with the Supreme Court’s admonition to avoid it.<sup>27</sup> The Ninth Circuit, like countless lower courts since *Smith*, have observed this limitation on the “substantial burden” inquiry.<sup>28</sup>

The *Elsinore* court also finds that RLUIPA’s “definitionally equating land use with ‘religious exercise,’” 291 F. Supp. 2d at 1091, similarly attempts a revolution in Free Exercise jurisprudence. RLUIPA, however, does not equate “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 Defendants and the *Elsinore* decision claim are vast disparities between RLUIPA and current “substantial burden” jurisprudence under the Free Exercise Clause are, in

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<sup>27</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>28</sup> See, e.g., *Kreisner v. San Diego*, 1 F.3d 775, 781 (9<sup>th</sup> Cir. 1993) (“[A]n inquiry into the intensity of a religious symbol essentially asks how ‘central’ that symbol is to the faith it represents.... The Supreme Court has disapproved this sort of inquiry in religion cases.”) (citing *Smith* and *Hernandez*); *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); *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).

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>29</sup> Congress found that

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<sup>29</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.’”).

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” described in *Smith* are especially common in the land-use context. *See id.* at 118 n. 31.<sup>30</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>31</sup> Some was *judicial*, including “decisions of the courts of the States and . . . the United States [reflecting] extensive litigation and

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<sup>30</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>31</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.) (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).

discussion of the constitutional violations.”<sup>32</sup> *Garrett*, 531 U.S. at 376 (Kennedy, J., concurring). Some was *anecdotal* evidence *paired with* testimony by experienced witnesses indicating that the anecdotes were representative.<sup>33</sup> *Cf. Garrett*, 531 U.S. at 369 (finding “half a dozen examples from the record” insufficient *by themselves* to establish pattern of constitutional violation).<sup>34</sup>

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<sup>32</sup> See Keetch Statement, at 131-53 (listing numerous state and federal zoning cases involving religious assemblies).

<sup>33</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>34</sup> *Amici* note 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 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.

The Defendants, like the *Elsinore* opinion cited in their brief, would conceal the depth and breadth of this hearing record by describing part of it and claiming it is the whole. Indeed, Defendants misleadingly gloss the massive record by suggesting that the entire evidence upon which Congress relied is found in a single report prepared by the House Committee on the Judiciary. Defs. Br. 44.<sup>35</sup> Although the following chart does not fully capture the depth of the record considered by Congress, it does begin to suggest the care Congress took in forming its legislative judgment that RLUIPA was needed.

Date	Session	Hearing	Witnesses
July 14, 1997	105 <sup>th</sup> Congress, 1 <sup>st</sup> Session	Protecting Religious Freedom After <u>Boerne v. Flores</u> (Part I), Hearing before the Subcommittee on the Constitution of the House Committee on the Judiciary	7
Oct. 1, 1997	105 <sup>th</sup> Congress, 1 <sup>st</sup> Session	Congress' Constitutional Role in Protecting Religious Liberty, Hearing before the Senate Committee on the Judiciary	4
Feb. 26, 1998	105 <sup>th</sup> Congress, 2 <sup>nd</sup> Session	Protecting Religious Freedom After <u>Boerne v. Flores</u> (Part II), Hearing before the Subcommittee on the Constitution of the House Committee on the Judiciary	10

<sup>35</sup> For a fuller summary of the evidence presented to Congress, *amici* respectfully direct this Court's attention to Douglas Laycock, *State RFRAs 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).

