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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

MARANATHA HIGH SCHOOL, a non-profit religious corporation; JOYCE BICKNELL; ED NEWKIRK; JOHN ROUSE, as an individual and guardian of CALEB ROUSE, a minor; CALEB ROUSE; DAVID POOLE, as an individual and guardian of SEAN POOLE, a minor; SEAN POOLE; KEVIN D. SMITH, as an individual and guardian of EMILY SMITH, a minor; EMILY SMITH; LINDA RUGGLES, as an individual and guardian of SUZANNE RUGGLES, a minor; SUZANNE RUGGLES; TERRY BRIGHT, as an individual and guardian of CHRISTOPHER BRIGHT, a minor; CHRISTOPHER BRIGHT; and DAVID HARRIS,

Plaintiffs,

vs.

THE CITY OF SIERRA MADRE, a municipal charter corporation; and DOES 1 through 10, inclusive,

Defendants

CASE NO. CV03-0082 DSF (SHSx)

AMICUS CURIAE BRIEF OF THE BECKET FUND FOR RELIGIOUS LIBERTY IN SUPPORT OF THE CONSTITUTIONALITY OF RLUIPA

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Amicus curiae The Becket Fund for Religious Liberty is an interfaith, bi-partisan public interest law firm dedicated to protecting the free expression of all religious traditions, and the freedom of religious people and institutions to participate fully in public life and public benefits. The Becket Fund litigates in support of these principles in state and federal courts throughout the United States, both as primary counsel and as *amicus curiae*. Accordingly, the Becket Fund has been heavily involved in litigation on behalf of a wide variety of religious worshippers, ministers, and institutions under the Religious Land Use and Institutionalized Persons Act of 2000, 42 U.S.C. §§ 2000cc *et seq.* ("RLUIPA").

As detailed (with citations) in the previously granted motion for leave to file this brief, The Becket Fund's RLUIPA cases run the gamut—as *amicus curiae* and as plaintiffs' counsel, in land-use and prisoner cases, from Alabama to New Hampshire to Hawaii—including cases within California. The Becket Fund also represents the plaintiffs in a host of RLUIPA cases outside California, including some that have resulted in published decisions, and others that have concluded by favorable settlement. In addition, we have filed a series of *amicus curiae* briefs in both prisoner and land-use cases involving RLUIPA. We intend to continue filing lawsuits and *amicus curiae* briefs under RLUIPA until the jurisprudence under the law, including its constitutionality, is established beyond reasonable dispute.

SUMMARY OF ARGUMENT

Essentially ignoring the overwhelming weight of judicial authority to the contrary,[1] Defendants assert that that the Substantial Burdens provision of

1 *See Congregation Kol Ami.* v. *Abingdon Tp.*, 2004 WL 1837037, at *9 (E.D.Pa. Aug. 17, 2004) (rejecting constitutional challenge to RLUIPA Section 2(a); *Williams Island Synagogue, Inc.* v. *City of Aventura,* No. 04-20257-CV, 2004 WL 1059798 (S.D.Fla. May 06, 2004) (same); *Castle Hills First Baptist Church* v. *City of Castle Hills,* No. SA-01-CA-1149-RF, 2004 WL 546792 (W.D.Tex. Mar. 17, 2004) ; *Murphy* v. *Town of New Milford,* 289 F.Supp.2d 87 (D.Conn. 2003) *rev'd on other grounds* 402 F.3d 342

RLUIPA, 42 U.S.C. § 2000cc(a) ("Section 2(a)"), is unconstitutional because it exceeds Congress' Enforcement Clause authority under Section 5 of the Fourteenth Amendment. But as Judge Posner, writing for the Seventh Circuit, recently noted, RLUIPA Section 2(a) simply codifies existing Free Exercise law and is therefore "an uncontroversial use of [Congress'] section 5" Enforcement Clause power. *Sts. Helen & Constantine* v. *City of New Berlin*, 396 F.3d 895, 898 (7th Cir. 2005). That conclusion has been echoed by every court to reach the issue (except for the anomalous *Elsinore* opinion[2] cited in Defendants' brief) because RLUIPA was carefully crafted precisely to avoid the flaws of its predecessor, the Religious Freedom Restoration Act of 1993, 42 U.S.C. §2000bb *et seq.* ("RFRA"), which the Supreme Court struck down as applied to the states in *City of Boerne* v. *Flores*, 521 U.S. 507 (1997).

