No. 03-13858-CC

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

MIDRASH SEPHARDI, INC.,
YOUNG ISRAEL OF BAL HARBOR, INC.,

Plaintiffs-Counter-Defendants-Appellants

v.

TOWN OF SURFSIDE, a Florida Municipal Corporation

Defendant-Counter-Claimant-Appellee

PAUL NOVACK, Individually and in his capacity as
Mayor of Surfside, et al.

Defendants

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA

BRIEF FOR THE UNITED STATES AS INTERVENOR

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Midrash Sephardi, Inc. & Young Israel of Bal Harbour v. *Town of Surfside*
No. 03-13858-C

CERTIFICATE OF INTERESTED PERSONS
AND CORPORATE DISCLOSURE STATEMENT

Counsel for Amicus Curiae and Intervenor United States of America hereby certifies, in accordance with F.R.A.P. 26.1 and 11th Cir. R.26.1-1, that the following persons may have an interest in the outcome of this case and were not included in the Appellant's Certificate of Interested Persons:

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT
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BRIEF FOR THE UNITED STATES AS INTERVENOR

QUESTION PRESENTED

The United States intervened in this case in the district court to defend the constitutionality of the land-use provisions of the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA), Pub. L. No. 106-274, 114 Stat. 803-807 (2000), codified at 42 U.S.C. 2000cc, *et seq.* The Appellee contends that the RLUIPA sections at issue in this case are not a valid exercise of Congress's authority under Section 5 of the Fourteenth Amendment or under the Commerce

Clause, and that RLUIPA violates the Establishment Clause and the Tenth Amendment. We address those issues in this brief.

STATEMENT OF FACTS AND STATEMENT OF THE CASE

Please see pages 2-7 of the Brief for the United States as *Amicus Curiae* Supporting Appellant for the United States' statement of facts and statement of the case.

STATUTORY BACKGROUND

As discussed on pages 8-10 of the Brief for the United States as *Amicus Curiae* Supporting Appellant, RLUIPA was signed into law on September 22, 2000, in order to address two areas in which Congress determined that statutory enforcement of religious liberty interests against state and local governments is appropriate: land-use decisions, and action relating to institutionalized persons in the custody of States and localities. See generally Storzer and Picarello, *The Religious Land Use and Institutionalized Persons Act of 2000: A Constitutional Response to Unconstitutional Zoning Practices*, 9 Geo. Mason L. Rev. 929, 944 (2001) (describing RLUIPA's history). The plaintiffs in this case are seeking to enforce the protections of three of RLUIPA's land-use provisions: Section 2(b)(1), Section 2(b)(3)(B),[1] and Section 2(a)(1).

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[1] Although plaintiff Young Israel of Bal Harbour does not appear to have reasserted its Section 2(b)(3)(B) claim on appeal, plaintiff Midrash Sephardi addresses its Section 2(b)(3)(B) on page 48 of its brief before this Court.

The requirements of the RLUIPA provisions at issue in this case are set out in the United States' *amicus* brief. Briefly, Section 2(b)(1) of RLUIPA prohibits state and local governments from imposing or implementing land use regulations "in a manner that treats a religious assembly or institution on less than equal terms with a nonreligious assembly or institution." 42 U.S.C. 2000cc(b)(1). Section 2(b)(3)(B) provides that "[n]o government shall impose or implement a land use regulation that unreasonably limits religious assemblies, institutions, or structures within a jurisdiction." 42 U.S.C. 2000cc(b)(3)(B). Section 2(a)(1) of RLUIPA provides that no state or local government "shall impose or implement a land use regulation in a manner that imposes a substantial burden on the religious exercise of a person, including a religious assembly or institution, unless the government demonstrates that imposition of the burden on that person, assembly, or institution" is both "in furtherance of a compelling governmental interest" and "the least restrictive means" of furthering that interest. 42 U.S.C. 2000cc(a)(1). As relevant to this case, Section 2(a)(1) applies in any case where either (1) "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," 42 U.S.C. 2000cc(a)(2)(C); or (2) "the substantial burden affects, or removal of that substantial burden would affect, commerce with foreign nations, among the several States, or with Indian tribes," 42 U.S.C. 2000cc(a)(2)(B).

SUMMARY OF ARGUMENT

The provisions of RLUIPA at issue in this case are a valid exercise of Congress's powers under the Constitution in every respect. Sections 2(b)(1), 2(b)(3)(B), and 2(a)(1) as applied through Section 2(a)(2)(C) represent legitimate exercises of Congress's authority under Section 5 of the Fourteenth Amendment because those statutory sections merely codify protections guaranteed under Section 1 of the Fourteenth Amendment. Specifically, Section 2(b)(1)'s prohibition of municipalities treating religious assemblies on less than equal terms with secular assemblies codifies the protections of the Free Exercise Clause, the Establishment Clause, and the Equal Protection Clause, as those protections have been explained by the Supreme Court. Section 2(b)(3)(B)'s requirement that municipalities not unreasonably limit religious assemblies also codifies protections of the Equal Protection Clause. And Section 2(a)(1), as applied through Section 2(a)(2)(C), codifies the individualized assessments doctrine under the Free Exercise Clause. Moreover, even if these sections of RLUIPA exceed the protections of the Constitution in some minor and unanticipated respect, they are justified as valid prophylactic legislation under Section 5 of the Fourteenth Amendment because Congress compiled a substantial evidentiary record demonstrating that religious entities are frequently discriminated against in land-use decisions.

In addition, Section 2(a)(1), as applied through Section 2(a)(2)(B), is a valid exercise of Congress's authority under the Commerce Clause because Section 2(a)(2)(B) contains a jurisdictional element. The jurisdictional element ensures that

this provision of the statute will be triggered on a case-by-case basis only when an alleged substantial burden, or its removal, affects interstate commerce.

Moreover, RLUIPA's land use provisions do not run afoul of the Establishment Clause because RLUIPA has a permissible secular purpose of alleviating government-created burdens on religion, RLUIPA's land-use provisions have secular effects, and RLUIPA's land-use provisions do not create excessive entanglement between government and religion. Finally, RLUIPA does not violate the Tenth Amendment because its provisions are well within the enumerated powers granted to Congress by the Constitution.

ARGUMENT

The RLUIPA Sections At Issue Are A Valid Exercise Of Congress's Authority Under Section 5 Of The Fourteenth Amendment And Under The Commerce Clause

The plaintiffs in this case assert claims under, *inter alia*, the Religious Land Use and Institutionalized Persons Act (RLUIPA), 42 U.S.C. 2000cc *et seq.* The defendant challenged the constitutionality of RLUIPA in the district court and the United States intervened in order to defend the statute's constitutionality. The district court did not reach the question of the statute's validity because it found in favor of the defendant on the merits of the plaintiffs' RLUIPA claims. On appeal, the defendant has again challenged the constitutionality of RLUIPA (Surfside Br. 59-67), and the United States submits this brief in defense of the statute's constitutionality. However, because the district court did not address these questions concerning the permissible reach of Congress's authority under the

Constitution, this Court need not do so on appeal, but may leave these questions for consideration by the district court in the first instance should the Court choose to remand this case.

