Certification of Word Count: 6,284

SUPREME COURT, STATE OF COLORADO Court Address: Colorado State Judicial Building 2 East 14th Avenue, Fourth Floor Denver, CO 80203	
Opinion by the Court of Appeals Graham, Terry, Nieto, JJ. Case No. 05-CA-0202 Appeal from the Arapahoe County District Court, Honorable Nancy A. Hopf Case No. 01-CV-3299	COURT USE ONLY
TOWN OF FOXFIELD, COLORADO, a Colorado municipal corporation, Petitioner v. THE ARCHDIOCESE OF DENVER, a Colorado corporation sole, and MONSIGNOR EDWARD L. BUELT, Respondent	Case No.: 06 SC 631
Attorney: Michael J. Norton (CO Bar #6430) Firm: Burns, Figa & Will, P.C. Address: 6400 S. Fiddler's Green Circle, Suite 1000 Greenwood Village, CO 80111 Phone No.: (303) 796-2626 Attorney: Anthony R. Picarello, Jr. (*pro hac vice*) Firm: The Becket Fund for Religious Liberty Address: 1350 Connecticut Ave., N.W. Suite 605 Washington, DC 20036 Phone No.: (202) 955-0098 Fax No.: (202) 955-0090 E-Mail: apicarello@becketfund.org	

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

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

Treatises

Constitutional Provisions

INTRODUCTION

Amici curiae are seventeen religious and civil rights organizations—the Becket Fund for Religious Liberty, American Jewish Congress; Association of Christian Schools International; Baptist Joint Committee for Religious Liberty; Christian and Missionary Alliance; Ethics & Religious Liberty Commission of the Southern Baptist Convention; General Conference of Seventh-day Adventists; Hindu American Foundation; National Association of Evangelicals; National Council of the Churches of Christ in the USA; Queens Federation of Churches; Resident Bishop of the Rocky Mountain Conference of the United Methodist Church; Sikh Coalition; Stated Clerk, Presbyterian Church (U.S.A.); Union of Orthodox Jewish Congregations of America; United States Conference of Catholic Bishops; and Worldwide Church of God—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*.

The diversity of *amici* also corresponds to the broad, bipartisan support enjoyed by the civil rights principles embodied in RLUIPA. For this reason, the law sailed virtually unopposed through both houses of an otherwise sharply divided Congress and was signed into law by President Clinton on September 22, 2000.

SUMMARY OF ARGUMENT

The purpose of this brief is to aid the Court in deciding this case by providing a fuller account of the background, purpose, and constitutionality of the Religious Land Use and Institutionalized Persons Act of 2000, 42 U.S.C. § 2000cc, *et seq.* ("RLUIPA").

As set forth below, RLUIPA represents "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). More precisely, "[b]y passing RLUIPA, Congress conclusively determined the national public policy that religious land uses are to be guarded from interference by local governments to the maximum extent permitted by the Constitution." *Cottonwood Christian Center* v. *Cypress Redevelopment Agency*, 218 F.Supp.2d 1203, 1222 (C.D. Cal. 2002).

This brief first summarizes the First Amendment principles that undergird RLUIPA, and then describes how the statute mainly codifies those very same principles in the land-use context (pursuant to the Enforcement Clause), and to a limited extent expands their application (pursuant to the Commerce Clause). Finally, the brief describes in summary form how RLUIPA satisfies the Enforcement, Commerce, and Establishment Clauses of the federal constitution.

ARGUMENT

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

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 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

---

[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).

