No. 08-1438

In The

Supreme Court of the United States

HARVEY LEROY SOSSAMON, III,

Petitioner,

v.

TEXAS, et al.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF OF *AMICUS CURIAE* NATIONAL ASSOCIATION OF EVANGELICALS IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether states and state officials may be subject to suit for damages for violations of the Religious Land Use and Institutionalized Persons Act.

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INTEREST OF *AMICUS CURIAE*[1]

The National Association of Evangelicals [NAE] is the largest network of evangelical churches, denominations, colleges, and independent ministries in the United States. It serves 50 member denominations and associations, representing 45,000 local churches and over 30 million Christians. NAE serves as the collective voice of evangelical churches and other religious ministries. NAE believes that religious freedom is a gift of God, and it is vital to limiting the government that is our American constitutional republic. RLUIPA is of vital importance to *amicus*'s constituents because it is the most effective, and sometimes the only effective, means available to protect religious ministries from overzealous city councils and county boards. Local governments have an incentive to quell religious ministries with land use regulations in order to attract tax revenue generating businesses. Local governments do not always appreciate the positive contributions of religious ministries to the community because such contributions are not easily measured in dollars and cents. RLUIPA leveled the playing field. Without a robust RLUIPA, the incentives to exclude religious ministries from a

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[1] All counsel of record received notice of *amicus*'s intention to file this brief at least ten days before this brief was due and all parties to this appeal consented to the filing of this brief. *Amicus* states that no portion of this brief was authored by counsel for a party and that no person or entity other than *amicus* or its counsel made a monetary contribution to the preparation or submission of this brief.

community through land use regulations will prevail and lead to pecuniary harm.

SUMMARY OF THE ARGUMENT

The Fifth Circuit's ruling in *Sossamon v. Texas* arguably nullifies the Religious Land Use and Institutionalized Persons Act's ["RLUIPA's"] application to religious land use disputes. The hearings leading up to passage of RLUIPA revealed that congressional action to enforce the free exercise of religion in the area of land use regulation was imperative. The hearings compiled a large body of evidence that demonstrated the freedom to assemble and worship was routinely violated by local governing bodies nationwide. RLUIPA, enacted under the authority provided by the Commerce and Spending Clauses, as well as Section 5 of the Fourteenth Amendment, was to remedy these impediments to religious persons and assemblies by providing "appropriate relief" and "broad protection of religious exercise" to the "maximum extent" permitted by law.

The Fifth Circuit has inadvertently endangered the land use protections RLUIPA provides for synagogues, mosques, and churches. In broad and unrestrained language, the circuit court denied individual capacity claims under RLUIPA predicated on the contract theory of the Spending Clause: those not a party to the contract are not restrained by the statute. This arguably altered the standard for

determining RLUIPA's general applicability to whether the respective violator of RLUIPA's provisions was a party to this same contract. Cities, counties, and local zoning officials are the perpetrators of most all the religious land use violations RLUIPA was to prevent and are thus the very defendants Congress contemplated when enacting RLUIPA. However, as non-parties to the contract under the Fifth Circuit's rationale these same cities, counties, and local zoning officials are immune from the requirements of RLUIPA altogether.

The Fifth Circuit has opened wide the door to exempting local governments from liability for any relief mandated by RLUIPA, injunctive or otherwise. This is tantamount to striking down the statute as it relates to land use regulation. Such an unreasonable result compels review in this case. The Fifth Circuit's decision is not only in conflict with this Court and other courts of appeals, but is contrary to the plain language of RLUIPA and its legislative record. Failure to reverse the decision below will cripple a vital civil rights statute relied upon by untold numbers of religious groups and persons.

ARGUMENT

I. In its attempt to sweep aside prison litigation, the Fifth Circuit inadvertently opened the door to invalidate RLUIPA's application to all religious land use disputes.

