No. 08-1438

In The
Supreme Court of the United States

HARVEY LEROY SOSSAMON, III,

Petitioner,

v.

TEXAS, et al.,

Respondents.

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

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

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INTEREST OF *AMICUS CURIAE*[1]

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

[1] All parties of record consented to the filing of amicus briefs in support of either or neither party. Amicus states that no portion of this brief was authored by counsel for a party and that no person or entity other than amicus or its counsel made a monetary contribution to the preparation or submission of this brief.

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

SUMMARY OF THE ARGUMENT

The Religious Land Use and Institutionalized Persons Act ("RLUIPA") provides important protections that cannot effectively be enforced without appropriate relief that includes damages. If RLUIPA does not provide for damages from a State that imposes substantial burdens on institutionalized persons' free exercise of religion, and if RLUIPA does not provide for damages when States use their powers to exclude, burden, and discriminate against religious assemblies in order to favor tax-revenue-generating organizations, then RLUIPA has no teeth.

To prevent RLUIPA and other federal nondiscrimination statutes from being ineffective in stopping discrimination, the Civil Rights Remedies Equalization Act ("CRREA") abrogates or waives State immunity under RLUIPA. RLUIPA follows the same nondiscrimination language that is used in other federal nondiscrimination statutes set forth in the CRREA.

With State sovereign immunity waived or abrogated through CRREA, a private plaintiff may recover monetary damages through RLUIPA's provision of "appropriate relief," a term of art including monetary damages. In concluding that RLUIPA cannot provide for monetary damages, the Fifth

Circuit incorrectly ignored both the plain language on RLUIPA, as the Fifth Circuit itself acknowledges, and the U.S. Department of Justice's interpretation of RLUIPA, despite the Attorney General's having been given authority to enforce compliance with RLUIPA.

RLUIPA also provides for recovery of nominal damages, which are essential in that they allow for religious rights to be enforced, even when no damages are apparent. Nominal damages are the symbol of scrupulous observation owed to nondiscrimination statutes, and the Court must hold the States accountable by honoring and preserving claims for such violations. Failing to do so opens the door to the unwanted upshot of allowing a State to violate civil rights and escape legal responsibility unscathed. Nominal damages also discourage governments who want to exclude tax-exempt religious associations from high-tax areas in favor of tax-revenue-generating for-profit organizations from using legal maneuvering to mercilessly litigate against the religious association, draining the association of funds, and then simply "seeing the light" and stopping their discrimination against the religious association, without any penalty to themselves or risk of judgment, but with the "problem" religious association now lacking the funds to continue operation, having been drained by the government.

The ability to recover damages under RLUIPA is vital to the prevention of the discriminations and unfair burdens placed upon religious persons and organizations by the State and local governments.

Without this protection, institutionalized persons and religious associations are defended by a cannon for which no ball exists.

ARGUMENT

I. The Spending Clause and the Civil Rights Remedies Equalization Act together abrogate a State's Eleventh Amendment immunity for cases under RLUIPA.

Sovereign immunity does not bar private plaintiffs from recovering official-capacity damages pursuant to the "appropriate remedy" provision of the Religious Land Use and Institutionalized Persons Act ("RLUIPA"). The Civil Rights Remedies Equalization Act ("CRREA") abolishes the Eleventh Amendment's preclusion of official-capacity damages for state violations of a federal nondiscrimination statute.[2] 42 U.S.C. § 2000d-7.

When it enacted RLUIPA, Congress constructed a defense shield over America's religious institutions, safeguarding them from antagonistic zoning or landmarking decisions by State and local governments.

[2] The CRREA has features of both waiver and abrogation of sovereign immunity: State sovereign immunity is waived as a condition of accepting federal monies, yet Congress has also abolished immunity pursuant to its Fourteenth Amendment § 5 power. Regardless of the mechanism employed by the CRREA, the end result is the same: recovery of official-capacity damages.