Date	Session	Hearing	Witnesses
Mar. 26, 1998	105 <sup>th</sup> Congress, 2 <sup>nd</sup> Session	Protecting Religious Freedom After <u>Boerne v. Flores</u> (Part III), Hearing before the Subcommittee on the Constitution of the House Committee on the Judiciary	7
June 16, 1998	105 <sup>th</sup> Congress, 2 <sup>nd</sup> Session	Religious Liberty Protection Act of 1998, Hearing before the Subcommittee on the Constitution of the House Committee on the Judiciary	8
June 23, 1998	105 <sup>th</sup> Congress, 2 <sup>nd</sup> Session	S. 2148, Religious Liberty Protection Act of 1998, Hearing Before the Senate Committee on the Judiciary	8
July 14, 1998	105 <sup>th</sup> Congress, 2 <sup>nd</sup> Session	Religious Liberty Protection Act of 1998, Hearing before the Subcommittee on the Constitution of the House Committee on the Judiciary	10
May 12, 1999	106 <sup>th</sup> Congress, 1st Session	Religious Liberty Protection Act of 1999, Hearing on H.R. 1691 before the Subcommittee on the Constitution of the House Committee on the Judiciary	15
June 23, 1999	106 <sup>th</sup> Congress, 1st Session	Issues Relating to Religious Liberty Protection, and Focusing on the Constitutionality of a Religious Protection Measure, Hearing Before the Senate Committee on the Judiciary	6
Sept. 9, 1999	106 <sup>th</sup> Congress, 1st Session	Issues Relating to Religious Liberty Protection, and Focusing	4

Date	Session	Hearing	Witnesses
		on the Constitutionality of a Religious Protection Measure, Hearing Before the Senate Committee on the Judiciary <sup>36</sup>	

Equally infirm is Defendants’ *amici*’s assertion that the record is incomplete for lack of opposing views, *see Amici Br.* at 17. But an examination of the record demonstrates that Congress heard many such views, including the views of the author of Defendants’ *amici* brief. *See, e.g.,* June-July 1998 House Hearings, at 91-110 (statements of Prof. Marci Hamilton).<sup>37</sup> Congress did not fail to consider those views, but considered them and simply found them less credible, by an overwhelming margin to boot. That judgment is entitled to deference from this Court.<sup>38</sup>

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<sup>36</sup> At the final hearing on Sept. 9, 1999, Professor Jay S. Bybee of the University of Nevada, Las Vegas, testified that he believed that Congress had answered the Supreme Court’s challenge in *Flores* through the land use provisions in RLPA. Previously, Professor Bybee had authored an *amicus* brief in *Flores* arguing that RFRA had exceeded Congress’s enforcement powers under the Fourteenth Amendment.

<sup>37</sup> Congress also heard testimony from other opponents, including Jeffrey Sutton, Solicitor General for the State of Ohio, Michael P. Farris, President of the Home School Legal Defense Association, Professor Christopher L. Eisgruber, New York University School of Law, Professor James Rankin, Washington College of Law, American University; Professor Lawrence C. Sager, New York University School of Law. In addition, Congress received written submissions from opponents such as Irene B. French, Mayor Merriam, Kansas and Vice Chair, National League of Cities, and Larry E. Neake, National Association of Counties.

<sup>38</sup> *See, e.g., Freedom Baptist*, 204 F. Supp. 2d at 867 (“Whatever the true percentage of cases in which religious organizations have improperly suffered at the hands of local zoning authorities, we certainly are in no position to quibble with Congress’s ultimate judgment that the undeniably low visibility of land regulation decisions may well have worked to undermine the Free Exercise rights of religious organizations around the country.”). *See also Hibbs*, 123 S. Ct. at 1982 (affirming congressional enforcement legislation designed to deter “subtle discrimination that may be difficult to detect on a case-by-case basis.”)

In sum, 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) (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, Section 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>39</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*. 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 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

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<sup>39</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.”).

not jeopardize the constitutionality of the Act. *See Guru Nanak*, slip op. at 42 (“To the extent that 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.’”) (quoting *Freedom Baptist*, 204 F. Supp. 2d at 874).<sup>40</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 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.

