UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
NEWNAN DIVISION

HOLINESS IS THE WAY MINISTRIES INC., and CHRISTOPHER BOWLES	)	
Plaintiffs,	)	
v.	)	Civil Action No. 3:11-CV-00055-TCB
COWETA COUNTY, GEORGIA	)	
Defendant.	)	

INTERVENOR UNITED STATES OF AMERICA'S MEMORANDUM IN DEFENSE OF THE CONSTITUTIONALITY OF THE RELIGIOUS LAND USE AND INSTITUTIONALIZED PERSONS ACT OF 2000

INTRODUCTION

In this land-use suit, Plaintiffs Holiness Is the Way Ministries, Inc. and Christopher Bowles allege, inter alia, that Defendant Coweta County's refusal to grant a conditional-use permit that would allow Plaintiffs to build a church on property zoned for rural conservation violates the Religious Land Use and Institutionalized Persons Act of 2000 ("RLUIPA"), Pub. L. No. 106-274, 114 Stat. 803, codified at 42 U.S.C. §§ 2000cc et seq. In response, Defendant has filed a motion to dismiss arguing in part that the statute's land-use provisions, RLUIPA § 2, 42 U.S.C. § 2000cc, exceed

Congress's power under the Fourteenth Amendment, the Commerce Clause, and the Spending Clause and also violate the Tenth Amendment and the First Amendment's Establishment Clause. The United States of America has moved to intervene to defend RLUIPA's constitutionality.[1]

The Court should reject Defendant's constitutional arguments and uphold the statute. Defendant's challenges to RLUIPA are not novel; indeed, several have been directly rejected by the Eleventh Circuit, as well as other courts of appeals. See Midrash Sephardi, Inc. v. Town of Surfside, 366 F.3d 1214, 1237–43 (11th Cir. 2004) (holding that Congress validly enacted RLUIPA § 2(b)(1) pursuant to its power under § 5 of the Fourteenth Amendment and that the provision does not violate the Establishment Clause or the Tenth Amendment); see also World Outreach Conference Ctr. v. City of Chicago, 591 F.3d 531, 534 (7th Cir. 2009); Westchester Day Sch. v. Vill. of Mamaroneck, 504 F.3d 338, 354–56 (2d Cir. 2007); Guru Nanak Sikh Soc'y of Yuba City v. Cnty. of Sutter, 456 F.3d 978, 993–95 (9th Cir. 2006). District courts have also overwhelmingly rejected constitutional challenges to RLUIPA's land-use provisions.[2] In fact, the only court to have struck down RLUIPA's land-use

[1] The United States takes no position at this time on the merits of Plaintiffs' RLUIPA claims—that is, whether RLUIPA applies and, if so, whether Defendant has violated it—or Plaintiffs' non-RLUIPA claims.

[2] E.g., Lubavitch v. Borough of Litchfield, Conn., No. 3:09cv1419, 2011 WL
(continued...)

provisions was reversed on appeal. Elsinore Christian Ctr. v. City of Lake Elsinore, 291 F. Supp. 2d 1083 (C.D. Cal. 2003), rev'd, 197 F. App'x 718 (9th Cir. 2006).

Even without this authority, Defendant's arguments would fail. First, the provisions of RLUIPA § 2 that rely on Congress's enforcement power under the Fourteenth Amendment do not exceed the scope of that authority because those provisions codify existing constitutional rights; moreover, even if the provisions were found to prohibit some conduct that is not itself unconstitutional, the statute is a congruent and proportional response to documented constitutional violations. Second, the provision of RLUIPA § 2 that relies on Congress's Commerce Clause authority employs a jurisdictional hook that ensures that it does not exceed the Commerce Clause's bounds. Third, the provision of RLUIPA § 2 that relies on Congress's Spending Clause power is a valid, noncoercive use of that authority because it constitutes a clear and unambiguous statement of Congress's intent to condition the receipt of federal funds on compliance with the statute's obligations and because it

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[2](...continued)
2471276, at *4–6 (D. Conn. June 21, 2011); Fortress Bible Church v. Feiner, 734 F. Supp. 2d 409, 509-11 (S.D.N.Y. 2010); Rocky Mt. Christian Church v. Bd. of Cnty. Comm'rs, 612 F. Supp. 2d 1163, 1177–89 (D. Colo. 2009); United States v. Maui Cnty., 298 F. Supp. 2d 1010, 1014–17 (D. Haw. 2003); Murphy v. Zoning Comm'n of New Milford, 289 F. Supp. 2d 87, 115–24 (D. Conn. 2003), vacated on other grounds, 402 F.3d 342 (2d Cir. 2005); Freedom Baptist Church of Delaware Cnty. v. Twp. of Middletown, 204 F. Supp. 2d 857, 863–74 (E.D. Pa. 2002).

furthers a legitimate interest in ensuring that federal funds are not used to support programs that unnecessarily interfere with the free exercise of religion. Fourth, because RLUIPA § 2 was validly enacted and because it does not commandeer any state authority, it does not violate the Tenth Amendment. Finally, RLUIPA § 2 is consistent with the Establishment Clause because it accommodates religious exercise without promoting or subsidizing a religious belief or message.

STATUTORY BACKGROUND

RLUIPA, signed into law on September 22, 2000, addresses two areas in which Congress determined that state and local governments had imposed substantial burdens on religious liberty: (1) land-use decisions and (2) restrictions on institutionalized persons. Only the Act's land-use provisions are at issue here.

I. RLUIPA's Land-Use Provisions

Congress enacted RLUIPA's land-use provisions to provide statutory enforcement for constitutional rights that Congress found states and localities were frequently violating with land-use decisions. See 146 Cong. Rec. S7774, S7775 (daily ed. July 27, 2000) (joint statement of Sen. Hatch and Sen. Kennedy) ("Each subsection [of RLUIPA's land-use provisions] closely tracks the legals standards in one or more Supreme Court opinions . . . .").

