IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 03-17343

GURU NANAK SIKH SOCIETY OF YUBA CITY,

Plaintiff-Appellee

v.

COUNTY OF SUTTER, CASEY KROON, DENNIS NELSON, LARRY MUNGER, DAN SILVA,

Defendants-Appellants

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

BRIEF FOR THE UNITED STATES AS INTERVENOR AND *AMICUS CURIAE*

JURISDICTION

The appellant's statement of jurisdiction is complete and correct.

ISSUES PRESENTED

1. Whether Section 2(a)(1) of the Religious Land Use and Institutionalized Persons Act (RLUIPA), as applied through Section 2(a)(2)(C), is a valid exercise of Congress's authority under Section 5 of the Fourteenth Amendment.

2. Whether the defendant's denial of the plaintiff's application for a use permit to build a Sikh temple substantially burdened the plaintiff's exercise of religion in violation of RLUIPA.

INTEREST OF THE UNITED STATES

The defendant has challenged the constitutionality of a federal statute. Section 2403(a) of Title 28 provides that "[i]n any action, suit or proceeding in a court of the United States to which the United States * * * is not a party, wherein the constitutionality of any Act of Congress affecting the public interest is drawn in question, the court * * * *shall permit the United States to intervene* * * * *for argument on the question of constitutionality*." (emphasis added). The United States has thus intervened in this appeal in order to defend the constitutionality of the Religious Land Use and Institutionalized Persons Act of 2000. In addition, this case concerns the interpretation of the prohibitions of the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA), 42 U.S.C. 2000cc *et seq.* The Department of Justice is charged with enforcing RLUIPA, see 42 U.S.C. 2000cc-2(f), and therefore has an interest in how courts construe the statute.

STATEMENT OF FACTS AND STATEMENT OF THE CASE

The plaintiff, Guru Nanak Sikh Society of Yuba City (Guru Nanak), is a Sikh religious organization seeking to build a temple in Sutter County, California. (E.R. 868.)[1] In April 2001, the organization purchased a 1.89 acre parcel of property in a residential area in Sutter County and applied for a conditional use permit to build a temple. (E.R. 869.) Under the Sutter County Zoning Code,

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[1] References to "E.R. __" are to pages in the Excerpts of Record filed by the appellant; references to "Def. Br. __" are to pages in the defendant-appellant's opening brief.

churches and other houses of worship are not permitted as of right anywhere in the county. They may locate in the county if they obtain a conditional use permit, but even then only in six out of the county's twenty-two zoning districts. The districts in which they are permitted with a conditional use permit are the general agricultural district, the "food processing, agricultural and recreational combining district," the two family residence district, the neighborhood apartment district, and the general apartment district. (E.R. 878-879.)

The application proposed building a Sikh temple large enough to accommodate up to 75 people and a 2,000 square foot assembly area. (E.R. 869.) The Sutter County Community Services Department issued a report recommending that the County Planning Commission issue a use permit to the plaintiff. (E.R. 870.) After holding a public meeting, however, the Planning Commission denied the permit, apparently based on citizens' concerns about noise and traffic in the residential neighborhood. (E.R. 870.) The plaintiff did not appeal that decision. (E.R. 870.)

Instead, the plaintiff purchased a 28.79 acre plot of land consisting of two parcels in an area of Sutter County zoned for agricultural use. (E.R. 870-871.) The plaintiff then applied for a conditional use permit to build a temple and assembly hall on the new parcels. (E.R. 871.) The application proposed converting the existing residential structure into a temple and erasing the lot line between the residential parcel and the agricultural parcel to create one larger parcel. (E.R. 871.) The County Community Services Department again

recommended granting a conditional use permit to the plaintiff. (E.R. 872.) The Planning Commission held a public meeting and subsequently granted the permit subject to certain conditions that would minimize any adverse impact on surrounding property owners. (E.R. 872-873.) Several citizens appealed the Commission's decision to the Sutter County Board of Supervisors. (E.R. 873.) While the appeal was pending, the County Community Services Department submitted another report recommending that the appeal be denied and the permit approved, subject to certain recommendations aimed at addressing concerns raised by citizens at the community meeting regarding the compatibility with neighboring agricultural uses. (E.R. 873-875.) The plaintiff agreed to accept all of the proposed conditions. (E.R. 255.)

After holding a public hearing on the appeal, the four-member Board of Supervisors voiced their opposition to granting the permit. (E.R. 876-877.) Most of the opposition was based on a general dislike of allowing non-agricultural uses in an agricultural area. (E.R. 876-877.) Despite the fact that agricultural districts comprise two of the six districts within the county in which houses of worship may locate, one supervisor noted that it would be more "appropriate" to locate a house of worship closer to Yuba City where other houses of worship were located. (E.R. 877.) The Board made a conclusory finding that the proposed use would be detrimental to the health, safety and general welfare of the persons residing and working in the area and to the property improvement and general welfare of the

county. (E.R. 877.) The Board of Supervisors denied the permit application by a unanimous vote. (E.R. 877.)

The plaintiff filed suit in federal court alleging that Sutter County's land-use regulations, both on their face and as applied to the denial of the plaintiff's application for a use permit, violate the Free Exercise Clause, the Equal Protection Clause, and the Religious Land Use and Institutionalized Persons Act (RLUIPA). (E.R. 1-18.) The plaintiff invoked the substantial burden provision of RLUIPA Section 2(a)(1) (as applied through the individualized assessments trigger in Section 2(a)(2)(C)), the "less than equal terms" provision of RLUIPA Section 2(b)(1), and the "unreasonably excludes" provision of RLUIPA Section 2(b)(3). (E.R. 10-11.) In response, the defendant challenged the constitutionality of RLUIPA. (E.R. 899.) The district court granted summary judgment to the plaintiff on the substantial burden (Section 2(a)(1)) claim and upheld the constitutionality of that section of RLUIPA. (E.R. 895-896, 899-911.) The district court granted summary judgment to the defendant on the plaintiff's claims under Sections 2(b)(1) and 2(b)(3) of RLUIPA. (E.R. 896-899.) The defendant filed a notice of appeal; the plaintiff did not appeal. (E.R. 919-921.) Thus, the only RLUIPA claim at issue in this appeal is the plaintiff's Section 2(a)(1) claim.

