No. 08-4167

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

World Outreach Conference Center, *et al.*,

Plaintiffs-Appellants,

v.

City of Chicago,

Defendant-Appellant.

On Appeal from the United States District Court
for the Northern District of Illinois

Brief for Intervenor the United States

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WORLD OUTREACH CONFERENCE CENTER, ET AL.,

Plaintiffs-Appellants,

v.

CITY OF CHICAGO,

Defendant-Appellee.

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS

_____

BRIEF FOR INTERVENOR THE UNITED STATES

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STATEMENT OF SUBJECT MATTER AND APPELLATE JURISDICTION

The statement of jurisdiction in Appellants' Brief is complete and correct.

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

The United States has intervened in this case for the sole purpose of defending the constitutionality of two sections of the Religious Land Use and Institutionalized Persons Act ("RLUIPA"), 42 U.S.C. 2000cc: section 2(a)(1) (RLUIPA's "substantial burden" provision), and section 2(b)(1) (RLUIPA's "equal terms" provision). The United States will address only the constitutionality of those provisions in this brief.

STATEMENT OF THE CASE

Plaintiff World Outreach Conference Center is a religious organization that owns a five-floor building in Chicago. WOCC filed this suit under the Religious Land Use and Institutionalized Persons Act, among other laws, after it experienced delays in obtaining a license from the City allowing it to rent out certain single residence occupancy units to the homeless. The district court held that WOCC failed to state a claim upon which relief can be granted on any of its claims, and WOCC filed this appeal to challenge that ruling.

For the first time on appeal, the City now challenges the constitutionality of the two RLUIPA sections plaintiffs rely upon in this action. Because the City failed to raise those arguments in the district court, it forfeited the right to make them on appeal. Nevertheless, because the United States has an interest in defending the constitutionality of federal statutes, the United States has intervened in this appeal and files this brief to explain why the two RLUIPA provisions at issue are constitutional. The United States takes no position on whether plaintiffs have stated a claim upon which relief can be granted. We do note, however, that the Court should consider that issue before it addresses the constitutionality of RLUIPA, if for some reason the Court concludes that the City has not forfeited its right to challenge RLUIPA's constitutionality.

STATUTORY BACKGROUND

RLUIPA was signed into law on September 22, 2000. *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 statute addresses two areas in which Congress determined that statutory enforcement of religious liberty interests against state and local governments is necessary to remedy existing widespread discrimination: land-use decisions, and action relating to institutionalized persons in the custody of states and localities. This case concerns one of RLUIPA's land-use provisions.

1. Congress enacted RLUIPA's land-use provisions to enforce, by statutory right, several constitutional prohibitions that Congress found states and localities were frequently violating in the land use context. *See* Joint Statement of Sen. Hatch and Sen. Kennedy (hereinafter, "Joint Statement"), 146 Cong. Rec. S7774, S7775 (daily ed. July 27, 2000) ("Each subsection [of RLUIPA's land use provisions] closely tracks the legal standards in one or more Supreme Court opinions"). Congress codified those constitutional prohibitions "for visibility and easier enforcement." *Id.* at S7775. *See also* Storzer & Picarello, 9 Geo. Mason L. Rev. at 946 (RLUIPA "lays out the appropriate free exercise standards and puts municipalities on notice that they apply").

1. RLUIPA Section 2(a)(1)

Section 2(a)(1) 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), (a)(1)(A), (a)(1)(B).