RLUIPA § 2(a)(1) 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 on that person, assembly or institution" is both "in furtherance of a compelling governmental interest" and "is the least restrictive means" of furthering that interest. 42 U.S.C. § 2000cc(a)(1). Section 2(a)(2) limits the applicability of the substantial burden provision to cases in which the substantial burden:

> (A) . . . is imposed in a program or activity that receives Federal financial assistance, even if the burden results from a rule of general applicability;
>
> (B) . . . 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
>
> (C) . . . 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.

Id. § 2000cc(a)(2). Each of the three applications relies on a separate constitutional basis: with respect to § 2(a)(2)(A), Congress relied on its authority under the Spending Clause; for § 2(a)(2)(B), its authority under the Commerce Clause; and for § 2(a)(2)(C), its authority under § 5 of the Fourteenth Amendment. See 146 Cong. Rec. at S7775.

RLUIPA § 2(b) contains three non-discrimination and non-exclusion provisions that protect religious assemblies and institutions. Section 2(b)(1), also known as the "equal terms" provision, states that no state or local government "shall impose or implement a land use regulation in a manner that treats a religious assembly or institution on less than equal terms with a nonreligious assembly or institution." 42 U.S.C. § 2000cc(b)(1). Section 2(b)(2) prohibits governmental entities from "impos[ing] or implement[ing] a land use regulation that discriminates against any assembly or institution on the basis of religion or religious denomination." Id. § 2000cc(b)(2). In addition, § 2(b)(3) provides that "[n]o government shall impose or implement a land use regulation that . . . totally excludes religious assemblies from a jurisdiction; or . . . unreasonably limits religious assemblies, institutions, or structures within a jurisdiction." Id. § 2000cc(b)(3). Congress enacted § 2(b) pursuant to its power under § 5 of the Fourteenth Amendment. See 146 Cong. Rec. at S7775.

RLUIPA provides for private causes of action, as well as actions brought by the United States to enforce the statute. See 42 U.S.C. §§ 2000cc-2(a), 2(f).

II. RLUIPA's Legislative History

Congress enacted RLUIPA's land-use provisions in response to a record of widespread religious discrimination in the implementation of state and local land-use

regulations. See 146 Cong. Rec. at S7774; see also H.R. Rep. No. 106-219 (1999) (House of Representatives report on the Religious Liberty Protection Act of 1999). In nine hearings over three years, Congress heard detailed testimony on "the need for legislation and the scope of Congressional power to enact such legislation." 146 Cong. Rec. at S7774; see also H.R. Rep. No. 106-219, at 17–24 (summarizing testimony).

In these hearings, witnesses presented "massive evidence" of a pattern of religious discrimination in state and local land-use decisions. See 146 Cong. Rec. at S7774–75; H.R. Rep. No. 106-219, at 21–24. Specifically, the House Report indicates that zoning discrimination resulted in a "consistent, widespread pattern of political and governmental resistance to a core feature of religious exercise: the ability to assemble for worship." H.R. Rep. No. 106-219, at 24. The Report also indicates that regulations implemented through individualized assessments of proposed land uses were particularly problematic because they placed religious groups' ability to assemble for worship "within the complete discretion of land use regulators." Id. at 19. The Report further concludes that "[r]egulators typically have virtually unlimited discretion in granting or denying permits for land use," id. at 20, and that the "standards in individualized land use decisions are often vague, discretionary, and subjective," id. at 24; see also id. at 17 ("Local land use regulation, which lacks

objective, generally applicable standards, and instead relies on discretionary, individualized determinations, presents a problem that Congress has closely scrutinized and found to warrant remedial measures under its Section 5 enforcement authority."). The evidence showed that in this system, "new, small, or unfamiliar churches" were more likely to face discrimination than large, established churches and that racial or religious animus sometimes appeared in local land-use decisions, "especially in cases of black churches and Jewish shuls and synagogues." 146 Cong. Rec. at S7774.

Congress also heard testimony that religious assemblies receive less than equal treatment when compared to secular land uses. Specifically, Congress found that:

> banquet halls, clubs, community centers, funeral parlors, fraternal organizations, health clubs, gyms, places of amusement, recreation centers, lodges, libraries, museums, municipal buildings, meeting halls, and theaters are often permitted as of right in zones where churches require a special use permit, or permitted on special use permit where churches are wholly excluded.

H.R. Rep. No. 106-219, at 19–20.

Congress further determined that, while individualized land-use assessments facilitate discrimination against religious assemblies, proving that a particular assessment was discriminatory may be difficult. See 146 Cong. Rec. at S7775; H.R. Rep. No. 106-219, at 18–24. In reaching this conclusion, RLUIPA's sponsors relied on evidence from national surveys, studies of zoning codes, and reported land-use

cases, all of which demonstrated unconstitutional government conduct. See 146 Cong. Rec. at S7775; H.R. Rep. No. 106-219, at 18–24; 146 Cong. Rec. E1234, E1235 (daily ed. July 14, 2000) (statement of Rep. Canady). Congress also relied on evidence and testimony regarding numerous specific examples of unconstitutional discrimination from across the country—examples that witnesses with broad expertise and experience testified were representative of unconstitutional discrimination that occurred generally. See 146 Cong. Rec. at S7775; H.R. Rep. No. 106-219, at 18–24. Congress found that unconstitutional treatment of religion in state and local land use was "very widespread" and noted that, although making separate findings on every jurisdiction would be impossible, the "cumulative and mutually reinforcing evidence" of discrimination demonstrated the existence of "a nationwide problem." 146 Cong. Rec. at S7775; H.R. Rep. No. 106-219, at 18–24.

Based on this extensive testimony, Congress found that religious discrimination in the land-use arena is "widespread," 146 Cong. Rec. at S7775; H.R. Rep. No. 106-219, at 18–24, and 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." H.R. Rep. No. 106-219, at 17. In light of these findings, Congress determined that a statutory remedy with a judicial forum was appropriate to address egregious and unnecessary burdens on religion,

when such burdens fall within its power to remedy under the Spending Clause, the Commerce Clause, or the Fourteenth Amendment. See id.