Unlike the sweeping language of its predecessor, the Religious Freedom Restoration Act ("RFRA"), which broadly required religious accommodation in nearly every aspect of the public sphere, RLUIPA focuses on two distinct areas: (1) barring governments from placing substantial burdens on institutionalized persons' free exercise of religion and (2) prohibiting discrimination against religious institutions in the context of zoning and land use. 42 U.S.C. § 2000cc et seq. (2000 ed.); *see also City of Boerne v. Flores,* 512 U.S. 507 (1997) (striking down RFRA as applied to state and local governments). Without a remedial provision, however, the practical effect of RLUIPA would be negated. State and local governments could drag out zoning and landmarking litigation, exhausting the resources of religious assemblies, knowing that they would be subjected to no financial repercussions. Accordingly, Congress armed harmed persons by inserting into RLUIPA a provision making "appropriate relief" available to those targeted by such discriminatory practices. 42 U.S.C. § 2000cc-2. It would be counterintuitive for Congress to try to equalize the playing field between government authorities and religious assemblies only to hamstring religious assemblies. To prevent this crippling of religious assemblies' abilities to defend themselves from discriminatory government actions, Congress allowed for the recovery of "appropriate relief," including injunctive, declaratory, and monetary relief, by the religious assemblies. The Fifth Circuit's opinion below abolishes official-capacity damages,

disarming religious assemblies and crippling their capacity to repel State-sanctioned discrimination.

A. RLUIPA is constitutional under the Spending Clause.

Courts have identified three constitutional sources of power for RLUIPA: the Commerce Clause, the enforcement powers of § 5 of the Fourteenth Amendment, and the Spending Clause. *Westchester Day School v. Village of Mamaroneck*, 504 F.3d 338, 353 (2nd Cir. 2007) ("Congress alternatively grounded RLUIPA, depending on the facts of a particular case, in the Spending Clause, the Commerce Clause, and § 5 of the Fourteenth Amendment."). Whether RLUIPA is valid under the Commerce Clause is irrelevant when considering the availability of official-capacity damages; an act passed pursuant to the Commerce Clause does *not* permit Congress to abrogate Eleventh Amendment immunity. *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 72-73 (1996) ("The Eleventh Amendment restricts the judicial power under Article III, and Article I [the location of the Commerce Clause] cannot be used to circumvent the constitutional limitations placed upon federal jurisdiction.").

The Spending Clause is one constitutional source of power for RLUIPA. To constitutionally exercise its Spending Clause power, Congress must act within the guidelines set forth by the Supreme Court. *See South Dakota v. Dole*, 483 U.S. 203 (1987). Every

circuit to consider the constitutionality of RLUIPA validated it under at least the Spending Clause. *Sossamon v. Lone Star State of Tex.*, 560 F.3d 316, 329 (5th Cir. 2009) ("[W]e agree with the Eleventh Circuit's conclusion (and the implicit conclusion of the other circuits by their uniform choice to select the Spending Clause as the most natural source of congressional authority to pass RLUIPA) . . . "). Official-capacity damages may be recovered when the state, by accepting federal funds, waives its sovereign immunity. Such waiver by the state must be "unequivocally expressed in statutory text . . . and must extend unambiguously to such monetary claims." *Lane v. Pena,* 518 U.S. 187, 192 (1996). Since Eleventh Amendment immunity does not extend to municipalities, the requirement that there be waiver of abrogation of sovereign immunity is only true when the state has violated an institutionalized person's or a religious assembly's rights under RLUIPA. *Northern Ins. Co. v. Chatham County,* 547 U.S. 189, 193 (2006) ("[O]nly States and arms of the State possess immunity from suits authorized by federal law. Accordingly, this Court has repeatedly refused to extend sovereign immunity to counties.") (internal cites omitted). While RLUIPA has a valid constitutional grant of authority under the Spending Clause, a statute supported by the Spending Clause alone cannot abrogate a State's sovereign immunity. To prevent this infirmity, Congress relied upon the CRREA.

B. RLUIPA is a federal nondiscrimination statute, and a State may not use sovereign immunity to avoid liability for violating RLUIPA.

The CRREA expressly abrogated sovereign immunity for recipients of federal funding for violations of federal nondiscrimination statutes. 42 U.S.C. § 2000d-7(a)(1). Because RLUIPA forbids discrimination against religious institutions in land use and zoning matters, and because States are recipients of federal funding, CRREA abrogates Eleventh Amendment immunity, and courts may not bar monetary recovery for violations of RLUIPA. CRREA, in relevant part, reads:

> *A State shall not be immune under the Eleventh Amendment* of the Constitution of the United States from suit in Federal court for a violation of section 504 of the Rehabilitation Act of 1973 [29 U.S.C.A. § 794], title IX of the Education Amendments of 1972 [20 U.S.C.A. § 1681 et seq.], the Age Discrimination Act of 1975 [42 U.S.C.A. § 6101 et seq.], title VI of the Civil Rights Act of 1964 [42 U.S.C.A. § 2000d et seq.], or *the provisions of any other Federal statute prohibiting discrimination by recipients of Federal financial assistance.*