"The right to assemble for worship is at the very core of the free exercise of religion." 146 CONG. REC. 16698 (2000) (joint statement of Sen. Hatch and Sen. Kennedy). Accordingly, the "right to build, buy or rent" a "physical space" in which to worship "is an indispensable adjunct of the core First Amendment right to assemble for religious purposes." *Id.* With these seemingly self-evident assertions the lead sponsors in the U.S. Senate of the Religious Land Use and Institutionalized Persons Act of 2000 ("RLUIPA") began their explanation of the need for RLUIPA's religious land use provisions. RLUIPA is "based on three years of hearings" before both the House and Senate "that addressed in great detail both the need for legislation and the scope of Congressional power to enact such legislation." *Id.* As recognized by the Senate, "[i]t is important to note that [RLUIPA] does not provide a religious assembly with immunity from zoning regulation." 146 CONG. REC. 14284 (2000) (statement of Sen. Hatch). It merely "prohibits discrimination against religious assemblies and institutions, and prohibits the total exclusion of religious assemblies from a jurisdiction." *Id.* Not surprisingly, RLUIPA unanimously passed both the House and Senate, and did so with the support of "over 50 diverse and respected groups, including the Family

Research Council, Christian Legal Society, American Civil Liberties Union, and People for the American Way." *Id.* (statement of Sen. Kennedy); *see* S.2869, Bill Summary and Status for 106th Congress (2000).[2]

Religious institutions, such as synagogues, churches and mosques, usually represent a non-revenue producing land use. With cities and counties across the United States experiencing significant declines in revenue, many would prefer to grant a development permit to a revenue producing shopping mall rather than a synagogue. Barring RLUIPA, religious institutions have inequitable bargaining power with municipalities as compared to Home Depot, the AMC movie theatre, or a Hilton hotel. Commercial development represents revenue. To many local governing bodies religious institutions represent wasted space, as well as lost revenue and jobs.

A. Congress intended to provide religious institutions protection from hostile local authorities, not just state authorities.

The years of hearings leading up to passage of RLUIPA revealed that legislative action to enforce the free exercise of religion in the area of land use regulation was imperative. The record of the hearings compiled "massive evidence" that the freedom to assemble and worship is "frequently" violated by local

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[2] The bill summary and status is available at http://thomas.loc.gov/cgi-bin/bdquery/z?d106:SN02869:@@@L&summ2=m& (last visited June 22, 2009).

governing bodies nationwide. 146 CONG. REC. 16698 (2000) (joint statement of Sen. Hatch and Sen. Kennedy). This is particularly true for cases involving "new, small, or unfamiliar churches," "especially in cases of black churches and Jewish shuls and synagogues." *Id.*

For example, an Orthodox Jewish rabbi in Miami was "threatened with criminal prosecution" for leading prayers in a converted garage in a single-family residential area. H.R. REP. NO. 106-219, at 10 (1999).[3] The town of Wayne, New Jersey "denied a permit to a black church, after one official opposed the permit on the ground that the city would soon look like Patterson, a predominately African-American city nearby." *Id.* at 23 n.111. A Mormon congregation in Tennessee was prohibited from using as a church a former church building of another faith because the city determined that allowing it to do so was not "in the best interests" of the city and wanted no more churches in the community. *Id.* at 22. Other churches requested permits to use a flower shop, a bank, and a theater as places of worship. In each case, the governing body responded by rezoning each parcel of land into a "tiny manufacturing zone[ ]" in which a church was a non-permissible use. *Id.* at 21-22.

The legislative record cites to a study of religious land use regulation conducted by Brigham Young

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[3] H.R. REP. NO. 106-219, at 18-24, was identified as summarizing the hearing record for RLUIPA. 146 CONG. REC. 16698-16699 (2000) (joint statement of Sen. Hatch and Sen. Kennedy).

University that found "Jews, small Christian denominations, and nondenominational churches are vastly over represented in reported church zoning cases." *Id.* at 20. Specifically, the study determined that "[r]eligious groups accounting for only 9% of the population account for 50% of the reported litigation involving location of churches," and that these same groups accounted for "34% of the reported litigation involving accessory uses at existing churches." *Id.* at 20-21. The same study found that while "Jews account for only 2% of the population," they account for "20% of the reported location cases and 17% of the reported accessory use cases." *Id.* at 21.