I. *RLUIPA Sections 2(b)(1), 2(b)(3)(B), And 2(a)(1) As Made Applicable By Section 2(a)(2)(C) Are Within Congress's Section 5 Powers Because They Codify Established Constitutional Principles*

In *City of Boerne* v. *Flores*, 521 U.S. 507 (1997), the Supreme Court held that Congress exceeded its Section 5 authority in making the Religious Freedom Restoration Act ("RFRA") applicable to state and local governments. As it existed at the time of the *Flores* decision, RFRA prohibited the federal government, as well as any State or subdivision of a State, from substantially burdening a person's exercise of religion unless the government could prove that the burden furthered a compelling government interest and was the least restrictive means of furthering that interest. See 42 U.S.C. 2000bb-1, 2000bb-2(1).[2]

In addressing RFRA's constitutionality as applied to state and local governments, the Supreme Court began by noting that "Congress can enact legislation under § 5 enforcing the constitutional right to the free exercise of religion." 521 U.S. at 519. As authority for this proposition, the Court cited, among other sources, *United States* v. *Price*, 383 U.S. 787 (1966), where the Court held that there is "no doubt of the power of Congress to enforce by appropriate

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[2] Congress amended RFRA after the *Flores* decision by deleting the provisions that had made RFRA applicable to a State or a subdivision of a State. See Pub. L. No. 106-274, § 7(a), 114 Stat. 806 (Sept. 22, 2000).

criminal sanction every right guaranteed by the Due Process Clause of the Fourteenth Amendment." *Id.* at 789.

The Court also noted, however, that where "a congressional enactment pervasively prohibits constitutional state action in an effort to remedy or to prevent unconstitutional state action," *Flores*, 521 U.S. at 533, there must be a "proportionality [and] congruence between the means adopted and the legitimate end to be achieved." *Ibid.* The Court held that this standard applied to RFRA because RFRA provides a standard for all free exercise of religion claims that is broader than what the Constitution requires. See *id.* at 534. The Court then held that RFRA failed that test because, for various reasons, RFRA could not be understood "as responsive to, or designed to prevent, unconstitutional behavior." *Id.* at 532.

As we demonstrate below, RLUIPA Sections 2(b)(1), 2(b)(3)(B), and 2(a)(1) (as made applicable through Section 2(a)(2)(C)) are within the scope of Congress's Section 5 powers as described in *Flores* because, unlike RFRA, they codify existing constitutional standards. Since those provisions do not expand on the meaning of existing constitutional guarantees, but merely codify them, *Flores*'s "proportionality and congruence" test is inapplicable to them, and they by definition are permissible under Section 5 as laws that "enforce" constitutional rights. See *Freedom Baptist Church* v. *Township of Middletown*, 204 F. Supp. 2d 857, 873-874 (E.D. Pa. 2002). See also *Nanda* v. *Bd. of Trs. of Univ. of Ill.*, 303 F.3d 817, 830 (7th Cir. 2002) (Title VII's disparate impact provisions, which "'enforce[] the Fourteenth

Amendment without altering its meaning,'" are within Congress's Section 5 powers); *Lesage* v. *Texas*, 158 F.3d 213, 217 (5th Cir. 1998) (Title VI within Section 5 power because it prohibits what the Constitution prohibits in virtually all possible applications), rev'd on other grounds, 528 U.S. 18 (1999).

In invoking Section 5 as authority for RLUIPA's land-use provisions, Congress sought to comply with *Flores* by codifying well-established constitutional principles. See 146 Cong. Rec. S7775 (daily ed. July 27, 2000) (joint statement of Sens. Hatch & Kennedy); H.R. Rep. No. 219, 106th Cong., 2d Sess. 12-13 (1999). Congress also sought to comply with *Flores* by compiling a legislative record that would satisfy *Flores*'s "congruence and proportionality" test even if a court were to hold that RLUIPA exceeds existing constitutional requirements in some minor, unanticipated way. See 146 Cong. Rec. at S7775; H.R. Rep. No. 219 at 25. See also pp. 22-27, *infra* (discussing the legislative record).

A. *RLUIPA Section 2(b)(1) Enforces The Constitution's Prohibitions Against Disadvantageous Treatment Of Religious Assemblies Compared To Analogous Secular Land Uses*

RLUIPA Section 2(b)(1) prohibits imposition or implementation of a land use regulation in a manner that treats a religious assembly or institution "on less than equal terms" with a nonreligious assembly or institution. 42 U.S.C. 2000cc(b)(1). Section 2(b)(1) is within Congress's Section 5 power because it codifies existing non-discrimination principles under the Free Exercise Clause, the Establishment Clause, and the Fourteenth Amendment's Equal Protection Clause. See *Freedom Baptist Church*, 204 F. Supp. 2d at 870.

1. *Non-discrimination Elements Of The Free Exercise Clause*

In *Church of the Lukumi Babalu Aye* v. *City of Hialeah*, 508 U.S. 520 (1993), the Supreme Court held that the Free Exercise Clause prohibits the government from allowing secular exemptions to otherwise generally applicable government policy but denying a religious exemption that would cause no greater harm to the government's interests than the secular exemptions allowed. As the Court explained, "[t]he principle that government, in pursuit of legitimate interests, cannot in a selective manner impose burdens only on conduct motivated by religious belief is essential to the protection of the rights guaranteed by the Free Exercise Clause." 508 U.S. at 543. To do otherwise, through a regulation that is either not neutral or of general applicability, triggers strict scrutiny. *Lukumi*, 508 U.S. at 521-532.

The ordinances at issue in *Lukumi* sought to prevent the suffering and mistreatment of animals and the improper disposal of carcases. See 508 U.S. at 543-545. Because the ordinances excluded from their purview almost all nonreligious animal killing and disposal, however, they "fail[ed] to prohibit nonreligious conduct that endangers these interests in a similar or greater degree" as the prohibited, religiously-motivated conduct. *Id.* at 543. For this reason, the Supreme Court held the ordinances unconstitutional under the Free Exercise Clause. As the Court explained, "[t]he Free Exercise Clause protects religious observers against unequal treatment, and inequality results when a legislature decides that the governmental interests it seeks to advance are worthy of being

pursued only against conduct with a religious motivation." 508 U.S. at 542-543 (internal quotation marks and citation omitted).

The lower federal courts have faithfully applied this principle in cases decided subsequent to *Lukumi*. For example, in *Fraternal Order of Police (FOP)* v. *Newark*, 170 F.3d 359 (3d Cir.), cert. denied, 528 U.S. 817 (1999), the Third Circuit applied the equal treatment doctrine in a case where only a single secular interest was accommodated to the exclusion of religion. *FOP* v. *Newark* involved a police department policy that prohibited officers from wearing beards but allowed an exception for health reasons. The Third Circuit held that this policy violated the Free Exercise Clause as applied by the police department to deny an exception for Sunni Muslim officers who were required to wear beards for religious reasons. See *id.* at 360-361, 367. Such unequal treatment of analogous activities, the Third Circuit explained, "indicates that the [government] has made a value judgment that secular (*i.e.*, medical) motivations for wearing a beard are important enough to overcome its general interest * * * but that religious motivations are not." *Id.* at 366. Citing *Lukumi*, the Third Circuit held that the Free Exercise Clause precludes the government from making that kind of value judgment. See *id.* at 365-366. Accord *Tenafly Eruv Ass'n* v. *Borough of Tenafly*, 309 F.3d 144, 168 (3d Cir. 2002) ("selective, discretionary application" of ordinance barring citizens from affixing signs and other items to telephone poles in a manner that disfavors religion "violates the neutrality principle of *Lukumi* and *Fraternal Order of Police*"), cert. denied, 123 S. Ct. 2609 (2003); *Cottonwood Christian Ctr.* v. *Cypress*

Redevelopment Agency, 218 F. Supp. 2d 1203, 1224 (C.D. Cal. 2002) (Free Exercise Clause, as interpreted in *Lukumi*, prohibits discrimination against religion in land-use matters).

