No. 04-55320

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ELSINORE CHRISTIAN CENTER, et al.

Plaintiffs-Appellants,

UNITED STATES OF AMERICA,

Intervenor-Appellant,

v.

CITY OF LAKE ELSINORE, et al.

Defendants-Appellees

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

ANSWERING BRIEF OF DEFENDANTS-APPELLEES CITY OF LAKE ELSINORE, ET AL.

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STATEMENT OF JURISDICTION

Pursuant to Circuit Rule 28-2.2, Defendants-Appellees hereby state their agreement with the Statement of Jurisdiction set forth in the opening Brief of Plaintiffs-Appellants.

STATEMENT OF THE ISSUES

1. Whether Section 2(a)(1) of RLUIPA is a constitutional exercise of congressional authority under Section Five of the Fourteenth Amendment.

2. Whether Section 2(a)(1) of RLUIPA is a constitutional exercise of congressional authority under the Commerce Clause.

3. Whether Section 2(a)(1) of RLUIPA is constitutional under the Establishment Clause.

STATEMENT OF THE CASE

This is an action to force the City of Lake Elsinore (the "City") to grant a conditional use permit ("CUP") for Elsinore Christian Center (the "Church") to relocate to a larger property three blocks from its current downtown location. Joint Excerpts Tab ("J.E.T.") 1, ¶¶ 16-34; J.E.T. 19 at pp. 3-6. The City's Planning Commission denied the CUP, citing the loss of needed services provided by the existing grocery store and recycling business, loss of tax revenue, insufficient parking and the belief that the denial of the CUP would not work a substantial burden on the Church, as it could continue to operate at its present downtown

location. J.E.T. 19 at pp. 5-6. On appeal of the CUP denial, the City Council unanimously agreed with the Planning Commission's decision. The Church and one of its members, Gary Holmes, (hereinafter collectively referred to as the "Church") filed an action in the district court below, seeking to enjoin the City from enforcing its Municipal Code and land use regulations with respect to the Church and to compel the City to issue a CUP without restrictions as to time and manner of permitted uses of the property. *Id.* ¶¶ 42, 47. The Church also sought monetary damages and attorneys' fees against the City. *Id.* ¶¶ 3-4 (in prayer at pp. 17-18).

The Church's claims against the City are based in part on the Religious Land Use and Institutionalized Persons Act of 2000, 42 U.S.C. § 2000cc, *et seq.* ("RLUIPA"). The Church argued that the denial of the CUP imposed a "substantial burden" on "religious exercise," without the necessary showing under RLUIPA that the CUP denial was the least restrictive means of furthering a compelling governmental interest. J.E.T. 1, ¶¶ 35-58. The Church also alleged civil rights violations pursuant to 42 U.S.C. § 1983 and other claims asserting constitutional violations with respect to freedom of speech and assembly, free exercise of religion and equal protection. *Id.* ¶¶ 59-77.

The district court denied the Church's motion for preliminary injunction, and it invited the parties to file cross-motions for partial summary judgment addressing

the Church's substantial burden claim under Section 2(a) of RLUIPA. In its motion papers, the City argued that the CUP denial did not impose a substantial burden on religious exercise. In the alternative, the City argued that RLUIPA is unconstitutional and exceeds Congress' powers under Section 5 of the Fourteenth Amendment and the Commerce Clause, and violates the Establishment Clause, of the United States Constitution.

In its Amended Order entered on August 22, 2003, the district court ruled that the CUP denial did place a substantial burden on religious exercise, but the district court went on to decide that Section 2(a) of RLUIPA is unconstitutional and beyond Congress' powers under Section 5 of the Fourteenth Amendment and the Commerce Clause. J.E.T. 19 (reported as *Elsinore Christian Ctr. v. City of Lake Elsinore,* 291 F. Supp. 2d 1083 (C.D. Cal. 2003)). Having decided that RLUIPA is unconstitutional on these grounds, the district court declined to reach the City's argument that Section 2(a) of RLUIPA violates the Establishment Clause. *Id.* at p. 44.

The Church sought interlocutory review of the district court's Amended Order pursuant to 28 U.S.C. § 1292(b). On December 17, 2003, the district court granted the Church's request for interlocutory review. The Church and Intervenor the United States then petitioned this Court for permission to bring this

interlocutory appeal under section 1292(b), which this Court granted on February 23, 2004.

On September 29, 2004, the City moved to remand the case to the district court because, after granting interlocutory review on the constitutionality of RLUIPA in this case, this Court decided the appeal of *San Jose Christian College v. City of Morgan Hill*, 360 F.3d 1024, 1034-35 (9th Cir. 2004). As the City pointed out in its motion to remand, this Court's decision in *Morgan Hill* constituted an intervening change in law warranting remand. The district court in this case had rejected the RLUIPA "substantial burden" standard on which the trial court in *Morgan Hill* had relied, but this Court subsequently affirmed the *Morgan Hill* standard and adopted it as the law of this Circuit. The City sought remand so that the district court could reconsider its decision on the "substantial burden" issue in light of this Court's *Morgan Hill* decision. As the City explained, if the district court had applied the *Morgan Hill* standard, it would have found no substantial burden on religious exercise and would not have had to reach the issue of RLUIPA's constitutionality.

On December 7, 2004, this Court issued an Order denying the City's motion for remand.

STATEMENT OF FACTS

In February 1980, severe flooding caused the City to suffer millions of dollars in property damage. Supplemental Excerpts Tab ("S.E.T.") 24 (City of Lake Elsinore Redevelopment Plan) at pp. 71-72. The City's historic Central Business District ("CBD"), an area already "suffering from an abnormally rate of unemployment," was an area where most of the property damage occurred. *Id.* In response to this disaster, the City and the City's Redevelopment Agency ("Agency") adopted a Redevelopment Plan for Redevelopment Project No. 1. *Id.* In 1981, the City and the Agency placed the City's CBD within a redevelopment project area by adopting, as an amendment to Redevelopment Project No. 1, the Redevelopment Plan for the Rancho Laguna Redevelopment Project ("Plan"). *Id.* According to the Plan, "[t]he revitalization and rehabilitation of the Central Business District (CBD) will be pursued to provide further job opportunities along with increased sales and property tax revenues which can be used to support the services and facilities provided by the City." *Id.* at p. 79.

In 1986, a grocery business operating as Food Smart, Inc. ("Food Smart") leased an abandoned store in the CBD, 217 North Main Street, Lake Elsinore, California ("Subject Property") from the Elsinore Naval and Military School ("School") to operate a full service grocery store and recycling center. S.E.T. 19 at pp. 4-5; S.E.T. 25 (Declaration of Charleen Proctor), ¶¶ 5-10. The opening of

Food Smart was not only good news to the residents of the CBD but also for the City in its efforts to revitalize and redevelop the CBD, an economically depressed area characterized by urban blight. With the opening of a market in the area, the CBD received an economic boost through the creation of new jobs at Food Smart. Moreover, and vital to the low-income residents of downtown, residents of the CBD were within comfortable walking distance to a full service grocery store.

