

1 validity. Defendants’ challenge to §2(a)(2)(B) fundamentally misunderstands how
2 the section works. Defendants apparently believe that §2(a)(2)(B) extends the
3 RLUIPA’s reach to all land use regulations. This is incorrect. As explained in
4 greater detail below, §2(a)(2)(B) applies only once a court finds, after an analysis of
5 the specific facts of the case at hand, that the burden on religion challenged in that
6 lawsuit (or the burden’s removal) “affects” interstate commerce. In other words,
7 §2(a)(2)(B) applies only when its application is consistent with the Commerce
8 Clause.

9 To be clear from the outset, the United States contends only that §2(a)(2)(B)’s
10 application is constitutional when interstate commerce is affected. The government
11 takes no position as to *whether* the burden on religion in this lawsuit affects interstate
12 commerce—that issue is beyond the scope of the government’s intervention in this
13 lawsuit.

14 **I. Section 2(a)(2)(B) of the RLUIPA Is a Valid Exercise of Congress’s**
15 **Commerce Power.**

16 Section 2(a)(2)(B) of the RLUIPA applies strict scrutiny whenever a land use
17 regulation imposes a substantial burden on religion, and that burden, or its removal,
18 “affects ... commerce with foreign nations, among the several States, or with Indian
19 tribes.” 42 U.S.C. §2000cc(a)(2)(B). Significantly, nowhere does the RLUIPA
20 indicate that all land use regulation “affects” interstate commerce. Rather,
21 §2(a)(2)(B) is a paradigmatic example of a jurisdictional hook, a clause that triggers
22 a statute’s application only when it would be proper under the Constitution’s
23 Commerce Clause. Using this tool, Congress can ensure that it has legislated to the
24 borders of its power, but no further.

25 The RLUIPA’s jurisdictional hook requires the courts, on a case-by-case basis,
26 to determine whether the burden on religion affects interstate commerce. After that
27 determination, there are only two possible outcomes. First, a court could find that the
28 land use regulation that burdens religion does affect interstate commerce. In this

1 case, the RLUIPA would be a valid exercise of the commerce power. Second, a court
2 could find that the burden on religion does not affect interstate commerce. In that
3 case, the RLUIPA would not apply at all as a *statutory* matter, so no constitutional
4 issue would arise. In neither event would the jurisdictional hook exceed Congress’s
5 commerce power.

6 Jurisdictional hooks that trigger a statute’s application only when the covered
7 activity “affects commerce” have long been considered the appropriate means for
8 Congress to invoke the full extent of its commerce power. See *Jones v. United States*,
9 529 U.S. 848, 859 (2000) (“the statutory term ‘affecting ... commerce’ ... when
10 unqualified, signal[s] Congress’ intent to invoke its full authority under the
11 Commerce Clause.”). Accordingly, Congress routinely employs these jurisdictional
12 hooks to target specific activities within a larger class that bear a direct relation to
13 interstate commerce. See, e.g., 18 U.S.C. §2332a(a)(2) (prohibiting the use of a
14 weapon of mass destruction, including any biological agent, toxin, or vector where
15 the results of such use “affect interstate or foreign commerce”); 18 U.S.C. §1951
16 (Hobbs Act, prohibiting robbery or extortion that “affects commerce”); 18 U.S.C.
17 §247 (Church Arson Prevention Act); 18 U.S.C. §844(i) (federal arson statute); 18
18 U.S.C. §922(g) (felony firearms possession law); 18 U.S.C. §2119 (federal carjacking
19 statute). The Ninth Circuit, just as routinely, holds that these jurisdictional hooks
20 satisfy the Commerce Clause. See, e.g., *United States v. Cummings*, 281 F.3d 1046,
21 1051 (9th Cir. 2002) (“The jurisdictional element insures on a case-by-case basis, that
22 a defendant’s actions implicate interstate commerce to a constitutionally adequate
23 degree.”) (internal quotation marks omitted); *United States v. Jones*, 231 F.3d 508,
24 514 (9th Cir. 2000) (same); *United States v. Polanco*, 93 F.3d 555, 563 (9th Cir.
25 1996) (same). Other circuits agree. Accord *United States v. Smith*, 101 F.3d 202, 215
26 (1st Cir. 1996); *United States v. Trzaska*, 111 F.3d 1019, 1028 (2d Cir. 1997); *United*
27 *States v. Nathan*, 202 F.3d 230, 234 (4th Cir. 2000); *United States v. Rawls*, 85 F.3d
28 240, 242 (5th Cir. 1996); *United States v. Baker*, 197 F.3d 211, 218 (6th Cir. 1999);

