Housing And Civil Enforcement Cases Documents

R. ALEXANDER ACOSTA
Assistant Attorney General
STEVEN H. ROSENBAUM, Chief
DIANE L. HOUK, Special Litigation Counsel
JE YON JUNG (Ohio # 0067441)
JAMES D. TODD, JR. (D.C. # 463511)
Trial Attorneys, U.S. Department
of Justice, Civil Rights Division
Housing and Civil Enforcement Section
950 Pennsylvania Avenue, N.W., G Street
Washington, D.C. 20530
Tel: (202) 305-1457 Fax: (202) 514-1116
jeyon.jung@usdoj.gov

EDWARD H. KUBO, JR. (2499)
United States Attorney
MICHAEL CHUN (3300)
HARRY YEE (3790)
Assistant U.S. Attorneys
PJKK Federal Building
300 Ala Moana Blvd., Rm. 6-100
Honolulu, HI 96850
Tel: (808) 541-2850 Fax:
(808) 541-3752
harry.yee@usdoj.gov
Attorneys for the United States

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF HAWAI'I

Civil 03-00362 SPK KSC

UNITED STATES OF AMERICA,

Plaintiff,

v.

Maui County,

Defendant.

PLAINTIFF UNITED STATES OF AMERICA'S OPPOSITION TO DEFENDANT'S MOTION TO DISMISS; TABLE OF CONTENTS; TABLE OF AUTHORITIES; CERTIFICATION RE: PAGE LIMIT; EXHIBITS 1-11; CERTIFICATE OF SERVICE
DATE: November 14, 2003
TIME: 10:00 a.m.
JUDGE: Samuel P. King

PLAINTIFF UNITED STATES OF AMERICA'S OPPOSITION TO DEFENDANT'S MOTION TO DISMISS

INTRODUCTION AND SUMMARY OF ARGUMENT

On July 10, 2003, the United States of America filed a Complaint against the Maui Planning Commission alleging violations of § 2(a) of the Religious Land Use and Institutionalized Persons Act of 2000 ("RLUIPA"), Pub. L. No. 106-274, 114 Stat. 803-807 (Sept. 22, 2000), codified at 42 U.S.C. §§ 2000cc - 2000cc-5 [attached at Tab 1]. On September 9, 2003, defendant filed a motion to dismiss. For the reasons set forth below, this Court should deny defendant's motion.

Contrary to defendant's contentions, the United States: (i) is not time-barred by any statute of limitations from bringing this action; (ii) has sued the proper party; (iii) has standing to maintain this action; and (iv) has not violated the Tenth Amendment in bringing this action.

Moreover, contrary to defendant's assertions, RLUIPA's land use provisions, both on their face and as applied in this case, do not violate the Establishment Clause, because they do not themselves promote or subsidize any religious belief or message. See Mayweathers v. Newland, 314 F.3d 1062, 1068-69 (9th Cir. 2002) (upholding RLUIPA's institutionalized persons provisions against Establishment Clause challenge). Instead, they merely permit religious groups and individuals to practice their religion as they otherwise would in the absence of unjustified government-imposed land use regulations. See id.

Further, Congress enacted RLUIPA's land use provisions at issue in this case to provide for direct enforcement of three types of well-established constitutional prohibitions that it found were being violated in the land use context.[1] First, RLUIPA's prohibition against "substantial burdens" on religious exercise that result from "individualized exemptions" to government regulations codifies the constitutional prohibition announced in Sherbert v. Verner, 374 U.S. 398, 405-07 (1963). That prohibition not only survives the rule reaffirmed in Employment Division v. Smith, 494 U.S. 872, 890 (1990), that rational basis scrutiny applied to neutral, generally applicable laws that substantially burden religious exercise, but also applies to individual exemptions outside the unemployment benefits context. See Church of the Lukumi

Babalu Aye, Inc. v. Hialeah, 508 U.S. 520, 537 (1993) (applying strict scrutiny to public welfare ordinances containing "individualized government assessment[s]" that substantially burden religious exercise). Moreover, RLUIPA's definition of free exercise does not change what constitutes the free exercise of religion, or, more significantly, what constitutes a substantial burden on the exercise of religion.[2]

Second, although defendant does not appear to contest this fact, the Act's non-discrimination prohibition codifies, in the land use context, constitutional prohibitions against unequal treatment of religious exercise and discrimination on the basis of religion. See, e.g., Lukumi, 508 U.S. at 542-43 (Free Exercise Clause also "'protects against unequal treatment'" and "inequality results" whenever a government interest "is pursued only against conduct with a religious motivation."); see also United States v. Batchelder, 442 U.S. 114, 125 n.9 (1979) (classifications based on religion are subject to strict scrutiny under the Equal Protection Clause).

Third, again, although defendant does not appear to contest this fact, the statute's "unreasonable-limitation" provision codifies the constitutional prohibitions against a jurisdiction's unreasonable limitations on land use. See Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 440 (1985) (Equal Protection Clause forbids treating similarly-situated, but unpermitted, land uses differently unless they threaten legitimate government interests in a way that other permitted uses do not).

In addition, because Congress merely codified these well-defined constitutional prohibitions for "greater visibility and easier enforcement," 146 Cong. Rec. S7774, S7775 (daily ed. July 27, 2000) (Jt. Statement of Sen. Hatch and Sen. Kennedy) [attached at Tab 7], RLUIPA's land use provisions need not be subjected to the congruence and proportionality test set out in Boerne v. Flores, 521 U.S. 507, 533-34 (1997), because they are not, and should not be interpreted to be, prophylactic legislation that prohibits otherwise constitutional conduct.[3] But even to the extent that any of RLUIPA's land use provisions could properly be interpreted to prohibit some constitutionally permissible conduct incidentally, they are nonetheless congruent and proportional responses to the pattern of religious discrimination documented by Congress. See Nevada Dept. of Human Res. v. Hibbs, _ U.S. _, 123 S. Ct. 1972, 1982 (2003) (Family and Medical Leave Act, 29 U.S.C. §§ 2612(a)(1) et seq., is a congruent and proportional response to the targeted gender discrimination); Varner v. Illinois State Univ., 226 F.3d 927, 932-36 (7th Cir. 2000), cert. denied, 533 U.S. 903 (2001) (Equal Pay Act, 29 U.S.C. §§ 206(d)(1) et seq., is a congruent and proportional response to targeted gender discrimination).

Further, defendant's challenge to RLUIPA's Commerce Clause application entirely ignores not only the Supreme Court's and the Ninth Circuit's "affecting commerce" jurisprudence, which has upheld jurisdictional elements that closely mirror RLUIPA § 2(a)(2)(B), but also ignores this Court's own holding that RLUIPA is valid Commerce Clause legislation. See Hale O Kaula Church v. Maui Planning Comm'n, 229 F. Supp. 2d 1056, 1072 (D. Haw. 2002). This jurisprudence

validates the constitutionality of RLUIPA's Commerce Clause application because statutes such as RLUIPA have jurisdictional requirements that properly limits their application. Such statutes apply only once a court finds, after an analysis of the specific facts of the case, that the precise conduct regulated by the statute (here, for example, that the burden on religion challenged in this lawsuit (or the burden's removal)) "affects" interstate commerce. Thus, the statute either applies, and its application is constitutional, or does not, in which case constitutionality is not at issue. See id. (noting that further Commerce Clause analysis is only appropriate for "laws of general applicability where Congress regulates an entire field of activity").

Finally, despite defendant's assertions to the contrary, the Seventh Circuit's recent ruling in Civil Liberties for Urban Believers v. Chicago, 342 F.3d 752, 762 (7th Cir. 2003), that, inter alia, the City of Chicago's zoning ordinances do not violate RLUIPA, has no bearing on whether RLUIPA applies to the facts alleged in this case. Rather, as is clear from both the face of the statute and the facts alleged in the complaint, each of RLUIPA's land use provisions at issue expressly prohibits the conduct alleged in the complaint.

STATUTORY BACKGROUND

RLUIPA addresses what Congress determined to be two areas in which the actions of state and local governments impose substantial burdens on the free exercise of religion--state and local land use regulations and restrictions on institutionalized persons in the custody of states and localities. Only the former provisions are at issue here.

A. RLUIPA's Land Use Provisions

Section 2(a) of RLUIPA provides that no state or local government "shall impose or implement a land use regulation in a manner that imposes a substantial burden on the religious exercise of a person, including a religious assembly or institution, unless the government demonstrates that imposition of the burden" is both "in furtherance of a compelling governmental interest" and "the least restrictive means" of furthering that interest. Pursuant to Congress's powers, inter alia, to regulate interstate commerce and to enforce the Fourteenth Amendment, this section contains a jurisdictional requirement that limits application of this prohibition to those cases in which:

the substantial burden affects, or removal of that substantial burden would affect, commerce with foreign nations, among the several States, or with Indian tribes, even if the burden results from a rule of general applicability; or

the substantial burden is imposed in the implementation of a land use regulation or system of land use regulations, under which a government makes, or has in place formal or informal procedures or practices that permit the government to make, individualized assessments of the proposed uses for the property involved.

42 U.S.C. §§ 2000cc-(a)(2)(B)-(C).

RLUIPA's substantial burden provision, then, essentially applies strict scrutiny to non-generally applicable land use regulations that substantially burden the freedom to assemble for religious purposes: Unless the state or local government has a compelling rationale in support of its burdensome regulation, it cannot use the regulation to hinder religious exercise.

RLUIPA's non-discrimination and non-exclusion provisions also protect religious assemblies or institutions. Section 2(b)(2) provides that these governmental entities shall not "impose or implement a land use regulation that discriminates against any assembly or institution on the basis of religion or religious denomination." In addition, § 2(b)(3)(B) provides that "[n]o government shall impose or implement a land use regulation that . . . unreasonably limits religious assemblies, institutions, or structures within a jurisdiction." As with >§ 2(a)(2)(C), Congress enacted each provision of § 2(b) pursuant to its Fourteenth Amendment enforcement power. See 146 Cong. Rec. at S7775.

B. Legislative History

Congress passed RLUIPA to protect the right of religious assembly against undue interference:

Churches and synagogues cannot function without a physical space adequate to their needs and consistent with their theological requirements. The right to build, buy, or rent such a space is an indispensable adjunct of the core First Amendment right to assemble for religious purposes.

146 Cong. Rec. at S7774. In evaluating the need for such legislation, Congress heard testimony in nine separate hearings over three years that "addressed in great detail both the need for legislation and the scope of Congressional power to enact such legislation." Id. See also Religious Liberty Protection Act of 1999 Report, H.R. Rep. No. 106-219, at 17-24 (1999) [attached at Tab 8] (summarizing testimony). The testimony--both anecdotal and statistical--strongly indicated a pattern of abuse in need of a remedy. See H.R. Rep. No. 106-219, at 17.[4] Some examples follow:

The hearings established that minority religions and religions unfamiliar to an individual community are often subjected to rigorous scrutiny that results in discrimination. Testimony included a description of a Mormon church that applied to use a building that another church had recently left. See H.R. Rep. No. 106-219, at 22. The city denied the permit on the basis that the new church would not be "in the best interests of and promote the public health, safety, morals, convenience, order, prosperity, and general welfare of the City." Id. Another witness described the denial of an application by a Pentecostal church to use an existing school building. The denial of the application was upheld in court, where the judge commented that " [w]e don't want twelve-story prayer towers in Rockford." Id. at 23.