SUMMARY OF ARGUMENT

The district court properly granted summary judgment to Guru Nanak on its claim that the County's denial of approval to build a Sikh temple imposed a substantial burden on the plaintiff's free exercise of religion in violation of

RLUIPA. Sutter County allows religious institutions to locate in only 6 of 22 zones within the county, and even then only after obtaining a conditional use permit. Guru Nanak has attempted to locate in two different zones and has been rebuffed both times in spite of the fact that the County's planning staff initially recommended approval of both permit applications and in spite of the fact that Guru Nanak agreed to all conditions proposed by the County in order to minimize any impact the temple would have on neighboring land owners. Under these circumstances, Sutter County has imposed a substantial burden on the plaintiff's religious exercise in violation of RLUIPA.

Contrary to the defendant's contention on appeal, Section 2(a)(1) of RLUIPA, as applied through Section 2(a)(2)(C), is a valid exercise of Congress's powers under Section 5 of the Fourteenth Amendment because it merely codifies protections guaranteed under Section 1 of the Fourteenth Amendment. Specifically, it codifies the individualized assessments doctrine of the Free Exercise Clause, as articulated by the Supreme Court. Furthermore, even if Section 2(a)(1), as applied through Section 2(a)(2)(C), exceeds the protections of the Constitution in some minor and unanticipated respect, it is 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.

STANDARD OF REVIEW

The district court's grant of summary judgment to the plaintiff is reviewed *de novo*, *San Jose Christian College* v. *City of Morgan Hill*, 360 F.3d 1024, 1029-1030 (9th Cir. 2004), as is the court's decision upholding the constitutionality of RLUIPA, *Mayweathers* v. *Newland*, 314 F.3d 1062, 1066 (9th Cir. 2002), cert. denied, 124 S.Ct. 66 (2003).

ARGUMENT

I

THE DISTRICT COURT CORRECTLY FOUND THAT THE COUNTY'S DENIAL OF GURU NANAK'S APPLICATION FOR A USE PERMIT CONSTITUTED A SUBSTANTIAL BURDEN IN VIOLATION OF SECTION 2 (A)(1) OF RLUIPA

Section 2(a)(1) of RLUIPA provides that:

> No government shall impose or implement a land use regulation in a manner that imposes a substantial burden on the religious exercise of a person, including a religious assembly or institution, unless the government demonstrates that imposition of the burden on that person, assembly, or institution * * * is in furtherance of a compelling government interest [and] is the least restrictive means of furthering that compelling government interest.

42 U.S.C. 2000cc(a)(2)(C). This provision is triggered in any of three ways – when the imposition of the burden is imposed in a program that receives federal financial assistance (Section 2(a)(2)(A), 42 U.S.C. 2000cc(a)(2)(A)), when the imposition or removal of the burden affects interstate commerce (Section 2(a)(2)(B), 42 U.S.C. 2000cc(a)(2)(B)), or when the burden is imposed in a system in which a government makes individualized assessments about how to apply a

land use regulation (Section 2(a)(2)(C), 42 U.S.C. 2000cc(a)(2)(C)). Each trigger is based upon a different congressional power[2] – respectively, the Spending Clause, the Commerce Clause, and Section 5 of the Fourteenth Amendment (enforcing rights under the Free Exercise Clause).

The plaintiff relies on the trigger in Section 2(a)(2)(C), which states that Section 2(a)(1) applies when:

> the substantial burden is imposed in the implementation of a land use regulation or system of land use regulations, under which a government makes, or has in place formal or informal procedures or practices that permit the government to make, individualized assessments of the proposed uses for the property involved.

42 U.S.C. 2000cc(a)(1). RLUIPA defines "religious exercise" to include "any exercise of religion, whether or not compelled by, or central to, a system of religious belief," and specifies that the "use, building, or conversion of real property for the purpose of religious exercise shall be considered to be religious exercise of the person or entity that uses or intends to use the property for that

[2] "Each subsection [of RLUIPA] closely tracks the legal standards in one or more Supreme Court opinions, codifying those standards for greater visibility and easier enforceability." 146 Cong. Rec. S7775 (daily ed. July 27, 2000); see also H.R. Rep. No. 219, 106th Cong., 1st Sess. 12-13 (1999).

purpose." 42 U.S.C. 2000cc-5(7).[3] RLUIPA does not define the term "substantial burden."

In granting summary judgment for the plaintiff on this claim, the district court correctly held: (1) that, under the facts of this case, the substantial burden standard of Section 2(a)(1) was properly invoked through the "individualized assessments" trigger of Section 2(a)(2)(C); (2) that Sutter County's denial of the plaintiff's application for a use permit substantially burdens the plaintiff's religious exercise, and (3) that Sutter County failed to establish that it had a compelling justification for denying the use permit application.

