Case No. 04-55320

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

ELSINORE CHRISTIAN CENTER, *et al.*
Plaintiffs-Appellants,

UNITED STATES OF AMERICA
Intervenor-Appellant,

v.

CITY OF LAKE ELSINORE, *et al.*,
Defendants-Appellees.

AMICI CURIAE BRIEF OF THE LEAGUE OF CALIFORNIA CITIES, THE NATIONAL LEAGUE OF CITIES, THE INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION, AND THE AMERICAN PLANNING ASSOCIATION IN SUPPORT OF DEFENDANTS-APPELLEES, CITY OF LAKE ELSINORE, *ET AL.*, AND SUPPORTING AFFIRMANCE OF THE DISTRICT COURT DECISION

Appeal From the United States District Court
For the Central District of California
Civil Case No. CV 01-04842
The Honorable Steven V. Wilson

RUTAN & TUCKER, LLP
JEFFREY T. MELCHING (SBN 180351)
JOHN A. RAMIREZ (SBN 184151)
611 Anton Boulevard, Fourteenth Floor
Costa Mesa, California 92626-1931
Telephone: 714-641-5100
Attorneys for *Amici Curiae*
League of California Cities, National League of Cities, International Municipal Lawyers Association, and American Planning Association

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

FEDERAL CASES

Page(s)

FEDERAL CASES (Cont.)

Page(s)

FEDERAL CASES (Cont.)

STATE CASES

FEDERAL STATUTES and RULES

Page(s)

MISCELLANEOUS

I. INTERESTS OF AMICI

The League of California Cities is an association of 476 California cities united in promoting the general welfare of cities and their citizens. The League is advised by its Legal Advocacy Committee, which is comprised of 24 city attorneys representing all 16 divisions of the League from all parts of the state. The committee monitors appellate litigation affecting municipalities and identifies cases that are of statewide significance.

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

The International Municipal Lawyers Association (IMLA) is a nonprofit, nonpartisan professional organization consisting of more than 1,400 member entities. Its membership is comprised of local governments, including cities and counties, and subdivisions thereof as represented by their chief legal officers, state municipal leagues, and individual attorneys who represent municipalities, counties, and other local government entities.

IMLA, previously known as the National Institute of Municipal Law Officers, has provided services and educational programs to local governments and their attorneys since 1935. IMLA's Legal Advocacy Program serves municipalities by advocating the nationwide interests, positions, and views of local governments on legal issues. IMLA has appeared as friend of the court on behalf of its members before the United States Supreme Court, in the United States Courts of Appeals, and in state supreme and appellate courts.[1]

The American Planning Association (APA) is a nonprofit public interest and research organization founded in 1978 to advance the art and science of planning – including physical, economic and social planning – at the local, regional, state, and national levels. The APA's mission is to encourage planning that will contribute to the public well-being by developing communities and environments that more effectively meet the present and future needs of people and society.

The APA resulted from a merger between the American Institute of Planners, founded in 1917, and the American Society of Planning Officials,

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[1] NLC and IMLA, as representatives of elected officials and their legal counselors, have filed several briefs urging courts to find RLUIPA unconstitutional. In those cases, courts have been urged to interpret RLUIPA broadly, just as the district court interpreted the statute in this case. The City in this case has ably addressed the unconstitutionality of RLUIPA, and IMLA and NLC wholly support the City's interpretation. However, in event this Court does not wish to invalidate RLUIPA on constitutional grounds, IMLA and NLC join with the League of California Cities and the American Planning Association in presenting this Court with an alternative, narrow interpretation under which RLUIPA could be constitutional.

established in 1934. The organization has 46 regional chapters and 19 divisions devoted to specialized planning interests. APA represents more than 37,000 practicing planners, officials, and citizens involved with urban and rural planning issues. These members are involved, on a day-to-day basis, in formulating planning policies and preparing land-use regulations.

This case raises critical issues of national importance to local government agencies, the planning profession, and property owners. Appellants Elsinore Christian Center and Gary Holmes (collectively "ECC") attempt to undermine local land-use authority to the detriment of the general public and property owners, all of whom rely on the protection and stability that local land-use controls provide. Appellants are requesting special treatment and favored status which the Constitution neither provides nor permits. If the mere denial of ECC's conditional use permit application – an action that does not run afoul of the Free Exercise Clause – constitutes a violation of RLUIPA, then local plans, planning processes, and land use-authority will be seriously eroded.

Pursuant to Federal Rule of Appellate Procedure 29(a), all parties have consented to the filing of this *amici curiae* brief.