Such discrimination and disparate treatment is not limited to small churches and minority religions. The record also referenced a 1997 survey by the Presbyterian Church (U.S.A.) – the largest Presbyterian body in the United States – of its 11,328 congregations. The survey focused on land use issues. Though a mainline Protestant denomination, the survey revealed at least 15% of the congregations had experienced significant conflict over a land use permit and/or an increase in the cost of their projects of more than 10% due to conditions imposed on the church by government. H.R. REP. NO. 106-219, at 21; Douglas Laycock, *State RFRAs and Land Use Regulation*, 32 U.C. DAVIS L. REV. 755, 772-73 (1999) [hereinafter "Laycock"].[4] These

[4] Laycock at 769-83 was identified as summarizing the hearing record for RLUIPA. 146 CONG. REC. 16698-16699 (2000) (joint statement of Sen. Hatch and Sen. Kennedy).

statistics amount to discriminatory actions against hundreds of churches because they are churches and untold dollars in increased costs and delays.

The record further revealed that discriminatory and biased actions against churches by many local governing bodies are nothing short of flagrant. In Portland, Oregon, a city official ordered a Methodist church to limit attendance at its worship services to 70 persons when the church's facility could accommodate 500. 146 CONG. REC. 14285 (2000). Arapahoe County, Colorado, "imposed numerical limits on the number of students who could enroll in religious schools" and imposed similar restrictions "on the size of congregations of various churches" as a means to "limit[ ] their growth." *Id.* Officials in Douglas County, Colorado, actually proposed limitations on the operational hours of a church in the same way they might limit a closing time for taverns. *Id.* The City of Los Angeles prohibited fifty elderly Jews from meeting for prayer in a house in the residential neighborhood of Hancock Park. It allowed other places for secular assemblies in the neighborhood, such as schools and recreational uses, but "refused this use because Hancock Park had no place of worship and the City did not want to create a precedent for one." H.R. REP. NO. 106-219, at 22. The City of Richmond "required places of worship wishing to feed more than thirty hungry and homeless people to apply for a conditional use permit at a cost of $1,000, plus $100 per acre of affected property." 146 CONG. REC. 14285 (2000). That particular ordinance

"regulated only places of worship, not other institutions, and only eating by persons who are hungry and homeless." *Id.* These illustrations represent only a small fraction of the violations compiled in the legislative record. The record contains dozens of additional examples of similar land use discrimination against churches and religious bodies, violations which represent the mere "tip of the iceberg." Laycock at 773.

Congress clearly and explicitly intended to protect religious land use from overzealous local government officials and entities. The legislative purpose is not in question. Religious institutions generally do not have land use disputes with states. Their disputes are usually with cities and counties. The Fifth Circuit failed to confine its analysis to individual capacity claims, but with a sweeping pen excluded from accountability all non-parties to the RLUIPA contract between Congress and the states. In so doing, the Fifth Circuit may have inadvertently given cities and counties a near absolute exemption from RLUIPA, gutting the very intent of the Act. This makes no sense. If the Fifth Circuit's opinion is taken to its logical conclusion, cities, counties, and local zoning officials are immune from the application of RLUIPA altogether, contrary to the obvious congressional intent. Failing to issue a *writ of certiorari* will result in great harm.

B. If state officials in their individual capacities are not parties to the contract and thus not subject to RLUIPA, then arguably cities and counties are also excluded from the application of RLUIPA.

The Fifth Circuit's justification for denying individual capacity actions under RLUIPA is that an individual is not a "party" to the Spending Clause "contract" formed between the federal and state governments. According to the Fifth Circuit, because RLUIPA was enacted solely under the Spending Clause (which *amicus* disputes, see Section I-C, *infra*), RLUIPA fails to "impose *direct* liability on a non-party to the contract between the state and the federal government." Pet. App. 19a. The Fifth Circuit agreed with the Eleventh Circuit that "only the grant recipient – the state – may be liable for [a RLUIPA] violation." Pet. App. 17a.

