

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

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

Robert H. Tyler, Esq.
Douglas L. Edgar, Esq.
Alliance Defense Fund
38760 Sky Canyon Drive, Suite B
Murrieta, CA 92563
Phone: (951) 461-7860
Fax: (951) 461-9056

Anthony R. Picarello, Jr., Esq.*
Derek L. Gaubatz, Esq.
The Becket Fund for Religious Liberty
1350 Connecticut Avenue, NW, Suite 605
Washington, DC 20036
Phone: (202) 955-0095
Fax: (202) 955-0090

Attorneys for Plaintiffs-Appellants

*Counsel of Record

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ARGUMENT

The City's answering brief does little more than parrot the arguments of the anomalous decision below, which the Church's and United States' initial briefs have already specifically rebutted. Thus, the City fails to meet its heavy burden to show that RLUIPA Section 2(a) ***always*** violates the Enforcement and Commerce Clauses when it is applied through Sections 2(a)(2)(C) and 2(a)(2)(B), respectively. See *United States v. Salerno*, 481 U.S. 739, 745 (1987) (party bringing a facial challenge to a law must demonstrate that "no set of circumstances exists" in which the challenged law can be applied constitutionally); *Midrash Sephardi v. Town of Surfside*, 366 F.3d 1214, 1237-38 (11th Cir. 2004) (listing various presumptions and other principles of construction calling for deference to Acts of Congress). See also Church Br. 20 n.14 (listing cases uniformly rejecting City's position). And the City's Establishment Clause challenge is foreclosed by controlling Ninth Circuit precedent that the City knowingly omits from its brief. All of these challenges should be rejected, the decision below reversed, and judgment entered for the Church on its Section 2(a) claim.

I. THE CITY DOES NOT REMOTELY APPROACH SATISFYING ITS BURDEN TO SHOW THAT RLUIPA SECTION 2(A)(1), AS APPLIED THROUGH SECTION 2(A)(2)(C), VIOLATES THE ENFORCEMENT CLAUSE.

The Church's initial brief (pp.21-24) discusses the Supreme Court and Ninth Circuit cases setting out the standard for evaluating Acts of Congress under the

Enforcement Clause. In short, courts should first examine the Fourteenth Amendment standard to be enforced and compare it with the enforcing legislation; if there is no disparity between the two, then the legislation is valid under the Enforcement Clause. If there is a disparity, so that the statute prohibits some constitutional conduct of state or local governments, then the analysis has a second step: the Court must examine the harm identified to Congress, and then assess whether the “remedial” or “deterrent” increment is “congruent and proportional” to that harm. If so, the Act is constitutional.

The City only discusses the standard briefly and in part, *see* City Br. 23, and does not appear to dispute the analytical structure set forth in the Church’s brief. *See* City Br. 17-22 (asserting great disparity between Free Exercise standards and RLUIPA); *id.* 22-27 (asserting that RLUIPA’s legislative record is scant and that great disparity is therefore unjustified).

A. The City Fails to Show That RLUIPA Diverges from Existing First Amendment Jurisprudence.

The Church’s brief explains that the test of *Sherbert v. Verner*, 374 U.S. 398 (1963) – whereby even incidental, “substantial burdens” on religious exercise triggered strict scrutiny – ***was not overruled*** by *Employment Division v. Smith*, 494 U.S. 872 (1990). Church Br. 26-27. Instead, *Smith* limited that test in scope to cases where the burden is imposed through a system involving “individualized governmental assessment of the reasons for the relevant conduct.” *Smith*, 494 U.S.

at 884; Church Br. 28-29. *Smith* also reaffirmed that courts should not evaluate the “centrality” of a belief when assessing whether a burden is “substantial.” *Id.* at 28. The Ninth Circuit and other lower courts have both avoided the “centrality” inquiry and applied the “individualized assessments” doctrine outside the unemployment context. *Id.* at 29-30. Moreover, the Ninth and Tenth Circuits have understood systems of “individualized assessments” to mean highly discretionary, case-by-case, exception-ridden systems. *Id.* at 30-31, 33. And on the same rationale, lower courts have routinely found discretionary land-use permitting decisions to be systems of “individualized assessments.” *Id.* at 31-32.

