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COLORADO COURT OF APPEALS Court Address: 2 East 14th Avenue, Suite 1400 Denver, CO 80203 TOWN OF FOXFIELD, COLORADO, a Colorado municipal corporation, Counterclaim Defendant, Plaintiff-Appellee / Cross-Appellant v. THE ARCHDIOCESE OF DENVER, a Colorado corporation sole, and MONSIGNOR EDWARD L. BUELT Counterclaim Plaintiffs, Defendants-Appellants / Cross-Appellees and UNITED STATES DEPARTMENT OF JUSTICE Defendant-Appellee	COURT USE ONLY Case No.: 2005CA000202

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BRIEF OF VARIOUS RELIGIOUS AND CIVIL RIGHTS ORGANIZATIONS AS *AMICI CURIAE*

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INTRODUCTION

Amici curiae are eight religious and civil rights organizations—The Becket Fund for Religious Liberty, The American Center for Law and Justice, The Association of Christian Schools International, The General Conference of Seventh-day Adventists, Liberty Counsel, The National Council of the Churches of Christ in the USA, The Queens Federation of Churches, Inc., and The Soka Gakkai International-USA—who, for all their diversity, share in common a strong commitment to religious liberty. In particular, they are acutely aware, often by first-hand experience, that zoning laws are commonly applied in a manner that either imposes heavy and unnecessary burdens on religious exercise, or discriminates based on religion or particular denomination. The accompanying motion for leave to file this brief contains the names and particular interests of each of the various *amici*.

SUMMARY OF ARGUMENT

Although the court below did not reach the constitutionality of RLUIPA Section 2(a), the Town raised the question below and could raise it again during this appeal. If this Court were to reach that question, it should afford RLUIPA the full extent of deference due to an Act of Congress, as Congress was especially attentive to and respectful of the constitutional limits on its power in passing this particular statute.

As a result, Section 2 does little more than restate a handful of existing federal Free Exercise Clause parameters around the broad discretion of local authorities to regulate land use. And where Section 2 goes beyond existing Free Exercise protections, it does so only when local zoning power is exercised in a manner that treads into federal territory, such as when it interferes with interstate commerce. Moreover, as the Supreme Court recently held, RLUIPA does not offend the Establishment Clause because it deregulates religious conduct without also deregulating other fundamental rights. In short, RLUIPA was carefully crafted to comply with—not to flout—the U.S. Supreme Court's religious freedom and federalism jurisprudence.

Moreover, this Court should reject the district court's deeply flawed reading of two out of Section 2(a)'s three jurisdictional elements. The lower court's

discussion of the Commerce Clause jurisdiction element, Section 2(a)(2)(B), cites an entirely irrelevant body of Commerce Clause jurisprudence. And its discussion of the Enforcement Clause jurisdictional element, Section 2(a)(2)(C), ignores the substantial risk of discriminatory enforcement associated with the ordinance at issue in this case.

ARGUMENT

I. RLUIPA IS DESIGNED SPECIFICALLY TO COMPLY WITH EXISTING FREE EXERCISE AND FEDERALISM JURISPRUDENCE, NOT TO DEFY IT.

RLUIPA is not an act of congressional defiance, but instead "the latest of long-running congressional efforts to accord religious exercise heightened protection from government-imposed burdens, consistent with this Court's precedents." *Cutter* v. *Wilkinson*, 125 S. Ct. 2113, 2117-18 (2005).

A. The Supreme Court Has Narrowed the "Substantial Burdens" Test Under the Free Exercise Clause to Cases Involving Systems of "Individualized Assessments."

In 1963, the Supreme Court held in *Sherbert* v. *Verner*, 374 U.S. 398 (1963), that the Free Exercise Clause mandated strict scrutiny ***whenever*** the government imposed a "substantial burden" on religious exercise, even when the burden was incidental. For almost thirty years, the Court applied this standard throughout its Free Exercise cases, but most who prevailed under the standard were claimants for

unemployment compensation. *See, e.g., Hobbie* v. *Unemplt. Appeals Comm'n,* 480 U.S. 136 (1987) (unemployment compensation); *Thomas* v. *Review Bd.,* 450 U.S. 707 (1982) (same). *But see Wisconsin* v. *Yoder,* 406 U.S. 205 (1972) (compulsory education laws).

In *Employment Div., Dept. of Human Resources of Oregon* v. *Smith*, 494 U.S. 872 (1990), the Supreme Court dramatically narrowed the range of cases where strict scrutiny applied under the Free Exercise Clause. *Smith* announced the general rule that laws burdening religious exercise trigger strict scrutiny only when they are not "neutral" with respect to religion, or not "of general applicability." *Id.* at 879. But *Smith* ***did not overrule*** prior Supreme Court decisions applying strict scrutiny to incidental burdens on religious exercise, where the burdens were also "substantial."

Instead, *Smith* distinguished those cases in two ways. Where strict scrutiny applied in *Sherbert* and other unemployment compensation cases, the Court distinguished them as involving "systems of individualized governmental assessment of the reasons for the relevant conduct." *Id.* at 884. The Court distinguished *Yoder* and all other cases as "hybrid situation[s]" involving "the Free Exercise Clause in conjunction with other constitutional protections, such as

freedom of speech and of the press, or the right of parents…to direct the education of their children." *Id.* at 881 (citations omitted).

