

Appeal No. 04-55320

**IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

ELSINORE CHRISTIAN CENTER, a nonprofit California corporation,
and GARY HOLMES,

Plaintiffs-Appellants

- and -

UNITED STATES OF AMERICA,

Intervenor-Appellant

- against -

CITY OF LAKE ELSINORE, a municipal corporation of the state of California,
LAKE ELSINORE REDEVELOPMENT AGENCY, a municipal corporation
of the state of California, ROBERT A. SCHIFFNER, PAMELA BRINLEY,
DANIEL METZE, GENIE KELLY, KEVIN PAPE, and DOES 1-10 inclusive,

Defendants-Appellees.

Appeal from the United States District Court
for the Central District of California
Case No. CV-01-04842-SVW

**BRIEF OF PLAINTIFFS-APPELLANTS
ELSINORE CHRISTIAN CENTER AND GARY HOLMES**

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, Appellants state that none of the Appellants has a parent corporation, nor does any Appellant issue any stock.

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STATEMENT OF JURISDICTION

The district court had jurisdiction under 28 U.S.C. §§1331, 1343(a)(3), and 1343(a)(4); and under 42 U.S.C. §§1983 and 2000cc, *et seq.*

The decision on appeal is an interlocutory order entered on August 21, 2003. *See Elsinore Christian Center v. City of Lake Elsinore*, 291 F.Supp.2d 1083 (C.D.Cal. 2003). That order is appealable under 28 U.S.C. §1292(b), the statutory basis for this Court's jurisdiction. The district court certified the order for interlocutory appeal on December 17, 2003. Plaintiffs timely petitioned this Court for permission to appeal on December 23, 2003. *See id.* §1292(b) (requiring petition to circuit court within ten days of district court certification); F.R.A.P. Rule 5(a)(2). This Court granted permission to appeal on February 23, 2004, rendering unnecessary a separate notice of appeal. Rule 5(d)(2).

STATEMENT OF THE ISSUES

1. Whether RLUIPA Section 2(a)(1), when applied through Section 2(a)(2)(C), is a constitutional exercise of congressional authority under the Enforcement Clause.

2. Whether RLUIPA Section 2(a)(1), when applied through Section 2(a)(2)(B), is a constitutional exercise of congressional authority under the Commerce Clause.

STATEMENT OF THE CASE

On May 30, 2001, Elsinore Christian Center and one of its members, Gary Holmes (collectively the “Church”) sued the City of Lake Elsinore, its Redevelopment Agency, and several of its officials (collectively the “City”), alleging violations of the U.S. Constitution under 42 U.S.C. §1983, and of the Religious Land Use and Institutionalized Persons Act of 2000, 42 U.S.C. §2000cc, *et seq.* (“RLUIPA”). Among other things, the Church claimed that the City’s discretionary decision to deny the Church a conditional use permit (“CUP”) to use 217 North Main Street for the Church’s religious exercise prohibited the Church from using the only available property adequate for its downtown ministry, thus imposing a “substantial burden” on the Church’s religious exercise in violation of Section 2(a) of RLUIPA and the Free Exercise Clause of the First Amendment.¹

On June 11, 2001, the Church moved for a preliminary injunction, which the district court denied on July 11, 2001. Although no discovery schedule had yet been entered, the July 11 order requested that the parties move for summary judgment on Plaintiffs’ substantial burden claim under RLUIPA Section 2(a), setting a hearing date of August 13, 2001.

¹ The Church has also alleged that the City’s zoning ordinances, both on their face and as applied, violated its rights under the Equal Protection Clause of the United States and California Constitutions, the Free Speech Clause of the United States and California Constitutions, and Sections 2(b)(1) and 2(b)(2) of RLUIPA.

Plaintiffs responded by moving for partial summary judgment on their RLUIPA Section 2(a) claim. The City responded by seeking summary judgment on all of the Church's claims, including the Section 2(a) claim. That motion included a constitutional challenge to Section 2(a), but only on Establishment Clause grounds. The United States intervened to defend the Act. In response to a *sua sponte* request by the district court, the City filed an additional brief on December 7, 2001, challenging Section 2(a) on the grounds that it exceeded Congress' power under Section 5 of the Fourteenth Amendment, commonly known as the Enforcement Clause.

On June 24, 2003 – a year and a half later – the district court denied the Church's motion for partial summary judgment on its Section 2(a) claim and granted the City summary judgment on that claim. The court held that the City violated Section 2(a) by denying the Church permission to develop and use the property. The court held that this denial imposed a “substantial burden” on Church's religious exercise, and that the City had failed to show the burden either served a “compelling government interest,” or represented the “least restrictive means” to advance any such interest.

The court then granted summary judgment for the City, because the court held that Section 2(a), when applied through Section 2(a)(2)(C), exceeded Congress' power under the Enforcement Clause. The court declined to reach the

question whether Section 2(a), when applied pursuant to Section 2(a)(2)(B), was a legitimate exercise of the commerce power, mistakenly asserting that the Church had not invoked this jurisdictional element.²

On July 8, 2003, the Church moved for reconsideration, highlighting that the June 24 order had not considered whether Section 2(a) could be sustained under the Commerce Clause. On August 21, 2003, the court responded by amending its order, 291 F.Supp.2d 1083, reaffirming its previous holdings but adding that Section 2(a) exceeds the commerce power when applied through Section 2(a)(2)(B). *Id.* at 1104. Again, the court held Section 2(a) unconstitutional and granted the City summary judgment on that claim.³

On October 30, 2003, the Church petitioned the district court under 28 U.S.C. §1292(b) to certify for interlocutory appeal its rulings on the constitutionality of RLUIPA. On December 17, 2003, the district court granted

² The Church's complaint alleged Section 2(a)(2) generally as the jurisdictional basis for its claim, presumptively including all of its subsections. On its motion for preliminary injunction, the Church also specifically argued that the facts involved an effect on commerce, satisfying Section 2(a)(2)(B). Most notably, in rejecting the Church's preliminary injunction motion, the district court *itself* referenced the Church's claim of commerce jurisdiction under Section 2(a)(2)(B). *See* J.E.T. 11, p.171.

³ In a separate order, the district court declined to rule on Defendants' summary judgment motion on Plaintiffs' remaining claims, ordering instead that discovery should proceed. The district court has since stayed discovery and all proceedings pending the outcome of this appeal.

that request. The Church and the United States petitioned this Court for permission to appeal, which this Court granted on February 23, 2004.

STATEMENT OF FACTS

Plaintiff Elsinore Christian Center is a Christian church that exists to minister to the downtown community in Lake Elsinore, California. Joint Excerpts Tab (hereinafter “J.E.T.”) 1, ¶17; J.E.T. 15, ¶¶3, 34; J.E.T. 18, ¶2. Since its humble beginnings in the pastor’s home in 1986, the Church has been seeking a permanent home for its ministry to fulfill its mission of serving the physical and spiritual needs of the downtown Lake Elsinore community. This case concerns the City’s decision to prevent the Church from establishing that permanent home.