A. The Plaintiff Properly Invoked The "Individualized Assessments" Trigger Of Section 2(a)(2)(C)

The County argues (Def. Br. 38-44) that its denial of the plaintiff's application for a use permit does not constitute the implementation of a land use regulation under which a government makes individualized assessments of a proposed property use within the meaning of Section 2(a)(2)(C). But the district court correctly found that the County's conditional use permitting process triggers Section 2(a)(2)(C) because "the County's denial of plaintiff's conditional use permit application is 'precisely the type of "individualized assessment"

[3] The defendant does not challenge the district court's finding that the plaintiff's proposed use of the subject property constitutes "religious exercise" within the meaning of RLUIPA. See *Midrash Sephardi, Inc.* v. *Town of Surfside*, No. 03-13858, 2004 WL 842527, at *7 (11th Cir. April 21, 2004) ("In passing RLUIPA, Congress recognized that places of assembly are needed to facilitate religious practice[.]").

contemplated' by RLUIPA." (E.R. 891 n.5 (quoting *Elsinore Christian Ctr.* v. *City of Lake Elsinore*, 270 F. Supp. 2d 1163, 1169, modified on reconsideration, 291 F. Supp. 2d 1083 (C.D. Cal. 2003)[4]); see also E.R. 908 n.10.)

Congress enacted Section 2(a)(1), as made applicable by Section 2(a)(2)(C), to codify the Free Exercise Clause "individualized assessments" doctrine set forth in *Employment Division* v. *Smith*, 494 U.S. 872 (1990), and thereafter applied in *Church of the Lukumi Babalu Aye, Inc.* v. *City of Hialeah*, 508 U.S. 520 (1993). See Joint Statement, 146 Cong. Rec. S7775 (daily ed. July 27, 2000). See also House Judiciary Committee Report, *Religious Liberty Protection Act of 1999*, H.R. Rep. No. 219, 106th Cong., 1st Sess. 17 (1999);[5] *Freedom Baptist Church* v. *Township of Middletown*, 204 F. Supp. 2d 857, 868-869 (E.D. Pa. 2002).

In *Smith*, the Supreme Court stated that the Free Exercise Clause does not ordinarily relieve a person of the obligation to comply with neutral and generally applicable laws. The Court thus held that heightened scrutiny was not required for claims by religious objectors against across-the-board laws that were not targeted at religion, such as criminal drug laws. The Court in *Smith*, however, noted that it had held that laws that are not generally applicable, but which instead have

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[4] There is currently an interlocutory appeal concerning the constitutionality of RLUIPA pending before this Court in *Elsinore Christian Center* v. *City of Lake Elsinore*, No. 04-33520.

[5] The bill discussed in the House Report cited above was Congress's initial effort to codify constitutional rights relating to state and local land use decisions and a predecessor to RLUIPA.

"eligibility criteria [that] invite consideration of the particular circumstances" and lend themselves "to individualized governmental assessment of the reasons for the relevant conduct" are subject to heightened scrutiny under the Free Exercise Clause. 494 U.S. at 884. The *Smith* Court wrote: "where the State has in place a system of individualized exemptions, it may not refuse to extend that system to cases of 'religious hardship' without compelling reason." *Ibid.*

Smith derived this principle from *Sherbert* v. *Verner*, 374 U.S. 398 (1963), and later Supreme Court cases applying *Sherbert*. 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 was discharged from her job as a mill worker and could not find equivalent work because her religious convictions prevented her from working on Saturdays. The statute permitted the Employment Security Commission to deny benefits if a claimant "failed, without good cause" to accept employment. 374 U.S. at 401. The unemployment law at issue was thus not an across-the-board, generally applicable law like the one in *Smith*, but rather was one that "invite[d] consideration of the particular circumstances behind an applicant's unemployment." *Smith*, 494 U.S. at 884. "The 'good cause' standard created a mechanism for individualized exemptions," and thus religious reasons had to be deemed "good cause" unless there was a compelling reason that they should not. *Ibid.*

In enacting RLUIPA, Congress found that land-use decisions, like employment compensation schemes, typically involve a system of individualized

assessments of particular circumstances. See Joint Statement, 146 Cong. Rec. S7775 (daily ed. July 27, 2000) (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, 106th Cong., 1st Sess. 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"). Moreover, lower court cases decided prior to RLUIPA faithfully applied the *Smith*/*Lukumi* "individualized assessments" doctrine to local land-use decisions, as a matter of constitutional law. See *Keeler* v. *Mayor & City Council*, 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*, 870 F. Supp. 991, 994-995 (D. Colo. 1994) (denial of special use permit to church, pursuant to discretionary standard of "appropriate[ness]," created substantial burden on religion requiring compelling government interest to justify); *First Covenant Church of Seattle* v. *City of Seattle*, 840 P.2d 174, 181 (Wash. 1992) (city landmark ordinances not generally applicable laws, because they "invite individualized assessments of the subject property and the owner's use of such property, and contain mechanisms for individualized exceptions").

The Sutter County Zoning Code provides the following guidance to the Planning Commission in considering applications for special use permits:

> The Planning Commission may approve or conditionally approve a use permit if it finds that the establishment, maintenance, or operation of the use or building applied for will or will not, *under the circumstances of the particular case*, be detrimental to the health, safety, and general welfare of persons residing or working in the neighborhood of such proposed use, or be detrimental or injurious to property and improvements in the neighborhood or to the general welfare of the County. Additionally, the Commission shall find that the use or activity approved by the use permit is consistent with the General Plan.

Sutter County Zoning Code Section 1500-8216, reprinted at E.R. 759-760 (emphasis added). This is precisely the type of case-by-case discretionary assessment process Congress intended to target with the "individualized assessments" trigger of RLUIPA. The District Court thus correctly held that Section 2(a)(2)(C) applied.