The City challenges one of the statutory conditions under which section 2(a)(1) can apply: where "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). As we explain more fully below, 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 Div.* v. *Smith*, 494 U.S. 872 (1990), which the Court subsequently applied in *Church of the Lukumi Babalu Aye* v. *City of Hialeah*, 508 U.S. 520 (1993). *See* Joint Statement, 146 Cong. Rec. at S7775. *See also* House Judiciary Committee Report, *Religious Liberty*

Protection Act of 1999, H.R. Rep. No. 106-219, 106th Cong., 1st Sess., at 17.[1]

2. RLUIPA Section 2(b)(1)

Section 2(b)(1) 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). Congress intended this provision to codify the Supreme Court's holding in *Church of the Lukumi Babalu Aye* that the Free Exercise Clause forbids the government from deciding 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. See 146 Cong. Rec. E1563 (Sept. 22, 2000) (daily ed.) (statement of Rep. Canady); H.R. Rep. No. 106-219, at 17.[2]

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[1] The bill discussed in the House Report discussed above represented Congress's initial effort to codify constitutional rights relating to state and local land use decisions. Section 2(a)(1) also applies where "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), and where "the substantial burden is imposed in a program or activity that receives Federal financial assistance," 42 U.S.C. 2000cc(a)(2)(A). Neither of those provisions is at issue in this appeal.

[2] RLUIPA section 2(b) also contains two other substantive provisions, neither of which is involved in this appeal. RLUIPA Section 2(b)(2) prohibits state and local governments from imposing or implementing land use regulations in a manner that "discriminates against any assembly or institution on the basis of religion or religious denomination." 42 U.S.C. 2000cc(b)(2). RLUIPA Section 2(b)(3) prohibits state and local governments from imposing or implementing a land use regulation that "totally

2. Congress enacted RLUIPA's land-use provisions subsequent to the Supreme Court's decision in *City of Boerne* v. *Flores*, 521 U.S. 507 (1997), which held that Congress lacked authority under section 5 of the Fourteenth Amendment to apply the Religious Freedom Restoration Act ("RFRA"), 42 U.S.C. 2000bb, to state and local governments. RFRA, which remains applicable against the federal government, *see O'Bryan* v. *Bureau of Prisons*, 349 F.3d 399 (7th Cir. 2003), prohibits the government from substantially burdening a person's exercise of religion unless the government can prove that the burden furthers a "compelling government interest" and is the "least restrictive means" of furthering that interest. *See* 42 U.S.C. 2000bb-1 & 2000bb-2(1). *Flores* held that RFRA, which applied to *all* laws, federal, state, and local, exceeded the protections created by the Fourteenth Amendment and was not "congruent and proportional" to the goal of redressing infringements of constitutional rights. *See* 521 U.S. at 531-533.

In enacting RLUIPA, Congress sought to comply with the direction the Supreme Court provided in *Flores* by limiting RLUIPA to two contexts (land use and prisoner rights) in which Congress found there is widespread discrimination against religion. With respect to RLUIPA's land use provisions, Congress also limited itself to codifying rights the Supreme Court has already recognized

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excludes religious assemblies from a jurisdiction" or "unreasonably limits religious assemblies, institutions, or structures within a jurisdiction." 42 U.S.C. 2000cc(b)(3)(A) & (B).

under the Constitution. *See* Joint Statement, 146 Cong. Rec. at S7775; H.R. Rep. 106-219, at 12-13. Additionally, given *Flores*'s admonition that the RFRA had lacked congruence and proportionality, Congress compiled a legislative record that would sustain RLUIPA's land-use provisions if any court were to hold that those provisions exceed what the Constitution already provides in some unanticipated respect.

STATEMENT OF FACTS

In July, 2005, plaintiff World Outreach Conference Center ("WOCC") purchased a five-floor building in Chicago, Illinois in order to operate a religious community center and to provide shelter to the homeless by renting out single room occupancy ("SRO") units. WOCC subsequently applied to the City for an SRO license, which WOCC was required to obtain under the Chicago Zoning Ordinance in order to rent out the SRO units. The City initially denied WOCC's application on the ground that WOCC needed to apply for a special use permit to operate a community center with SRO units in the business district where its building is located. After WOCC filed this suit, the City's Zoning Department approved WOCC's application for an SRO license. Final issuance of that license was delayed by numerous repairs to the SRO units and by inspections that were required by the City, but the City eventually did issue an SRO license to WOCC. *See* D. Ct. Opinion (R91) at 1-3 (App. 2-4).