From 1986 through April 2000, the School leased the Subject Property to Food Smart without incident. S.E.T. 25, ¶ 1. In April 2000, the School and the Church entered into an agreement for the Church to purchase the Subject Property. J.E.T. 1, ¶ 24. The Subject Property is located in an area of the City zoned as C-1, or "Neighborhood Commercial." *Id.* The following uses are among those that may be located in C-1 zones as a matter of right: apparel stores, appliance stores, bicycle stores, food stores, florists, general merchandise stores, hardware stores, health and exercise clubs, hobby supply stores, jewelry stores, media shops, music stores, personal service establishments, pet shops, restaurants, dance and music schools, sporting goods stores, toy shops and sellers of vehicle parts. J.E.T. 19 at p. 5.

The following uses may be located in C-1 zones subject to a CUP: automatic car washes, bars, churches, drive-through or drive-in establishments, arcades, gas stations, hotels, mortuaries, motels, private clubs and lodges,

restaurants with outside eating areas, small veterinary clinics and any other use having similar characteristics and in accord with the zone's purposes. *Id.*

On October 24, 2000, the Church applied for the CUP. J.E.T. 1, ¶ 9-12. The issue of whether to grant the Church the CUP and lose the downtown grocery store deeply divided residents of the City. J.E.T. 1, Ex. B, pp. 2-5. At the February 21, 2001 Planning Commission meeting, twenty-six citizens spoke either in favor or against granting the Church a CUP. *Id.* After hearing both the advantages and disadvantages of allowing the Church to operate at the Subject Property, the Planning Commission voted 3-2 against granting the CUP. J.E.T. 1, Exh. C, p. 1 (under heading entitled "Project History"). The Planning Commission explained that the denial of the Church's CUP application was necessary to maintain a vital service to the low-income residents of the CBD – the grocery store and recycling business – and to prevent a loss of tax revenue. J.E.T. 19 at pp. 5-6. Further, the Planning Commission concluded that the denial of the CUP would not work as a "substantial burden" on the Church because it could continue to operate at its present downtown location. *Id.*

The Church then appealed to the City Council. J.E.T. 19 at p. 6. Two themes emerged from the meeting. The Church's congregation had outgrown its current facility and desired to locate to another downtown location close by. However, downtown residents raised the issue that the relocation of the Church

would cause the loss of the only neighborhood grocery store serving the downtown area and the resulting loss of employment. *Id.* Following the discussion among its members, the City Council voted 5-0 to deny the Church's appeal. *Id.*

SUMMARY OF ARGUMENT

RLUIPA is not a constitutional exercise of congressional authority under Section V of the Fourteenth Amendment ("Enforcement Clause") or the Commerce Clause. RLUIPA suffers from the same fatal flaws as its predecessor statute, the Religious Freedom Restoration Act ("RFRA"). Like RFRA, RLUIPA exceeds congressional authority by attempting "to determine what constitutes a constitutional violation." *City of Boerne*, 521 U.S. at 519. In addition, RLUIPA violates the Commerce Clause by regulating a non-economic activity: land use regulation. Further, RLUIPA violates the Establishment Clause by unconstitutionally favoring religious landowners over secular or non-religious landowners.

Contrary to the arguments of the Church and Intervenor the United States (collectively "Appellants"), RLUIPA does not merely codify existing Free Exercise Clause jurisprudence. Rather, current Free Exercise Clause jurisprudence requires application of strict scrutiny to a generally neutral law only in the limited circumstance where the government "has in place a system of individualized exemptions," not assessments as used in land use regulation. *See Employment Div.*

Dep't of Human Resources v. Smith, 494 U.S. 872, 884 (1990). Assessments made by local land use officials, with no reference to an entity's religious beliefs, do not warrant strict scrutiny.

Appellants are also misguided in their position that RLUIPA is constitutional under Congress' Enforcement Clause power. Congress has repeated the same mistake of RFRA. As in the case of RFRA, RLUIPA's record fails to show that the states have engaged in "widespread and persisting" deprivation of constitutional rights. The legislative history of RLUIPA is devoid of any close examination of whether complaints by religious land owners were justified as creating an impermissible burden on their "religious exercise" of land. Also, because RLUIPA applies to nearly every state or local governmental entity, RLUIPA's use of strict scrutiny is incongruent and disproportional to any alleged constitutional violations by the States.

The Church's argument that RLUIPA is constitutional under Congress' Commerce Clause power is also wrong. The Church completely misses the mark in its assertion that regulation of land use is economic in nature. The Church has failed to recognize that direct commercial action does not take place in the regulation of land. Governmental officials engaged in land use regulation are not involved with any commercial activity. In addition, any derivative economic effects of land use regulation do not "substantially affect" interstate commerce.

Lastly, RLUIPA is unconstitutional because it violates the Establishment Clause. In violation of the Establishment Clause, RLUIPA's purpose is to benefit religious landowners by allowing only them, and not secular landowners, the right to challenge generally applicable and neutral land use laws. The primary effect of RLUIPA unconstitutionally advances religion because only religious entities benefit from RLUIPA, thereby resulting in the inducement of religious practices rather than just the protection of religion. Furthermore, because local land use officials must "excessively entangle" themselves with religion in determining whether land use regulation will create a "substantial burden" on "religious exercise," RLUIPA violates the Establishment Clause.

STANDARD OF REVIEW

The issue of whether RLUIPA is constitutional under Section Five of the Fourteenth Amendment, the Commerce Clause and the Establishment Clause concerns purely legal issues, which are reviewed *de novo*. *See Alcaraz v. Immigration and Naturalization Service*, 384 F.3d 1150, 1158 (9th Cir. 2004).

ARGUMENT

I. The History of RLUIPA

In 1963, the United States Supreme Court held that state actions that burdened the exercise of religion must advance a compelling state interest ("strict scrutiny"). *Sherbert v. Verner*, 374 U.S. 398 (1963). The strict scrutiny test laid out in *Sherbert* requires a showing that the regulation at issue advances a compelling state interest and employs the least restrictive means of advancing that interest. *Id.* at 407-09. In 1990, the Supreme Court had occasion to clarify its *Sherbert* decision and held that the Free Exercise Clause of the Constitution does not require a compelling state interest when the law being considered is of general applicability that burdens the exercise of religion. *Employment Div. Dep't of Human Resources v. Smith*, 494 U.S. 872, 883-85 (1990).