In addition, Congress heard about Orthodox Minyan of Elkins Park v. Cheltenham Twp. Zoning Hearing Bd., 123 Pa. Commw. 29, 552 A.2d 772 (1989), a case in which the zoning board denied an application of an Orthodox Jewish congregation because the proposed structure did not include enough parking spaces for the number of seats in the building. See H.R. Rep. No. 106-219, at 23. The congregation had explained that Orthodox Jews do not drive on their Sabbath, the day they would attend the synagogue, and so parking spaces were not necessary. But the city would not relent, and so the congregation amended its proposal to add the requisite number of parking spaces. The city then denied the application because it would create too much traffic. See id.

Congress also heard testimony regarding a proposal to subject churches to the same rules as commercial establishments, which effectively proscribed any church activity outside of approved "operational hours." H.R. Rep. No. 106-219, at 11. This would have prevented Catholic churches, for example, from performing an act of devotion known as the Perpetual Adoration of Blessed Sacrament, which requires that the Blessed Sacrament in the church never be left unattended. See id. at 11 n.36. Seemingly "neutral" rules, Congress found, could have dramatic effects on religious assembly rights. By contrast, Congress found many non-religious assemblies, such as banquet halls, community centers, and meeting halls, were not subject to the same sorts of discrimination.[5] See id. at 19.

Based on this and other similar testimony, Congress found that the "[s]tatistical and anecdotal evidence strongly indicates a pattern of abusive and discriminatory actions by land use authorities who have imposed substantial burdens on religious exercise." Id. at 17. In light of these findings, Congress determined that it was appropriate to provide a statutory remedy and judicial forum to address egregious and unnecessary burdens on religious liberty, when such burdens fall within its power under the Fourteenth Amendment. See id.

ARGUMENT

I. THE UNITED STATES CAN MAINTAIN THIS ACTION AGAINST DEFENDANT

A. The United States is Not Time Barred from Enforcing RLUIPA Against Defendant

The United States' action was filed well within the applicable four-year statute of limitations period. Contrary to defendant's assertion, the United States is not subject to Hawai'i's two-year statute of limitations period that governs private civil rights actions, such as those brought under 42 U.S.C. §§ 1981 or 1983. Rather, because RLUIPA, enacted in 2000, itself contains no statute of limitations, the four-year federal statute of limitations for bringing civil actions to enforce any laws enacted since 1990 applies to this action. See 28 U.S.C. § 1658(a) ("Except as otherwise provided by law, a civil action arising under an Act of Congress enacted after [December 1, 1990] may not be commenced later than 4 years after the cause of action accrues."). The United States' Complaint, filed on July 10, 2003, alleges that defendant violated

RLUIPA in July 2001, at the earliest. Thus, the United States commenced this action within, at most, just over two years of the alleged violations, well within the four-year statute of limitations established by § 1658(a).

Defendant maintains that 42 U.S.C. § 1988(a) dictates that Hawai'i's two-year statute of limitations applies. However, § 1988(a) only provides that:

[the civil rights] laws shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause. . . .

42 U.S.C. § 1988(a). Thus, by the statute's own terms, state law is not applicable unless the laws of the United States are unsuitable to carry the same into effect. Zubi v. AT&T Corp., 219 F.3d 220, 226 (3d Cir. 2000) ("Section 1988 does not provide a specific limitations period for claims that would otherwise be governed by § 1658; it provides only for the borrowing of state rules when there are no federal rules suitable to carry the civil rights laws into effect."). Such is not the case here.

Moreover, contrary to defendant's assertion, § 1988 does not control the statute of limitations for all "civil rights" cases. In support of this proposition, defendant cites a string of cases holding that § 1988 governs the statute of limitations for certain civil rights actions. See Def. Mot. at 6-7. However, as defendant fails to cite any cases addressing statutes enacted after December 1, 1990, these cases are entirely inapposite.

Further, the Third Circuit has addressed the question of § 1988's application to statutes enacted after 1990, and has expressly found that "§ 1988 does not provide a statute of limitations for civil actions arising under acts of Congress enacted after December 1, 1990, so as to preclude application of § 1658." Zubi, 219 F.3d at 226; id. at 223 ("Congress enacted § 1658 in response to calls for a new, nationally uniform statute of limitations for federal causes of action not having their own explicit limitations period."); see also Jones v. R.R. Donnelley & Sons Co., 305 F.3d 717, 725 (7th Cir. 2002) ("In enacting this section, Congress sought to alleviate the uncertainty inherent in the practice of borrowing analogous state statutes of limitations for federal causes of action that do not contain their own limitations periods."), cert. granted, _ U.S. _, 123 S. Ct. 2074 (2003); Madison v. IBP, Inc., 257 F.3d 780, 798 (8th Cir. 2001) ("We agree with the reasoning articulated in Zubi."), vacated on other grounds, 536 U.S. 919 (2002).[6] The United States is aware of no authority to the contrary. Because RLUIPA's enforcement is governed by §

1658's four-year statue of limitations, the United States is not time-barred from bringing this action for violations of the statute that occurred in July 2001, at the earliest.

B. The United States Sued the Proper Party

The Maui Planning Commission is the proper defendant to this action. Contrary to defendant's assertion that state law allows a lawsuit to be brought only against Maui County, Hawai'i Revised Statute § 91-14 specifically authorizes judicial review of agency decisions. The Maui Planning Commission has been the sole defendant pursuant to § 91-14. See Chang v. Planning Comm'n of the County of Maui, 643 P.2d 55 (Haw. 1982). In addition, the Maui Planning Commission has been a defendant in a number of state court actions. See, e.g., Kahana Sunset Owners Ass'n v. Maui Planning Comm'n, 947 P.2d 378 (Haw. 1997); Peabody v. Maui Planning Comm'n, 797 P.2d 58 (Table) (Haw. 1990); Hui Alaloa v. Planning Comm'n of the County of Maui, 705 P.2d 1042 (Haw. 1985). In any event, should this Court so require, the United States will amend its Complaint to add the County of Maui as a defendant as a matter of course before defendant files a responsive pleading (i.e., an answer), in accordance with Fed. R. Civ. P. 15(a).

C. The United States Has Standing

The United States' standing to bring this action is rooted in the plain language of the statute itself and Supreme Court precedent regarding Article III and prudential standing requirements. Defendant fails to acknowledge the United States' specific statutory authority under RLUIPA and incorrectly asserts that the United States cannot satisfy either the Article III or the prudential standing requirements to bring this action to enforce RLUIPA.

First, RLUIPA § 4(f) specifically authorizes the United States to bring this action: "The United States may bring an action for injunctive or declaratory relief to enforce compliance with this Act." 42 U.S.C. § 2000cc(4)(f). Because defendant itself concedes that the United States has standing if express statutory authority is granted, see Def. Mot. at 16 ("In any case, the federal government is not authorized to bring suit against an agency of a municipality unless it has express statutory authority. . . .") (emphasis added), this Court should dispense with defendant's standing argument in summary fashion.

As the Supreme Court explained in Warth v. Seldin, 422 U.S. 490 (1975), "[i]n essence, the question of standing is whether the litigant is entitled to have the court decide the merits of the dispute or of particular issues." Id. at 498. Significantly, in defining the injury required by Article III, the Supreme Court went on to note that "[t]he actual or threatened injury required by Article III may exist solely by virtue of statutes creating legal rights, the invasion of which creates standing." Id. at 500 (emphasis added) (citation and quotation marks omitted). Moreover, the Court continued, "Congress may create a statutory right or entitlement the alleged deprivation of which can confer standing to sue even where the plaintiff would have suffered no judicially cognizable injury in the absence of statute." Id. at 514.[7] Because Congress provided the United

States with direct statutory authority to enforce RLUIPA, it satisfies the Article III requirement of standing to maintain this action.

Defendant's prudential standing arguments against the United States must similarly fail. Quite simply, the Supreme Court has stated that, "Congress may grant an express right of action to persons who otherwise would be barred by prudential standing rules." Id. at 501. Again, because Congress provided the Attorney General with direct statutory authority to enforce RLUIPA, the allegations of the United States' Complaint satisfy the prudential requirements of standing.

Satisfaction of the standing requirements notwithstanding, defendant argues that the United States has not alleged an injury distinct from that alleged in the private action instituted by the Hale O Kaula Church itself. See Def. Mot. at 14-15. However, the United States' authority to bring a RLUIPA action in accordance with RLUIPA 4(f) is "to enforce compliance" with RLUIPA. Nothing in the statute even suggests that the existence of a private cause of action prohibits the United States from its own cause of action.

Indeed, the Supreme Court addressed and rebuffed an analogous argument in United States v. Borden, Co., 347 U.S. 514 (1954). Borden involved a government action against private parties for violations of the Clayton Act when a private injunction had already been entered. In holding that the United States had standing to enforce the Act, the Court found that:

[t]he Government seeks its injunctive remedies on behalf of the general public; the private plaintiff, though his remedy is made available pursuant to public policy as determined by Congress, may be expected to exercise it only when his personal interest will be served. These private and public actions were designed to be cumulative, not mutually exclusive.

Id. at 518 (citation omitted). In this case, like Borden, the United States seeks injunctive relief regarding, inter alia, defendant's formal or informal procedures or practices which impose a substantial burden on religious exercise without a compelling governmental interest or with the least restrictive means of furthering that compelling governmental interest. See Compl. ¶22 & Prayer for Injunctive Relief ¶1-2. Here, like Borden, the United States' "right and duty to seek an injunction to protect the public interest exists without regard to any private suit or decree." Id. at 519; see also California v. American Stores Co., 872 F.2d 837, 843 (9th Cir. 1989) (applying Borden to uphold state's right to bring a separate action to protect a private right), rev'd on other grounds, 495 U.S. 271 (1990).[8]

Defendant also suggests that the United States, through its Attorney General, must meet additional determinations prior to filing suit, such as those provided under Title VIII of the Civil Rights Act of 1968, 42 U.S.C. §§ 3601 et seq., such as a "pattern or practice" or a finding of "general public importance." See Def. Mot. at 12. Quite simply, that Congress did not see fit to "restrain" the Attorney General from enforcing RLUIPA in a manner similar to the Fair Housing Act is irrelevant from a standing perspective. See, e.g., Freedom of Access to Clinic Entrances

Act ("FACE") 18 U.S.C. § 248(c)(2)(A). Because RLUIPA specifically authorizes the Attorney General to enforce RLUIPA, the United States is not required to allege in its Complaint more than what the statute requires.

Finally, defendant claims that the use of federal funds to enforce RLUIPA violates the Establishment Clause. See Def. Mot. at 12-13. However, in addressing an Establishment Clause challenge to RLUIPA's conditioning of federal funds on compliance with its institutionalized persons provisions, the Ninth Circuit addressed this concern in Mayweathers:

The First Amendment . . . demonstrates the great value placed on protecting religious worship from impermissible government intrusion. By ensuring that governments do not act to burden the exercise of religion . . . , RLUIPA is clearly in line with this positive constitutional value. . . . RLUIPA follows a long tradition of federal legislation designed to guard against unfair bias and infringement on fundamental freedoms.

314 F.3d at 1067-68. Accordingly, this Court should reject defendant's contention.

Addressing an almost identical argument regarding the United States' enforcement authority under the Rivers and Harbors Act, 33 U.S.C. §§ 403 et seq. the First Circuit found that because " [t]he United States plainly has standing under the statute," defendant's "lack of standing argument is incomprehensible." United States v. San Juan Bay Marina, 239 F.3d 400, 408 (1st Cir. 2001). The United States clearly meets the constitutional and prudential limitations of standing to bring this action against defendant.