B. The County's Denial Of The Plaintiff's Special Use Permit Substantially Burdens The Plaintiff's Religious Exercise In Violation Of RLUIPA Section 2(a)(1)

1. As this Court recently noted in *San Jose Christian College* v. *City of Morgan Hill*, 360 F.3d 1024, 1034 (9th Cir. 2004), petition for rehearing pending, RLUIPA does not define the phrase "substantial burden." However, the legislative history of RLUIPA instructs that the term be given the same meaning that it has

been given in the Supreme Court's Free Exercise Clause cases.[6] The Joint Statement of the sponsors of RLUIPA states:

> The Act does not include a definition of the term "substantial burden" because it is not the intent of this Act to create a new standard for the definition of "substantial burden" on religious exercise. Instead, that term as used in the Act should be interpreted by reference to Supreme Court jurisprudence. Nothing in this Act, including the requirement in Section 5(g) that its terms be broadly construed, is intended to change that principle. The term "substantial burden" as used in this Act is not intended to be given any broader interpretation than the Supreme Court's articulation of the concept of substantial burden or religious exercise.

146 Cong. Rec. S7776 (daily ed. July 27, 2000). The Supreme Court has employed a variety of descriptions in explaining how the term "substantial burden" should be understood in any particular case.

In *Sherbert* v. *Verner*, the Court found a substantial burden where an individual was "force[d] * * * to choose between following the precepts of her religion and forfeiting benefits, on the one hand, and abandoning one of the

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[6] Although the Supreme Court has defined the term "substantial burden" in a number of ways over time, the definition appears not to have been affected by the *Smith*-RFRA-*Boerne*-RLUIPA chain of events, which altered the circumstances in which the substantial burden/least restrictive means test should be applied to evaluate government action, but did not purport to alter the meaning of the substantial burden concept. See *Smith*, 494 U.S. at 884-885 (holding that the *Sherbert* test is inapplicable in challenges to neutral laws of general applicability); 42 U.S.C. 2000bb(b) (purpose of RFRA is "to restore the compelling interest test as set forth in *Sherbert* v. *Verner*, 374 U.S. 398 (1963)[,] and *Wisconsin* v. *Yoder*, 406 U.S. 205 (1972)[,] and to guarantee its application in all cases where free exercise of religion is substantially burdened"); *City of Boerne* v. *Flores*, 521 U.S. 507, 533-534 (1997) (discussing requirements of RFRA); 146 Cong. Rec. S7776 (daily ed. July 27, 2000) ("substantial burden" in RLUIPA intended to be given same meaning as under Free Exercise Clause).

precepts of her religion in order to accept work, on the other hand." 374 U.S. at 404. More recently, in *Lyng* v. *Northwest Indian Cemetery Protective Ass'n*, the Court found that a substantial burden would exist where "the affected individuals [would] be coerced by the Government's action into violating their religious beliefs" or where "governmental action penalize[s] religious activity by denying any person an equal share of the rights, benefits, and privileges enjoyed by other citizens." 485 U.S. 439, 449 (1988).

This Court recently had occasion to define "substantial burden" in the context of a claim under Section 2(a) of RLUIPA in *San Jose Christian College*. After noting that RLUIPA does not define the term "substantial burden," the court determined the plain meaning of the phrase not by reference to prior Supreme Court cases as the legislative history of RLUIPA suggests was intended, but by consulting dictionary definitions of the words "substantial" and "burden." The Court determined that a land use regulation imposes a "substantial burden" on religion if it "impose[s] a significantly great restriction or onus upon such exercise." 360 F.3d at 1034-1035. The Court found no substantial burden in that case, in which the defendant city had rejected an application to re-zone a hospital for use as a religious college on the basis that the plaintiff's application was incomplete. The Court reasoned that "[t]he City's ordinance imposes no restriction whatsoever on [the plaintiff's] religious exercise; it merely requires [the plaintiff] to submit a *complete* application, as is required of all applicants. Should [the plaintiff] comply with this request, it is not at all apparent that its re-zoning

application will be denied." *Id.* at 1035. The Court concluded that denial of the re-zoning application did not, under the circumstances, impose "a significantly great restriction or onus" on religious exercise. *Id.* at 1034.

Other courts applying the substantial burden standard of RLUIPA or the Free Exercise Clause in the land use context have found that the denial of a new house of worship may constitute a substantial burden in a variety of contexts.[7] In *Islamic Center of Mississippi, Inc.* v. *City of Starkville*, 840 F.2d 293, 300 (5th Cir. 1988), the court found a substantial burden under the Free Exercise Clause when a proposed mosque seeking to locate near a university – where all houses of worship required special exception permits – was met with one denial of a formal permit application and four occasions when informal site proposals were rebuffed by various city officials. The court held that, although sites distant from the university were available, "[b]y making a mosque relatively inaccessible within the city limits to Muslims who lack automobile transportation, the City burdens their exercise of

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[7] In addition, several courts have found substantial burdens where a church already existed and a municipality attempted to apply its zoning code in order to prohibit a particular activity at the church such as feeding homeless people or running a religious school. *Alpine Christian Fellowship* v. *County Comm'rs*, 870 F. Supp. 991, 994-995 (D. Colo. 1994) ("[T]he issue here is not the construction of a building to be used by a church; it is a restriction on the activities taking place within a church building legitimately placed in a residential neighborhood."); *Western Presbyterian Church* v. *Board of Zoning Adjustment*, 862 F. Supp. 538, 546 (D.D.C. 1994) ("Once the zoning authorities of a city permit the construction of a church in a particular locality, the city must refrain, absent extraordinary circumstances, from in any way regulating what religious functions the church may conduct."); *Jesus Ctr.* v. *Farmington Hills Zoning Bd. of Appeals*, 544 N.W.2d 698 (Mich. Ct. App. 1996) (same).