ARGUMENT

I. The Principle of Constitutional Avoidance Requires the Court to Resolve All Statutory Issues Before Deciding the Constitutionality of RLUIPA.

Under the well established principle of constitutional avoidance, the Court should not rule on RLUIPA's constitutionality if the case may be resolved on another basis without reaching the question. See, e.g., Slack v. McDaniel, 529 U.S. 473, 485 (2000); PVC Windoors, Inc. v. Babbitbay Beach Constr., N.V., 598 F.3d 802, 807 (11th Cir. 2010) ("[T]he federal courts are duty bound to avoid a constitutional question if answering the question is unnecessary to the adjudication of the claims at hand . . . ."). For instance, if the Court decided that Plaintiffs had not established a substantial burden on their religious exercise, or that Defendant had used the least restrictive means to further a compelling government interest, the Court would not need to rule on whether RLUIPA's substantial burden provision, RLUIPA § 2(a), 42 U.S.C. § 2000cc(a), is constitutional. Similarly, if the Court agreed with Defendant that Plaintiffs have failed to state a claim under RLUIPA § 2(b)(1)–(3), 42 U.S.C. § 2000cc(b)(1)–(3), the Court would not need to reach the constitutionality of those

provisions.[3]

II. Alternatively, If the Court Reaches the Question of RLUIPA's Constitutionality, It Should Conclude that RLUIPA Is Constitutional.

To the extent necessary to resolve this case, the Court should hold that RLUIPA § 2 neither exceeds Congress's authority under the Fourteenth Amendment, the Commerce Clause, or the Spending Clause, nor violates the Tenth Amendment or the Establishment Clause.

A. RLUIPA's Substantial Burden Provision, as Applied to Individualized Assessments of Land-Use Proposals, Is Within Congress's Authority Under Section 5 of the Fourteenth Amendment.[4]

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[3] The United States does not suggest that these outcomes would or would not be correct. These examples merely illustrate outcomes that would obviate the need for a constitutional ruling here.

[4] Although Defendant states broadly that Congress lacked authority under the Fourteenth Amendment to enact RLUIPA, Defendant directs all of its arguments in this respect at RLUIPA § 2(a)(2)(C) and does not advance a single substantive argument regarding the other RLUIPA provisions enacted pursuant to Congress's power under the Fourteenth Amendment—namely, RLUIPA § 2(b)(1)–(3). Defendant's decision to focus its Fourteenth Amendment challenge exclusively on § 2(a)(2)(C) appears to reflect its recognition that this type of challenge to § 2(b)'s provisions is foreclosed, either directly or effectively, by the Eleventh Circuit's binding decision in Midrash. See Def.'s Mem. in Support of Mot. to Dismiss, Dkt. No. 7-1, at 20. The United States agrees and therefore similarly restricts its Fourteenth Amendment discussion to RLUIPA § 2(a)(2)(C). See Midrash, 366 F.3d at 1239–40 ("Because § [2](b)(1) of RLUIPA codifies existing Free Exercise, Establishment Clause and Equal Protection rights against states and municipalities that treat religious assemblies or institutions 'on less than equal terms' than secular institutions, § [2](b) is an appropriate and constitutional use of Congress's authority

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Section 1 of the Fourteenth Amendment prohibits 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." U.S. Const. amend. XIV, § 1. The liberties that Section 1 of the Fourteenth Amendment protects from state infringement include those guaranteed by the First Amendment. See Cantwell v. Connecticut, 310 U.S. 296, 303 (1940). Additionally, Section 5 of the Fourteenth Amendment grants Congress the "power to enforce, by appropriate legislation, the provisions of this article." U.S. Const. amend. XIV, § 5.

Under the Fourteenth Amendment's Enforcement Clause, Congress may pass "corrective legislation . . . necessary and proper for counteracting . . . such acts and proceedings as the States may commit or take, and which, by the amendment, they are prohibited from committing or taking." The Civil Rights Cases, 109 U.S. 3, 13–14 (1883). Congress may also apply its Enforcement Clause authority to prohibit "a somewhat broader swath of conduct, including that which is not itself forbidden by the Amendment's text," so long as the law maintains "congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end." Tennessee v. Lane, 541 U.S. 509, 518–20 (2004) (internal quotation marks and

[4](...continued)
under § 5 of the Fourteenth Amendment.").

citations omitted). Judicial deference to Congress is appropriate in construing legislation passed under this authority because "[i]t is for Congress in the first instance to determine whether and what legislation is needed to secure the guarantees of the Fourteenth Amendment." City of Boerne v. Flores, 521 U.S. 507, 536 (1997) (internal quotation marks and citation omitted).

Because RLUIPA § 2(a)(2)(C)—the sub-section that triggers application of RLUIPA's substantial burden provision in those instances in which a state or local government makes individualized assessments of the proposed uses for a piece of property in the course of implementing land-use regulations—directly enforces existing constitutional rights, it is necessarily a valid exercise of Congress's core power under Section 5 of the Fourteenth Amendment. Furthermore, even if RLUIPA § 2(a)(2)(C) were found to prohibit marginally constitutional conduct, it is a proportional response to the widespread constitutional violations found by Congress.

1. RLUIPA's Substantial Burden Provision, as Applied to Individualized Assessments of Land-Use Proposals, Codifies the Supreme Court's "Individualized Assessments" Doctrine.

Although the First Amendment right of free exercise does not relieve the obligation to comply with a neutral, generally applicable law, see Emp't Div. v. Smith, 494 U.S. 872, 879 (1990), the Free Exercise Clause "forbids subtle departures from neutrality" and "covert suppression of particular religious beliefs," Church of the

Lukumi Babalu Aye v. City of Hialeah, 508 U.S. 520, 534 (1993) (internal quotation marks and citations omitted). To protect against such infringement, the Supreme Court has repeatedly distinguished between the rational-basis review that applies to neutral laws of general applicability that incidentally burden religious exercise and the strict scrutiny that applies "where the State has in place a system of individual exemptions," but "refuse[s] to extend that system to cases of 'religious hardship.'" Smith, 494 U.S. at 884 (citation omitted).