From its inception, the Church’s mission has been to minister to the downtown Lake Elsinore community. The Church seeks to follow biblical precepts in evangelistic and social action, providing ministry to meet the spiritual, physical, and emotional, needs of that community. *See* J.E.T. 13, ¶2; J.E.T. 15, ¶4. One important component of the Church’s mission is clothing and feeding the poor in downtown Lake Elsinore through its clothing distribution and food pantry ministries. J.E.T. 13, ¶¶ 17-19. The Church also believes it is necessary to care for the community’s children and youth, both through traditional Sunday school educational activities, and through more unconventional approaches such as religious concerts and dramas oriented toward youth. J.E.T. 13, ¶¶7, 17, 20, 21. Typical beneficiaries of the Church’s downtown ministry include Mitch Southwell and Winnifred Dahl and her three children. J.E.T. 7, ¶¶1-2; J.E.T. 6, ¶1. Because

these individuals suffer from physical and economic disadvantages preventing them from attending any church outside downtown Lake Elsinore, *id.*, the Church must be located downtown to minister to them.

In 2000, the Church contracted to purchase a property in downtown Lake Elsinore to enable it for the first time to establish a permanent home for its ministry. The Church had bounced around among seven different temporary locations. J.E.T. 13, ¶23. When it entered the contract, the Church was located at a rented facility on Graham Avenue in downtown Lake Elsinore (the “Graham Avenue facility”), which the City concedes was “functionally deficient.” J.E.T. 15, ¶2. While searching for an adequate property, the Church limped along for years at this facility, unable to establish core elements of its ministry to the downtown community. The two primary problems with the Graham Avenue facility were its lack of accessibility and its small size.

Regarding accessibility, the Church was consistently unable to minister to disabled and elderly members and visitors because its facility lacked handicapped access and parking. Indeed, the City admits that the facility “has severe parking problems[] and lacks adequate handicapped facilities.” J.E.T. 15, ¶2.

Though some of these problems arise from the facility’s lack of on-site parking, J.E.T. 1, ¶20, the City admits that the “parking problems [at the Graham Avenue facility] are *largely* a result of affirmative actions which [the] *City* has

undertaken since the time [the Church] originally moved to [the] location.” J.E.T. 15, ¶8 (emphasis added). In particular, the City painted red a curb adjacent to the facility and placed “no parking” signs across the street. *Id.* Monthly, the City closed off a portion of Graham Avenue in front of the Church on Sunday mornings for an Open Air Market, further limiting parking and accessibility. *Id.* The City also limited parking by closing off Graham Avenue for an annual motor-cross race. *Id.* ¶9.

These accessibility issues regularly prevented the Church from ministering to disabled and elderly members and visitors who could not overcome physical obstacles to get there. *See, e.g.*, J.E.T. 5, ¶¶2-3 (Nieto declaration describing how combination of polio and severe parking problems prevented him from attending services at Graham Avenue facility on “several occasions”); J.E.T. 4, ¶1 (Curtis declaration describing how combination of age, arthritis, and severe parking problems prevented her from attending services at Graham Avenue facility on “several occasions”); J.E.T. 3, ¶¶2-3 (declaration of Gary Holmes describing how combination of disabilities and lack of parking at Graham Avenue facility “impaired [his] involvement in worship and religious exercise”). These accessibility issues were so severe that they caused some members to leave the congregation and prospective members not to join. J.E.T. 13, ¶¶16, 22(F).

In addition, the small size and design of the Graham Avenue facility rendered it impossible for the Church to carry out certain of its core ministries:

- The facility lacked sufficient space to conduct the clothing and feeding ministry to the downtown poor. J.E.T. 13, ¶¶17-19; J.E.T. 15, ¶¶2, 36, 41.
- The facility lacked space for the Church to develop its outreach ministry to troubled youth in the community through religious concerts and drama. J.E.T. 13, ¶¶16-18, 20; J.E.T. 15, ¶¶2, 36, 41.
- The facility lacked space for the Church to have an adequate Sunday school for children, causing some parents and children to stop attending the Church. J.E.T. 13, ¶¶16, 21.; J.E.T. 15 ¶¶2, 36, 41.
- The facility's lack of space for group assembly altered the manner and content of the worship activities of the entire Church body. J.E.T. 13, ¶20.

Even the City has conceded that the facility was “functionally deficient.” J.E.T. 15, ¶2.

The Church simply could not fulfill its mission at the Graham Avenue facility and remained there out of necessity – at severe cost to its ministry – while raising money and searching for a downtown property. *See* J.E.T. 13, ¶¶14-15. That effort finally yielded fruit in 2000, when the Church contracted to purchase a

property owned by the Elsinore Naval and Military School at 217 North Main Street (the “Subject Property”).⁴ J.E.T. 1, ¶24.

The size and design of the Subject Property would enable the Church, for the first time, to have a fully-functioning ministry to the downtown community. The accessibility problems that had hampered its ministry to the disabled and elderly—even driving some away—would have been solved. J.E.T. 3, ¶4. The Subject Property included an adequate, exclusive parking area with handicapped access, eliminating previous shortcomings. J.E.T. 15, ¶40. Moreover, core ministries of the Church—such as the food and clothing ministry to the poor,⁵ Sunday school education facilities for children, outreach to youth, and group worship of the entire Church—would no longer be stunted or prevented entirely by lack of space. J.E.T. 15, ¶¶39, 41, 42; J.E.T. 2, ¶10; J.E.T. 13, ¶¶16-21, 22(G).

Thus, unlike the “functionally deficient” Graham Avenue facility, the Subject Property was accessible and sufficient in size to accommodate the core religious activities of the Church. J.E.T. 15, ¶¶39-42; J.E.T. 2, ¶10; J.E.T. 13, ¶22(G). The Subject Property was also the *only* available property that could

⁴ At the time, the School was renting the Subject Property on a month-to-month basis to a small grocery and could evict the grocery at any time upon 30 days notice. J.E.T. 15, ¶13; J.E.T. 1, ¶24.

⁵ Whereas the Church’s mercy ministry at the Graham Avenue facility was limited to a 40 square foot food pantry, the Subject Property would have allowed the Church to have a fully functioning food and clothing ministry of several hundred square feet. J.E.T. 13, ¶19; J.E.T. 2, ¶10.

house the Church’s ministry: as the City conceded, “[t]here [we]re no vacant buildings in the downtown Lake Elsinore vicinity that [we]re suitable or available for [the Church] to occupy.” J.E.T. 13, ¶31.

To finalize its purchase of the Subject Property, the Church needed City approval to locate a church there. City laws prohibited churches from locating as of right *anywhere* in the City, including the downtown C-1 district of the Subject Property. J.E.T. 15, ¶¶10, 18. While several non-religious assembly and institutional uses could locate in that same zone as of right,⁶ *id.* ¶16, churches were required—in C-1 and every other zone—to run the gauntlet of the discretionary Conditional Use Permit (“CUP”) process before they could assemble for worship and service. *Id.* ¶¶10, 18.

On October 24, 2000, J.E.T. 1, ¶27, the Church applied for a CUP, submitting to what the City concedes is a system of “individualized assessments.” *See* J.E.T. 15, ¶20 (admitting that City “conducts individualized assessments of properties for which CUP applications are submitted, and may grant preference to one occupant over another and regulate the times and methods of operation.”).⁷

⁶ For example, health clubs and certain types of schools were among the secular assemblies that were allowed as of right in the C-1 district. J.E.T. 15, ¶16.