religion." *Id.* at 299. Similarly, in *Cottonwood Christian Center* v. *Cypress Redevelopment Agency*, the district court held that, while a burden under RLUIPA must be "more than an inconvenience" in order to be "substantial," "[p]reventing a church from building a worship site fundamentally inhibits its ability to practice its religion." 218 F. Supp. 2d 1203, 1226 (C.D. Cal. 2002). The court thus held that a church that had pieced together a large plot of land to build a new church for its growing congregation was substantially burdened by a city's denial of zoning approval. See also *Murphy* v. *Zoning Comm'n*, 148 F. Supp. 2d 173, 189 (D. Conn. 2001) (barring large prayer meetings in home in residential district was substantial burden on religious exercise under RLUIPA); *Shepherd Montessori Ctr. Milan* v. *Ann Arbor Charter Township*, 675 N.W.2d 271, 282 (Mich. Ct. App. 2003) (finding a dispute of material fact on substantial burden issue under RLUIPA where religious day care center sought to lease adjacent property for operation of religious school; determinative factors would include administrative feasibility of operating two separate sites, convenience to parents, and availability and nature of alternative sites).[8]

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[8] Some pre-*Smith* Free Exercise cases held that the use of land in general, or the specific use of land proposed in the particular case, did not constitute religious exercise where the plaintiff failed to present evidence that such use was a central tenet of the plaintiff's religious beliefs. See *Lakewood, Ohio Congregation of Jehovah's Witnesses, Inc.* v. *City of Lakewood*, 699 F.2d 303, 307 (6th Cir.) (no substantial burden because there was no evidence that construction of a church at the particular residential location in question was "a ritual, a 'fundamental tenet,' or a 'cardinal principle' of [the plaintiff's] faith."), cert. denied, 464 U.S. 815 (1983); *Messiah Baptist Church* v. *County of Jefferson* 859 F.2d 820, 824-825

(continued...)

The legislative history of RLUIPA indicates that the instant case is exactly the type of situation that RLUIPA was intended to target. Sutter County's zoning code requires houses of worship to obtain a use permit before they may locate anywhere within the county. Even with a use permit, houses of worship are only permitted within six of twenty-two zones. The House report accompanying RLUIPA's predecessor bill specifically states that RLUIPA is aimed at zoning codes in which there is "no place where a church [can] locate without the grant of a

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[8](...continued)
(10th Cir. 1988) (zoning code prohibiting location of a church in an agricultural zone did not impose a substantial burden because "the record contain[ed] no evidence that building a church or building a church on the particular site is intimately related to the religious tenets of the church."), cert. denied, 490 U.S. 1005 (1989); *Christian Gospel Church, Inc.* v. *City & County of San Francisco*, 896 F.2d 1221, 1224 (9th Cir.) (finding plaintiff had "made no showing of why it is important for the Church to worship in th[e] particular home" at issue), cert. denied, 498 U.S. 999 (1990). These holdings requiring religious "centrality" in order to find a substantial burden likely are no longer good law, and in any event do not apply in RLUIPA cases. As noted *supra*, RLUIPA defines "religious exercise" to include "any exercise of religion, whether or not compelled by, or central to, a system of religious belief." 42 U.S.C. 2000cc-5(7). This definition codifies instructions from the Supreme Court that "[i]t is not within the judicial ken to question the centrality of particular beliefs or practices to a faith, or the validity of particular litigants' interpretations of those creeds." *Hernandez* v. *CIR*, 490 U.S. 680, 699 (1989). The Court stated in *Smith* that "[i]t is no more appropriate for judges to determine the 'centrality' of religious beliefs before applying a 'compelling interest' test in the free exercise field, than it would be for them to determine the 'importance' of ideas before applying the 'compelling interest' test in the free speech field." 494 U.S. at 886-887; see also *id.* at 887 ("Repeatedly and in many different contexts, we have warned that courts must not presume to determine the place of a particular belief in a religion or the plausibility of a religious claim."). The Ninth Circuit has expressly adopted this part of *Smith*'s holding and reasoning. See *Kreisner* v. *City of San Diego*, 1 F.3d 775, 781 (9th Cir. 1993), cert. denied, 510 U.S. 1044 (1994); accord *Peterson* v. *Minidoka County Sch. Dist.*, 118 F.3d 1351, 1357 (9th Cir. 1997) (Constitution protects an act "rooted in religious belief," not "mandated" by it).

special use permit." H.R. Rep. No. 219, 106th Cong., 1st Sess. 19 (1999); *id.* at 24 ("Many zoning schemes around the country make it illegal to start a church anywhere in the community without discretionary permission from a land use authority."). The Report also noted that the "inherent uncertainty for churches attempting to locate is exacerbated by the fact that * * * the church must commit to a costly lease or a mortgage to hold the property while it litigates in order to have standing." *Id.* at 20.

As the legislative history of RLUIPA indicates, jurisdictions where houses of worship are not permitted in any zone as of right are by their nature problematic, as they force congregations to seek permits and zoning variances through a subjective process that opens them to the possibility of prejudice. This case presents an even more onerous system because there are only six of twenty-two districts in which the subjective permit system is even available to churches. The plaintiff has undertaken great efforts to site its temple at a location and to build in a manner that will satisfy the County. In its first attempt to comply with the zoning code's requirements, Guru Nanak purchased a parcel of land located in the one-family residence district and applied for a permit to build its temple at that location. (E.R. 869.) The Sutter County Community Services Department staff recommended to the County Planning Commission that the proposal be accepted, but the Planning Commission denied that permit based on citizens' concerns about traffic and noise. (E.R. 870.) Of the remaining five zones open to houses of worship, three are residential in nature – the two family residence district, the

neighborhood apartment district, and the general apartment district. (E.R. 878-879.) It would have been reasonable for Guru Nanak to conclude that the same concerns might serve as a reason to bar its temple from any of these districts as well.