42 U.S.C. § 2000d-7(a)(1) (emphasis added). The Fourth Circuit explained that "to fit within the CRREA's sovereign immunity waiver pursuant to its catch-all provision . . . RLUIPA must be like the statutes expressly listed [the Rehabilitation Act of

1973, title IX of the Education Amendments of 1972, the Age Discrimination Act of 1975, title VI of the Civil Rights Act of 1964]." *Madison v. Virginia,* 474 F.3d 118, 133 (4th Cir. 2006). Thus, the Fourth Circuit reasoned, for CRREA's catch-all provision to apply to RLUIPA, the Act must, "at a minimum[,] be aimed at discrimination" in the same way that the enumerated statutes in CRREA are aimed at discrimination. *Id.* RLUIPA passes this test. In addition to RLUIPA's limitation on the government's placing a substantial burden on institutionalized persons and religious assemblies and RLUIPA's preventing governments that want to keep non-tax-revenue-producing organizations out of their jurisdictions from excluding religious associations or unreasonably limiting the associations, RLUIPA also requires that religious associations be treated on equal terms with revenue-producing organizations and bans discrimination against religious associations.

The evidence of legislative purpose shows that RLUIPA is a nondiscrimination statute. Its Senate co-author stated that RLUIPA "prohibits discrimination against religious assemblies and institutions. . . ." 146 Cong. Rec. 14,284 (2000) (statement of Sen. Hatch). Excerpts from the Congressional Record provide evidence that Congress recognized the pervasive problem of discrimination against religious assemblies and crafted RLUIPA to prevent and remedy such discrimination:

> [W]ith respect to land use regulation, the bill specifically prohibits various forms of religious *discrimination* and exclusion.

146 Cong. Rec. 16,698 (2000) (emphasis added).

> This *discrimination* against religious [land] uses is a nationwide problem.

Id. at 16,699 (emphasis added).

> Sections 2(b)(1) and (2) *prohibit various forms of discrimination* against or among religious land uses.

Id. (emphasis added).

> The land use section of the legislation *would prohibit discrimination* against or among religious assemblies and institutions.

Id. at 14,612 (emphasis added).

> In addition, *the land use section applies to cases of discrimination* and exclusion to cases in which land use authorities can make individualized assessments of proposed land uses.

Id. (emphasis added). There is no room for uncertainty as to the nondiscrimination nature of RLUIPA; not treating RLUIPA as a nondiscrimination measure contravenes the text of RLUIPA and the evidence of legislative purpose in passing RLUIPA.

As further evidence of the nondiscrimination nature of RLUIPA, it bears noting that RLUIPA's language mirrors the language of the acts enumerated in

the CRREA. RLUIPA explicitly requires religious assemblies to be treated on equal terms with non-religious institutions and protects religious institutions from State discrimination. This tracks closely with the statutes enumerated in the CRREA:

> No otherwise qualified individual with a disability in the United States . . . shall, solely by reason of his or her disability . . . *be subjected to discrimination* under any program or activity receiving Federal financial assistance.

29 U.S.C. § 794. ("Rehabilitation Act of 1973") (emphasis added).

> No person in the United States shall, on the basis of sex . . . *be subjected to discrimination* under any education program or activity receiving Federal financial assistance.

20 U.S.C. § 1681. ("Title IX of the Education Amendments of 1972") (emphasis added).

> No person in the United States shall, on the basis of age . . . *be subjected to discrimination* under any program or activity receiving Federal financial assistance.

42 U.S.C. § 6102. ("The Age Discrimination Act of 1975") (emphasis added).

> No person in the United States shall, on the ground of race, color, or national origin . . . *be subjected to discrimination* under any

> program or activity receiving Federal financial assistance.

42 U.S.C. § 2000d. ("Title VI of the Civil Rights Act of 1964") (emphasis added).

CRREA unambiguously places States on notice that they will not be immune to suits for violations of nondiscrimination statutes. The statute further notifies States that a plaintiff has available the same remedies against the State as he or she would have against any other private or public entity. CRREA provides:

> In a suit against a State for a violation of [a nondiscrimination statute], remedies (including remedies both at law and in equity) are available for such a violation to the same extent as such remedies are available for such a violation in the suit against any public or private entity other than a State.