The Supreme Court has long recognized that legislative schemes employing individualized assessments may be used by government officials to discriminate against religious adherents, and it has required that substantial burdens on religious exercise imposed in such a context be justified by a compelling interest. In Sherbert v. Verner, 374 U.S. 398, 399–401 (1963), for example, a state agency found that a Seventh-day Adventist who was discharged because she refused to work on Saturdays, the Sabbath Day of her faith, was ineligible for unemployment benefits on the ground that she had failed, without good cause, to accept available work. The Court held that the state's denial of the claimant's application for unemployment benefits, which followed from a government assessment of her rationale for not accepting available work, violated the Free Exercise Clause because the denial of benefits was a substantial burden on her religious exercise and the state agency could not show that

its decision was the least restrictive means of furthering a compelling state interest. Id. at 406–07; see also Hobbie v. Unemp't Appeals Comm'n, 480 U.S. 136, 141–42 (1987) (applying strict scrutiny to state commission's denial of unemployment benefits to religious applicant and expressly rejecting a lesser standard of scrutiny); Thomas v. Review Bd. of Ind. Emp't Sec. Div., 450 U.S. 707, 718 (1981) (applying strict scrutiny to state's denial of unemployment benefits to applicant who left his job because his religious beliefs prohibited him from participating in production of armaments).

The Supreme Court's holding in Smith reinforced this point. Although the Smith Court held that strict scrutiny did not apply to neutral laws of general applicability that incidentally burden religious exercise (there, an Oregon criminal law prohibiting the possession of peyote), it specifically distinguished government decisions made pursuant to "a system of individual exemptions." 494 U.S. at 884. The Court characterized the unemployment-benefit denials at issue in Sherbert and its progeny as government decisions made in "a context that lent itself to individualized governmental assessment of the reasons for the relevant conduct" and described that line of cases as "stand[ing] for the proposition that where the State has in place a system of individual exemptions, it may not refuse to extend that system to cases of 'religious hardship' without compelling reason." Id. (emphasis added) (citation

omitted).

Subsequent to Smith, the Supreme Court again applied the Free Exercise Clause "individualized assessments" doctrine in Lukumi, where the Court struck down a facially neutral animal cruelty ordinance that prohibited animal slaughter unless the killing was necessary on the ground that the ordinance was being applied in such a way as to"devalue[] religious reasons for killing by judging them to be of lesser import than nonreligious reasons." 508 U.S. at 537–38. Because the ordinance required "an evaluation of the particular justification for the killing," the Court found that the law created a system of individualized assessments. Id. at 537. The Court concluded by emphasizing that a "law burdening religious practice that is not neutral or not of general application must undergo the most rigorous of scrutiny." Id. at 546. In doing so, the Court "confirmed that the presence of 'individualized assessments' remains of constitutional significance in Free Exercise cases even outside the unemployment compensation arena." Freedom Baptist Church of Delaware Cnty. v. Twp. of Middletown, 204 F. Supp. 2d 857, 868 (E.D. Pa. 2002).[5]

The vast majority of courts to have considered the question have determined

[5] Defendant completely overlooks Lukumi when suggesting that Smith confines the individualized assessments doctrine to cases involving the denial of unemployment benefits. See Def.'s Mem. in Support of Mot. to Dismiss, Dkt. No. 7-1, at 19.

that, because RLUIPA § 2(a)(1), as applied by § 2(a)(2)(C), applies only to land-use decisions that employ individualized assessments, the provision merely codifies the Supreme Court's Free Exercise jurisprudence and thus is well-within Congress's power under the Fourteenth Amendment.[6] See, e.g., World Outreach Conference Ctr. v. City of Chicago, 591 F.3d 531, 534 (7th Cir. 2009) (holding that the provision "'codifies Sherbert" (citation omitted)); Guru Nanak Sikh Soc'y of Yuba City v. Cnty. of Sutter, 456 F.3d 978, 993 (9th Cir. 2006) ("In this case, RLUIPA targets only 'individualized government assessment[s]' subject to strict scrutiny under the Supreme Court's free exercise jurisprudence."); Church of the Hills v. Twp. of Bedminster, No. Civ. 05-3332, 2006 WL 462674, at *7 (D.N.J. Feb. 24, 2006) ("Applying the heightened level of scrutiny imposed by the RLUIPA's general rule, as established in Section (a)(1), to these types of individualized assessments merely codifies the jurisprudence in Free Exercise cases that originated with the Supreme Court's decision in Sherbert."); Castle Hills First Baptist Church v. City of Castle

[6] Indeed, even before the passage of RLUIPA, a number of courts applied Lukumi to land-use decisions that involved individualized assessments burdening religious practice and held that the burden in question must "advance interests of the highest order and be narrowly tailored in pursuit of those interests" in order to pass constitutional muster. Keeler v. Mayor & City Council of Cumberland, 940 F. Supp. 879, 886 (D. Md. 1996) (quoting Lukumi, 508 U.S. at 546); see also, e.g., Alpine Christian Fellowship v. Cnty. Comm'rs of Pitkin Cnty., 870 F. Supp. 991, 994 (D. Colo. 1994) (requiring the county to demonstrate a compelling governmental interest for its failure to provide a religious assembly with a use permit).