Smith also emphasized that, when applying the "substantial burdens" test, courts must avoid "[j]udging the centrality of different religious practices [because it] is akin to the unacceptable business of evaluating the relative merits of differing religious claims." 494 U.S. at 887. *See also 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, or the validity of particular litigants' interpretations of those creeds.").

Three years later, in *Church of the Lukumi Babalu Aye* v. *Hialeah,* 508 U.S. 520 (1993), the Court expressly relied on the rationale of *Sherbert,* as narrowed by *Smith*, to invalidate a government action outside the unemployment context. *Id.* at 537 (concluding that local animal sacrifice "ordinance represents a system of 'individualized governmental assessment of the reasons for the relevant conduct,'" because it "requires an evaluation of the particular justification for the killing") (quoting *Smith*, 494 U.S. at 884). In both *Smith* and *Lukumi,* the Court used the terms "individualized assessment" and "individualized exemption" interchangeably. *Lukumi*, 508 U.S. at 537; *Smith,* 494 U.S. at 884.

B. Lower Courts Since *Smith* Have Fleshed Out the Meaning of the Term "Individualized Assessments" and Applied It Routinely in the Land-Use Context.

Since 1990, federal Courts of Appeals have treated "individualized assessments" as an exception to the general rule announced in *Smith.* *See, e.g.*, *Axson-Flynn* v. *Johnson*, 356 F.3d 1277, 1294 (10th Cir. 2004) (discussing "two exceptions" to general rule of *Smith*, "individualized assessments" and "hybrid rights"); *American Friends Serv. Comm. Corp.* v. *Thornburgh*, 951 F.2d 957, 960-61 (9th Cir. 1991) (same).

Federal Courts of Appeals have, moreover, applied the "individualized assessments" or "exemptions" doctrine outside the unemployment context.[1] For example, the Ninth Circuit in *Thornburgh* recognized that, although this exception had emerged in the unemployment context, *Smith* extrapolated a broader principle from *Sherbert* and its progeny: "'where the State has in place a system of individual exemptions, it may not refuse to extend that system to cases of "religious hardship" without compelling reason.'" *Thornburgh*, 951 F.2d at 961 (quoting *Smith*, 494 U.S. at 884). Accordingly, the *Thornburgh* Court applied that

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[1] *See, e.g.*, *Axson-Flynn*, 356 F.3d at 1297-99 (university curriculum); *Thornburgh*, 951 F.2d at 961 (immigration). *See also Fraternal Order of Police* v. *City of Newark*, 170 F.3d 359, 364 (3d Cir. 1999) (noting *Lukumi's* application of "individualized assessments" outside unemployment context).

principle in the immigration context, but ultimately rejected the plaintiff's claim because the facts did not actually involve "individualized assessments."

Finally, appellate courts have explained that burdens imposed through systems of "individualized assessment" – particularly in the zoning context – trigger strict scrutiny not because they ***certainly*** involve ***actual discrimination,*** but because they are ***especially likely*** to involve ***cloaked discrimination.*** For example, Judge Posner, writing for a unanimous panel of the Seventh Circuit, recently noted that courts should construe Section 2(a) with an awareness of "the vulnerability of [especially minority] religious institutions … to subtle forms of discrimination when, as in the case of the grant or denial of zoning variances, a state delegates essentially standardless discretion to nonprofessionals operating without procedural safeguards." *Sts. Helen & Constantine Greek Orthodox Church* v. *City of New Berlin*, 396 F.3d 895, 900 (7th Cir. 2005). Thus, "the 'substantial burden' provision ***backstops*** the explicit prohibition of religious discrimination in the later section of the Act, much as the disparate-impact theory of employment discrimination backstops the prohibition of intentional discrimination." *Id.* (emphasis added).

Similarly, the Eleventh Circuit recently explained that a zoning process that "results in a case-by-case evaluation of the proposed activity of religious

organizations, carries the concomitant ***risk*** of idiosyncratic application" of zoning standards." *Midrash Sephardi, Inc.* v. *Town of Surfside*, 366 F.3d 1214, 1225 (11th Cir. 2004) (emphasis added). That discretion, in turn, allows local government officials to "use their authority to individually evaluate and either approve or disapprove of churches and synagogues in ***potentially*** discriminatory ways." *Id.* (emphasis added).

Consistent with this, other appellate courts have emphasized that case-by-case determinations and broad, standardless discretion are common characteristics of systems of "individualized assessments." *Axson-Flynn*, 356 F.3d at 1298 (systems of "individualized exemptions" are only those "designed to make case-by-case determinations," and not those "contain[ing] express exceptions for objectively defined categories of persons."); *Thornburgh*, 951 F.2d at 961 n.2 (contrasting system of "individualized exemptions" with the kind of "across-the-board criminal prohibition on a particular form of conduct" at issue in *Smith*).