WOCC alleges that the City unlawfully prevented it from renting out its SRO units under a contract WOCC had negotiated with the Federal Emergency Management Agency ("FEMA"), and that the City's delay reduced the number of potential attendees at WOCC's religious services. WOCC asserts claims under RLUIPA's "substantial burden" and "equal terms" provisions, as well as under the United States Constitution, the Chicago Zoning Ordinance, and the Illinois RLUIPA, seeking damages arising out of WOCC's temporary inability to rent its SRO rooms to the homeless.

The district court dismissed all of WOCC's claims, including its RLUIPA claims, for failure to state a claim. In so doing, the district court did not address RLUIPA's constitutionality, nor did the City request it to do so. WOCC appealed, and the City's appellee brief challenges Congress's authority under section 5 of the Fourteenth Amendment to enact the two RLUIPA provisions at issue here: section 2(a)(1) (RLUIPA"s substantial burden provision) as made applicable by virtue of section 2(a)(2)(C) (RLUIPA's "individualized assessments" provision), and section 2(b)(1) (RLUIPA's "equal terms" provision).

The United States has intervened in this appeal for the sole purpose of defending the constitutionality of those RLUIPA provisons.

SUMMARY OF ARGUMENT

This Court should not consider the City's constitutional challenge to the RLUIPA sections at issue here because the City failed to make that argument in the district court. Moreover, even if the Court were to conclude that the City did not forfeit its right to raise that argument, the Court should address whether plaintiffs can state a claim for relief under RLUIPA before considering the statute's constitutionality.

If the Court reaches the issue of RLUIPA's constitutionality, it should hold that section 2(a)(1), as made applicable through section 2(b), is within Congress's power under section 5 of the Fourteenth Amendment because it codifies existing Free Exercise Clause doctrine, as this Court held in *St. Constantine and Helen Greek Orthodox Church, Inc.* v. *City of New Berlin*, 396 F.3d 895 (7th Cir. 2005). If the Court reaches the constitutionality of RLUIPA section 2(b), it should uphold that provision because, as the Eleventh Circuit correctly held in *Midrash Sephardi, Inc.* v. *Town of Surfside*, 366 F.3d 1214 (11th Cir. 2004), it codifies religious nondiscrimination principles under the Free Exercise, Establishment, and Equal Protection Clauses.

STATEMENT OF THE STANDARD OF REVIEW

An order granting a motion to dismiss under Rule 12(b)(6) is reviewable *de novo*. *See Thompson* v. *Illinois Dep't of Prof. Regulation*, 300 F.3d 750, 753 (7th Cir. 2002).

ARGUMENT

I. RLUIPA'S "SUBSTANTIAL BURDEN" AND "EQUAL TERMS" PROVISIONS ARE VALID EXERCISES OF CONGRESS' AUTHORITY UNDER SECTION 5 OF THE FOURTEENTH AMENDMENT.

As explained above, the City did not challenge RLUIPA's constitutionality in the district court. As a result, the City forfeited the right to raise that issue on appeal, and this Court should not entertain the City's argument. *See, e.g., Local 15, Int'l Bhd. of Elec. Workers, AFL-CIO* v. *Exelon Corp.*, 495 F.3d 779, 783 (7th Cir. 2007).

In addition, if the Court were to conclude for some reason that the City has not forfeited its right to challenge RLUIPA's constitutionality in this appeal, it should not address that issue before resolving whether plaintiffs have stated a claim under RLUIPA. *See Lyng* v. *Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439, 446 (1988) ("courts should avoid reaching constitutional questions in advance of the necessity of deciding them").

If the Court reaches the City's constitutional challenge to RLUIPA, however, the Court should reject it because RLUIPA's "substantial burden" and "equal terms" provisions both codify rights that are already guaranteed under the Constitution. This Court upheld RLUIPA's substantial burden provision in *St. Constantine* on that ground, and RLUIPA's equal terms provision also codifies existing Supreme Court precedent.