This ruling lays the groundwork and opens wide the door to completely exempt local government from liability for any relief mandated by RLUIPA. If the standard for determining RLUIPA's applicability is whether the respective party defendant is a party to the RLUIPA "contract," cities, counties and local zoning officials – non-parties to the "contract" – are immune from RLUIPA's requirements entirely. Congress, however, obviously intended to alleviate the burden on religious institutions facing exclusion at the hand of zoning entities such as municipalities. *See* Section I-A, *supra*. To exclude all non-parties to

the "contract" is to exclude all of the known defendants contemplated when Congress passed the legislation. Such an absurd result compels review in this case. Not only is there a well-defined conflict between circuits, failure to reverse the decision below will damage a vital civil rights statute.

The Fifth Circuit has reversed almost a decade of religious land use protection under RLUIPA. Its approach is in conflict with the Seventh, Ninth, and Tenth Circuits, see Pet. at 17-18; Pet. App. 15a & n.23, all of which held that RLUIPA has application beyond injunctive relief against state officials in their official capacities. The Fifth Circuit's holding nullifies an act of Congress that enjoyed wide bi-partisan support and was signed into law by President Clinton. Excluding all non-parties, including cities and counties, from the application of RLUIPA is tantamount to striking down the statute as it relates to land use regulation because almost all land use involves either city or county regulation.

To render a portion of a statute meaningless contravenes a canon of statutory construction. *See Beck v. Prupis*, 529 U.S. 494, 506 (2000). Congress obviously intended RLUIPA to apply to cities and counties. Thus, the Fifth Circuit's rationale that Congress enacted RLUIPA solely under the Spending Clause is wrong. As shown in Section I-C, *infra*, Congress enacted RLUIPA under the Spending Clause, the Commerce Clause, and its enforcement powers under Section 5 of the Fourteenth Amendment.

C. Congress enacted RLUIPA pursuant to its powers under the Commerce Clause, Spending Clause, and Section 5 of the Fourteenth Amendment.

Recognizing the widespread and increasing nature of the problem, Congress enacted RLUIPA pursuant to its power to regulate under the Commerce Clause, Spending Clause, and Section 5 of the Fourteenth Amendment. H.R. Rep. No. 106-219, at 27; 146 CONG. REC. 16698-16699 (2000) (joint statement of Sen. Hatch and Sen. Kennedy); 146 CONG. REC. 14284 (2000) (statement of Sen. Kennedy). This scope of application is set out not only in the legislative record but in the text of RLUIPA itself. *See* 42 U.S.C. §§ 2000cc(a)(2), 2000cc-1(b) (2000). This strongly undercuts the Fifth and Eleventh Circuits' opinions limiting RLUIPA as enacted solely under the Spending Clause and supports the more reasonable determinations of this Court and other circuit courts of appeal. *See, e.g.*, *Cutter v. Wilkinson*, 544 U.S. 709, 715 (2005) (recognizing Congress "invok[ed] federal authority under the Spending and Commerce Clauses" to enact RLUIPA); *Madison v. Virginia*, 474 F.3d 118, 124 (4th Cir. 2006) (stating "Congress relied on its Spending and Commerce Clause [sic] authority" to enact RLUIPA); *Cutter v. Wilkinson*, 423 F.3d 579, 584-90 (6th Cir. 2005) (recognizing that Congress enacted RLUIPA under both the Spending and Commerce Clauses). The Court should grant the petition to resolve this conflict and give appropriate guidance to courts not to interpret RLUIPA solely

through a Spending Clause prism contrary to clear congressional intent.

It is no argument that the Fifth Circuit's analysis only involved state liability and did not extend its analysis to the land use portion of the statute. Many of the operative portions of RLUIPA are the same for prison inmates and religious institutions, including the section providing for remedies. The Fifth Circuit failed to consider that Congress, under both the Spending and Commerce Clauses, used identical language to protect both institutionalized persons and religious land use. *See* 42 U.S.C. §§ 2000cc(a)(2), 2000cc-1(b) (2000). The relief available both to religious bodies and institutionalized persons is identical, as well. *See* 42 U.S.C. § 2000cc-2 (2000). As the authority to enact and the relief available under both Section 2000cc and Section 2000cc-1 are identical, any ruling affecting or interpreting the authority to enact or the relief available under one section directly affects the other. Thus, the Fifth Circuit's ruling on the congressional authority to enact RLUIPA and on the relief it provides, though delivered in the context of the rights of institutionalized persons, directly affects RLUIPA's protection of churches. If the Fifth Circuit intended to bifurcate the congressional authority to enact RLUIPA between states and political sub-divisions of the state such as municipalities, its analysis failed to reveal such a fine distinction.