II. SUMMARY OF ARGUMENT

RLUIPA's contours and limitations have not been extensively explored, explicated, and tested in the case law. This Court has addressed RLUIPA's "substantial burden on religious exercise" proscription only once, and the Supreme Court has yet to explore the issue. Given this limited authority, this Court's responsibility to interpret RLUIPA in a manner that renders it constitutional plays a heightened role. (*Virginia v. Black*, 538 U.S. 343, 378 (2004) [Scalia, J., concurring in part and dissenting in part] ["applying the maxim '*ut res magis valeat quam pereat*' . . . we would adopt the alternative that renders the statute constitutional rather than unconstitutional."].) Toward that end, *amici* respectfully submit that (i) RLUIPA's "individualized assessments" jurisdictional trigger should be construed as a codification of the "individualized exemptions" test established by case law, and (ii) RLUIPA's "substantial burden on religious exercise" proscription should be construed as a codification of the "substantial burden on religious exercise" test set forth under applicable Free Exercise Clause precedents.

City of Boerne v. Flores, 521 U.S. 507, 519 (1997) provides further aid in determining the constitutionality of RLUIPA. *Boerne* articulates a simple three-part analysis for testing the constitutionality of legislation enacted pursuant to Section 5 of the Fourteenth Amendment ("Section 5"). First, one must determine whether the legislation merely codifies existing constitutional rights. If it does, the

legislation falls within Congress' Section 5 power. If it does not, then a second inquiry is triggered; namely, has Congress successfully identified a "widespread and persisting deprivation of constitutional rights which it is acting to deter"? (*Id.* at 519-520, 526; *see also Board of Trustees v. Garrett,* 531 U.S. 356, 365 (2001).) If it has not, then the legislation is unconstitutional under Section 5. If it has, then a third and final inquiry is necessary: Is there a "congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end." (*Ibid.*) If there is, the legislation passes muster under Section 5. If there is no congruence and proportionality, the legislation is unconstitutional.

Utilizing the *Boerne* test, the necessary starting point for evaluating RLUIPA's constitutionality under Section 5 is the identification "with some precision the scope of the constitutional right at issue." (*Hibbs v. Dept of Human Res.,* 273 F.3d 844, 853 (9th Cir. 2001), *aff'd,* 538 U.S. 721 (2003) (*quoting Garrett,* 531 U.S. at 365).) *Amici* perform this threshold analysis and show that, to be constitutional, RLUIPA's protections can only extend as far as the protections of the Free Exercise Clause. *Amici* also show that, under well-established precedents, the mere denial of a religious organization's land use permit application does not run afoul of the Free Exercise Clause.

Specifically, *amici* demonstrate first that a local agency's generally applicable evaluation of a land use application is not "a system of individualized

exemptions" as that phrase has been interpreted by the courts. (*See San Jose Christian College v. City of Morgan Hill*, 360 F.3d 1024, 1031 (9th Cir. 2004) [denial of land use application does not violate Free Exercise Clause because, *inter alia*, the applicable regulation was neutral and generally applicable].) Because the conditional use permit process is not the type of individualized exemption prohibited by Free Exercise jurisprudence, RLUIPA does not even come into play in this case. Nothing in this case indicates that the City's decision was made on the basis of religion, or that the City refused to extend an exemption from its conditional use permit process to ECC that was otherwise available to other classes of land use applicants.

Second, *amici* demonstrate that the denial of a conditional use permit does not, by itself, create a "substantial burden on religious exercise," as that term has been defined under Free Exercise Clause case law. (*Christian Gospel Church, Inc. v. San Francisco*, 896 F. 2d 1221 (9th Cir. 1990) ["The burden on religious practice is not great when the government action, in this case the denial of a use permit, does not restrict current religious practice, but rather prevents a change in religious practice."])

If the denial of a conditional use permit is a "substantial burden on religious exercise" under RLUIPA, then Congress attempted to create something different than is represented by Free Exercise jurisprudence. This would then trigger

Borene's "legislative history" and "congruence and proportionality" tests. RLUIPA simply cannot withstand scrutiny under *Boerne* because, as interpreted by the District Court, ECC, and its aligned *amici*, RLUIPA would prohibit ***any denial*** of a land use application by a religious organization. Far from being congruent and proportional, this result would provide religious organizations with the very land use immunity that RLUIPA's architects expressly disavowed. (146 Cong. Rec. S7774 at S7776 ["This Act does not provide religious institutions with immunity from land use regulation . . . ."])

Conversely, local government would be deprived of ***any*** land use authority over religious land use applicants. It is precisely this "blunderbuss of a remedy" that led the District Court to correctly conclude that, as interpreted by ECC, RLUIPA is an unconstitutional enactment. (*Elsinore Christian Ctr. v. City of Lake Elsinore*, 291 F. Supp. 2d 1083, 1102 (C.D. Cal. 2003).)