42 U.S.C. § 2000d-7(a)(2).

CRREA abolishes sovereign immunity for violations of federal statutes prohibiting discrimination by recipients of federal funding. CRREA's catch-all provision encompasses RLUIPA's barring discrimination by the State. Thus, monetary relief may not be denied to private plaintiffs for RLUIPA violations. The Fifth Circuit's analysis left religious assemblies precariously defenseless to stonewalling decisions by government authorities.

II. "Appropriate relief" contemplates monetary damages.

RLUIPA allows for the recovery of "appropriate relief," a term of art intended to encompass monetary damages. *See, e.g., Franklin v. Gwinnett County Pub. Sch.,* 503 U.S. 60 (1991); *School Comm. of Burlington v. Dept. of Educ.,* 471 U.S. 359, 369 (1996); *see also Smith v. Allen*, 502 F.3d 1255, 1275 (11th Cir. 2007) ("[W]e conclude that 'appropriate relief' . . . includes an award for monetary damages . . . "). As this Court stated, "In the absence of contrary indication, we assume that when a statute uses . . . a term [of art], Congress intended it to have its established meaning." *McDermott v. Wilander*, 498 U.S. 337, 342 (1991). Even the Fifth Circuit recognized that the "plain language of RLUIPA . . . seems to contemplate such [monetary] relief," *Sossamon,* 560 F.3d at 327, and that "RLUIPA is clear enough to create a right for damages on the cause of action analysis." *Id.* at 331. To reject that "plain language" is problematic. *See United States v. Clintwood Elkhorn Mining Co.,* 128 S. Ct. 1511, 1518 (2008) (stating that the "strong presumption that the plain language of the statute expresses congressional intent is rebutted only in rare and exceptional circumstances." (internal quotation marks omitted); *Carcieri v. Salazar,* 129 S. Ct. 1058, 1066-67 (2009) ("[C]ourts must presume that a legislature says in a statute what it means and means in a statute what it says there."); *Jimenez v. Quartermen,* 129 S. Ct. 681, 685 (2009) ("It is well

established that, when the statutory language is plain, we must enforce it according to its terms.").

Additionally, the Department of Justice ("DOJ") has interpreted RLUIPA to allow for the recovery of damages. U.S. Department of Justice Civil Rights Division, *A Guide to Federal Religious Land Use Protections,* http://www.usdoj.gov/crt/religdisc/rluipa_guide.pdf (last visited August 9, 2010) ("Religious institutions and individuals whose rights under RLUIPA are violated may bring a private civil action for injunctive relief and *damages."*) (emphasis added). The DOJ's interpretation should be given considerable weight given that, in the text of RLUIPA itself, Congress provided the Attorney General express authority to "enforce compliance with this Act." 42 U.S.C. § 2000cc-2(f) (2000). When, as here, the terms of a statute contain some alleged ambiguity, this Court has determined that the statutory interpretation of the government agency authorized to enforce the statute should be given due deference. *See, e.g., I.N.S. v. Aguirre-Aguirre,* 526 U.S. 415 (1999) (finding that the court of appeals should have given appropriate deference to the statutory construction of the Attorney General regarding a statute that he was charged with enforcing).

III. The Eleventh Amendment does not provide immunity for nominal damages.

Religious institutions, such as synagogues, churches, and mosques, usually represent a non-revenue producing land use. With cities and counties across the United States experiencing significant declines in revenue, many would prefer to grant a development permit to a revenue producing shopping mall than to a synagogue. Without the protections provided by Congress in RLUIPA, religious institutions have inequitable bargaining power with municipalities compared to Home Depot, the AMC movie theater, or a Hilton hotel. Commercial development represents revenue. To many bottom-line oriented governing bodies, religious institutions represent wasted space and lost revenue and jobs.

A. Nominal damages claims are essential to protect religious freedom under RLUIPA.

Assuming that the Eleventh Amendment protects states from damages under RLUIPA, the question remains whether that protection bars nominal damages. The availability of nominal damages from the State, when the State is cloaked in Eleventh Amendment immunity, is unclear. The Fifth Circuit opinion below's outright bar on damages may be read to preclude even nominal damages. Such a bar creates the undesirable consequence of allowing the State to wholly escape litigation for RLUIPA violations. The premise for awarding nominal damages is

that it makes the "deprivation of such rights actionable . . . without proof of actual injury," ensuring "that those rights be scrupulously observed." *Carey v. Piphus*, 435 U.S. 247 (1978). The Supreme Court, however, has never directly addressed the interaction between State sovereign immunity and nominal damages and has only pronounced the general proposition that if Eleventh Amendment immunity is neither abrogated nor waived, then "a State cannot be sued directly in its own name regardless of the relief sought." *Kentucky v. Graham*, 473 U.S. 159, 167 (1985) (emphasis added); *Hess v. Port Authority Trans-Hudson Corp.*, 513 U.S. 30, 60 (1994) (O'Connor, J., dissenting) ("We have long held that the Eleventh Amendment bars suits against States and state entities regardless of the nature of relief requested.") (emphasis added).