**V. RLUIPA Section 2(a), As Applied Through Section 2(a)(B), Is a Legitimate Exercise of Congress’ Enumerated Power Under the Commerce Clause.**

Finally, the Defendants claim that Congress lacked the authority under the Commerce Clause to pass RLUIPA Section 2(a). *See* Defs. Br. 41-43. Section 2(a), however, contains an “express jurisdictional element,” and regulates “economic activity” – namely, interference with the use and development of land – whose connection to interstate commerce is not “attenuated,” but “visible to the naked eye.” *See United States v. Lopez*, 514 U.S. 549, 561-63 (1995); *United*

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<sup>40</sup> *See also 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”); *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*, 531 U.S. at 365 (“Congress is not limited to mere legislative repetition of this Court’s constitutional jurisprudence,” but may also prohibit “a somewhat broader swath of conduct”).

*States v. Morrison*, 529 U.S. 598, 608-13 (2000) Therefore, the Defendants’ Commerce Clause challenge to RLUIPA Section 2(a) should be rejected.

The Supreme Court recently clarified the factors courts should consider when assessing whether congressional legislation represents “regulation of an activity that substantially affects interstate commerce,” *Lopez*, 514 U.S. at 559: (1) whether the statute contains an express “jurisdictional element which would ensure, through case-by-case inquiry, that the [regulated activity] in question affects interstate commerce,” *Lopez*, 514 U.S. at 561; *Morrison*, 529 U.S. 611-12; (2) whether the statute regulates “economic activity,” *Lopez*, 514 U.S. at 559; *Morrison*, 529 U.S. at 610; (3) whether “the link between [the regulated activity] and a substantial effect on interstate commerce was attenuated,” *Morrison*, 529 U.S. at 612 (citing *Lopez*, 514 U.S. at 563-67); and (4) whether the statute’s “legislative history contain[s] express congressional findings regarding the effects upon interstate commerce,” *Morrison*, 529 U.S. at 612 (quoting *Lopez*, 514 U.S. at 562). See *United States v. Griffith*, 284 F.3d 338, 346 (2d Cir. 2002); *Groome Resources, Ltd. v. Parish of Jefferson*, 234 F.3d 192, 204-05 (5th Cir. 2000). Commerce Clause legislation need not satisfy every single factor, and no single factor is strictly required.

Notably, moreover, Commerce Clause legislation is entitled to the same judicial deference and strong presumption of constitutionality as other Acts of Congress. See *Groome Resources*, 234 F.3d at 203 (“In reviewing an act of Congress passed under its Commerce Clause authority, we apply the **rational basis test** as interpreted by the *Lopez* court.”) (emphasis added). Although it is not the plaintiffs’ burden to show it, *amici* explain further below how RLUIPA Section 2(a), when applied through Section 2(a)(2)(B), satisfies all four factors of the *Lopez* / *Morrison* analysis.

**A. RLUIPA Section 2(a) contains an “express jurisdictional element.”**

First and foremost, in contrast to the laws at issue in *Lopez* and *Morrison*, Section 2(a) of RLUIPA is supported by an “express jurisdictional element which might limit its reach to a discrete set of [burdens on land use] that additionally have an explicit connection with or effect on interstate commerce.” *Morrison*, 529 U.S. at 611-12; *see* RLUIPA § 2(a)(2)(B). As a matter of law and logic, the presence of this provision ensures the *facial* constitutionality of the statute under the Commerce Clause: by its own terms, the statute applies only to conduct affecting “commerce with foreign nations, among the several States, or with Indian tribes.” *Compare* RLUIPA § 2(a)(2)(B), *with* U.S. CONST. Art. I., § 8, cls. 3.<sup>41</sup>

The jurisdictional element also precludes *as-applied* challenges under the Commerce Clause. If the conduct at issue in a particular case satisfies the jurisdictional requirement of Section 2(a)(2)(B), then the conduct also falls within the sweep of the commerce power and may be regulated constitutionally. If the facts do not satisfy the jurisdictional element, then the constitution *would* prohibit the statute from reaching the conduct under the commerce power – but those are the same cases where the statute does not reach the conduct in the first place, so constitutional limits are never transgressed.<sup>42</sup> In other words, the Act applies either constitutionally, or not at all.