Although RFRA and RLUIPA are similar in some respects – both were designed to strengthen the protection of religious liberty and both were passed by overwhelming margins as a result of broad, bipartisan support – they are different in all respects relevant to the Supreme Court's Enforcement Clause analysis in *Boerne* and its progeny. This difference is the result of a painstaking effort by

(2nd Cir. 2005); *United States* v. *Maui County*, 298 F.Supp.2d 1010 (D.Haw. 2003) (same); *Guru Nanak Sikh Society* v. *County of Sutter*, 326 F. Supp. 2d 1140 (E.D.Cal. 2003) (same); *Westchester Day Sch.* v. *Village 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-PCT-RCB (D.Ariz. Mar. 26, 2003) (same); *Christ Universal Mission Church* v. *City of Chicago*, No. 01-C-1429, 2002 U.S. Dist. LEXIS 22917, at *24 (N.D.Ill. Sept. 11, 2002), *rev'd on other grounds*, No. 02-4119 (7th Cir. Mar. 26, 2004); *Freedom Baptist Church* v. *Township of Middletown*, 204 F.Supp.2d 857 (E.D.Pa. 2002). *See also Sts. Helen & Constantine* v. *City of New Berlin*, 396 F.3d 895, 898 (7th Cir. 2005) (noting that RLUIPA Section (2(a) "is an uncontroversial use of [Congress'] section 5" Enforcement Clause power); *Midrash Sephardi* v. *Town of Surfside*, 366 F.3d 1214 (11th Cir. 2004) (rejecting Enforcement Clause challenge to RLUIPA Section 2(b)); *Cottonwood Christian Center* v. *City of Cypress*, 218 F.Supp.2d 1203, 1221 n.7 (C.D.Cal. 2002) (noting that "RLUIPA would appear to have avoided the flaws of its predecessor RFRA, and be within Congress's constitutional authority").

2 Elsinore Christian Center v. City of Lake Elsinore, 291 F.Supp.2d 1083 (C.D.Cal. 2003) interlocutory appeal pending, No. 04-55320 (9th Cir.).

legislators and legal scholars to ***comply*** with the requirements of *Boerne* – not, as the Defendants suggest, to defy it or to usurp judicial authority to define constitutional violations.

Accordingly, RLUIPA codifies ***current*** First and Fourteenth Amendment standards – based on ***substantial*** evidence in the legislative history demonstrating the need for better enforcement of those standards – and institutes eminently ***proportional*** remedies, vastly narrower than the congressional record could support. Thus, by design, RLUIPA respects the Supreme Court's view of the Enforcement Clause and falls squarely within the bounds of that enumerated power.

As explained in detail below, Defendants' argument disregards not only the weight of ***judicial*** authority on this question, but fails to account for the deference that is due to acts of the federal ***legislature***. *See United States* v. *Morrison*, 529 U.S. 598, 606 (2000) ("Due respect for the decisions of a coordinate branch of government demands that we invalidate a congressional enactment only upon a plain showing that Congress has exceeded its constitutional bounds."); *Walters* v. *Nat'l Ass'n of Radiation Survivors*, 473 U.S. 305, 319 (1985) ("Judging the constitutionality of an Act of Congress is properly considered the gravest and most delicate duty that this Court is called upon to perform.").

ARGUMENT

I. RLUIPA SECTION 2(A)(1), AS APPLIED THROUGH SECTION 2(A)(2)(C), IS A LEGITIMATE EXERCISE OF CONGRESS' ENUMERATED POWER UNDER THE ENFORCEMENT CLAUSE.

Section 5 of the Fourteenth Amendment grants Congress the "power to enforce, by appropriate legislation," Section 1 of the Amendment, which includes

the Equal Protection Clause, the Due Process Clause, and the various protections of the Bill of Rights incorporated thereunder against the States, including rights under the Free Exercise Clause. Congress' power "to enforce" these rights includes the power to provide by legislation judicial remedies – in the narrow sense of monetary damages, injunctive relief, and attorneys' fees – for violations of existing constitutional protections. *See, e.g.,* 42 U.S.C. §§ 1983, 1988.

In *City of Boerne* v. *Flores,* 521 U.S. 507 (1997), the Supreme Court reaffirmed a long line of cases holding that Section 5 allows for broader remedies as well: legislation that "deters" or "prevent[s]" constitutional violations, "even if in the process it prohibits conduct which is not itself unconstitutional and intrudes into 'legislative spheres of autonomy previously reserved to the States.'" *Boerne,* 521 U.S. at 518, 524; *Nevada Dept. of Human Res.* v. *Hibbs,* 538 U.S. 721, 727-28 (2003) . Thus, "Congress is not limited to mere legislative repetition of this Court's constitutional jurisprudence," but may also prohibit "a somewhat broader swath of conduct." *Bd. of Trustees of Univ. of Ala.* v. *Garrett*, 531 U.S. 356, 365 (2001). *See Nanda* v. *Univ. of Illinois,* 303 F.3d 817, 826 (7th Cir. 2002) (Congress "not limited to parroting the language of §1.").

