04-10481FF

United States Court of Appeals

FOR THE ELEVENTH CIRCUIT

JOSEPH KONIKOV,

Plaintiff-Appellant,

v.

ORANGE COUNTY, FLORIDA, JOEL D. HAMMOCK, JIM POWERS, ROBERT BURNS, ROBERT HIGH,

Defendants-Appellees.

On Appeal from the United States District Court
for the Middle District of Florida

BRIEF OF AMICI CURIAE THE ANTI-DEFAMATION LEAGUE, THE AMERICAN JEWISH COMMITTEE, THE AMERICAN JEWISH CONGRESS, THE UNION OF ORTHODOX JEWISH CONGREGATIONS OF AMERICA, THE JEWISH COUNCIL FOR PUBLIC AFFAIRS, LIBERTY COUNSEL, AND THE BECKET FUND FOR RELIGIOUS LIBERTY

GIBSON, DUNN & CRUTCHER LLP
200 Park Avenue
New York, New York 10166
(212) 351-4000

Attorneys for Amici Curiae

AMICI CURIAE'S CERTIFICATE OF INTERESTED PERSONS

Pursuant to Federal Rule of Appellate Procedure 26.1 and 11th Cir. R. 26.1, the Amici Curiae files the following Certificate of Interested Persons:

American Liberties Institute, Counsel for the Plaintiff/Appellant

Antoon, Hon. John, United States District Court, Middle District of Florida, Orlando Division

Burns, Robert, Defendant/Appellee

Glassman, Gary M., Attorney for the Defendants/Appellees, Assistant County Attorney, Orange County, Florida

Glazebrook, Hon. James G., Magistrate Judge, United States District Court, Middle District of Florida, Orlando Division

Hammock, Joel, Defendant/Appellee

High, Robert, Defendant/Appellee

Konikov, Joseph, Plaintiff/Appellant

Nelson, Frederick H., Attorney for the Plaintiff/Appellant

Orange County, Florida, Defendant/Appellee

Powers, Jim, Defendant/Appellee

Stemberger, John T., Attorney for the Plaintiff/Appellant

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, and to assist judges in making a determination of whether they have any interests in any of a party's related corporate entities that would disqualify the judges from hearing the appeal, *amici curiae* the Anti-Defamation League ("ADL"), the American Jewish Committee ("AJ Committee"), the American Jewish Congress ("AJ Congress"), the Union of Orthodox Jewish Congregations of America ("UOJCA"), the Jewish Council for Public Affairs ("JCPA"), Liberty Counsel, and the Becket Fund for Religious Liberty ("Becket Fund") state the following:

The ADL has no parent corporations, and no public companies own 10% or more of the ADL's stock. The AJ Committee has no parent corporations, and no public companies own 10% or more of the AJ Committee's stock. The AJ Congress has no parent corporations, and no public companies own 10% or more of the AJ Congress' stock. The UOJCA has no parent corporations, and no public companies own 10% or more of the UOJCA's stock. The JCPA has no parent corporations, and no public companies own 10% or more of the JCPA's stock. Liberty Counsel has no parent corporations, and no public companies own 10% or more of Liberty Counsel's stock. The Becket Fund has no parent corporations, and no public companies own 10% or more of the Becket Fund's stock.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Legislative History

Statutes

This is the *amici curiae* brief of the Anti-Defamation League ("ADL"), the American Jewish Committee ("AJ Committee"), the American Jewish Congress ("AJ Congress"), the Union of Orthodox Jewish Congregations of America ("UOJCA"), the Jewish Council for Public Affairs ("JCPA"), Liberty Counsel, and the Becket Fund for Religious Liberty (the "Becket Fund"). The *amici* submit this brief to demonstrate that Congress acted well within its constitutional powers in enacting the Religious Land Use and Institutionalized Persons Act ("RLUIPA"), 42 U.S.C. § 2000cc, *et seq*. All parties have consented to the filing of this brief.

PRELIMINARY STATEMENT

RLUIPA provides that "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 religious assembly or institution," unless the government shows that the burden is (a) "in furtherance of a compelling governmental interest" and (b) "the least restrictive means of furthering that compelling governmental interest."

Congress enacted RLUIPA in response to overwhelming evidence that local governments, through their power to regulate land use, were discriminating against both mainstream and non-mainstream religions. Despite this nation's history of religious tolerance, its First Amendment protections, and data that suggests that Americans – more than the citizens of any other Western society – describe

themselves as being observant of some faith, the reality, at least in regard to acceptance of organized religious practice in our midst, is starkly different. As Congress found during its extensive hearings, municipalities, cities, and towns have demonstrated a consistent hostility towards the free exercise of religion with respect to land use.

It was against this backdrop that Congress passed RLUIPA on July 27, 2000. Following three years of hearings regarding the issue of religious liberty – at which *more than 50 witnesses testified* and volumes of statistical and other data were presented – Congress concluded that RLUIPA was needed to stamp out official animus towards organized religious groups with respect to land use.

This brief focuses on that legislative history to demonstrate that Congress, by passing RLUIPA, acted well within its power under Section 5 of the Fourteenth Amendment, given (a) the detailed record of religious discrimination in land use regulation by local governments across the United States; and (b) the proportionate measures that RLUIPA embodies in response to that identified discrimination.