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<sup>41</sup> *See United States v. Chesney*, 86 F.3d 564, 568-69 (6<sup>th</sup> Cir. 1996) (concluding “presence of the jurisdictional element defeats [defendant’s] facial challenge”); *United States v. Sorrentino*, 72 F.3d 294, 296 (2d Cir. 1995) (“The statute before us avoids the constitutional deficiency identified in *Lopez* because it requires a legitimate nexus with interstate commerce” by means of a jurisdictional element.); *United States v. Bishop*, 66 F.3d 569, 588 (3d Cir. 1995) (“[T]he jurisdictional element in [the federal carjacking statute] independently refutes appellants’ arguments that the statute is constitutionally infirm.”).

<sup>42</sup> *See Morrison*, 529 U.S. at 611-12; *Lopez*, 514 U.S. at 561 (noting that jurisdictional element ensures “through case-by-case inquiry” that regulated activity falls within Commerce Clause authority); *United States v. Cummings*, 281 F.3d 1046, 1051 (9<sup>th</sup> Cir. 2002) (same); *see, e.g., United States v. Grassie*, 237 F.3d 1199, 1211 (10<sup>th</sup> Cir. 2001) (“[B]y making interstate

This has proven sufficient *alone* for courts—including this one—to reject Commerce Clause challenges to both RLUIPA Section 2(a)(2)(b), and the analogous prisoner provision, Section 3(b)(2). *See Mayweathers v. Terhune*, 2001 WL 804140, at \*7-\*8 (E.D. Cal. July 2, 2001) (“The jurisdictional element in § 3(b)(2) thereby ensures that Congress’ Commerce Clause power is only exercised in those cases where interstate commerce is directly affected by the prison regulation at issue.”).<sup>43</sup> This Court should not depart from its prior ruling on this point.

**B. RLUIPA Section 2(a) regulates “economic activity.”**

When a jurisdictional element assesses the effect of regulated activity on interstate commerce on a *case-by-case* basis, the Court need not additionally examine whether that regulated activity may also be characterized as “economic” in some abstract or general sense, as courts have already concluded.<sup>44</sup> Nonetheless, in the abundance of caution, if the Court deems it

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commerce an element of the [Church Arson Prevention Act] ... to be decided on a case-by-case basis, constitutional problems are avoided.”). *See also United States v. Harrington*, 108 F.3d 1460, 1465 (D.C. Cir. 1997) (“Indeed, the Court specifically suggested that a jurisdictional element could justify the application of the commerce power to a single firearm possession, despite the inevitable insubstantiality of such a one-time, small-scale event from the perspective of interstate commerce.”).

<sup>43</sup> *See also Maui County*, 2003 WL 23148864, at \*4 (“RLUIPA does not facially violate the Commerce Clause . . . because RLUIPA has a jurisdictional element”); *Hale O Kaula*, 229 F. Supp. 2d at 1072 (“*Lopez* itself recognized that if a statute includes a jurisdictional element, the statute avoids such a jurisdictional challenge. RLUIPA contains such an element.”) (citations omitted); *Life Teen*, slip op. 25-26 (“The Ninth Circuit has declined to hold that a statute which contains a jurisdictional element explicitly requiring the “necessary nexus between the statutory provision and interstate commerce” violates the Commerce Clause because “the jurisdictional element ‘insures on a case-by-case basis, that a defendant’s actions implicate interstate commerce to a constitutionally adequate degree.’”) (quoting *United States v. Jones*, 231 F.3d 508, 514 (9th Cir. 2000)); *Johnson*, 223 F. Supp. at 828 (“RLUIPA is saved by its jurisdictional requirement which establishes the requisite nexus to interstate commerce to satisfy the Commerce Clause.”) *rev’d on other grds.*

<sup>44</sup> *See Hale O Kaula*, 229 F. Supp. 2d at 1072 (noting that further Commerce Clause analysis only appropriate for “laws of general applicability where Congress regulates an entire field of activity”). *See also Life Teen*, slip op. 26 (“[I]t is not necessary to address Plaintiff and Defendants’ arguments as to whether religious activities and land use decisions involve economic activity that substantially affects interstate commerce generally.”).

necessary to examine this factor, *amici* explain why the Court should find that RLUIPA regulates “economic activity.”

