No. 03-9877

IN THE

Supreme Court of the United States

JON B. CUTTER, *et al.*,
Petitioners,

v.

REGINALD WILKINSON, Director,
Ohio Department of Rehabilitation and Correction, *et al.*
Respondents.

**On Writ of Certiorari to the
United States Court of Appeals
for the Sixth Circuit**

BRIEF OF *AMICI CURIAE* INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION, NATIONAL LEAGUE OF CITIES, AND AMERICAN PLANNING ASSOCIATION IN SUPPORT OF RESPONDENTS

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QUESTION PRESENTED

Whether the Religious Land Use and Institutionalized Persons Act's provisions relating to the exercise of religion in state prisons are constitutional.

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INTEREST OF THE *AMICI CURIAE* [1]

The International Municipal Lawyers Association is a non-profit, nonpartisan professional organization consisting of more than 1,400 member entities. Its membership is com-

[1] Counsel for a party did not author this brief in whole or in part. No person or entity, other than the *amici curiae*, its members, or its counsel, made a monetary contribution to the preparation or submission of the brief. The Petitioners filed consents to the filing of amicus briefs in support of either party on December 9, 2004. A letter, dated December 30, 2004, from the Respondents consenting to the filing of this brief is on file with the Clerk.

prised of local governments, including cities and counties, and subdivisions thereof as represented by their chief legal officers; state municipal leagues; and individual attorneys who represent municipalities, counties, and other local government entities.

IMLA, previously known as the National Institute of Municipal Law Officers, has provided services and educational programs to local governments and their attorneys since 1935. IMLA's Legal Advocacy Program serves municipalities by advocating the nationwide interests, positions, and views of local governments on legal issues. IMLA has appeared as friend of the court on behalf of its members before the United States Supreme Court, in the United States Courts of Appeals, and in state supreme and appellate courts.

The National League of Cities is the country's largest and oldest organization serving municipal government, with more than 1,600 direct member cities and 49 state municipal leagues that collectively represent more than 18,000 United States cities, villages, and towns and more than 135,000 local elected officials. Its mission is to strengthen and promote cities as centers of opportunity, leadership, and governance, and to serve as a national resource and advocate for the municipal governments it represents.

The American Planning Association (APA) is a nonprofit public interest and research organization founded in 1978 to advance the art and science of planning at the local, regional, state, and national levels. The APA resulted from a merger between the American Institute of Planners, founded in 1917, and the American Society of Planning Officials, established in 1934. The organization has 46 regional chapters, including the Connecticut Chapter which joins in filing this amicus brief, as well as 19 divisions devoted to specialized planning interests, including the economic development division, and the housing and community development division. The APA represents more than 37,000 practicing planners, officials,

and citizens involved, on a day-to-day basis, in formulating and implementing planning policies and land-use regulations.

The *amici's* interest in this case stems from the fact that when Congress enacted RLUIPA, it put local governments in an untenable position. On the one hand, local governments are charged with the responsibility to protect the public welfare and to employ land use regulatory powers in a neutral and even-handed fashion. On the other hand, in the field of land use applicants, RLUIPA has elevated the religious institution as a special applicant when it seeks a conditional use permit or other land use development approval. Local decision-makers cannot balance all of the competing interests and goals of the community if one class of land use applicant can usurp the process to its own advantage.

SUMMARY OF THE ARGUMENT

While this case addresses only the prison provisions of the Religious Land Use and Institutionalized Persons Act of 2000, 42 U.S.C. § 2000cc et seq., ("RLUIPA"), which constitute only a portion of RLUIPA, this *amici* brief is being submitted for the purpose of bringing to the Court's attention that more is at stake than the prison provisions alone. 42 U.S.C. § 2000cc(a), ("Section (a)(2)(B)" of RLUIPA), also imposes strict scrutiny on neutral, generally applicable land use laws. Similar constitutional reasoning may be applied to invalidate both the prison and the land use regulations, but *amici* believe that the land use regulations are sufficiently distinct from prison regulation to merit a brief on RLUIPA's effect on land use laws and the constitutionality of Section (a)(2)(B).

Section (a)(2)(B) is unconstitutional for a number of reasons. First, by enacting Sec. (a)(2)(B), Congress acted beyond its Fourteenth Amendment enforcement power. Congress also overstepped its bounds under concepts of federalism and under the Tenth Amendment. Section (a)(2)(B) is a direct

regulation by Congress of an area that inherently belongs to state and local control, and introduces a novel means for Congress to expend its powers vis-à-vis the states. Section (a)(2)(B) is, therefore, an improper exercise of Congress's interstate commerce power.

In addition, because RLUIPA provides a direct benefit only to religious individuals or entities, it violates the Establishment Clause. RLUIPA is not a permissible accommodation, but rather is a blind accommodation for an entire universe of laws and religious practices barely examined by Congress. RLUIPA also violates the doctrine of separation of powers because Congress has made itself the branch to effect accommodation, attempted to overrule a First Amendment decision of this Court, and put itself in the role of setting burdens of proof. Lastly, RLUIPA also attempts to change the standards for evaluating claims under the Free Exercise Clause in an inappropriate manner.

ARGUMENT

I. BACKGROUND

RLUIPA was preceded by the Religious Freedom Restoration Act, which was held unconstitutional in *Boerne v. Flores*, 521 U.S. 507 (1997). This Court held that RFRA was: (1) a hostile and unconstitutional takeover of the states' sovereign power, *Boerne*, 521 U.S. at 532; (2) a usurpation of the judiciary's role in interpreting the First Amendment, *id.* at 535-36; and (3) an abdication of the states' and people's roles in amending the Constitution. *Id.* at 529.