III. ARGUMENT

A. To Be Constitutional, RLUIPA's "Individualized Assessments" Jurisdictional Trigger Provision Must Codify the "Individualized Exemptions" Doctrine Established in Free Exercise Case Law

The City's conditional use permit requirement does not fall within the ambit of the "individualized exemptions" doctrine that ECC claims RLUIPA codifies in its "individualized assessments" jurisdictional provision. (*See* Appellant's Opening Brief, pp. 26-34.) The "individualized exemptions" test – which

emanates from unemployment compensation cases such as *Sherbert v. Verner*, 374 U.S. 398 (1968) and *Hobbie v. Unemployment App. Commission of Fla*, 480 U.S. 136 (1987) – applies only: (i) where the government creates, by statute, categorical exemptions for individuals with a secular objection to a law, but not for individuals with a religious objection or, (ii) where evidence of overt discrimination against religious beliefs is present. (*See Fraternal Order of the Police, Newark Lodge v. City of Newark*, 170 F.3d 359, 364-65 (3d. Cir. 1999) [explaining same].)

Thus, for example, in *Church of Lukumi Babalu Aye v. City of Hialeah* the ordinance prohibiting the "ritualistic slaughter of animals" exempted secular hunting and fishing. The ordinance devalued "religious" slaughter by judging it to be "unnecessary." (508 U.S. 520, 537-38 (1993); *Fraternal Order*, 170 F.3d at 364-65.) It was this categorical exemption, coupled with extensive evidence of discrimination, that led the United States Supreme Court to impose strict scrutiny review on the challenged ordinance. (*City of Hialeah,* 508 U.S. at 537-38.)

Unlike the unemployment cases, and unlike the ordinance in *City of Hialeah*, the City's conditional use permit requirement simply has nothing to do with evaluating the religious motivations of applicants. Moreover, the City's zoning ordinance is neutral, generally applicable, and contains absolutely ***no exceptions*** to its terms which allow the City to "evaluate" the religious motivations of the

applicant.[2] Accordingly, it lacks any of the coercive or discriminatory characteristics of the statutes and ordinances at issue in *Sherbert*, *Hobbie*, and *City of Hialeah*, and thus cannot be said to be subject to the so-called "individualized exemptions test."

The City's use permit process does not constitute a system of "individualized exemptions" for an additional reason. *Sherbert's* general rule is that "in circumstances in which individualized exemptions from a general requirement are available, the government 'may not refuse to extend that system to cases of 'religious hardship' without compelling reason.'" (*City of Hialeah*, 508 U.S. at 537.) Here, the City's conditional use permit application process contains no exemptions; rather it applies an existing process to all applicants seeking a conditionally permitted use, regardless of their secular or religious nature.

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[2] In *City of Boerne v. Flores*, 521 U.S. 507 (1997), the Supreme Court indicated quite strongly that zoning laws are "generally applicable":

> It is a reality of the modern regulatory state that numerous state laws, such as the zoning regulations at issue here, impose a substantial burden on a large class of individuals. When the exercise of religion has been burdened in an incidental way by a law of general application, it does not follow that the persons have been burdened any more than other citizens, let alone burdened because of their religious beliefs.

(*Boerne*, 521 U.S. at 535.) The Ninth Circuit has recognized *Boerne* in reaching the same conclusion. (*See Miller v. Reed*, 176 F.3d 1202, 1207 (9th Cir. 1999); *Thomas v. Anchorage Equal Rights Comm'n,* 165 F.3d 692, 700 n. 6 (9th Cir. 1999), vacated on different grounds in 220 F.3d 1134, 1142.)

Further, even if the City's use permit procedure were a system of "individualized exemptions" as defined by Free Exercise jurisprudence, there is simply no indication that the City "has refuse[d] to extend that system to cases of religious hardship," thereby invoking the compelling interest test. (*City of Hialeah*, 508 U.S. at 537; *Civil Liberties for Urban Believers v. City of Chicago*, 342 F.3d 752, 764 (7th Cir., 2003) ["no person, nor any nonconforming land use, is exempt from the procedural system in place for Special Use [permitting] specifically, or the [Chicago Zoning Ordinance] generally"].)