Hills, No. SA-01-CA-1149-RF, 2004 WL 546792, at *19 (W.D. Tex. Mar. 17, 2004) ("RLUIPA's § 2(a) codifies existing Supreme Court 'individualized assessment' jurisprudence."); Freedom Baptist Church, 204 F. Supp.2d at 868 (RLUIPA "codif[ies] the individualized assessments jurisprudence in Free Exercise cases that originated with the Supreme Court's decision in Sherbert."). But see Congregation Kol Ami v. Abington Twp., No. Civ. A. 01-1919, 2004 WL 1837037, at *9–*11 (E.D. Pa. Aug. 17, 2004) (concluding that RLUIPA goes beyond merely codifying the individualized assessments doctrine, but holding that it is still within Congress's power under Section 5 of the Fourteenth Amendment).[7]

Defendant's primary argument against RLUIPA § 2(a)(2)(C) appears to be that the provision attempts to avoid Smith's rule that neutral laws of general applicability that incidentally burden religious exercise are subject only to rational-basis review by "characterizing the application of land use regulations as a system of 'individualized assessments.'" Def.'s Mem. in Support of Mot. to Dismiss, Dkt. No. 7-1, at 18. This

[7] Kol Ami incorrectly relied on the proposition that in "deciding what burdens amount to a prohibition of free exercise, the nature and centrality of the religious activity is a major consideration." 2004 WL 1837037, at *5. The court mistakenly determined that because RLUIPA applies to matters not central to one's religious beliefs, it "applies to cases where the burdens on free exercise are less than those that were previously actionable." Id. at *9. However, this centrality principle is inconsistent with Supreme Court precedent. See Smith, 494 U.S. at 887 ("Judging the centrality of different religious practices" violates the principle that "courts must not presume to determine the place of a particular belief in a religion.").

argument, however, incorrectly describes how RLUIPA § 2(a)(2)(C) operates: the provision does not deem all land-use regulation to involve systems of individualized assessments. Rather, a jurisdictional determination must first be made that the land-use regulation in question involves an "individualized assessment" of the proposed uses of the property involved. If it does not involve such an assessment, then there would be no jurisdiction based on § 2(a)(2)(C). Thus, by the statute's explicit terms, it cannot be applied to those zoning ordinances and land-use decisions that are, in fact, neutral laws of general applicability. See Life Teen, Inc. v. Yavapai Cnty., No. 3:01-CV-1490, 2003 WL 24224618, at *14 (D. Ariz. Mar. 26, 2003) ("RLUIPA first requires a jurisdictional determination that the relevant government action is based on an individualized assessment before that action will be subject to strict scrutiny.").

Defendant also complains that applying strict scrutiny when the government has made an individualized assessment of the proposed uses for a piece of property is "untenable in practice," suggesting that if its application of a land-use ordinance to a person applying for a conditional use permit is an individualized assessment, then all criminal laws would involve such an assessment. Def.'s Mem. in Support of Mot. to Dismiss, Dkt. No. 7-1, at 19. This argument, however, flies in the face of the Supreme Court's creation of a doctrinal distinction between "an across-the-board criminal prohibition on a particular form of conduct" (e.g., a law that criminalizes possession

of peyote) and a law that requires an "individualized governmental assessment of the reasons for the relevant conduct" (e.g., an ordinance that punishes only the unnecessary killing of animals). Smith, 494 U.S. at 884; Lukumi, 508 U.S. at 537. RLUIPA § 2(a)(2)(C) appropriately hews to this doctrinal distinction.[8]

Finally, Defendant repeatedly argues that RLUIPA's substantial burden provision is identical to that of its predecessor, the Religious Freedom Restoration Act ("RFRA"), Pub. L. No. 104-141, 107 Stat. 1488, codified at 42 U.S.C. § 2000bb et seq., and must fail for the same reasons. See Def.'s Mem. in Support of Mot. to Dismiss, Dkt. No. 7-1, at 12. This is clearly incorrect. In City of Boerne v. Flores, 521 U.S. 507, 532 (1997), the Court held that RFRA, which targeted virtually all laws and official actions at every level of government, was unconstitutional as applied to the states and their subdividions because it would necessarily apply even to generally applicable laws that incidentally burdened religion. Indeed, RFRA's stated purpose was to overrule Smith and to guarantee the application of strict scrutiny in "'all cases

[8] Defendant further asserts, without elaboration or explanation, that the statute deviates from First Amendment jurisprudence by "incorporat[ing] an overbroad definition of what constitutes a substantial burden on religious exercise." Def.'s Mem. in Support of Mot. to Dismiss, Dkt. No. 7-1, at 17. This argument also misses the mark. The statue does not contain a definition of substantial burden, and courts have therefore looked to case law in order to define the term. See Midrash, 366 F.3d at 1226 ("The Supreme Court's definition of 'substantial burden' within its free exercise cases is instructive in determining what Congress understood 'substantial burden' to mean in RLUIPA.").

where free exercise of religion is substantially burdened.'" City of Boerne, 521 U.S. at 515 (quoting 42 U.S.C. § 2000bb(b)). By contrast, Congress purposefully limited the applicability of RLUIPA's substantial burden provision in order to make it consistent with the Supreme Court's individualized assessments doctrine, a doctrine explicitly reaffirmed by Smith.

In sum, RLUIPA § 2(a)(1), as applied through § 2(a)(2)(C), applies only to laws involving a system of individualized assessments, and thus merely codifies preexisting Free Exercise jurisprudence. It is therefore well within Congress's power under the Fourteenth Amendment.

2. Even If RLUIPA's Substantial Burden Provision, as Applied to Individualized Assessments of Land-Use Proposals, Extends Beyond Settled Constitutional Protections, It Nevertheless Represents a Permissible Exercise of Congress's Power to Enforce the Fourteenth Amendment.

Because RLUIPA § 2(a)(1), as applied through § 2(a)(2)(C), simply codifies First Amendment protections, this Court need not address whether these provisions satisfy the City of Boerne "congruence and proportionality" test. As explained below, however, even if this Court were to determine that the Fourteenth Amendment provisions of RLUIPA § 2(a) extend beyond the proscriptions of the Constitution, the Court should find that they nevertheless represent a permissible exercise of Congress's enforcement power.