1 *United States v. Taylor*, 226 F.3d 593, 598-600 (7th Cir. 2000); *United States v.*
2 *Barry*, 98 F.3d 373, 378 (8th Cir. 1996); *United States v. Grassie*, 237 F.3d 1199,
3 1211 (10th Cir. 2001); *United States v. Adams*, 91 F.3d 114, 114 (11th Cir. 1996);
4 *United States v. Harrington*, 108 F.3d 1460, 1464-67 (D.C. Cir. 1997). The
5 RLUIPA’s jurisdictional hook fits comfortably within these decisions, which hold
6 that case-by-case determinations whether commerce is affected insulate a statute from
7 Commerce Clause challenges.

8 Defendants’ challenge expends nearly all its effort at arguing that *United States*
9 *v. Lopez*, 514 U.S. 556 (1995), and *United States v. Morrison*, 529 U.S. 598 (2000),
10 demonstrate that the RLUIPA’s jurisdiction hook is unconstitutional. Defendants
11 have wildly misstated the holdings of these cases. *Lopez* expressly recognizes that
12 jurisdictional hooks avoid Commerce Clause difficulties. In analyzing the Gun-Free
13 School Zone Act at issue in *Lopez*, the Supreme Court identified two distinct rubrics
14 under which Congress may enact legislation pursuant to its commerce power. The
15 first rubric consists of statutes of general applicability, whereby Congress regulates
16 an entire field of activity. For such broad regulations to be lawful, the statute must
17 relate to interstate commerce in one of three ways: it must regulate the channels of
18 commerce, the instrumentalities of commerce, or—if the statute regulates a purely
19 intrastate activity—activity that, in the aggregate, “substantially affect[s] interstate
20 commerce.” *Lopez*, 514 U.S. at 558-59. Alternatively, the Court continued, instead
21 of regulating an entire field, Congress may employ a jurisdictional hook to target only
22 those individual acts that themselves affect commerce. See *id.* at 561-62 (stating that
23 a jurisdictional hook “would ensure, through case-by-case inquiry, that the firearm
24 possession in question affects interstate commerce”). See also *United States v.*
25 *Morrison*, 529 U.S. 598, 612 (2000) (“Such a jurisdictional element may establish
26 that the enactment is in pursuance of Congress’ regulation of interstate commerce.”).
27 The Ninth Circuit understands well this distinction. See, e.g., *United States v. Jones*,
28 231 U.S. 508, 514–15 (9th Cir. 2000) (“[W]e are not prepared to say that the

1 teachings of *Morrison* apply to statutes, like § 922(g)(8), that do contain a precise
2 statement of a jurisdictional element.”).

3 Defendants’ reliance on *Lopez* and *Morrison*, then—which are the lynchpins
4 of Defendants’ entire challenge to §2(a)(2)(B)—fails because the statutes in those
5 cases did not contain jurisdictional hooks, but, rather, were statutes of general
6 applicability. See *Morrison*, 529 U.S. at 613 (“Like the Gun-Free School Zones Act
7 at issue in *Lopez*, § 13981 contains no jurisdiction element establishing that the
8 federal cause of action is in pursuance of Congress’ power to regulate interstate
9 commerce.”); *Jones*, 231 F.3d at 514–15 (declining to apply *Lopez* and *Morrison* to
10 a statute with a jurisdictional hook). Because the RLUIPA contains a jurisdictional
11 hook that ensures that the commerce power is invoked only in those instances where
12 interstate commerce is affected, the concerns reflected in *Lopez* and *Morrison* are
13 absent. For example, Defendants’ federalism concern—that the RLUIPA will
14 regulate truly local activity, see Defendants’ Opposition Memorandum at 10–11—is
15 inapposite because §2(a)(2)(B) is only triggered when interstate commerce is
16 affected. Similarly, Defendants’ concern that the RLUIPA will affect non-economic
17 activities, see Def. Opp. Mem. at 5–7, is misplaced. The RLUIPA’s jurisdictional
18 hook targets only individual cases, each of which must affect interstate commerce.
19 See *Jones v. United States*, 529 U.S. 848, 859 (2000) (reaffirming the
20 constitutionality of the federal arson statute, which targets individual acts of arson via
21 jurisdictional hook). Accordingly, because Defendants’ analysis treats §2(a)(2)(B)
22 as a statute of general applicability, which it is not, the challenge is doomed from the
23 start. The Supreme Court has expressly approved of jurisdictional hooks, and
24 Defendants provide no reason to treat the RLUIPA’s hook differently from any of the
25 other statutes that utilize the same language.