The Church’s brief then compares this current, “substantial burdens” jurisprudence to the language of RLUIPA Sections 2(a)(1) and 2(a)(2)(C), and cites numerous cases finding no disparity between them. Church Br. 34-35; *see id.* at 26. Finally, the brief refutes the four disparities invented by the court below: (1) that the Supreme Court has never applied “individualized assessments” doctrine outside the unemployment context, *id.* at 35; (2) that avoiding the “centrality” inquiry is inconsistent with *Smith*, *id.* at 35-36; (3) that “individualized assessments” and “individualized exceptions” are not used interchangeably by the Supreme Court, the Ninth Circuit, and uniformly by other lower courts, *id.* at 36; (4) that using land “for the purpose of religious exercise” under RLUIPA is meaningfully distinct from engaging in religious exercise on land, *id.* at 36-37.

In response, the City does not take up the district court’s argument that “individualized assessments” applies only in the unemployment context. Instead, the City simply asserts that the “doctrine does not apply in the land-use context.” City Br. 17. But the City has no explanation for the numerous cases cited by the Church (p.32) in which the doctrine has been applied in the land-use context,¹ and that the Ninth Circuit’s interpretation of the doctrine squares well with these decisions.² Nor does the City explain why land-use regulation should be specially – indeed, uniquely – excluded from a doctrine that otherwise applies consistently throughout Free Exercise jurisprudence.³

¹ The City does claim (incorrectly) that no “federal court has ever applied the ‘individualized assessments doctrine’ to invalidate a municipality’s decision to deny a land use permit to a religious entity where there was no evidence of religious discrimination against the applicant.” City Br. 17. See, e.g., *Castle Hills First Baptist Church v. City of Castle Hills*, 2004 WL 546792 (W.D.Tex., Mar 17, 2004) (finding “substantial burden” pursuant to system of “individualized assessments” in denial of use permit for fourth floor of building, but rejecting discrimination claim). But even if this claim were correct, it would be irrelevant: so long as “individualized assessments” doctrine is validly applied **at all** in the land-use context – even if a showing of discrimination were necessary (which it is not) – then the law would survive the facial challenge made in this case. See *United States v. Salerno*, 481 U.S. 739, 745 (1987) (party bringing a facial challenge to a law must demonstrate that “no set of circumstances exists” in which the challenged law can be applied constitutionally).

² The City cites *Miller v. Reed*, 176 F.3d 1202 (9th Cir. 1999), for the proposition that the Ninth Circuit has already decided that “individualized assessments” does not apply in the land use context. City Br. 18. In fact, *Miller* was not a land use case, and never even used the phrase “individualized assessments.”

³ In the absence of an explanation for such an unprecedented exclusion, the City (and its lobbyists) claim that the sky would fall otherwise. Specifically, they assert that if “individualized assessments” applies in the land use context, then virtually every land-use permit denial involving a religious institution would trigger strict scrutiny. See City Br. 20, 22, 25; League Amicus at 10-11, 18. But this ignores that a plaintiff faces the additional and significant hurdle of showing that the permit denial imposes a “substantial burden.” In addition, although most

The City does follow the district court’s lead regarding “centrality,” City Br. 21, but like the district court, fails in any way to account for the fact that *Smith* specifically admonishes courts to avoid that inquiry, and that the Ninth Circuit and other lower courts have respected that admonition. Church Br. 28-29.

The City also argues, along with the district court, that RLUIPA’s use of “individualized assessments” departs meaningfully from the term “individualized exemptions,” which is somehow the only authentic description of the relevant Free Exercise doctrine. Notably, the City cites *not a single case* distinguishing the two terms. The City similarly attempts to ignore that the very word “assessments” appears – interchangeably with the term “exemptions” – in discussions of the doctrine in *Smith*, *Church of the Lukumi Babalu Awe, Inc. v. City of Hialeah*, 508 U.S. 520 (1993), and this Court’s own decision in *American Friends Serv. Comm. Corp. v. Thornburgh*, 951 F.2d 957 (9th Cir. 1991). See Church Br. 28-29 (quoting cases).

But even if this distinction reflected a difference, it would be irrelevant to whether Section 2(a)(2)(C) is constitutional. It contains language that quotes *verbatim* from the Supreme Court decision whose doctrine it purports to codify. If that does not satisfy the demands of the Enforcement Clause, then nothing does. See also *Sts. Helen & Constantine v. City of New Berlin*, 396 F.3d 895, 898 (7th

land-use permitting decisions are sufficiently discretionary to represent “systems of individualized assessments,” some are not, and in any event, a plaintiff must plead and prove that they are in every case.

Cir. 2005) (Posner, J.) (“*Sherbert* [as narrowed by *Smith*] was an interpretation of the Constitution, and so [RLUIPA’s] creation of a federal judicial remedy for conduct contrary to its doctrine is an uncontroversial use of section 5.”). The City and the district court may be eager to contest the precise meaning of “individualized assessments” under RLUIPA, but so long as it means the same thing as the *exact same term* under the Free Exercise Clause, it is constitutional. In short, this Court need not delve into the meaning of “individualized assessments” – which, in any event, was resolved in *Thornburgh*⁴ – in order to resolve the Enforcement Clause question at hand.