The Supreme Court explained that the compelling interest standard announced in *Sherbert* had been rarely applied in the free exercise context involving neutral, non-discriminatory, generally applicable laws. *Smith*, 494 U.S. at 883-85. Justice Scalia, writing for the majority, declined to apply the strict scrutiny test of *Sherbert.* Justice Scalia explained that to require the government to show a "compelling interest" in enforcing a generally applicable law, when such a law impedes on religiously motivated conduct, permits the individual to "become a

law unto himself," "invites anarchy" and would produce a "constitutional anomaly." *Id.* at 879. Justice Scalia reasoned that:

> We have never invalidated any governmental action on the basis of the *Sherbert* test except denial of unemployment compensation. Although we have sometimes purported to apply the *Sherbert* test in contexts other than that, we have always found the test satisfied.

Smith, 494 U.S. at 883-84.

Dissatisfied with the Supreme Court's holding in *Smith*, Congress sought to nullify it with the Religious Freedom Restoration Act ("RFRA"). *See Religious Freedom Restoration Act of 1990: Hearing on H.R. 5377 Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary*, 101st Cong., 2d Sess. 2, 8, 9, 11, 22, 28-29, 31-32, 35, 38, 41, 48, 49, 51, 61 (1990). RFRA applied strict scrutiny to every law that had the effect of burdening religious exercise and provided in pertinent part:

> Government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability, except (1) in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that governmental interest.

42 U.S.C. § 2000bb-1(a)(b) (1994).

By enacting RFRA, Congress ignored the limits of federalism, gave religious entities a privilege against myriad laws and compelled the judiciary to read the Free Exercise Clause as it directed, contrary to the Supreme Court's interpretation in *Smith*. *See City of Boerne v. Flores*, 521 U.S. 507 (1997). In effect, Congress

sought to overrule the Supreme Court's decision in *Smith* and to reinstate the compelling interest standard of *Sherbert*.

In 1997, in *City of Boerne*, the Supreme Court struck down RFRA as unconstitutional insofar as it applied to states and localities because it exceeded Congress' powers under Section 5 of the Fourteenth Amendment. *City of Boerne*, 521 U.S. at 536. The Supreme Court held that RFRA unconstitutionally usurped the states' sovereign powers, the judiciary's role in interpreting the First Amendment and the roles of the states in amending the Constitution. *Id.* at 529-36. The Supreme Court reasoned that although Congress may have the power to enact legislation enforcing the constitutional right to free exercise of religion, its power under the Constitution to enforce is only preventative or remedial. *Id.* at 519. Moreover, the Supreme Court held that Congress does not have the power under the Fourteenth Amendment to decree the substance of the Fourteenth Amendment's restrictions on states, nor may Congress enforce a constitutional right by changing the components of a right guaranteed by the Constitution. *Id.*

Justice Kennedy explained that RFRA was unconstitutional because:

> Regardless of the state of the [l]egislative record, RFRA cannot be considered remedial, preventative Legislation, if those terms are to have any meaning. RFRA is so out of proportion to a supposed remedial or preventative object that it cannot be understood as responsive to, or designed to prevent, unconstitutional behavior. It appears, instead, to attempt a substantive change in constitutional protections . . . requiring a state to demonstrate a compelling state interest and show that it has adopted the least restrictive means of

> achieving that interest in the most demanding test known to constitutional law . . . . This is a considerable Congressional intrusion into the state's traditional prerogatives and general authority to regulate for the health and welfare of their citizens.

Id. at 535.

Congress was no more pleased with *City of Boerne* than it had been with *Smith.* In response to the Supreme Court's invalidation of RFRA, the Religious Liberty Protection Act ("RLPA") was introduced. RLPA was introduced as a purportedly proper exercise of Congress' powers under the Spending and Commerce Clauses as well as Section 5 of the Fourteenth Amendment. *See* Religious Liberty Protection Act of 1999, H.R. 1691, 106th Cong. (1999). Like the provisions of RFRA, RLPA would have required the same strict scrutiny which was found unconstitutional in *City of Boerne.* Due to congressional concerns regarding the constitutionality of RLPA, the bill stalled in the Senate. *Id.* RLPA's supporters then settled on two areas that RFRA and RLPA had encompassed: land use law and prison regulations. The Religious Land Use and Institutionalized Persons Act of 2000 ("RLUIPA") was the result.

Section (a) of RLUIPA provides in pertinent part:

> (1) No government shall impose or implement a land use regulation in a manner that imposes a substantial burden on the religious exercise of a person, including a religious assembly or institution, unless the government can demonstrate that imposition of the burden on that person, assembly or institution

(A) is in furtherance of a compelling governmental interest; and

(B) is the least restrictive means of furthering that compelling governmental interest.

(2) Scope of Application. This subsection applies in any case in which--

(A) 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; or

(B) 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

(C) 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.

RLUIPA is Congress' direct response to the failures of RFRA and RLPA. The congressional intent and purpose underlying RLUIPA is identical to that of RFRA: to restore the strict scrutiny standard announced in *Sherbert.* *See* 146 CONG. REC. S7774-01, Exh. 1 (daily ed. July 27, 2000) (Joint Statement of Senators Hatch and Kennedy) ("[T]he Bill applies the standard of the Religious Freedom Restoration Act, 42 U.S.C. 2000bb-1 (1994): if government substantially burdens the exercise of religion, it must demonstrate that imposing that burden on

the claimant serves a compelling interest by least restrictive means"). *See also* Section 2000bb(b) of RLUIPA (the purpose of RLUIPA is "to restore the compelling interest test as set forth in *Sherbert v. Verner*. . . . and to guarantee its application to all cases where free exercise of religion is substantially burdened").

Although RLUIPA is limited to land use law and prison regulations, it contains the same constitutional flaws as its predecessors, RFRA and RLPA. Interestingly, RLUIPA was passed by Congress even though it already implicitly recognized, by rejecting RLPA, that RLUIPA exceeded its legislative powers. Moreover, Congress ignored the Supreme Court's holdings in *Smith* and *City of Boerne* that Congress may not "alter the meaning of the Free Exercise Clause," *City of Boerne*, 521 U.S. at 519, by "restoring" a perceived constitutional standard that the Supreme Court expressly rejected in both *Smith* and *City of Boerne* in the context of a land use dispute. *See Cottonwood Christian Ctr. v. Cypress Redevelopment Agency*, 218 F. Supp. 2d 1203, 1220 (C.D. Cal. 2002) ("[A]s far as Congress was concerned, the *Smith* Court's 'neutral, generally applicable' jurisprudence was retired and claims under the Free Exercise Clause were to be determined under the familiar strict scrutiny test"). *See also Freedom Baptist Church v. Middleton*, 204 F. Supp. 2d 857, 861 (E.D. Pa. 2002) ("As noted, there is really no doubt that RLUIPA is the result of the Supreme Court's decision in *Boerne*").