[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

[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").

the very same standard "for greater visibility and easier enforceability," 146 CONG. REC. S7775, courts reach that conclusion routinely.[3]

---

[3] *See Guru Nanak Sikh Society of Yuba City* v. *County of Sutter*, 456 F.3d 978, 985 (9th Cir. 2006) (holding conditional use permit decision was an "individualized assessment"); *Midrash Sephardi, Inc.* v. *Town of Surfside*, 366 F.3d 1214, 1225 (11th Cir. 2004) (finding individualized assessments where zoning "officials may use their authority to individually evaluate and either approve or disapprove of churches and synagogues in potentially discriminatory ways"); *DiLaura* v. *Ann Arbor Charter Tp.*, 30 Fed. Appx. 501, 510 (6th Cir. 2002) (denial of variance was "clearly" a system of "individualized assessments"); *Westchester Day School* v. *Village of Mamaroneck*, 417 F.Supp.2d 477, 542 (S.D.N.Y. 2006) (denial of permit to build religious school based upon "subjective" criteria involved system of individualized assessments); *Castle Hills First Baptist Church* v. *City of Castle Hills*, 2004 WL 546792, at *15 (W.D. Tex. 2004) (special use permit application is a system of 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 '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

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—
>
> …
>
> (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

---

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").

> 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 – since reversed on appeal – 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] Indeed, Congress made absolutely explicit in the legislative

---

[4] *See, e.g., Guru Nanak*, 456 F.3d at 993 ("RLUIPA targets only 'individualized governmental assessment[s]' subject to strict scrutiny under the Supreme Court's free exercise jurisprudence."); *Church of the Hills* v. *Township of Bedminster*, 2006 WL 462674, at *7 (D.N.J. Feb. 24, 2006) ("Zoning regulation, like the ones at issue in this case, impose individual assessment regimes" under both RLUIPA and the Free Exercise Clause); *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.");

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

---

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) 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*"). *See also Elsinore Christian Ctr.* v. *City of Lake Elsinore,* 197 Fed. Appx. 718 (9th Cir., Aug. 22, 2006) (reversing only decision ever to strike down any portion of RLUIPA Section 2, its land use provision).

[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.").

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 "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.

If this Court were to address these questions at all, it should approach them with all of the deference that is due to an Act of Congress.[6] *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

[6] *Amici* recognize that this Court has not certified the question of the constitutionality of RLUIPA, and that the parties have not generated this issue in their briefs. *Amici* nonetheless address common constitutional challenges briefly in order to underscore just how consistently they fail and, correspondingly, just how firm is the constitutional foundation on which RLUIPA rests.

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.

Every Enforcement Clause challenge to Section 2(a) has failed.[7] Rather than restate the Enforcement Clause analytical structure set forth in those decisions,

---

[7] *See Elsinore Christian Ctr.* v. *City of Lake Elsinore*, 197 Fed. Appx. 718 (9th Cir., Aug. 22, 2006); *Guru Nanak Sikh Society of Yuba City* v. *County of Sutter*, 456 F.3d 978 (9th Cir. 2006); *Church of the Hills* v. *Township of Bedminster*, 2006 WL 462674 (D.N.J. Feb. 24, 2006); *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); *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); *Greater Bible Way Temple* v. *City of Jackson*, 708 N.W.2d 756 (Mich.App. 2005). *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

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.*

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

---

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).

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.[8] Congress found that discriminatory ***application*** of zoning laws is particularly common because, as here, zoning laws across the country are overwhelmingly discretionary; in other words, the systems of "individualized assessments" described in *Smith* are pervasive in the land-use context.[9]

---

[8] *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 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.'").

[9] *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

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 attitudes.[10] Some was ***judicial***, including "decisions of the courts of the States

---

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.").

[10] 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).

and…the United States [reflecting] extensive litigation and discussion of the constitutional violations."[11] *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 anecdotes were representative.[12] *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

---

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

[12] *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).

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.

- 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.

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.").

Although RLUIPA Section 2(a)(1), applied through Section 2(a)(2)(B), satisfies all four factors recently set forth by the Supreme Court in *United States* v.

Lopez, 514 U.S. 549, 559 (1995), the first of these is dispositive here.[13] 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.[14]

---

[13] Recently, 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).

[14] *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

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.").[15] In other words, the Act applies either constitutionally, or not at all.

---

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

[15] *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

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).[16]

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

Recently, 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

---

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.").