The power to enforce the Fourteenth Amendment also allows Congress to prohibit a "somewhat broader swath of conduct, including that which is not itself forbidden by the Amendment's text," Kimel v. Fla. Bd. of Regents, 528 U.S. 62, 81 (2000), as long as there exists a "congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end." City of Boerne, 521 U.S. at 520. The Eleventh Circuit has explained that this analysis requires a three-part test: "[W]e must determine (1) the constitutional right or rights that Congress sought to enforce . . . ; (2) whether there was a history of unconstitutional discrimination to support Congress's determination that prophylactic legislation was necessary; and (3) whether [the statute] is an appropriate response to this history and pattern of unequal treatment." Ass'n for Disabled Americans, Inc. v. Fla. Int'l Univ., 405 F.3d 954, 957 (11th Cir. 2005).

Here, it cannot be disputed that Congress sought through RLUIPA § 2(a)(2)(C) to enforce rights guaranteed by the First Amendment's Free Exercise Clause. Moreover, before enacting RLUIPA, Congress identified a broad pattern of unconstitutional conduct against religious organizations in land-use decisions, and RLUIPA § 2(a)(2)(C) represents a proportional and congruent response to the First Amendment violations that Congress found.

a. Congress Had Evidence of a Pattern of Discrimination in the Implementation of State and Local Land-Use Regulation.

Before enacting RLUIPA, Congress held nine hearings over three years on the need for legislation. Congress heard testimony and reviewed evidence from national surveys, studies of zoning codes, reported land-use cases, and the experiences of particular religious institutions. Congress found that this evidence demonstrated a pattern of widespread religious discrimination in the implementation of state and local land-use laws and noted that laws permitting individualized assessments of land-use proposals were particularly likely to result in religious discrimination. These congressional 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. Nat'l Ass'n of Radiation Survivors, 473 U.S. 305, 331 n.12 (1985); see also City of Boerne, 521 U.S. at 531-32 ("As a general matter, it is for Congress to determine the method by which it will reach a decision.").

In short, contrary to Defendant's claims, Congress had before it ample evidence of local land-use decisions burdening free exercise to warrant the enactment of corrective legislation. See, e.g., Midrash, 366 F.3d at 1239 ("Congress's findings regarding the widespread discrimination against religious institutions are plausible and provided a basis for concluding that RLUIPA remedies and prevents discriminatory

land use regulations"); Guru Nanak, 456 F.3d at 994 ("In nine hearings preceding the enactment of RLUIPA, Congress compiled a substantial amount of statistical and anecdotal data demonstrating that governmental entities nationwide purposefully exclude unwanted religious groups by denying them use permits through discretionary and subjective standards and processes."); Church of the Hills, 2006 WL 462674, at *7 n.3 ("The legislative record of the RLUIPA amply supports the notion that zoning laws are often applied in a manner that is hostile to the free exercise of religion.").

b. RLUIPA's Substantial Burden Provision, as Applied to Individualized Assessments of Land-Use Proposals, Satisfies the Congruence and Proportionality Test.

RLUIPA § 2(a)(1), as applied through § 2(a)(2)(C), is narrowly drawn to address the burdens on free exercise identified by Congress that occur in discretionary applications of zoning laws and is thus congruent and proportional to the constitutional violations identified by Congress. See Guru Nanak, 456 F.3d at 994–95 ("RLUIPA . . . targets only regulations that are susceptible, and have been shown, to violate individuals' religious exercise."); Kol Ami, 2004 WL 1837037, at *11 (same); Freedom Baptist Church, 204 F. Supp. 2d at 873–74 (RLUIPA "is targeted solely to low visibility decisions with the obvious—and, for Congress, unacceptable—concomitant risk of idiosyncratic application.").

Unlike RFRA, RLUIPA does not attempt to impose strict scrutiny on neutral

laws of general applicability. Nor does RLUIPA exempt religious institutions from zoning laws. Rather, RLUIPA requires strict scrutiny of land-use decisions that substantially burden religious exercise only where the government was permitted to make an individualized assessment of the proposed land use and thus works to prevent local government officials from discriminating against religious institutions. This precision stands in sharp contrast to RFRA's wholly untargeted provisions, which sought to apply strict scrutiny to all laws, in all contexts. In short, RLUIPA does not provide the "sweeping coverage" of RFRA that the Supreme Court objected to in City of Boerne. See 521 U.S. at 532.

As numerous courts have already held with respect to RLUIPA, "[w]here, 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.'" Murphy, 289 F. Supp. 2d at 120 (quoting Freedom Baptist Church, 204 F. Supp. 2d at 874); see also Guru Nanak, 456 F.3d at 994–95 ("RLUIPA is a congruent and proportional response to free exercise violations"); Church of the Hills, 2006 WL 462674, at *7 n.3; Kol Ami, 2004 WL 1837037, at *12 ("RLUIPA is sufficiently congruent and proportional to fall under Section V of the Fourteenth Amendment").

In sum, even if this Court were to determine that RLUIPA covers more conduct than the Fourteenth Amendment itself, it should nevertheless conclude that RLUIPA represents a congruent and proportional response to the nationwide problem identified by Congress of religious discrimination in the implementation of state and local land-use regulations.

B. RLUIPA's Substantial Burden Provision, as Applied to Burdens that Affect Interstate Commerce, Is a Valid Exercise of Congress's Authority Under the Commerce Clause.

RLUIPA § 2(a)(2)(B) provides that strict scrutiny also applies in those instances where the implementation of a land-use regulation imposes a substantial burden upon the religious exercise of a person or institution and that burden affects, or its removal 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." 42 U.S.C. § 2000cc(a)(2)(B).[9] This clause—often called a jurisdictional hook—triggers

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[9] The statute further specifies that

> [i]f the only jurisdictional basis for applying a provision of this chapter is a claim that a substantial burden by a government on religious exercise affects, or that removal of that substantial burden would affect, commerce with foreign nations, among the several States, or with Indian tribes, the provision shall not apply if the government demonstrates that all substantial burdens on, or the removal of all substantial burdens from, similar religious exercise throughout the Nation would not lead in the aggregate to a substantial effect on commerce with foreign nations,

(continued...)