RLUIPA Section 2(b)(1) codifies this Free Exercise Clause principle by prohibiting zoning regulations that treat religious assemblies or institutions on less than equal terms with nonreligious assemblies or institutions or in a discriminatory manner. See *Freedom Baptist Church*, 204 F. Supp. 2d at 869-870.

2. *Non-discrimination Elements Of The Establishment Clause*

The Supreme Court has also held that unequal treatment of religion vis-a-vis secular activities violates the Establishment Clause. Thus, the Court has noted that the Establishment Clause requires the government to be "neutral" with respect to religion, see *Board of Educ. of Kiryas Joel Vill. Sch. Dist.* v. *Grumet*, 512 U.S. 687, 704 (1994), and that the "principal or primary effect [of government action] must be one that neither advances nor inhibits religion." *Lemon* v. *Kurtzman*, 403 U.S. 602, 612 (1971) (citation omitted). See also *Zorach* v. *Clauson*, 343 U.S. 306, 314 (1952) (government may not "prefe[r] those who believe in no religion over those who do believe"). The government can violate the Establishment Clause's requirement of neutrality toward religion by, among other things, prohibiting religious organizations from receiving government benefits that are available to a wide range of secular groups. In *Rosenberger* v. *Rector and Visitors of University of Virginia*, 515 U.S. 819 (1995), for example, the Supreme Court held that the Establishment Clause's "guarantee of neutrality is respected, not offended, when the

government, following neutral criteria and evenhanded policies, extends benefits to recipients whose ideologies and viewpoints, including religious ones, are broad and diverse." *Id.* at 839.[3]

The Supreme Court has also held that the neutrality required by the Establishment Clause is not served by excluding religious entities from participating as providers of secular government services. See, *e.g.*, *Zelman* v. *Simmons-Harris*, 122 S. Ct. 2460 (2002) (allowing religious schools to receive government tuition vouchers on equal basis with secular schools reflects neutrality required by Establishment Clause); *Bowen* v. *Kendrick*, 487 U.S. 589 (1988) (allowing religious entities to receive federal funds for providing secular counseling services regarding prevention of pregnancy reflects Establishment Clause neutrality); *Bradfeld* v. *Roberts*, 175 U.S. 291 (1899) (allowing religious hospitals to receive government funds on equal basis with secular hospitals for providing health care services).

RLUIPA Section 2(b)(1) codifies the Establishment Clause's prohibition of government action that discriminates against religion. See *Freedom Baptist Church*, 204 F. Supp. 2d at 870.[4]

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[3] Accord *Good News Club* v. *Milford Cent. Sch.*, 121 S.Ct. 2093 (2001); *Lamb's Chapel* v. *Center Moriches Union Free Sch. Dist.*, 508 U.S. 384 (1993); *Board of Educ. of Westside Cmty. Schs.* v. *Mergens*, 496 U.S. 226, 248 (1990); *Widmar* v. *Vincent*, 454 U.S. 263 (1981).

[4] At least two courts have also held that the Free Speech Clause prohibits discrimination against religious institutions with respect to land use. See *Cornerstone Bible Church* v. *City of Hastings*, 948 F.2d 464, 468-471 (8th Cir. 1991); *Vineyard Christian Fellowship of Evanston* v. *City of Evanston*, 250 F. Supp. 2d 961, 984 (N.D. Ill. 2003). Thus, RLUIPA Section 2(b)(1) could also be seen as codifying free speech and assembly protections.

3. *Non-discrimination Mandate Of The Equal Protection Clause*

The Equal Protection Clause provides a third constitutional basis for RLUIPA Section 2(b)(1). See *Lukumi*, 508 U.S. at 540 ("In determining if the object of the law is a neutral one under the Free Exercise Clause, we can also find guidance in our equal protection cases."). The Supreme Court has indicated that discrimination against religion is inconsistent with the principles embodied in the Equal Protection Clause. *Board of Educ. of Kiryas Joel Vill. Sch. Dist.* v. *Grumet*, 512 U.S. 687, 715 (1994) (O'Connor, J., concurring) ("[T]he Religion Clauses – the Free Exercise Clause, the Establishment Clause, the Religion Test Clause, Art. VI, cl. 3, and the Equal Protection Clause as applied to religion – all speak with one voice on this point: Absent the most unusual circumstances, one's religion ought not affect one's legal rights or duties or benefits."). These precedents establish that zoning provisions which treat religious activity on less than equal terms with nonreligious activity discriminate against religious exercise and are inconsistent with the Equal Protection Clause. See *Vineyard Christian Fellowship* v. *City of Evanston*, 250 F. Supp. 2d 961, 979 (N.D. Ill. 2003) (city violated Equal Protection Clause by excluding churches from district where similar secular uses are allowed).

Thus, RLUIPA Section 2(b)(1) also codifies existing Supreme Court precedent regarding the Equal Protection Clause. See *Freedom Baptist Church*, 204 F. Supp. 2d at 870.

B. *RLUIPA Section 2(b)(3)(B) Codifies The Supreme Court's Equal Protection Jurisprudence*

RLUIPA Section 2(b)(3)(B) prohibits state and local governments from imposing or implementing land use regulations that "unreasonably limit[] religious assemblies, institutions, or structures within a jurisdiction." 42 U.S.C. 2000cc(b)(3)(B). This provision codifies the Supreme Court's Equal Protection analysis of land-use regulations. See *Freedom Baptist Church*, 204 F. Supp. 2d at 870-871. The Equal Protection Clause of the Fourteenth Amendment commands that no State shall "deny to any person within its jurisdiction the equal protection of the law," which is essentially a directive that states must treat alike all persons similarly situated. See *Plyler* v. *Doe*, 457 U.S. 202, 216 (1982). When courts review state action that does not implicate a protected category of people under the Equal Protection Clause, "[t]he general rule is that legislation is presumed to be valid and will be sustained if the classification drawn by the statute is rationally related to a legitimate state interest." *City of Cleburne* v. *Cleburne Living Ctr.*, 473 U.S. 432, 440 (1985).[5]

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[5] See also *Cleburne*, 473 U.S. at 452 (Stevens, J., with whom Burger, C.J., joined, concurring) ("The term 'rational,' of course, includes a requirement that an impartial lawmaker could logically believe that the classification would serve a legitimate public purpose that transcends the harm to the members of the

(continued...)