In response to the denial of its first permit application, Guru Nanak purchased a parcel of land in the general agricultural district where the types of noise and traffic concerns that may be inherent in residential areas would not be a factor. (E.R. 870-871.) Guru Nanak again applied for a use permit. (E.R. 871.) The County's planning staff again recommended approval, and the Planning Commission approved the use permit after holding a public hearing on the permit application. (E.R. 872-873.) In response to complaints by neighboring land owners, the Commission recommended to the Board of Supervisors that it approve the use subject to certain conditions that would ensure that the construction and operation of the temple would not adversely impact the agricultural uses of neighboring land owners. (E.R. 872-873.) The plaintiff agreed to comply with any conditions put on approval of the permit. (E.R. 872-875.) Nevertheless, the Board of Supervisors overturned the Planning Commission's approval, citing only general objections. (E.R. 876-877.)

The plaintiff's sustained and determined efforts to obtain property for religious worship, only to be barred from using that property for religious purposes, demonstrate that barring it from worshiping on its property places "a significantly great restriction or onus" upon its religious exercise. *San Jose*

Christian College, 360 F.3d at 1034-1035. As the district court in *Cottonwood* observed, "[c]hurches are central to the religious exercise of most religions. If [the plaintiff] could not build a church, it could not exist." 218 F. Supp. 2d at 1226. Absent relief through RLUIPA, Guru Nanak would have to either give up its search or continue to purchase property after property in the various residential and agricultural zones in the speculative hope that at some point it will obtain approval. Thus, the County has imposed "a significantly great restriction or onus upon [religious] exercise," the standard for establishing a "substantial burden" under RLUIPA adopted by this Court in *San Jose Christian College*. 360 F.3d at 1034-1035.

The Supreme Court's decision in *Sherbert* supports the conclusion that the plaintiff should not have to continue purchasing properties indefinitely in an effort to win approval before it can establish a substantial burden. In *Sherbert*, which held that it was a substantial burden on a Seventh-day Adventist to deny her unemployment benefits after being discharged for refusing to work on Saturdays, the Court noted that "of the approximately 150 or more Seventh-day Adventists in the Spartanburg area, only appellant and one other have been unable to find suitable non-Saturday employment." 374 U.S. at 402 n.2. After being discharged from her job, the plaintiff sought employment with three other mills but was unable to find full-time work that would permit her to observe her Saturday Sabbath. *Ibid.* Despite the possibility that she eventually might have found suitable work, as other Seventh-day Adventists in the area had, the Court focused on the burden placed on

her by "condition[ing] the availability of benefits upon [her] willingness to violate a cardinal principle of her religious faith" with regard to the one job she left and the three she turned down. *Id.* at 406. Here, we are not faced with government pressure through conditioning a government benefit, but an outright bar on using a property for religious worship. If anything, then, the burden on the plaintiff in the instant case is more direct and substantial than it was on Ms. Sherbert. After Guru Nanak made a sustained and determined effort to find an appropriate site, Sutter County's denial of Guru Nanak's permit application was a substantial burden on its religious exercise. Just as the *Sherbert* plaintiff's good-faith efforts to find a suitable alternative were sufficient, so, too, should Guru Nanak's good-faith efforts be sufficient here.

This Court's decision in *San Jose Christian College* does not compel a different conclusion. In finding no substantial burden, the Court relied on the fact that the defendant denied the plaintiff's re-zoning application on the basis that the application was not completed in the manner required by the zoning law. 360 F.3d at 1035. Although the defendant in the instant case claims that the plaintiff failed to submit a complete application because it did not comply with the California Environmental Quality Act (CEQA), the district court found no evidence to support the defendant's conclusion that it relied on that consideration. See E.R. 885 (finding a total lack of "evidence in th[e] administrative record that suggests that the County's denial of plaintiff's use permit application was based on CEQA

considerations"). The defendant has not argued that Guru Nanak's application was deficient in any other manner.

The *San Jose Christian College* panel also discussed the consistency of its decision with the Seventh Circuit's decision in *Civil Liberties for Urban Believers (CLUB)* v. *City of Chicago*, 342 F.3d 752 (7th Cir. 2003), petition for cert. filed, 72 USLW 3644 (April 2, 2004) (No. 03-1397). In *CLUB*, the Seventh Circuit considered a *facial* challenge to the City of Chicago's zoning scheme, and held that the code did not substantially burden the plaintiff churches' free exercise of religion. The Seventh Circuit found that, while the zoning restrictions and permitting requirements "may contribute to the ordinary difficulties associated with location (by any person or entity, religious or nonreligious) in a large city, they do not render impracticable the use of real property in Chicago for religious exercise, much less discourage churches from locating or attempting to locate in Chicago." 342 F.3d at 761. *San Jose Christian College* can be viewed, as with *CLUB,* as a challenge to the ordinance *itself* rather than a particular denial. See 360 F.3d at 1035 ("it appears that College is simply adverse to complying with the [zoning] ordinance's requirements.").

Unlike the plaintiffs in *CLUB*, however, Guru Nanak has invoked Section 2(a)(1) of RLUIPA not to challenge the defendant's zoning code itself, but to challenge a specific application of the zoning code. This appeal does not involve a facial challenge to the County's zoning code, and the plaintiff has not asserted the facial challenge that merely having to apply for a use permit imposes a substantial

burden on its religious exercise. Rather, Guru Nanak challenges a particular denial of a use permit. Thus, as in *Sherbert* and the various land-use cases cited above, Guru Nanak has demonstrated a substantial burden that triggers strict scrutiny.