Simply stated, it is ***not*** the law of this nation that the "individualized exemptions test" applies every time a local agency exercises its legislative discretion to grant or deny a permit application affecting a religious institution. Such a rule – in tandem with the broad interpretation of "substantial burden on religious exercise" also advanced by ECC and accepted by the District Court below – would result in "strict scrutiny" being applied ***in every zoning case involving a religious institution.***

This would effectively "immunize" religious institutions from local government zoning decisions every time the legislative body was authorized to make a legislative decision in the zoning context. Such a drastic result has no support in either logic or law, runs directly contrary to any notions of the separation of powers doctrine, and has been directly repudiated by both the courts

and RLUIPA's own legislative history. (*See Hale O Kaula v. Maui Planning Commission,* 229 F.Supp.2d 1056, 1070 (D. Haw. 2002)[rejecting interpretation of RLUIPA that effectively "would exempt religious institutions from all zoning laws and this, according to RLUIPA's legislative history, clearly was not the intent of RLUIPA."]; 146 Cong.Rec. S7774 at S7775 ["The General Rule does not exempt religious uses from land use regulation"], S7776 ["This Act does not provide religious institutions with immunity from land use regulation, nor does it relieve religious institutions from applying for variances, special permits or exceptions, hardship approval, or other relief provisions in land use regulations, where available without discrimination or unfair delay."]; *see also Messiah Baptist Church v. County of Jefferson*, 859 F. 2d 820, 824-26 (10th Cir. 1988).)

B. To Be Constitutional, RLUIPA's "Substantial Burden on Religious Exercise" Provision Must Codify Free Exercise Clause Jurisprudence

RLUIPA specifically instructs courts to look to pre-existing judicial decisions when analyzing what constitutes a "substantial burden" on religious exercise:

> 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. S7774, S7776 (emphasis added); *see also Maui Planning Commission*, 229 F.Supp.2d at 1056 [analysis under RLUIPA's "substantial burden" provision is identical to that required by the Free Exercise Clause].)

1. RLUIPA Adopts The Pre-Existing Case Law Definition of "Substantial Burden on Religious Exercise"

The Supreme Court described the substantial burden test as follows:

> Where the state conditions ***receipt*** of an important benefit upon conduct proscribed by a religious faith, or where it denies such a benefit ***because of*** conduct mandated by religious belief, ***thereby putting substantial pressure on an adherent to modify his behavior and to violate his beliefs, a burden upon religion exists***. While the compulsion may be indirect, the infringement upon Free Exercise ***is substantial***.

(*Hobbie*, 480 U.S. 136 (emphasis added).) Under this or similar tests of "substantial burden," courts from throughout the country, including the Ninth Circuit, have held that the denial of a single land use permit for a single site – in the absence of egregious facts not present here – does not amount to a legally cognizable "substantial burden" on religious exercise.

In *Christian Gospel Church* (a case pre-*Smith*), the Ninth Circuit forcefully ***rejected*** claims that are strikingly similar to those made here by ECC. (896 F. 2d at 1221-1224.) There, the plaintiff tried to invalidate San Francisco's denial of a

use permit that would have enabled worship services in a residential zone by alleging the denial "substantially burdened" its religious practices. (*Id.* at 1224.) Upholding the denial and rejecting the church's claims, the court found no substantial burden on the church's religious exercise: "The burden on religious practice is not great when the governmental action, in this case the denial of a use permit, does not restrict current religious practices, but rather prevents a change in religious practice." (*Ibid.*) The court also rejected the notion that the "burdens" of increased expenses of having to locate a different facility or the inconvenience on the plaintiff church's current operations were constitutionally sufficient "substantial burdens" on religious practices:

> The government action in this case did not prevent all home worship. Rather, it involved the denial of a permit to worship in this specific home. The burdens imposed by this action are therefore of convenience and expense, ***requiring appellant to find another home or forum for worship***. We find that the burden on religious practice in this zoning scheme is minimal.

(*Ibid.* (emphasis added)*; see also Jimmy Swaggart Ministries v. Board of Equalization*, 493 U.S. 378, 391 (1990) [economic burdens do not constitute "substantial burdens" on the practice of religion]; *Smith v. Fair Employment and Housing Comm.*, 12 Cal. 4th at 1143, 1172-73 (1996).)