In *Cleburne*, the Supreme Court reviewed a city's land use regulation that required the operators of a home for persons with mental retardation to obtain a special use permit in an area that allowed as of right apartment houses, multiple dwellings, boarding and lodging houses, fraternity or sorority houses, dormitories, apartment hotels, hospitals, sanitariums, nursing homes, private clubs, fraternal orders, and other specified uses. See 473 U.S. at 447. The Court held that, although the mentally retarded as a group "are indeed different from others not sharing their misfortune," the difference was irrelevant unless the group home and its occupants "would threaten legitimate interests of the city in a way that other permitted uses such as boarding houses and hospitals would not." *Id.* at 448. Finding no evidence in the record that revealed "any rational basis" for believing that the group home would pose any threat to the city's legitimate interests, the Court struck down application of the ordinance against the home. *Id.*

In reaching this conclusion, the Court rejected the professed reasons the city offered to justify its actions. *Id.* First, it dismissed concerns about the negative attitudes of nearby property owners, holding that "[p]rivate biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect." *Id.* (quoting *Palmore* v. *Sidotti*, 466 U.S. 429, 433 (1984)). Second, it dismissed all other reasons the city proffered, such as concerns about density regulation,

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[5](...continued)
disadvantaged class. Thus, the word 'rational' * * * includes elements of legitimacy and *neutrality* that must always characterize the performance of the sovereign's duty to govern *impartially*." (emphasis added) (footnotes omitted)).

concentration of population, lessening of traffic congestion, and serenity of the neighborhood, holding that such explanations failed to explain why other allowable uses did not cause the same problems. See *id.* at 449-450. Thus, the Court refused to defer to the city's justifications because they "appear[ed] to rest" only on the city's "irrational prejudice." *Id.* at 450.

In enacting RLUIPA, Congress received testimony that many local land use regulations continue to unreasonably restrict religious assemblies, institutions, or structures. See H.R. Rep. No. 219 at 19, 22. Congress enacted RLUIPA Section 2(b)(3)(B) to codify the above-described equal protection principles by prohibiting land use regulations that unreasonably limit such assemblies, institutions, or structures within a jurisdiction. See *Freedom Baptist Church*, 204 F. Supp. 2d at 871.

C. *RLUIPA Section 2(a)(1), As Applied Through Section 2(a)(2)(C), Codifies The Supreme Court's Individualized Assessments Doctrine*

1. In *Employment Division* v. *Smith*, 494 U.S. 872 (1990), the Supreme Court held that the Free Exercise Clause does not relieve a person of the obligation to comply with a neutral, generally applicable law. *Smith* also noted, however, that the Free Exercise Clause requires strict scrutiny of laws that are aimed at religion, and that government action can be fairly described as aimed at religion "where the State has in place a system of individualized exemptions," but "refuse[s] to extend that system to cases of 'religious hardship.'" *Id.* at 884. Government action of that

type, the Court noted, shows that the government is not pursuing neutral policies, but is singling out religion to bear disproportionate burdens. See *id.* at 884.

Smith derived this principle from *Sherbert* v. *Verner*, 374 U.S. 398 (1963). See *Smith*, 494 U.S. at 884. *Sherbert* held that a state could not constitutionally deny unemployment benefits to a member of the Seventh Day Adventist Church who could not find work because her religious convictions prevented her from working on Saturdays. Because the statute's distribution of benefits permitted "individualized exemptions" based on "good cause," the State could not refuse to accept the plaintiff's religious reason for not working on Saturdays as good cause without satisfying strict scrutiny. *Smith*, 494 U.S. at 884.

The Supreme Court also applied the "individualized exemptions" doctrine in *Lukumi*, *supra*, which was decided after *Smith*. There, the Court struck down an animal-cruelty ordinance that required the government to evaluate the justification for animal killings on the basis of whether such killings were "unnecessar[y]." 508 U.S. at 537. The Court held that this was a system of individualized assessments because it required "an evaluation of the particular justification for the killing," *id.*, and that it failed strict scrutiny because the City of Hialeah had devalued religious reasons for killing animals by "judging them to be of lesser import than nonreligious reasons." *Ibid.*

In enacting RLUIPA, Congress found that land-use decisions, like employment compensation laws, typically involve individualized assessments. See 146 Cong. Rec. S7775 ("hearing record demonstrates a widespread practice of

individualized decisions to grant or refuse permission to use property for religious purposes"); H.R. Rep. No. 219 at 20 (finding that regulators "typically have virtually unlimited discretion in granting or denying permits for land use and in other aspects of implementing zoning laws"). Thus, Congress enacted RLUIPA Section 2(a)(1), as applied through Section 2(a)(2)(C), to enforce the Supreme Court's interpretation of the Free Exercise Clause in situations that involve individualized assessments by government officials in land-use matters. See 146 Cong. Rec. S7775; H.R. Rep. No. 219 at 17.

2. The majority of the federal district courts to have addressed this issue have held that RLUIPA Section 2(a)(1), as applied through Section 2(a)(2)(C), is a valid exercise of Congress's Section 5 powers on the grounds explained above. See *Murphy* v. *Zoning Comm'n of New Milford*, No. 00-2297, 2003 WL 22299219, *22-*26 (D. Conn. Sep. 30, 2003); *Westchester Day Sch.* v. *Village of Mamaroneck*, 280 F. Supp. 2d 230, 234-237 (S.D.N.Y. 2003); *Freedom Baptist Church* v. *Township of Middletown*, 204 F. Supp. 2d 857, 868-869 (E.D. Pa. 2002); see also *Hale O Kaula Church* v. *Maui Planning Comm'n*, 229 F. Supp. 2d 1056, 1072 (D. Haw. 2002); *Cottonwood Christian Ctr.* v. *Cypress Redevelopment Agency*, 218 F. Supp. 2d 1203, 1221 (C. D. Cal. 2002). One federal district court has held otherwise, see *Elsinore Christian Center* v. *City of Lake Elsinore*, 270 F. Supp. 2d 1163 (C. D. Cal. 2003), but that case was wrongly decided.

The district court in *Elsinore* held that the "individualized assessments" doctrine does not apply to land-use decisions because the Supreme Court has never

applied that doctrine outside the unemployment compensation context. See 270 F. Supp. 2d at1176-1177. In so ruling, however, the court ignored the fact that the Supreme Court applied that doctrine outside the unemployment compensation context in *Church of the Lukumi Babalu Aye* v. *City of Hialeah*, 508 U.S. 520, 537 (1993), and that the Court "approved of [that] exception in general terms" in *Employment Division* v. *Smith*, 494 U.S. 872, 884 (1990).