Lower court decisions, in contrast to those in *Kentucky* and *Hess*, have found no abrogation or waiver of sovereign immunity, but still have permitted nominal damages; and, in RLUIPA contexts, courts have awarded nominal damages in cases in which the court found that RLUIPA's money damage claims were equally barred by both government immunity and the Prison Litigation Reform Act ("PLRA"), which bars a prisoner from bringing a federal suit for monetary damages without the showing of a physical injury. *See Mayfield v. Texas Dept. of Criminal Justice*, 529 F.3d 599, 606 (5th Cir. 2008); 42 U.S.C. § 1997(e). The Second, Third, Seventh, Ninth, Tenth, and Eleventh Circuits have

held that despite the PLRA's preclusion of monetary damages, a prisoner may recover nominal damages for the vindication of a constitutional violation. *Smith v. Allen*, 502 F.3d 1255, 1271 (11th Cir. 2007); *Hughes v. Lott*, 350 F.3d 1157, 1162 (11th Cir. 2003). It bears noting that even though the Eleventh Circuit recognized the availability of monetary damages for RLUIPA violations, the Eleventh Circuit limited State liability to only *nominal damages* based on the PLRA's directive that monetary damages not be awarded to prisoners for nonphysical injuries. *Smith*, 502 F.3d at 1271 (a *prisoner plaintiff's* right to monetary relief is severely circumscribed by the terms of the Prisoner Litigation Reform Act.").

Compelling reasons exist for this Court to make nominal damages available under RLUIPA. A plaintiff's case may be mooted by a compliant defendant if he or she does not have the option to pursue nominal damages. *See Sossamon*, 560 F.3d at 324 ("If defendants could eject plaintiffs from court on the eve of judgment, then resume the complained of activity without fear of flouting the mandate of a court, plaintiffs would face the hassle, expense, and injustice of constantly relitigating . . . "); *see also Boxer X v. Donald*, 169 Fed. Appx. 555, 559 (11th Cir. 2006), *citing C & C Prods., Inc. v. Messick*, 700 F.2d 635, 636 (11th Cir. 1983). With no recovery of nominal damages possible, States wield the power to moot a claim under RLUIPA simply by voluntarily ceasing the challenged practice. Nominal damages are the symbol of scrupulous observation owed to

nondiscrimination statutes, and the Court must hold the States accountable by honoring and preserving claims for such violations. Failing to do so opens the door to the unwanted upshot of allowing a State to violate civil rights and escape legal responsibility unscathed.

B. The Fifth Circuit's opinion allows cities and counties to easily manipulate the legal system to financially eliminate religious institutions from the city or county limits.

The years of hearings leading up to passage of RLUIPA revealed that legislative action to enforce the free exercise of religion in the area of land use regulation was imperative. The record of the hearings compiled "massive evidence" that the freedom to assemble and worship is "frequently" violated by governing bodies nationwide. 146 Cong. Rec. 16,698 (2000) (joint statement of Sen. Hatch and Sen. Kennedy). This is particularly true for cases involving "new, small, or unfamiliar churches," "especially in cases of black churches and Jewish shuls and synagogues." *Id*.

For example, an Orthodox Jewish rabbi in Miami was "threatened with criminal prosecution" for leading prayers in a converted garage in a single family residential area. H.R. Rep. No. 106-219, at 10 (1999). The town of Wayne, New Jersey, "denied a permit to a black church, after one official opposed

the permit on the ground that the city would soon look like Patterson, a predominately African-American city nearby." *Id*. at 23 n.111. A Mormon congregation in Tennessee was prohibited from using as a church a former church building of another faith because the city determined that allowing it to do so was not "in the best interests" of the city. *Id*. at 22. Other churches requested permits to use a flower shop, a bank, and a theater as places of worship. In each case, the governing body responded by spot zoning each parcel of land into a "tiny manufacturing zone" in which a church was a non-permissible use. *Id*. at 21-22.