II. ENFORCING RLUIPA DOES NOT VIOLATE THE TENTH AMENDMENT

The United States' enforcement of RLUIPA does not violate the Tenth Amendment. First, Congress enacted RLUIPA §§ 2(a)(2)(C), (b)(2), and (b)(3)(B) pursuant to Congress's Fourteenth Amendment enforcement power, which was adopted with the specific intent of expanding federal power vis-à-vis the states in the wake of the Civil War. Consequently, as the Supreme Court has held, "principles of federalism that might otherwise be an obstacle to congressional authority are necessarily overridden by the power to enforce the Civil War Amendments." Rome v. United States, 446 U.S. 156, 179 (1980).

Nor does enforcement of the portion of RLUIPA enacted pursuant to Congress's Commerce Clause power, § 2(a)(2)(B), violate the Tenth Amendment. The Tenth Amendment is commonly described as a tautology. Powers not granted to Congress are given to the states and localities; therefore, if a statute is validly enacted under a power granted to Congress, local rights are not infringed and the Tenth Amendment is not implicated. See United States v. Jones, 231 F.3d 508, 515 (9th Cir. 2000) ("[I]f Congress acts under one of its enumerated powers, there can be no violation of the Tenth Amendment."); United States v. Wilson, 159 F.3d 280, 287 (7th Cir. 1998) (same). Beyond that, the Tenth Amendment prohibits the federal government from commandeering states or state officials to administer federal programs. See Printz v. United

States, 521 U.S. 898, 935 (1997); New York v. United States, 505 U.S. 144, 175-76 (1992). New York and Printz, according to the Supreme Court itself, held only that Congress cannot force the states to enact a federal regulatory program, and also cannot co-opt state officers directly. Specifically, the Court "held in New York that Congress cannot compel the States to enact or enforce a federal regulatory program. Today we hold that Congress cannot circumvent that prohibition by conscripting the state's officers directly." Printz, 521 U.S. at 935.

RLUIPA's Commerce Clause application does not "commandeer" a locality in violation of New York and Printz. See Mayweathers, 314 F.3d at 1069. It does not compel the states "to enact or enforce" a federal program through state legislation. Nor does it "conscript[] the States directly" to enforce federal legislation. Cf. Reno v. Condon, 528 U.S. 141, 149-50 (2000) (upholding the Driver's Privacy Protection Act of 1994 against similar challenges). RLUIPA § 2(a)(2)(B) contains no affirmative mandate and no regulatory program. It remains the decision of the states and localities to enact land use regulations. RLUIPA is implicated only if a state or locality chooses to impose a substantial burden on religious exercise in ways that are not the least restrictive means of furthering a compelling governmental interest. That the state may have to expend resources to comply with RLUIPA would not bolster this argument. See South Carolina v. Baker, 485 U.S. 505, 514-515 (1988) ("Any federal regulation demands compliance. That a State wishing to engage in certain activity must take administrative and sometimes legislative action to comply with federal standards regulating that activity is a commonplace that presents no constitutional defect.").

Nevertheless, defendant asserts that, because RLUIPA regulates land use, the Tenth Amendment's protections against its enforcement are somehow greater. See Def. Mot. at 16-17; cf. Elsinore, supra, slip op. at 41-42. However, both defendant and the Elsinore decision fail to recognize that Congress already regulates, via its Commerce Clause power, local land use without judicially recognized constitutional objection. For example, each circuit court to have considered constitutional challenges to the Fair Housing Act's reasonable accommodation provision, 42 U.S.C. § 3604(f)(5)(b), has rejected them. See Groome Res. Ltd. v. Jefferson, 234 F.3d 192, 209 (5th Cir. 2000) ("[I]n the context of the strong tradition of civil rights enforced through the Commerce Clause--a tradition in which the FHAA firmly sits--we have long recognized the broadly defined 'economic' aspect of discrimination.") (citing Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241, 257 (1964)); Oxford House-C v. St. Louis, 77 F.3d 249, 251 (8th Cir. 1996) (holding that "Congress had a rational basis for deciding that housing discrimination against the handicapped [via local land use laws], like other forms of housing discrimination, has a substantial effect on interstate commerce"); Morgan v. Secretary of HUD, 985 F.2d 1451, 1455 (10th Cir. 1993) (same); Seniors Civil Liberties Ass'n v. Kemp, 965 F.2d 1030, 1034 (11th Cir. 1992) (same). Similarly, in adopting § 332(c)(7)(B) of the Telecommunications Act of 1996, Congress also chose to regulate the authority of state or local governments to pass upon zoning requests of wireless service providers without (to date) any judicially recognized constitutional objection. See 47 U.S.C. § 332(c)(7)(B); Freedom Baptist Church, 204 F. Supp. 2d

at 867. Because Congress can regulate local land use via its Commerce Clause power, there can be no Tenth Amendment objection to bringing an action to enforce that power.

Accordingly, enforcement either of RLUIPA's Fourteenth Amendment applications or of its Commerce Clause application against defendant does not violate the Tenth Amendment.

III. RLUIPA DOES NOT VIOLATE THE ESTABLISHMENT CLAUSE

The Supreme Court has repeatedly stated that government may legislatively accommodate religious exercise consistent with the Establishment Clause. See Board of Educ. of Kiryas Joel Village Sch. Dist. v. Grumet, 512 U.S. 687, 705 (1994) ("Our cases leave no doubt that in commanding neutrality the Religion Clauses do not require the government to be oblivious to impositions that legitimate exercises of state power may place on religious belief and practice."); Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos, 483 U.S. 327, 334 (1987) ("'The Court has long recognized that the government may (and sometimes must) accommodate religious practices, and that it may do so without violating the Establishment Clause.'") (quoting Hobbie v. Unemployment Appeals Comm'n of Fla., 480 U.S. 136, 144-145 (1987)).[9] Applying these holdings, the Ninth Circuit has expressly held that RLUIPA's institutionalized persons provisions do not violate the Establishment Clause. See Mayweathers, 314 F.3d at 1068. Defendant entirely ignores this line of precedent, maintaining instead that any legislation that accommodates religious exercise is inherently unconstitutional. See Def. Mot. at 19-27.

As defendant admits, see Def. Mot. at 22, the proper framework for evaluating Establishment Clause challenges to accommodation statutes such as RLUIPA is the three-part test articulated in Lemon v. Kurtzman, 403 U.S. 602 (1971). See Amos, 483 U.S. at 335; Mayweathers, 314 F.3d at 1068. Under the Lemon test, a statute will survive an Establishment Clause challenge if it (1) has "a secular legislative purpose," (2) has a "principal or primary effect" that "neither advances nor inhibits religion," and (3) does not "foster an excessive government entanglement with religion." Lemon, 403 U.S. at 612-13 (internal quotation marks and citations omitted).

Defendant incorrectly claims that RLUIPA fails the first prong of the Lemon test, i.e., that the statute serve a secular purpose, because RLUIPA's purported purpose is to establish a religious test to excuse religious land users from land use laws. See Def. Mot. at 23. Defendant misstates RLUIPA's purpose; rather than establishing a religious test, Congress's precise aim in enacting RLUIPA § 2 was to alleviate unnecessary governmental interference. See 146 Cong. Rec. E1234, E1235 (Remarks of Rep. Canady) [attached at Tab 9] (explaining that RLUIPA was "designed to protect the free exercise of religion from unnecessary government interference"). Indeed, the Supreme Court has repeatedly recognized that "it is a permissible legislative purpose to alleviate significant governmental interference with the ability of religious organizations to define and carry out their religious missions." Amos, 483 U.S. at 335; see also Bowen v. Kendrick, 487 U.S. 589, 602 (1988) (plurality) (holding that a law fails this prong "only if it is

motivated wholly by an impermissible purpose") (emphasis added); Gillette v. United States, 401 U.S. 437, 453 (1971) (any effort to protect first Amendment values is "neutral in the sense of the Establishment Clause."). Moreover, in passing upon an Establishment Clause challenge to RLUIPA's institutionalized persons provisions, the Ninth Circuit itself held that the statute is "designed to protect the free exercise of religion . . . from unwarranted and substantial infringement." Mayweathers, 314 F.3d at 1068. Just as the Ninth Circuit has found that this is a permissible secular purpose for RLUIPA's institutionalized persons, so should this Court for RLUIPA's land use provisions.[10]

The second prong of the Lemon test requires that a statute's "principal or primary effect . . . neither advance[] nor inhibit[] religion." Lemon, 403 U.S. at 612. Defendant asserts that RLUIPA violates the Establishment Clause because it "advances religious land owners uses ahead of those whose land does not include religious exercise," and somehow "imposes a religious test." Def. Mot. at 24. First, defendant fails to explain how a law that merely codifies Free Exercise protections violates the Establishment Clause. Moreover, the Supreme Court has explained that "[f]or a law to have forbidden 'effects' under Lemon, it must be fair to say that the government itself has advanced religion through its own activities and influence." Amos, 483 U.S. at 337 (emphasis in original); Mayweathers, 314 F.3d at 1068. Although defendant asserts otherwise, RLUIPA § 2 does not itself promote or subsidize a religious belief or message; on its face, the statute merely frees religious groups and individuals to practice as they otherwise would in the absence of certain government-imposed land-use regulations. The Supreme Court has emphasized that "[a] law is not unconstitutional simply because it allows churches to advance religion, which is their very purpose." Amos, 483 U.S. at 337 (emphasis in original); see also Mayweathers, 314 F.3d at 1068; Boyajian v. Gatzunis, 212 F.3d 1, 10 (1st Cir. 2000) (finding that a Massachusetts law prohibiting municipal authorities from excluding religious uses of property from a zoning area "does not itself advance religion but clears the way so that churches themselves may do so"). Accordingly, "[w]here, as here, government acts with proper purpose of lifting a regulation that burdens the exercise of religion, we see no reason to require that the exemption comes packaged with benefits to secular entities." Amos, 483 U.S. at 338; Mayweathers, 314 F.2d at 1069 (quoting Amos).

Second, to the extent that defendant suggests that RLUIPA's Commerce Clause application impermissibly advances religion because it extends greater protection to religious exercise than does the First Amendment's Free Exercise Clause, see Def. Mot. at 24-25, it is in error. The Supreme Court has repeatedly and unequivocally held that "'[t]he limits of permissible state accommodation to religion are by no means co-extensive with the noninterference mandated by the Free Exercise Clause.'" Amos, 483 U.S. at 334 (quoting Walz, 397 U.S. at 673) (alteration in original); see also Smith, 494 U.S. at 890 ("Values that are protected against government interference through enshrinement in the Bill of Rights are not thereby banished from the political process. . . . [A] society that believes in the negative protection accorded to religious belief can be expected to be solicitous of that value in its legislation as well.").[11]

Third, defendant claims that RLUIPA violates Lemon's entanglement prong[12] because compliance requires the government to become an expert in religious land uses. See Def. Mot. at 25-27. However, the Supreme Court addressed, and rejected, this same argument in Amos. In Amos, the Supreme Court upheld a statutory provision that exempted religious groups from Title VII's prohibition against religious discrimination in employment, holding that, "[i]t cannot be seriously contended that [the statute] impermissibly entangles church and state; the statute effectuates a more complete separation of the two . . . ." 483 U.S. at 339. Quite simply, defendant misunderstands RLUIPA's effect. The actual effect of RLUIPA's land use provisions is to relieve religious institutions from certain state-imposed burdens, not to involve the state in fostering religion. See Mayweathers, 314 F.3d at 1069.