By reinstating the strict scrutiny standard found in RFRA and RLPA, RLUIPA is another poorly disguised attempt by Congress to legislatively overrule the Supreme Court's holdings in *Smith* and *City of Boerne.*

II. Section 2(a) of RLUIPA Is Unconstitutional

A. RLUIPA Does Not Codify Existing Free Exercise Clause Jurisprudence

In their briefs, the Church and Intervenor the United States of America ("United States" or "Intervenor") (collectively "Appellants") argue that RLUIPA merely "codifies the Supreme Court's individualized assessments doctrine." *See* Brief of United States at 19. The so-called "individualized assessments doctrine" originated with and has been applied almost exclusively in the context of unemployment compensation cases. *See Hobbie v. Unemployment Appeals Comm.*, 480 U.S. 136, 142 (1987). According to Appellants, RLUIPA merely codifies the standard of *Sherbert*, as modified by *Smith*, which in their view applies strict scrutiny to "individualized assessments" that bear on religious practice. Appellants are wrong. The "individualized assessments" doctrine does not apply in the land use context.

As an initial matter, neither the Supreme Court nor any other federal court has ever applied the "individualized assessments doctrine" to invalidate a municipality's decision to deny a land use permit to a religious entity where there was no evidence of religious discrimination against the applicant. Rather, in each

instance that a court, including this Court, has been confronted with the issue whether to apply the "individualized assessments doctrine" in a land use context prior to the enactment of RLUIPA, the court has rejected the use of the doctrine, reasoning that zoning laws are normally neutral laws of general application which are immune to strict scrutiny. *Miller v. Reed*, 176 F.3d 1202, 1207 (9th Cir. 1999); *First Assembly of God v. Collier County*, 20 F.3d 419, 423 (11th Cir. 1994).

Appellants have exaggerated the scope of the "individualized assessments doctrine" by misconstruing dictum found in *Smith.* The Supreme Court held in *Smith* that the Free Exercise Clause requires a compelling governmental interest only "where the State has in place a system of ***individualized exemptions***" but "refuses to extend that system to cases of 'religious hardship.'" *Smith*, 494 U.S. at 884 (emphasis added). Appellants have misinterpreted Section (a)(2)(C) of RLUIPA's reference to "***individualized assessments***" as codification of *Smith's* dictum that unemployment schemes held unconstitutional under *Sherbert* deserved strict scrutiny, because they permitted "***individualized exemptions***." *Id.* In the land use context, "assessments" are not "exemptions."

Appellants' confusion with respect to the difference between "assessments" and "exemptions" can easily be seen through their misunderstanding of the holding in *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993). *See* Church's Brief at 28-29. *See also* United States Brief at 17-18. Appellants

argue that since the Supreme Court applied the "individualized assessments doctrine" in *Hialeah*, strict scrutiny is proper in this case. *Id.* In *Hialeah*, the Supreme Court struck down an alleged facially neutral law against "unnecessary" animal killings because the ordinance at issue required the government to make "an evaluation of the particular justification for the killing." 508 U.S. at 537. The Supreme Court reasoned that use of the strict scrutiny test was proper because the ordinance at issue permitted city officials to make "exemptions" of the law against "unnecessary" animal killings based on the applicant's religious beliefs. *See Id.* Moreover, unlike the present case, strict scrutiny was utilized in *Hialeah* because the ordinance at issue was not neutral nor generally applicable. *Id.* at 542-46.

Sherbert is another example of Appellants' misunderstanding and misapplication of the "individualized assessments doctrine." *Sherbert* held that the government could not deny unemployment benefits to a person who refused to work on Saturdays due to her religious beliefs. *Sherbert*, 374 U.S. at 405-07. The Supreme Court applied strict scrutiny because the statute allowed the government to make "individualized exemptions" based on "good cause," which unconstitutionally permitted or denied exemptions based on the litigant's religious beliefs. *Id.* at 408-09.

In sharp contrast to the situations in *Hialeah* and *Sherbert*, *Smith's* application of strict scrutiny to "individualized exemptions" does not apply to the

"individualized assessments" necessarily made in land use proceedings. Because every parcel of land is unique, governmental entities must necessarily make "individualized assessments" in applying land use laws to a property owner. In land use regulation, there is no determination whether or not to apply the law or "exempt" a particular applicant from the law, but rather the municipality must determine whether the particular applicant fits the category for proper application of the existing generally applicable law. For example, in this case, no land user is "exempt" from the C-1 zoning rules. Instead, certain commercial users may locate in C-1 zones without a permit, while non-commercial uses, including churches, must obtain a CUP. No land user is "exempt" from complying with the C-1 zoning rules. If all "individualized assessments" in land use permitting were to be accorded strict scrutiny, the holding in *Smith* would virtually have no application. Clearly, the Supreme Court did not intend such a result.

In addition, the "individualized assessments doctrine" only applies to a generally neutral law when the government is allowed an opportunity to "exempt" or excuse an applicant from the law. Yet, under Appellants' view, RLUIPA effectively applies strict scrutiny every time a governmental entity makes an "individual assessment" in regard to a particular parcel of land. This is in direct conflict with current Free Exercise Clause jurisprudence. Therefore, Appellants'

contention that RLUIPA merely codifies existing Free Exercise Clause jurisprudence fails.

Even if the concepts of "assessment" and "exemption" could somehow be considered interchangeable, current Free Exercise Clause jurisprudence permits strict scrutiny to a generally neutral law only when the government "substantially burdens" the free exercise of religion based on "assessments" or "exemptions" of religious practice. *See Smith,* 494 U.S. at 883; *Sherbert,* 374 U.S. at 406 (strict scrutiny applies to state's "substantial infringement" of free exercise rights). The relevant governmental conduct in cases regarding "substantial burden" on "religious practice" is whether the burden is ***central*** to one's religious belief or practice. *Hernandez v. Commissioner of Internal Revenue*, 490 U.S. 680, 699 (1989). *Smith*, *Sherbert* and *Hialeah* all involved situations where strict scrutiny applied to a facially neutral law because the government substantially burdened the free exercise of religion based on "assessments" of religious motives that were central to the litigant. The use of strict scrutiny in these cases is in accord with existing Free Exercise Clause jurisprudence because a government decision maker was allowed to consider a proffered religious justification when deciding whether to subject the litigant to a facially neutral law, and thus created the potential for discrimination against religiously motivated conduct.

In contrast, RLUIPA does not codify current Free Exercise Clause jurisprudence because it mandates strict scrutiny in every situation in which the government makes an "individualized assessment" regarding "religious use of land," even if the government's action does not infringe upon central religious beliefs. Prior to the enactment of RLUIPA, strict scrutiny was only applied to general neutral laws when the government was given discretion to make "individualized exemptions" based on religious beliefs. With the enactment of RLUIPA, strict scrutiny must be applied every time there is a "substantial burden" on religion, even if that burden is incidental to one's religious beliefs. This is in direct contrast to, rather than a codification of, existing Free Exercise Clause jurisprudence.