Accordingly, courts have consistently found that burdens imposed through zoning prohibitions are imposed pursuant to systems of "individualized assessments." Courts reached this conclusion several times under the Free

Exercise Clause after *Smith* but before RLUIPA.[2] Now that RLUIPA has codified the very same standard "for greater visibility and easier enforceability," 146 CONG. REC. S7775, courts reach that conclusion routinely.[3]

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[2] *Keeler* v. *Mayor of Cumberland*, 940 F. Supp. 879, 885 (D.Md. 1996) (landmark ordinance involves "system of individualized exemptions"); *Alpine Christian Fellowship* v. *Cy. Comm'rs of Pitkin*, 870 F. Supp. 991, 994-95 (D.Colo. 1994) (special use permit denial triggered strict scrutiny because decision made under discretionary "appropriate[ness]" standard); *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."); *First Covenant Church* v. *Seattle*, 840 P.2d 174, 181 (Wash. 1992) (landmark ordinances "invite individualized assessments of the subject property and the owner's use of such property, and contain mechanisms for individualized exceptions").

[3] *See Guru Nanak Sikh Society of Yuba City* v. *County of Sutter*, 326 F.Supp.2d 1140, 1160 n.10 (E.D.Cal. 2003), ("[I]t is … beyond cavil that zoning decisions such as the [conditional use permit application] at issue in this case are properly described as individualized assessments."); *Hale O Kaula Church* v. *Maui Planning Com'n*, 229 F.Supp.2d 1056, 1073 (D.Haw. 2002) (holding that state special permit "provisions are a system of 'individualized exemptions' to which strict scrutiny applies"); *Cottonwood Christian Center* v. *Cypress Redevelopment Agency*, 218 F.Supp.2d 1203, 1222 (C.D.Cal. 2002) (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 Church* v. *Township of Middletown*, 204 F.Supp.2d 857, 868 (E.D.Pa. 2002) ("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) ("[F]ree exercise clause prohibits local governments from making discretionary (*i.e.*, not neutral, not generally applicable) decisions that burden the free exercise of religion, absent some compelling governmental interest….Land use regulation often involves

In sum, even after *Smith*, incidental, substantial burdens on religious exercise still trigger strict scrutiny under the Free Exercise Clause, so long as they are imposed pursuant to a system of individualized assessments. And discretionary decisions to deny particular uses of land for religious exercise often trigger strict scrutiny for that reason.

C. Unlike RFRA, RLUIPA Sections 2(a) and 2(a)(2)(C) Apply Strict Scrutiny Only to "Substantial Burdens" Imposed Through Systems of "Individualized Assessments."

Sections 2(a)(1) and 2(a)(2)(C) of RLUIPA provide:

> SEC. 2. PROTECTION OF LAND USE AS RELIGIOUS EXERCISE.
> (a) SUBSTANTIAL BURDENS—
> (1) GENERAL RULE- No government shall impose or implement a land use regulation in a manner that imposes a ***substantial burden*** on the religious exercise of a person, including a religious assembly or institution, unless the government demonstrates that imposition of the burden on that person, assembly, or institution—
> (A) is in furtherance of a ***compelling governmental interest***; and
> (B) is the ***least restrictive means*** of furthering that compelling governmental interest.
> (2) SCOPE OF APPLICATION- This subsection applies in any case in which—

'individualized governmental assessment of the reasons for the relevant conduct,' thus triggering *City of Hialeah* scrutiny."). *See also 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").

> …
> (C) the ***substantial burden is imposed in the implementation of a land use regulation or system of*** land use regulations, under which a government makes, or has in place formal or informal procedures or practices that permit the government to make, ***individualized assessments*** of the proposed uses for the property involved.

42 U.S.C. § 2000cc(a)(1), (a)(2)(C) (emphasis added).

With only one exception, every court to examine these provisions has recognized Congress' unmistakable attempt to codify – rather than flout or redefine – existing "substantial burdens" jurisprudence under the Free Exercise Clause.[4]

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[4] *See, e.g., Castle Hills First Baptist Church v. City of Castle Hills* , No. SA-01-CA-1149, 2004 WL 546792, at *19 (W.D.Tex. Mar. 17, 2004) ("RLUIPA's § 2(a) codifies existing Supreme Court 'individualized assessment' jurisprudence."); *Murphy v. Zoning Comm'n of Town of New Milford,* 289 F.Supp.2d 87, 119 (D.Conn. 2003) ("[S]ubsection (a)(2)(c) limits subsection (a)(1)'s 'compelling interest' / 'least restrictive means' standard to cases involving 'individualized assessments' – a limitation implicitly approved in *Smith* and explicitly confirmed in *Lukumi.*"), *rev'd on other grounds,* 402 F.3d 342 (2d Cir. 2005); *Westchester Day Sch.* v. *Vill. of Mamaroneck,* 280 F.Supp.2d 230 (S.D.N.Y. 2003) ("individual assessments" limitation on substantial burden claims "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 individual exemptions,' but nevertheless 'refuse[s] to extend that system to cases of 'religious hardship.'"), *rev'd on other grounds,* 386 F.3d 183 (2d Cir. 2004); *Hale O Kaula,* 229 F.Supp.2d at 1072 ("Section [2(a)(2)](c) codifies the 'individualized assessments' doctrine, where strict scrutiny applies."); *Cottonwood,* 218 F.Supp.2d at 1221 ("To the extent that RLUIPA is enacted under the Enforcement Clause, it merely codifies numerous precedents holding that systems of individualized assessments, as opposed to generally applicable laws, are subject to strict scrutiny."); *Freedom Baptist,* 204 F.Supp.2d at 868 ("What Congress manifestly has done in this subsection [2(a)(1)