Finally, defendant claims that Justice Stevens's lone opinion in Boerne, that the Religious Freedom Restoration Act (RFRA), 42 U.S.C. §§ 2000bb et seq., violated the Establishment Clause, should control RLUIPA's fate. See Def. Mot. at 27. However, because no other Justice joined Justice Stevens's opinion, the Ninth Circuit's holding that RFRA did not violate the Establishment Clause, see Mockaitis v. Harcleroad, 104 F.3d 1522, 1530 (9th Cir. 1997), remains binding on this court. Moreover, since Boerne, the Ninth Circuit expressly held that RFRA applies to the federal government, a conclusion it could not reach if the statute violated the Establishment Clause. See Guam v. Guerrero, 290 F.3d 1210, 1221 (9th Cir. 2002). And, as cannot be emphasized enough, the Ninth Circuit has expressly held that RLUIPA's institutionalized persons provisions does not violate the Establishment Clause. See Mayweathers, 314 F.3d at 1068-69. In short, because RLUIPA's land use provisions strike the same balance of religious accommodation as RFRA but on a far more modest scale, applying only in the limited context of land use regulation, RLUIPA's more limited protections are necessarily valid accommodation legislation.[13]

IV. RLUIPA IS A VALID USE OF CONGRESSIONAL POWER TO ENFORCE § 1 OF THE FOURTEENTH AMENDMENT BECAUSE IT MERELY CODIFIES WHAT § 1 REQUIRES

RLUIPA's Fourteenth Amendment applications of its land use provisions are constitutional because they merely codify what the Constitution requires. Section 1 of the Fourteenth Amendment prohibits the states from "depriv[ing] any person of life, liberty, or property, without due process of law" or from "deny[ing] to any person within its jurisdiction the equal protection of the laws." Section 1 applies the requirements of the First Amendment to the states. See Cantwell v. Connecticut, 310 U.S. 296, 303 (1940).[14]

A. RLUIPA's Fourteenth Amendment Application of § 2(a) Codifies Free Exercise Jurisprudence

As defendant correctly notes, the Free Exercise Clause does not relieve a person of the obligation to comply with a neutral, generally applicable law. See Smith, 494 U.S. at 890. However, although defendant fails to mention it, the Supreme Court has also held that the

Clause's protections "extend[] beyond facial discrimination," not only "forbid[ding]" "covert suppression of religious beliefs," but also "subtle departures from neutrality." Lukumi, 508 U.S. at 533 (citations omitted).

To protect against such infringement, the Court has repeatedly distinguished use of rational basis scrutiny appropriate for review of generally applicable neutral laws from the strict scrutiny appropriate for review, not merely of laws in the unemployment benefits context, but in any situation "where the State has in place a system of individual exemptions," yet "refuse[s] to extend that system to cases of 'religious hardship.' without compelling reason." Smith, 494 U.S. at 884 (citing, inter alia, Sherbert, 374 U.S. at 405-07); Hale O Kaula Church, 229 F. Supp. 2d at 1073.

Congress enacted RLUIPA's Fourteenth Amendment application of the substantial burden provision, § 2(a)(2)(C), for the express purpose of enforcing, in the land use context, the guarantees of the Free Exercise Clause as interpreted by the Supreme Court in those situations that involve government officials' individualized assessments of the burden imposed on religious beliefs. See Freedom Baptist Church, 204 F. Supp. 2d at 868 ("What Congress manifestly has done in this subsection is to codify the individualized assessments jurisprudence in Free Exercise cases that originated with the Supreme Court's decision in Sherbert . . ."); see also Murphy II, supra; Westchester Day School, 2003 WL 22110445, at * 5; Cottonwood, 218 F. Supp. 2d at 1221 ("To the extent that RLUIPA is enacted pursuant to 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."); see also 146 Cong. Rec. at S7775; H.R. Rep. No. 106-219, at 17.

Despite defendant's contention to the contrary, see Def. Mot. at 28-29, the individualized assessments doctrine articulated in Sherbert applies outside the unemployment-compensation context. Indeed, only three years after Smith, the Court expressly applied the exception to public welfare ordinances that regulated animal sacrifice in Lukumi, see 508 U.S. at 537,[15]

and even Smith, while noting that the Court had only addressed a system of individualized assessments in the unemployment benefits, expressly affirmed the vitality of the Sherbert exception in any system of individualized assessments. See 494 U.S. at 884;[16] Hale O Kaula Church, 229 F. Supp. 2d at 1072; but see Elsinore, supra, slip op. at 29 (notwithstanding Lukumi, holding that Supreme Court has never applied individualized exemptions doctrine outside the field of unemployment benefits).

Moreover, because of the continued vitality of the individualized-assessments standard, defendant's assertion that the Free Exercise Clause prohibits only "unmistakable pressure to forego religious beliefs" is erroneous. See Def. Mot. at 29. Rather, in any situation in which a government offers a system of individualized exemptions from a general requirement, the government "may not refuse to extend that system to cases of 'religious hardship' without

compelling reason." Lukumi, 508 U.S. at 537 (quoting Smith, 494 U.S. at 484). Moreover, the Supreme Court has also made clear that differential treatment of religious conduct that is otherwise similarly-situated to non-religious conduct is constitutionally suspect, and will be sustained only in rare circumstances. See id. at 542, 546.

Further, this Court should reject defendant's assertion that RLUIPA's definition of religious exercise changes the constitutional standard of Free Exercise violations. See Def. Mot. at 30-31; cf. Elsinore, supra, slip op. at 31. RLUIPA defines "religious exercise" to include "any exercise of religions, whether or not compelled by, or central to, a system of religious beliefs." RLUIPA § 8(7)(A). RLUIPA's exclusion of centrality from its definition of religious exercise simply codifies the Supreme Court's proscription against judicial inquiry into centrality. Smith, for example, affirmed that the courts are not equipped to judge religious matters, and therefore, cannot "'question the centrality of particular beliefs or practices, or the validity of particular litigants' interpretations of those creeds.'" 494 U.S. at 886-87 (quoting Hernandez v. Commissioner of Internal Revenue, 490 U.S. 680, 699 (1989)). The Ninth Circuit has expressly adopted this part of Smith's holding and reasoning. See Kreisner v. San Diego, 1 F.3d 775, 781 (9th Cir. 1993); accord Peterson v. Minidoka Cty. Sch. Dist., 118 F.3d 1351, 1357 (9th Cir. 1997) (Constitution protects an act "rooted in religious belief," not "mandated" by it) (citations omitted).[17]

In light of the Supreme Court's proscription against questioning the centrality of an individual's religious beliefs, RLUIPA's exclusion of centrality of religious exercise is jurisprudentially irrelevant. Thus, the courts' focus should remain on the whether the religious belief at issue is "sincerely held."[18] Smith, supra.

Second, many courts employing the constitutional standard have concluded that the burdens imposed on religious exercise by land use regulations were, in fact, substantial, and therefore violated of the Free Exercise Clause. See, e.g., Islamic Center of Mississippi v. Starkville, 840 F.2d 293, 299 (5th Cir. 1988) (burden imposed by denial of permit to locate mosque within walking distance of university campus where Muslim students resided was substantial); Stuart Circle Parish v. Board of Zoning Appeals, 946 F. Supp. 1225, 1239 (E.D. Va. 1996) (burden on religious exercise imposed by limitation on number and frequency of homeless feeding and shelter programs was substantial); Western Presbyterian Church, 862 F. Supp. at 546 (burden imposed on religious exercise by denial of variance to relocate homeless feeding program was substantial).[19] Because these cases illustrate that burdens imposed by particular land use regulations and decisions may, in fact, be substantial, RLUIPA's inclusion of the use of land for religious purposes in its definition of religious exercise does not effect, and should not be interpreted to effect, a change in what constitutes a substantial burden on the exercise of religion. Rather, like the rest of the statute enacted pursuant to the Fourteenth Amendment, RLUIPA's definitional language merely codifies established Free Exercise jurisprudence.[20]

Further, RLUIPA's substantial burden provision is constitutional because its Fourteenth Amendment application does not apply to zoning and land use decisions that are laws of general applicability. But cf. Elsinore, supra, slip op. at 32 (finding that RLUIPA § 2(a)(2)(C) applies to laws of general applicability). In Boerne, for example, the Court reasoned that the expansive provisions of the Religious Freedom Restoration Act (RFRA), 42 U.S.C. §§ 2000bb et seq., were unconstitutional as applied to the states because they would necessarily apply even to land use laws that were generally applicable and incidentally burdened religion by normal operation, see 521 U.S. at 531, but nowhere did the Court suggest that land use laws are necessarily laws of general applicability. See id. By contrast, RLUIPA's Fourteenth Amendment application of its substantial burden provision requires a jurisdictional determination that the relevant government action is based on an individualized assessment before that action will be subject to strict scrutiny. See § 2(a)(2)(C). Thus, by this provision's terms, it cannot be applied to those zoning ordinances and land use decisions that are, in fact, based on neutral laws of general applicability. [(21)]

B. RLUIPA § 2(b)(2) Codifies Free Exercise and Equal Protection Jurisprudence

RLUIPA's non-discrimination provision protects against constitutionally impermissible religious discrimination in the land use area--whether such discrimination manifests itself as improper discrimination on the basis of religion or religious denomination. Congress's enactment of RLUIPA § 2(b)(2) codifies both Free Exercise and Equal Protection Clause jurisprudence.

1. Free Exercise Clause. In addition to employing the individualized exceptions doctrine, the Lukumi Court elucidated an additional type of Free Exercise violations. Lukumi held that a government violates the Free Exercise Clause when it provides numerous secular exemptions to particular governmental interests which cause the same harm to that interest as the disfavored religious practice would cause. See 508 U.S. at 543 ("The principle that government, in pursuit of legitimate interests, cannot in a selective manner impose burdens only on conduct motivated by religious belief is essential to the protection of the rights guaranteed by the Free Exercise Clause."). Elsewhere, the Court also indicated that allowing broad exemptions of secular activities while refusing the same for religious activities constitutes unconstitutional discrimination. See id. at 545 (stating that the ordinances at issue "ha[d] every appearance of a prohibition that society is prepared to impose upon [religious] worshipers but not upon itself.") (internal quotation marks and citation omitted).[(22)] Yet the Court was careful to explain that even situations of unequal treatment involving fewer secular exemptions than were at issue in that case would also constitute unconstitutional religious discrimination. See 508 U.S. at 543 (declining to "define with precision the standard used to evaluate whether a prohibition is of general application," but noting that the ordinances at issue in that case fell "well below the minimum standard necessary to protect First Amendment rights").

Accordingly, Lukumi held that policies or laws that create distinctions between religious and secular activities where the excluded religious activities have the same or similar negative

effects on the government's policy interest as the permitted secular ones were constitutionally suspect. The animal cruelty ordinances at issue in Lukumi sought to prevent the suffering and mistreatment of animals and the improper disposal of carcasses. See 508 U.S. at 543-45. However, because the ordinances excluded from their purview certain religious and almost all nonreligious animal killing and disposal, the Court found that they "fail[ed] to prohibit nonreligious conduct that endangers these interests in a similar or greater degree [than the prohibited, religiously motivated conduct]." Id. at 542. As the Court explained, "[t]he Free Exercise Clause protects religious observers against unequal treatment, and inequality results when a legislature decides that the governmental interests it seeks to advance are worthy of being pursued only against conduct with a religious motivation." Id. at 542-43 (internal quotation marks and citation omitted) (emphasis added). As a result, the Court held that "[a] law that targets religious conduct for distinctive treatment or advances legitimate governmental interests only against conduct with a religious motivation will survive strict scrutiny only in rare cases." Lukumi, 508 U.S. at 546.