B. RLUIPA Is Not a Proper Exercise of Congress' Power Under Section 5 of the Fourteenth Amendment

As applied to this case, RLUIPA can rest only on congressional "power to enforce, by appropriate legislation, the provisions of the [Fourteenth Amendment]". U.S. CONST. amend. XIV, § 5 (the "Enforcement Clause"). "Congress's power is limited to enforcement; the Fourteenth Amendment does not give Congress the power 'to determine what constitutes a constitutional violation.'" *City of Boerne*, 521 U.S. at 519. The Supreme Court in *City of Boerne* emphasized a key distinction between remedying constitutional violations and defining constitutional rights: "[Congress] has been given the power to enforce, not

the power to determine what constitutes a constitutional violation. Were it not so, what Congress would be enforcing would no longer be, in any meaningful sense, the provisions of [the Fourteenth Amendment]." *Id.* (internal quotation marks omitted).

Under the Enforcement Clause, Congress may not regulate the States' governance of land use unless Congress can identify (1) that the states have engaged in "widespread and persisting" deprivation of constitutional rights and (2) that the federal law is "congruent and proportional" to those violations. *University of Ala. Birmingham Bd. of Trustees v. Garrett*, 531 U.S. 356, 365 (2000); *Florida PrePaid Post Secondary Expense Bd. v. Florida Bd. of Regents*, 527 U.S. 627, 645 (1999); *Kimel v. Florida Bd. of Regents*, 528 U.S. 62, 82 (2000). Here, Congress has established neither element.

1. Congress Failed to Establish the Existence of a Widespread and Persisting Pattern of Constitutional Violations Towards Religious Landowners

RLUIPA, similar to its predecessor RFRA, was not enacted pursuant to a congressional finding of a pattern of "widespread and persisting" constitutional violations towards religious landowners. In order for Congress to properly exercise its power pursuant to the Enforcement Clause, Congress must establish a pattern of "widespread and persisting" constitutional violations by the states. *City of Boerne*, 521 U.S. at 519-20.

Appellants assert that "Congress has 'compiled massive evidence,' based on nine hearings over a period of three years that clearly establishes what the RFRA record did not: a 'widespread pattern of religious discrimination in this country' in land use regulation, including 'examples of legislation enacted or enforced due to animus or hostility to the burdened religious practices." *See* Church's Brief at 38 (internal citations and punctuation omitted). Appellants argue that the evidence documented by Congress is "more than sufficient to justify RLUIPA's land use provisions." *See* United States Brief at 33. In reality, the hearing record consists of a relatively small number of instances where religious groups were allegedly discriminated by zoning decisions or regulations.

The examples of discrimination in support of RLUIPA do not begin to demonstrate the "widespread and persisting" constitutional violations by the states necessary to justify such a massive congressional intervention. For RLUIPA, the evidence upon which Congress relied is summarized in a report generated by the House Committee Judiciary, which purports to provide examples of unconstitutional zoning laws enacted by state and local governments. *See* H.R. Rep. No. 106-219 (1999). What the report contains on the subject of land use regulation, however, is a discussion of complaints by religious institutions regarding their inability to locate at desired sites. *Id.* The reports lacks any kind of close examination of these complaints or the applicable ordinances in an effort to

determine whether the laws are constitutional under settled Free Exercise Clause jurisprudence. *Id.* There is no indication that Congress scrutinized these laws to determine whether they created an impermissible burden on religious land use. *Id.*

A few examples of unfavorable land use decisions do not fulfill the requirement of a "widespread ***pattern*** of religious discrimination" in order for Congress to act under its Enforcement Clause power. A comparable record of negative land use decisions could readily be compiled from secular property owners, and the mere fact of such decisions in no way demonstrates that local public officials have systematically discriminated against religious land owners. Congress has therefore failed to provide the requisite pattern of "widespread and persisting" constitutional violations to justify RLUIPA through its Enforcement Clause powers.

2. RLUIPA Is Not Congruent and Proportional to any Evidence of Constitutional Violations by the States

Even if this Court were to view RLUIPA's legislative history as somehow containing a sufficient showing of "widespread and persisting" constitutional violations, RLUIPA, similar to its predecessor RFRA, is not "congruent and proportional" to any evidence of constitutional violations by the States. Rather, RLUIPA sweeps far too broadly by resorting to strict scrutiny in every instance in which land use law is applied to a religious landowner. Such application of the

strict scrutiny test is clearly incongruent and disproportional to any alleged constitutional violations by the States.

For the same reasons that RFRA was held unconstitutional because it was not "congruent and proportional," RLUIPA is also unconstitutional. In *City of Boerne*, RFRA was held unconstitutional because it was "so out of proportion to a supposed remedial or preventive object that it [could not] be understood as responsive to, or designed to prevent, unconstitutional behavior." *City of Boerne*, 521 U.S. at 532. RLUIPA suffers from the same fatal flaws.

Although the scope of RLUIPA is, unlike RFRA, limited to decisions and regulations affecting land use or institutionalized persons, this distinction is insignificant because virtually every state or local government is subject to the provisions of RLUIPA. Most state and local governments operate some type of zoning scheme. Therefore, through its zoning regulations, nearly every state or local government in the country is subject to RLUIPA, regardless of whether it has ever violated the Free Exercise Clause. RLUIPA's effect is not confined to a particular area of law, in contrast to provisions of the Voting Rights Act which were upheld by the Supreme Court. *See State of S.C. v. Katzenbach*, 383 U.S. 301, 308 (1966). Where "a congressional enactment pervasively prohibits constitutional state action in an effort to remedy or prevent unconstitutional state action," the unbounded legislation is suspect. *City of Boerne*, 521 U.S. at 533.

Moreover, like RFRA, RLUIPA does not contain geographical restrictions, termination provisions, an expiration date or other limiting feature that attempts to confine its application to the alleged unconstitutional conduct it aims to remedy. *See United States v. Morrison*, 529 U.S. 598, 626-27 (2000) (invalidating the Violence Against Women Act and noting it created a nationwide remedy not confined to states that had discriminated against women).

The requirement of a "compelling governmental interest" coupled with a showing that the action was the least restrictive means of advancing a "compelling governmental interest" is incongruent and disproportional to actions that "far more often than not, are neither motivated by religious bigotry nor burdensome on central religious practice or beliefs." J.E.T. 19 at p. 37-38. The district court properly described RLUIPA's use of strict scrutiny as incongruent and disproportional because "[governmental decisions] are subject to the single most searching standard of judicial inquiry and one historically reserved for restrictions on the core exercise of fundamental constitutional rights." *Id.* Because RLUIPA fails to show that the States' are the culprits of systematic discrimination against religious land users, the use of strict scrutiny is an unconstitutional remedy for perceived constitutional violations. Thus, RLUIPA is an unconstitutional exercise of Congress' Establishment Clause power.