Section (a)(2)(B) of RLUIPA applies the same standard to neutral, generally applicable land use laws that RFRA applied to all neutral, generally applicable laws. Section (a)(2)(B) of RLUIPA, which governs land use law, is unconstitutional on

its face.[2] The following is a summary of its constitutional defects. The remainder of the brief will focus more closely on Congress's overreaching into local and state land use lawmaking pursuant to Sec. (a)(2)(B) in violation of bedrock federalism principles.

First, Sec. (a)(2)(B) is beyond Congress's Fourteenth Amendment enforcement power. *See Bd. of Trs. of the Univ. of Ala. v. Garrett*, 531 U.S. 356, 370-73 (2001); *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 82-84 (2000); *United States v. Morrison*, 529 U.S. 598, 625-27 (2000); *Boerne*, 521 U.S. at 532-33; *see also Tennessee v. Lane*, 124 S. Ct. 1978, 1988-90 (2004); *Elsinore Christian Ctr. v. City of Lake Elsinore*, 291 F. Supp. 2d 1083, 1100-1102 (C.D. Cal. 2003).

Second, it overtakes the Constitution's inherent limits of federalism and the Tenth Amendment, and therefore is an improper exercise of Congress's interstate commerce power. *See Printz v. United States*, 521 U.S. 898, 923-24 (1997); *United States v. Lopez*, 514 U.S. 549, 561-63 (1995); *see also Reno v. Condon*, 528 U.S. 141, 148 (2000) (holding that when state acts as a private economic actor, as opposed to a sovereign, it may be regulated by Congress's interstate commerce power).

Third, it violates the Establishment Clause. *Boerne*, 521 U.S. at 536-37 (Stevens, J., concurring); *see also Cutter v. Wilkinson*, 349 F.3d 257, 263-68 (6th Cir. 2003). RLUIPA is the opposite of the voucher program approved in *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002), where this Court held that "where a government aid program is neutral with respect to religion, and provides assistance directly to a broad class of citizens who, in turn, direct government aid to religious

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[2] *Amici* do not address the Spending Clause or equality provisions of RLUIPA that govern land use, which pose different constitutional issues than those involving Sec. (a) and the prison provisions at issue in this case, 42 U.S.C. § 2000cc-1 (2004).

schools wholly as a result of their own genuine and independent private choice, the program is not readily subject to challenge under the Establishment Clause." *Id.* at 652. In contrast, RLUIPA is a direct benefit enjoyed by only religious individuals or entities. Indeed, if the argument is that RLUIPA regulates interstate commerce, it is doing so by singling out religious landowners for special treatment in interstate commerce, which violates the Establishment Clause.

Various amici have attempted to argue that RLUIPA is simply a legitimate religious accommodation statute, and therefore no violation of the Establishment Clause. While the Court specifically has upheld practice-specific accommodations, see *Employment Division v. Smith*, 494 U.S. 872, 890 (1990) (referring favorably to peyote exemptions), and *Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-day Saints v. Amos*, 483 U.S. 327, 339 (1987) (upholding exemption for religious employee hiring from anti-discrimination laws), it has never upheld this sort of blind accommodation wherein the religious practices accommodated were barely acknowledged, let alone contemplated. Land use by religious entities encompasses a wide array of building projects, social services, programs, and impacts, few of which were ever mentioned in the RLUIPA legislative history. Proper legislative accommodation places the legislature in the position of making a public policy determination whether the accommodation is consistent with the public good. See, e.g., *Smith*, 494 U.S. at 890. When the public good is nowhere considered, as in the RLUIPA legislative history, and the accommodation reaches religious practices never contemplated by the legislature, it is not legitimate, but rather a blind handout afforded religious entities solely because of their religious identity.

Fourth, it violates the separation of powers in three ways. It puts courts into the shoes of legislators, by giving them the power to carve out religious exemptions from duly enacted,

neutral, generally applicable laws. *Cf. O Centro Espirita Beneficiente Uniao do Vegetal v. Ashcroft*, No. 02-2323, 2004 U.S. App. LEXIS 23781, at *69-71 (10th Cir. Nov. 12, 2004) (McConnell, J., concurring) (applying strict scrutiny under RFRA and making determination that the public interest is better served by a judicially-created exemption than the existing neutral, generally applicable, Controlled Substances Act). Courts are not institutionally competent to make the public policy determinations demanded by RLUIPA. *Employment Div. v. Smith*, 494 U.S. 872, 890 (1990). It also grants Congress the last word on the interpretation of the Constitution in conflict with *Marbury v. Madison*, 5 U.S. 137 (1803). *Boerne*, 521 U.S. at 536. Finally, it takes over the courts' power to set standards of constitutional review and to assign burdens of proof. It is a congressional act that is "designed to control cases and controversies. . . ." *Id.*; *see also* Gregory S. Watson, *Federalism and Federal Spending: Why the Religious Land Use and Institutionalized Persons Act of 2000 is Unconstitutional*, 23 Hawaii L. Rev. 479, 486-87 (2001).

Fifth, by attempting to set a new standard of free exercise rights through simple majority vote, RLUIPA attempts a piecemeal amendment of the Constitution. *See* Marci A. Hamilton, *The Religious Freedom Restoration Act is Unconstitutional, Period*, 1 U. Pa. J. Const. L. 1, 18 (1998).