RLUIPA's application only in instances that properly fall within the reach of the Commerce Clause. Cf. United States v. Lopez, 514 U.S. 549, 561 (1995) ("[Section] 922(q) contains no jurisdictional element which would ensure, through case-by-case inquiry, that the firearm possession in question affects interstate commerce.") By requiring case-by-case proof of Congress's authority to regulate, RLUIPA's jurisdictional hook ensures that each application of RLUIPA's substantial burden provision based on an effect on interstate commerce is necessarily within the bounds of Congress's Commerce Clause authority. See, e.g., Westchester Day Sch. v. Vill. of Mamaroneck, 504 F.3d 338, 354 (2d Cir. 2007) ("[W]here the relevant jurisdictional element is satisfied, RLUIPA constitutes a valid exercise of congressional power under the Commerce Clause."); United States v. Maui Cnty., 298 F. Supp. 2d 1010, 1015 (D. Haw. 2003); Freedom Baptist Church, 204 F. Supp. 2d at 866–68.

In the face of this authority, Defendant essentially argues that interstate commerce can never be affected by a land-use regulation because land-use decisions and the commercial transactions that they touch are not interstate in nature. See Def.'s

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[9](...continued)
among the several States, or with Indian tribes.

Id. § 2000cc-2(g).

Mem. in Support of Mot. to Dismiss, Dkt. No. 7-1, at 15. This conclusion, however, does not follow; simply because a law only regulates activity within a state's borders does not mean that the regulation's effects do not extend more broadly. See, e.g., Bibb v. Navajo Freight Lines, 359 U.S. 520, 526–28 (1959) (describing how Illinois's requirements for trucks traveling in Illinois had a large impact on interstate commerce); Westchester Day Sch., 504 F.3d at 354 (holding no error in district court's finding that proposed construction of $9 million building would affect interstate commerce). Moreover, to the extent that Defendant argues that Plaintiffs have failed to allege that the denial of their application for a conditional-use permit has affected interstate commerce, such an argument bears only on whether RLUIPA § 2(a)(2)(C)'s jurisdictional test is satisfied here, not on whether application of RLUIPA's substantial burden provision is constitutional when an effect on interstate commerce is established.

C. RLUIPA's Substantial Burden Provision, as Applied to Burdens Imposed in a Program that Receives Federal Financial Assistance, Is a Valid Exercise of Congress's Spending Clause Authority.

Under RLUIPA § 2(a)(2)(A), governments that implement a land-use regulation in a manner that imposes a substantial burden on the religious exercise of a person or institution must show that the burden satisfies strict scrutiny if "the substantial burden is imposed in a program or activity that receives Federal financial assistance, even if

the burden results from a rule of general applicability." 42 U.S.C. § 2000cc(a)(2)(A). This provision properly relies on Congress's power to enact legislation under the Spending Clause.

Article I of the Constitution provides Congress with the power to "provide for the . . . general welfare of the United States." U.S. Const. art. I, § 8, cl. 1. It is well established that "[i]ncident to this power, Congress may attach conditions on the receipt of federal funds." South Dakota v. Dole, 483 U.S. 203, 206 (1987). Although broad, Congress's power under the Spending Clause is not without limits, and the Supreme Court in Dole identified four specific restrictions that Spending Clause legislation must satisfy. First, "the exercise of the spending power must be in pursuit of 'the general welfare,'" although in evaluating "whether a particular expenditure is intended to serve general public purposes, courts should defer substantially to the judgment of Congress." Id. at 207 (citation omitted). Second, conditions on the state receipt of federal funds must be unambiguous, "'enabl[ing] the States to exercise their choice knowingly, cognizant of the consequences of their participation.'" Id. (citation omitted). Third, conditions on federal funds should be reasonably related "'to the federal interest in particular national projects or programs.'" Id. (citation omitted). Fourth and finally, "other constitutional provisions may provide an independent bar to the constitutional grant of federal funds." Id. at 208.

Significantly, the Eleventh Circuit in Benning v. Georgia, 391 F.3d 1299, 1305–08 (11th Cir. 2004), applied Dole's four requirements to an identical provision in RLUIPA § 3 and held that Congress acted pursuant to its Spending Clause authority in enacting that provision of the statute. Defendant fails to offer a single reason why a different result should obtain with respect to RLUIPA § 2(a)(2)(A). Rather, instead of arguing that this provision does not satisfy one of Dole's requirements, Defendant simply asserts that it is "irrelevant" because land-use regulations are not implemented in programs funded through federal grants. Def.'s Mem. in Support of Mot. to Dismiss, Dkt. No. 7-1 at 14–15. At its base, this is not an argument about whether Congress had authority under the Spending Clause to enact RLUIPA § 2(a)(2)(A), but an argument that this particular jurisdictional test will seldom, if ever, be satisfied. Yet, regardless of the frequency with which RLUIPA § 2(a)(2)(A) applies, it is clear that Congress, pursuant to its Spending Clause authority, validly provided that the programs and activities of state and local governments that receive federal funds must comply with RLUIPA's substantial burden provision.

D. RLUIPA § 2 Does Not Violate the Tenth Amendment.

Under the Tenth Amendment, "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. Const. amend. X. Defendant repeatedly implies

that RLUIPA violates this federalism principle because it regulates in an area that traditionally has been within the purview of state and local governments. Yet, the relevant inquiry for Tenth Amendment purposes is not whether a particular activity is local in nature, but whether the federal statute was enacted pursuant to Congress's constitutional authority. See New York v. United States, 505 U.S. 144, 156 (1992) ("If a power is delegated to Congress in the Constitution, the Tenth Amendment expressly disclaims any reservation of that power to the States."); Midrash, 366 F.3d at 1242 ("Although RLUIPA intrudes to some degree on local land use decisions, RLUIPA does not violate principles of federalism if it is otherwise grounded in the Constitution."). Because, for the reasons discussed above, Congress had authority to enact each provision of RLUIPA § 2, the statute is consistent with the Tenth Amendment.