⁷ The CUP process requires evaluation of the following highly discretionary factors:

1. That the proposed use will not be detrimental to the general health, safety, comfort, or general welfare of persons residing or working within the

The Church did not expect difficulty in obtaining the CUP, because the City had granted one to another church—The Bread of Life Fellowship—immediately adjacent to the Subject Property. J.E.T. 15, ¶¶24-27. The Church also brought a flexible attitude to the process, agreeing to abide by all 26 conditions that City planning staff suggested for the permit. *See Elsinore*, 291 F.Supp.2d at 1086; J.E.T. 1, ¶29; J.E.T. 10, ¶6. The grant seemed especially likely when City planning staff made the same positive findings for the Church’s CUP application that it had made for Bread of Life. J.E.T. 15, ¶¶28.

But the City Planning Commission and City Council both overruled the staff’s recommendation and denied the CUP.⁸ J.E.T. 1. Among the stated reasons for the denial was that the City would lose tax revenue by allowing the use, and would prefer the property to be occupied by its then month-to-month tenant, a

neighborhood of the proposed use or the City, or injurious to property or improvements in the neighborhood or the City.

2. That in approving the subject use at the specific location, there will be no adverse effect on abutting property or the permitted and normal use thereof.
3. That adequate conditions and safeguards pursuant to Section 17.74.50 [sic: probably intended 17.74.050] have been incorporated into the approval of the Conditional Use Permit to insure that the use continues in a manner envisioned by these findings for the term of the use.

See LEMC §§17.74.060; 17.74.060B; 17.74.060E; 17.74.060F.

⁸ The City’s denial of the CUP fits within a broader pattern of preventing this particular Church from establishing a permanent home for its ministry anywhere in Lake Elsinore. According to the City, since 1972 it has granted 26 CUP applications by churches and denied only three. J.E.T. 15, ¶8. Since the City twice denied the Church’s CUP applications twice in 1990, *id.* ¶11, and once again in 2001, the City appears to have singled out this Church for special disfavor.

convenience-style grocery.⁹ J.E.T. 15, ¶15. The City also asserted that prohibiting the Church from using the property for religious exercise did not impose a “substantial burden,” because the Church could continue its impaired ministry at the Graham Avenue facility.¹⁰ *See id.*

The CUP denial not only condemned the Church to a “functionally deficient” facility, it generated additional burdens on the Church. Soon after, weekly attendance plummeted from 200 to 120, J.E.T. 18, ¶37, as Church members and other beneficiaries of its ministry could no longer endure the limitations of the inadequate facility. Because “a *primary reason* for the existence of [the] church is to minister to and serve fellow Christians in order to build them up and equip them

⁹ Later, the City offered the *post hoc* rationalization that keeping a grocery store at the Subject Property instead of a Church would help prevent urban blight. *Elsinore*, 291 F.Supp.2d at 1093-94. But the Church would also alleviate blight. *Cottonwood Christian Center v. City of Cypress*, 218 F.Supp.2d 1203, 1228 (C.D.Cal. 2002). In any event, the district court found that denying the Church a CUP did *not* ensure the continued presence of the grocery store, because it was a month-to-month tenant that could be evicted at any time. *Elsinore*, 291 F.Supp.2d at 1094-95; J.E.T. 15, ¶13.

¹⁰ The City also asserted that the Subject Property might not have adequate on-site parking. J.E.T. 15, ¶15. But the City essentially abandoned that speculative claim. *Elsinore*, 291 F.Supp.2d at 1093. In any event, the City planning staff had proposed conditions to address parking, and the Church had agreed to meet any conditions necessary to obtain a CUP. J.E.T. 10, ¶6, J.E.T. 1. Moreover, the 70 on-site parking spots at the Subject Property were 70 more than were available to the Church previously, and so would have comparatively improved any parking problems caused by the Church’s presence. J.E.T. 1. *See* J.E.T. 9 (Declaration of Pastor James Turner stating that Church’s use of Subject Property would not create parking problems for congregation adjacent to Subject Property).

in their faith,” the loss of these members struck at the heart of the Church’s ministry. *Id.*¹¹

Later, the owner of the Graham Avenue facility decided to sell the property unless the Church would agree to a two-year lease. J.E.T. 18, ¶4. Because no other properties were available downtown, J.E.T. 15, ¶31; J.E.T. 8, ¶3, the Church faced a Hobson’s choice: either make a long-term commitment to a functionally deficient property, or abandon (hopefully temporarily) the downtown community whose needs the Church exists to serve.¹² Reluctantly, the Church declined the lease and left downtown, setting up temporary operations five miles away at an elementary school that it rents on Sunday – all the while, continuing to search for a property where it could resume its downtown ministry. J.E.T. 18, ¶¶5, 9-12.

¹¹ The Church has also suffered financial harm as a result of the City’s decision, on a scale that is especially onerous for a small church. The decline in attendance from 200 to 120 has caused tithes to drop approximately \$1,000 to \$1,500 per month. J.E.T. 18, ¶37. The Church also lost \$38,247 expended in the CUP process, including \$16,500 paid to keep escrow open pending the appeal. *Id.* ¶¶25-34. Eventually, the owner of the Subject Property cancelled escrow, placed the property on the market, and sold it for \$575,000. Since the Church had originally agreed to purchase the property for \$375,000, the Church lost \$200,000 in appreciation on the Property. J.E.T. 17, ¶¶4, 6, 8.

¹² Lack of transportation and disability issues have prevented some church members who live in the downtown community from attending services outside that area. *See* J.E.T. 7, ¶¶1-2; J.E.T. 6, ¶1. Because these are the very people the Church exists to serve, being forced to leave the downtown area further impairs the Church’s ministry.

Since the CUP denial, the Church has continued searching – unsuccessfully – for a permanent home. J.E.T. 18, ¶7; J.E.T. 15, ¶31; J.E.T. 10, ¶3; J.E.T. 8, ¶3. But for the City’s denial of the CUP, the Church would now be – and would have been for years – engaging in the full range of religious exercise encompassed by its mission to the downtown community.

SUMMARY OF ARGUMENT

The decision below is anomalous: the first (and still only) decision of *any* court striking down *any* part of Section 2 of RLUIPA, the land-use provision of the Act. The decision does not afford the Act a strong presumption of constitutionality – or indeed show any other form of deference due an Act of Congress – but instead strikes down Section 2(a)(1) *in every application* under both the Enforcement Clause and Commerce Clause jurisdictional elements.

Regarding the Enforcement Clause, 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 legislators and legal scholars to *comply* with the requirements of *Boerne* – not, as the court below has suggested, 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.

Regarding the Commerce Clause, the decision below rests on a novel proposition of law: the Commerce Clause may prohibit all manner of interference with commercial transactions, but interference in the form of state and local government regulation is immune. There is no such immunity. If there were, Dormant Commerce Clause jurisprudence could not exist, and a common form of federal legislation – laws like the Fair Housing Amendments Act of 1988 and the Telecommunications Act of 1996, which regulate “economic activity” by preempting local regulatory burdens that may interfere with it – would be struck down wholesale.