The long-established rule under the Free Exercise Clause is that religious conduct is governed by the rule of law. That is, identical actions resulting in the same harm are governed by the same laws. Religious belief is absolutely protected and religious speech is highly protected. But religious conduct—because it has the capacity to harm others and the public good—may be regulated and is no defense to the law. As this Court stated in *Gillette v. United States*, 401 U.S. 437, 461 (1971): "Our cases do not at their farthest reach support the proposition that a stance of conscientious opposition relieves

an objector from any colliding duty fixed by a democratic government." *See generally Smith*, 494 U.S. 872; *Reynolds v. United States*, 98 U.S. 145 (1878). Accordingly, rationality review—not strict scrutiny—applies to generally applicable, neutral laws. *Smith*, 494 U.S. at 883-85.[3]

This rule has governed land use law as applied to religious landowners and developers for decades. "In a long line of decisions, the federal courts and the several state courts of last resort now advance the general rule that any municipality may, as a lawful exercise of the police power, enact comprehensive zoning ordinances, provided they are enacted pursuant to proper enabling authority." Zoning Law and Practice § 3-6 (Matthew Bender & Co. 2004). This principle applies to religious as well as secular landowners, as it must if the general good of the community through pairing compatible uses is to be achieved.

The need for sensible land use and zoning laws as applied to religious projects has increased over time as "[t]he traditional concept of a small church serving the immediately neighboring community" has been supplanted by:

> [T]he establishment of a modern church, not dependent upon local residents as its communicants, and in some instances attracting people from far distances, the in-

[3] In a small number of cases and for a relatively short period of time, this Court experimented with applying strict scrutiny to neutral, generally applicable laws. *See, e.g.*, *Wisconsin v. Yoder*, 406 U.S. 205 (1972). The result was that actors—simply because they were acting from religious motivation—were given greater latitude to violate the law, even when the legislature had determined that the conduct was against the public interest. *Smith* returned free exercise doctrine to the dominant rule, which permits religious exemptions from generally applicable, neutral laws only through legislative action, because the legislature is the more institutionally competent branch to determine the public good. *See generally* Marci A. Hamilton, *Religious Institutions, the Rule of Law, and the Public Good*, 2004 B.Y.U. L. REV. 1099 (2004).

> evitable use of the automobile in connection therewith and the increased activities of the church for social and community functions having only a remote connection with its primary function, all present a different zoning picture.

1 Arden H. Rathkopf, Law of Zoning and Planning 19-28 (3d ed. 1975); *see also* Marci A. Hamilton, *Federalism and the Public Good: The True Story Behind the Religious Land Use and Institutionalized Persons Act*, 78 Ind. L.J. 311, 340 (2003).

Some have tried to defend Section (a)(2)(B) on the ground that it only addresses "individualized assessments" on the theory that any "individualized" assessment of a case by land use authorities triggers strict scrutiny. This is a fundamental misunderstanding of this Court's free exercise jurisprudence. Individualized assessments, otherwise known as case-by-case assessment, only trigger strict scrutiny under the Free Exercise Clause where religious claims are treated less well than secular claims. For example, the unconstitutional individualized assessment in *Sherbert v. Verner*, 374 U.S. 398 (1963), involved an unemployment compensation scheme that permitted workers to avoid weekend work for secular reasons but that refused to permit religious reasons. The reasons for the refusal were the unconstitutional element, not the fact that there were case-by-case determinations.

Case-by-case analysis—e.g., what this Court does as a matter of course—is not presumptively unconstitutional. Rather, only those systems of individualized assessment that treat religious reasons less well than secular reasons trigger strict scrutiny under the Free Exercise Clause. Thus, Section (a)(2)(B) captures many land use disputes that do not mandate strict scrutiny and, therefore, its imposition of strict scrutiny increases the level of scrutiny dramatically. Its corresponding burden on local land use law is a federal takeover of inherently local and state regulation.

It is important to note that Section (a)(2)(B) of RLUIPA does not regulate land use itself. Congress did not hold hearings to determine how many parking spaces are needed for each seat in a church, or what flow of traffic is appropriate in a residential neighborhood, or what levels of occupancy are appropriate in a particular district. Indeed, how could Congress reach such determinations without input from the community's members, knowledge of each community's particular needs, or the geographical layout of the particular community? Congress is inherently ill-equipped to enact state and local land use regulations.[4]

Rather, Section (a)(2)(B) regulates land use *law*. This is a constitutionally dispositive distinction. With the land use provisions of RLUIPA, Congress has attempted to take over one of the most, if not *the* most, clearly recognized arenas of local and state control. It goes to the core of local and state regulatory power. *Congregation Kol Ami v. Abington Township*, 309 F.3d 120, 137 (2002) ("land use law is one of the bastions of local control, largely free of federal intervention."), *summary judgment granted in part and denied in part*, No. 01-1919, 2004 U.S. Dist. LEXIS 16397 (E.D. Pa. Aug. 17, 2004) (interlocutory appeal pending decision).

Setting aside constitutional violations, land use law naturally belongs under the control of state and local law. The reason for this is three-fold. First, the permanent nature of land and each tract's uniqueness make its uses far more relevant to those who are nearby than those who are far away. Second, how land is used is an essential ingredient for communities to develop their character and to ensure harmonious use. Third, by keeping land use law local, citizens have

[4] The federal Fair Housing Act, 42 U.S.C. § 3601 (1968), is distinguishable. The Fair Housing Act forbids discrimination against potential landowners and renters; it does not address the physical impact of a building project on neighbors or a community.

correspondingly more direct access to their representatives and a proportionally larger voice in the lawmaking process that so directly affects their interests.