Although the Supreme Court has "often acknowledged" that the enforcement power "is a broad power indeed," it is not without limits. *Tennessee* v. *Lane,* 124 S. Ct. 1978, 1985 (2004)(quotations omitted). *Boerne* also reaffirmed that the Enforcement Clause does not authorize Congress "to decree the substance of the Fourteenth Amendment's restrictions on the States," or otherwise "to determine what constitutes a constitutional violation." *Boerne,* 521 U.S. at 518, 519 ; *CSX Transp.* v. *NYS Office of Real Prop. Servs*., 306 F.3d 87, 96 (2d Cir. 2002).

Therefore, when enforcement legislation prohibits more than existing constitutional protections do, courts will assess whether that increment is permissible prophylaxis or impermissible redefinition. Specifically, "§5 legislation

reaching beyond the scope of §1's actual guarantees must exhibit 'congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end.'" *Garrett*, 531 U.S. at 365 (quoting *Boerne*, 521 U.S. at 520). Preventive measures are "congruent and proportional" where Congress had "reason to believe that many of the laws affected by the congressional enactment have a significant likelihood of being unconstitutional." *Id.* at 532. *Cf. Kimel* v. *Fla. Bd. of Regents*, 528 U.S. 62, 88, 91 (2000) (striking down law that "prohibits very little conduct likely to be held unconstitutional," and where "Congress had virtually no reason to believe that state and local governments were unconstitutionally discriminating").

Notably, the Supreme Court's two most recent Enforcement Clause decisions have upheld such "prophylactic legislation." *See Lane*, 124 S. Ct. at 1985 (rejecting Enforcement Clause challenge to Title II of Americans with Disabilities Act); *Hibbs*, 538 U.S. at 721 (rejecting Enforcement Clause challenge to Family and Medical Leave Act).

In light of these principles, the Ninth Circuit has prescribed the following Enforcement Clause analysis. First, the Court will "'identify with some precision the scope of the constitutional right at issue.'" *Hibbs* v. *Dept. of Human Res.*, 273 F.3d 844, 853 (9th Cir. 2001), *aff'd*, 538 U.S. 721 (2003) (quoting *Garrett*, 531 U.S. at 365); *accord Nanda*, 303 F.3d at 828.

Next, if the statute reaches beyond that constitutional right, the Court should "determine whether the statute in question is 'an appropriate remedy' for violations of that right." *Hibbs*, 273 F.3d at 853 (quoting *Kimel*, 528 U.S. at 88); *see Hibbs*, 538 U.S. at 728 ("Section 5 legislation reaching beyond the scope of §1's actual guarantees must be an appropriate remedy for identified constitutional violations,…"). This triggers the "congruence and proportionality" inquiry, which has two components:

1. "[E]xamine whether Congress identified a history and pattern of unconstitutional" conduct to be remedied, *Garrett,* 531 U.S. at 368, "perhaps by scrutinizing the statute's legislative history." *Hibbs,* 273 F.3d at 853; *CSX Transp.,* 306 F.3d at 97. Examining "the legislative record containing the reasons for Congress' action" is "[o]ne means" of determining whether prophylaxis is "an appropriate remedy," but "lack of support [in the record] is not determinative of the §5 inquiry." *Kimel,* 528 U.S. at 88, 91.

2. Consider "[t]he appropriateness of remedial measures…in light of the evil presented [to Congress]. Strong measures appropriate to address one harm may be an unwarranted response to another, lesser one." *Hibbs,* 273 F.3d at 853 (quotations omitted). *See, e.g., United States* v. *Blaine,* 363 F.3d 897, 905-09 (9th Cir. 2004) (evaluating "congruence and proportionality" of particular remedial provisions of Voting Rights Act by examining them in light of legislative record before Congress).

In sharp contrast to RFRA, the RLUIPA's provisions challenged here readily satisfy this analysis. First, far from redefining the substance of constitutional law, RLUIPA Sections 2(a)(1) and 2(a)(2)(C) merely restate that part of the "substantial burden" test from *Sherbert* v. *Verner,* 374 U.S. 398 (1963), that remains after it was distinguished in *Employment Div.* v. *Smith,* 494 U.S. 872 (1990) . Because these provisions do not "reach beyond" existing "substantial burden" jurisprudence, there is no "remedial" or "deterrent" increment that must be evaluated for "congruence and proportionality."