ARGUMENT

In *Mayweathers v. Newland*, 314 F.3d 1062 (9th Cir. 2002), *cert. denied*, 124 S. Ct. 66 (2003), this Court rejected Spending Clause, Establishment Clause, Tenth Amendment, Eleventh Amendment, and Separation-of-Powers challenges to RLUIPA Section 3, the prisoner provision of the Act.¹³ This interlocutory appeal presents the question whether RLUIPA Section 2(a), the analogous land-use provision, exceeds Enforcement Clause authority when applied through Section 2(a)(2)(C) and exceeds Commerce Clause authority when applied through Section 2(a)(2)(B).

¹³ *Mayweathers* accords with the decisions of the Seventh and Fourth Circuits. See *Madison v. Riter*, 355 F.3d 310 (4th Cir. 2003) (rejecting Establishment Clause challenge), *cert. pending sub nom. Bass v. Madison*, No. 03-1404 (filed Apr. 6, 2004); *Charles v. Verhagen*, 348 F.3d 601 (7th Cir. 2003) (rejecting Spending Clause, Tenth Amendment, and Establishment Clause challenges).

The district courts overwhelmingly agree. See, e.g., *Benning v. Georgia*, No. 602-CV-139 (S.D.Ga. Jan. 8, 2004); *Williams v. Bitner*, 285 F.Supp.2d 593 (M.D.Pa. 2003); *Goodman v. Snyder*, No. 00-C-0948, 2003 WL 22765047 (N.D.Ill. Nov. 20, 2003); *Sanabria v. Brown*, No. 99-4699 (D.N.J. June 5, 2003); *Gordon v. Pepe*, No. 00-10453, 2003 WL 1571712 (D.Mass. Mar. 6, 2003); *Johnson v. Martin*, 223 F.Supp.2d 820 (W.D.Mich. 2002), *overruled by Cutter v. Wilkinson*, 349 F.3d 257 (6th Cir. 2003); *Gerhardt v. Lazaroff*, 221 F.Supp.2d 827 (S.D. Ohio 2002), *overruled by Cutter, supra*; *Taylor v. Cockrell*, No. H-00-2809 (S.D.Tex. Sept. 25, 2002), *vacated on other grounds, Taylor v. Groom*, No. 02-21316 (5th Cir. Aug. 26, 2003); *Love v. Evans*, No. 2:00-CV-91 (E.D.Ark., Aug. 8, 2001).

Recently, however, the Sixth Circuit struck down Section 3 on Establishment Clause grounds, based exclusively on two district court opinions since reversed on appeal. *Cutter v. Wilkinson*, 349 F.3d 257 (6th Cir. 2003), *cert. pending*, No. 03-9877 (filed Apr. 19, 2004).

By finding that Section 2(a) exceeds both enumerated powers, the court below became the first nationwide to find unconstitutional *any* part of RLUIPA Section 2. A year later, not a single court has followed its lead. Every other constitutional challenge to Section 2(a) has been rejected – not just the Enforcement and Commerce Clause challenges accepted below, but all others as well.¹⁴ And the only challenge to Section 2(b) was recently rejected. *Midrash Sephardi v. Town of Surfside*, 366 F.3d 1214 (11th Cir. 2004).

As explained in detail below, the court below has not only disregarded the weight of *judicial* authority on this question, it has shown none of the deference that is due to acts of the federal *legislature*. See *United States v. Morrison*, 529

¹⁴ In this Circuit alone, three district courts have upheld Section 2(a), and another has suggested it is constitutional. See *United States v. Maui County*, 298 F.Supp.2d 1010 (D.Haw. 2003); *Guru Nanak Sikh Society v. County of Sutter*, No. S-02-1785, 2003 WL 23676118, (E.D.Cal. Nov. 19, 2003); *Life Teen, Inc. v. Yavapai County*, No. Civ. 01-1490-PCT-RCB (D.Ariz. Mar. 26, 2003). See also *Cottonwood*, 218 F.Supp.2d at 1221 n.7 (noting that “RLUIPA would appear to have avoided the flaws of its predecessor RFRA, and be within Congress’s constitutional authority”).

District courts across the country are in accord. See, e.g., *Williams Island Synagogue, Inc. v. City of Aventura*, No. 04-20257-CV, 2004 WL 1059798 (S.D.Fla. May 06, 2004); *Castle Hills First Baptist Church v. City of Castle Hills*, No. SA-01-CA-1149-RF, 2004 WL 546792 (W.D.Tex. Mar. 17, 2004); *Murphy v. Town of New Milford*, 289 F.Supp.2d 87 (D.Conn. 2003); *Westchester Day Sch. v. Village of Mamaroneck*, 280 F.Supp.2d 230 (S.D.N.Y. 2003); *Freedom Baptist Church v. Township of Middletown*, 204 F.Supp.2d 857 (E.D.Pa. 2002). See also *Christ Universal Mission Church v. City of Chicago*, No. 01-C-1429, 2002 U.S. Dist. LEXIS 22917, at *24 (N.D.Ill. Sept. 11, 2002), *reversed on other grounds*, No. 02-4119 (7th Cir. Mar. 26, 2004).

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.”).

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 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.

The decision below, however, strains to manufacture disparities between current “substantial burden” jurisprudence under the Free Exercise Clause and

RLUIPA Sections 2(a)(1) and 2(a)(2)(C). The court also ignores 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, the court unsurprisingly found the (imagined) prophylaxis of RLUIPA to be excessive, lacking “congruence” or “proportionality.” Therefore, the Enforcement Clause decision of the court below should be reversed.

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

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 the decision below, 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, this 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, this 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, this and other Courts of Appeals have applied the “individualized assessments” or “exemptions” doctrine outside the unemployment context.¹⁵ In

¹⁵ 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

Thornburgh, this Court 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.

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

“individualized assessments” outside unemployment context).

objectively defined categories of persons.” *Axson-Flynn*, 356 F.3d at 1298. Like this Court, 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).

Recently, in *San Jose Christian College v. City of Morgan Hill*, 360 F.3d 1024 (9th Cir. 2004), this Court 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.

But whenever they do reach the question, courts in this 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.¹⁶ Now that RLUIPA has codified the very same standard “for greater visibility and easier enforceability,” 146 CONG. REC. S7775, courts reach that conclusion routinely.¹⁷

¹⁶ *Keeler v. Mayor of Cumberland*, 940 F.Supp. 879, 885 (D.Md. 1996) (landmark ordinance involves “system of individualized exemptions”); *Alpine Christian Fellowship v. Cy. Comm’rs of Pitkin*, 870 F.Supp. 991, 994-95 (D.Colo. 1994) (special use permit denial triggered strict scrutiny because decision made under discretionary “appropriate[ness]” standard); *Korean Buddhist Dae Won Sa Temple v. Sullivan*, 953 P.2d 1315, 1344-45 n.31 (Haw. 1998) (“The City’s variance law clearly creates a ‘system of individualized exceptions’ from the general zoning law.”); *First Covenant Church v. Seattle*, 840 P.2d 174, 181 (Wash. 1992) (landmark ordinances “invite individualized assessments of the subject property and the owner’s use of such property, and contain mechanisms for individualized exceptions”). Notably, the court below acknowledged only two individualized assessments cases in the land-use context before RLUIPA. 291 F.Supp.2d at 1097 n.7 (citing only *Keeler* and *Alpine*).

¹⁷ *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

This weight of authority comports well with this Court’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.