26 Defendants also mistakenly contend that §2(a)(2)(B) is inadequate because it
27 applies to burdens that “affect,” rather than “substantially affect,” interstate
28 commerce. See, e.g., Def. Opp. Mem. at 3. A statute need only contain “affecting

1 commerce” language to invoke full Congressional authority under the Commerce
2 Clause. See *Jones*, 529 U.S. at 854 (“the statutory term ‘affecting . . . commerce,’ .
3 . . . when unqualified, signal[s] Congress’ intent to invoke its full authority under the
4 Commerce Clause.”); *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 273
5 (1995) (“That phrase—‘affecting commerce’—normally signals Congress’ intent to
6 exercise its Commerce Clause powers to the full.”). Neither *Lopez* nor *Morrison*
7 changed this standard.¹ The Ninth Circuit has explicitly held that *Lopez* does not
8 require a substantial effect on interstate commerce for statutes containing a
9 jurisdictional element similar to the one in RLUIPA. See *United States v. Atcheson*,
10 94 F.3d 1237, 1242-43 (9th Cir. 1997) (“Where the crime itself directly affects
11 interstate commerce, as in the Hobbs Act, no requirement of a substantial effect is
12 necessary to empower Congress to regulate the activity under the Commerce
13 Clause.”); *United States v. Juvenile Male*, 118 F.3d 1344, 1347-48 (9th Cir. 1997)
14 (following *Atcheson* to reject “substantial effect” requirement in RICO statute with
15 jurisdictional hook); *United States v. Woodruff*, 122 F.3d 1185, 1186 (9th Cir. 1997)
16 (finding “substantially affects” test of *Lopez* inapplicable to the Hobbs Act). Indeed,
17 the Ninth Circuit has gone so far as to hold—in decisions issued after *Lopez* and
18 *Morrison*—that only a de minimis effect on commerce need be established. See
19 *United States v. Lynch*, 282 F.3d 1049, 1051 (9th Cir. 2002) (“We have held that the
20 government need prove that a defendant’s acts had only a *de minimis* effect on
21 interstate commerce to satisfy this jurisdictional element of the Hobbs Act.”) (internal
22 quotation marks omitted). Thus, Defendants’ attack on the jurisdictional element in
23 RLUIPA § 2(a)(2)(B) misses the mark.

24 Finally, in the closing pages of their opposition, Defendants realize that
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27 ¹In fact, the Supreme Court reiterated the rule that “affecting commerce”
28 language broadly invokes the Congress's Commerce Clause authority in *Jones* seven
days after issuing its opinion in *Morrison*. See *Jones*, 529 U.S. at 854.

1 §2(a)(2)(B) is a jurisdictional hook, not a statute of general applicability. See Def.
2 Opp. Mem. at 11–12. Accordingly, they switch gears, and attempt to establish that
3 it will be exceedingly difficult for Plaintiffs to prove that interstate commerce is
4 affected in any given factual circumstance. The United States takes no position on
5 this argument, nor need it. Congress passed §2(a)(2)(B) and it is a valid exercise of
6 the commerce power. Whether it is difficult for individual plaintiffs to prove that the
7 jurisdictional hook has been triggered is irrelevant to the statute’s validity. It is also
8 irrelevant to application of the RLUIPA to this lawsuit. Plaintiffs need only establish
9 that the burden on religion (or its removal) in this lawsuit—without regard to any
10 other lawsuits—affects interstate commerce. If Plaintiffs can meet this standard, then
11 the application of the RLUIPA in this lawsuit is proper under the Constitution.

12 **Conclusion**

13 For the foregoing reasons, this Court should affirm the constitutionality of the
14 RLUIPA’s jurisdictional hook, if it finds that interstate commerce is affected by the
15 burden on religion in this lawsuit.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Reply to Defendants' Opposition to Plaintiffs' Motion to Reconsider was served by U.S. MAIL AND FACSIMILE this 31st day of July 2003, on:

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