Finally, the City does not defend the district court’s argument that RLUIPA’s including religious use of land in the statutory definition of “religious exercise” poses a constitutional problem. Church Br. 36-37.

⁴ Although the City avoids any mention of *Thornburgh* anywhere in its brief, the League of Cities avoids the import of that case in another way: it cites a factually distinguishable case from another jurisdiction. League Amicus at 8 (citing *F.O.P. v. Newark*, 170 F.3d 359 (3d Cir. 1999)). *F.O.P.* was a discrimination case: the local government made “categorical exemptions” for secular reasons but not religious ones, and the court did not assess whether the burden was “substantial.” See also *Brown v. Borough of Mahaffey*, 35 F.3d 846, 849-50 (3d Cir. 1994) (rejecting requirement to show “substantial burden” for discrimination claims, because religious discrimination cases “have never limited liability to instances where a ‘substantial burden’ was proved by the plaintiff”). By contrast, “individualized assessments” or “exemptions” cases do not require a showing of such patent discrimination, but instead guard against the risk of cloaked discrimination and only require an evaluation of whether the burden is “substantial.” *Sts. Helen & Constantine v. City of New Berlin*, 396 F.3d 895, 900 (7th Cir. 2005) (Posner, J.) (“substantial burden” provision guards against “subtle forms of discrimination when, as in the case of the grant or denial of zoning variances, a state delegates essentially standardless discretion to nonprofessionals operating without procedural safeguards,” and so “backstops the explicit prohibition of religious discrimination in the later section of the Act.”). The open-ended language of the City’s CUP ordinance (Church Br. p. 12 n.7) is a classic example of the standard-less discretion granted to land-use officials described by Judge Posner.

For all these reasons, this Court should reject all of the district court's and the City's claims of disparity between current "substantial burdens" / "individualized assessments" jurisprudence under the Free Exercise Clause, and RLUIPA Sections 2(a)(1) and 2(a)(2)(C).

B. The City Fails to Show That Any Divergence from Existing First Amendment Jurisprudence Lacks "Congruence and Proportionality."

Because the City has failed to show any disparity between the language of RLUIPA and current, post-*Smith* jurisprudence, there is no need to pursue the two-step, "congruence and proportionality" analysis. Church Br. 23-25, 37. In the abundance of caution, the Church replies to the City's discussion of that analysis.

1. The City does not even attempt to rebut the substantial showing that Congress had reason to believe that many land-use laws may have been applied unconstitutionally to religious activities.

The Church's brief summarizes the extensive record of religious discrimination in land use law presented to Congress in the 9 hearings preceding the passage of RLUIPA. Church Br. 38-42. *Amici curiae* the Anti-Defamation League, *et al.*, provide additional detail. See ADL Amicus 10-22, 25-27. Rather than engage this evidence, the City responds as the district court did, summarily dismissing the record as "a relatively small number of instances." City Br. 24. This argument has already been rebutted in the briefs of the Church and *amici curiae*, *supra*.

2. The City fails to identify any remedial feature of RLUIPA that is incongruous or disproportionate in relation to the legislative record.

The Church has explained that the differential between existing Free Exercise jurisprudence and RLUIPA (if any) is so small, and the record of religious discrimination in land-use regulation so large, that the statute easily passes the “congruence and proportionality” test. Church Br. 43-45.

In response, the City argues that, even though the RLUIPA provisions at issue are specifically tailored to the land-use context – precisely where Congress found the worst problems – those provisions are still disproportionate because “virtually every state or local government is subject to [its] provisions.” City Br. 26. In fact, states engage in relatively little land-use regulation, and it is usually only a specialized agency with a local government (such as the Planning Commission here) that must concern itself with RLUIPA. And even then, it only covers land uses involving religious exercise. In short, the provisions are precisely focused on the problem area, and do not extend more broadly.

The City also complains that RLUIPA has no “geographical restrictions, termination provisions, ... expiration date or other limiting features.” City Br. 27. But the Supreme Court has already made clear that provisions like these are not required to satisfy Enforcement Clause scrutiny. *City of Boerne v. Flores*, 521 U.S. 507, 533 (1997).

Finally, the City alleges that application of the strict scrutiny standard is disproportionate. City Br. 27. As the Church has already explained, however, strict scrutiny applies pursuant to Enforcement Clause power only where it would otherwise apply under existing constitutional jurisprudence. Church Br. 43.