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

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”).

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 lower court’s attempts to create a disparity between existing “substantial burdens” jurisprudence and the RLUIPA provisions at issue.

With the sole exception of the decision below, 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.¹⁸ 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

¹⁸ See, e.g., *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*”).

enforcement.¹⁹ Notwithstanding this weight of authority, the court below would avoid this conclusion by manufacturing disparities between post-*Smith* “substantial burdens” jurisprudence and these two provisions.

First, the district court 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 decision below concludes 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.”²⁰

¹⁹ *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.”).

²⁰ *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.”).

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, this Court 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), this Court 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 court 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.

Finally, the court below 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.”²¹ RLUIPA’s definition does not broaden

²¹ *See Yoder*, 406 U.S. at 215; *Frazee v. Illinois Dept. of Emplt. Sec.*, 489 U.S.

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 decision below 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 that these RLUIPA provisions “alter the meaning of the Free Exercise Clause,” as RFRA did. *Id.* at 519.

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

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”).

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.

Congress has “compiled massive evidence,” 146 CONG. REC. S7774 – based on nine hearings over a period of three years – that clearly establishes what the RFRA record did not: a “widespread pattern of religious discrimination in this country” in land-use regulation, including “examples of legislation enacted or enforced due to animus or hostility to the burdened religious practices.” *Boerne*, 521 U.S. at 531. The congressional record reflects that land-use laws are commonly *both* enacted *and* enforced out of hostility to religion.²² Congress found that discriminatory *application* of zoning laws is particularly common because, as here, zoning laws across the country are overwhelmingly discretionary;

²² Compare 146 CONG. REC. S7774 (“Churches in general, and new, small, or unfamiliar churches in particular, are frequently discriminated against *on the face* of zoning codes.”)(emphasis added), and Laycock, *State RFRAs and Land Use Regulation*, 32 U.C. DAVIS L. REV. 755, 773 (1999) (discussing examples from congressional record of “evidence of discrimination *in the zoning codes themselves*”)(emphasis added), with 146 CONG. REC. S7774 (“Sometimes, zoning board members or neighborhood residents explicitly offer race or religion as the reason to exclude a proposed church, especially in cases of black Churches and Jewish shuls and synagogues. More often, discrimination lurks behind such vague and universally applicable reasons as traffic, aesthetics, or ‘not consistent with the city’s land use plan.’”).

in other words, the systems of “individualized assessments” described in *Smith* are pervasive in the land-use context.²³

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.²⁴ Some was *judicial*, including “decisions of the courts of the States

²³ 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.”).

²⁴ 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

and...the United States [reflecting] extensive litigation and discussion of the constitutional violations.”²⁵ *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.²⁶ *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

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).

²⁵ See Keetch Statement, at 131-53 (listing numerous state and federal zoning cases involving religious assemblies).

²⁶ See, e.g., Mauck Statement, at 1-5 (describing 22 representative cases based on 25 years experience representing churches in land-use disputes); June-July 1998 House Hearings, at 360-64 (statement of Bruce D. Shoulson, attorney)(describing experiences representing Jewish congregations in land-use disputes, and concluding that “the implications of these examples, which I believe are not unique, are obvious, and the need for assurances to Americans of all faiths that they will be free to exercise their religions should be equally obvious”). See also 146 CONG. REC. E1564-E1567 (Sept. 22, 2000)(listing 19 additional instances of land-use burdens on religious exercise arising since conclusion of hearings).

20% of reported principal use cases. *See* Keetch Statement at 118, 127-30; Laycock Statement at 411.

- This pattern of decisions reflects broader public attitudes to religious minorities, as reported in the Gallup poll presented to Congress. Specifically, 86% of Americans admit mostly unfavorable or very unfavorable attitudes toward religions they categorize as “sects ” or “cults,” and 45% of Americans hold mostly or very unfavorable opinions of those termed “fundamentalists.” When asked whether they would want to have these same groups as neighbors, 62% and 30% of Americans, respectively, would not. Laycock Statement at 415.
- According to John Mauck, a leading religious land-use attorney in Chicago, 30% of all cases before the city’s Zoning Board of Appeals involved houses of worship, even though that type of use does not remotely approach 30% of the land uses in the city. Laycock Statement at 414.

Notwithstanding the depth and breadth of this hearing record, the opinion below characterizes it as “a relatively small number of anecdotal instances in which religious assemblies were dissatisfied with zoning decisions or regulations, few of which constitute state or municipal action of a clearly unconstitutional character.” 291 F.Supp.2d at 1100. This conclusion was based exclusively on an *amicus* brief filed in another case, of which the court took judicial notice *sua sponte*. *Id.* at 1100 n.8. Suffice to say, that *amicus* brief would have benefited from exposure to the adversarial process, for then the Church might have pointed out that the brief merely cited part of the record and claimed it was the whole.²⁷

²⁷ For a more nearly complete summary of the evidence before Congress, *see* Laycock, *supra*, 32 U.C. DAVIS L. REV. at 769-83 and *Protecting Religious Liberty: Hearings Before the Senate Comm. on the Judiciary*, 106th Cong., 2d Sess. (Sept. 9, 1999), (statement of Prof. Douglas Laycock, Univ. Texas Law Sch., (<<http://www.senate.gov/~judiciary/9999dlay.htm>>)). In addition, the BYU study

Although the lower court mentioned that Congress' assessment of the need for remedial legislation is "entitled to great deference," the court's actual approach to this question reflects the opposite.

The *Freedom Baptist* court summed up the matter best:

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.").

presented to Congress in the Keetch Statement has been published at Keetch & Richards, *The Need for Legislation to Enshrine Free Exercise in the Land Use Context*, 32 U.C. DAVIS L. REV. 725 (1999).

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 reverse the Enforcement Clause decision of the court below.

II. RLUIPA SECTION 2(A)(1), AS APPLIED THROUGH SECTION 2(A)(2)(B), IS A LEGITIMATE EXERCISE OF CONGRESS' ENMUERATED POWER UNDER THE COMMERCE CLAUSE.

The Supreme Court recently clarified the factors courts should consider when assessing whether congressional legislation represents “regulation of an activity that substantially affects interstate commerce,” *United States v. Lopez*, 514 U.S. 549, 559 (1995): (1) whether the statute contains an express “jurisdictional element which would ensure, through case-by-case inquiry, that the [regulated activity] in question affects interstate commerce,” *Lopez*, 514 U.S. at 561; *Morrison*, 529 U.S. at 611-12; (2) whether the statute regulates “economic activity,” *Lopez*, 514 U.S. at 559; *Morrison*, 529 U.S. at 610; (3) whether “the link between [the regulated activity] and a substantial effect on interstate commerce was attenuated,” *Morrison*, 529 U.S. at 612 (citing *Lopez*, 514 U.S. at 563-67); and (4) whether the statute’s “legislative history contain[s] express congressional findings regarding the effects upon interstate commerce,” *Morrison*, 529 U.S. at 612 (quoting *Lopez*, 514 U.S. at 562).

Commerce Clause legislation is entitled to the same judicial deference and strong presumption of constitutionality as other Acts of Congress. *See Groome*, 234 F.3d at 203 (“In reviewing an act of Congress passed under its Commerce Clause authority, we apply the rational basis test as interpreted by the *Lopez* court.”). Although not its burden, the Church explains below how RLUIPA

Section 2(a)(1), applied through Section 2(a)(2)(B), satisfies all four *Lopez-Morrison* factors.