The district court in *Elsinore* also held that RLUIPA Section 2(a)(1), as applied by section 2(a)(2)(C), goes beyond the Free Exercise Clause because certain federal court decisions prior to RLUIPA's enactment supposedly held that land-use laws cannot impose any substantial burden on the free exercise of religion. See *Elsinore*, 270 F. Supp. 2d at 1170, 1177 (citations omitted). In fact, however, those decisions merely held that the plaintiffs in those cases had not articulated a substantial burden on the specific facts they presented. See *Christian Gospel Church, Inc.* v. *City and County of San Francisco*, 896 F.2d 1221, 1224 (9th Cir.), cert. denied, 498 U.S. 999 (1990); *Messiah Baptist Church* v. *County of Jefferson*, 859 F.2d 820, 825-826 (10th Cir. 1988), cert. denied, 490 U.S. 1005 (1989); *Grosz* v. *City of Miami Beach*, 721 F.2d 729, 739 (11th Cir. 1983), cert. denied, 469 U.S. 827 (1984); *Lakewood, Ohio Congregation of Jehovah's Witnesses, Inc.* v. *City of Lakewood*, 699 F.2d 303, 307 (6th Cir.), cert. denied, 464 U.S. 815 (1983). See also *Civil Liberties for Urban Believers* v. *City of Chicago*, 342 F.3d 752 (7th Cir. 2003)

(same).[6] Moreover, the district court in *Elsinore* ignored other cases which specifically hold that land-use laws *can* impose a substantial burden on religion. See *Keeler* v. *Mayor of Cumberland*, 940 F. Supp. 879, 886 (D. Md. 1996) (historic preservation ordinance, which called for assessment of the "best interest of a majority of persons in the community," was a system of individualized assessments); *Alpine Christian Fellowship* v. *County Comm'rs of Pitkin County*, 870 F. Supp. 991, 994-995 (D. Colo. 1994) (denial of special use permit, pursuant to discretionary standard of "appropriate[ness]," created substantial burden on religion); *First Covenant* v. *City of Seattle*, 840 P.2d 174, 215 (Wash. 1992) (city landmark ordinances not generally applicable because they "invite individualized assessments of the subject property and the owner's use of such property, and contain mechanisms for individualized exceptions").

Elsinore also held that land-use laws cannot constitute a system of individualized assessments because "[i]n determining whether to issue a zoning

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[6] Those decisions in various respects also relied on an unduly narrow conception of what can constitute a substantial burden. For example, the Sixth Circuit in *Lakewood* held that the plaintiffs needed to articulate that the land-use laws in question burdened a "fundamental tenet" of their faith. See 699 F.2d at 307. In *Employment Division* v. *Smith*, however, the Supreme Court held that a court may not inquire into the centrality of a person's religious beliefs in applying the Free Exercise Clause, since that would require courts to become involved in making decisions of religious doctrine. See 494 U.S. at 886-887. The district court in *Elsinore* made the same mistake, see 270 F. Supp. 2d at 1170 (holding that RLUIPA Section 2(a)(1) expands on the Free Exercise Clause by relieving RLUIPA plaintiffs of having to prove a government invasion of a "central" religious practice), as did this Court in *Grosz*, see 721 F.2d at 739 (characterizing the conduct of plaintiffs that was prohibited by defendant's zoning laws as "nonessential" and "not integral to [plaintiffs'] faith").

permit, municipal authorities do not decide whether to exempt a proposed user from an applicable law, but rather whether the general law *applies* to the facts before it." 270 F. Supp. 2d at 1178. This holding misses the point of the individualized assessments doctrine, however, and attempts to distinguish *Smith*, *Lukumi*, and *Sherbert* based on what amounts to mere wordplay. As explained above, *Lukumi*, *Smith*, and *Sherbert* held that strict scrutiny is applicable to cases where the government has in place a system of individualized assessments under a broad standard such as "good cause," but refuses to extend that system to cases of religious hardship, because the discretion that inheres in that kind of system makes it fair to be concerned that the denial of a religious claim may have resulted from the improper devaluation of religious claims. As Congress specifically found, that rationale is fully applicable to land-use laws that allow local officials wide discretion to decide whether religious institutions may use land for religious purposes.

Finally, *Elsinore* erred by holding that the individualized assessments doctrine applies only where the government specifically takes religion into account in denying a conditional use permit. See 270 F. Supp. 2d at 1178-1179. As *Smith* and *Lukumi* make clear, the doctrine applies whenever the government refuses to extend a system of individualized assessments to religious cases, regardless of whether the government acted on the basis of religion in so doing. See *Lukumi*, 508 U.S. at 507; *Smith*, 494 U.S. at 884. Thus, for all the above reasons, the district court decision in *Elsinore* provides no ground upon which to hold Section 2(a)(1)

of RLUIPA, as applied through Section 2(a)(2)(C), unconstitutional. Rather, if this Court reaches the issue, it should uphold Section 2(a)(1), as applied through Section 2(a)(2)(C), as a constitutional exercise of Congress's power under Section 5 of the Fourteenth Amendment because it codifies existing constitutional precedent.

D. *The Sections Of RLUIPA Based On Congress's Section 5 Authority Would Be Within Congress's Power Even If They Were To Exceed What The Constitution Requires In Some Unanticipated Respect*

As demonstrated above, Surfside has failed to identify any particular respect in which the provisions in RLUIPA that are based on Congress's authority to enforce the protections of the Fourteenth Amendment go beyond what the Constitution already requires. Thus, this Court need not address whether, if those provisions were to exceed existing constitutional requirements, they would satisfy the *Flores* "proportionality and congruence" test in that respect. As we explain below, however, these RLUIPA sections would be a permissible exercise of Congress's Section 5 power even if the Court were to find that they extend slightly beyond the proscriptions of the Constitution in some unanticipated respect.

1. *Flores* itself recognized that Congress may go beyond the Supreme Court's precise articulation of constitutional protections and prohibit conduct that is not unconstitutional if there is a "congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end." *Flores*, 521 U.S. at 520. See *In re Employment Discrimination Litig.*, 198 F.3d 1305, 1322 (11th Cir. 1999) (upholding disparate impact provisions of Title VII as valid Section 5

legislation because they "can reasonably be characterized as 'preventive rules' that evidence a 'congruence between the means used and the ends to be achieved'"); see also *Downing* v. *Board of Trus. of Univ. of Ala.*, 321 F.3d 1017, 1024 (11th Cir. 2003) (upholding Title VII's prohibition of retaliation for complaining of same sex harassment because "Congress enacted the antiretaliation provision of Title VII to deter the sort of employment discrimination the statute (and Equal Protection Clause) prohibits"); *Varner* v. *Illinois State Univ.*, 226 F.3d 927, 932-36 (7th Cir. 2000) (upholding Equal Pay Act's burden-shifting procedures even though effect would be "to prohibit at least some conduct that is constitutional," because "the Act is targeted at the same kind of discrimination forbidden by the Constitution"), cert. denied, 533 U.S. 902 (2001). As demonstrated above, the predominant effect of the RLUIPA sections based on the Fourteenth Amendment is to codify existing constitutional guarantees. Thus, even if a court were to hold that those sections do prohibit more conduct than the Constitution bars in some respect, they would still satisfy *Flores*'s "proportionality and congruence" test because they predominantly forbid conduct that the Constitution already forbids, and because, as demonstrated below, Congress compiled a substantial record to show that religious uses are frequently discriminated against nationwide in land-use decisions. See generally *Varner*, 226 F.3d at 935 (noting that the importance of congressional findings is "greatly diminished" where the statute in question "prohibits very little constitutional conduct").

2. In nine hearings over the course of three years, Congress compiled what it considered to be "massive evidence" of widespread discrimination against religious institutions by state and local officials regarding land-use decisions. That record includes nationwide studies of land-use decisions, expert testimony, and anecdotal evidence illustrating the kinds of flagrant discrimination religious organizations frequently suffer in the land-use context. See H.R. Rep. No. 219, 106th Cong., 2d Sess. 18-24 (1999).