A. As This Court Held in *St. Constantine*, RLUIPA Section 2(a)(1), As Applied By Section 2(a)(2)(C), Codifies the Supreme Court's Individualized Assessments Doctrine

1. In *Employment Div.* 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 compelling interest 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 "refuses to extend that system to cases of 'religious hardship.'" *Id.* at 884. That type of action, 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 (noting that *Sherbert*'s Free Exercise Clause compelling interest test "was developed in a context that lent itself to individualized government assessment of the reasons for the relevant conduct"). *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 plaintiff's religious reason for not working on Saturdays as good cause without satisfying compelling interest scrutiny. *See id.* at 405-07.

The Supreme Court also applied the individualized assessments 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 compelling interest 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* Joint Statement, 146 Cong. Rec. at 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. 106-219, 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 where land use decisions are made according to individualized assessments. Joint Statement, 146 Cong. Rec. at S7775; H.R. Rep. 106-219, at 17.[3]

Since RLUIPA section 2(a)(1), as applied through section 2(a)(2)(C), codifies the Supreme Court's individualized assessments doctrine, and extends no further than that doctrine applies, it is, by definition, a permissible exercise of Congress' power under section 5 of the Fourteenth Amendment. Every court to have reached the issue has so held, including this Court in *St. Constantine*, *see* 396 F.3d at 897. *See also Guru Nanak*, 456 F.3d at 993-995; *Elsinore Christian Center* v. *City of Lake Elsinore*, 2006 WL 245671 (9th Cir. 2006).[4]

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[3] *See Guru Nanak Singh Soc'y* v. *County of Sutter*, 456 F.3d 978, 986 (9th Cir. 2006) (holding that RLUIPA section 2(a)(1) applies "when the government may take into account the particular details of an applicant's proposed use of land when deciding to permit or deny that use"); *Midrash Sephardi, Inc.* v. *Town of Surfside*, 366 F.3d 1214, 1225 (11th Cir. 2004)(concluding that conditional use permit rules under zoning law constituted a system of individualized assessments because it allowed a "case-by-case evaluation of the proposed activity of religious organizations," which created the "risk of idiosyncratic application of SZO standards").

[4] In *Elsinore*, the Ninth Circuit reversed the only district court decision that had ever held RLUIPA section 2(a)(1) unconstitutional. The other relevant district court decisions 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 power. *See United States* v. *Maui County*, 298 F. Supp. 2d 1010 (D. Haw. 2003); *Murphy* v. *Zoning Comm'n of Town of New Milford*, 289 F. Supp. 2d 87

As this Court explained in *St. Constantine*, section 2(a)(C) "codifies *Sherbert* v. *Verner*," and the Supreme Court's decision in *Flores* "reaffirmed *Sherbert* insofar as that case holds that a state that has a system for granting individual exemptions from a general rule must have a compelling reason to deny a religious group an exemption that is sought on the basis of hardship or, in the language of the present Act, of 'a substantial burden on . . . religious exercise.'" *Ibid.* (Citations omitted). Since *Sherbert* was an interpretation of the Constitution, this Court concluded, "the creation of a federal judicial remedy for conduct contrary to its doctrine is an uncontroversial use of section 5." *Ibid.*[5]

(D. Conn. 2003), *vacated on other grounds*, 402 F.3d 342 (2d Cir. 2005); *Westchester Day School* v. *Village of Mamaroneck*, 280 F.Supp.2d 232 (S.D.N.Y. 2003), *aff'd on other grounds*, 504 F.3d 338 (2d Cir. 2007); *Cottonwood Christian Center* v. *Cypress Redevelopment Agency*, 218 F. Supp. 2d 1203, 1221 (C.D. Cal. 2002); *Christ Universal Mission Church* v. *City of Chicago*, 2002 U.S. Dist. Lexis 22917 (N.D. Ill. Sept. 11, 2002), *rev'd on other grounds*, 402 F.3d 423 (7th Cir. 2004); *Freedom Baptist Church of Delaware County* v. *Township of Middletown*, 204 F. Supp. 2d 857, 874 (E.D. Pa. 2002).