Indeed, the Lukumi Court found that the discriminatory treatment that subjected the challenged provisions at issue to heightened scrutiny in the first place were the same reasons that the provisions did not survive that scrutiny. See Lukumi, 508 U.S. at 546 (holding that "[i]t is established in our strict scrutiny jurisprudence that a law cannot be regarded as protecting an interest of the highest order . . . when it leaves appreciable damage to that supposedly vital interest unprohibited.") (internal quotation marks and citations omitted) (alteration in original).[(23)] In light of this pronouncement, it was a constitutional exercise of Congress's Fourteenth Amendment enforcement power to impose an outright ban on less than equal treatment of, or discrimination against, religious land uses vis-a-vis similarly situated non-religious land uses. See also infra, at § IV(D).

RLUIPA § 2(b)(2) incorporates these constitutional protections of free exercise rights by prohibiting land use regulations that treat religious assemblies or institutions in a discriminatory manner.[(24)]

2. Equal Protection Clause. RLUIPA's non-discrimination provision also codifies Equal Protection Clause jurisprudence. Accord Lukumi, 508 U.S. at 540 ("In determining if the object of the law is a neutral one under the Free Exercise Clause, we can also find guidance in our equal protection cases."); see also Kiryas Joel, 512 U.S. at 715 (O'Connor, J., concurring) ("[T]he Religion Clauses - the Free Exercise Clause, the Establishment Clause, the Religion Test Clause, Art. VI, cl.3, and the Equal Protection Clause as applied to religion - all speak with one voice on this point: Absent the most unusual circumstances, one's religion ought not affect one's legal rights or duties or benefits.").[(25)]

The Equal Protection Clause generally subjects laws that discriminate on the basis of religion to strict scrutiny. See, e.g., Batchelder, 442 U.S. at 114, 125 n.9; Oyler v. Boles, 368 U.S. 448, 456 (1962). In equal protection cases, a court may determine the state or local government's object

from both direct and circumstantial evidence. See Arlington Heights v. Metro. Hsg. Dev. Corp., 429 U.S. 252, 266 (1977). Relevant evidence includes, among other things, the historical background of the decision under challenge, the specific series of events leading to the enactment, official policy, or decision in question, and the legislative, administrative, or quasi-judicial history, including contemporaneous statements made by members of the decisionmaking body. Id. at 267-68; see also Lukumi, 508 U.S. at 540 (citing Arlington Heights and employing these criteria in its Free Exercise analysis). "These objective factors bear on the question of discriminatory intent." Lukumi, 520 U.S. at 540 (citing Personnel Adm'r of Mass. v. Feeney, 442 U.S. 256, 279 n.24 (1979)).[(26)]

During legislative hearings, Congress found that churches and other places of religious assembly are often disadvantaged by zoning requirements that are not imposed on otherwise identical or similarly-situated secular assemblies or institutions. See H.R. Rep. No. 106-219, at 19, 21-23. Thus, zoning provisions that discriminate against religious assemblies-for no discernible reason other than their religious nature-impermissibly discriminate against religious exercise, and are seldom, if ever, permissible ways to achieve any legitimate governmental interest. Cf., e.g., Vineyard Christian, 250 F. Supp. 2d at 976 (zoning district that permitted otherwise similarly-situated non-religious assemblies but excluded religious ones classified churches on basis of religion was subject to strict scrutiny); Love Church v. Evanston, 671 F. Supp. 515, 521 (N.D. Ill. 1987) (same), vacated on other grounds, 896 F.2d 1082 (7th Cir. 1990). RLUIPA § 2(b)(2) codifies this proscription.

C. RLUIPA's Unreasonable Limitation Provision Codifies the Supreme Court's Equal Protection Land Use Jurisprudence

Where an allegedly offensive land use regulation does not classify on the basis of religion (or any other suspect classification) but otherwise treats similarly-situated entities differently, Cleburne v. Cleburne Living Ctr., 473 U.S. 432 (1985), sets the constitutional standard. In Cleburne, the Supreme Court reviewed a city's land use regulation that required the operators of a home for persons with developmental disabilities to obtain a special use permit in an area which allowed as of right apartment houses, multiple dwellings, boarding and lodging houses, fraternity or sorority houses, dormitories, apartment hotels, hospitals, sanitariums, nursing homes, private clubs, fraternal orders, and other specified uses. See id. at 447. The Court held that, although persons with developmental disabilities, as a group, "are indeed different from others not sharing their misfortune," the difference was irrelevant unless the group home and its occupants "would threaten legitimate interests of the city in a way that other permitted uses such as boarding houses and hospitals would not." Id. at 448. Finding no evidence in the record that revealed "any rational basis" for believing that the group home would pose any threat to defendants' legitimate interests, the Court struck down the application of the ordinance against the home. Id.

In reaching this conclusion, the Court rejected the professed reasons the city offered to justify its actions. Id. First, it dismissed concerns about the negative attitudes of nearby property owners, holding that "[p]rivate biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect." Id. (quoting Palmore v. Sidoti, 466 U.S. 429, 433 (1984)); see also Seattle Title Trust Co. v. Roberge, 278 U.S. 116, 118 (1928). Second, it dismissed all other reasons the city proffered, such as concerns about density regulation, concentration of population, lessening of traffic congestion, and serenity of the neighborhood, holding that such explanations failed to explain why other allowable uses did not cause the same problems. See id. at 449-50. Thus, the Court refused to defer to the defendants' justifications because they "appear[ed] to rest" only on the defendants' "irrational prejudice." Id. at 450.(27)

In applying this Equal Protection standard to land use regulations that affect religious assemblies or institutions, the courts have been careful to require detailed analyses of the bases offered by state and local jurisdictions for treating religious land uses differently than otherwise similarly-situated non-religious entities and have telegraphed their suspicion that such justification will not survive even rational basis scrutiny. See, e.g., Cornerstone Bible Church v. City of Hastings, 948 F.2d 464, 471-72 (8th Cir. 1991) (city had yet to explain rationale for permitting Birthright, Alcoholics Anonymous, and the Masonic Lodge in a commercial zone while denying a permit to a church).(28)

RLUIPA's unreasonable-limitation prohibition codifies this standard.

D. Even Though RLUIPA Need Not Be Subject To The Congruence And Proportionality Test For Fourteenth Amendment Legislation, It Nevertheless Satisfies This Test

Defendant mistakenly contends that RLUIPA exceeds Congress's Fourteenth Amendment power because it is not "congruent and proportional" to the Free Exercise Clause violations it seeks to remedy. See Def. Mot. at 30. This Court should reject defendant's argument.

First, the "congruent and proportional" test applies only to prophylactic legislation enacted pursuant to § 5 of the Fourteenth Amendment. The Supreme Court has long recognized that "Congress' power 'to enforce' the Amendment includes the authority both to remedy and to deter violation of rights guaranteed thereunder by prohibiting a somewhat broader swath of conduct, including that which is not itself forbidden by the Amendment's text." Kimel, 528 U.S. at 81. See also Florida Prepaid Post-Secondary Educ. Expense Bd. v. College Savings Bank, 527 U.S. 627, 638 (1999); Garcia, 280 F.3d at 108). The test is used to evaluate whether legislation that blazes a trail wider than § 1 of the Fourteenth Amendment is still acceptable as a prophylactic enforcement rule under § 5. See, e.g., Kimel, 528 U.S. at 81; Florida Prepaid, 527 U.S. at 639. As demonstrated above, RLUIPA's Fourteenth Amendment mandates are no broader than the Constitution requires--they only create in statutory form what the Supreme Court has already held § 1 of the Fourteenth Amendment prescribes. Thus, the United States need not

demonstrate that RLUIPA's Fourteenth Amendment applications are congruent and proportional to the Fourteenth Amendment; they are identical to the Fourteenth Amendment.

Second, even if defendant could establish that, in some way, RLUIPA's Fourteenth Amendment applications extend slightly beyond the prescriptions of § 1 of the Fourteenth Amendment, they would be acceptable as a prophylactic rule. See Hibbs, 123 S. Ct. at 1891 (record of states' "unconstitutional participation in, and fostering of, gender-based discrimination in the administration of leave benefits is weighty enough to justify the enactment of prophylactic § 5 legislation.") (emphasis added). Moreover, where, as here, § 5 legislation closely tracks constitutional guarantees, any marginal conduct that is covered by the statute, but not the Constitution, "nevertheless constitutes the kind of congruent, and, above all, proportional remedy Congress is empowered to adopt under § 5 of the Fourteenth Amendment." Freedom Baptist Church, 204 F. Supp. 2d at 874 (emphasis added); see also Westchester Day Sch., 2003 WL 22110445 at *5. This is particularly true when Congress designs legislation to ensure the full vindication of constitutional rights and incidentally captures some conduct that, although close to the constitutional line, is not itself unconstitutional. See Garcia, 280 F.3d at 112 ("[S]ince both the McDonnell Douglas and Price Waterhouse approaches [to Title VII] center on ferreting out injurious irrational prejudice, which after all is the concern of the Fourteenth Amendment where the disabled are concerned, and since both leave the ultimate burden of proof for establishing animus on the plaintiff, we believe they comport with Congress's enforcement authority under § 5."); Varner v. Illinois State Univ., 226 F.3d 927, 932-36 (7th Cir. 2000) (upholding the Equal Pay Act's burden-shifting procedures despite recognition that "the effect of the Equal Pay Act's burden-shifting remedial scheme is to prohibit at least some conduct that is constitutional," because "the Act is targeted at the same kind of discrimination forbidden by the Constitution."). RLUIPA § 2 certainly hews as close to the constitutional standard as the Title VII provision at issue in Garcia or the Equal Pay Act provision evaluated in Varner--both of which were upheld-and hews much closer than the Family Medical Leave Act upheld in Hibbs. These decisions demonstrate conclusively that, if the Court finds reason to evaluate congruence and proportionality, RLUIPA passes easily.

Third, in light of the constitutional violations that RLUIPA prohibits, the legislative record is more than adequate to establish that the statute falls within Congress's § 5 enforcement power. As the Supreme Court has made clear, congressional findings are "not determinative of the § 5 inquiry." Kimel, 528 U.S. at 91. Moreover, despite defendant's contentions to the contrary, see Def. Mot. at 30, only when "impugn[ing] the constitutionality of state discrimination against" groups subject to rational basis scrutiny, such as the disabled or the elderly, must Congress identify a "widespread pattern" of irrational reliance on such criteria. Hibbs, 123 S. Ct. at 1981. But where Congress directs its attention to discrimination, such as Free Exercise violations, "which triggers [at least] a heightened level of scrutiny," it is "easier for Congress to show a pattern of state constitutional violations" sufficient to withstand congruence and proportionality analysis. Id. at 1982; see also id. at 1985 (Scalia, J., dissenting)

(Hibbs does not require Congress to demonstrate that each one of the 50 States was in violation of the Fourteenth Amendment, but may treat the States as a "collective entity").

Further, the need for such findings is particularly diminished where, as here, "the Act prohibits very little constitutional conduct." Nanda v. Board of Trustees of the Univ. of Illinois, 303 F.3d 817, 828-29 (7th Cir. 2002) (citing Kimel, 528 U.S. at 91). In any event, as summarized, supra, at 7-10, Congress held extensive hearings on the need for legislation over a period of three years. Any characterization of the record as a "string" of anecdotes is incorrect. Those hearings included anecdotal evidence by knowledgeable witnesses as well as statistical evidence from experts in the field. "The hearing record compiled massive evidence that this right [of religious communities to assemble] is frequently violated." 146 Cong. Rec. at S7774; see Murphy II, supra, slip op. at 63 ("Congress found that discriminatory application of zoning laws is particularly common because, as in this case, zoning laws across the country are overwhelmingly discretionary and subjective.") (emphasis in original) (footnote omitted). And "[w]hen Congress makes findings on essentially factual issues," those findings are "entitled to a great deal of deference, inasmuch as Congress is an institution better equipped to amass and evaluate the vast amounts of data bearing on such an issue." Walters v. National Ass'n of Radiation Survivors, 473 U.S. 305, 330 n.12 (1985) (collecting cases). There can be no question that Congress adequately established the need for this legislation.