By its very terms, RLUIPA regulates “economic activity”: burdens on the use, development, or conversion of real property, where the burdens *also* affect interstate commerce. RLUIPA §§ 2(a)(2)(B), 8(5), 8(7)(B); *see, e.g., Freedom Baptist Church*, 204 F. Supp. 2d at 867-68 (concluding that “insofar as state or local authorities ‘substantially burden’ the economic activity of religious organizations, Congress has ample authority to act under the Commerce Clause”); *Westchester Day School*, 280 F. Supp. 2d at 238 (rejecting Commerce Clause challenge to application of RLUIPA to zoning interference with operation of Jewish day school).

The conclusion that RLUIPA regulates “economic activity” is reinforced by a recent decision of the Fifth Circuit Court of Appeals concluding that congressional regulation of local zoning laws to combat housing discrimination fell within the commerce power, based in part on a finding that Congress was regulating “economic activity.” *Groome Resources, Ltd. v. Parish of Jefferson*, 234 F.3d 192, 205-06 (5<sup>th</sup> Cir. 2000) (upholding constitutionality of Fair Housing Amendments Act). The court reasoned that “an act of discrimination that directly interferes with a commercial transaction” – there, the purchase, sale, or rental of residential property – “is an act that can be regulated to facilitate an economic activity.” *Id.* at 205-06. *See also United States v. Cummings*, 281 F.3d 1046, 1050 (9<sup>th</sup> Cir. 2002) (“Congress has authority to prevent individuals from impeding commerce.”).<sup>45</sup> In addition, the development of land is at least as “commercial”

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<sup>45</sup> Other Circuit Courts of Appeals are in accord. A recent decision of the Seventh Circuit summarizes the matter well:

The salient, overriding inquiry in both *Jones* and *Lopez* was the search for a commercial activity that Congress could properly regulate. If there is an interstate commercial activity which meets any of the three *Lopez* categories Congress may regulate that activity *and* the actions or activities which secondarily affect the primary commercial activity. Hence, Congress may regulate the arson or bombing of any commercial

or “economic” as the purchase, sale, or rental of that land. Indeed, the legislative history of RLUIPA repeatedly identifies the “construction project” as an example of “a specific economic transaction in commerce” that land-use regulations may impermissibly burden. 146 CONG. REC. S7775; H.R. REP. 106-219, at 28.

Moreover, the purchase, sale, rental, development or use of land is no less an “economic activity” when undertaken by a religious group or other non-profit organization.<sup>46</sup> Courts have consistently held that the commercial activities of religious institutions are subject to regulation under the Commerce Clause.<sup>47</sup> If commercial activities of religious entities fall within the commerce power when Congress would *regulate* them, they cannot fairly be said to fall beyond that power when it would *deregulate* them. Therefore, unlike the statutes at issue in *Lopez* and *Morrison*, both of which pertained to violent crime, RLUIPA regulates “economic activity.”

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building because the destruction of the building indirectly *affects* interstate commerce by virtue of the fact that the building was used in interstate commerce.

*United States v. Turner*, 301 F.3d 541, 547 (7th Cir. 2002) (citations omitted, emphasis in original).