But even if the statute somehow prohibits government action that is not already unconstitutional, any such prophylaxis is "congruent and proportional" to the pervasive constitutional injuries identified to Congress. RLUIPA's legislative history contains an extensive factual record indicating that local governments – frequently and nationwide – impose "substantial burdens" on the religious use of land pursuant to zoning systems involving "individualized assessments," and that such systems conceal religious discrimination that is difficult to prove in court. In addition, the challenged provisions of RLUIPA are narrowly tailored, applying

only to the precise area of law – zoning and landmarking – where the legislative record indicates the worst abuses.

But Defendants and the *Elsinore* decision on which they rely strain to manufacture disparities between current "substantial burden" jurisprudence under the Free Exercise Clause and RLUIPA Sections 2(a)(1) and 2(a)(2)(C). They also either ignore or second guess most of the evidence in the legislative record that prompted the passage of the Act, demonstrating the opposite of the deference that courts should afford Congress in this regard. Finally, in light of the (imagined) deficiencies of the legislative record, they unsurprisingly assert that the (imagined) prophylaxis of RLUIPA to be "out of proportion" to a remedial object, *i.e.*, lacking "congruence" or "proportionality." Therefore, Defendants' Enforcement Clause argument should be rejected.

A. <u>RLUIPA precisely targets, according to current Supreme Court precedent, state and local land-use laws that are unconstitutional</u>.

Section 2(a), when applied through Section 2(a)(2)(C), affects only unconstitutional state and local land-use laws, because those RLUIPA provisions were designed to codify ***current*** Free Exercise Clause "substantial burden" jurisprudence. Specifically, where a land-use regulation involving "individualized assessments of the proposed uses for … property" imposes a "substantial burden on … religious exercise," these provisions require a showing that the burden furthers "a compelling governmental interest" by the "least restrictive means." RLUIPA §§2(a)(1), 2(a)(2)(C). Notwithstanding Defendants' assertions to the contrary, this is precisely what remains of the "substantial burdens" test after *Employment Div.* v. *Smith*, 494 U.S. 872 (1990), except further limited to the land-use context.

1. Even after Smith, strict scrutiny still applies to "substantial burdens," but only when they are imposed pursuant to a system of "individualized assessments."

We first "determine[] the metes and bounds of the constitutional right in question," Garrett, 531 U.S. at 368: the Free Exercise Clause, and particularly its limited protection of incidental, "substantial burdens" on religious exercise after *Smith*.

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. App. 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 *Smith*, 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 881-82 (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.

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

Similarly, the Ninth Circuit and other Courts of Appeals have respected the Supreme Court's admonition to avoid evaluating the "centrality" of a belief within a religious system. *See Kreisner* v. *San Diego*, 1 F.3d 775, 781 (9th Cir. 1993) (citing *Smith* and *Hernandez*); *Church of Scientology* v. *Clearwater*, 2 F.3d 1514, 1549 (11th Cir. 1993) (quoting *Hernandez*); *Salvation Army* v. *Dept. of Comm'y Affairs*, 919 F.2d 183, 189 n.4 (3d Cir. 1990) (same).

Finally, the Ninth Circuit and other Courts of Appeals have applied the "individualized assessments" or "exemptions" doctrine outside the unemployment context.[3] In *Thornburgh*, the Ninth Circuit 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."

Thornburgh's rationale for rejecting that particular claim is also important here. The Court found the exemptions at issue were not "individualized" within the meaning of *Smith*, because they "exclude[d] entire, objectively-defined categories of employees from the scope of the statute," and because the system involved "no procedures whereby anyone 'applies' for any of the[] exemptions." 951 F.2d at 961. *Thornburgh* also contrasted a system of "individualized exemptions" with the kind of "across-the-board criminal prohibition on a particular form of conduct" at issue in *Smith*. *Id.* at 961 n.2.

3 *See, e.g.*, *Thornburgh*, 951 F.2d at 961 (immigration); *Axson-Flynn*, 356 F.3d at 1297-99 (university curriculum). *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).