D. The Fifth Circuit's interpretation of RLUIPA directly conflicts with that of the United States Department of Justice.

The Fifth Circuit arguably eliminated a church's or other religious organization's ability to seek damages for a violation of RLUIPA. Such an unreasonable conclusion stands in stark contrast to established U.S. Department of Justice analysis. The DOJ, assessing the relief available under RLUIPA, determined that "[r]eligious institutions and individuals whose rights under RLUIPA are violated may bring a private civil action for injunctive relief and *damages*."[5] While the text of RLUIPA does not expressly address damages,[6] the Fifth Circuit admitted that the "plain language of RLUIPA * * * seems to contemplate such relief." Pet. App. 16a. To reject that "plain language" is problematic in its own right. See *United States v. Clintwood Elkhorn Mining Co.*, 128 S. Ct. 1511, 1518 (2008) (stating the "strong presumption that the plain language of the statute expresses congressional intent is rebutted only in rare and exceptional circumstances.") (internal quotation marks omitted);

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[5] U.S. Department of Justice Civil Rights Division, A Guide to Federal Religious Land Use Protections, *available at* http://www.usdoj.gov/crt/religdisc/rluipa_guide.pdf (last visited June 15, 2009) (emphasis added).

[6] The text of RLUIPA does, however, call for "appropriate relief" and "broad construction" all "construed in favor of a broad protection of religious exercise, to the maximum extent permitted by the terms of this Act and the Constitution." 42 U.S.C. §§ 2000cc-2(a), 2000cc-3(g) (2000).

Carcieri v. Salazar, 129 S. Ct. 1058, 1066-1067 (2009) ("[C]ourts must presume that a legislature says in a statute what it means and means in a statute what it says there."); *Jimenez v. Quartermen*, 129 S. Ct. 681, 685 (2009) ("It is well established that, when the statutory language is plain, we must enforce it according to its terms.").

The DOJ's interpretation should be given considerable weight given that, in the text of RLUIPA itself, Congress provided the Attorney General express authority to "enforce compliance with this Act." 42 U.S.C. § 2000cc-2(f) (2000). When, such as here, the terms of a statute contain some alleged ambiguity, in comparable circumstances this Court has determined that the statutory interpretation of the government agency authorized to enforce the statute should be given due deference. *See, e.g.*, *I.N.S. v. Aguirre-Aguirre*, 526 U.S. 415 (1999) (finding that the court of appeals should have given appropriate deference to the statutory construction of the Attorney General regarding a statute he was charged with enforcing). The Attorney General's express statutory authority to enforce RLUIPA and the DOJ's corresponding assessment of the relief available under RLUIPA speak loudly to the error of the decision below. This petition is important because it provides an opportunity for the Court to articulate for the first time the scope of relief and class of defendants Congress intended when it enacted the legal reforms in RLUIPA.

II. If damages are not available to religious institutions in land use cases under RLUIPA, cities and counties may easily manipulate the legal system to financially eliminate religious institutions from the city or county limits.

The Fifth Circuit's restrictive reading of the relief available under RLUIPA presents a significant problem for churches and other religious organizations. As the legislative record reveals, prior to the enactment of RLUIPA churches were the victims of increasing discrimination in the area of zoning and other land use regulation. Such free exercise violations cause extensive monetary damages and delay to churches and religious bodies. *See, e.g.*, 146 CONG. REC. 19125 (2000) (a Muslim mosque estimated $200,000 to cover its legal fees and relocation to another town after it was denied use of a building); 146 CONG. REC. 14285-14286 (2000) (a Chicago church spent $5,000 and wasted a year seeking a special use permit); H.R. REP. NO. 106-219, at 21 (a comprehensive survey of thousands of Presbyterian churches revealed a large number of churches experienced an increase in cost of projects of more than 10% due to conditions imposed on the church by local government).