INTEREST OF THE *AMICI*

Organized in 1913 to advance good will and mutual understanding among Americans of all creeds and races and to combat racial, ethnic, and religious prejudice in the United States, the ADL is today one of the world's leading organizations fighting hatred, bigotry, discrimination, and anti-Semitism. While

the ADL counts among its core beliefs strict adherence to the separation of Church and State embodied in the Establishment Clause of the First Amendment, it is an equal adherent of the Free Exercise Clause. In particular, the ADL embraces the diversity of religion in our society, and believes that in such a religiously diverse society a zealous defense of the Free Exercise Clause will strengthen our democracy and preserve our Republic.[1]

The AJ Committee, a national organization of over 125,000 members and supporters, was founded in 1906 to protect the civil and religious rights of Jews. It is the conviction of the AJ Committee that those rights will be secure only when the rights of all Americans are equally secure. Recognizing the critical need to protect religious institutions against onerous and unfair application of land use regulations and to provide a remedy for persons confined to state residential facilities who are denied the right to practice their faith, the AJ Committee played a

---

1 In furtherance of these beliefs, the ADL has participated as *amicus* in the major church-state cases of the last half-century that have reached the Supreme Court. See ADL briefs *amicus curiae* filed in Locke v. Davey, 124 S. Ct. 1307 (2004); Zelman v. Simmons-Harris, 536 U.S. 639 (2002); Mitchell v. Helms, 530 U.S. 793 (2000); Santa Fe Indep. School Dist. v. Doe, 530 U.S. 290 (2000); Agostini v. Felton, 521 U.S. 203 (1997); Rosenberger v. Rector and Visitors of the Univ. of Va., 515 U.S. 819 (1995); Zobrest v. Catalina Foothills School Dist., 509 U.S. 1 (1993); Lee v. Weisman, 505 U.S. 577 (1992); Witters v. Washington Dep't of Servs. for the Blind, 474 U.S. 481 (1986); Lynch v. Donnelly, 465 U.S. 668 (1984); Comm. for Public Educ. v. Nyquist, 413 U.S. 756 (1973); Lemon v. Kurtzman, 403 U.S. 602 (1971); Engel v. Vitale, 370 U.S. 421 (1962); and McCollum v. Bd. of Educ., 333 U.S. 203 (1948)

crucial role in shepherding RLUIPA to passage, and joins in this brief in support of the statute's constitutionality.

The AJ Congress was founded in 1918 to further the religious, civil, political, and economic interests of American Jews. It played an important role in the drafting of RLUIPA.

The UOJCA is the largest Orthodox Jewish umbrella organization in the United States. The UOJCA represents nearly 1,000 synagogues throughout the United States, which collectively represent hundreds of thousands of individual Jews. Among its activities, the UOJCA participates in various federal and state litigations, largely through the submission of *amicus* briefs that relate to matters of concern to the Orthodox Jewish community.

The UOJCA has a significant interest in the questions presented in this case because this Court's ruling will have, without question, a profound impact upon the ability of the Orthodox Jewish community to grow, flourish and enjoy the full benefits and freedoms afforded by the United States to its citizens – particularly the freedom to practice the religion of one's choosing in any part of this country. The Orthodox segment of the American Jewish community is rapidly growing and is regularly engaged in the construction and/or expansion of new synagogue and day school facilities. The discriminatory utilization of zoning and land use regulations to deter or prevent members of the Orthodox Jewish community from creating or

expanding these necessary facilities and, thereby, seeking to exclude us from residing in one locale or another, is an experience the Orthodox Jewish community is personally familiar with. It was for this reason that the UOJCA and its constituency worked tirelessly to secure the enactment of the RLUIPA. Therefore, the UOJCA joins in this brief to offer its views and support other American communities of faith in this case.

The JCPA, the coordinating body of 13 national and 122 local Jewish federations and community relations councils, was founded in 1944 to safeguard the rights of Jews throughout the world and to protect, preserve, and promote a just society. The JCPA recognizes that the Jewish community has a direct stake – along with an ethical imperative – in assuring that America remains a country wedded to the Bill of Rights and that the wall of separation between church and state is an essential bulwark for religious freedom in the United States.

Liberty Counsel is a national religious civil liberties litigation, education and policy organization. Liberty Counsel has been involved in religious land use issues from its inception in 1989. Liberty Counsel was part of the coalition that supported the successful passage of RLUIPA and has litigated many cases under RLUIPA since 2000. Liberty Counsel recently won a church zoning case in the Middle District of Florida styled, Open Homes Fellowship v. Orange County, FL. Although this case contained a RLUIPA claim, the District Court decided the case

on the Fourteenth Amendment Equal Protection clause, which has been codified in RLUIPA. Liberty Counsel has a strong interest in preserving the constitutional viability of RLUIPA.

The Becket Fund 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 RLUIPA.