[5] *See generally 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. 1988) (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).

2. This Court's decision in *St. Constantine* forecloses the City's constitutional challenge to RLUIPA section 2(a)(1) in this appeal. To ensure the Court is made fully aware of all the appropriate responses to the arguments the City raises on appeal regarding RLUIPA's constitutionality, however, we will discuss each of those arguments below.

a. The City contends that "RLUIPA goes well beyond the judiciary's construction of the Constitution" because it "provides that any substantial burden on religious practice triggers strict scrutiny, while the case law uses a more refined balancing test, considering general applicability and neutrality." Appellee Br. at 28 (citation omitted). What the City fails to appreciate, however, is that a system of individualized assessments is neither generally applicable nor neutral, as those terms are properly understood. *See, e.g., Guru Nanak*, 456 F.3d at 986.

As the Supreme Court held in *Sherbert*, *Smith*, and *Lukumi*, *see* pp. 11-13, *supra*, a system of individualized assessments requires strict scrutiny when it imposes a substantial burden on the exercise of religion. That is so because it can easily mask discrimination against religion. As this Court explained in *St. Constantine*, religious institutions, and "especially those that are not affiliated with the mainstream Protestant sects or the Roman Catholic Church," are vulnerable "to subtle forms of discrimination when, as in the case of the grant or denial of zoning variances, a

state delegates essentially standardless discretion to nonprofessionals operating without procedural safeguards." 396 F.3d at 900 (citations omitted). *See also Midrash Sephardi*, 366 F.3d at 1225 (noting that land use laws that allow for case-by-case evaluation of the proposed activity of religious organizations "carr[y] the concomitant risk of idiosyncratic application").

Thus, RLUIPA's substantial burden provision, as applied to a law allowing individualized assessments, "backstops the explicit prohibition of religious discrimination in [RLUIPA section 2(b),] much as the disparate-impact theory of employment discrimination backstops the prohibition of intentional discrimination." *St. Constantine*, 396 F.3d at 900 (citations omitted). If a land-use decision that is rendered under a system of individualized assessments imposes a substantial burden on religious exercise and cannot satisfy strict scrutiny, "the inference arises that hostility to religion, or more likely to a particular sect, influenced the decision." *Ibid.*

b. The City also argues that "distinctions between the regulation of religious land use and other types of land use are judged under the case law by rational basis test, not the stricter test found in RLUIPA." Appellee Br. at 28. In *Lukumi*, however, the Supreme Court applied compelling interest scrutiny under the Free Exercise Clause *to a land use provision*. One of the ordinances *Lukumi* struck down prohibited the slaughter of animals

outside of areas zoned for slaughterhouses. *See* 508 U.S. at 545. The Supreme Court held that this ordinance violated the Free Exercise Clause because it contained an exemption for commercial operations that slaughter small numbers of hogs and cattle, and because the City's refusal to allow comparable religious exceptions was not justified by a compelling interest. *See ibid.*

Thus, as *Lukumi* illustrates, there is no reason why a land use law should not be subject to compelling interest scrutiny under the Free Exercise Clause, and under RLUIPA as well, if it imposes a substantial burden on religion and allows "individualized assessments" regarding whether it applies in particular cases. As we have explained, such laws merit strict scrutiny because they can easily mask unconstitutional discrimination against religion, *see* pp. 11-13, *supra*, which Congress found occurs frequently nationwide. *See* pp. 20-23, *infra*.