Defendant also attempts to argue that RLUIPA § 2 violates the Tenth Amendment anti-commandeering rules set forth in New York and Printz v. United States, 521 U.S. 898, 935 (1997), which prohibit Congress from forcing states "to enact or enforce a federal regulatory program." See Def.'s Mem. in Support of Mot. to Dismiss, Dkt. No. 7-1, at 21. Yet, this challenge to RLUIPA was directly addressed and rejected by the Eleventh Circuit in Midrash. There, the court explained that "[w]hile RLUIPA may preempt laws that discriminate against or exclude religious

institutions entirely, it leaves individual states free to eliminate the discrimination in any way they choose, so long as the discrimination is actually eliminated." Midrash, 366 F.3d 1242. Thus, the court concluded, "RLUIPA's core policy is not to regulate the states or compel their enforcement of a federal regulatory program, but to protect the exercise of religion, a valid exercise of Congress's § 5 power under the Fourteenth Amendment, which does not run afoul of the Tenth Amendment's protection of the principles of federalism." Id. at 1243; see also Westchester Day Sch., 504 F.3d at 355 ("We do not believe RLUIPA directly compels states to require or prohibit any particular acts. Instead, RLUIPA leaves it to each state to enact and enforce land use regulations as it deems appropriate so long as the state does not substantially burden religious exercise in the absence of a compelling interest achieved by the least restrictive means."). Defendant's Tenth Amendment challenge to RLUIPA § 2 must accordingly be rejected.

E. RLUIPA § 2 Does Not Violate the Establishment Clause.

Finally, RLUIPA § 2 does not run afoul of the First Amendment's Establishment Clause because it is a permissible accommodation of religious exercise. See Hobbie, 480 U.S. at 144–45 ("[T]he government may (and sometimes must) accommodate religious practices and . . . it may do so without violating the Establishment Clause."). Under Lemon v. Kurtzman, 403 U.S. 602, 612–13 (1971),

a statute will survive an Establishment Clause attack if (1) it has "a secular legislative purpose," (2) its "principal or primary effect . . . neither advances nor inhibits religion," and (3) it does not "foster an excessive government entanglement with religion." In Midrash, the Eleventh Circuit applied the Lemon test to hold that RLUIPA § 2(b)(1) is consistent with the Establishment Clause, and the court's logic makes clear that an Establishment Clause challenge to the rest of the provisions of RLUIPA §2 similarly cannot succeed. See Midrash, 366 F.3d at 1240–42; see also Westchester Day Sch., 504 F.3d at 355–56 (applying Lemon to hold that "RLUIPA's land use provisions do not violate the Establishment Clause").

First, the Midrash court found that RLUIPA has a secular legislative purpose—namely, "to alleviate significant government interference with the exercise of religion." Id. at 1241. In this respect, the court relied on Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos, 483 U.S. 327, 335 (1987), where the Supreme Court held 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." See also Westchester Day Sch., 504 F.3d at 355 ("RLUIPA's land use provisions plainly have a secular purpose, that is . . . to lift government-created burdens on private religious exercise.").

Next, Midrash held that RLUIPA § 2(b)(1)'s principal or primary effect neither

advances nor inhibits religion. The court noted that under Supreme Court precedent, "'[a] law is not unconstitutional simply because it allows churches to advance religion. . . . For 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 influences.'" Midrash, 366 F.3d at 1241 (quoting Amos, 483 U.S. at 337). The court further emphasized that the Supreme Court has made "clear that a law does not violate the Establishment Clause simply because it lifts burdens imposed on religious institutions without affording similar benefits to secular entities." Id. (citing Amos, 483 U.S. at 338). The court went on to reject explicitly the argument, which Defendant nonetheless reasserts here, that RLUIPA "allow[s] religious assemblies to avoid the application of zoning regulations." Id. Although Midrash was evaluating RLUIPA's equal terms provision, its recognition that "a relevant and meaningful distinction exists between statutes whose effect is to advance religion and statutes whose effect is to allow religious organizations to advance religion" precludes Defendant's arguments in this respect. See also Westchester Day Sch., 504 F.3d at 355 ("Under RLUIPA, the government itself does not advance religion; all RLUIPA does is permit religious practitioners the free exercise of their religious beliefs without being burdened unnecessarily by the government.").

The Midrash court concluded its Establishment Clause analysis by holding that

RLUIPA does not produce an excessive entanglement between church and state. The court explained that "RLUIPA does not require 'pervasive monitoring' to prevent the government from indoctrinating religion," or otherwise foster impermissible levels of interaction between church and state. Midrash, 366 F.3d at 1241; see also Westchester Day Sch., 504 F.3d at 355. Rather, "RLUIPA requires only that states avoid discriminating against or among religious institutions." Midrash, 366 F.3d at 1241.

In short, the Eleventh Circuit in Midrash carefully examined and rejected an Establishment Clause challenge to RLUIPA § 2(b)(1). Defendant offers no explanation for why that provision is consistent with the Establishment Clause but RLUIPA's other land-use provisions are not. Instead, guided by the Eleventh Circuit's analysis in Midrash, this Court should hold that none of the provisions in RLUIPA § 2 violate the Establishment Clause.

CONCLUSION

To the extent necessary to resolve this case, the Court should conclude that RLUIPA is constitutionally sound.

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CERTIFICATE OF COMPLIANCE

I certify that the documents to which this certificate is attached have been prepared with one of the font and point selections approved by the Court in LR 5.1B for documents prepared by computer.

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CERTIFICATE OF SERVICE

I hereby certify that, on August 15, 2011, a true and correct copy of the foregoing Memorandum in Defense of the Constitutionality of the Religious Land Use and Institutionalized Persons Act of 2000 was filed electronically through the Northern District of Georgia Electronic Filing System, and the document is available for viewing on that system.

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