The Becket Fund's RLUIPA cases run the gamut—as *amicus curiae* and as plaintiffs' counsel, in land-use and prisoner cases, from Alabama to New Hampshire to Hawaii. The Becket Fund also represents the plaintiffs in a host of RLUIPA cases both in and outside of the Eleventh Circuit, including some that have resulted in published decisions,[2] and others that have concluded by favorable

---

2 See, e.g., Castle Hills First Baptist Church v. City of Castle Hills, __ F.Supp.2d __, 2004 WL 54692 (W.D. Tex. Mar. 17, 2004); United States v. Maui County, 298 F. Supp. 2d 1010 (D. Haw. 2003); Cottonwood Christian Center v. City of Cypress, 218 F. Supp. 2d 1203 (C.D. Cal. 2002); Freedom Baptist Church v. Township of Middletown, 204 F. Supp. 2d 857 (E.D. Pa. 2002).

settlement. In addition, we have filed a series of *amicus curiae* briefs in both prisoner and land-use cases involving RLUIPA.[3] We intend to continue filing lawsuits and *amicus curiae* briefs under RLUIPA until the jurisprudence under the law, as well as its constitutionality, is established beyond reasonable dispute.

For these reasons, the ADL, the AJ Committee, the AJ Congress, the UOJCA, the JCPA, Liberty Counsel, and the Becket Fund appear as *amici* in this case.

STATEMENT OF THE ISSUES ADDRESSED IN THIS BRIEF

Did Congress properly enact RLUIPA pursuant to its preventive and remedial powers under Section 5 of the Fourteenth Amendment where (a) there was significant evidence in the legislative record of discrimination in the application of local land use laws; and (b) RLUIPA was specifically limited to those contexts in which Congress had ample evidence of discrimination?

---

3 See, e.g., Westchester Day School v. Village of Mamaroneck, No. 03-9042 (2d Cir.) (*amicus* brief on behalf of broad coalition filed January 20, 2004); Midrash Sephardi v. Town of Surfside, No. 03-13858-CC (11th Cir.) (*amicus* brief filed Nov. 21, 2003); Cutter v. Wilkinson, 349 F.3d 257 (6th Cir. 2003) (*amicus* brief in support of rehearing en banc filed on behalf of broad coalition Dec. 19, 2003); Madison v. Riter, 355 F.3d 310 (4th Cir. 2003) (*amicus* brief filed on behalf of broad coalition June 6, 2003); San Jose Christian College v. City of Morgan Hill, No. 02-15693 (9th Cir.) (*amicus* brief filed on behalf of broad coalition Aug. 28, 2002); C.L.U.B. v. City of Chicago, 342 F.3d 752 (7th Cir. 2003) (*amicus* brief filed June 26, 2002).

HISTORY OF RLUIPA

A. The Supreme Court In *Flores* Finds That RFRA Was Passed Upon An Insufficient Legislative Record

In 1990, the Supreme Court held that the strict scrutiny standard of judicial review did not apply to neutral laws of general applicability, even if they incidentally burdened the exercise of religious belief. Employment Div. v. Smith, 494 U.S. 872, 886-87 (1990).

In the wake of Smith, Congress enacted the Religious Freedom Restoration Act of 1993 ("RFRA"). 42 U.S.C. § 2000bb, *et seq* RFRA mandated that courts apply a strict scrutiny standard to all laws that significantly burden the exercise of religion. Specifically, RFRA required that any substantial burden on religion by the government be "in furtherance of a compelling government interest" and "the least restrictive means of furthering that compelling governmental interest." 42 U.S.C. § 2000bb-1. Congress claimed that it had authority under Section 5 of the Fourteenth Amendment to apply RFRA to the federal government and the states.

The constitutionality of RFRA came under challenge in a lawsuit that was ultimately appealed to the Supreme Court. See City of Boerne v. Flores, 521 U.S. 507 (1997). In Flores, the Supreme Court held that RFRA was unconstitutional as applied to the states because it exceeded the scope of congressional authority conferred by the Fourteenth Amendment. Id. at 536. The Supreme Court held that while Congress may have remedial power under the Fourteenth Amendment to

redress religious discrimination, it could only exercise that power in cases where (a) there is evidence that states have engaged in widespread and persistent constitutional violations; and (b) the congressional response is congruent and proportionate to those violations. Id. at 531-32.

One of the key criticisms of RFRA in the Flores decision was that the legislative record lacked sufficient evidence of discrimination. Id. at 530-31. The Supreme Court noted that the record failed to demonstrate a "widespread pattern of religious discrimination in this country" or "examples of legislation enacted or enforced due to animus or hostility to the burdened religious practices." Id. at 530-31.[4] In addition, the Supreme Court criticized RFRA because it made "any law . . . subject to challenge at any time by any individual who allege[d] a substantial burden on his or free exercise of religion" and thus "reflect[ed] a lack of proportionality or congruence between the means adopted and the legitimate end to be achieved." Id. at 532-33.

---

4 The legislative history of RFRA consisted entirely of highly generalized anecdotes of religious discrimination. See, e.g., H.R. 1308, 139 Cong. Rec. H2361 (1993) ("Amish farmers have been forced to affix garish warning signs to their buggies, despite expert testimony that more modest silver reflector tape would be sufficient. Orthodox Jews have been subjected to unnecessary autopsies in violation of their family's religious faith and one Catholic teaching hospital lost its accreditation for refusing to provide abortion services.").

B. In Response To *Flores,* Congress Holds A Series Of Hearings Over Three Years To Determine The Extent To Which Discrimination Against Religious Groups Is Commonplace In the Land Use Context

In direct response to the criticism in Flores that RFRA was passed upon an insufficient legislative record and lacked any congruence and proportionality to identified constitutional violations, Congress held a series of hearings over three years to determine the extent to which the abridgement of religious liberty had become commonplace in two narrow contexts: land use and the treatment of institutionalized persons.