Indeed, 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.[5]

This stands in stark contrast to RFRA, which attempted (unsuccessfully) to restore the strict scrutiny test for ***all*** substantial burdens, not just those imposed pursuant to systems of "individualized assessments." *City of Boerne* v. *Flores*, 521 U.S. 507, 532 (1997) ("***Any*** law is subject to challenge [under RFRA] at ***any*** time by ***any*** individual who claims a substantial burden on his or her free exercise of religion.") (emphasis added). Thus, in *City of Boerne*, the Supreme Court struck down the Religious Freedom Restoration Act, 42 U.S.C. § 2000bb, *et seq.* ("RFRA"), in part because of its "sweeping coverage," and because it appeared to

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and 2(a)(2)(C)] is to codify the individualized assessments jurisprudence in Free Exercise cases that originated with the Supreme Court's decision in *Sherbert*").

[5] *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.").

"attempt a substantive change in constitutional protections." *Boerne*, 521 U.S. at 532.

D. Unlike RFRA, RLUIPA Sections 2(a) and 2(a)(2)(B) Apply Strict Scrutiny Only to "Substantial Burdens" That Interfere with Interstate Commerce.

To be sure, RLUIPA does apply the substantial burdens test outside the scope of the Enforcement Clause power, but it does so only when the particular facts of a case bring it within the scope of a different enumerated power of Congress. Section 2(a)(2)(B), for example, provides that strict scrutiny applies to those substantial burdens that interfere with interstate commerce, and so fall within the sweep of the commerce power. *Compare* RLUIPA § 2(a)(2)(B) ("the substantial burden affects, or removal of that substantial burden would affect, commerce with foreign nations, among the several States, or with Indian tribes"), *with* U.S. CONST. Art. I., § 8, cls. 3 (Congress shall have the power "to regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes").

II. RLUIPA SECTION 2(A) IS CONSTITUTIONAL.

In light of the foregoing, it is especially clear that Section 2(a) is constitutional under the Enforcement Clause when applied through Section 2(a)(2)(C), and under the Commerce Clause when applied through Section

2(a)(2)(B). Moreover, in accordance with the Supreme Court's recent unanimous decision regarding Section 3(a) in *Cutter* v. *Wilkinson,* 125 S. Ct. 2113 (2005), any analogous Establishment Clause challenge to Section 2(a) should fail.

In examining all of these questions, this Court should approach them with all of the deference that is due to an Act of Congress. *Rostker* v. *Goldberg*, 453 U.S. 57, 64 (1981) ("judg[ing] the constitutionality of an Act of Congress [is] 'the gravest and most delicate duty that this Court is called upon to perform,'") (quoting *Blodgett* v. *Holden,* 275 U.S. 142, 148 (1927) (Holmes, J.)). Indeed, "[t]he customary deference accorded the judgments of Congress is certainly appropriate when, as here, Congress has specifically considered the question of the law's constitutionality." *Midrash Sephardi,* 366 F.3d at 1238 (citing *Rostker,* 453 U.S. at 64).

A. RLUIPA Section 2(a), As Applied Through Section 2(a)(2)(C), Does Not Exceed the Enforcement Clause Power.

With a single exception, every court to hear an Enforcement Clause challenge to Section 2(a) has rejected it.[6]

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[6] *See Williams Island Synagogue, Inc.* v. *City of Aventura,* No. 04-20257-CV, 2004 WL 1059798 (S.D.Fla. May 06, 2004); *Castle Hills First Baptist Church* v. *City of Castle Hills,* No. SA-01-CA-1149, 2004 WL 546792 (W.D.Tex. Mar. 17, 2004); *United States* v. *Maui County,* 298 F.Supp.2d 1010 (D.Haw. 2003); *Guru Nanak Sikh Society of Yuba City* v. *County of Sutter,* 326 F.Supp.2d 1140, 1160

Rather than recapitulate the analytical structure likely to be set out by to the parties, *amici* simply note briefly that Enforcement Clause legislation must generally restate existing constitutional protections, ***unless*** there is a strong record before Congress indicating the need for additional "deterrent" or "preventive" measures. *See Boerne,* 521 U.S. at 530. And in that case, courts must assess whether that increment of deterrence is proportional to the harm Congress identified. *See id.*

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n.10 (E.D. Cal. 2003); *Murphy* v. *Town of New Milford*, 289 F.Supp.2d 87 (D. Conn. 2003) *rev'd on other grounds*, 402 F.3d 342 (2nd Cir. 2005); *Westchester Day Sch.* v. *Vill. of Mamaroneck,* 280 F.Supp.2d 230 (S.D.N.Y. 2003) *rev'd on other grounds*, 386 F.3d 183 (2nd Cir. 2004); *Life Teen, Inc.* v. *Yavapai County*, No. CIV-01-1490, slip op. at 25-26 (D.Ariz. Mar. 26, 2003); *Freedom Baptist Church* v. *Township of Middletown*, 204 F.Supp.2d 857 (E.D.Pa. 2002). *See also 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), *rev'd on other grounds*, No. 02-4119 (7th Cir. Mar. 26, 2004).