Land use law is enacted by state and local governing bodies and implemented by locally elected or appointed boards, with publicized public hearings an integral component in altering the law and in applying it. This Court consistently has recognized "the States' traditional and primary power over land and water use." *Hess v. Port Authority Trans-Hudson Corp.*, 513 U.S. 30, 44 (1994) (holding that regulation of land use is a function traditionally performed by local governments); *Solid Waste Agency of N. Cook County v. United States Army Corps of Eng'rs*, 531 U.S. 159, 174 (2001) ("[R]egulation of land use [is] a function traditionally performed by local governments"); *see also F.E.R.C. v. Mississippi*, 456 U.S. 742, 767-68 n.30 (1982) ("[R]egulation of land use is perhaps the quintessential state activity"); *Village of Belle Terre v. Boraas*, 416 U.S. 1 (1974); *Nectow v. City of Cambridge*, 277 U.S. 183, 187 (1928) (reviewing zoning restrictions under low level scrutiny); *Gorieb v. Fox*, 274 U.S. 603, 610 (1927) (upholding local setback requirement); *Zahn v. Board of Public Works*, 274 U.S. 325, 328 (1927) (upholding local zoning ordinance prohibiting construction of business buildings); *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 397 (1926) (local ordinance imposing building restrictions upheld).[5]

These principles do not become inapplicable simply because the landowner is a religious entity or individual. The impact of a building or land use project on a neighbor and community is felt just as keenly whether it arises from a secular or a religious landowner.

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[5] Notably, none of these long-settled principles were voiced, let alone acknowledged, during the hearings for RFRA or RLPA. There were no hearings for RLUIPA itself.

The Supreme Court has never, repeat never, applied strict scrutiny to land use laws simply because they affected religious landowners—even during the few years in which the Court embraced strict scrutiny in some cases, e.g., compulsory education laws. *Wisconsin v. Yoder*, 406 U.S. 205 (1972). To the contrary, in the one relevant action, this Court dismissed an appeal brought by a church claiming the right to locate in a residential district, because the case lacked a substantial federal question. The Court later characterized that dismissal as follows:

> When the effect of a statute or ordinance upon the exercise of First Amendment freedoms is relatively small and the public interest to be protected is substantial, it is obvious that a rigid test requiring a showing of imminent danger to the security of the Nation is an absurdity. We recently dismissed for want of substantiality an appeal in which a church group contended that its First Amendment rights were violated by a municipal zoning ordinance preventing the building of churches in certain residential areas.

American Communications Ass'n. v. Douds, 339 U.S. 382, 397-398 (1950) (citing *Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-day Saints v. Porterville*, 338 U.S. 805 (1949))

The federal courts' recognition that land use law is a state and local power has meant that each state has been left to develop its own land use jurisprudence suited to its land and its people, and that the federal courts have "emphasize[d their] reluctance to substitute [their] judgment for that of local decision makers, particularly in matters of such local concern as land-use planning." *Sameric Corp. v. Philadelphia*, 142 F.3d 582, 596 (3d Cir. 1998); *Bay Area Addiction Research and Treatment, Inc. v. City of Antioch*, 179 F.3d 725, 732 (9th Cir. 1999) (holding that zoning is a traditionally local activity); *Porterville*, 338 U.S. at 805; *Minney v. City of Azusa*,

359 U.S. 436, 436 (1959). RLUIPA, in contrast, inserts the federal government into the most mundane local land use disputes.

The effect of RLUIPA on residential neighborhoods in particular has been extreme. As early as 1926, this Court recognized the power of communities to create residential havens for families. *Euclid*, 272 U.S. at 394-95. The Court reaffirmed this principle almost 50 years later:

> A quiet place where yards are wide, people few, and motor vehicles restricted are legitimate guidelines in a land-use project addressed to family needs. This goal is a permissible one . . . The police power is not confined to elimination of filth, stench, and unhealthy places. It is ample to lay out zones where family values, youth values, and the blessings of quiet seclusion and clean air make the area a sanctuary for people.

Belle Terre, 416 U.S. at 9 (citation omitted).

Upon RLUIPA's enactment, homeowners discovered that their religious neighbors have the right to go to federal court to overcome the zoning rules that make the neighborhood residential and safe for families. RLUIPA creates two classes of property owners: religious and all others. With RLUIPA in place, the former have first-class status, while the latter have been reduced to second-class status. It violates fundamental principles of equality in the context of one of the core principles undergirding the constitutional order—private property and home ownership. RLUIPA also has introduced a disturbing degree of discord in previously tranquil residential neighborhoods.

II. RLUIPA IS UNCONSTITUTIONAL

There are two purported bases for Congress's power to enact RLUIPA: the Commerce Clause and Section 5 of the Fourteenth Amendment. Neither basis is sufficient, because

the states' power to determine local land use law cannot be overtaken by the Congress in this way.