At those hearings, Congress received evidence from witnesses both supporting and opposing the Religious Liberty Protection Act ("RLPA"), the precursor to RLUIPA, and RLUIPA itself, which was ultimately passed in 2000. For the Court's ease of reference, we have listed the relevant hearings below:

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[5]	4

In addition, Congress received a submission in 2000 regarding zoning conflicts between churches and cities in the time since the hearings had concluded. See Rep. Henry J. Hyde's September 21, 2000 remarks on RLUIPA (in which he submits a document detailing such conflicts prepared by the Christian Legal Society), 146 Cong. Rec. E1564-67 (Sept. 22, 2000).[6]

---

5 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 Religious Liberty Protection Act ("RLPA"), the precursor to RLUIPA. Previously, Professor Bybee had authored an *amicus* brief in Flores arguing that RFRA had exceeded Congress's enforcement powers under the Fourteenth Amendment.

6 This 2000 submission detailed additional instances in which local land use authorities had opposed the requested use of property by religious groups. See, e.g., 146 Cong. Rec. E1565 (describing how the zoning permit of a church, which ministered to the homeless population of San Diego and was attempting to relocate to a suburban neighborhood, was amended to

[Footnote continued on next page]

C. Congress Compiled Significant Evidence That Land Use Laws Continue To Be Used To Discriminate Against Religious Groups

During its three years of hearings, Congress "compiled massive evidence that this right [of religious communities to assemble] is frequently violated." 146 Cong. Rec. S7774 (July 27, 2000). "This evidence is cumulative and mutually reinforcing; it is greater than the sum of its parts. It demonstrates that land use regulation is a substantial burden on religious liberty." Senate Hrg., Sept. 9, 1999, at 83.

This evidence specifically demonstrated that land use laws continue to be used to discriminate against religious groups. See, e.g., 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.").

The following is but a sample of the evidence presented to Congress at its hearings:

- **Brigham Young University Law School Study:** Professors at the Brigham Young University Law School, together with the law firm Mayer, Brown & Platt, determined in a 1997 study that minority religious groups

---

[Footnote continued from previous page]
prohibit feeding, housing, or clothing individuals because suburban residents feared that the church would attract indigents into the area).

were vastly overrepresented in reported church zoning cases. Indeed, the study found that religious groups representing less than 9% of the general population accounted for nearly 50% of reported litigation involving location of churches and more than 33% of reported litigation involving accessory uses (such as operating homeless shelters or soup kitchens) at existing churches. One of the authors of the study testified that the numbers revealed by the study "significantly understate the number of situations in which religious groups believe that their rights are being violated" because a variety of practical disincentives (such as the sheer cost of litigation and the undesirability of settling amongst disgruntled neighbors) deter religious groups from litigation. House Hrg., June 16, 1998, at 223.

- **Presbyterian Church Survey**: Presbyterian Church (U.S.A.), the largest Presbyterian body in the United States, conducted a survey of its congregations which indicated that instances of religious discrimination in the land use context are underreported. Senate Hrg., Sept. 9, 1999, at 84. Out of the 9,603 Presbyterian congregations responding to the survey, 2,194 congregations reported needing a land use permit at some point since January 1992. Id. Out of these 2,194 congregations needing land use permits, 10% reported significant conflict with government or neighbors

over the land use permit and 8% reported that the government imposed conditions that increased the cost of the project by more than 10%. Id. These figures indicate that between 325 and 400 Presbyterian congregations experienced significant difficulty in getting a land use permit. Id. The Brigham Young study referenced above, however, found only five *reported* cases involving Presbyterian churches. In a statement to Congress, Professor Douglas Laycock of the University of Texas School of Law observed, "we know that reported cases are the tip of the iceberg; this comparison gives some sense of how enormous is the iceberg and tiny is the reported tip." Id.

- **Survey of Chicago Zoning Codes**: John Mauck, a zoning attorney at Mauck, Bellande & Cheely in Chicago, found that, in 22 of 29 zoning codes surveyed in suburban Chicago, churches had a less favorable status than secular meeting places, such as theaters, meeting halls, lodges, clubs, restaurants and funeral homes. House Hrg., July 14, 1998, at 405.

- **Zoning Ordinances Used To Prevent Elderly Orthodox Jews From Meeting In Home:** Chaim Rubin, Rabbi of Congregation Etz Chaim in Los Angeles, testified that the City of Los Angeles refused to allow

between ten and fifty elderly Orthodox Jewish men to continue meeting for prayer services in the area of Hancock Park, even though the City did permit other places of assembly in Hancock Park, including schools, buildings for recreation, embassy parties and a law school. House Hrg., Feb. 26, 1998, at 60. Eighty-four thousand cars passed the building at issue in Hancock Park each day and hundreds of law students converged upon the law school, which was within walking distance of where the elderly Orthodox Jewish men sought to congregate. Under the pretext of local zoning ordinances, the City declined without discussion the request of the elderly Orthodox Jewish men to meet in Hancock Park. House Hrg., July 14, 1998, at 418.

- **Emergency Ordinance Passed To Prevent Building Of Church**: Rolling Hills Estate, California created an "Institutional Zone" in which a variety of public buildings, including churches, could be located. The "Institutional Zone" covered existing churches, but provided no opportunity for the establishment of new churches. However, new churches could locate within commercial zones with a conditional use permit. The Morning Star Christian Church acquired rights to a building in a commercial zone for use as a church. But when it became clear that the church satisfied all requirements for a conditional use permit, the city passed an emergency

ordinance declaring a moratorium on all institutional uses in a commercial zone. No application was pending except that of the Morning Star Christian Church. House Hrg., May 12, 1999, at 216-17.