A Brigham Young University study found that Jews, small Christian denominations, and nondenominational churches are vastly overrepresented in reported church zoning cases. See H.R. Rep. No. 219 at 20. This study revealed, for example, that 20% of the reported cases concerning the location of churches involve members of the Jewish faith, even though Jews account for only 2% of the population in the United States. See *id.* at 21. Two other studies also confirm the existence of widespread discrimination against religious institutions in land-use matters. One of those studies documented 29 Chicago-area jurisdictions and revealed that numerous secular land uses (including clubs, community centers, lodges, meeting halls, and fraternal organizations) were allowed by right or special use permit, but similarly situated religious uses were denied equal treatment. See H.R. Rep. No. 219 at 19. The other study showed that many Presbyterian congregations nationwide reported significant conflict with land use authorities. See *id.* at 21.

Several land-use experts confirmed the existence of widespread discrimination against religious uses in the land-use context. One attorney who specializes in land use litigation testified, for example, that "it is not uncommon for ordinances to establish standards for houses of worship differing from those applicable to other places of assembly, such as where they are conditional uses or not permitted in any zone." H.R. Rep. No. 219 at 19. Another expert testified that a "pattern of abuse * * * exists among land use authorities who deny many religious groups their right to free exercise, often using mere pretexts (such as traffic, safety, or behavioral concerns) to mask the actual goal of prohibiting constitutionally protected religious activity." *Id.* at 20.

Finally, witnesses testified about a number of cases of religious discrimination in land-use decisions occurring across the nation. See H.R. Rep. No. 219 at 20-22 (describing religious discrimination occurring in Rockford, Illinois; Forest Hills, Tennessee; Starkville, Mississippi; and other locations). In one case, for example, the City of Los Angeles "refused to allow fifty elderly Jews to meet for prayer in a house in the large residential neighborhood of Hancock Park," even though the City permitted secular assemblies. *Id.* at 22. In another case, a "bustling beach community with busy weekend night activity" in Long Island, New York barred a synagogue from locating there because "it would bring traffic on Friday nights." *Id.* at 23. Perhaps the most vivid example of religious discrimination in land-use, however, concerned the City of Cheltenham Township, Pennsylvania, "which insisted that a synagogue construct the required number of parking spaces

despite their being virtually unused" (because Orthodox Jews may not use motorized vehicles on their Sabbath). H.R. Rep. No. 219 at 23. "When the synagogue finally agreed to construct the unneeded parking spaces, the city denied the permit anyway, citing the traffic problems that would ensue from cars for that much parking." *Ibid.* The witness testified that he had handled more than thirty other cases of similar religious discrimination. See *ibid.* Congress also noted that "[c]onflicts between religious organizations and land use regulators [over unconstitutional governmental actions] are much more common than reported cases would indicate." *Id.* at 24.

Based on such studies, expert testimony, and case evidence, Congress determined that religious discrimination in the land-use arena is "widespread." See 146 Cong. Rec. S7775; H.R. Rep. No. 219 at 18-24. Congress also noted that individualized land use assessments readily lend themselves to discrimination against religious assemblies, yet make it difficult to prove such discrimination in any particular case. See 146 Cong. Rec. S7775; H.R. Rep. No. 219 at 18-24. Finally, Congress determined that it would be impossible to make separate findings about every jurisdiction, to target only those jurisdictions where discrimination had occurred or was likely to occur, or, for constitutional reasons, to extend protection only to minority religions. See 146 Cong. Rec. S7775.

"When Congress makes findings on essentially factual issues," those findings are "entitled to a great deal of deference, inasmuch as Congress is an institution better equipped to amass and evaluate the vast amounts of data bearing on such an

issue." *Walters* v. *National Ass'n of Radiation Survivors*, 473 U.S. 305, 331 n.12 (1985) (citing cases); see also *Flores*, 521 U.S. at 531-533 (emphasizing that as a general matter "it is for Congress to determine the method by which it will reach a decision"). Thus, even if the Court determines that RLUIPA's codification protections exceed the Constitution's guarantees, it should nevertheless uphold the statute as congruent and proportional to the constitutional violations that the statute addresses. See *Freedom Baptist Church*, 204 F. Supp. 2d at 874 (finding RLUIPA record more than sufficient to show a widespread, national problem of religious discrimination in the land-use context).

II. *Section 2(a)(1), As Applied Through Section 2(a)(2)(B), Is A Valid Exercise Of Congress's Commerce Clause Authority*

Section 2(a)(1), as applied through Section 2(a)(2)(B), is a constitutional exercise of Congress's Commerce Clause authority. RLUIPA Section 2(a)(2)(B) contains a jurisdictional element that triggers the statute's protections on a case-by-case basis, only when a plaintiff demonstrates that the substantial burden imposed upon its religious exercise affects interstate commerce, or when removal of that burden would affect interstate commerce. The Supreme Court has made clear that jurisdictional elements of this kind – common in both civil and criminal statutes – are valid exercises of congressional power, because they allow for case-by-case determinations of whether interstate commerce is implicated before Congress's authority is exercised. See *Freedom Baptist Church* v. *Township of Middletown*,

204 F. Supp. 2d 857, 865-868 (E.D. Pa. 2002); accord *Westchester Day Sch.* v. *Village of Mamaroneck*, 280 F. Supp. 2d 230, 237-238 (S.D.N.Y. 2003).

The landmark case in this area, *United States* v. *Lopez*, 514 U.S. 549 (1995), recognized that jurisdictional elements avoid Commerce Clause difficulties.[7] *Lopez* confirmed that, instead of regulating an entire field, Congress may employ a jurisdictional element to target only those individual acts that themselves affect commerce, as is the case with Section 2(a)(1)'s application through Section 2(a)(2)(B). See *Lopez*, 514 U.S. at 561 (stating that a jurisdictional element "would ensure, through case-by-case inquiry, that the firearm possession in question affects interstate commerce").

Indeed, Congress routinely employs jurisdictional elements in order to target those specific activities, within a larger class, that have an effect on interstate or foreign commerce. Such statutes have been consistently upheld. See, *e.g.*, *United States* v. *Pierson*, 139 F.3d 501, 503 (5th Cir. 1998) (holding, with regard to 18 U.S.C. 922(g)(8), that "[b]y expressly requiring a nexus between the illegal firearm and interstate commerce, Congress has exercised its delegated power under the Commerce Clause to reach 'a discrete set of firearm possessions that additionally

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[7] *Lopez* identified two distinct rubrics under which Congress may enact legislation pursuant to its Commerce Clause powers. The first is a statute of general applicability, whereby Congress regulates an entire field of activity without regard to the interstate commerce nexus in any particular case. For such a broad regulation to be lawful, it must affect interstate commerce in one of three ways: it must either regulate the channels of commerce, regulate the instrumentalities of commerce, or – if the law regulates a purely intrastate activity – the activity must, in the aggregate, "substantially affect interstate commerce." *Id.* at 558-59. Alternatively, Congress may legislate via a case-by-case jurisdictional element. This second rubric is discussed in the text.