2. Because the defendant's denial of Guru Nanak's use permit application imposes a substantial burden on the plaintiff's exercise of religion, Sutter County must justify that denial as narrowly tailored to serve a compelling government interest. The only allegedly compelling interest Sutter County offers (Def. Br. 50-51 n.18) is adherence to "municipal zoning objectives." But allowing a defendant to escape liability under Section 2(a)(1) of RLUIPA by relying on such a vague and undifferentiated interest would essentially eviscerate the statute. Rather, as the Supreme Court stated in *Lukumi*, government action that discriminates on the basis of religion "will survive strict scrutiny only in rare cases." 508 U.S. at 546. Moreover, even if Sutter County were able to articulate a compelling government interest, it has not even attempted to argue that its denial of the plaintiff's permit application was the least restrictive means of advancing its interest. In fact, when the permit application was approved by the Planning Commission, it was approved subject to certain conditions (*e.g.*, a buffer zone to separate the temple facilities from surrounding agricultural groves in which landowner would spray pesticides and other fumigants) that were intended to ensure that operation of the temple would not interfere with the agricultural nature of the surrounding properties. Guru Nanak agreed to abide by any such conditions. It is difficult to see how the

County could argue that total denial of the use permit would be less restrictive than granting the permit subject to those conditions.

II

RLUIPA SECTION 2(A)(1), AS MADE APPLICABLE BY SECTION 2(A)(2)(C), IS A VALID EXERCISE OF CONGRESS'S SECTION 5 POWERS BECAUSE IT CODIFIES ESTABLISHED CONSTITUTIONAL PRINCIPLES

In *City of Boerne* v. *Flores*, 521 U.S. 507 (1997), the Supreme Court held that Congress exceeded its authority under Section 5 of the Fourteenth Amendment by making the Religious Freedom Restoration Act ("RFRA") applicable to state and local governments. As it existed at the time of the *Boerne* 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).[9]

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

[9] Congress amended RFRA after the *Boerne* 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).

held that there is "no doubt of 'the power of Congress to enforce by appropriate 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," *Boerne*, 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 Section 2(a)(1), as made applicable through Section 2(a)(2)(C), is within the scope of Congress's Section 5 powers as described in *Boerne* because, unlike RFRA, it codifies existing Free Exercise Clause standards. Since this provision does not expand upon existing constitutional guarantees, but merely codifies them, *Boerne*'s "proportionality and congruence" test is inapplicable to it, and this section of RLUIPA is by definition permissible under Section 5 as a law that "enforces" 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. *Board of Trs.*, 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), cert. denied, 539 U.S. 902 (2003); *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 *Boerne* 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 *Boerne* by compiling a legislative record that would satisfy *Boerne*'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. 34-37, *infra* (discussing the legislative record).

A. 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. As discussed above, however, *Smith* also noted that *Sherbert* and its progeny establish that laws that are not

generally applicable, but rather have "eligibility criteria [that] invite consideration of the particular circumstances" and lend themselves "to individualized governmental assessment of the reasons of the relevant conduct," are subject to heightened scrutiny when they substantially burden religious exercise. *Smith*, 494 U.S. at 884.

The Supreme Court also applied the "individualized assessments" doctrine in *Church of the Lukumi Babalu Aye* v. *City of Hialeah*, 508 U.S. 520 (1993), 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." *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. This was in accord with lower court decisions applying *Sherbert, Smith* and *Hialeah*. See, *e.g., Keeler* v. *Mayor & City Council*, 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*, 870 F. Supp. 991, 994-995 (D. Colo. 1994) (denial of special use permit to church, pursuant to discretionary standard of "appropriate[ness]," created substantial burden on religion requiring compelling government interest to justify); *First Covenant Church of Seattle* v. *City of Seattle*, 840 P.2d 174, 181 (Wash. 1993) (city landmark ordinances not generally applicable laws, because they "invite individualized assessments of the subject property and the owner's use of such property, and contain mechanisms for individualized exceptions").

2. The vast 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 *Castle Hills First Baptist Church* v. *City of Castle Hills*, No. 01-1149, 2004 WL 546792, at *18-*19 (W.D. Tex. Mar. 17, 2004); *United States* v. *Maui County*, 298 F. Supp. 2d 1010, 1016-1017 (D. Haw. 2003); *Murphy* v. *Zoning Comm'n of New Milford*, 289 F. Supp. 2d 87, 117-121 (D. Conn. 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 *Cottonwood Christian Ctr.* v. *Cypress Redevelopment Agency*, 218 F. Supp. 2d 1203, 1221 (C. D. Cal. 2002) (stating that RLUIPA "merely codifies numerous precedents holding that systems of indidivualized assessments, as opposed to generally applicable laws, are subject to strict scrutiny").

While only one federal district court has held otherwise, see *Elsinore Christian Center* v. *City of Lake Elsinore*, 291 F. Supp. 2d 1083 (C.D. Cal. 2003), (interlocutory appeal on constitutionality holding pending in this Court, No. 04-55320), because that case is within this Circuit, a discussion of the principal errors in that decision is warranted.

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 *Id.* at 1097. In so ruling, however, the court ignored the fact that the Supreme Court applied that doctrine outside the unemployment compensation context in *Lukumi*, 508 U.S. at 537, and that the Court approved of that exception in general terms in *Smith*, 494 U.S. at 884. Indeed, in *Lukumi*, one of the ordinances that the Court found to be not generally applicable because of the exemptions it provided for non-religious reasons was in fact a zoning ordinance. See 508 U.S. at 545.