- **Parking Concerns As Pretext To Prevent Construction Of Synagogues**: Congress received testimony that land use authorities often refuse permits for Orthodox Jewish synagogues because they do not have as many parking spaces as the city requires for the number of proposed seats. House Hrg., July 14, 1998, at 418. The denial of permits to build Orthodox Jewish synagogues makes little sense, however, because Orthodox Jews are forbidden from using cars to travel to synagogue on the Sabbath. Id. To take but one example in which alleged parking concerns were used to unfairly discriminate against an Orthodox Jewish group, Cheltenham Township in Pennsylvania insisted on the required parking spaces for a proposed synagogue, refused to count leased spaces off-site, and then, when the synagogue offered to construct the parking spaces and let them sit empty, denied the permit on the ground that cars for that much parking would aggravate parking problems. Senate Hrg., June 23, 1999, at 88 (citing Orthodox Minyan v. Cheltenham Township Zoning Hearing Bd., 552 A.2d 772, 773 (Pa. Cmmw. Ct. 1989)).

- **Zoning Plan Used To Prevent Building Of Mormon Temple:** In 1991, the City of Forest Hills, Tennessee adopted a zoning plan that classified property on which churches and schools already existed as "Educational and Religious Zones." The zoning plan provided that an applicant could seek rezoning of residential property if the applicant demonstrated that the property had changed so that it was more suitable for religious use than for residential use, but otherwise effectively excluded the building of any new churches on property where there was no preexisting church or school. In 1994, the Latter-Day Saints Church (Mormons) determined a need for a temple within Forest Hills and sought a zoning change for property it owned. This application was rejected by the City. The Mormons then acquired a second piece of property on which a church building had been located several years earlier and to which other churches of different denominations were located nearby. Sensitive to the City's concerns about the size, height, acreage, and capacity of the temple, the Mormons surveyed the four existing churches in the City and designed a temple well in keeping with the size and capacity of the other church buildings. Notwithstanding these efforts, the City denied the Mormons' request to build a temple on the second piece of property as well. House

Hrg., March 26, 1998, at 111-12; House Hrg., May 12, 1999, at 61-62; House Hrg., July 14, 1998, at 419.

- **Zoning Law Used To Remove Church From Vicinity Of New Baseball Team Stadium**: The Refuge Pinellas, Inc., was a mission church in a depressed part of St. Petersburg, Florida. Attendees of the Refuge's worship services include homeless, poor, addicted, or mentally ill. As the Refuge also provided food to the hungry and sponsored counseling for alcoholics and AIDS sufferers, St. Petersburg zoning officials decided to classify the Refuge a "social service agency" and ordered the Refuge to vacate because churches, but not social services agencies, were permitted in the neighborhood. House Hrg., May 12, 1999, at 216-17. The zoning officials' decision to uproot the Refuge from its neighborhood coincided with the introduction of the new Tampa Bay Devil Rays baseball team at nearby Tropicana Field. In a court filing, the City was candid about its reasons for classifying the Refuge as a "social service agency" and forcing it out of the neighborhood: "[I]f the rose begins to smell like a stink weed, it can still call itself a rose and may look like one, but it is no longer functioning as one, and so it is eventually going to have a negative impact on

the rose garden and be weeded out and moved to the weed patch for the sake of all those living around the garden." Id. at 301.

- **Eminent Domain Proceedings Used To Keep Out Orthodox Jewish Synagogue**: Bruce D. Shoulson, an attorney at Lowenstein Sandler, P.C., testified to a situation in which a community instituted eminent domain proceedings against property that an Orthodox Jewish group sought to convert to a synagogue and Yeshiva, even though the property had been previously used as a house of worship. House Hrg., July 14, 1998, at 363. The community claimed that the eminent domain proceedings were justified because the property was needed for construction of a new municipal complex. Id. However, ten years later – after the Orthodox group ultimately sold the property to avoid litigation – no such municipal complex had been built. Id.

- **Traffic Concerns Used As Pretext To Deny Muslim Group Place of Worship**: Congress heard testimony about the difficulty that a Muslim group, which primarily served students at the University of Mississippi in Starkville, faced when it tried to get approval for an Islamic Center to be used as place of worship near the campus. House Hrg., June 16, 1998 at

225. After the Muslim group considered three sites that were rejected by the City, either due to traffic or parking concerns, the Muslim group asked the City to tell them exactly where they could locate the Islamic Center. Id. The City recommended a fourth location, with the proviso that it needed sufficient parking. Id. The Muslim group bought the property and provided the requisite 18 parking spaces. Id. Though the planning commission recommended approval, the Board of Alderman initially denied the application after a neighbor complained that the use would cause "congestion, parking and traffic problems." Id. After much wrangling, the building was finally approved. However, just months later, the Islamic Center was ordered to stop holding worship services at the building. Id. No such order was directed to a building immediately adjacent being used by Pentecostal Christians who caused more noise and had less parking, or to five other churches within a quarter mile of the Islamic Center. Id. The Muslim group filed suit, but a district court held that the denial of the Islamic Center's zoning application was supported by "valid traffic considerations" and opined that that the City's decision "does not preclude students from purchasing cars and driving to a worship site located [outside Starkville's city limits]." Id. at 225-226. It was only when the Fifth Circuit applied a heightened scrutiny test that the deference of the district court to

the City's discriminatory motive was reversed. See id. at 226; Islamic Ctr. of Miss., Inc. v. City of Starkville, Miss., 840 F.2d 293, 298 (5th Cir. 1998).