A. RLUIPA contains an “express jurisdictional element.”

First and foremost, in contrast to the laws at issue in *Lopez* and *Morrison*, Section 2(a) of RLUIPA is supported by an “express jurisdictional element which might limit its reach to a discrete set of [burdens on land use] that additionally have an explicit connection with or effect on interstate commerce.” *Morrison*, 529 U.S. at 611-12; *see* RLUIPA § 2(a)(2)(B). As a matter of law and logic, the presence of this provision ensures the *facial* constitutionality of the statute under the Commerce Clause: by its own terms, the statute applies only to conduct affecting “commerce with foreign nations, among the several States, or with Indian tribes.” *Compare* RLUIPA §2(a)(2)(B), *with* U.S. CONST. Art. I., § 8, cls. 3.²⁸

The jurisdictional element also precludes *as-applied* challenges under the Commerce Clause. If the conduct at issue in a particular case satisfies the jurisdictional requirement of Section 2(a)(2)(B), then the conduct also falls within the sweep of the commerce power and may be regulated constitutionally. If the

²⁸ *See also United States v. Bishop*, 66 F.3d 569, 588 (3d Cir. 1995) (“[T]he jurisdictional element in [the federal carjacking statute] independently refutes appellants’ arguments that the statute is constitutionally infirm.”). *See also United States v. Chesney*, 86 F.3d 564, 568-69 (6th Cir. 1996) (concluding “presence of the jurisdictional element defeats [defendant’s] facial challenge”); *United States v. Sorrentino*, 72 F.3d 294, 296 (2d Cir. 1995) (“The statute before us avoids the constitutional deficiency identified in *Lopez* because it requires a legitimate nexus with interstate commerce” by means of a jurisdictional element.).

facts do not satisfy the jurisdictional element, then the constitution *would* prohibit the statute from reaching the conduct under the commerce power – but those are the same cases where the statute does not reach the conduct, so constitutional limits are never transgressed.²⁹ In other words, the Act applies either constitutionally, or not at all.

This has proven sufficient *alone* for courts in this Circuit to reject Commerce Clause challenges to both RLUIPA Section 2(a)(2)(b), and the analogous prisoner provision, Section 3(b)(2).³⁰

B. RLUIPA regulates “economic activity.”

²⁹ See *Morrison*, 529 U.S. at 611-12; *Lopez*, 514 U.S. at 561 (noting that jurisdictional element ensures “through case-by-case inquiry” that regulated activity falls within Commerce Clause authority); *United States v. Cummings*, 281 F.3d 1046, 1051 (9th Cir. 2002) (same); see, e.g., *United States v. Grassie*, 237 F.3d 1199, 1211 (10th Cir. 2001) (“[B]y making interstate commerce an element of the [Church Arson Prevention Act] ... to be decided on a case-by-case basis, constitutional problems are avoided.”). See also *United States v. Harrington*, 108 F.3d 1460, 1465 (D.C. Cir. 1997) (“Indeed, the Court specifically suggested that a jurisdictional element could justify the application of the commerce power to a single firearm possession, despite the inevitable insubstantiality of such a one-time, small-scale event from the perspective of interstate commerce.”).

³⁰ See, e.g., *United States v. Maui County*, 298 F.Supp.2d 1010, 1015 (D.Haw. 2003) (“RLUIPA does not facially violate the Commerce Clause ... because RLUIPA has a jurisdictional element”); *Life Teen*, slip op. 25-26 (“The Ninth Circuit has declined to hold that a statute which contains a jurisdictional element explicitly requiring the “necessary nexus between the statutory provision and interstate commerce” violates the Commerce Clause because “the jurisdictional element ‘insures on a case-by-case basis, that a defendant’s actions implicate interstate commerce to a constitutionally adequate degree.’”(quoting *United States v. Jones*, 231 F.3d 508, 514 (9th Cir. 2000)). See also *Mayweathers v. Terhune*, 2001 WL 804140, at *7-*8 (E.D.Cal. July 2, 2001) (same).

When a jurisdictional element assesses the effect of regulated activity on interstate commerce on a case-by-case basis, the Court need not examine whether that regulated activity may *also* be characterized as “economic” generally. *See United States v. Jones*, 231 F.3d 508, 514-15 (9th Cir. 2000); *Life Teen, Inc. v. Yavapai County*, No. CIV-01-1490-PCT-RCB, slip op. 25-26 (D.Ariz. Mar. 26, 2003); *Hale O Kaula*, 229 F.Supp.2d at 1072 (further Commerce Clause analysis only appropriate for “laws of general applicability where Congress regulates an entire field of activity”). But if the Court deems it necessary to examine the “economic activity” factor, the Court should find it satisfied.

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

These decisions are reinforced by a recent Fifth Circuit decision concluding that congressional preemption of local zoning laws to combat housing discrimination fell within the commerce power, based in part on a finding that

Congress was regulating “economic activity.” *Groome Resources, Ltd. v. Parish of Jefferson*, 234 F.3d 192, 205-206 (5th Cir. 2000) (upholding constitutionality of Fair Housing Amendments Act). The court reasoned that “an act of discrimination that directly interferes with a commercial transaction” – there, the purchase, sale, or rental of residential property – “is an act that can be regulated to facilitate an economic activity.” *Id.* at 205-06.

The development of land – such as the construction activity associated with renovation here – is at least as “commercial” or “economic” as the purchase, sale, or rental of that land. The legislative history of RLUIPA repeatedly identifies “construction projects” as examples of “a specific economic transaction in commerce” that land-use regulations may impermissibly burden. 146 CONG. REC. S7775; H.R. REP. 106-219, at 28.

The purchase, sale, rental, development or use of land is no less an “economic activity” when undertaken by a religious group or other non-profit organization.³¹ Courts have consistently held that the commercial activities of

³¹ See *Camps Newfound/Owatonna, Inc. v. Town of Harrison*, 520 U.S. 564, 585 (1997) (“Nothing intrinsic to the nature of nonprofit entities prevents them from engaging in interstate commerce.”); H.R. REP. No. 106-219, at 28 (recognizing “that the exercise of religion sometimes requires commercial transactions, such as the construction of churches.”); see, e.g., *Grassie*, 237 F.3d at 1210 (“Religion and in particular religious buildings actively used as the site and dynamic for a full range of activities, easily falls within” the commerce power.); *id.* at 1209 (listing among common church activities affecting interstate commerce “social services, educational and religious activities, the purchase and distribution

religious institutions – including employment and the provision of social services – are subject to regulation under the Commerce Clause. *See, e.g., Tony & Susan Alamo Fdn. v. Sec’y of Labor*, 471 U.S. 290 (1985) (finding religious foundation to be an “[e]nterprise engaged in commerce or in the production of goods for commerce” under Fair Labor Standards Act); *Volunteers of America v. NLRB*, 777 F.2d 1386, 1389 (9th Cir. 1985) (noting that nonprofit charitable employers are subject to National Labor Relations Act when they affect commerce, and finding statute to cover church-operated alcohol rehabilitation center). If commercial activities of religious entities fall within the commerce power when Congress would regulate them, they cannot fairly be said to fall beyond that power when it would deregulate them. Therefore, unlike the statutes at issue in *Lopez* and *Morrison*, RLUIPA regulates “economic activity.”