Other federal courts are in accord. In *Messiah Baptist Church*, the city's zoning laws prohibited churches from operating in an agricultural zone. (859 F. 2d

at 821-22.) A church that had purchased approximately 80 acres of land in the agricultural zone applied three separate times for a zone change to build structures for worship services, administrative offices, and educational and recreational purposes. After the city denied each permit application, the church challenged the permit denials arguing the denials burdened its religious practices by precluding any construction on the site. (*Id.* at 823-26.) As in *Christian Gospel Church*, the *Messiah Baptist Church* court held that the three permit denials that precluded the ability of the church to use its own land to construct a church did not substantially burden the free exercise of religion. Relying on *Wisconsin v. Yoder*, 406 U.S. 205 (1972), and *Sherbert v. Verner*, 374 U.S. 398 (1963), the court held:

> The Free Exercise Clause is written in terms of what the government cannot do to the individual, not in terms of what the individual can extract from the government. . . . This is not a case where the church must choose between criminal penalties or foregoing government benefits and its religious beliefs such as apparent in *Yoder*, 406 U.S. at 218, or *Sherbert*, 374 U.S. at 404. . . . In short, there is no infringement on . . . religious freedom. A church has no constitutional right to be free from reasonable zoning regulations nor does a church have a constitutional right to build its house of worship where it pleases.

(*Id.* at 824, 825-26.)

Finally, in *Daytona Rescue Mission v. City of Daytona Beach*, a church sought a "special use permit" to construct a homeless shelter. (885 F. Supp. 1554, 1555-57 (M.D. Fla. 1995).) After the City denied the church's special use permit,

the church sued the City alleging violations of both the Free Exercise Clause and RFRA. (*Id.* at 1555.) The court granted the City's motion for summary judgment holding that "[a]lthough denial of the application for semi-public use prevents [the church] from running a homeless shelter . . . [the church] fail[ed] to show that the City code prevents them from engaging in such conduct anywhere in Daytona Beach. . . ." (*Id.* at 1560 (emphasis added).)

Christian Gospel Church, Messiah Baptist, and Daytona Rescue Mission are among the legions of authority that hold that the inability of a religious institution to use a site for its desired religious purposes, without more, does not in and of itself constitute a "substantial burden" on religious exercise. It is for this reason that the courts have repeatedly rejected claims similar to those being made here by ECC in analogous factual contexts. (*See, e.g., Lakewood, Ohio Congregation of Jehovah's Witnesses, Inc. v. Lakewood*, 699 F. 2d 303, 306 (6th Cir. 1983) [rejecting a church's challenge to a city zoning scheme that prohibited church construction in over 90% of the city holding that because the zoning ordinance "does not pressure the Congregation to abandon its religious beliefs through financial or criminal penalties . . . the Congregation's freedom of religion . . . has not been infringed."]; *Grosz v. City of Miami Beach*, 721 F. 2d 729, 739 (11th Cir. 1984) [citing *Sherbert v. Verner* and upholding the civil prosecution of a rabbi who conducted at-home religious services in violation of the zoning ordinances because

the "burden imposed . . . plainly does not rise to the level of criminal liability, loss of livelihood, or denial of basic income sustaining public welfare benefits"]; *International Church v. Chicago Heights*, 955 F. Supp. 878, 880-81 (N.D. Ill. 1996) ["We do not believe the denial of a permit imposes a substantial burden within the meaning of [RFRA]. It does not impose a forfeiture of a benefit or a penalty because of a religious belief. The impact is not upon the content of religious practices, but only upon where that religion may be practiced."]; *Storm v. Town of Woodstock*, 944 F. Supp. 139, 141-42 (N.D.N.Y. 1996) [rejecting a RFRA challenge to a city parking ordinance because it did not force plaintiff to "either abandon one of the precepts of their religion or choose between following precepts of their religion and forfeiting benefits."]; *Thiry v Carlson*, 887 F. Supp. 1407, 1413 (D.C. Kan 1995) [rejecting RFRA challenge to the condemnation of a religious grave site because "taking the [plaintiffs'] land . . . would undoubtedly impose a burden on [religious] practices. That burden, however, is not so substantial as to give rise to a claim under RFRA."]; *see by analogy Love Church v. Evanston*, 896 F. 2d 1082, 1086 (7th Cir. 1990) [court rejecting a Free Exercise challenge to a zoning law stating "[t]he harsh reality of the marketplace sometimes dictates that certain facilities are not available to those who desire them."].)

2. This Court's Adoption and Application of RLUIPA's "Substantial Burden on Religious Exercise" Provision Is Consistent with Free Exercise Clause Precedents

In its only interpretation of RLUIPA's substantial burden provision to date, this Court adopted a reading of the statute in harmony with the Free Exercise Clause precedents. (*San Jose Christian College*, 360 F.3d 1024.) In *San Jose Christian College*, this Court held that "for a land use regulation to impose a 'substantial burden,' it must be 'oppressive' to a 'significantly great' extent." (*Id.* at 1034.) Applying that test, this Court upheld the denial of a rezoning application even though the City's actions "may have rendered College unable to provide education and/or worship at the Property." (*Id.* at 1035.) The City's regulations did not "render religious exercise effectively impracticable," as the evidence did not show that other sites were unavailable for the plaintiff's proposed use. (*Ibid.*; *see also Civil Liberties for Urban Believers*, 342 F. 3d at 761 ["a land-use regulation that imposes a substantial burden on religious exercise is one that necessarily bears direct, primary, and fundamental responsibility for rendering religious exercise – including the use of real property for the purpose thereof within the regulated jurisdiction generally – effectively impracticable."].)