C. RLUIPA Is Not a Proper Exercise of Congress' Power Under the Commerce Clause

In addition to exceeding its Establishment Clause power, Congress exceeded its Commerce Clause power in enacting RLUIPA. The Commerce Clause provides Congress with the power to enact legislation in order to regulate commerce with foreign nations, among the several States and with Indian tribes. U.S. CONST. art. I, § 8, cal. 3. The Supreme Court has identified three broad categories of activity that Congress may regulate pursuant to the Commerce Clause. Specifically, Congress may (1) "regulate the use of the channels of interstate commerce;" (2) "regulate and protect the instrumentalities of," or "person or things in," interstate commerce; and (3) regulate intrastate activities where the activity has a "substantial effect" on interstate commerce. *United States v. Lopez*, 514 U.S. 549, 559 (1995). RLUIPA does not fall into any of these three categories.

Appellants concede that RLUIPA is not within Congress' powers under the first and second categories. *See* Church's Brief at 46. Instead, Appellants argue that RLUIPA is valid under the third category because RLUIPA represents "regulation of an activity that substantially affects interstate commerce." *Id.* However, in order for Congress to regulate "activity that has a substantial effect on interstate commerce," the activity must be (1) economic in nature and (2) substantially affect interstate commerce. *Lopez*, 514 U.S. at 561-67.

1. The "Jurisdictional Element" Does Not Save RLUIPA Because It Regulates Land Use Law Which Is Not Economic in Nature

Appellants attempt to distinguish *Lopez* and its progeny *Morrison* by arguing that the presence of a "jurisdictional element" allows RLUIPA to apply either constitutionally, or not at all. *See* Plaintiff's Brief at 47-48. Appellants contend that the presence of a "jurisdictional element" allows RLUIPA to only be applicable in cases where a substantial burden on interstate commerce is found.[1] *See id.*

The presence of a "jurisdictional element" in a statute provides support for the proposition that the regulated activity is not merely local in nature, but has some connection to interstate commerce. *Lopez*, 514 U.S. at 561-62. Although RLUIPA may superficially appear to contain the "jurisdictional element" addressed in *Lopez* to ensure through a case-by-case inquiry that only activities with interstate effects are regulated, the "jurisdictional element" in RLUIPA fails to accomplish its required purpose.

Because RLUIPA is not regulating the economic aspects of land use, but rather land use law, the presence of a "jurisdictional element" does not "ensure[] the facial constitutionality of the statute under the Commerce Clause." *See*

[1] Intervenor the United States "does not take a position, however, on whether the record in this case actually shows an effect on commerce that satisfies the statute's jurisdictional element." *See* Intervenor's Brief at 41.

Church's Brief at 47. The land use provisions of RLUIPA are only triggered when state or local authorities implement land use regulation. Therefore, RLUIPA is not even applicable until the state or local government has passed or enforced a land use law. The provisions of RLUIPA are clear – RLUIPA is not directed to the actual commercial activities of land users. "The Commerce Clause . . . authorizes Congress to regulate interstate commerce directly; it does not authorize Congress to regulate state governments' regulation of interstate commerce." *Printz v. United States*, 521 U.S. 898, 924 (1997).

The Church argues that "RLUIPA regulates 'economic activity' – the use, building, or conversion of land for religious purpose – by prohibiting interference with that activity." *See* Church's Brief at 49. Although various economic considerations may factor into land use regulation, such as those mentioned by the Church, mere economic considerations do not establish that land use regulation constitutes "economic activity." *See Lopez,* 514 U.S. at 559-61. *Lopez* explained that an "economic activity" is to be construed narrowly and that it must involve economic enterprise and commercial transactions. *Id.* Unlike the examples that the Supreme Court found to demonstrate an "economic activity": operations involving the sale of interstate coal, *Hodel v. Virginia Surface Mining & Reclamation Assn., Inc.*, 452 U.S. 264, 276-80 (1981); restaurants that purchase supplies and sell food across state lines, *Katzenbach v. McClung,* 379 U.S. 294,

299-301 (1964); hotels catering to interstate guests, *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 252-53 (1964) and loan sharks that engage in extortionate interstate credit transactions, *Perez v. United States,* 402 U.S. 146, 155-56 (1971), land use regulation does not share in the common traits of economic enterprise involved in commercial transactions. *See Lopez,* 514 U.S. at 559-61.

Rather, similar to both Congressional Acts in *Lopez*, the "Gun-Free School Zones Act" and in *Morrison*, the "Violence Against Woman Act," RLUIPA's regulation of land use does not amount to "economic activity" because mere economic effects are insufficient to satisfy the Supreme Court's definition of "economic activity," the involvement of economic enterprise and commercial transactions. *See Lopez*, 514 U.S. at 559-61. *See also United States v. Morrison*, 529 U.S. 598, 610-11 (2000). Land use regulation fails to satisfy the Supreme Court's narrow definition of "economic activity" because land use regulation itself is not an economic endeavor and does not involve a transaction or the buying and selling of goods.

For example, when governmental officials perform their duties of regulating the use of land, they are not engaged in commerce, but rather, their roles encompass how a particular parcel of land is to be used. No commercial action takes place. The regulation of land use is no more of an "economic activity" than

the possession of a gun (*Lopez)* and gender-motivated crimes (*Morrison*), both of which the Supreme Court has already found not to be "economic activities." Moreover, even though in certain instances land use regulation may encourage or prevent future economic transactions, such as the buying and selling of construction materials, the Supreme Court has already held that the economic nature of the activity is the key, not the economic effects. *See Lopez*, 514 U.S. at 559-61; *Morrison*, 529 U.S. at 610-11.

2. RLUIPA Exceeds Congress' Commerce Clause Powers Because Land Use Regulation Does not "Substantially Affect" Interstate Commerce

Even if this Court held that land use regulation constitutes an "economic activity," RLUIPA is an unconstitutional exercise of Congress' Commerce Clause power because land use regulation does not "substantially affect" interstate commerce. The regulated activity must "substantially affect" interstate commerce in order for Congress not to exceed its authority under the Commerce Clause. *Lopez,* 514 U.S. at 559. If the nexus between the regulation and interstate commerce is too tenuous, the regulated activity does not "substantially affect" interstate commerce. *Lopez*, 514 U.S. at 563-67; *Morrison*, 529 U.S. at 612.

The nexus between land use regulation and interstate commerce is too tenuous because several inferences need to be made to conclude that land use regulation has an impact on interstate commerce. The Church's reasoning that

"RLUIPA regulates a class of activity having a direct, rather than an attenuated, link to interstate commerce," *see* Church's Brief at 54, is similar to the "but-for causal chain" the Supreme Court rejected in the "Gun Free School Zone Act" in *Lopez* and the Violence Against Woman Act in *Morrison.* The Church in effect argues that the City's zoning scheme prevented the Church's purchase of the building, which in turn prevented its plans to renovate the building, which in turn disallowed ongoing use of the building, all of which somehow "substantially affects" interstate commerce. *See* Church's Brief at 54-55.