V. RLUIPA'S COMMERCE CLAUSE APPLICATION ACCORDS WITH BINDING "AFFECTS COMMERCE" JURISPRUDENCE

Section 2(a) of RLUIPA provides that no state or local government "shall impose or implement a land use regulation in a manner that imposes a substantial burden on the religious exercise of a person, including a religious assembly or institution, unless the government demonstrates that imposition of the burden" is both "in furtherance of a compelling governmental interest" and "the least restrictive means" of furthering that interest. 42 U.S.C. § 2000cc(a)(1). Pursuant to Congress's powers, inter alia, to regulate interstate commerce, this section contains a jurisdictional element that limits application of this prohibition to those cases in which a land use regulation imposes a substantial burden on religion, and that burden, or its removal, "affects . . . commerce with foreign nations, among the several States, or with Indian tribes." 42 U.S.C. § 2000cc(a)(2)(B). Significantly, nowhere does the Act provide that all land use regulation "affects" interstate commerce. Rather, as this Court has already recognized, § 2(a)(2)(B) is a paradigmatic example of a jurisdictional "hook," a clause that triggers a statute's application only when it would be proper under the Constitution's Commerce Clause. See Hale O Kaula Church, 229 F. Supp. 2d at 1071-72. Using this tool, Congress can ensure that it has legislated to the borders of its power in each application of a statute, but no further.

RLUIPA's jurisdictional provision requires the courts, on a case-by-case basis, to determine whether the burden on religion affects interstate commerce. After that determination, there are only two possible outcomes. First, a court could find that the land use regulation that burdens

religion does affect interstate commerce. In this case, RLUIPA would be a valid exercise of the commerce power. Second, a court could find that the burden on religion does not affect interstate commerce. In that case, RLUIPA would not apply at all as a statutory matter, so no constitutional issue would arise. In neither event would the jurisdictional provision exceed Congress's commerce power.

Notwithstanding the simplicity of RLUIPA's Commerce Clause application, defendant makes a number of erroneous claims that the statute exceeds Congress's Commerce Clause authority. First, defendant's recitation of select passages from United States v. Lopez, 514 U.S. 549 (1995), fails to acknowledge that Lopez itself expressly recognized that jurisdictional elements, properly designed, avoid Commerce Clause difficulties. Even though defendant focuses only on one, Lopez in fact identified two, distinct rubrics under which Congress may enact legislation pursuant to its Commerce Clause powers. The first is that Congress may pass a statute of general applicability, whereby Congress regulates an entire field of activity. For such a regulation to be constitutional, it must relate to interstate commerce in one of three ways: it must regulate the channels of commerce, the instrumentalities of commerce, or-if the law regulates a purely intrastate activity-the activity must, in the aggregate, "substantially affect interstate commerce." 514 U.S. at 558-59. The second is that Congress may employ a jurisdictional element, or "hook," to target only those individual acts that themselves affect commerce, as is precisely the case with the RLUIPA's Commerce Clause application of its substantial burden provision. See id. at 561-62 (stating that a jurisdictional element "would ensure, through case-by-case inquiry, that the firearm possession in question affects interstate commerce"). See also United States v. Morrison, 529 U.S. 598, 612 (2000) ("[A] jurisdictional element may establish that the enactment is in pursuance of Congress' regulation of interstate commerce."). Both the Ninth Circuit and this Court have upheld this distinction. See, e.g., Jones, 231 F.3d at 514-15 ("[W]e are not prepared to say that the teachings of Morrison apply to statutes, like § 922(g)(8), that do contain a precise statement of a jurisdictional element."); Hale O Kaula Church, 229 F. Supp. 2d at 1071-72.[(29)]

Second, defendant fails to acknowledge that the Supreme Court and the Ninth Circuit have repeatedly upheld Congress's authority to employ jurisdictional elements in order to target those specific activities, within a larger class, that do have an effect on interstate or foreign commerce. Quite simply, such an "affects commerce" element has long been regarded as the appropriate means for Congress to invoke the full extent of its authority. See, e.g., Jones v. United States, 529 U.S. 848, 854 (2000) ("[T]he statutory term 'affecting . . . commerce,' . . . when unqualified, signal[s] Congress' intent to invoke its full authority under the Commerce Clause."); Allied-Bruce Terminix Cos. v. Dobson, 513 U.S. 265, 273 (1995) ("Th[e] phrase-'affecting commerce'-normally signals Congress' intent to exercise its Commerce Clause powers to the full."); United States v. Green, 350 U.S. 415, 420-21 (1956) (upholding constitutionality of Hobbs Act, 18 U.S.C. § 1951(a)-which prohibits robbery or extortion that "in any way or degree obstructs, delays, or affects commerce or the movement of any article or

commodity in commerce"-because "racketeering affecting interstate commerce [is] within federal legislative control"). Accordingly, appellate courts have repeatedly held that properly designed jurisdictional elements ensured that numerous federal laws were a valid exercise of Congress's Commerce Clause powers. See, e.g., United States v. Cummings, 281 F.3d 1046, 1051 (9th Cir.) ("The jurisdictional element insures, on a case-by-case basis, that a defendant's actions implicate interstate commerce to a constitutionally adequate degree.") (emphasis added) (internal quotation marks and citations omitted), cert. denied, _ U.S. _, 123 S. Ct. 179 (2002); Jones, 231 F.3d at 514 (same); United States v. Polanco, 93 F.3d 555, 563 (9th Cir. 1996) (same). RLUIPA's Commerce Clause application fits comfortably within this array of statutes that have been consistently upheld by the courts as valid exercises of Congress's Commerce Clause powers.

To be clear, RLUIPA § 2(a)(2)(B) is a constitutional exercise of Congress's Commerce Clause power even though it applies to burdens that "affect," rather than "substantially affect," interstate commerce. A statute need only contain "affecting commerce" language to invoke full Congressional authority under the Commerce Clause. See Jones, 529 U.S. at 854; Allied-Bruce Terminix, 513 U.S. at 273. Both the Supreme Court and the Ninth Circuit have held that neither Lopez nor Morrison changed this standard. See Jones, 529 U.S. at 854 (issued after Morrison); United States v. Atcheson, 94 F.3d 1237, 1242-43 (9th Cir. 1997) ("Where the crime itself directly affects interstate commerce, as in the Hobbs Act, no requirement of a substantial effect is necessary to empower Congress to regulate the activity under the Commerce Clause."); see also United States v. Juvenile Male, 118 F.3d 1344, 1347-48 (9th Cir. 1997) (following Atcheson to reject "substantial effect" requirement in RICO statute with jurisdictional hook); United States v. Woodruff, 122 F.3d 1185, 1186 (9th Cir. 1997) (finding "substantially affects" test of Lopez inapplicable to the Hobbs Act). Indeed, the Ninth Circuit has gone so far as to hold--in decisions issued after Lopez and Morrison--that only a de minimis effect on commerce need be established. See United States v. Lynch, 282 F.3d 1049, 1051 (9th Cir. 2002) ("We have held that the government need prove that a defendant's acts had only a de minimis effect on interstate commerce to satisfy this jurisdictional element of the Hobbs Act.") (internal quotation marks and citations omitted).

Third, because RLUIPA contains a jurisdictional provision or "hook" that ensures that the commerce power is invoked only in those instances where interstate commerce is affected, defendant's claim that RLUIPA somehow generally regulates local, non-economic, religious activities, see Def. Mot at 33, entirely misunderstands the effect of § 2(a)(2)(B)'s jurisdictional limitation. Section 2(a)(2)(B) triggers RLUIPA's substantial burden provision only when the burden affects, or removal of that burden would affect, interstate commerce. Cf. Heart of Atlanta Motel, 379 U.S. at 258 ("[I]f it is interstate commerce that feels the pinch, it does not matter how local the operation which applies the squeeze.") (internal quotation marks and citations omitted). RLUIPA neither replaces local zoning and land-marking systems with a federal one, nor provides religious uses a blanket exemption from such systems. Instead, § 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 Hale O Kaula Church, 229 F. Supp. 2d at 1071; Freedom Baptist Church, 204 F. Supp. 2d at 867-68 (concluding that "insofar as state or local authorities 'substantially burden' the economic activity of religious organizations, Congress has ample authority to act under the Commerce Clause").

Finally, defendant's concern that RLUIPA will somehow affect non-economic activities, see Def. Mot. at 33, is misplaced. RLUIPA's jurisdictional hook targets only individual cases, each of which must affect interstate commerce. See Jones, 529 U.S. at 859 (reaffirming the constitutionality of the federal arson statute, which targets individual acts of arson via jurisdictional hook); Hale O Kaula Church, 229 F. Supp. 2d at 1072 (noting that further Commerce Clause analysis is appropriate only for "laws of general applicability where Congress regulates an entire field of activity"). (30) See also Life Teen, supra, slip op. at 25-26 (rejecting Commerce Clause challenge to Section 2(a) on the same basis).

VI. RLUIPA PROHIBITS DEFENDANT'S ACTIONS

The Seventh Circuit's recent ruling in Civil Liberties for Urban Believers v. Chicago ("CLUB"), 342 F.3d 752 (7th Cir. 2003), has no bearing on whether RLUIPA applies to the facts alleged in this case. Defendant's exclusive reliance on CLUB in support of its argument that RLUIPA is inapplicable to the facts of this case is misplaced. See Def. Mot. at 35-38. Rather, as is clear from both the face of the statute and the facts alleged in the Complaint, each of RLUIPA's land use provisions at issue expressly prohibits the conduct alleged in the complaint.

In CLUB, an association of Chicago-area religious assemblies challenged the facial validity of Chicago's zoning ordinance. See 342 F.3d at 756. Specifically, the plaintiffs claimed that the mere fact that the ordinance (i) required religious assemblies to apply for and obtain special use permits to locate in all business and most types of commercial districts, and (ii) required them to obtain a "map amendment" to locate in one type of commercial district and in the city's "M" districts, violated both RLUIPA's substantial burden and non-discrimination provisions. See id. at 755, 759-60. Addressing the plaintiffs' claims, the court held, first, that the mere fact that the churches had to expend time and money to find suitable locations within the city in and of itself did not entitle them to relief under RLUIPA's substantial burden provision. See id. at 761.(31) Second, the court held that the city's amendment of its zoning ordinance in 2000 had placed religious assemblies on equal footing with non-religious assemblies (such as clubs, lodges, and meetings halls) in the special use permit and map amendment processes, and thereby corrected any potential violation of RLUIPA's non-discrimination provision. See id. at 762. Thus, CLUB did not even address the applicability of the statute to a denial of a special use permit.

Nevertheless, based on CLUB's holding, defendant claims that its denial of the Hale O Kaula Church's special use permit to construct a second story to a building on property it has owned since 1990 and to conduct religious services on the property does not violate the statute. See Def. Mot. at 37. In making this argument, defendant ignores both CLUB's distinguishing facts and the actual holding of CLUB. First, defendant ignores the fact that the plaintiffs were not challenging the city's denial of special use permits or map amendments to use land that they already owned, but rather were challenging the mere fact that they had to apply for and obtain permits to use land in certain districts within the city. See CLUB, 342 F.3d at 755-56. By contrast, the United States' Complaint alleges that defendant's denial of the Hale O Kaula Church's special use permit imposed a substantial burden on its use of its own land. See Compl. ¶22. For example, at present, the Church cannot conduct all its religious activities on the property and cannot assemble all members on the property.