San Jose Christian College's "effectively impracticable" test ably reconciles "substantial burden" Free Exercise Clause cases with RLUIPA's directive that the "use, building, or conversion" of real property be construed as "religious exercise"

for purposes of a substantial burden analysis. (RLUIPA §8(7)(B).) Thus, this Court's precedents correctly and constitutionally interpret RLUIPA to mandate strict scrutiny review only where land use regulation, by design or by effect, prohibits religious uses throughout a jurisdiction generally. (*San Jose Christian College,* 360 F.3d at 1035; *see also Civil Liberties for Urban Believers*, 342 F. 3d at 761.)

C. ECC's Interpretation Of RLUIPA Renders The Statute Unconstitutional Section 5 Legislation

As interpreted by the District Court, ECC, and ECC's aligned *amici*, the legal standard imposed by RLUIPA on local agency land use decisions is far more stringent than the legal standard imposed under Free Exercise Clause jurisprudence. For example, ECC claims that RLUIPA's proscription against "substantial" burdens on religious exercise is triggered whenever a local government implements a land use regulation involving the "individualized assessment" of the proposed uses for the property involved. By their very nature, ***every*** application for a conditional use permit, special use permit, planned unit development application, and/or variance – and the vast majority of zone change applications (collectively "land use permit applications") – requires an "individualized assessment of the proposed use for the property involved." (RLUIPA §2(a)(2)(C).) If ECC's interpretation is correct, RLUIPA's rule applies in virtually ***every*** instance where

local government evaluates a land use application submitted by a religious organization.

As discussed above, Free Exercise Clause case law forbids "substantial burdens on religious exercise" only when the local agency has in place a system of "individualized exemptions" but nevertheless "refuse[s] to extend that system to cases of 'religious hardship.'" (*Employment Division v. Smith*, 494 U.S. 872, 884 (1990); *see also City of Hialeah*, 508 U.S. at 537 ["[I]n circumstances in which individualized exemptions from a general requirement are available, the government 'may not refuse to extend that system to cases of 'religious hardship' without compelling reason'"].) Land use permit applications rarely fall within the ambit of this "individualized exemptions" test because they typically involve the application of a land use regulation to a set of particular facts and typically do not allow for ***any*** exemption from those standards, much less an exemption that does not extend to cases of religious hardship. (*Civil Liberties for Urban Believers*, 342 F.3d at 764.) Therefore, if ECC is correct in its interpretation of RLUIPA, RLUIPA violates Section 5 of the Fourteenth Amendment for the same reasons RFRA was found unconstitutional in *Boerne*. By attempting to set a new standard of free exercise rights as applied to land use law, RLUIPA attempts a piecemeal amendment of the Constitution. (*See* Marci A. Hamilton, *The Religious Freedom Restoration Act is Unconstitutional, Period*, 1 U. Pa. J. Const. L. 1, 18 (1998); *see*

also Eric A. Posner, Adrian Vermeule, *Legislative Entrenchment: A Reappraisal*, 111 Yale L. J. 1665, 1680 (2002).)

In addition to codifying a shift from "individualized exemptions" to "individualized assessments," ECC and the District Court's reading of RLUIPA results in a second major departure from current Free Exercise Clause jurisprudence by redefining "substantial burden on religious exercise." ECC, relying on the statute's characterization of the "use, building, or conversion of real property for the purpose of religious exercise" as "religious exercise" for purposes of the substantial burden analysis, effectively argues that ***any*** denial of a religious organization's proposed use of property constitutes a "substantial burden."

As noted above, this is a deviation from existing Free Exercise jurisprudence. Free Exercise Clause cases have focused on governmental pressure "on an adherent to modify his behavior and to violate his beliefs" (*Hobbie,* 480 U.S. 136, 141 (1987)), not on the effect a regulation has on the use of property. Utilizing *Hobbie*'s analysis, this Court and other Circuit Courts of Appeal have determined that mere denials of land use permit applications do not substantially burden religious exercise. (*Christian Gospel Church*, 896 F. 2d 1221; *Messiah Baptist Church*, 859 F. 2d 820.)