In *Lopez*, the Supreme Court also rejected an attempt of "piling inference upon inference" to conclude that the regulated activity impacted interstate commerce. *Lopez*, 514 U.S. at 567. In *Lopez*, the proponents of the "Gun-Free School Zones Act" argued that school violence affected interstate commerce because it can effect education levels, which in turn impact national productivity. *Lopez,* 514 U.S. at 564. The Supreme Court rejected this argument:

> [U]nder the Government's "national productivity" reasoning, Congress could regulate any activity that it found was related to the economic productivity of individual citizens: family law (including marriage, divorce, and child custody), for example. Under the theories that the Government presents in support of [the Gun-Free School Zones Act of 1990], it is difficult to perceive any limitation on federal power, even in areas such as criminal law enforcement or education where States historically have been sovereign. Thus, if we were to accept the Government's arguments, we are hard pressed to posit any activity by an individual that Congress is without power to regulate.

Id.

Similarly, any argument that land use regulation "substantially affects" interstate commerce is too attenuated. In order to show that land use regulation "substantially affects" interstate commerce, an inference must be made that the regulation would cause a religious institution to refrain from undertaking an action. As an example, in considering a land use ordinance restricting the ability of a church to expand, a court would first have to infer that a church intended to expand. The court would then have to make the additional inference that the church's inability to expand would somehow affect interstate commerce, perhaps by decreasing the demand for interstate labor or interstate supplies. Thus, the number and type of inferences necessary to conclude that land use regulation "substantially affects" interstate commerce is similar to the reasoning the Supreme Court rejected in *Lopez* and *Morrison.*

To accept Appellants' reasoning that land use regulation "substantially affects" interstate commerce would suggest that Congress could regulate all local land use regulations. *See Lopez,* 514 U.S. at 557. The Supreme Court in *Morrison* held that permitting Congress to regulate gender-motivated crimes would allow Congress to regulate any type of violent crime because gender-motivated violence, "as a subset of all violent crime, is certain to have lesser economic impacts than the larger class of which it is a part." *Morrison*, 529 U.S. at 615. The Supreme Court

feared that allowing Congress to regulate all violent crime would result in the obliteration of "the Constitution's distinction between national and local authority." *Id.* Similarly, if RLUIPA is held to be a proper exercise of Congress' Commerce Clause power, state and local land use regulations and zoning ordinances would be regulated by Congress according to its Commerce Clause power. Such a result would threaten "the distinction between what is national and what is local." *Lopez*, 514 U.S. at 557, 567.

Thus, RLUIPA is an unconstitutional exercise of Congress' Commerce Clause power.

D. RLUIPA Violates the Establishment Clause

Even if this Court were to find that RLUIPA is a proper exercise of Congress' powers under the Enforcement and Commerce Clauses, RLUIPA is unconstitutional because it violates the Establishment Clause. The Establishment Clause states: "Congress shall make no law respecting an establishment of religion." U.S. CONST. amend. I, cl. 1. The fundamental requirement of the Establishment Clause is neutrality, which prohibits government from either endorsing a particular religion or promoting religion generally. *Board of Educ. of Kiryas Joel Village School Dist. v. Grumet*, 512 U.S. 687, 703 (1994) ("[A] principle at the heart of the Establishment Clause [is] that government should not prefer one religion to another, or religion to irreligion").

In *Lemon*, the Supreme Court formulated a three-pronged test to determine whether a statute complies with the Establishment Clause. *Lemon v. Kurtzman*, 403 U.S. 602 (1971). Under the *Lemon* test, a statute (1) "must have a secular purpose," (2) its principal or primary effect must be one that neither advances nor inhibits religion" and (3) it must not create "excessive government entanglement with religion." *Id.* at 612-13 (internal quotation marks and citations omitted). The challenged practice or law violates the Establishment Clause if it fails to satisfy any of these prongs. *Edwards v. Aguillard*, 482 U.S. 578, 583 (1987). RLUIPA fails all three prongs.

1. RLUIPA Does Not Have a Secular Purpose

There is no secular purpose behind RLUIPA. "The purpose prong of the *Lemon* test asks whether government's actual purpose is to endorse or disapprove of religion." *Id.* at 585 (quoting *Lynch v. Donnelly*, 465 U.S. 668, 690 (1984) (O'Connor, J., concurring)). The purpose prong "aims at preventing the relevant governmental decisionmaker. . . . from abandoning neutrality and acting with the intent of promoting a particular point of view in religious matters." *Id.*

The purpose of RLUIPA is to benefit religious landowners by giving them the right to challenge generally applicable and neutral land use and zoning laws. RLUIPA, identical to RFRA in its defects, sweeps so broadly that any religious landowner can come under the protection of strict scrutiny merely by a finding of a

"substantial burden" on "religious exercise." On the other hand, non-religious landowners are not afforded the benefits of strict scrutiny, even if a "substantial burden" is imposed on their secular interests.

Because RLUIPA mandates an "across the board" accommodation for religious landowners, by always providing strict scrutiny to religious landowners, but never to non-religious landowners, RLUIPA's actual purpose is to advance the religious beliefs of landowners. Only religious landowners, and not secular landowners, are privy to the highest degree of governmental protection, strict scrutiny. Clearly, RLUIPA does not have a secular purpose, but rather, its purpose is to advance religion.

2. The Primary Effect of RLUIPA Advances Religion

Even if the purpose of RLUIPA could somehow be considered secular, RLUIPA is still unconstitutional because it has the primary effect of advancing religion. "The effect prong [of the *Lemon* test] asks whether, irrespective of government's actual purpose, the practice under review in fact conveys a message of endorsement or disapproval. *Lynch*, 465 U.S. at 690 (O'Connor, J., concurring). In evaluating the effect prong, the two most important factors are (1) whether a particular government action benefits both secular and religious entities, and (2) whether the action will induce religious exercise, rather than only protecting it.

Cutter v. Wilkinson, 349 F.3d 257, 264 (6th Cir. 2004), *cert. granted*, 125 S. Ct. 308 (U.S. Oct. 12, 2004) (No. 03-9877).[2]

The only persons or institutions that benefit from RLUIPA are religious in character. RLUIPA is only triggered when there is a finding of a "substantial burden" on "religious exercise" by a generally applicable neutral law. For example, a religious group can force a city to provide a "compelling governmental interest" for its zoning ordinance restricting expansion of building size by merely showing that the ordinance places a "substantial burden" on its "religious exercise." However, a similarly situated group, with no religious affiliation, must comply with the same zoning ordinance because it will not be afforded the benefits of strict scrutiny. Thus, the primary effect is to provide religious landowners "a legal weapon that no atheist or agnostic can obtain." *City of Boerne*, 521 U.S. at 537 (Stevens, J., concurring).