Two other courts have suggested that Section 2(a) satisfies the requirements of the Enforcement Clause. *See Sts. Helen and Constantine Church* v. *Town of New Berlin*, 396 F.3d 895, 897 (7th Cir. 2005) ("*Sherbert* was an interpretation of the Constitution, and so the creation of a federal judicial remedy for conduct contrary to its doctrine is an uncontroversial use of section 5."); *Cottonwood*, 218 F.Supp.2d at 1221 n.7 (noting that "RLUIPA would appear to have avoided the flaws of its predecessor RFRA, and be within Congress's constitutional authority"). Still another has rejected an Enforcement Clause challenge to Section 2(b). *Midrash Sephardi* v. *Town of Surfside*, 366 F.3d 1214, 1239-40 (11th Cir. 2004).

As explained above, RLUIPA Section 2(a), as applied through Section 2(a)(2)(C), simply restates the remnant of "substantial burdens" jurisprudence that survived *Smith.* Because there is no prophylaxis in mere restatement, the Enforcement Clause analysis could well end there. *See Sts. Helen & Constantine,* 396 F.3d at 897 ("*Sherbert* was an interpretation of the Constitution, and so the creation of a federal judicial remedy for conduct contrary to its doctrine is an uncontroversial use of section 5.").

But even if these provisions did represent some kind of additional protection, the record before Congress more than justifies any such prophylaxis. Congress has "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. The congressional record reflects that land-use laws are commonly ***both*** enacted ***and*** enforced out of hostility to religion.[7] Congress found that

[7] *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 RFRAs and Land Use Regulation,* 32 U.C. DAVIS L. REV. 755, 773 (1999) (discussing examples from

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 pervasive in the land-use context.[8]

These conclusions were backed by evidence presented to Congress in various forms that were cumulative and mutually reinforcing. Some evidence was ***statistical***, including national surveys of churches, zoning codes, and public

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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.'").

[8] *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 (once city "vest[ed] absolute discretion in a single person or body," then "[t]hat decision-maker would [be] free to discriminate against religious uses and exceptions with impunity, without any judicial review.").

attitudes.[9] Some was ***judicial***, including "decisions of the courts of the States and…the United States [reflecting] extensive litigation and discussion of the constitutional violations."[10] *Bd. of Trustees of University of Alabama* v. *Garrett*, 531 U.S. 356, 376 (2001) (Kennedy, J., concurring). Some was ***anecdotal*** evidence ***paired with*** testimony by experienced witnesses indicating that the

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[9] The record before Congress contained 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_0f.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, 105th 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_0f.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).

[10] *See* Keetch Statement, at 131-53 (listing numerous state and federal zoning cases involving religious assemblies).

anecdotes were representative.[11] *Cf. Garrett,* 531 U.S. at 369 (finding "half a dozen examples from the record" insufficient ***by themselves*** to establish pattern of constitutional violation).

Below is a small sample of what the evidence revealed:

- The Brigham Young University 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 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.

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[11] *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"). *See also* 146 CONG. REC. E1564-E1567 (Sept. 22, 2000)(listing 19 additional instances of land-use burdens on religious exercise arising since conclusion of hearings).

- 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 the city. Laycock Statement at 414.

Suffice to say, this record could justify a large measure of "prophylaxis" against "substantial burdens" on religious exercise imposed through "systems of individualized assessments." Even so, Congress passed only a modest remedy under the Enforcement Clause: mere restatement of that standard in the form of RLUIPA Sections 2(a) and 2(a)(2)(C). Therefore, this Court should reject out of hand any claim that these provisions are "incongruous" or "disproportionate" to the constitutional harm they were passed to address.

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 the "sweeping coverage" of RFRA, and so falls well within the boundaries of Congress' Enforcement Clause authority as defined in *Boerne* and its progeny.

B. RLUIPA Section 2(a), As Applied Through Section 2(a)(2)(B), Does Not Exceed the Commerce Clause Power.

In recent years, the Supreme Court has clarified the factors courts should consider when assessing whether congressional legislation represents "regulation of an activity that substantially affects interstate commerce," *United States* v. *Lopez*, 514 U.S. 549, 559 (1995): (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; *United States* v. *Morrison*, 529 U.S. 598, 611-12 (2000); (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).

Commerce Clause legislation is entitled to the same judicial deference and strong presumption of constitutionality as other Acts of Congress. *See Gonzales* v. *Raich*, 125 S. Ct. 2195, 2208-09 (2005) ("We need not determine whether respondents' activities, taken in the aggregate, substantially affect interstate

commerce in fact, but only whether a 'rational basis' exists for so concluding.") (citations omitted); *Groome Resources Ltd., L.L.C.* v. *Parish of Jefferson,* 234 F.3d 192, 203 (5th Cir. 2000) ("In reviewing an act of Congress passed under its Commerce Clause authority, we apply the rational basis test as interpreted by the *Lopez* court."). RLUIPA Section 2(a)(1), applied through Section 2(a)(2)(B), satisfies all four *Lopez-Morrison* factors.