The net effect of RLUIPA's asserted changes to Free Exercise Clause case law is simple and drastic. Cases that under *Smith* and its progeny would have

dictated "rational basis review" are now subject to "strict scrutiny review" – a standard that is aptly characterized as "strict in theory, but fatal in fact." (*Fullilove v. Klutznick*, 448 U.S. 448, 507, 519 (1980) [Powell, J., concurring, Marshall, J., concurring in the judgment].) Indeed, under ECC's (and its aligned *amici's*) construction, virtually ***every*** denial of a religious applicant's land use application will be subject to strict scrutiny under RLUIPA. Under ECC's interpretation, because local government actions necessarily assess the appropriateness of proposed uses at the proposed sites, such actions will "substantially burden" the "use, building, or conversion of real property for the purpose of religious exercise." Thus, far from merely "codifying" Free Exercise Clause jurisprudence, ECC interprets RLUIPA to effectively strip away all local government authority to regulate land use applications submitted by religious applicants. Because that result is neither congruent nor proportional to the harm that Congress sought to alleviate, ECC's reading of RLUIPA yields an unconstitutional result under Section 5 of the Fourteenth Amendment. (*Boerne*, 521 U.S. at 519.)

Under Section 5, Congress may not regulate the states' regulation of land use unless there is proof that the states have engaged in "widespread and persisting" constitutional violations in the land use context and that the federal law is "congruent and proportional" to those violations. (*Garrett*, 531 U.S. at 365; *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 81 (2000); *Florida Prepaid Postsecondary*

Educ. Expense Bd. v. College Sav. Bank, 527 U.S. 627, 645 (1999); *Alden v. Maine*, 527 U.S. 706, 756 (1999); *Boerne*, 521 U.S. at 519-20, 533-34.) RLUIPA fails both requirements.

1. There Is No Widespread and Persisting Pattern of Constitutional Violations Towards Religious Landowners

For Congress to properly exercise the power to enact a law pursuant to Section 5 of the Fourteenth Amendment, there must be a pattern of "widespread and persisting" constitutional violations by the states. (*Kimel*, 528 U.S. at 81-82; *Garrett*, 531 U.S. at 365; *Boerne*, 521 U.S. at 519-520, 530.) This principle exists to square Congress's Section 5 powers with the Constitution's inherent limits on federalism. (*Boerne*, 521 U.S. at 524.)

The land use anecdotes used to support RLUIPA do not begin to illustrate the sort of widespread and persisting constitutional violations by states and local governments necessary to justify the interpretation of RLUIPA urged by ECC. In fact, there is little, if any, proof that churches have been the target of discrimination by local zoning boards. The record behind RLUIPA simply does not support the claim that there are widespread and persisting constitutional violations by the local and state governments against religious entities. (*See* Marci A. Hamilton, *Federalism and the Public Good: The True Story Behind the Religious Land Use and Institutionalized Persons Act*, 78 Ind. L.J. 311, 324 (2003); Caroline Adams, *2003 Zoning and Planning Law Handbook,* 442-55 (2003) [concluding that, in

context of RLUIPA, Congress's use of its Section 5, Fourteenth Amendment power was not remedial because Congress lacked a sufficient record to demonstrate a pattern of discrimination].) Indeed, in the only neutral land use study of churches and zoning done to date, churches do quite well in the process. (*See* Mark Chaves, William Tsitsos, *Are Congregations Constrained by Government? Empirical Results from the National Congregations Study*, 42 J. Church & St. 335, 337 (2000).)

2. RLUIPA Is Not Congruent and Proportional to Any Evidence of Constitutional Malfeasance

When it examined RFRA's constitutional infirmities, the Supreme Court explained that "[t]here must be a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end. Lacking such a connection, legislation may become substantive in operation and effect." (*Boerne*, 521 U.S. at 519-520, 530.) Section 5 grants Congress the power only to provide remedies congruent and proportional to violations of the rights incorporated in the Fourteenth Amendment, and not to unilaterally enlarge those rights against the states. (*Garrett*, 531 U.S. at 365; *Kimel*, 528 U.S. at 81; *Florida Prepaid*, 527 U.S. at 645-46; *Alden*, 527 U.S. at 756; *Boerne*, 521 U.S. at 519-520, 530, 545-46; Marci A. Hamilton, David Schoenbrod, *The Reaffirmation of Proportionality Analysis Under Section 5 of the Fourteenth Amendment*, 21 Cardozo L. Rev. 469 (Dec. 1999).)

Even if widespread and persisting free exercise violations by local land use lawmakers across the country existed, RLUIPA's resort to strict scrutiny for every instance in which a land use law is applied to a religious landowner is incongruent and disproportional to any problems such landowners are claiming in the land use context. (*Boerne*, 521 U.S. at 530-32.) As such, the interpretation of RLUIPA urged by ECC is not a valid exercise of Congress's power under Section 5 of the Fourteenth Amendment.