<sup>46</sup> See *Camps Newfound / Owatonna, Inc. v. Town of Harrison*, 520 U.S. 564, 585 (1997) (“Nothing intrinsic to the nature of nonprofit entities prevents them from engaging in interstate commerce.”); H.R. REP. No. 106-219, at 28 (noting that predecessor bill of RLUIPA “does not treat religious exercise itself as commerce,” but “recognizes that the exercise of religion sometimes requires commercial transactions, such as the construction of churches.”); see, e.g., *Grassie*, 237 F.3d at 1210 (“Religion and in particular religious buildings actively used as the site and dynamic for a full range of activities, easily falls within” the commerce power.); *id.* at 1209 (listing among common church activities that affect interstate commerce “social services, educational and religious activities, the purchase and distribution of goods and services, civil participation, and the collection and distribution of funds for these and other activities across state lines”); *Cottonwood Christian Center v. City of Cypress*, 218 F. Supp. 2d 1203, 1221-22 (C.D. Cal. 2002) (listing various activities of particular church, including broadcasts of its services, and concluding that interference with them “affects commerce”).

<sup>47</sup> See, e.g., *Tony & Susan Alamo Fdn. v. Sec’y of Labor*, 471 U.S. 290 (1985) (finding religious foundation to be an “[e]nterprise engaged in commerce or in the production of goods for commerce” under Fair Labor Standards Act); *Volunteers of America v. NLRB*, 777 F.2d 1386, 1389 (9<sup>th</sup> Cir. 1985) (noting that nonprofit charitable employers are subject to National Labor Relations Act when they affect commerce, and finding statute to cover church-operated alcohol rehabilitation center).

Here, RLUIPA regulates “economic activity” within the meaning of the Commerce Clause in this case. Specifically, RLUIPA regulates the burden imposed on the Plaintiffs’ ability to operate a religious radio station that is integrated into their church’s ministry. Courts have repeatedly held that operation of a radio station, including one by a church, is an economic activity subject to federal regulation under the interstate commerce clause. *See, e.g., United States v. Rayborn*, 312 F.3d 229, 233-34 (6<sup>th</sup> Cir. 2002) (finding that church’s activities affect commerce to allow jurisdiction under the commerce clause where “church used regular radio broadcasts as part of its evangelism” and “the desired effect [of the broadcasts] was to increase membership and attendance at the church's worship services and other programs.”); *United States v. Butterfield*, 91 F. Supp. 2d 704, 705 (D.Vt. 2000) (rejecting argument that Congress lacks power to regulate intrastate radio broadcasts because “radio broadcasts have impact upon interstate commerce, regardless of whether those broadcasts are interstate or intrastate in scope.”) *Cf. F.C.C. v. League of Women Voters of California*, 468 U.S. 364, 376 (1984) (recognizing Congress’ right to regulate access to radio and television broadcast frequencies under interstate commerce power).

**C. RLUIPA Section 2(a) regulates a class of activity having a direct, rather than an attenuated, link to interstate commerce.**

Even after *Lopez* and *Morrison*, courts will measure interstate effect on commerce by examining the activity at issue “taken together with that of many others similarly situated.” *Lopez*, 514 U.S. at 556 (quoting *Wickard v. Filburn*, 317 U.S. 111, 127-28 (1942)). *See also Citizens Bank v. Alafabco, Inc.*, 123 S. Ct. 2037, 2040 (2003) (“Congress’ Commerce Clause power may be exercised in individual cases without showing any specific effect upon interstate commerce if in the aggregate the economic activity in question would represent a general

practice ... subject to federal control.”) (internal quotations omitted).<sup>48</sup> But even these aggregated effects may fall beyond the commerce power if they are “so indirect and remote that to embrace them ... would effectually obliterate the distinction between what is national and what is local.” *Lopez*, 514 U.S. at 557 (quoting *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 37 (1937)).