Second, defendant ignores CLUB's holding that a land use regulation or decision imposes a substantial burden on religious exercise whenever it "bears direct, primary, and fundamental responsibility for rendering religious exercise - including the use of real property thereof with the regulated jurisdiction - effectively impractical." CLUB, 342 F.3d at 761. In this case, defendant's denial of the special use permit has rendered the Hale O Kaula Church's use of its own land "effectively impractical." Indeed, this Court has already correctly held that defendant's denial of the Church's special use permit is subject to strict scrutiny under the Constitution, and now only need make this same finding under RLUIPA's substantial burden provision. See Hale O Kaula Church, 229 F. Supp. 2d at 1073. Faced with similar denials, many other courts have reached the same conclusion. See Cottonwood, 218 F. Supp. 2d at 1222; Freedom Baptist Church, 204 F. Supp. 2d at 868; Oblates of St. Joseph, supra, slip op. at 12 n.9; Al-Salam Mosque Found'n, supra; First Covenant Church, 840 P.2d at 181-82; Korean Buddhist Dae Won Sa Temple, 953 P.2d at 1345 n.31 (1998). Cf. Keeler, 940 F. Supp. at 885; Alpine Christian Fellowship, 870 F. Supp. at 994; Western Presbyterian Church, 862 F. Supp. at 545, 547. Thus, the fact that the Church could locate elsewhere in Maui County is irrelevant to whether defendant's denial violates RLUIPA. Any other conclusion would render RLUIPA inapplicable to almost any governmentally imposed substantial burden on, or discrimination against, religious assemblies, a result clearly not intended by Congress nor required by the statute's text.

Defendant also claims that the fact that it has granted special use permits to other religious assemblies seeking to locate in agricultural districts is evidence not of defendant's discrimination against the Hale O Kaula Church but rather somehow demonstrates that RLUIPA's non-discrimination provision could not apply to this denial. See Def. Mot. at 38. However, as indicated above, both the Fourteenth Amendment and RLUIPA's non-discrimination and unreasonable limitations provisions prohibit state or local governments from discriminating against a particular religion, see RLUIPA § 2(b)(2); Lukumi, 508 U.S. at 540, or from unreasonably limiting land use or otherwise giving effect, directly or indirectly, to private biases. See RLUIPA § 2(b)(3)(B); Cleburne, 473 U.S. at 447-48. Similarly, the fact that

defendant's land use system allows rodeos, for example, to operate as of right in its agricultural districts--with all of their attendant traffic, water usage, and fire safety issues--while simultaneously denying the Hale O Kaula Church's special use permit to use its own land on these same grounds, seriously undermines defendant's claim that RLUIPA's non-discrimination and unreasonable limitation provisions do not apply to defendant's denial of the Church's special use permit. See RLUIPA § 2(b)(2); Vineyard Christian, 250 F. Supp. 2d at 976 (zoning district that permitted otherwise similarly-situated non-religious assemblies but excluded religious ones classified churches on basis of religion was subject to strict scrutiny); Love Church v. Evanston, 671 F. Supp. at 521 (same); see also RLUIPA § 2(b)(3)(B); Cornerstone Bible Church, 948 F.2d at 471-72.

Accordingly, this Court should reject defendant's contention that RLUIPA's land use provisions do not apply to the facts alleged against defendant in the United States' Complaint.

CONCLUSION

For the foregoing reasons, this Court should deny defendant's motion to dismiss, uphold the constitutionality of RLUIPA's land use provisions, and hold that the United States' Complaint states a claim upon which relief may be granted under RLUIPA.

DATED: October 17, 2003

Respectfully submitted,

R. ALEXANDER ACOSTA
Assistant Attorney General

STEVEN H. ROSENBAUM
Chief
DIANE L. HOUK
Special Litigation Counsel
JE YON JUNG (Ohio #0067441)
JAMES D. TODD, JR. (D.C. #463511)
Trial Attorneys Housing and Civil Enforcement Section
U.S. Department of Justice, Civil Rights
Division
950 Pennsylvania Avenue, N.W., G Street
Washington, D.C. 20530
Tel.: (202) 305-1457
Fax: (202) 514-1116

CERTIFICATE OF SERVICE

I hereby certify that the Plaintiff United States of America's Opposition to Defendant Maui Planning Commission's Motion to Dismiss was served by first-class mail on October 17, 2003 on the following:

Jan Yoneda
United States Attorney's Office
Room 6-100, PJKK Federal Building
300 Ala Moana Blvd.
Honolulu, HI 96850
Tel: (808) 440-9282
Fax: (808) 541-3752

cc: AUSA Michael Chun

1. See Murphy v. Zoning Comm'rs ("Murphy II"), No. 00-2297, _ F.2d _, 2003 WL 22299219, at * 23-26 (D. Conn. Sep. 30, 2003) (upholding RLUIPA's Fourteenth Amendment provisions) [attached at Tab 2]; Westchester Day Sch. v. Mamaroneck,No. 02-6291, _ F. Supp. 2d _, 2003 WL 22110445 (S.D.N.Y. Sep. 5, 2003) (RLUIPA is a constitutional exercise of Congress's Fourteenth Amendment enforcement power, Commerce Clause power, and does not violate the Establishment Clause) [attached at Tab 3]; Life Teen, Inc. v. Yavapai Cty., No. 01-1490, slip. op. at 27-30 (D. Ariz. Mar. 26, 2003) (same) [attached at Tab 4]; Freedom Baptist Church of Delaware Cty. v. Middletown, 204 F. Supp. 2d 857, 874 (E.D. Pa. 2002) (same); Christ Universal Mission Church v. Chicago, Civ. No. 01-C-1429 (N.D. Ill. Sept. 11, 2002) (same) [attached at Tab 5]; but see Elsinore Christian Center v. Lake Elsinore, No. 01-4842 (C.D. Cal. Aug. 22, 2003) (holding both that RLUIPA § 2(a)'s Fourteenth Amendment application neither codifies Free Exercise jurisprudence nor is congruent and proportional land that RLUIPA § 2(a)'s Commerce Clause application impermissibly regulates local land use) [attached at Tab 6].

2. Cf. Grace United Methodist Church v. Cheyenne, 235 F. Supp. 2d 1186, 1194 (D. Wyo. 2002) (RLUIPA does not define or change what constitutes a substantial burden); Cottonwood Christian Ctr. v. Cypress Redev. Agency, 218 F. Supp. 2d 1203, 1226-27 (C.D. Cal. 2002) (same).

3. Indeed, the Supreme Court has repeatedly held that "'if a case can be decided on either of two grounds, one involving a constitutional question, the other a question of statutory construction or general law,'" a court must decide only the latter. Department of Commerce v. United States House of Reps., 525 U.S. 316, 344 (1999) (quoting Ashwander v. TVA, 297 U.S. 288, 347 (1936) (Brandeis, J., concurring)).

4. Witnesses testified to a widespread pattern of local governments refusing to permit property to be used for religious purposes: "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. But the committees in each house have examined large numbers of cases, and the hearing record reveals a widespread pattern of discrimination against churches as compared to secular places of assembly, and of discrimination against small and unfamiliar denominations as compared to larger and more familiar ones." 146 Cong. Rec. at S7775.

5. For example, Congress heard testimony of twenty-one instances where different cities refused to permit churches to use buildings previously used by non-religious assemblies. See H.R. Rep. No. 106-219, at 21.

6. In each of these cases, the issue before the court was whether § 1988 or § 1658 controls the limitations period for actions brought under the portion of § 1981 that Congress amended by the Civil Rights Act of 1991. See Jones, 305 F.3d at 725; Madison, 257 F.3d at 798; Zubi, 219 F.3d at 226. Because Congress amended § 1981, rather than create a new statute, the courts uniformly found that § 1988 continued to govern the limitations period. See Jones, 305 F.3d at 725 ("Section 1658, therefore, applies only when an act of Congress creates a wholly new cause of action, one that does not depend on the continued existence of a statutory cause of action previously enacted and kept in force by the amendment."); Madison, 257 F.3d at 798; Zubi, 219 F.3d at 226.

7. In Warth, petitioners alleged that a zoning ordinance had the purpose and effect of excluding people of low and moderate incomes from the housing market. The Supreme Court found that petitioners' inability to reside in the town was a result of economies of scale and individual financial situations, rather than the zoning ordinance. See 422 U.S. at 506. The Court concluded that the link between plaintiffs' injury and defendants' actions was so tenuous that plaintiffs could not even show causation. Id. at 507. In the present case, by contrast, the United States' cause of action is traceable to defendant's actions.

8. For this reason, defendant's reference to Gladstone Realtors v. Bellwood, 441 U.S. 91, 100 (1979), that Congress cannot abrogate the standing requirements, is inapposite. Had Congress created a provision that authorized "any person," whether that person was injured or not, to bring an action to enforce a violation of the Act against another person or another religious

assembly, Gladstone might have some application. In light of the United States' obvious interest in enforcing RLUIPA, see Borden, supra, Gladstone has no application here.

9. See also Lynch v. Donnelly, 465 U.S. 668, 673 (1984) ("Nor does the Constitution require complete separation of church and state; it affirmatively mandates accommodation, not merely tolerance, of all religions, and forbids hostility toward any."); Walz v. Tax Comm'n of City of New York, 397 U.S. 664, 673 (1970) ("Few concepts are more deeply embedded in the fabric of our nationallife . . . than for the government to exercise at the very least this kind of benevolent neutrality toward churches and religious exercise generally so long as none was favored over others and none suffered interference."); Lee v. Weisman, 505 U.S. 577, 627 (1992) (Souter, J., concurring) (stating that the Establishment Clause is not violated when the government accommodates religious beliefs "by relieving people from generally applicable rules that interfere with their religious callings").

10. Without citation to any authority, defendant claims that Congress's failure to acknowledge the conclusions of one private land use study somehow invalidates RLUIPA on Establishment Clause grounds. Because there is no legal basis for this contention, this Court should reject this argument.

11. Indeed, to accept defendant's argument that the Establishment Clause is violated when the compelling interest test is applied to facially neutral laws that burden religious exercise would call into question the constitutionality of numerous state constitutions and laws or state court precedent that safeguard religious freedom by doing exactly that. See, e.g., Ala. Const. Amend. No. 622; Ariz. Rev. Stat. §§ 41-1493.01-.02; Conn. Gen. Stat. Ann. § 52-571b; Fla. Stat. Ann. §§ 761.01-.05; 775 Ill. Comp. Stat. §§ 35/1-99; R.I. Gen. Laws §§ 42-80.1-3; S.C. Code Ann. §§ 1-32-10 through 1-32-60; Swanner v. Anchorage Equal Rights Comm'n, 874 P.2d 274, 280-81 (Alaska), cert. denied, 513 U.S. 979 (1994); Rupert v. City of Portland, 605 A.2d 63, 65-66 (Me. 1992); Attorney General v. Desilets, 636 N.E.2d 233, 235-36 (Mass. 1994); State v. Hershberger, 462 N.W.2d 393, 398 (Minn. 1990); St. John's Lutheran Church v. State Compensation Ins. Fund, 830 P.2d 1271, 1276 (Mont. 1992); Hunt v. Hunt, 648 A.2d 843, 853 (Vt. 1994); First Covenant Church of Seattle v. City of Seattle, 840 P.2d 174, 185-87 (Wash. 1992); State v. Miller, 549 N.W.2d 235, 241 (Wis. 1996).