The Tenth Circuit's standard is virtually identical, recently reaffirming that 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." *Axson-Flynn*, 356 F.3d at 1298. Like the Ninth Circuit, the Tenth Circuit emphasized the role of particularity and subjectivity, citing corresponding language in *Smith*. *Id.* at 1297 (exception requires "'individualized governmental assessment of the reasons for the relevant conduct' that 'invite[s] considerations of the particular circumstances' involved in the particular case.")(quoting *Smith*, 494 U.S. at 884).[4]

Whenever they reach the question, courts in the Ninth Circuit and elsewhere have found that burdens imposed through zoning permit denials are imposed pursuant to systems of "individualized assessments." Courts reached this conclusion several times under the Free Exercise Clause after *Smith* but before RLUIPA. *See, e.g., 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

4 Recently, in *San Jose Christian College* v. *City of Morgan Hill*, 360 F.3d 1024 (9th Cir. 2004), the Ninth Circuit discussed some of these Free Exercise principles in the land-use context. For example, the Court acknowledged *Smith's* general rule that neutral and generally applicable laws do not trigger strict scrutiny. *Id.* at 1031. But the Court did not discuss individualized assessments. Because the Court found no "substantial burden" on the facts before it, the Court had no occasion to decide whether such a burden was applied through a system of "individualized assessments," either under RLUIPA 2(a)(2)(C) or the Free Exercise Clause.

property and the owner's use of such property, and contain mechanisms for individualized exceptions").

Now that RLUIPA has codified the very same standard "for greater visibility and easier enforceability," 146 CONG. REC. S7775, courts reach that conclusion routinely. *See, e.g., See Guru Nanak,* 2003 WL 23676118, at *18 n.10 ("[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*, 229 F.Supp.2d at 1073 (holding that state special permit "provisions are a system of 'individualized exemptions' to which strict scrutiny applies"); *Cottonwood*, 218 F.Supp.2d at 1222 (holding that City's "land-use decisions...are not generally applicable laws," and that refusal to grant church's "CUP 'invite[s] individualized assessments of the subject property and the owner's use of such property, and contain mechanisms for individualized exceptions.'"); *Freedom Baptist*, 204 F.Supp.2d at 868 ("no one contests" that land use laws "by their nature impose individualized assessment regimes"); *Al-Salam Mosque Fdn.* v. *Palos Heights*, 2001 WL 204772, at *2 (N.D.Ill. 2001) ("[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 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").

This weight of authority comports well with the Ninth Circuit's interpretation of "individualized assessments" in *Thornburgh,* and the similar interpretation in *Axson-Flynn.* Common zoning concepts like "special exception," "conditional use," and "variance" all imply a general prohibition in a given zone from which individual exceptions are available on a "case-by-case" basis. *See Axson-Flynn,* 356 F.3d at 1298. Those exceptions are typically obtained by submitting an application, *see Thornburgh,* 951 F.2d at 961, containing the particular details of and reasons for the proposed activity. *See Axson-Flynn,* 356 F.3d at 1297 (quoting *Smith*). The standards for evaluating these applications, moreover, are rarely objective, including factors like "aesthetics" or consistency with the "general welfare" or the "general plan." *See Thornburgh,* 951 F.2d at 961 (emphasizing lack of "objectively-defined categories"); *Axson-Flynn,* 356 F.3d at 1298 (same). And by design, the exceptions (or permits or variances) are extended to some applicants but not others. Discretionary, exception-ridden systems like these are a far cry from an "across-the-board … prohibition on a particular form of conduct." *Thornburgh,* 951 F.2d at 961 n.2. *See also Sts. Helen & Constantine,* 396 F.3d at 900 ("substantial burden" provision guards against "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," and so "backstops the explicit prohibition of religious discrimination in the later section of the Act.").

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 permits to use land for religious exercise often trigger strict scrutiny for that reason.

2. This Court – like every other to address the issue – should reject the Elsinore decision's attempt to create a disparity between existing "substantial burdens" jurisprudence and the RLUIPA provisions at issue.

With the sole exception of the *Elsinore* decision, every court to examine Sections 2(a)(1) and 2(a)(2)(C) of RLUIPA has recognized Congress' unmistakable attempt to codify – rather than flout or redefine – existing "substantial burdens" jurisprudence under the Free Exercise Clause.[5] 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.[6] Notwithstanding this weight of authority, the Defendants and the

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5 *See, e.g., Sts. Helen & Constantine,* 396 F.3d at 898 ("*Sherbert* [as narrowed by *Smith*] was an interpretation of the Constitution, and so [RLUIPA's] creation of a federal judicial remedy for conduct contrary to its doctrine is an uncontroversial use of section 5"); *Castle Hills,* 2004 WL 546792, at *19 ("RLUIPA's § 2(a) codifies existing Supreme Court 'individualized assessment' jurisprudence."); *Murphy,* 289 F.Supp.2d at 119 ("[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*."); *Westchester Day*, 280 F.Supp.2d at 236 ("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.'"); *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) 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*").

6 *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.").

Elsinore court would avoid this conclusion by manufacturing disparities between post-*Smith* "substantial burdens" jurisprudence and these two provisions.