- **Gallup Polls**: A 1989 Gallup poll presented to Congress indicated that 30% of Americans did not want "religious fundamentalists as neighbors" and 62% would not want "members of minority religious sects" as neighbors. House Hrg., July 14, 1997, at 115-16. A subsequent 1993 Gallup poll indicated that 45% of Americans have "mostly unfavorable" or "very unfavorable" opinions of religious fundamentalists and 86% of Americans have mostly or very unfavorable opinions of members of minority religious groups. Id.

As these examples illustrate, and as Professor Laycock of the University of Texas Law School has observed, Congress was presented with extensive evidence of religious discrimination in the land use context:

> Some of th[e] testimony [provided at Congressional hearings] is statistical – surveys of cases, churches, zoning codes, and public attitudes. Some of it is sworn statements by individuals or representatives of organizations with wide experience in the field who said that the anecdotes are representative – that similar problems occur frequently. This evidence is cumulative and mutually reinforcing; it is greater that the sum of its parts. It demonstrates that land use regulation is a substantial burden on religious liberty.

Senate Hrg., Sept. 9, 1999, at 83.

D. Congress Passes RLUIPA In A *Unanimous* Vote

In light of the ample evidence that land use laws continue to be used to discriminate against religious groups, Congress passed RLUIPA *unanimously* on July 27, 2000. President Clinton signed RLUIPA into law on September 22, 2000.

Unlike RFRA, which indiscriminately applied the strict scrutiny standard to each and every conceivable government action, RLUIPA is limited to two discrete areas (land use and treatment of institutionalized persons) in which Congress has found substantial evidence of widespread discrimination against religious groups.

SUMMARY OF ARGUMENT

Congress can pass remedial legislation pursuant to Section 5 of the Fourteenth Amendment if (a) there is "reason to believe that many of the laws affected by the congressional enactment have a significant likelihood of being unconstitutional"; and (b) the legislation is a "congruent and proportionate" response to the constitutional violations identified by Congress.

As the legislative history of RLUIPA and RLPA makes clear, Congress had ample evidence from which it could reasonably conclude that religious groups were suffering from discrimination in the land use context at the hands of local governments. Indeed, mindful that RLUIPA's statutory predecessor, RFRA, was declared unconstitutional in part because the legislative record supporting the passage of that act was found inadequate, Congress made sure not to make the

same mistake twice. Congress conducted three years of hearings in which it heard extensive testimony from more than 50 witnesses on the issue of religious discrimination in land use and the treatment of institutionalized persons. At the conclusion of those hearings, it was apparent to the members of the House and Senate that discrimination in land use regulation was, unfortunately, a pervasive aspect of the American landscape.

Any attempt to second-guess Congress' findings should be rejected. To enact remedial legislation, all that is constitutionally required is a showing that Congress had "reason to believe" that there would be a "significant likelihood" of discrimination in the absence of the action taken – it is *not* necessary for Congress to be certain that discrimination will result if it does not act. Here, evidence of discrimination abounded.

Moreover, RLUIPA is a constitutionally congruent and proportionate response because it codifies and applies existing Supreme Court jurisprudence to those cases in which a local government decides whether to grant the land use application of a specific applicant, ensuring that only "individualized assessments" fall within the ambit of the statute.

For all these reasons, RLUIPA represents a valid exercise of Congress' preventive and remedial powers under Section 5 of the Fourteenth Amendment.

ARGUMENT

I. RLUIPA'S MASSIVE LEGISLATIVE HISTORY CONFIRMS THAT CONGRESS HAD SIGNIFICANT EVIDENCE OF DISCRIMINATION BY LOCAL GOVERNMENTS IN THE LAND USE CONTEXT

RLUIPA's extensive legislative history confirms that Congress had significant evidence of discrimination against religious groups by local land use authorities.

In a series of hearings held over three years, Congress heard testimony from more than 50 witnesses and was presented with, *inter alia*, academic studies, statistics, polls and other data on discrimination by local governments in the land use context.[7] See, e.g., 146 Cong. Rec. S7774 (July 27, 2000) (RLUIPA "is based on three years of hearings . . . that addressed in great detail both the need for legislation and the scope of Congressional power to enact such legislation.").

The evidence presented to Congress showed that land use laws are often manipulated to discriminate against religious groups. See, e.g., 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."). In some cases,

---

7 The legislative history of RLUIPA is comparable to the legislative history of other statutes passing constitutional muster. See, e.g., Nanda v. Board of Trustees of the Univ. of Ill., 303 F.3d 817, 830 (7th Cir. 2002) (finding evidence submitted to Congress on race and gender discrimination sufficient support for Title VII); Okruhlik v. The Univ. of Ark., 255 F.3d 615, 624 (8th Cir. 2001) (same).

the evidence showed that public animus against religious groups was explicit, such as where "zoning board members or neighborhood residents explicitly offer race or religion as the reason to exclude a proposed church, especially in the cases of black churches and Jewish shuls and synagogues." Id. More often, though, Congress found that local land use authorities discriminated by "lurk[ing] behind such vague and universally applicable reasons as traffic, aesthetics, or 'not consistent with the city's land use plan.'" Id. Indeed, Congress noted that discriminatory application of land use is especially prevalent because of the discretionary nature of the laws. See id. at S7774 ("The hearing record demonstrates a widespread practice of individualized decisions to grant or refuse permission to use property for religious purposes[;] [t]hese 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 (1999) ("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 authority").