have an explicit connection with or effect on interstate commerce'" (quoting *Lopez*, 514 U.S. at 562)); *United States* v. *Harrington*, 108 F.3d 1460, 1464-1467 (D.C. Cir. 1997) (holding that the jurisdictional element employed in the Hobbs Act assured the statute's facial constitutionality); *United States* v. *Grassie*, 237 F.3d 1199, 1211 (10th Cir.) ("[B]y making interstate commerce an element of the [Church Arson Prevention Act] * * * to be decided on a case-by-case basis, constitutional problems are avoided."), cert. denied, 533 U.S. 960 (2001); *United States* v. *Bishop*, 66 F.3d 569, 588 (3d Cir.) ("[T]he jurisdictional element in [the federal carjacking statute] independently refutes appellants' arguments that the statute is constitutionally infirm."), cert. denied, 516 U.S. 1032 (1995); *United States* v. *Polanco*, 93 F.3d 555, 563 (9th Cir.) (stating, with regard to 18 U.S.C. 922(g)(1), that the "jurisdictional element * * * insures, on a case-by-case basis, that a defendant's actions implicate interstate commerce to a constitutionally adequate degree"), cert. denied, 519 U.S. 973 (1996). RLUIPA fits comfortably within this array of statutes.[8]

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[8] Any suggestion that RLUIPA 2(a)(2)(B)'s jurisdictional element is inadequate because it is triggered by burdens that "affect," rather than "substantially affect," commerce would be meritless. *Lopez* itself consistently omitted the adverb "substantially" when discussing the nexus required in statutes containing a jurisdictional element. See *Lopez*, 514 U.S. at 561 ("Section 922(q) contains no jurisdictional element which would ensure, through case-by-case inquiry, that the firearm possession in question *affects* interstate commerce." (emphasis added)); *id.* at 562 ("[Section] 922(q) 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." (emphasis added)). Noting the Supreme Court's careful choice of language, the D.C. Circuit observed, "immediately after explicitly requiring a 'substantial[ ]'

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Accordingly, should this Court decide the issue, it should conclude that Section 2(a)(1), as applied through Section 2(a)(2)(B), is a valid exercise of Congress's Commerce power.

III. *The RLUIPA Provisions At Issue Are Consistent With The Establishment Clause*

The Supreme Court "'has long recognized that the government may (and sometimes must) accommodate religious practices and that it may do so without violating the Establishment Clause.'" *Corporation of Presiding Bishop of Church of Jesus Christ of Latter Day Saints* v. *Amos*, 483 U.S. 327, 334 (1987) (citation omitted). To hold otherwise, the Court has noted, would require the government to be "oblivious to impositions that legitimate exercises of state power may place on religious belief and practice." *Board of Educ. of Kiryas Joel Vill. Sch. Dist.* v. *Grumet*, 512 U.S. 687, 705 (1994). The Supreme Court has applied the accommodation principle to a wide variety of contexts to uphold, *inter alia*, the following: Title VII's exemption of religious organizations from its general prohibition against discrimination in employment on the basis of religion, see *Amos*, 483 U.S. at 335-339; a state property tax exemption for religious

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[8](...continued)
effect on interstate commerce for regulation of purely *intra*state activities under the Commerce Clause generally, the Court was careful not to use the word 'substantial' in describing the interstate nexus required to satisfy a statutory jurisdictional element." *Harrington*, 108 F.3d at 1465 (alteration in original).

organizations, see *Walz* v. *Tax Comm'n of New York*, 397 U.S. 664, 672-680 (1970); and a state program releasing public school children during the school day to receive religious instruction at religious centers. See *Zorach* v. *Clauson*, 343 U.S. 306, 315 (1952).

The federal courts of appeals, except for the Sixth Circuit, have held that RLUIPA's prisoner rights provisions, and the RFRA, as it remains applicable to the federal government after *City of Boerne* v. *Flores*, 521 U.S. 507 (1997), are consistent with the Establishment Clause. See *Madison* v. *Riter*, Nos. 03-6362, 03-6363, 2003 WL 22883620 (4th Cir. Dec. 8, 2003); *Charles* v. *Verhagen*, 348 F.3d 601 (7th Cir. 2003); *Mayweathers* v. *Newland*, 314 F.3d 1062 (9th Cir. 2002) (rejecting Establishment Clause challenge to RLUIPA's prisoner rights provisions), cert. denied, 124 S. Ct. 66 (2003); *Mockaitis* v. *Harcelroad*, 104 F.3d 1522, 1530 (9th Cir. 1997) (rejecting Establishment Clause challenge to RFRA); *In re Young*, 141 F.3d 854, 863 (8th Cir.) (RFRA), cert. denied, 525 U.S. 811 (1998); *EEOC* v. *Catholic Univ. of Am.*, 83 F.3d 455, 470 (D.C. Cir. 1996) (RFRA); *Flores* v. *City of Boerne*, 73 F.3d 1352, 1364 (5th Cir. 1996) (RFRA), rev'd on other grounds, 521 U.S. 507 (1997). But see *Cutter* v. *Wilkinson*, 349 F.3d 257, 262-268 (6th Cir. 2003) (holding that RLUIPA's prisoner rights provisions violate the Establishment Clause), petition for rehearing pending.

Based on these decisions, this Court should hold that RLUIPA's land-use provisions are a permissible accommodation of religion consistent with the Establishment Clause, if it reaches the issue. Those provisions have the permissible

secular purpose and effect of lifting a significant government-imposed burden on the exercise of religion, and do not require any excessive entanglement between government and religion. See *Amos*, 483 U.S. at 355 (applying three-part *Lemon* v. *Kurtzman*, 403 U.S. 602 (1971), test to evaluate constitutionality of statute under accommodation doctrine).

A. *RLUIPA's Land-Use Provisions Have A Permissible Secular Purpose*

The Supreme Court in *Amos* held that it is a permissible legislative purpose to alleviate a special, government-created burden on religious belief and practice. See *Amos*, 483 U.S. at 335. Accord *Texas Monthly, Inc.* v. *Bullock*, 489 U.S. 1, 15 (1989) (plurality opinion); *Children's Healthcare is a Legal Duty, Inc.* v. *DeParle*, 212 F.3d 1084, 1093 (8th Cir. 2000), cert. denied, 532 U.S. 957 (2001).[9] RLUIPA's land-use provisions free religious institutions from governmental restrictions that otherwise would prevent them from engaging in religiously motivated activity – the religious use of land for worship, teaching, and good works, etc. – without sufficient justification. See generally 146 Cong. Rec. E1235 (daily ed. July 14, 2000) (remarks of Rep. Canady) (RLUIPA was "designed to protect the free exercise of religion from unnecessary government interference"). As such, they clearly remove a government-created burden on the exercise of religion. As the

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[9] Thus, a legislative purpose need not be unrelated to religion in order to satisfy the first prong of *Lemon*. "[T]hat would amount to a requirement 'that the government show a callous indifference to religious groups,' and the Establishment Clause has never been so interpreted." *Amos*, 483 U.S. at 335 (citation omitted).

Fourth Circuit recently held, "[t]his secular goal of exempting religious exercise from regulatory burdens in a neutral fashion, as distinguished from advancing religion in any sense, is indeed permissible under the Establishment Clause." *Madison*, 2003 WL 22883620, at *4.