First, the *Elsinore* opinion claims "the Supreme Court has never invalidated a governmental action on the basis of *Sherbert* outside the context in which it was decided: denial of unemployment compensation." *Elsinore*, 291 F.Supp.2d at 1097. That is simply false. *See Lukumi*, 508 U.S. at 537. *See also Life Teen*, slip op. at 27 (rejecting as "not reasonable" argument that individualized assessment exception applies only in unemployment context).

Second, the *Elsinore* court claims that RLUIPA departs from existing Free Exercise jurisprudence by omitting judicial evaluation of the "centrality" of a burdened religious practice in determining whether the burden is "substantial."[7] RLUIPA does omit the "centrality" inquiry, but precisely to ***comply*** with the Supreme Court's specific admonition in *Smith* and *Hernandez* to avoid it. As discussed above, the Ninth Circuit and many others respect this prohibition. *See Kreisner*, 1 F.3d at 781. In fact, even interpreting the undefined ***statutory*** term "substantial burden" in RLUIPA Section 2(a), the Ninth Circuit avoided the "centrality" inquiry. *San Jose Christian College*, 360 F.3d at 1034. Avoiding this inquiry strengthens, rather than weakens, the constitutionality of RLUIPA.

Third, the *Elsinore* decision labors mightily to distinguish "individualized assessments" and "individualized exceptions." 291 F.Supp.2d at 1098-99. But as discussed above, the precedents that define the scope of those terms use them interchangeably. There is no difference at all, least of all a relevant one.

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7 *See Elsinore*, 291 F.Supp.2d at 1091 (faulting RLUIPA for "explicitly prescribing that the centrality of a religious belief is immaterial to whether or not that belief constitutes 'religious exercise'"); RLUIPA § 8(7)(A)(defining "religious exercise" to include "any exercise of religion, whether or not compelled by, or central to, a system of religious belief.").

Finally, the *Elsinore* decision asserts that RLUIPA's "definitionally equating land use with 'religious exercise'" radically changes free exercise law. 291 F.Supp.2d at 1091. RLUIPA, however, does not equate "religious exercise" with ***just any*** use of land, but instead with ***religious*** use of land. RLUIPA §8(7)(B)("The use, building, or conversion of real property ***for the purpose of religious exercise*** shall be considered to be religious exercise….")(emphasis added). And that equation is hardly shocking. In general, protected "religious exercise" is conduct "rooted in religious belief" that is "sincerely held."[8] RLUIPA's definition does not broaden this definition, but instead narrows it to the subset of religiously motivated conduct associated with the use of land – another instance of RLUIPA's codifying existing Free Exercise jurisprudence to facilitate enforcement in the land-use context.

Thus, what the *Elsinore* decision claims are vast disparities between RLUIPA and current "substantial burden" jurisprudence are not disparities at all. Instead, Sections 2(a)(1) and 2(a)(2)(C) so closely track that constitutional standard that Congress did not just have a "reason to believe" – ***but knew*** – that not just "many" – ***but virtually all*** – of the state laws affected by these provisions did not just "have a significant likelihood of being" – ***but actually were*** – unconstitutional. *Boerne*, 521 U.S. at 532. The tight correspondence of legislative and constitutional standards puts to rest any claim by the Defendants that these RLUIPA provisions "alter the meaning of the Free Exercise Clause," as RFRA did. Id. at 519.

8 *See Yoder*, 406 U.S. at 215; *Frazee* v. *Illinois Dept. of Emplt. Sec.*, 489 U.S. 829, 834 (1989). *See also Peterson* v. *Minidoka Cy. Sch. Dist. No. 331*, 118 F.3d 1351, 1357 (9th Cir. 1997) (protected religious exercise includes "what the individual human being perceives to be the requirement of the transhuman Spirit to whom he or she gives allegiance").

B. Even if RLUIPA prohibits some constitutional conduct, that margin of prohibition is "congruent and proportional" to the widespread constitutional injuries to be remedied.

Because Sections 2(a)(1) and 2(a)(2)(C) do not represent "prophylactic measures," this Court may simply find them "an appropriate remedy" without further analysis. *See Hibbs*, 538 U.S. at 728; *Hibbs*, 273 F.3d at 853; *see, e.g.*, *Murphy*, 289 F.Supp.2d at 120. If, however, the Court does find some disparity between those provisions and current "substantial burdens" jurisprudence, the substantial legislative record, paired with the modest scope of the Act, assure its "congruence and proportionality." Boerne, 521 U.S. at 520.

1. RLUIPA's legislative history establishes a "history and pattern" of constitutional violations caused by local land-use laws.

Although the following chart does not fully capture the depth of the record considered by Congress, it does begin to suggest the care Congress took in forming its legislative judgment that RLUIPA was needed.