The City incorrectly suggests that in *Flores*, *supra*, the Supreme Court held that land use laws are never subject to strict scrutiny under the Free Exercise Clause. *See* Appellee Br. at 28 n.9. That argument, which would bring *Flores* into conflict with *Lukumi*, is wrong. As we have explained, *Flores* held the Religious Freedom Restoration Act ("RFRA") unconstitutional because it applied the compelling interest test to *all* state action – including neutral and generally applicable laws that, under *Employment Div.* v. *Smith*, *supra*, are subject only to rational basis

scrutiny under the Free Exercise Clause. *See* p. 6, *supra*. By contrast, RLUIPA section 2(a)(1), as applied through section 2(a)(2)(C), requires the application of compelling interest scrutiny only to land use laws that allow individualized assessments – a category of laws that *Smith itself* recognized are subject to strict scrutiny under the Free Exercise Clause. *See* pp. 11, *supra*.

For all the above reasons, therefore, this Court in *St. Constantine* was right to hold that RLUIPA's substantial burden provision, as applied to laws involving individualized assessments, is within Congress's section 5 power because it codifies rights protected by the Free Exercise Clause.

B. RLUIPA Section 2(a)(1), As Applied Through Section 2(a)(2)(C), Would Be Within Congress's Power Under Section 5 of the Fourteenth Amendment Even If It Were to Exceed What the Constitution Requires in Some Unanticipated Respect.

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 beyond the prescriptions of the Constitution in some respect Congress did not anticipate. Congress compiled an extensive record showing widespread discrimination against religion in land use matters nationwide, and RLUIPA section 2(a)(1), as applied through section 2(a)(2)(C), is a congruent and proportional response to that discrimination.

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 and the means adopted to that end." *Flores*, 521 U.S. at 520. *See also 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 we have shown, the predominant effect of RLUIPA section 2(a)(1), as applied by section 2(a)(2)(C), 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 bars, 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, which frustrated a core aspect of religious exercise – the ability to worship. *See* Joint Statement, 146 Cong. Rec. S7774-75; H.R. Rep. No. 106-219, at 21-24. Congress also found that while systems of individualized land use assessments readily lend themselves to discrimination against religious assemblies, it is difficult to prove discrimination in any particular case. *See* 146 Cong. Rec. at S7775; H.R. Rep. No. 106-219, at 18-24.

As discussed below, the record of anti-religious discrimination Congress compiled in enacting RLUIPA 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, at 18-24. This evidence is more than sufficient to justify RLUIPA's land use provisions, to the extent any of them exceed what the Constitution protects.

a. A Brigham Young University study found that Jews, small Christian denominations, and nondenominational churches are vastly overrepresented in reported house of worship 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. Since Congress was, quite reasonably, unwilling to assume that minority religions have a greater propensity to litigate than majority religions or the nonreligious, *see id.* at 24, Congress concluded that this study strongly suggests that religious minorities are discriminated against in land-use decisions nationwide.

Two other studies also confirm widespread discrimination against religious institutions in land-use matters. One of those studies, of 29 Chicago-area jurisdictions, 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 similar religious uses were denied equal treatment. *See* H.R. Rep. No. 219, at 20. The other study showed that many Presbyterian congregations nationwide reported significant conflict with land use authorities. *See id.* at 21.

b. Several land-use experts confirmed the existence of widespread discrimination against religion in land-use matters. 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.

c. 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 many locations across the country). 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. *See 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.

Similarly, in another case, the City of Cheltenham Township, Pennsylvania "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 22-23. "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 synagogue's

attorney testified that he had handled more than thirty other cases of similar religious discrimination. *See ibid.*

3a. The City urges the Court to ignore the above evidence because Congress failed to examine each law identified in the congressional record to determine whether it created an impermissible burden on religious land use. *See* Appellee Br. at 29. This objection, however, suffers from a number of fatal defects.

To begin, the zoning studies Congress considered involved land-use laws that discriminated against religion *on their face*, as well as in application. *See* p. 21, *supra*. Moreover, a number of the anecdotal examples of religious discrimination documented in the House Report discussed above were cases where a *court* had upheld the claims of the churches in question.[6] It was perfectly reasonable for Congress to rely on that kind of evidence, as well as the testimony of land-use experts that was presented to it, in evaluating the need for RLUIPA, and the City has identified no reason why this Court should second-guess Congress's considered judgment regarding that matter.