The court below nevertheless concluded that RLUIPA did not regulate “economic activity” at all, because it “regulates land use *law* and not economic conduct.” 291 F.Supp.2d at 1103.

To begin with, RLUIPA regulates the “economic activity” of the commercial activities of private parties – using, developing, and converting land for religious purposes – not the regulatory activities of local governments. *See United States v.*

of goods and services, civil participation, and the collection and distribution of funds for these and other activities across state lines”); *Cottonwood*, 218 F.Supp.2d at 1221-22 (listing various activities of church, interference with which “affects commerce”).

Turner, 301 F.3d 541, 547 (7th Cir. 2002) (“If there is an interstate commercial activity which meets any of the three *Lopez* categories Congress may regulate that activity *and* the actions or activities which secondarily affect the primary commercial activity.”).

The Commerce Clause protects private commercial transactions from all manner of interference, even in the form of regulatory action by state and local governments. If it were otherwise, Dormant Commerce Clause jurisprudence would be meaningless. *But see Camps Newfound/Owatonna*, 520 U.S. at 583-87 (holding Commerce Clause invalidates state real estate tax law burdening economic activity of small church camp). Commerce Clause legislation may similarly **preempt** state and local laws in order to regulate – *i.e.*, facilitate – private “economic activity.” *See, e.g., Brown v. Investors Mort. Co.*, 121 F.3d 472, 476 (9th Cir. 1997) (rejecting Commerce Clause challenge to federal legislation preempting contrary state laws while facilitating interstate commerce). That is exactly how RLUIPA operates. *See* RLUIPA §5(e) (referring to “preemptive force of this Act”).

The Supreme Court cases cited in the opinion below are not to the contrary. Certainly the commerce power ““does not authorize Congress to regulate state governments’ regulation of interstate commerce,”” but that quote is from a case where Congress was trying to force a state to issue regulations. *Elsinore*, 291

F.Supp.2d at 1104 (quoting *New York v. United States*, 505 U.S. 144, 166 (1992)). But as *New York* emphasized, states’ desire to avoid preemption often induces them to do voluntarily what they cannot be forced to do: pass ***their own*** laws or regulations to comply with federal standards. *New York*, 505 U.S. at 166. And this implies that Congress may use the power of preemption to box out conflicting state and local laws whenever Congress acts on ***its own*** to protect commerce. That is what Congress did with RLUIPA.

The court below also cites *Reno v. Condon*, 528 U.S. 141 (2000), and *South Carolina v. Baker*, 485 U.S. 505 (1988), but both cases ***rejected*** the Commerce Clause challenges presented.

Last, the district court claims that “RLUIPA appears to be unique among federal laws in purporting to” displace contrary land-use laws. *Elsinore*, 291 F.Supp.2d at 1103. In fact, Section 2(a) is typical of Commerce Clause statutes that set certain limits on (but do not replace or supplant) the zoning power of local governments when they interfere with commerce – ***that is, when they tread into federal territory.***³²

³² See, e.g., *Groome*, 234 F.3d at 205-06 (rejecting Commerce Clause challenge to Fair Housing Amendments Act); *USCOC of Virginia RSA#3, Inc. v. Montgomery Cy.*, 245 F.Supp.2d 817, 833-34 (W.D.Va. 2003) (rejecting Commerce Clause challenge to Telecommunications Act); *Freedom Baptist Church*, 204 F.Supp.2d at 867 (noting that Telecommunications Act “specifically governs state and local authorities passing upon zoning requests of wireless providers without (to date) any judicially-recognized constitutional objection”).

Thus, the Court should reject the lower court's conclusion that Section 2(a) does not regulate "economic activity."

C. RLUIPA regulates a class of activity having a direct, rather than an attenuated, link to interstate commerce.

Third, the aggregate effect of the regulated activity at issue here has a direct link to interstate commerce. Even after *Lopez* and *Morrison*, courts will measure interstate effect by examining the activity at issue "'taken together with that of many others similarly situated.'" *Lopez*, 514 U.S. at 556 (quoting *Wickard v. Filburn*, 317 U.S. 111, 127-28 (1942)). But even these aggregated effects may fall beyond the commerce power if they are "so indirect and remote that to embrace them ... would effectually obliterate the distinction between what is national and what is local." *Lopez*, 514 U.S. at 557 (quotations omitted).

Here, the Church has shown that Defendants have imposed the substantial burden of prohibiting: (1) the Church's ***purchase*** of the building, (2) its proposed ***construction*** to renovate the building, and (3) its ongoing ***use*** of that building.

Specifically, the Church had entered an agreement to ***purchase*** the Subject Property for \$375,000, but when the City denied the Church's permit to worship there, the deal collapsed. *See* J.E.T. 17, ¶¶4-7.

See also id. ("Nor is [RLUIPA] the first time Congress has entered the zoning arena."); Salkin, *Smart Growth and Sustainable Development: Threads of a National Land Use Policy*, 36 VAL. U. L. REV. 381, 388 (Spring 2002) (providing additional examples from the "host" or "litany of federal laws and implementing regulations [that] affect and restrict state and local land use decision making.").

The City's CUP denial also directly stifles the multiple, large-scale, commercial activities involved in the Church's proposed **construction** project: employing construction workers, purchasing and transporting building materials and supplies, raising and transferring funds, entering contracts, and engaging in other related commercial transactions. *See* J.E.T. 18, ¶38; J.E.T. 1, Anx. A, p.22-23 (City Report describing scope of construction project, including interior remodeling, parking redesign, roofing, and landscaping). *See, e.g., Cottonwood*, 218 F.Supp.2d at 1221 ("The construction of the church will affect a large quantity of construction workers, construction materials, transportation vehicles and commercial financial transactions, all of which affect commerce.").

Although the commercial effects above are sufficient alone, the burden imposed by the City also precludes longer-term economic activities associated with mere **use** of the building once purchased and renovated: employing maintenance workers and staff; providing social services; hosting receptions and banquets; collecting tithes; and funding of national and international missionaries. *See* J.E.T. 18, ¶38; *id.* ¶37; J.E.T. 10, ¶5; J.E.T. 13, ¶19; *id.* ¶¶1, 6; *id.* ¶22E. *See, e.g., Volunteers of America*, 777 F.2d at 1389 (employment and social services); *Cottonwood*, 218 F.Supp.2d at 1221-22 (concluding that burden affects commerce where burdened church "will employ ministers, maintenance personnel, and daycare center workers[; ...] will use its church to transmit a televised ministry and

hold national religious conferences[; and will include a] bookstore [that] will have employees and will regularly obtain merchandise for resale.”).

The burden on these activities, “taken together with ... many others similarly situated,” would “substantially affect interstate commerce.” *Lopez*, 514 U.S. at 556, 559. Even if every commercial transaction suppressed here would have occurred exclusively in California – unlikely though that may be – the aggregate effect of similar suppression elsewhere would still implicate the commerce power.³³ By contrast, the regulated activity in *Lopez* – possessing a gun in a school zone – was not one “that might, through repetition elsewhere, substantially affect any sort of interstate commerce.” *Lopez*, 514 U.S. at 567.