Unlike for RFRA, in which "the history of persecution in this county detailed in the [congressional] hearings mention[ed] no episodes occurring in the past 40 years" (Flores, 521 U.S. at 530), for RLUIPA, "the committees in each

house . . . examined large numbers of cases, and the hearing record reveals a widespread pattern of discrimination against churches as compared to secular places of assembly." 146 Cong. Rec. S. 7774, 7775.

Indeed, the evidence of discrimination against religious groups in local land use decisions was so compelling that RLUIPA was passed *unanimously* by both the House and the Senate. In sum, based on all the evidence presented to it, Congress determined that discrimination against religious groups by local land use authorities is a pervasive aspect of the American landscape. See, e.g., 146 Cong. Rec. S7774 (hearing record "demonstrates a widespread practice of individualized decisions to grant or refuse permission to use property for religious purposes" and such "individualized assessments readily lend themselves to discrimination").

II. ANY ATTEMPT TO SECOND-GUESS CONGRESS' FINDINGS OF DISCRIMINATION IN THE LAND USE CONTEXT SHOULD BE REJECTED

Any attempt to second-guess Congress' findings of discrimination in the land use context should be rejected..

As courts have made clear, Congressional findings are entitled to great deference. See, e.g., Murphy v. Zoning Comm'n of New Milford, 289 F. Supp. 2d 87, 118 (D. Conn. 2003) ("When Congress makes findings on essentially factual issues, those findings are 'entitled to a great deal of deference, inasmuch as Congress is an institution better equipped to amass and evaluate the vast amounts

of data bearing on such an issue.'") (quoting Walters v. Nat'l Ass'n of Radiation Survivors, 473 U.S. 305, 331 n.12 (1985)).

Congress' findings here also should be entitled to great deference particularly because Congress heard not only from proponents of RLUIPA, but also from numerous opponents, including the following individuals: Professor Marci A. Hamilton, Benjamin N. Cardozo School of Law; Jeffrey Sutton, Solicitor for the State of Ohio; Michael P. Farris, President of the Home School Legal Defense Association; Professor Christopher L. Eisgruber, New York University School of Law; Professor Jamin Rankin, Washington College of Law, American University; Professor Lawrence C. Sager, New York University School of Law. In addition, Congress also received written submissions from opponents including Irene B. French, Mayor of Merriam, Kansas and Vice Chair, National League of Cities, and Larry E. Naake, National Association of Counties.

Based on all the testimony and evidence provided by both proponents and opponents of RLUIPA, Congress determined that there was a pattern of discrimination against religious groups by local land use authorities. To pass constitutional muster, all that is required is a showing that Congress had "reason to believe" that there would be a "significant likelihood" of discrimination in the absence of the action taken – it is *not* necessary for Congress to be "certain" that discrimination will result if it does not act. The legislative record for RLUIPA

amassed over a three-year period plainly meets that standard. See Freedom Baptist Church of Delaware County v. Township of Middletown, 204 F. Supp. 2d 857, 862 (E.D. Pa. 2002) (finding RLUIPA a valid exercise of Congress' powers under the Fourteenth Amendment because "the standard is not certainty, but 'reason to believe' and 'significant likelihood.'").

Accordingly, any attempt to second-guess Congress' findings of discrimination in the land use context should be rejected.

III. RLUIPA IS A CONGRUENT AND PROPORTIONATE RESPONSE TO CONGRESS' FINDINGS OF DISCRIMINATION IN THE LAND USE CONTEXT

Finally, RLUIPA is a constitutionally "congruent and proportionate" response because it codifies and applies existing Supreme Court jurisprudence only to the limited contexts in which Congress had ample evidence of discrimination.[8]

In Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520 (1993), the Supreme Court confirmed that strict scrutiny applies to government regulations that offer "individualized exemptions from a general requirement." Id. at 537. See also Smith, 494 U.S. at 884 ("[O]ur decisions . . . stand for the

---

8 Numerous courts have upheld the constitutionality of RLUIPA in the land use context. See Castle Hills First Baptist, Church v. City of Castle Hills, No. SA-01-CA01149-RF, 2004 WL 546792, at *18-*20 (W.D. Tex. March 17, 2004), United States v. Maui County, No. 03-0-0362SPK/KSC, slip. op. at 12 (D. Haw. Dec. 29, 2003) (collecting cases); Murphy, 289 F. Supp. 2d at 87, Westchester Day School v. Village of Mamaroneck, 280 F. Supp. 2d 230 (S.D.N.Y. 2003); Freedom Baptist, 204 F. Supp. 2d at 874 .

proposition that where the State has in place a system of individualized exemptions, it may not refuse to extend that system to cases of 'religious hardship' without compelling reason"); Sherbert v. Verner, 374 U.S. 398 (1963) (applying strict scrutiny to individualized exemptions).