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[6] *See* H.R. Rep. No. 219, at 20 n.86 (citing *Islamic Center of Miss.* v. *City of Starkville*, 840 F.2d 293 (5th Cir. 1988)); *id.* at 22 (citing *Family Christian Fellowship* v. *County of Winnebago*, 503 N.E.2d 367 (Ill. App. 1986), and *City of Chicago Heights* v. *Living Word Outreach Full Gospel Church and Ministries, Inc.*, 707 N.E.2d 53 (Ill. App. 1999)); *id.* at 23 (citing *Orthdox Minyan* v. *Cheltenham Township Zoning Hearing Bd.*, 552 A.2d 772 (Pa. Com. 1989)).

"Congress is the body constitutionally appointed to decide in the first instance 'whether and what legislation is needed to the guarantees of the Fourteenth Amendment,' and thus its conclusions are entitled to great deference." *Kimel* v. *Florida Bd. of Regents*, 528 U.S. 62, 80-81 (2000), *quoting Flores*, 521 U.S. at 536. "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. *Nat'l Ass'n of Radiation Survivors*, 473 U.S. 305, 331 n.12 (1985) (citing cases). The court's obligation is only to "assure that, in formulating its judgments, Congress has drawn reasonable inferences based on substantial evidence." *Turner Broadcasting System* v. *FCC*, 520 U.S. 180, 195 (1996). The legislative record concerning RLUIPA easily passes that test.

b. The City also argues that RLUIPA "sweeps far too broadly," Appellee Br. at 31, because most municipalities have zoning laws. As we have explained, however, Congress found that religious discrimination in land-use decisions is a nationwide problem. That is precisely the kind of showing that justifies a nationwide *response*, just as Title VII, the Equal Pay Act, and other civil rights statutes apply to all municipalities nationwide. *See Nevada Dep't of Human Resources* v. *Hibbs*, 538 U.S. 721, 734 (2003) (record of widespread gender-based discrimination Congress

compiled to support the Family and Medical Leave Act justified Congress's decision to make that Act applicable to all states, "no matter how generous" the family leave policy of the petitioner state may have been). Moreover, Congress found that it would be "impossible to make separate findings about every jurisdiction or to legislate in a way that reaches only those jurisdictions that are guilty." Joint Statement, 146 Cong. Rec. S7774. The Constitution does not require Congress to undertake the impossible in order to remedy a nationwide problem of discrimination in a discrete area of the law.

c. Finally, the City argues that RLUIPA is too broad because it "contains no geographical restriction, termination provision, expiration date, or other limiting feature . . .." *Id.* at 31. The Supreme Court, however, has never held that any of those features is necessary to sustain civil rights legislation. *See Flores*, 521 U.S. at 533 ("This is not to say, of course, that § 5 legislation requires termination dates, geographic restrictions, or egregious predicates"). Moreover, for the reasons stated above, this Court should conclude, if it reaches the question, that RLUIPA is narrowly tailored to remedy the specific, nationwide problem of religious discrimination in land use decisions that Congress found and documented in the legislative record.

C. RLUIPA's "Equal Terms" Provision is Within Congress's Section 5 Powers Because it Codifies Nondiscrimination Principles Under the Free Exercise, Establishment, and Equal Protection Clauses.

RLUIPA section 2(b)(1) 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). In *Midrash Sephardi*, *supra*, the only court of appeals decision to address that issue, the Eleventh Circuit held that section 2(b)(1) is within Congress's section 5 power because it codifies nondiscrimination principles under the Free Exercise, Establishment, and Equal Protection Clauses. *See* 366 F.3d at 1238-40. If this Court were to reach this issue for some reason, it should follow the Eleventh Circuit's decision in *Midrash Sephardi*, for the reasons explained below.