Date	Session	Hearing	Witnesses
July 14, 1997	105th Congress, 1st Session	Protecting Religious Freedom After Boerne v. Flores (Part I), Hearing before the Subcommittee on the Constitution of the House Committee on the Judiciary	7
Oct. 1, 1997	105th Congress, 1st Session	Congress' Constitutional Role in Protecting Religious Liberty, Hearing before the Senate Committee on the Judiciary	4

Date	Session	Hearing	Witnesses
Feb. 26, 1998	105th Congress, 2nd Session	Protecting Religious Freedom After Boerne v. Flores (Part II), Hearing before the Subcommittee on the Constitution of the House Committee on the Judiciary	10
Mar. 26, 1998	105th Congress, 2nd Session	Protecting Religious Freedom After Boerne v. Flores (Part III), Hearing before the Subcommittee on the Constitution of the House Committee on the Judiciary	7
June 16, 1998	105th Congress, 2nd Session	Religious Liberty Protection Act of 1998, Hearing before the Subcommittee on the Constitution of the House Committee on the Judiciary	8
June 23, 1998	105th Congress, 2nd Session	S. 2148, Religious Liberty Protection Act of 1998, Hearing Before the Senate Committee on the Judiciary	8
July 14, 1998	105th Congress, 2nd Session	Religious Liberty Protection Act of 1998, Hearing before the Subcommittee on the Constitution of the House Committee on the Judiciary	10
May 12, 1999	106th Congress, 1st Session	Religious Liberty Protection Act of 1999, Hearing on H.R. 1691 before the Subcommittee on the Constitution of the House Committee on the Judiciary	15

Date	Session	Hearing	Witnesses
June 23, 1999	106th Congress, 1st Session	Issues Relating to Religious Liberty Protection, and Focusing on the Constitutionality of a Religious Protection Measure, Hearing Before the Senate Committee on the Judiciary	6
Sept. 9, 1999	106th Congress, 1st Session	Issues Relating to Religious Liberty Protection, and Focusing on the Constitutionality of a Religious Protection Measure, Hearing Before the Senate Committee on the Judiciary[9]	4

In short, Congress "compiled massive evidence," 146 CONG. REC. S7774 – based on nine hearings over a period of three years – that clearly establishes what the RFRA record did not: a "widespread pattern of religious discrimination in this country" in land-use regulation, including "examples of legislation enacted or enforced due to animus or hostility to the burdened religious practices." *Boerne*, 521 U.S. at 531. The congressional record reflects that land-use laws are commonly ***both*** enacted ***and*** enforced out of hostility to religion.[10] Congress

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

10 *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

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.[11]

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

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lurks behind such vague and universally applicable reasons as traffic, aesthetics, or 'not consistent with the city's land use plan.'").

11 *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.").

12 The record contains at least four such studies. See, e.g., Protecting Religious Freedom after Boerne v. Flores (III), Hearing Before the Subcomm. on the Constitution of the House Comm. on the Judiciary, 105th Cong., 2d Sess., at 127-54 (Mar. 26, 1998)(statement of Von Keetch, Counsel to Mormon Church, <http://commdocs.house.gov/committees/judiciary/hju57227.000/hju57227_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."[13] *Garrett,* 531 U.S. at 376 (Kennedy, J., concurring). Some was ***anecdotal*** evidence ***paired with*** testimony by experienced witnesses indicating that the anecdotes were representative.[14] *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

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

14 *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).

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.

Notwithstanding the depth and breadth of this hearing record, Defendants claim that the evidence was not sufficient and urge this Court to secondguess Congress' legislative findings and judgment. The *Freedom Baptist* court summed up the matter best in rejecting a similar invitation:

> Whatever the true percentage of cases in which religious organizations have improperly suffered at the hands of local zoning authorities, we certainly are in no position to quibble with Congress's ultimate judgment that the undeniably low visibility of land regulation decisions may well have worked to undermine the Free Exercise rights of religious organizations around the country.

Freedom Baptist, 204 F.Supp.2d at 867. *See also Hibbs*, 538 U.S. at 736 (enforcement legislation may deter "subtle discrimination that may be difficult to detect on a case-by-case basis.").

In sum, this Court should affirm that the record reflects a "widespread pattern" of likely constitutional violations that could justify vastly more prophylaxis than RLUIPA Sections 2(a)(1) and 2(a)(2)(C) represent. *See Hibbs*, 538 U.S. at 722 (concluding that legislative record "is weighty enough to justify the enactment of prophylactic §5 legislation.")(emphasis added). *See also id.* at 738 ("[I]n light of the evidence before Congress, a statute…that simply mandated gender equality in the administration of leave benefits, would not have achieved Congress' remedial object.").