II. THE CITY DOES NOT REMOTELY APPROACH SATISFYING ITS BURDEN TO SHOW THAT RLUIPA SECTION 2(A)(1), AS APPLIED THROUGH SECTION 2(A)(2)(B), VIOLATES THE COMMERCE CLAUSE.

The Church's initial brief set forth the four factors that *the City* must show break its way sufficiently to declare that Sections 2(a)(1) and 2(a)(2)(B) exceed Congress' commerce power, and then explained that all four factors break in favor of the Church. Church Br. 46-59.

The City largely glosses the Church's argument (pp.47-48) that RLUIPA's "express jurisdictional element," which very closely tracks the language of the Commerce Clause itself, assures that the statute applies under the commerce power only when interstate commerce is affected. Nor does the City respond to the Church's argument (p.49) that when a case-by-case jurisdictional element thus assures a sufficient effect on commerce, a broader, more general inquiry about whether the activity is "economic" is unnecessary.

The City claims instead that the element is flawed because it does not describe the regulation of "economic activity"; following the district court, it asserts that RLUIPA does not regulate "the economic aspects of land use, but

rather land use law.” City Br. 29. But this responds to an argument that the Church does not make. Instead, as the Church’s initial brief explained (pp.49-52) RLUIPA regulates three distinct “economic activities” – purchasing, developing, and using real property – by protecting those unmistakably commercial transactions from certain local government interference. Notably, the City never joins this argument, preferring instead to fight only the straw man it has erected. See City Br. 30-32 (consistently discussing “land use regulation” as the alleged “economic activity”).

The City also cites *Printz v. United States*, 521 U.S. 898 (1997) for the proposition that federal commerce legislation may not even **preempt** contrary state law to protect the free flow of commerce, because that preemption would involve “regulat[ing] state governments’ regulation of interstate commerce.” City Br. 30. The flaws of this argument, including its grave implications for the scope of the commerce power, have already been addressed in both the Church’s brief (pp.51-53) and in the brief of *amici curiae* Dwight and Leia Smith (pp.5-12) (discussing and applying *Hodel v. Virginia Surface Mining & Reclamation Assoc., Inc.*, 452 U.S. 264 (1981)).

The City also argues that the connection of these “economic activities” to interstate commerce is “too attenuated,” because the connection requires “piling inference upon inference,” as forbidden in *United States v. Lopez*, 514 U.S. 549

(1995). City Br. 33-34. But the three, independently sufficient “economic activities” at issue – purchasing, developing, and using real property – are all prohibited with equal immediacy and directness by the City’s denying the Church a permit that would have allowed it to purchase, develop, and use real property for a house of worship. No one of these activities represents the end of an inferential chain, or the single activity which alone establishes a sufficient nexus; all are prohibited at the same time by the same denial, and the prohibition of each is sufficient alone to affect commerce.

Finally, the City offers no response to the evidence in RLUIPA’s legislative history, highlighted in the Church’s brief (pp.58-59), resolving any doubt as to whether the effect on interstate commerce is “substantial.”

III. THE CITY’S ESTABLISHMENT CLAUSE ARGUMENTS HAVE ALREADY BEEN REJECTED BY THIS COURT IN *MAYWEATHERS* v. *NEWLAND*, A CONTROLLING DECISION THAT THE CITY IS AWARE OF BUT FAILS TO CITE.

Finally, as an alternative ground for affirmance, the City claims that RLUIPA Section 2(a) violates the Establishment Clause, because it fails the three-pronged test of *Lemon* v. *Kurtzman*, 403 U.S. 602, 612-13 (1971). City Br. 35-40. Specifically, the City argues that Section 2(a): (1) lacks any secular purpose, because it “always provid[es] strict scrutiny to religious landowners, but never to non-religious landowners,” *id.* at 37; (2) has the effect of advancing religion, again because “[t]he only persons or institutions that benefit from RLUIPA are religious

in character,” thus “inducing religious exercise,” *id.* at 38; and (3) creates an excessive entanglement with religion, because it “compels local land-use officials to become experts in the needs and requirements of religious landowners in the community.” *Id.* at 40.

This Court has already rejected these ***exact same Establishment Clause arguments*** against a “substantial burdens” provision of RLUIPA – except substituting “land-use officials” for “prison officials,” and “landowners” for “prisoners” – in *Mayweathers v. Newland*, 314 F.3d 1062 (9th Cir. 2002), *cert. denied sub nom. Alameida v. Mayweathers*, 124 S. Ct. 66 (2003). The City has not offered any good faith basis for distinguishing these arguments in the land-use context, nor could it, because there is none. Indeed, the City has not even cited *Mayweathers* in its brief.⁵ Therefore, the City’s Establishment Clause challenge should be summarily rejected.