There can be little doubt that the disruption to commerce at issue here, “taken together with ... many others similarly situated,” would “substantially affect interstate commerce.” *Lopez*, 514 U.S. at 556, 559. Even if the Plaintiffs’ desired radio broadcasts were somehow purely intrastate in character, the aggregate effect of preventing similar activity elsewhere would still implicate the commerce power.<sup>49</sup> Indeed, courts have found the mere *use*—separate and apart from the *development*—of real property for religious purposes to have sufficiently direct connections to interstate commerce to fall within the sweep of the commerce power.<sup>50</sup> By

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<sup>48</sup> See, e.g., *Camps Newfound / Owatonna, Inc.*, 520 U.S. at 586 (relying on “interstate commercial activities of nonprofit entities *as a class*” in Commerce Clause determination, citing *Lopez* and *Wickard*) (emphasis added); *Johnson*, 223 F. Supp. 2d at 829 n.8 (noting the continuing viability of the aggregation principle of *Wickard v. Filburn*, and noting its codification in RLUIPA § 4(g)); *Freedom Baptist Church*, 204 F. Supp. 2d at 867 & nn.12, 14 (same).

<sup>49</sup> See, e.g., *Camps Newfound / Owatonna*, 520 U.S. at 586 (“[A]lthough the [Christian Scientist] summer camp involved in this case may have a relatively insignificant impact on the commerce of the entire Nation, the interstate commercial activities of nonprofit entities as a class are unquestionably significant.”). See also *Johnson*, 223 F. Supp. 2d at 829 (noting that “RLUIPA covers regulation of the free exercise of religion, an objectively interstate activity,” and that religious exercise “affects interstate commerce in a multitude of ways”).

<sup>50</sup> See *Rayborn*, 312 F.3d at 233 (“The “business” or “commerce” of a church involves the solicitation and receipt of donations, and the provision of spiritual, social, community, educational (religious or non-religious) and other charitable services.”) (quoting *United States v. Odom*, 252 F.3d 1289, 1294 (11<sup>th</sup> Cir. 2001)); *United States v. Grassie*, 237 F.3d 1199, 1210 (10<sup>th</sup> Cir. 2001) (“Religion and in particular religious buildings actively *used* as the site and dynamic for a full range of activities, easily falls within” the commerce power) (emphasis added); see, e.g., *Cottonwood*, 218 F. Supp. 2d at 1221-22 (concluding that “the *use* of the church once it is constructed will affect commerce,” because it “will employ ministers, maintenance personnel, and daycare center workers[; will] transmit a televised ministry and hold

contrast, the regulated activity in *Lopez*—possessing a gun in a school zone—was not one “that might, through repetition elsewhere, substantially affect any sort of interstate commerce.” *Lopez*, 514 U.S. at 567.

Moreover, this Court need not “pile inference upon inference,” *Lopez*, 514 U.S. at 567, to get from the regulated category of activity to an effect on interstate commerce: the application of land-use restrictions in this case ***directly and immediately*** affects the economic activity of radio broadcasts.<sup>51</sup>

Finally, RLUIPA Section 2(a) does not remotely threaten “the distinction between what is national and what is local.” *Lopez*, 514 U.S. at 557, 567. RLUIPA neither replaces local zoning and land-marking systems with a federal one, nor provides religious uses a blanket exemption from such systems. Instead, Section 2(a) requires local authorities to provide ***additional justification*** for a ***limited category*** of zoning and land-marking laws, namely, those that ***both*** substantially burden religious exercise ***and*** tread into national territory by affecting interstate commerce. See *Freedom Baptist Church*, 204 F. Supp. 2d at 867-68 (concluding that “insofar as state or local authorities ‘substantially burden’ the economic activity of religious organizations, Congress has ample authority to act under the Commerce Clause”). Thus, RLUIPA Section 2(a) is typical of Commerce Clause laws, such as the Telecommunications Act of 1996 and the Fair Housing Amendments Act of 1988, that permissibly set certain limits on

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national religious conferences[; and] will have employees and will regularly obtain merchandise for resale.”) (emphasis added); *Westchester Day School*, 280 F. Supp. 2d at 238 (concluding that “***operating*** an orthodox Jewish day school is an economic endeavor within the meaning of the Commerce Clause”) (emphasis added).