Here, based on its findings that local governments continue to discriminate against religious groups in the land use context, Congress specifically limited RLUIPA to those land use decisions in which a local government "makes, or has in place formal or informal procedures or practices that permit the government to make, individual assessments." 42 U.S.C. § 2000cc(a)(2)(C).

Indeed, RLUIPA simply "codifies the 'individual assessments' jurisprudence in the Sherbert through Lukumi line of cases." Freedom Baptist, 204 F. Supp. 2d at 869. See also Murphy, 289 F. Supp. 2d at 119 ("RLUIPA is therefore not hostile to Smith, Lukumi, or Flores, and in fact represents a fair amalgamation of those decisions."). Thus, as courts have recognized, "unlike RFRA, RLUIPA does not 'attempt a substantive change in constitutional protections.'" Murphy, 289 F. Supp. 2d at 119 (quoting Flores, 521 U.S. at 532).

As RLUIPA merely codifies and applies existing Supreme Court jurisprudence to those land use decisions in which a local government makes individualized assessments, RLUIPA is undoubtedly a constitutionally "congruent and proportionate" response to the continuing violations of religious freedom

Congress has found in the land use context. See Murphy, 289 F. Supp. 2d at 119 ("RLUIPA essentially codifies First and Fourteenth Amendment standards – based on sufficient evidence in the legislative history demonstrating the need for better enforcement of those standards – and institutes proportional measures.").[9]

CONCLUSION

Congress spent over three years weighing testimony and evidence that it found demonstrated a pattern of discrimination against religious groups in local land use decisions. RLUIPA is a congruent and proportionate response to that problem and is a constitutional exercise of Congress' preventive and remedial powers under Section 5 of the Fourteenth Amendment. Accordingly, the *amici* respectfully request that this Court uphold the constitutionality of RLUIPA against any challenge.

---

9 Moreover, where legislation "closely tracks constitutional guarantees, any marginal conduct that is covered by the statute, but not the Constitution, nevertheless constitutes the kind of congruent, and above all, proportional remedy Congress is empowered to adopt under § 5 of the Fourteenth Amendment." Murphy, 289 F. Supp. 2d at 120.

Dated: New York, New York
April 15, 2004

Respectfully submitted,

GIBSON, DUNN & CRUTCHER LLP

By: _____
Mitchell A. Karlan

200 Park Avenue
New York, New York 10166

Attorneys for *Amici Curiae*
The Anti-Defamation League, The American Jewish Committee, The American Jewish Congress, The Union of Orthodox Jewish Congregations of America, The Jewish Council for Public Affairs, Liberty Counsel, and The Becket Fund for Religious Liberty

On the brief:

David JB Arroyo
Aric H. Wu
Farrah Pepper
Ayn B. Ducao

CERTIFICATE OF BAR MEMBERSHIP

I, Mitchell A. Karlan, am a member in good standing of the Bar of this Court, and so certify in compliance with LAR 46-1(a).

Dated: New York, New York
April 15, 2004

GIBSON, DUNN & CRUTCHER LLP

By: _____
Mitchell A. Karlan

200 Park Avenue
New York, New York 10166

Attorneys for *Amici Curiae*
The Anti-Defamation League, The American Jewish Committee, The American Jewish Congress, The Union of Orthodox Jewish Congregations of America, The Jewish Council for Public Affairs, Liberty Counsel, and The Becket Fund for Religious Liberty

CERTIFICATE OF COMPLIANCE WITH RULE 32(A)

Pursuant to Fed. R. App. P. Rule 32(a), the ADL certifies that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 6,978 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7(B)(iii).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Times New Roman in 14-point font.

Dated: New York, New York
April 15, 2004

GIBSON, DUNN & CRUTCHER LLP

By: _____
Mitchell A. Karlan

200 Park Avenue
New York, New York 10166

The Anti-Defamation League, The American Jewish Committee, The American Jewish Congress, The Union of Orthodox Jewish Congregations of America, The Jewish Council for Public Affairs, Liberty Counsel, and The Becket Fund for Religious Liberty

CERTIFICATE OF SERVICE

It is hereby certified that today, April 15, 2004, the foregoing "Brief of *Amici Curiae*" was served, by facsimile and U.S. Mail, on the addresses listed below:

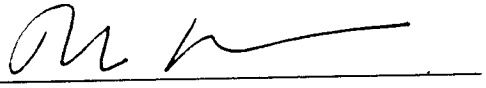
Gary M. Glassman, Esq.
Assistant County Attorney
Orange County Attorney's Office
435 North Orange Avenue, 3rd Floor
Orlando, Florida 32801

John T. Stemberger, Esq.
Law Offices of John Stemberger, P.A.
4853 South Orange Avenue, Suite C
Orlando, Florida 32806

Frederick H. Nelson, Esq.
American Liberties Institute
P.O. Box 547503
Orlando, FL 32854-7503

Dated: New York, New York
April 15, 2004

GIBSON, DUNN & CRUTCHER LLP

By: 
Mitchell A. Karlan

200 Park Avenue
New York, New York 10166

Attorneys for *Amici Curiae*
The Anti-Defamation League, The American Jewish Committee, The American Jewish Congress, The Union of Orthodox Jewish Congregations of America, The Jewish Council for Public Affairs, Liberty Counsel, and The Becket Fund for Religious Liberty