IV. CONCLUSION

For the foregoing reasons, this Court should interpret RLUIPA's proscription against substantial burdens on religious exercise as consistent with pre-existing Free Exercise Clause case law or, alternately, find RLUIPA an unconstitutional exercise of Congress' power under Section 5 of the Fourteenth Amendment.

Dated: January 31, 2005

Respectfully submitted

RUTAN & TUCKER, LLP
JOHN A. RAMIREZ
JEFFREY T. MELCHING

By: _____
Jeffrey T. Melching
Attorneys for *Amici Curiae* League of California Cities, National League of Cities, International Municipal Lawyers Association, and American Planning Association

CERTIFICATE OF COMPLIANCE

I certify that pursuant to Federal Rule of Appellate Procedure Rule 32(a)(7)(C) and Ninth Circuit Rule 32-1, the foregoing Brief is proportionally spaced, has a typeface of 14 points or more and contains 5542 words, as calculated by the word-processing system used to prepare the brief, which was Word, version 2000.

DATED: January 31, 2005

Jeffrey T. Melching

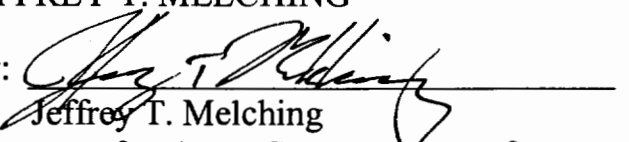
STATEMENT OF RELATED CASE

The following case currently on appeal before this Court raise some issues that are the same as or closely related to the issues on appeal in the instant case: *Guru Nanak Sikh Society of Yuba City v. County of Sutter,* Ninth Circuit Court of Appeals Docket Number 03-17343. In the *Guru Nanak Sikh Society of Yuba City* matter, the appellants challenge the constitutionality of RLUIPA under, *inter alia,* Section 5 of the Fourteenth Amendment. The bases for that challenge are similar to those advanced in the current matter.

Dated: January 31, 2005

Respectfully submitted

RUTAN & TUCKER, LLP
JOHN A. RAMIREZ
JEFFREY T. MELCHING

By: 
Jeffrey T. Melching
Attorneys for *Amici Curiae* League of California Cities, National League of Cities, International Municipal Lawyers Association, and American Planning Association

PROOF OF SERVICE BY MAIL

STATE OF CALIFORNIA, COUNTY OF ORANGE

I am employed by the law office of Rutan & Tucker, LLP in the County of Orange, State of California. I am over the age of 18 and not a party to the within action. My business address is 611 Anton Boulevard, Fourteenth Floor, Costa Mesa, California 92626-1931.

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Valerie Bloom
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SERVICE LIST

Edwin J. Richards
Paul F. Donsbach
Terry S. Park
Kutak Rock LLP
18201 Von Karman Ave., Suite 1100
Irvine, CA 92612-1077

Attorneys for Defendants-Appellees, City of Lake Elsinore, et al.

Brad Dacus
Pacific Justice Institute
9851 Horn Road, Suite 115
Sacramento, CA 95827

Attorneys for Plaintiff and Appellant, Elsinore Christian Center

Roman P. Storzer, Esq.
Derek L. Gaubatz, Esq.
Anthony Picarello, Esq.\
The Becket Fund for Religious Liberty
1350 Connecticut Ave. N.W., Suite 605
Washington, DC 20036

Attorneys for Plaintiffs and Appellants, Elsinore Christian Center and Gary A. Holmes

Robert H. Tyler, Esq.
Alliance Defense Fund
38760 Sky Canyon Drive, Suite B
Murrieta, CA 92563

Attorneys for Plaintiffs and Appellants, Elsinore Christian Center and Gary A. Holmes

David H. Mann, Esq.
Barbara Leibold, Esq.
Van Blarcom, Leibold, McClendon & Mann
23422 Mill reek Drive, Suite 105
Laguna Hills, CA 92653

Co-counsel for Defendants and Appellees, City of Lake Elsinore, Redevelopment Agency of the City of Lake Elsinore, Kevin Pape, Genie Kelly, Pamela Brinley, Daniel Metze and Robert A. Schiffner

Lowell V. Sturgill, Jr., Esq.
Mark B. Stern, Esq.
Joshua Z. Rabinovitz, Esq.
United States Department of Justice
601 D Street, NW, Civil Division Room 9140
Washington, DC 20530-0001

Attorneys for United States of America