<sup>51</sup> See, e.g., *Westchester Day School*, 280 F. Supp. 2d at 238 (finding use activities directly prohibited by application of land-use regulation); *Cottonwood*, 218 F. Supp. 2d at 1221-22 (finding wide range of use and development activities directly prohibited by application of land-use regulation). See also *Groome Resources*, 234 F.3d at 213 (noting that “the connection between racial discrimination and its effect on interstate commerce had been established by [the Supreme Court] in *Heart of Atlanta Motel* and *McClung*.”).

(but do not replace or supplant) the zoning power of local governments, but only when it interferes with commerce—*that is, only when it treads into federal territory.*<sup>52</sup>

**D. RLUIPA’s legislative history contains evidence that the act regulates activity that “substantially affects interstate commerce.”**

Both *Lopez* and *Morrison* make clear that Congress is not required to make formal findings of the regulated activity’s effect on interstate commerce when “such substantial effect [is] visible to the naked eye.” *Morrison*, 529 U.S. at 612 (citing *Lopez*, 514 U.S. at 563). Because the substantial effect on commerce of the regulated activity here—interference with land use and development—is abundantly “visible,” the Court need not rely on congressional findings to conclude that Congress has acted within its bounds.

Nevertheless, Congress still found in RLUIPA’s legislative history that burdens on religious land use substantially affects interstate commerce. *See* 146 CONG. REC. S7775; H.R. REP. NO. 106-219, at 28. These findings, moreover, are based on extensive testimony, studies, and other evidence demonstrating the nationwide magnitude of the commercial activity of religious institutions, in construction and otherwise. According to one study in the legislative history, in 1992 alone, religious communities spent \$6 billion on capital investments and new

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<sup>52</sup> *See, e.g., Groome Resources*, 234 F.3d at 205-06 (rejecting Commerce Clause challenge to Fair Housing Amendments Act); *USCOC of Virginia RSA #3, Inc. v. Montgomery County Bd. of Supervisors*, 245 F. Supp. 2d 817, 833-834 (W.D. Va. 2003) (rejecting Commerce Clause challenge to Telecommunications Act); *Freedom Baptist Church*, 204 F.Supp.2d at 867 (noting that Telecommunications Act “specifically governs state and local authorities passing upon zoning requests of wireless providers without (to date) any judicially-recognized constitutional objection”). *See also id.* (“Nor is [RLUIPA] the first time Congress has entered the zoning arena.”); Salkin, *Smart Growth and Sustainable Development: Threads of a National Land Use Policy*, 36 VAL. U. L. REV. 381, 388 (Spring 2002) (providing additional examples from the “host” or “litany of federal laws and implementing regulations [that] affect and restrict state and local land use decision making.”).

construction, up from \$4.8 billion five years earlier.<sup>53</sup> Paired with the substantial evidence of widespread discriminatory and burdensome land-use regulation discussed above, *see supra* Section I.B.2, Congress had much more than a “*rational basis* ... for concluding that [such regulation] sufficiently affected interstate commerce.” *Lopez*, 514 U.S. at 557 (emphasis added).

Thus, RLUIPA Section 2(a), as applied through Section 2(a)(2)(B), satisfies all four elements of the Supreme Court’s Commerce Clause analysis, and so represents a proper exercise of that power.

### CONCLUSION

For all of the foregoing reasons, the Defendants’ constitutional challenge to RLUIPA Section 2(a) should be rejected.

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<sup>53</sup> *See, e.g., 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. at 125, 134 (statement of Marc D. Stern, American Jewish Congress). *See also* 146 Cong. Rec. S7775 (joint statement of Sen. Hatch and Sen. Kennedy) (citing Stern statement in support of Commerce Clause authority); *Grassie*, 237 F.3d at 1209-10 & n.7 (noting “litany of billions of dollars and varied activities” reflected in Stern statement and similar authoritative documents).

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY under penalty of perjury that a copy of the foregoing Brief *Amici Curiae* was sent by the method indicated below, postage prepaid, to each of the following persons at their last known address on February 13, 2004:

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