2. *Any "preventive" or "deterrent" features of RLUIPA are modest, especially in light of the legislative record*.

The Enforcement Clause provisions of RLUIPA – including Sections 2(a)(1) and 2(a)(2)(C) – correspond so closely to current First and Fourteenth Amendment jurisprudence that they scarcely require justification as "preventive" or "deterrent" measures that trigger the congruence / proportionality inquiry under *Boerne*. *See Garrett,* 531 U.S. at 365 ("§5 legislation ***reaching beyond*** the scope of §1's actual guarantees must exhibit 'congruence and proportionality'")(emphasis added). Rather than "prohibit[] conduct which is not itself unconstitutional," *Boerne,* 521 U.S. at 518, these provisions merely restate a frequently violated constitutional standard and provide familiar judicial remedies for such violations.

Unlike RFRA, RLUIPA applies the compelling interest test pursuant to the Enforcement Clause power ***only*** where land-use laws impose substantial burdens pursuant to systems of "individualized assessments," *i.e.,* where the compelling interest standard ***already applies***. *Compare* RLUIPA § 2(a)(2)(C), *with Lukumi,* 508 U.S. at 537. Codifying the Supreme Court's constitutional standard to facilitate enforcement cannot possibly be a disproportionate means of enforcing that standard. *See* 146 CONG. REC. S7775 ("Each subsection closely tracks the legal standards in one or more Supreme Court opinions, codifying those standards for greater visibility and easier enforceability.").

Moreover, the contested provisions apply only in the area of "land use regulation," which the statute defines narrowly as "a zoning or landmarking law," RLUIPA § 8(5), where enforcement is amply justified by the congressional record. *See supra* Section I.B.1. RFRA, by contrast, applied to all areas of law, and so was faulted for "[s]weeping coverage … displacing laws and prohibiting official actions of almost every description and regardless of subject matter." *Boerne,* 521 U.S. at 532. *See also Hibbs,* 538 U.S. at 723 (contrasting disproportionate statutes

"which applied broadly to every aspect of state employers' operations," with statutes "narrowly targeted … precisely where [impermissible employment discrimination] has been and remains strongest – and affects only one aspect of the employment relationship.")

Finally, RLUIPA provides a federal cause of action for "appropriate relief," including attorneys' fees, RLUIPA §4(a), (d). Even the burden shifting provision of the Act, RLUIPA §4(b), reflects Supreme Court jurisprudence regarding the respective burdens of the parties once strict scrutiny is triggered. *See, e.g., Republican Party of Minn.* v. *White*, 122 S.Ct. 2528, 2535 (2002) ("Under the strict-scrutiny test, [defendants] have the burden to prove that the [challenged action] is (1) narrowly tailored, to serve (2) a compelling state interest."). Notably, none of these remedies remotely "alters the meaning of the Free Exercise Clause." *Boerne,* 521 U.S. at 519.

But even if RLUIPA occasionally prohibits more land-use regulation than the Constitution already does, the Act is still constitutional. *See, e.g., Freedom Baptist,* 204 F.Supp.2d at 874 ("To the extent that, conceivably, the RLUIPA may cover a particular case that is not on all fours with an existing Supreme Court decision, it nevertheless constitutes the kind of congruent and, above all, proportional remedy Congress is empowered to adopt under § 5 of the Fourteenth Amendment."). *See also Hibbs,* 528 U.S. at 727 ("Congress may, in the exercise of its §5 power, do more than simply proscribe conduct that we have held unconstitutional.").

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 – in the narrowest sense – for violations of those standards. To the extent RLUIPA's provisions are "preventive" or "deterrent" at all, they are "congruent" and

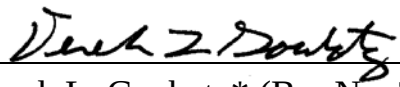
"proportional" to the constitutional injuries targeted. RLUIPA thus contrasts sharply with the "sweeping coverage" of RFRA, and so falls well within the boundaries of Congress' Enforcement Clause authority, as defined in *Boerne* and its progeny. This Court should therefore reject Defendants' argument to follow the anomalous *Elsinore* decision and sustain RLUIPA Section 2(a) as a valid exercise of Congress' Enforcement Clause authority.

CONCLUSION

For all of the reasons stated above, this Court should hold that RLUIPA Section 2(a) is a constitutional exercise of Congress' Enforcement Clause power.

DATED: May 6, 2005

THE BECKET FUND FOR RELIGIOUS LIBERTY



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