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.[12]

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[12] *See also 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."). *See also United States* v. *Chesney,* 86 F.3d 564, 568-69 (6th 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

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, so constitutional limits are never transgressed. *United States* v. *Grassie,* 237 F.3d 1199, 1211 (10th Cir. 2001) ("[B]y making interstate commerce an element of the [Church Arson Prevention Act] … to be decided on a case-by-case basis, constitutional problems are avoided.").[13] In other words, the Act applies either constitutionally, or not at all.

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constitutional deficiency identified in *Lopez* because it requires a legitimate nexus with interstate commerce" by means of a jurisdictional element.).

[13] *See also 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 (9th Cir. 2002) (same); *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.").

This has proven sufficient ***alone*** for courts to reject Commerce Clause challenges to both RLUIPA Section 2(a)(2)(b), and the analogous prisoner provision, Section 3(b)(2).[14]

The ***second*** factor is whether the law regulates "economic activity." But when a jurisdictional element assesses the effect of regulated activity on interstate commerce on a case-by-case basis, the Court need not examine whether that regulated activity may ***also*** be characterized as "economic" generally. *See United States* v. *Jones*, 231 F.3d 508, 514-15 (9th Cir. 2000); *Life Teen*, slip op. at 25-26; *Hale O Kaula*, 229 F.Supp.2d at 1072 (further Commerce Clause analysis only appropriate for "laws of general applicability where Congress regulates an entire field of activity"). But if the Court deems it necessary to examine the "economic activity" factor, the Court should find it satisfied.

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[14] *See, e.g.*, *Maui County*, 298 F.Supp.2d at 1015 ("RLUIPA does not facially violate the Commerce Clause ... because RLUIPA has a jurisdictional element"); *Life Teen*, slip op. at 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)). *See also Mayweathers* v. *Terhune*, 2001 WL 804140, at *7-*8 (E.D.Cal. July 2, 2001) (same).

RLUIPA regulates "economic activity" – the use, building, or conversion of land for religious purposes – by prohibiting interference with that activity. RLUIPA §§2(a)(2)(B), 8(5); *see Freedom Baptist*, 204 F.Supp.2d at 867-68 ("insofar as state or local authorities 'substantially burden' the economic activity of religious organizations, Congress has ample authority to act under the Commerce Clause"); *see, e.g.*, *Westchester Day*, 280 F.Supp.2d at 238 ("operating [a religious] day school is an economic endeavor within the meaning of the Commerce Clause"); *Castle Hills*, 2004 WL 546792, at *19 (same).

These decisions are reinforced by a recent Fifth Circuit decision concluding that congressional preemption 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* 234 F.3d at 205-206 (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.

The development of land is at least as "commercial" or "economic" as the purchase, sale, or rental of that land. The legislative history of RLUIPA repeatedly identifies "construction projects" as examples 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. *See 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 1209-10 n.7 ("Religious organizations, as a division of the charitable and non-profit sector . . . impact the national economy in orders of magnitude"); *see, e.g.*, *id.* at 1209 (listing among common church activities affecting 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").[15] Courts have consistently held that the commercial activities of religious institutions are subject to regulation under the Commerce

[15] *See also 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 (recognizing "that the exercise of religion sometimes requires commercial transactions, such as the construction of churches."); *see, e.g.*, *Cottonwood*, 218 F.Supp.2d at 1221-22 (listing various activities of church, interference with which "affects commerce").

Clause. *See, e.g., Tony & Susan Alamo Found.* 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). 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*, RLUIPA regulates "economic activity."

Third, the aggregate effect of the kind of activity regulated by RLUIPA has a direct link to interstate commerce. Even after *Lopez* and *Morrison*, courts will measure interstate effect 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)). 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 (quotations omitted).

Once again, RLUIPA covers the use, building, or conversion of land for religious purposes. RLUIPA §§2(a)(2)(B). Zoning burdens on these activities, "taken together with … many others similarly situated," would "substantially

affect interstate commerce." *Lopez,* 514 U.S. at 556, 559. And even where every commercial transaction suppressed by zoning laws occurred exclusively in any given state – rare though that may be – the aggregate effect of similar suppression elsewhere would still implicate the commerce power.[16] By 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 ***directly and immediately*** prohibits a full range of commercial transactions, the purchase, development, and use of land.[17]

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[16] *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 v. Martin*, 223 F.Supp.2d 820, 829 n.8 (W.D. Mich. 2002) (noting the continuing viability of *Wickard* aggregation principle, and its codification in RLUIPA §4(g)); *Freedom Baptist*, 204 F.Supp.2d at 867 & nn.12, 14 (same). *Cf. Johnson*, 223 F.Supp.2d at 829 ("RLUIPA covers regulation of the free exercise of religion, an objectively interstate activity.").

[17] *See Groome,* 234 F.3d at 213 (noting that "connection between racial discrimination and its effect on interstate commerce" is well established). *See,*

Nor does RLUIPA 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*, 204 F.Supp.2d at 867-68 ("insofar as state or local authorities 'substantially burden' the economic activity of religious organizations, Congress has ample authority to act under the Commerce Clause").[18]

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e.g., *Cottonwood*, 218 F.Supp.2d at 1221-22 (detailing commercial activities directly prohibited by application of land-use regulation).