[16] *See, e.g., Church of the Hills*, 2006 WL 462674, at *8 ("The application of this jurisdictional element, by definition, prevents the RLUIPA from exceeding the bounds of Congress' power under the Commerce Clause."); *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); *Elsinore Christian Ctr.* v. *City of Lake Elsinore,* 197 Fed. Appx. 718 (9th Cir., Aug. 22, 2006) (reversing the only opinion on record holding RLUIPA violated the Commerce Clause).

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).[17] If it is addressed yet again here, it should be rejected as well.

---

[17] *See Lighthouse Community Church of God* v. *City of Southfield*, 2007 WL 30280 (E.D.Mich. Jan. 3, 2007) (rejecting constitutional challenges to RLUIPA § 2); *Mintz* v. *Roman Catholic Bishop of Springfield*, 424 F.Supp.2d 309 (D.Mass. 2006) (same); *Church of the Hills* v. *Township of Bedminster*, 2006 WL 462674 (D.N.J. Feb. 24, 2006) (same); *Castle Hills First Baptist Church* v. *City of Castle Hills*, No. SA-01-CA-1149 (W.D.Tex., Mar. 17, 2004) (same); *United States* v. *Maui County*; 298 F.Supp.2d 1010 (D. Haw. 2003) (same); *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) *aff'd* 456 F.3d 978 (9th Cir. 2006); *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); *Greater Bible Way Temple* v. *City of Jackson*, 708 N.W.2d 756 (Mich.App. 2005) (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)).

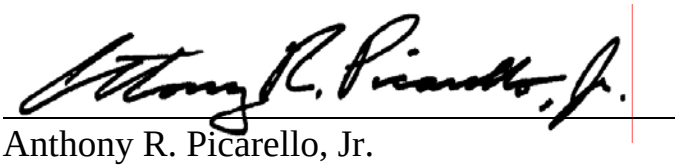
CONCLUSION

For all of the foregoing reasons, the decision of the Court of Appeals should be affirmed.

Dated: March 15, 2007

Respectfully submitted,

Michael Norton (CO Bar # 6430)
BURNS, FIGA & WILL, P.C.
6400 S. Fiddlers Green Circle
Suite 1000
Greenwood Village, CO 80111



Anthony R. Picarello, Jr.
Derek L. Gaubatz
THE BECKET FUND FOR RELIGIOUS LIBERTY
1350 Connecticut Avenue, NW, Suite 605
Washington, DC 20036

Attorneys for *amici curiae*

CERTIFICATE OF SERVICE

I hereby certify that on March 15, 2007, 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:

Bradley S. Abramson, Esq.
Thomas N. Scheffel, Esq.
Thomas N. Scheffel
& Associates, P.C.
3801 E. Florida Avenue, Suite 600
Denver, CO 80210

Corey Y. Hoffmann, Esq.
Hayes, Phillips, Hoffmann &
Carberry, P.C.
1350 17th Street, Suite 450
Denver, CO 80202

Thomas S. Rice, Esq.
Senter Goldbarb & Rice, L.L.C.
P.O. Box 22833
Denver, CO 80222-0833

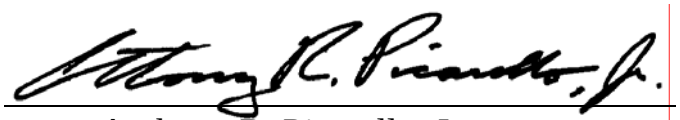
Michael E. Hegarty, Esq.
United States Attorney's Office
1225 Seventeenth Street, Suite 700
Denver, CO 80202

Lisa A. Christian, Esq.
United States Attorney's Office
1225 Seventeenth Street
Suite 700
Denver, Colorado 80202

Theodore C. Hirt, Esq.
Andrew H. Tannenbaum, Esq.
Elizabeth A. Weishaupl Esq.
U.S. Department of Justice
Civil Division
P.O. Box 883
Washington, DC 20044

Charles Goldberg
Rothgerber Johnson & Lyons LLP
1200 Seventeenth Street
Suite 3000
Denver, CO 80202

Eric V. Hall
Rothgerber Johnson & Lyons LLP
90 South Cascade, Suite 1100
Colorado Springs, CO 80903



Anthony R. Picarello, Jr.