Surfside suggests (Surfside Br. 65-67) that RLUIPA Section 2(b)(1)'s prohibition of treating a religious assembly on less than equal terms with a secular assembly violates the Establishment Clause because it improperly provides a "special preference for, or deference to, religion."[10] In *Amos*, however, the Supreme Court held that a law that lifts a significant government-imposed burden on religion can serve a valid secular purpose even though it "singles out religious entities for a benefit." 483 U.S. at 338; see also *id.* (explaining that, "[w]here * * * government acts with the proper purpose of lifting a regulation that burdens the exercise of religion, we see no reason to require that the exemption comes packaged with benefits to secular entities"). Accord *Texas Monthly*, *supra*, 489 U.S. at 2 (plurality opinion) (noting that a subsidy directed exclusively to religious entities is permissible if it is "required by the Free Exercise Clause" or "can[] reasonably be seen as removing a significant state-imposed deterrent to the free exercise of religion"). Thus, Surfside's Establishment Clause argument in this appeal conflicts with controlling Supreme Court precedent. See also *Mayweathers* v. *Newland*, 314

[10] The Sixth Circuit in *Cutter* made the same mistake in evaluating RLUIPA's prisoner rights provisions. See 349 F.3d 257, 264 (6th Cir. 2003).

F.3d 1062, 1068 (9th Cir. 2002) ("Just because RLUIPA addresses religion does not mean that its purpose is religious in nature.").

B. *RLUIPA's Land-Use Provisions Have Permissible Secular Effects*

The Supreme Court in *Amos* held that an otherwise permissible religious accommodation does not have the "primary effect" of advancing religion merely because it allows individuals or institutions to "better * * * advance their [religious] purposes." 483 U.S. at 336. To the contrary, the Court held, a law that lifts a significant, government-imposed burden on the free exercise of religion has the primary effect of advancing religion only if it involves the government *itself* advancing religion through its own activities and influence. *Id.* at 337.

RLUIPA's land-use provisions have no such unconstitutional effects. Those provisions do not involve the government itself advancing religion, any more than did the accommodations upheld in *Amos*, *Walz*, and *Zorach*, *et al.* Rather, all they do is allow religious groups themselves to practice religion to the same extent they could have done if the land-use laws at issue had never been enacted.[11] See *Madison*, 2003 WL 22883620, at *5 ("Congress has simply lifted government

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[11] Thus, merely granting religious institutions an exemption from certain land-use laws does not involve direct government subsidization of religious activity, cf. *Bowen* v. *Kendrick*, 487 U.S. 589 (1988); government endorsement of religious views, cf. *County of Allegheny* v. *ACLU Greater Pittsburgh Chapter*, 492 U.S. 573 (1989); or any other form of active government participation in religious advocacy or conduct. See generally *Lambs Chapel* v. *Center Moriches Union Free Sch. Dist.*, 508 U.S. 384 (1993) (no government endorsement of religion involved where religious organizations use public schools after hours for religious instruction).

burdens on religious exercise and thereby facilitated free exercise of religion for those who wish to practice their faiths.").

C. *RLUIPA's Land-Use Provisions Do Not Create Excessive Entanglement Between Government And Religion*

In *Agostini* v. *Felton*, 521 U.S. 203 (1997), the Supreme Court held that two considerations the Court previously had considered relevant to whether there is "excessive entanglement" between government and religion no longer have any force: whether a program requires "administrative cooperation" between government and religious institutions, and whether a program might increase the dangers of "political divisiveness" on account of religion. See *id.* at 233-234. Thus, after *Agostini*, the excessive entanglement question focuses solely on whether the government program in question would require "pervasive monitoring by public authorities" to ensure that there is no government indoctrination of religion. See 521 U.S. at 233-234. RLUIPA's land-use provisions easily satisfy this standard, since they require no monitoring by public authorities of the religious activities of any organization. See *Madison*, 2003 WL 22883620, at *6 ("RLUIPA itself minimizes the likelihood of entanglement through its carefully crafted enforcement provisions.").

IV. *RLUIPA Does Not Violate The Tenth Amendment*

The provisions of RLUIPA enacted pursuant to Congress's authority under Section 5 of the Fourteenth Amendment merely codify the proscriptions of the Constitution, and therefore cannot violate the Tenth Amendment's mandate that

"[t]he powers *not delegated to the United States by the Constitution*, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. Const. Amend. X (emphasis added).[12] See *Westchester Day Sch.* v. *Village of Mamaroneck*, 280 F. Supp. 2d 230, 239 (S.D.N.Y. 2003).

As for Section 2(a)(1), as applied through Section 2(a)(2)(B), which was enacted pursuant to the Commerce Clause, the Supreme Court has explained that, "[i]f a power is delegated to Congress in the Constitution, the Tenth Amendment expressly disclaims any reservation of that power to the States." *New York* v. *United States*, 505 U.S. 144, 156 (1992); see also *Cheffer* v. *Reno*, 55 F.3d 1517, 1521 (11th Cir. 1995) ("Because the Access Act is within Congress' Commerce Clause power, it does not violate the Tenth Amendment."). Because Section 2(a)(1), as applied through Section 2(a)(2)(B), is a valid enactment pursuant to the Commerce Clause, see pp. 27-30 *supra*, it is necessarily consistent with the Tenth Amendment.

Federal statutes enacted pursuant to valid authority may nevertheless violate the Tenth Amendment in two discrete instances. The Supreme Court has held that Congress may not compel a State to enact regulations, see *New York*, 505 U.S. at

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[12] Moreover, the Fourteenth Amendment was adopted with the specific intent of expanding federal power vis-à-vis the States in the wake of the Civil War. Consequently, "principles of federalism that might otherwise be an obstacle to congressional authority are necessarily overridden by the power to enforce the Civil War Amendments." *City of Rome* v. *United States*, 446 U.S. 156, 179 (1980); see also *Gregory* v. *Ashcroft*, 501 U.S. 452, 468 (1991) ("By its terms, the Fourteenth Amendment contemplates interference with state authority.").

175-177, 188; nor may Congress conscript state officers to administer or enforce a federal regulatory program. See *Printz* v. *United States*, 521 U.S. 898, 927-935 (1997). RLUIPA Section 2(a)(2)(B) violates neither of these limits. Rather, that provision establishes federal standards that preempt certain land use regulations and decisions, when those regulations and decisions substantially burden religious exercise and affect interstate commerce. Such preemption is provided for by the Supremacy Clause of the Constitution and does not run afoul of the Tenth Amendment. See *Federal Energy Regulatory Comm'n* v. *Mississippi*, 456 U.S. 742, 759 (1982) ("[T]he Federal government may displace state regulation even though this serves to 'curtail or prohibit the States' prerogatives to make legislative choices respecting subjects the States may consider important.'" (citation omitted)).

CONCLUSION

Should this Court reach the question of the constitutionality of the provisions of RLUIPA at issue in this case, the Court should uphold those provisions as consistent with the Constitution in every respect.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that pursuant to Fed. R. App. P. 32(a)(7)(C), the attached Brief for the United States as Intervenor is proportionally spaced, has a typeface of 14 points, and contains 9,385 words.

January 5, 2004

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CERTIFICATE OF SERVICE

I hereby certify that on January 5, 2004, two copies of the foregoing Brief for the United States as Intervenor were served by overnight mail, postage prepaid, on the following counsel:

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