[18] *See also Gonzales* v. *Raich*, 125 S. Ct. 2195, 2212-13 (2005) ("It is beyond peradventure that federal power over commerce is '"superior to that of the States to provide for the welfare or necessities of their inhabitants,"' however legitimate or dire those necessities may be.") (citations omitted); *Fidelity* 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."); *Groome*, 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 v. Montgomery County Bd. of*

The ***fourth*** and final consideration is the legislative record. Both *Lopez* and *Morrison* make clear that Congress is not generally required to make findings of the regulated activity's effect on interstate commerce. *Morrison*, 529 U.S. at 612 (quoting *Lopez*, 514 U.S. at 562). Instead, congressional findings may help courts assess whether the effect is substantial when "no such substantial effect [is] visible to the naked eye." *Id.* (quoting *Lopez*, 514 U.S. at 563). Because the substantial effect on commerce here is abundantly "visible," *see supra* pages 25-26 (discussing effect of regulated activity on purchase, construction, and use of property), the Court need not rely on congressional findings.

Nevertheless, Congress still found that the regulated land-use activities substantially affect interstate commerce, based on evidence indicating the

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Supervisors, 245 F.Supp.2d 817, 834 (W.D.Va. 2003) (when Congress acts within Commerce Clause authority, "[i]t is completely irrelevant that land use decisions are an important and traditionally local matter."); *Freedom Baptist*, 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 even when it is primarily intrastate in nature."). *Cf. Franchise Tax Bd. of California* v. *Hyatt*, 538 U.S. 488, 498 (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.'"); *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).

nationwide magnitude of the commercial activity of religious institutions, including in construction. *See* 146 CONG. REC. S7775; H.R. REP. No. 106-219, at 28. According to one study, in 1992 alone, religious communities spent $6 billion on capital investments and new construction, up from $4.8 billion five years earlier.[19] Paired with the evidence of widespread discriminatory land-use regulation also presented, Congress had vastly more than a "rational basis … for concluding that [such regulation] sufficiently affected interstate commerce." *Lopez*, 514 U.S. at 557; *see Raich*, 125 S. Ct. at 2208-09 (same).

Because RLUIPA Sections 2(a)(1) and 2(a)(2)(B) satisfy all four factors of the *Lopez-Morrison* analysis, this Court should reject any Commerce Clause challenge to those provisions.

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

Just weeks ago in *Cutter* v. *Wilkinson*, 125 S. Ct. 2113 (2005), the Supreme Court unanimously rejected an Establishment Clause challenge to Section 3 of RLUIPA, the "substantial burdens" test as applied in the prison context. The Court squarely rejected the argument that RLUIPA impermissibly advanced religion by

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[19] *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, 105th Cong., 2d Sess., at 125, 134 (June 16 and July 14, 1998)(statement of Marc D. Stern, American Jewish Congress); 146 CONG. REC. S7775 (citing Stern statement in support of Commerce Clause authority).

accommodating religious exercise alone, without also accommodating other constitutional rights. *Id.* at 2123-24. As the Court explained, if this were the rule "all manner of religious accommodations would fall." *Id.* at 2124. Without exception, lower courts have rejected the same argument when asserted against RFRA, *see Cutter*, 125 S. Ct. at 2118 n.2 (listing cases), and against RLUIPA Section 2(a).[20] If it is raised yet again here, it should be rejected as well.

II. THE DISTRICT COURT MISAPPLIED THE JURISDICTIONAL ELEMENTS OF RLUIPA SECTION 2(A).

A. In Applying the Commerce Clause Jurisdictional Element, the District Court Drew on Wholly Irrelevant Jurisprudence.

As suggested by the Commerce Clause analysis above, the relevant inquiry under Section 2(a)(2)(B) is whether the Town's zoning ordinance interferes with

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[20] *See Castle Hills First Baptist Church* v. *City of Castle Hills*, No. SA-01-CA-1149 (W.D.Tex., Mar. 17, 2004) (rejecting constitutional challenges to RLUIPA § 2); *United States* v. *Maui County*; 298 F.Supp.2d 1010 (D. Haw. 2003); *Murphy* v. *New Milford*, 289 F.Supp.2d 87 (D. Conn. 2003) (rejecting constitutional challenges to RLUIPA Section 2) *rev'd on other grounds*, 402 F.3d 342 (2nd Cir. 2005); *Westchester Day Sch.* v. *Vill. of Mamaroneck*, 280 F.Supp.2d 230 (S.D.N.Y. 2003) (same) *rev'd on other grounds*, 386 F.3d 183 (2nd Cir. 2004); *Guru Nanak Sikh Society* v. *County of Sutter*, 326 F.Supp.2d 1140 (E.D.Cal. 2003) (same); *Life Teen, Inc.* v. *Yavapai County*, No. CIV-01-1490, slip op. at 25-26 (D. Ariz. Mar. 26, 2003) (same); *Christ Universal Mission Church v. Chicago*, No. 01-C-1429, 2002 U.S. Dist. LEXIS 22917 (N.D. Ill. Sept. 11, 2002) (same) *rev'd on other grounds* 2004 WL 595392 (7th Cir. Mar. 26, 2004); *Freedom Baptist Church* v. *Township of Middletown*, 204 F.Supp.2d 857 (E.D. Pa. 2002) (same). *See also Midrash Sephardi, Inc.* v. *Town of Surfside*, 366 F.3d 1214, 1241-42 (11th Cir. 2004) (rejecting Establishment Clause challenge to RLUIPA Section 2(b)(1)).