A. Section 5 of the Fourteenth Amendment Does Not Support RLUIPA

Under Section 5 of the Fourteenth Amendment, Congress may not regulate the states' regulation of land use unless there is proof that the states have engaged in "widespread and persisting" constitutional violations in the land use context and that the federal law is "congruent and proportional" to those violations. *Tennessee v. Lane*, 124 S. Ct. 1978, 1993 (2004)**;** *Garrett*, 531 U.S. at 365; *Kimel*, 528 U.S. at 81; *Florida Prepaid Postsecondary Educ. Expense Bd. v. College Sav. Bank*, 527 U.S. 627, 645 (1999); *Alden v. Maine*, 527 U.S. 706, 756 (1999); *Boerne*, 521 U.S. at 519-20, 533-34; *Nanda v. Bd. of Trs. of the Univ. of Ill*., 303 F.3d 817, 824 (7th Cir. 2002), *cert. denied*, 539 U.S. 902 (2003). This principle exists to square Congress's Section 5 powers with the Constitution's inherent limits on federalism. *Boerne*, 521 U.S. at 524.

Those limits were never more in need than with RLUIPA, which attempts to federalize that which naturally and properly belongs under state and local control: land use governance. Under RLUIPA, the state and local governments and the people they serve are no longer able to determine local neighborhood requirements, to ensure peaceful enjoyment of private property—especially that of homeowners—or to enforce the many master plans that spread uses throughout the community to ensure harmonious uses. RLUIPA hands the religious landowner a unique "legal weapon" to battle laws restricting traffic, noise, and intense uses, and in effect, steals state and local power to serve their communities. *See Boerne*, 521 U.S. at 534-35.

Section (a)(2)(B) fails both requirements. *Elsinore Christian Ctr.*, 291 F. Supp. 2d at 1099 ("Congress's Section 5

authority is not absolute . . . and is a particularly tenuous basis upon which to found RLUIPA.").

After a decade of searching for examples of unconstitutional treatment of religious projects by local zoning officials, the supporters of RLUIPA cobbled together a short string of land use anecdotes that do not begin to illustrate the sort of widespread and persisting state *constitutional* violations necessary to justify such massive and pervasive congressional intervention in such a substantial and traditional arena of state and local control. *Id.* While it is true that religious landowners, like every other land-owning entity, bear incidental burdens imposed by generally applicable, neutral land use regulations, such burdens do not amount to constitutional violations. In fact, there is little, if any, proof that churches have been the targets of discrimination by local zoning boards.[6]

Those courts that have upheld RLUIPA's constitutionality in the land use context have accepted as true the sponsors' claims to a strong legislative record, without independent examination of the record itself. *See, e.g.*, *Westchester Day School v. Village of Mamaroneck*, 280 F. Supp. 2d 230 (S.D.N.Y. 2003), *vacated and remanded*, 386 F.3d 183 (2d Cir. 2004); *Freedom Baptist Church of Delaware County*, 204 F.Supp.2d 857, 861 (E.D. Pa. 2002); *Life Teen Inc. v.*

[6] A record is not necessary to prove that Congress has the power to enact a law under Section 5 of the Fourteenth Amendment if there is general knowledge of widespread and persisting constitutional violations. *See Boerne*, 521 U.S. at 526; *see also Nanda*, 303 F.3d at 817. There is no general knowledge that religious landowners are persistently discriminated against by land use authorities across the United State, as compared to others in the zoning process. Indeed, in the only neutral land use study of churches and zoning done to date, churches do quite well in the process. *See* Mark Chaves & William Tsitsos, *Are Congregations Constrained by Government? Empirical Results from the National Congregations Study*, 42 J. Church & St. 335, 337 (2000).

County of Yavapai, No. CIV 01-1490, 2003 U.S. Dist. LEXIS 24363, *46-47 (D. Ariz. Mar. 26, 2003), *interlocutory appeal denied*, 2003 U.S. Dist. LEXIS 24364 (D. Ariz. June 17, 2003); *Guru Nanak Sikh Soc'y of Yuba City v. County of Sutter*, 326 F. Supp. 2d 1140, 1155 (E.D. Cal. 2003); *Murphy v. Zoning Comm'n of Town of New Milford*, 289 F. Supp. 2d 87, 118 (D. Conn. 2003), *appeal pending*, No. 03-9329 (2d Cir. argued Sept. 21, 2004); *United States v. Maui County*, 298 F. Supp. 2d 1010, 1016-17 (D. Haw. 2003). Congress's choice of adjectives to describe its own record cannot satisfy the test set forth in *Boerne*.[7]

Not only is the legislative history deficient of proof of constitutional malfeasance by the states, but also it is utterly bereft of the expertise of the many state or local officials or government organizations that could have testified authoritatively regarding zoning practices and religious landowners. No land use official, state, city, or municipal official, organization representing states, cities, local governments, counties, or historical preservation organization was permitted to testify for the record on the failed Religious Liberty Protection Act ("RLPA"), whose legislative history is used to justify RLUIPA. The views of those with the most knowledge and the most experience on the subject have been excluded from the legislative record. *See* Marci A. Hamilton, *Federalism and the Public Good: The True Story Behind the Religious Land Use and Institutionalized Persons Act*, 78 Ind. L.J. 311, 342 (2003).

Although land use laws may have an "effect" on churches, just as they have an effect on all other landowners and developers, there is no evidence of *widespread* and *persisting*

[7] The same problem is evident on the prison side of RLUIPA, where Senators Hatch and Kennedy's conclusory joint statement has been repeatedly offered as sufficient proof that Congress has the authority to regulate state and local prisons and jails.

discrimination against religious landowners that would justify the federal overreaching of RLUIPA.