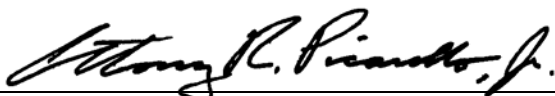
⁵ The City’s omission of this controlling authority on the Establishment Clause issue – indeed, the City’s even asserting an Establishment Clause challenge at all on appeal – is especially puzzling, because the City had to have known of *Mayweathers* from the Church’s opening brief (p.19). See FED. R. CIV. P. Rule 11(b)(1), (b)(2). But a footnote in the Establishment Clause section of the City’s brief suggests its purpose in raising that challenge: the prospect of further delay. See City Br. 38 n.2. For several reasons, the Court should not delay in any way the process for deciding this case because *Cutter v. Wilkinson*, 349 F.3d 257 (6th Cir. 2005), *cert. granted*, 125 S. Ct. 308 (U.S. Oct. 12, 2004) (No. 03-9877), is pending before the Supreme Court. First, as this Court has already noted, this case has seen more than its fair share of delays. See Order of December 30, 2004. Second, *Cutter* will be decided by the end of June, almost certainly before this case would be decided in the ordinary course. Third, the pendency of *Cutter* has not stopped other Courts of Appeals from deciding (and rejecting) Establishment Clause or other challenges to the constitutionality of RLUIPA. See, e.g., *Benning v. Georgia*, 391 F.3d 1299 (11th Cir. 2004) (rejecting Establishment Clause, Spending Clause, and Tenth Amendment challenges to RLUIPA, citing *Mayweathers*, after petition for *certiorari* in *Cutter* was granted). Fourth, this Court has good reason

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.

Dated: February 24, 2005

THE BECKET FUND FOR RELIGIOUS LIBERTY

By: 
Anthony R. Picarello, Jr., Esq. *
Roman P. Storzer, Esq.
Derek L. Gaubatz, Esq.
1350 Connecticut Avenue, NW, Suite 605
Washington, DC 20036
Phone: (202) 955-0095
Fax: (202) 955-0090

Robert H. Tyler, Esq.
Douglas L. Edgar, Esq.
ALLIANCE DEFENSE FUND
38760 Sky Canyon Drive, Suite B
Murrieta, CA 92563
Phone: (951) 461-7860
Fax: (951) 461-9056

** Counsel of Record*

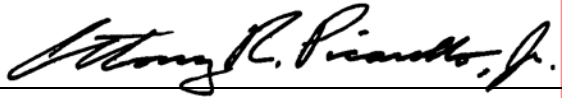
*Attorneys for Plaintiffs-Appellants
Elsinore Christian Center and
Gary Holmes*

to believe that *Mayweathers* will remain good law after *Cutter* is decided: **every court** other than *Cutter* to hear these same Establishment Clause arguments has rejected them, not only as against the prisoner and land-use provisions of RLUIPA, but also against RFRA before it. See Church Br. 19-20 & nn.13-14.

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 less than 7,000 words, as calculated by Microsoft Word.

Dated: February 24, 2005



Anthony R. Picarello, Jr.

CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury that, on this 24th day of February, 2005, copies of the foregoing REPLY BRIEF OF PLAINTIFFS-APPELLANTS ELSINORE CHRISTIAN CENTER AND GARY HOLMES were sent by United States mail, first class postage prepaid, to the following:

David H. Mann, Esq.
Jon McClendon, Esq.
Barbara Leibold, Esq.
Van Blarcom, Lebold, McClendon
& Mann
23422 Mill Creek Drive, Suite 105
Laguna Hills, CA 92653

Attorneys for Defendants CITY OF
LAKE ELSINORE,
REDEVELOPMENT AGENCY,
ROBERT A. SCHIFFNER,
PAMELA BRINLEY, DANIEL
METZE, GENIE KELLY and
KEVIN PAPE

Edwin J. Richards, Esq.
Jules S. Zeman, Esq.
Haight, Brown & Bonesteel, LLP
6080 Center Drive, Suite 800
Los Angeles, CA 90045-1574

Co-counsel for Defendants CITY
OF LAKE ELSINORE, et al.

Lowell V. Sturgill
United States Department of Justice
601 D Street, N.W.
Room 9140
Washington, D.C. 20530

Attorneys for United States
Department of Justice

Megan Anderson