Moreover, this Court need not “pile inference upon inference,” *Lopez*, 514 U.S. at 567, Defs. Br. 9-10, 12, to get from the regulated category of activity to an effect on interstate commerce: the application of land-use restrictions ***directly and***

³³ See, e.g., *Camps Newfound/Owatonna*, 520 U.S. at 586 (“[A]lthough the [Christian Scientist] summer camp involved in this case may have a relatively insignificant impact on the commerce of the entire Nation, the interstate commercial activities of nonprofit entities as a class are unquestionably significant.”). See also *Johnson*, 223 F.Supp.2d at 829 n.8 (noting the continuing viability of *Wickard* aggregation principle, and its codification in RLUIPA §4(g)); *Freedom Baptist*, 204 F.Supp.2d at 867 & nn.12, 14 (same). Cf. *Johnson*, 223 F.Supp.2d at 829 (“RLUIPA covers regulation of the free exercise of religion, an objectively interstate activity.”).

immediately prohibits a full range of commercial transactions, the purchase, development, and use of land.³⁴

Finally, applying RLUIPA here does not remotely threaten “the distinction between what is national and what is local.” *Lopez*, 514 U.S. at 557, 567. As noted above, RLUIPA neither replaces local zoning and land-marking systems with a federal one, nor provides religious uses a blanket exemption from such systems. Instead, Section 2(a) requires local authorities to provide ***additional justification*** for a ***limited category*** of zoning and land-marking laws, namely, those that ***both*** substantially burden religious exercise ***and*** tread into national territory by affecting interstate commerce. *See Freedom Baptist*, 204 F.Supp.2d at 867-68 (“insofar as state or local authorities ‘substantially burden’ the economic activity of religious organizations, Congress has ample authority to act under the Commerce Clause”).³⁵

³⁴ *See Groome*, 234 F.3d at 213 (noting that “connection between racial discrimination and its effect on interstate commerce” is well established). *See, e.g., Cottonwood*, 218 F.Supp.2d at 1221-22 (detailing commercial activities directly prohibited by application of land-use regulation).

³⁵ *See also Fidelity v. de la Cuesta*, 458 U.S. 141, 153 (1982) (addressing preemption of state real property law, and concluding that “The relative importance to the State of its own law is not material when there is a conflict with a valid federal law, for the Framers of our Constitution provided that the federal law must prevail.”); *Groome*, 234 F.3d at 215 (rejecting “incantation of ‘local zoning’ and ‘traditional’ authority,” because “it does not serve the balance of federalism to allow local communities to discriminate”); *USCOC of Virginia*, 245 F.Supp.2d at 834 (when Congress acts within Commerce Clause authority, “[i]t is completely irrelevant that land use decisions are an important and traditionally

D. RLUIPA’s legislative history contains evidence that the regulated activity “substantially affects interstate commerce.”

Both *Lopez* and *Morrison* make clear that Congress is not generally required to make findings of the regulated activity’s effect on interstate commerce. *Morrison*, 529 U.S. at 612 (quoting *Lopez*, 514 U.S. at 562). Instead, congressional findings may help courts assess whether the effect is substantial when “no such substantial effect [is] visible to the naked eye.” *Id.* (quoting *Lopez*, 514 U.S. at 563). Because the substantial effect on commerce here is abundantly “visible,” *see supra*, Section II.C. (discussing effect of regulated activity on purchase, construction, and use of property), the Court need not rely on congressional findings.

Nevertheless, Congress still found that one of the particular burdens on religious land use at issue here – a “construction project” – substantially affects interstate commerce. *See* 146 CONG. REC. S7775; H.R. REP. No. 106-219, at 28. These findings are based various forms of evidence indicating the nationwide

local matter.”); *Freedom Baptist*, 204 F.Supp.2d at 867 (“[T]he mere fact that zoning is traditionally a local matter does not answer Congress’s undoubtedly broad authority after *Wickard* to regulate economic activity even when it is primarily intrastate in nature.”). *Cf. Franchise Tax Bd. v. Hyatt*, 123 S. Ct. 1683, 1689 (2003) (rejecting “as ‘unsound in principle and unworkable in practice’ a rule of state immunity from federal regulation under the Tenth Amendment that turned on whether a particular state government function was ‘integral’ or ‘traditional.’”); *Camps Newfound/Owatonna*, 520 U.S. at 574-75 (rejecting argument that dormant Commerce Clause cannot invalidate discriminatory state real estate tax because Congress cannot impose real estate tax itself).

magnitude of the commercial activity of religious institutions, including in construction. According to one study, in 1992 alone, religious communities spent \$6 billion on capital investments and new construction, up from \$4.8 billion five years earlier.³⁶ Paired with the evidence of widespread discriminatory land-use regulation also presented, Congress had vastly more than a “rational basis ... for concluding that [such regulation] sufficiently affected interstate commerce.” *Lopez*, 514 U.S. at 557.

Because RLUIPA Sections 2(a)(1) and 2(a)(2)(B) satisfy all four factors of the *Lopez-Morrison* analysis, this Court should reverse the decision below finding a violation of the Commerce Clause.

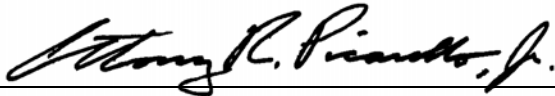
CONCLUSION

The district court’s decision striking down RLUIPA Section 2(a) should be reversed, and judgment should be entered for Plaintiffs-Appellants on their Section 2(a) claim.

³⁶ See, e.g., *Religious Liberty Protection Act of 1998: Hearing on H.R. 4019 Before the Subcomm. on the Constitution of the House Comm. on the Judiciary*, 105th Cong., 2d Sess., at 125, 134 (June 16 and July 14, 1998)(statement of Marc D. Stern, American Jewish Congress); 146 CONG. REC. S7775 (citing Stern statement in support of Commerce Clause authority).

Dated: August 20, 2004

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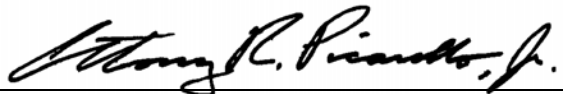
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Gary Holmes

CERTIFICATE OF COMPLIANCE

I hereby certify that pursuant to FED. R. APP. P. 32(a)(7)(C) and Ninth Circuit Rule 32-1, the foregoing Appellants' Brief is proportionally spaced, has a typeface of 14 points or more, and contains 13,994 words, as calculated by Microsoft Word.

Dated: August 20, 2004

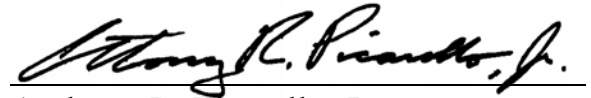


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STATEMENT OF RELATED CASES

The instant case raises some issues that are the same as or closely related to the issues on appeal before this Court in *Guru Nanak Sikh Society of Yuba City v. County of Sutter, et al.*, App. No. 03-17343. In *Guru Nanak*, the appellants challenge the constitutionality of RLUIPA under Section 5 of the Fourteenth Amendment, relying heavily on the rationale of the decision below here.

Dated: August 20, 2004


Anthony R. Picarello, Jr.