Even if this Court were to find widespread and persisting free exercise violations by land use lawmakers across the country, Section (a)(2)(B)'s resort to strict scrutiny for every instance in which a generally applicable, neutral land use law is applied to a religious landowner is incongruent and disproportional to any problems such landowners are claiming in the land use context. *Id.; Boerne*, 521 U.S. at 530-32; *Elsinore Christian Ctr.*, 291 F. Supp. 2d at 1101 (RLUIPA's test "does place a nearly, even if not entirely, insuperable barrier before States and municipalities attempting to justify actions that, far more often than not, are neither motivated by religious bigotry nor burdensome on central religious practice or beliefs."). Sec. (a)(2)(B) is an invalid exercise of Congress's power under Section 5 of the Fourteenth Amendment.

B. Section (a)(2)(B) of RLUIPA Is Not a Proper Exercise of Congress's Power Under the Commerce Clause

The Commerce Clause provides Congress with the authority to enact legislation to regulate commerce with foreign nations, among the states and with the Indian tribes. U.S. Const. art. 1, § 8, cl.3.

This Court has identified three broad categories of activity that Congress may regulate under the Commerce Clause. *See Lopez*, 514 U.S. 549. The first two categories involve laws that either "regulate the use of the channels of interstate commerce" or "regulate and protect the instrumentalities of interstate commerce, and the persons or things in interstate commerce, even though the threat may come only from intrastate activities," such as interstate highways, telecommunications, shipping, etc. *Id.* at 561. RLUIPA does not fit into either of these two categories. The third category includes the power to regulate intrastate activities where the

activity has a substantial effect on interstate commerce. *Id.* at 559. The Court has stated that this last category includes only those activities that are economic in nature.

Five years after *Lopez*, the Supreme Court overturned the Violence Against Women Act in *United States v. Morrison*, 529 U.S. 598 (2000), and "established what is now the controlling four-factor test for determining whether a regulated activity 'substantially affects' interstate commerce." *United States v. McCoy*, 323 F.3d 1114, 1119 (9th Cir. 2003). When considering whether a statute is consistent with the Commerce Clause Power, the determinative factors are:

> 1) [W]hether the statute in question regulates commerce 'or any sort of economic enterprise'; 2) whether the statute contains any 'express jurisdictional element which might limit its reach to a discrete set' of cases; 3) whether the statute or its legislative history contains 'express congressional findings' that the regulated activity affects interstate commerce; and 4) whether the link between the regulated activity and substantial effect on interstate commerce is 'attenuated'.

Id. (quoting *Morrison*, 529 U.S. 598, 610-612 (2000)).

1. *RLUIPA Does Not Regulate Commerce or Any Sort of Economic Enterprise*

RLUIPA does not regulate the economic aspects of land use, but rather, land use *law*. State and local law, by their nature, do not affect interstate commerce for purposes of Commerce Clause analysis. "The Commerce Clause . . . authorizes Congress to regulate interstate commerce directly; it does not authorize Congress to regulate state governments' regulation of interstate commerce." *Printz*, 521 U.S. at 924. RLUIPA is triggered by imposition of the state or local law and therefore is not even applicable if the state or local government has not passed or enforced a land use law. RLUIPA is regulating a non-economic activity—land use law

and regulation—that by its very nature cannot support a "nexus with interstate commerce." *Lopez*, 514 U.S. at 562 (quoting *United States* v. *Bass*, 404 U.S. 336, 347 (1971); *see also Terrero v. Watts*, No. CV202-134 (S.D. Ga. Oct. 14, 2003).

The Commerce Clause permits Congress to regulate private citizens or states acting as economic actors. *See Condon*, 528 U.S. at 151; *New York v. United States*, 505 U.S. 144, 167 (1992) (citing *Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 288 (1981)). Yet, RLUIPA does not regulate private citizens or states acting as market participants. Rather, RLUIPA regulates state and local government in their role as sovereigns, for the benefit of private citizens. The Supreme Court's federalism cases have made clear that path is foreclosed to Congress. *Garrett*, 531 U.S. at 364 (citing *Kimel*, 528 U.S. at 79); *Morrison*, 529 U.S. at 618-619; *Printz*, 521 U.S. at 924 ("[T]he Commerce Clause, for example, authorizes Congress to regulate interstate commerce directly; it does not authorize Congress to regulate state governments' regulation of interstate commerce.").

Amici Senators Hatch and Kennedy argue that RLUIPA is not an unconstitutional exercise of the Commerce Clause power on the theory that it is a form of deregulatory federal preemption. *See* Brief of Amici Curiae Senators Orrin G. Hatch and Edward M. Kennedy, at 28-30. They cite the Airline Deregulation Act of 1978 upheld in *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374 (1992) and the "Machinists preemption" rule of *Machinists v. Wisconsin Employment Relations Comm'n*, 427 U.S. 132 (1976). This is quite a stretch. First, neither case even addressed the Commerce Clause issue. Moreover, Senators Kennedy and Hatch are inviting this Court to extend congressional power well beyond existing law. While federal economic deregulation may well be constitutional, the underlying federal statute must first have some relation to interstate commerce. The

deregulated activity in each case cited by amici was so obviously and thoroughly related to interstate commerce that the exercise of the Commerce Clause power—even when the federal law worked to hinder state law—was not even at issue.