1. Nondiscrimination Elements of the Free Exercise Clause

In *Lukumi*, the Supreme Court held that the Free Exercise Clause prohibits the government from allowing secular exemptions to otherwise generally applicable government policy while 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. *Id.* at 521-32.

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." *Id.* 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 260-361, 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 365-66. *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*, 539 U.S. 942 (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).

As the Eleventh Circuit held in *Midrash Sephardi*, 366 F.3d at 1238-39, RLUIPA section 2(b)(1) codifies this Free Exercise 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 also Freedom Baptist Church* v. *Township of Middletown*, 204 F. Supp. 2d 857, 869-870 (E.D. Pa. 2002).

2. Nondiscrimination Elements of the Establishment Clause

The Supreme Court also has 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 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 Univ. 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.[7]

The Supreme Court also has 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*, 536 U.S. 639 (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).

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[7] *Accord Good News Club* v. *Milford Cent. Sch.*, 533 U.S. 98 (2001); *Lamb's Chapel* v. *Center Moriches Union Free Sch. Dist.*, 508 U.S. 384 (1993); *Bd. of Educ. of Westside Cmty. Schs.* v. *Mergens*, 496 U.S. 226, 248 (1990); *Widmar* v. *Vincent*, 454 U.S. 263 (1981).

As the Eleventh Circuit recognized in *Midrash Sephardi*, RLUIPA section 2(b)(1) codifies the Establishment Clause's prohibition against government action that discriminates against religion. *See* 366 F.3d at 1239. *See also Freedom Baptist Church*, 204 F. Supp. 2d at 870.[8]

3. Nondiscrimination Elements 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 neutral under the Free Exercise Clause, we can also find guidance in our equal protection cases."). Discrimination against religion is inconsistent with the principles embodied in the Equal Protection Clause. *See Kiryas Joel*, 512 U.S. at 715 (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.").

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[8] In addition, at least two courts have 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) also could be seen as codifying Free Speech and assembly protections.

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*, 250 F. Supp. 3d at 979 (holding that a city violated the Equal Protection Clause by excluding churches from a district where similar secular uses were allowed). Thus, RLUIPA Section 2(b)(1) also codifies existing Supreme Court precedent regarding the Equal Protection Clause. *See Midrash Sephardi*, 366 F.3d at 1239.

The City does not address *Midrash Sephardi* or explain why RLUIPA's equal terms provision does not merely codify existing constitutional nondiscrimination requirements. Rather, it argues only that Congress did not compile a sufficient record showing discrimination against religion in land use to justify this legislation. *See* Appellee Br. at 30. The City is wrong about that, as we have explained, but the issue is not relevant where, as here, Congress has merely codified existing constitutional principles. In that kind of context, as we have explained, and as this Court recognized in *St. Constantine*, Congress's action cannot be anything but congruent and proportional to the constitutional harm that is at issue.

CONCLUSION

The Court should not address the City's constitutional challenge to the RLUIPA sections at issue here, since the City did not make the argument in the district court, but if the Court does reach that issue, it should conclude that both sections are within Congress's power under section 5 of the Fourteenth Amendment.

Respectfully submitted,

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Certificate of Compliance

I hereby certify that the text of the accompanying Brief is composed in Courier New typeface, with 12-point type, in compliance with the type-size limitations of Federal Rule of Appellate Procedure 32(a)(5)(B) and Seventh Circuit Rule 32(b). The Brief contains 7393 words, according to the word count provided by Wordperfect 12.

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Lowell V. Sturgill Jr.

Seventh Circuit Rule 31(e) Certification

I hereby certify that the diskette upon which counsel has provided an electronic copy of this brief to the Court and to counsel has been scanned for viruses and is virus free.

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Lowell V. Sturgill Jr.

Certificate of Service

I hereby certify that on this 29th day of September, 2009, I filed the above Brief for Intervenor the United States by delivering two copies of the Brief to Federal Express for overnight delivery to the following counsel:

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