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

Such discrimination and disparate treatment is not limited to small churches and minority religions. The record also references a 1997 survey by the

Presbyterian Church (U.S.A.) – the largest Presbyterian body in the United States – of its 11,328 congregations. The survey focused on land use issues. Though a mainline Protestant denomination, the survey revealed at least 15% of the congregations had experienced significant conflict over a land use permit and/or an increase in the cost of their projects of more than 10% because of conditions imposed on the church by government. H.R. Rep. No. 106-219, at 21; Douglas Laycock, *State RFRAs and Land Use Regulation*, 32 U.C. Davis L. Rev. 755, 772-73 (1999). These statistics point to discriminatory actions costing untold dollars in increased costs and delays to churches simply because they are churches.

The record further reveals that discriminatory and biased actions against churches by many governing bodies are nothing short of flagrant. In Portland, Oregon, a city official ordered a Methodist church to limit attendance at its worship service to 70 persons when the church's facility could accommodate 500. 146 Cong. Rec. 14,285 (2000). Arapahoe County, Colorado, "imposed numerical limits on the number of students who could enroll in religious schools" and imposed similar restrictions "on the size of congregations of various churches" as a means to "limit[ ] their growth." *Id*. Officials in Douglas County, Colorado, actually proposed limitations on the operational hours of a church in the same way they might impose limitations on taverns. *Id*. The City of Los Angeles prohibited fifty elderly Jews from meeting for prayer in a house in the residential

neighborhood of Hancock Park. The city allowed other places for secular assemblies in the neighborhood, such as schools and recreational uses, but "refused this use because Hancock Park had no place of worship and the City did not want to create a precedent for one." H.R. Rep. No. 106-219, at 22. The City of Richmond "required places of worship wishing to feed more than thirty hungry and homeless people to apply for a conditional use permit at the cost of $1,000, plus $100 per acre of affected property." 146 Cong. Rec. 14,285 (2000). That particular ordinance "regulated only places of worship, not other institutions, and only eating by persons who are hungry and homeless." *Id*. These illustrations represent only a small fraction of the violations compiled in the legislative record. The record similarly contains dozens of additional examples of similar land use discrimination against churches and religious bodies, violations that represent the mere "tip of the iceberg." Laycock at 773.

The Fifth Circuit's restrictive reading of the relief available under RLUIPA presents a significant problem for churches and other religious organizations. As the legislative record reveals, prior to the enactment of RLUIPA, churches were the victims of increasing discrimination in the area of zoning and other land use regulation. Such free exercise violations cause extensive monetary damages and delay to churches and religious bodies. *See, e.g.,* 146 Cong. Rec. 19,125 (2000) (a Muslim mosque estimated $200,000 to cover its legal fees and relocation to another town after it

was denied use of a building); 146 Cong. Rec. 14,285–86 (2000) (a Chicago church spent $5,000 and wasted a year seeking a special use permit); H.R. Rep. No. 106-219, at 21 (a comprehensive survey of thousands of churches revealed an increase in the cost of projects by more than 10% due to conditions imposed on the churches by state and local governments).

While RLUIPA changed the law, the sentiment of these governing bodies remains the same. Religious institutions still face intentional discrimination. Such hostility to religion is more prevalent in some geographic areas than others. In the arena of land use, there are strong commercial interests at stake. Religious institutions are routinely seen as obstacles to local commercial progress, even in the most religiously tolerant cities and towns. Religious institutions, by virtue of their IRS 501(c)(3) statuses, are precluded from advocating for or against those who seek elective office. Their commercial competitors are not so restrained. The political and economic disadvantages of religious institutions further compound their inability to negotiate with city officials to the same extent as a promising commercial enterprise that produces jobs and tax revenues. Thus, the incentive of cities and counties to try to wear down a church through litigation is alluring. RLUIPA significantly reduced the incentive and provided churches the much needed bargaining equalizer to reach fair decisions regarding land use.

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

A savvy city could easily deny a synagogue's permit to build for reasons that violate RLUIPA. When the synagogue sues, the city could deploy a

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

CONCLUSION

The Fifth Circuit's ruling in this case undermines the protections that Congress established not just for institutionalized persons but also for nearly every religious assembly in the United States. The Court should reverse the judgment of the Fifth Circuit.

Respectfully submitted,

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