RLUIPA fails under this reasoning for three reasons. First, under RLUIPA, the "deregulated" activity, i.e., the state's ability to enforce generally applicable and neutral prison regulations and zoning laws, is non-economic. *Reno v. Condon*, 528 U.S. 141, 148 (2000). Second, in the land use context, the federal government has no authority to regulate land use law, because it is a quintessentially state and local economic activity. Third, if the argument is that RLUIPA is deregulating land use law as an economic matter, then singling out religious landowners surely violates the Establishment Clause. It is not nullifying state law for the purpose of aiding the economy but rather solely to aid reli-gious entities over and against neutral, generally applicable land use regulations. Indeed, it is quite clear that the members of Congress were not concerned about RLUIPA's effect on the economy. It is a non-economic statute intended to put religious landowners in a privileged position. *See Lopez*, 514 U.S. at 562-63.

2. *The Link Between the Regulated Activity and Substantial Effect on Interstate Commerce Is Too Attenuated to be a Constitutional Exercise of the Commerce Clause Power*

The universe of that which is being regulated pursuant to the Commerce Clause must "substantially affect" interstate commerce. *Lopez*, 514 U.S. at 558. Although individual instances of economic activity may not by themselves substantially affect interstate commerce, their aggregation may. *Wickard v. Filburn*, 317 U.S. 111 (1942). Yet, where that which is being regulated is not economic in nature–like state

and local regulation—such aggregation does not amount to a substantial effect on interstate commerce. *See Morrison*, 529 U.S. at 617-18 (stating commerce power does not extend to traditional local regulation even if, in the aggregate, such activities substantially affect commerce); *see also Raich v. Ashcroft*, 352 F.3d 1222, 1231 (9th Cir. 2003), (growth and use of medicinal marijuana is not commercial and the aggregation analysis of *Wickard* is therefore inapplicable); *McCoy*, 323 F.3d at 1122 (possession of a single pornographic picture of a child "was purely non-economic and non-commercial" and was not analogous to the aggregation in *Wickard*.).

The Court in *Lopez* refused to follow the tortured logic that justified the Gun-Free School Zones Act: violence affects schools, and schools train tomorrow's work force, therefore guns near school zones affect "national productivity." The same reasoning was invoked to justify RLUIPA, which rests on the backward theory that Congress may directly regulate state and local land use law affecting religious landowners, because the landowners themselves make economic decisions that affect the interstate market.

If Section (a)(2)(B) were upheld as a valid exercise of commerce power, then Congress would have the newfound power to take over any arena of state law it so desires and claim that the economic interests of those being regulated by the states satisfy the requirements of the Commerce Clause. That would yield Congress plenary power to regulate the states as states, far exceeding the enumerated powers the Congress provides. *See McCoy*, 323 F.3d at 1124 ("It is particularly important that in the field[s] . . . where state power is preeminent, national authority be limited to those areas in which interstate commerce is truly affected."). RLUIPA's effect on interstate commerce is too attenuated to justify this exercise of congressional power.

3. *RLUIPA and Its Legislative History Do Not Support the Finding That the Regulated Activity Affects Interstate Commerce*

As previously explained, *supra*, the congressional record supporting RLUIPA is dubious at best. The statute asserts that, "the substantial burden[s] 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). While there is precious little regarding effect on interstate commerce, the legislative history of RLUIPA indicates Congress believed that "the burden [i.e., the state or local law] prevents a specific economic transaction in commerce, such as a construction project, purchase or rental of a building, or an interstate shipment of religious goods." 146 Cong. Rec. S. 7775 (daily ed. July 27, 2000) (joint statement of Sen. Hatch & Sen. Kennedy). The characterization is inaccurate, however. The regulated "activity" is land use law, and as explained, *supra*, land use law has no constitutionally significant impact on commerce. If RLUIPA were regulating building project impacts themselves, the answer might be different, but it does not.

The question whether there is impact on commerce is one for the courts. "[I]t is not the mere *existence* of legislative findings that is determinative." *McCoy*, 323 F.3d at 1127 (emphasis in original). "Rather, '[w]hether particular operations affect interstate commerce sufficiently to come under the constitutional power of Congress to regulate them is ultimately a judicial rather than a legislative question.'" *Id*. (quoting *Morrison*, 529 U.S. at 614). Local and state land use laws, by their nature, deal solely with non-economic and intrastate commercial ventures. *United States v. Corp*, 236 F.3d 325, 332 (6th Cir. 2001); *United States v. Maxwell*, 386 F.3d 1042, 1063 (11th Cir. 2004) (jurisdictional hook not enough to sustain conviction). As previously argued, *supra*,

the connection to interstate commerce is too attenuated to justify this exercise of congressional power.

4. *RLUIPA Does Not Contain Any Express Jurisdictional Element Which Might Limit Its Reach to a Discrete Set of Cases*

Those defending RLUIPA have hung their hopes on the theory that Congress has carte blanche authority to regulate so long as it provides a "jurisdictional element." *Lopez*, 514 U.S. at 559. This argument elevates form over substance. By "jurisdictional element" RLUIPA supporters mean that RLUIPA is applicable only in individual cases where a substantial burden on interstate commerce is found. RLUIPA does in fact require a showing that the "substantial burden affects . . . commerce . . . among the several states." 42 U.S.C. § 2000cc(a)(2)(B). The jurisdictional element, however, does not save RLUIPA from constitutional violation because the jurisdictional element of RLUIPA simply cannot be satisfied. *It is nonsensical to ask whether land use law affects commerce, because it is non-economic in nature.*

Like the 'jurisdictional hook' in *McCoy*, which was found to be inadequate to justify the federal law under the Commerce Clause, RLUIPA "not only fails to limit the reach of the statute to any category . . . of cases that have a particular effect on interstate commerce, but, to the contrary, it encompasses virtually *every* case imaginable" where a religious group challenges a local land use law, because it regulates the law, not the economic activity. *McCoy*, 323 F.3d at 1124 (emphasis in original).