"economic activity" of the Church that has sufficient connection to interstate commerce to implicate the commerce power. If the answer to that question is yes, then Section 2(a) may be applied in this case pursuant to Section 2(a)(2)(B), and without exceeding the reach of the federal commerce power. *See*, *e.g.*, *Cottonwood*, 218 F.Supp.2d at 1221-22. *See also Freedom Baptist*, 204 F.Supp.2d at 867-68 ("insofar as state or local authorities 'substantially burden' the economic activity of religious organizations, Congress has ample authority to act under the Commerce Clause").

But the court below goes off in another direction entirely, applying the balancing test of *Pike* v. *Bruce Church, Inc.*, 397 U.S. 139 (1970), a Dormant Commerce Clause case. Under the *Pike* test, an "even-handed[] regulation" by state or local government that "effectuates a legitimate local public interest" would be upheld "'unless the burden imposed on [interstate] commerce is clearly excessive in relation to the putative local benefits.'" *Id.* at 142. *See, e.g., Oregon Waste Sys., Inc.* v. *Dep't of Envtl. Quality of State of Oregon*, 511 U.S. 93, 99 (1994) (applying *Pike* test to strike down State ordinance as violation of Dormant Commerce Clause).

This analysis is wildly off the mark. The "negative" or "dormant" Commerce Clause doctrine limits the power of *state and local* governments to

interfere with interstate commerce, not the power of the *federal* government to regulate (or deregulate) it by statute. Rather than repeat the Church's reasons why the facts of this case satisfy Section 2(a)(2)(B), *amici* instead emphasize in the strongest possible terms that this Court should reject the district court's analytical approach to this question. To let it stand would do great violence to Section 2(a) claims asserted through Section 2(a)(2)(B); it would simply read them out of existence, substituting in their place simple Dormant Commerce Clause challenges to local ordinances.

B. In Applying the "Individualized Assessments" Jurisdictional Element, the District Court Ignored That Standardless Discretion of Complaining Neighbors Drives Enforcement of the Ordinance.

By contrast, in applying Section 2(a)(2)(C), the district court sets out the appropriate analytical framework, but then misapplies it to the present facts. Consistent with the above discussion of the term "individualized assessments" under the Free Exercise Clause, the district court emphasizes the risks of discrimination associated with discretionary zoning processes. But the court mistakenly concludes that "[t]he instant ordinance provides for no discretion, evaluation, or case-by-case determination of any activity." Slip Op. at 6.

In fact, the ordinance vests almost boundless discretion in complaining neighbors, who alone drive the enforcement of this particular ordinance. If

neighbors are kindly disposed to the faith of religious group that parks dozens of cars on its property, there would be no enforcement at all; but if neighbors happen to be hostile to that group's faith, its fortunes would change dramatically.

The fact that the risk of religious discrimination through unchecked discretion is located in the local populace, rather than in the government officials themselves, is constitutionally irrelevant. As the Supreme Court has explained, "[p]rivate biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect." *Palmore* v. *Sidoti,* 466 U.S. 429, 433 (1984). *See also City of Cleburne* v. *Cleburne Living Ctr.,* 473 U.S. 432, 448 (1985) (specifically rejecting "negative attitudes, or fear" of neighbors as constitutionally permissible factors in zoning decisions). If it were otherwise, zoning authorities could always escape constitutional constraints simply by claiming that they are enforcing the popular will. *See City of Cleburne,* 473 U.S. at 448 ("[T]he City may not avoid the strictures of th[e Equal Protection] Clause by deferring to the wishes or objections of some fraction of the body politic.").

CONCLUSION

For all of the foregoing reasons, the decision of the District Court of Arapahoe County should be reversed.

Dated: July 5, 2005

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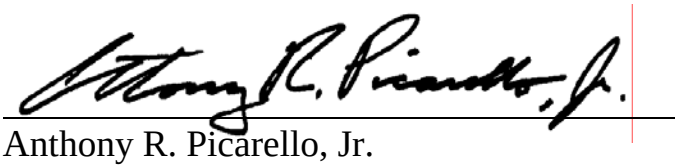

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CERTIFICATE OF SERVICE

I hereby certify that on July 5, 2005, a copy of the **MOTION OF VARIOUS RELIGIOUS AND CIVIL RIGHTS GROUPS FOR LEAVE TO FILE BRIEF AS *AMICI CURIAE*** and accompanying **BRIEF OF VARIOUS RELIGIOUS AND CIVIL RIGHTS ORGANIZATIONS AS *AMICI CURIAE*** was sent by U.S. Mail, to the following:

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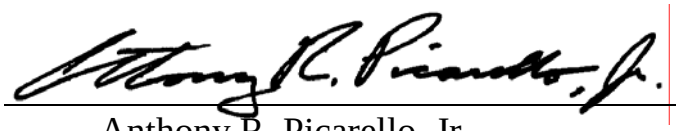

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