12. Recently, the Supreme Court has suggested that the entanglement prong of Lemon is subsumed by the second prong - whether the statute has the effect of advancing religion. See Agostini v. Felton, 521 U.S. 203, 233 (1997). As noted, RLUIPA § 2 passes the entanglement inquiry, regardless of whether it is understood to be a separate factor or merely part of the inquiry into the statute's effect.

13. Without any apparent basis, defendant challenges RLUIPA's Spending Clause application on Establishment Clause grounds as well. See Def. Mot. at 34. Because this provision is not at issue in this litigation, and because the Ninth Circuit has expressly upheld RLUIPA's Spending Clause

application against an Establishment Clause challenge, see Mayweathers, 314 F.3d at 1068-69, this Court should disregard this argument.

14. The Fourteenth Amendment grants to Congress the "power to enforce, by appropriate legislation, the provisions of this article." U.S. Const. amend. XIV, § 5. See also Garcia v. S.U.N.Y. Health Sciences Ctr., 280 F.3d 98, 108 (2d Cir. 2001) ("When operating under § 5, Congress may prohibit conduct that itself violates the Fourteenth Amendment's substantive guarantees.") (citing Board of Trustees v. Garrett, 531 U.S. 356, 365 (2001)). And, "[i]t is for Congress in the first instance to determin[e] whether and what legislation is needed to secure the guarantees of the Fourteenth Amendment, and its conclusions are entitled to deference." Kimel v. Board of Regents, 528 U.S. 62, 80-81 (2000). Statutes that merely codify rights guaranteed by § 1--as opposed to extending those rights, which will be discussed, infra at § IV(D),--are at the core of Congress's § 5 Enforcement Power.

15. In Lukumi, the Court considered provisions of an animal cruelty ordinance that required the government to evaluate the particular justification for animal killings on the basis of whether such killings were "unnecessar[y]." 508 U.S. at 537. Under such a system of individualized assessments, the Court held that the government violated the Free Exercise Clause because it "refuse[d] to extend that system to cases of 'religious
hardship' without compelling reason." Id. (emphasis added).

16. Smith did not change the Free Exercise standard, see 494 U.S. at 878-79; see, e.g., United States v. Lee, 455 U.S. 252, 263 n.3 (1982) (Stevens, J., concurring) (individual must comply with "valid and neutral law of general applicability"). Accordingly, the Ninth Circuit's application of strict scrutiny to individualized land use decision in Christian Gospel Church v. San Francisco, 896 F.2d 1221, 1223-24 (9th Cir. 1990), remains binding on courts in the circuit, and is overridden only to the extent that Lukumi sets a higher standard. See, e.g., Cottonwood, 218 F. Supp. 2d at 1222.

For this reason, courts addressing land use decisions and regulations that contain individualized exemptions that substantially burden religion before and after the Lukumi decision have correctly applied the strict scrutiny standard. See Christian Gospel, 896 F.2d at 1224; Hale O Kaula Church, 229 F. Supp. 2d at 1073; see also Cottonwood, 218 F. Supp. 2d at 1222; Freedom Baptist Church, 204 F. Supp. 2d at 868-69; Oblates of St. Joseph v. Nichols, No. 01-2349, slip op. at 12 n.9 (E.D. Cal. Apr. 26, 2002) [attached at Tab 10]; Al-Salam Mosque Found'n v. City of Palos Heights, No. 00-4596, 2001 WL 204772 (N.D. Ill. Mar. 1, 2001) [attached at Tab 11]; see also First Covenant Church, 840 P.2d at 181-82; Korean Buddhist Dae Won Sa Temple of Haw. v. Sullivan, 87 Haw. 217, 953 P.2d 1315, 1345 n.31 (1998). Cf. Keeler v. Mayor & City Council of Cumberland, 940 F. Supp. 879, 885 (D. Md. 1996); Alpine Christian Fellowship v. County Comm'rs, 870 F. Supp. 991, 994 (D. Neb. 1994); Western Presbyterian Church v. Bd. of Zoning Adjustment, 862 F. Supp. 538, 545, 547 (D.D.C. 1994).

17. But see Bryant v. Gomez, 46 F.3d 948, 949 (9th Cir. 1995) (holding that burden on religious exercise must be "central," but failing to indicate how courts should evaluate centrality in light of Smith's proscription).

18. In any event, were the Court to conclude that RLUIPA's definition of religious exercise somehow did effect a change in the constitutional standard, the correct remedy would be to strike down only that definition, not any other portion of the statute. Indeed, RLUIPA contains a severability provision. See 42 U.S.C. § 2000cc-3(i). The "inclusion of [a severability clause] creates a presumption that Congress did not intend the validity of the statute in question to depend on the validity of the constitutionally offensive provision." Alaska Airlines, Inc. v. Brock, 480 U.S. 678, 686 (1987) (citation omitted). "In such a case, unless there is strong evidence that Congress intended otherwise, the objectionable provision can be excised from the remainder of the statute." Id. It is beyond question that RLUIPA could function to enforce constitutional guarantees without this definitional provision. See 146 Cong. Rec. at S7776 (Congress did not intend to change Supreme Court jurisprudence on the definition of substantial burden).

19. See also, e.g., Murphy v. Zoning Comm'rs, 148 F. Supp. 2d 173, 189 (D. Conn. 2001) (burden on religious exercise imposed by threat of criminal prosecution against prayer-meeting attendees for alleged zoning violation was substantial); First Covenant Church, 840 P.2d at 184 (burden on religious exercise imposed by denial of exemption to landmarking of church was substantial); but see Elsinore, supra, slip op. at 14, which failed to acknowledge the holding of these cases when it concluded that courts have not found that land use regulations ever impose substantial burdens on religious exercise.

20. In any event, even if the Court were to conclude that this particular definitional language somehow did exceed Congress's Fourteenth Amendment power, the proper remedy would be to hold only this definitional provision of the statute unconstitutional, and not any other portion. See Alaska Airlines, 480 U.S. at 686.

21. In addition, this Court should reject any assertion that Congress went beyond its Fourteenth Amendment power because RLUIPA's substantial burden provision requires a showing of "least restrictive means." Cf. Elsinore, supra, slip op. at 38-39. Although Sherbert did not specifically use the term "least restrictive means," the opinion nevertheless suggests the same standard. See 374 U.S. at 407 ("[I]t would plainly be incumbent upon the appellees to demonstrate that no alternative forms of regulation would combat such abuses without infringing First Amendment rights.") (emphasis added). Indeed, the Supreme Court directly employed the term in Thomas v. Review Bd., 450 U.S. 707, 718 (1981) ("The state may justify an inroad on religious liberty by showing that it is the least restrictive means of achieving some compelling state interest.") (emphasis added).

22. See also Smith, 494 U.S. at 877 ("[a] State would be 'prohibiting the free exercise [of religion]' if it sought to ban such acts . . . only when they are engaged in for religious reasons.")

(alterations in original).

23. Similarly, in Fowler v. Rhode Island, 345 U.S. 67, 69-70 (1953), the Supreme Court found a Free Exercise violation when a municipal ordinance was interpreted to forbid preaching in a public park by Jehovah's Witnesses but to permit preaching during a Catholic Mass or Protestant church service.

24. In Vineyard Christian Fellowship of Evanston, Inc. v. Evanston, 250 F. Supp. 2d 961, 992 (N.D. Ill. 2003), the district court found that RLUIPA § 2(b) is a subset of the general provision of § 2(a) and that it therefore has an implied substantial burden requirement as a matter of jurisdiction. Not only does the plain language of the statute fail to support this interpretation, but nowhere in Lukumi's holding concerning the Free Exercise Clause's prohibition against unequal treatment, which even Vineyard admits § 2(b) codifies, is there any suggestion that a religious entity suffering from unequal treatment need establish that such treatment imposes a substantial burden of its religious exercise. See 508 U.S. 542-46.

25. As Justice Harlan noted in the related context of the Establishment Clause, "[n]eutrality in its application requires an equal protection mode of analysis." Walz, 397 U.S. at 696.

26. Employing this analysis, the Lukumi Court took note of the "significant hostility exhibited by residents, members of the city council, and other city officials" toward the religion.

27. See also id. at 452 (Stevens, J., joined by Burger, C.J., concurring) ("The term 'rational,' of course, includes a requirement that an impartial lawmaker could logically believe that the classification would serve a legitimate public purpose that transcends the harm to the members of the disadvantaged class. Thus, the word 'rational' . . . includes elements of legitimacy and neutrality that must always characterize the performance of the sovereign's duty to govern impartially.") (footnotes omitted).

28. See also Jehovah's Witnesses Assembly Halls of New Jersey, Inc. v. City of Jersey City, 597 F. Supp. 972, 982 (D.N.J. 1984) (allowing city to forbid church from using a theater in a commercial zone "is not rationally related to legitimate municipal zoning concern."); see also Christian Gospel, 896 F.2d at 1225 ("[T]he church must make a showing that a class that is similarly situated has been treated disparately").

29. See also United States v. Harrington, 108 F.3d 1460, 1467 (D.C. Cir. 1997) ("In the case of a statute with a jurisdictional element, however, each case stands alone on its evidence that a concrete and specific effect does exist, and we can find no controlling authority suggesting that courts must require that, as to each factual scenario, a 'substantial' rather than a 'concrete' effect on interstate commerce be shown."); 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.").

30. Moreover, that the Supreme Court did not intend to impose a commercial character requirement upon laws with a jurisdictional element is evidenced by its decision in Jones, issued just seven days after Morrison. In Jones, the Court implicitly reaffirmed the facial constitutionality of the federal arson statute, which targets individual acts of arson via a jurisdictional element. See Jones, 529 U.S. at 859. It goes without saying that arson is not an inherently commercial activity. See United States v. Pappadopoulos, 64 F.3d 522, 526-27 (9th Cir. 1995); see also United States v. DiSanto, 86 F.3d 1238, 1245 (1st Cir. 1996). It would be gratuitous to superimpose a "commercial character" requirement upon a law whose scope is already restricted by a jurisdictional element to those activities that affect interstate commerce. As the Morrison Court explained, an "'express jurisdictional element,' . . . might limit [a statute's] reach to a discrete set of firearm possessions that additionally have an explicit connection with or effect on interstate commerce.'" 529 U.S. at 611-12 (emphasis added) (quoting Lopez, 514 U.S. at 562). RLUIPA § 2(a)(2)(B)'s jurisdictional element requires just such a connection, and is thus constitutional.

31. In reaching this conclusion, the court did not, as defendant disingenuously claims, find that RLUIPA's definition of religious exercise was "flawed." See Def. Mot. at 36. Rather, the court simply rejected those plaintiffs' contention that the ordinance's requirements--that religious assemblies apply for and obtain special use permits and map amendments to locate in relevant districts--constituted a substantial burden. See CLUB, 342 F.3d at 761 ("Application of the substantial burden provision to a regulation inhibiting or constraining any religious exercise, including the use of property for religious purposes, would render meaningless the word "substantial," because the slightest obstacle to religious exercise incidental to the regulation of land use--however minor the burden it were to impose--could then constitute a burden sufficient to trigger RLUIPA's requirement that regulation advance a compelling governmental interest furthered by the least restrictive means.") (emphasis added).

Document Filed: October 16, 2003 > >

Updated June 12, 2023

Office of the Assistant Attorney General,
Main
Washington DC 20530

Civil Rights Division
202-514-3847

TTY/TDD: 711