Moreover, by conferring benefits only on those exercising religious beliefs, RLIUPA has the effect of inducing religious exercise. RLUIPA creates a strong incentive for land owners to conduct some or all of their activities in the name of

[2] Defendants-Appellees believe it would be appropriate for this Court to defer its decision on the constitutionality of Section 2(a)(1) of RLUIPA until after the Supreme Court has decided *Cutter* this term. *See Robinson v. Solano County*, 278 F.3d 1007, 1011 (9th Cir. 2002) (submission deferred pending Supreme Court decision in a controlling case and filing of supplemental briefs). *Cutter* involves the constitutionality of RLUIPA applicable to institutionalized persons and will likely determine some of the issues presented in this appeal.

religion in an attempt to obtain the benefits of RLUIPA. RLUIPA's primary effect is therefore not to protect religion, but rather to induce religion. This violates the Establishment Clause.

3. RLUIPA Creates Excessive Governmental Entanglement with Religion

Even if RLUIPA's primary effect does not advance religion, RLUIPA violates the Establishment Clause because it creates excessive governmental entanglement with religion. The entanglement prong of the *Lemon* test "seeks to minimize the interference of religious authorities with secular affairs and secular authorities in religious affairs." *Cammack v. Waihee,* 932 F.2d 765, 780 (9th Cir. 1991). Along with the effect prong, whether congressional action creates an excessive entanglement with religion are the most critical factors under the *Lemon* test. *Estate of Thornton v. Caldor, Inc.*, 472 U.S. 703 (1985). In determining whether government action creates excessive entanglement with religion, the Supreme Court has looked to the character and purpose of the institutions benefited. *See Bowen v. Kendrick*, 487 U.S. 589, 615-16 (1988).

As stated above, RLUIPA only benefits religious institutions. Only religious institutions which establish a "substantial burden" to their "religious exercise" can invoke the strict scrutiny standard of RLUIPA. Because religious institutions are the only entities to benefit from RLUIPA, local land use officials must excessively entangle itself with religion. RLUIPA forces local land use officials in every

situation where local government wishes to enact or apply a land use law, to entangle themselves with the religious beliefs of landowners.

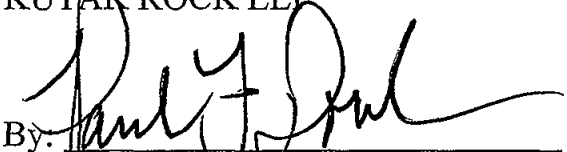
RLUIPA compels local land use officials to become experts in the needs and requirements of religious landowners in the community. RLIUPA forces local land use officials to investigate whether an ordinance places a "substantial burden" on a landowner's religious beliefs. Thus, local government officials must not only learn whether the proposed use of property relates to a landowner's religious beliefs, but also obtain a thorough understanding of a landowner's religious beliefs in order to avoid a "substantial burden" on such beliefs. Moreover, RLUIPA compels local land use officials to investigate whether an ordinance is the "least restrictive means of furthering governmental interest." In order to assess whether the government is utilizing the "least restrictive means" to further its interest, land use officials will need to familiarize themselves with a landowner's religious beliefs to decide whether alternate means will interfere with the landowner's religious beliefs. Therefore, the strict scrutiny standard of RLUIPA creates excessive governmental entanglement with religion causing RLUIPA to violate the Establishment Clause.

CONCLUSION

The district court's holding that RLUIPA is unconstitutional under Section Five of the Fourteenth Amendment and the Commerce Clause should be affirmed. RLUIPA should also be held unconstitutional under the Establishment Clause, as an additional, independent basis for affirming the district court's order.

Dated: January 19, 2005

KUTAK ROCK LLP

By: 
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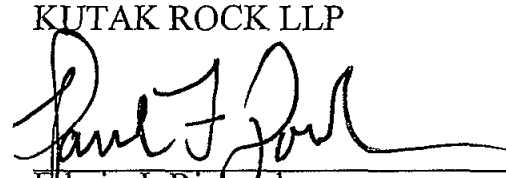
REQUEST FOR ORAL ARGUMENT

This appeal presents issues of first impression relating to the constitutionality of Section 2(a)(1) of RLUIPA under the Enforcement Clause of the Fourteenth Amendment and the Commerce and Establishment Clauses of the United States Constitution. Oral argument will allow the Court the opportunity to further explore these issues of first impression. Accordingly, pursuant to Rule 34(a)(1) of the Federal Rules of Appellate Procedure, the City of Lake Elsinore respectfully requests that oral argument be permitted.

Dated: January 19, 2005

Respectfully submitted,

KUTAK ROCK LLP



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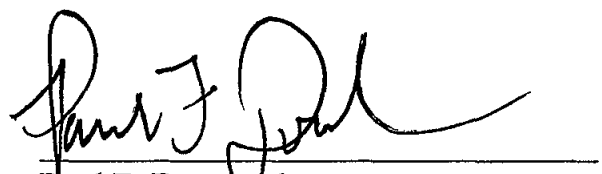
CERTIFICATE OF COMPLIANCE WITH RULE 27(d)(2)

Pursuant to Rule 32(a)(7)(C) of the Federal Rules of Appellate Procedure and Circuit Rule 32-1, I certify that the Answering Brief of Defendants-Appellees is proportionately spaced, has a typeface of 14 points and contains 10,333 words, exclusive of the tables, request for oral argument and certificates of counsel, as calculated by Microsoft Word.

Dated: January 19, 2005



Paul F. Donsbach

STATEMENT OF RELATED CASES

The constitutionality of the RLUIPA provision at issue in this appeal is also at issue in *Guru Nanak Sikh Soc. v. County of Sutter*, No. 03-17343 (9th Cir.). Counsel are aware of no other related cases within the meaning of Circuit Rule 28-2.6.

PROOF OF SERVICE

I, Angela McCoy-Campos, declare:

I am a citizen of the United States and employed in Orange County, California. I am over the age of eighteen years and not a party to the within-entitled action. My business address is Suite 1100, 18201 Von Karman Avenue, Irvine, California 92612-1077. On January 19, 2005, I served a copy of the within document(s):

ANSWERING BRIEF OF DEFENDANTS-APPELLEES CITY OF LAKE ELSINORE, ET AL.

☐ by transmitting via facsimile the document(s) listed above to the fax number(s) set forth below on this date before 5:00 p.m.

☐ by placing the document(s) listed above in a sealed envelope with postage thereon fully prepaid, in the United States mail at Irvine, California addressed as set forth below.

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I am readily familiar with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with the U.S. Postal Service on that same day with postage thereon fully prepaid in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

I declare that I am employed in the office of a member of the bar of this court at whose direction the service was made.

Executed on January 19, 2005, at Irvine, California.

Angela McCoy-Campos

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