While RLUIPA changed the law, the sentiment of these governing bodies remains the same. Religious institutions still face intentional discrimination. Such hostility to religion is more prevalent in some geographic areas than others. In the arena of land use,

there are strong commercial interests at stake. Religious institutions are routinely seen as obstacles to local commercial progress, even in the most religiously tolerant cities and towns. Religious institutions, by virtue of their IRS 501(c)(3) status, are precluded from advocating for or against those who seek local elective office. Their commercial competitors are not so restrained. The political and economic disadvantages of religious institutions further compound their inability to negotiate with city officials to the same extent as a promising commercial enterprise that produces jobs and tax revenues. Thus, the incentive of cities and counties to try to wear down a church through litigation is alluring. RLUIPA significantly reduced that incentive and provided churches the much needed bargaining equalizer to reach fair local decisions regarding land use.

Even if churches may seek injunctive relief under RLUIPA against cities, counties, and local zoning officials, which the Fifth Circuit has brought into serious question,[7] under the Fifth Circuit's ruling local governing bodies may now discourage religious land use with the same hostile tactics employed prior to RLUIPA. Government, relying on a church's often

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[7] *See* Section I-B, *supra*. The Fifth Circuit provided no explanation for why its reasoning should be limited to damages alone. While the Fifth Circuit made some attempt to restrict its analysis to damages relief, it has laid the groundwork and opened wide the door to completely exempt local government from liability for any relief mandated by RLUIPA, injunctive or otherwise.

humble monetary resources, may now force a delay in a church's land use request and require the church to litigate, knowing any damages inflicted by the delay will never be required of it. As "churches most exposed to zoning problems are young and often have little capital," Laycock at 765, such tactics are enough to chill a church's free exercise of religion and defeat the purposes of RLUIPA. *See, e.g.*, Laycock at 765 ("Litigation is expensive and uncertain at best, and in addition to the costs of litigation, the church has to commit to a lease or a mortgage to hold the property while it litigates."); Laycock at 765 n.33 (quoting *Hearing on H.R. 4019 Before the Subcomm. on the Constitution of the House Comm. on the Judiciary*, 105th Cong. (1998) (oral testimony of John Mauck)[8] ("The churches don't have the money, or the municipalities can wait them out because a church has a choice of buying a building that it can't use or having to carry that expense and pay the mortgage every month, if you can get a mortgage, on a building that it can't use, or walking away.")).

A savvy city could easily deny a synagogue's permit to build for reasons that violate RLUIPA. When the synagogue sues, the city could deploy a massive defense, draining the synagogue's limited financial resources by exposing it to protracted and sharply contested litigation. Then, when it becomes obvious

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[8] The oral testimony is available at http://commdocs.house.gov/committees/judiciary/hju59929.000/hju59929_0f.htm (last visited June 18, 2009).

that the synagogue is on the brink of victory, the city could simply approve the synagogue's permit to build, thereby mooting the request for injunctive relief. The stark facts of *City of Mesquite v. Alladin's Castle, Inc.*, 455 U.S. 283 (1982), are little comfort in the face of a city attorney proclaiming to the court that the city now "sees the light" and will abide by the law. The synagogue obtains a hollow victory, as its funds set aside to build its place of worship have been expended on the costs of experts, litigation, depositions, and attorneys – none of which are recoverable under *Buckhannon Bd. & Care Home, Inc. v. West Virginia Dept. of Health and Human Res.*, 532 U.S. 598 (2001). The land will sit empty, the faithful will be without their place of worship, and the city will have prevailed in its violation of RLUIPA. Does such a scenario seem extreme? It is a scenario that represented the day to day practices of local governments before RLUIPA was enacted.

CONCLUSION

The petition for a *writ of certiorari* should be granted and the ruling of the Fifth Circuit should be reversed.

Respectfully submitted,

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