The *Elsinore* court also contended that land-use laws cannot constitute a system of individualized exemptions because, "[i]n determining whether to issue a zoning 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." 291 F. Supp. 2d at 1098-1099 (emphasis in original). This holding misses the point of the individualized assessments doctrine, however, and attempts to distinguish *Smith*, *Lukumi*, and *Sherbert* based on mere wordplay. As explained above, the Supreme Court in these cases has applied the "individualized assessment" concept to cases where the government has in place a system of "individualized governmental assessment of the reasons for the relevant conduct." *Smith* at 494 U.S. at 884. The Employment Security Commission in *Sherbert* denied Ms. Sherbert benefits because she would not work on Saturdays, even though the commission would grant benefits on a showing of "good cause." Whether one calls what the commission did "applying" the good cause requirement in such a way as not to include her religious reasons, or failing to provide her an "exemption" from the general requirement that the unemployed accept work, the substance is the same: where a system of individualized assessments of reasons for refusing work was in place, she could not be denied benefits due to her religious reasons for refusing work absent a compelling government interest. The *Elsinore* court's distinction is one without any material difference.

The district court in *Elsinore* also held that RLUIPA Section 2(a)(1), as applied through Section 2(a)(2)(C), goes beyond the Free Exercise Clause because "a burden on a religious assembly's use of land does not generally impinge upon a central tenet of religious belief, and thus has not been subjected to heightened

scrutiny under the Free Exercise Clause." See *Elsinore*, 291 F. Supp. 2d at 1090, 1098 (citations omitted). This is in error, for two reasons. First, the decisions relied on by the Elsinore court did not rule that land-use restrictions cannot substantially burden religious exercise, but merely held, under the facts of each case, that a substantial burden had not been established. See *Christian Gospel Church, Inc.* v. *City & 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).

Moreover, the Elsinore court's assumption that only burdens on "central religious practice[s]" can be "substantial burdens" is misplaced. In *Employment Division* v. *Smith*, 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 *Elsinore* court's contention that restrictions on religious land use do not constitute burdens on religion under the Free Exercise Clause is refuted by numerous decisions holding that land-use laws can and often do impose a substantial burden on religion in violation of the Free Exercise Clause. See *Islamic Ctr. of Miss., Inc.* v. *City of Starkville*, 840 F.2d 293, 299 (5th Cir. 1988) (denial of

use permit for mosque in area easily accessible to students created substantial burden on religion in violation of the Free Exercise Clause); *Keeler*, 940 F. Supp. at 883-884 (barring church from its plans to demolish monastery and chapel and replace with more modern facilities was substantial burden on free exercise); *Alpine Christian Fellowship*, 870 F. Supp. at 994-995 (denial of special use permit to operate religious school in church building created substantial burden on religion in violation of free exercise); *First Covenant Church*, 840 P.2d at 219 (restrictions on church altering its exterior substantially burdened its religious exercise in violation of the Free Exercise Clause).

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, this Court should, as has every other court considering the issue, 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 simply codifies existing Free Exercise Clause precedent.

B. RLUIPA 2(a)(1), As Applied Through Section 2(a)(2)(C), Would Be Within Congress's Power Even If It Were To Exceed What The Constitution Requires In Some Respect

Because Section 2(a)(1) of RLUIPA, as applied through Section 2(a)(2)(C) simply codifies the protections of the First Amendment, this Court need not address the question whether, if those provisions were to exceed existing constitutional requirements, they would satisfy the *Boerne* "proportionality and

congruence" test in that respect. As we explain below, however, RLUIPA Section 2(a)(1), as applied through Section 2(a)(2)(C), would be a permissible exercise of Congress's Section 5 power even if the Court were to find that it extends slightly beyond the proscriptions of the Constitution in some unanticipated respect.

1. *Boerne* 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." *Boerne*, 521 U.S. at 520. See also *Tennessee* v. *Lane*, No. 02-1667, 2004 WL 1085482, at *7 (U.S. May 17, 2004) ("We have thus repeatedly affirmed that 'Congress may enact so-called prophylactic legislation that proscribes facially constitutional conduct, in order to prevent and deter unconstitutional conduct.'" (quoting *Nevada Dept. of Human Resources* v. *Hibbs*, 538 U.S. 721, 727-728 (2003)); *United States* v. *Blaine County*, 363 F.3d 897 (9th Cir. 2004); *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'"); *Varner* v. *Illinois State Univ.*, 226 F.3d 927, 932-936 (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 Section 2(a)(1), applied through Section 2(a)(2)(C), is to codify existing constitutional guarantees. Thus, even if a court were to hold that this section does prohibit slightly more conduct than the Constitution bars in some unanticipated respect, it would still satisfy *Boerne*'s "proportionality and congruence" test because it predominantly forbids 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., 1st 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 houses of

worship 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). *Ibid.* "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 *Boerne*, 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 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).

CONCLUSION

This Court should affirm the district court's grant of summary judgment to the plaintiff.

Respectfully submitted,

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STATEMENT OF RELATED CASES

The United States is aware of the following related cases pending in this Court:

1. *San Jose Christian College* v. *City of Morgan Hill*, No. 02-15693, petition for rehearing pending: raises question whether denial of a land-use permit constitutes a substantial burden on the exercise of religion under Section 2(a)(1) of RLUIPA.
2. *Elsinore Christian Center* v. *City of Lake Elsinore*, No. 04-55320: raises question of constitutionality of RLUIPA's land-use provisions.

CERTIFICATE OF COMPLIANCE

I certify that, pursuant to Fed. R. App. P. 32(a)(7)(C) and Ninth Circuit Rule 32-1, the attached answering brief is proportionately spaced, has a typeface of 14 points and contains 9966 words.

May 19th, 2004

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CERTIFICATE OF SERVICE

I certify that the foregoing BRIEF FOR THE UNITED STATES AS INTERVENOR AND *AMICUS CURIAE* was sent by overnight mail, postage pre-paid, to the following counsel of record on this 19th day of May, 2004:

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