C. RLUIPA Violates the Constitution's Inherent Principles of Federalism and the Tenth Amendment

RLUIPA is a violation of three federalism principles.[8] First, the Court's federalism cases have emphasized that Congress may not regulate areas that traditionally or inherently belong to state and local control. *See Lopez*, 514 U.S. at 561; *Morrison*, 529 U.S. at 617-18. State and local land use laws clearly occupy an area of inherent state and local control.

Second, no court (other than those who have misguidedly upheld RLUIPA) has held that the "jurisdictional element" hands Congress the power to directly regulate the states in their sovereign capacity. This Court's dictum in *Lopez* does not create a *per se* rule that the magic words of a jurisdictional element can save every federal statute from federalism defects. "[The statute] has no express jurisdictional element which might limit its reach to a discrete set of firearm possessions that additionally have an explicit connection with or effect on interstate commerce." *Lopez*, 514 U.S. at 562.

This "jurisdictional element" dictum in *Lopez* is intended to ensure that the limits of federalism are observed, not to introduce a novel means of circumventing those limitations. "A 'hard and fast rule' upholding a statute's constitutionality under the *Commerce Clause* whenever a jurisdictional element was present would 'ignore[ ] the fact that the connection

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[8] Both the Constitution's inherent limits of federalism and the Tenth Amendment limit the reach of the Commerce Clause. *Regents of the Univ. of Mich. v. Ewing*, 474 U.S. 214, 226 (1985). Under this Court's cases, land use policy has customarily been a feature of local government and an area in which the tenets of federalism are particularly strong. *See, e.g.*, *Solid Waste Agency*, 531 U.S. at 159; *Village of Belle Terre*, 416 U.S. at 1; *Euclid*, 272 U.S. at 365; *Izzo v. Borough of River Edge*, 843 F.2d 765 (3d Cir. 1988).

between the activity regulated and the jurisdictional hook may be so attenuated' that there may be no substantial effect on interstate commerce." *McCoy*, 323 F.3d at 1126 (quoting *United States v. Rodia*, 194 F.3d 465, 472 (3d Cir. 1999)). This is especially true for RLUIPA, which introduces a jurisdictional hook that is intended to justify wholesale takeover of state and local zoning and land use laws whenever applied to religious landowners.

Third, RLUIPA singles out the state and local governments in their sovereign capacity. RLUIPA does not regulate land use, e.g., setbacks or density requirements, but rather regulates the law of land use. To Amicis' knowledge, these features make RLUIPA unique among all federal laws invoking the Commerce Clause. RLUIPA is the next step in Congress's ongoing attempt to expand its own power at the expense of the states, and should be recognized as such.

While the states have been permitted to be regulated as part of a congressional policy to regulate economic activity, RLUIPA presents the circumstance where they are being regulated in their sovereign capacity and not as economic actors. *See Printz*, 521 U.S. at 924 ("[E]ven where Congress has the authority under the Constitution to pass laws requiring or prohibiting certain acts, it lacks the power to directly compel the States to require or prohibit those acts. . . . [T]he Commerce Clause, for example, authorizes Congress to regulate interstate commerce directly; it does not authorize Congress to regulate state governments' regulation of interstate commerce.") (citing *New York*, 505 U.S. at 166). As the Court explained in *Reno v. Condon*, 528 U.S. 141 (2000), when it upheld the Driver's Privacy Protection Act of 1994, the Act did not regulate the states in their sovereign capacity, but rather "the universe of entities that participate as suppliers to the market for motor vehicle information - the States as initial suppliers of the information in interstate commerce and private resellers or redisclosers of that information in com-

merce." *Condon*, 528 U.S. at 151. With the DPPA, Congress was regulating the flow of information in the "stream of interstate commerce," and not the "'manner in which States regulate private parties.'" *Id.* at 150 (relying on and citing *South Carolina v. Baker*, 485 U.S. 505, 514-15 (1988)). The reasoning of *Condon* leads to the conclusion that the federal government may regulate an economic market under the Commerce Clause, but it may reach the states under that regulation only if they are acting as economic actors in that market. RLUIPA, of course, regulates the states in their role as lawmakers, not economic actors. The *Condon* Court distinguished a federal law like RLUIPA that "regulates the States exclusively," saying that issue was not presented by the DPPA. *Id.* at 151. A federal law that targets the states acting in their sovereign capacity to regulate private parties violates plain principles set forth in the Supreme Court's federalism cases.

CONCLUSION

Section (a)(2)(B) of RLUIPA attempts to take over state and local control of an arena— land use law—that has long been held to be quintessentially local. There is no constitutional authority for this direct intervention in state and local law under either Section 5 of the Fourteenth Amendment or the Commerce Clause.

RLUIPA is not a reiteration of the Supreme Court's free exercise jurisprudence, and therefore simply redundant of the Free Exercise Clause. To the contrary, it imposes strict scrutiny against generally applicable, neutral laws, which places it in direct opposition to the Supreme Court's most recent free exercise cases, *Employment Div. v. Smith*, 494 U.S. 872 (1990); *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993); and *Locke v. Davey*, 540 U.S. 712 (2004).

Respectfully submitted,

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