No. 08-1438

IN THE
# Supreme Court of the United States

HARVEY LEROY SOSSAMON, III,
*Petitioner*,

v.

TEXAS, ET AL.,
*Respondent*.

On Writ Of Certiorari
To The United States Court of Appeals
for the Fifth Circuit

## BRIEF FOR THE RUTHERFORD INSTITUTE AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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## QUESTION PRESENTED

Whether an individual may sue a state or state official in his official capacity for damages for violations of the Religious Land Use and Institutionalized Persons Act of 2000, 42 U.S.C. §§ 2000cc *et seq*.

## TABLE OF CONTENTS

**Page**

**TABLE OF CONTENTS—Continued**

## TABLE OF AUTHORITIES

**Page(s)**

**Cases**

**TABLE OF AUTHORITIES—Continued**

**Page(s)**

**TABLE OF AUTHORITIES—Continued**

**Page(s)**

**TABLE OF AUTHORITIES—Continued**

**Page(s)**

**TABLE OF AUTHORITIES—Continued**

**Page(s)**



**Constitutional Provisions**



**Statutes**

**TABLE OF AUTHORITIES—Continued**

**Page(s)**



**Other Authorities**

## INTEREST OF *AMICUS CURIAE*[1]

The Rutherford Institute is an international nonprofit civil liberties organization headquartered in Charlottesville, Virginia. Founded in 1982 by its President, John W. Whitehead, the Institute specializes in providing legal representation without charge to individuals whose civil liberties are threatened or infringed and in educating the public about constitutional and human rights issues. The Rutherford Institute is interested in the instant case because the Institute was one of the moving forces behind the drafting and enactment of the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA), 42 U.S.C. § 2000cc *et seq.*, and has and continues to represent individuals, religious assemblies and institutions that are the intended beneficiaries of RLUIPA. The Rutherford Institute fears that the broad ruling of the United States Court of Appeals for the Fifth Circuit will undermine the salutary purposes of RLUIPA and eviscerate the protection it was meant to provide to religious liberty.

## INTRODUCTION AND SUMMARY OF ARGUMENT

In the decision below, the Fifth Circuit *sua sponte* concluded that RLUIPA was not enacted pursuant to Congress's Commerce Clause or Section 5 of the Fourteenth Amendment ("Enforcement Clause")

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1 This brief was not authored, in whole or in part, by counsel for either party, and no person or entity other than *amicus curiae* and its counsel contributed monetarily to its preparation or submission. The parties have consented to the filing of this brief, and copies of their letters of consent have been lodged with the Clerk of the Court.

powers. *Sossamon v. Texas*, 560 F.3d 316, 328 (5th Cir. 2009) ("RLUIPA was enacted pursuant to Congress's Spending Clause power, not pursuant to the Section 5 power of the Fourteenth Amendment"); *id.* at 328 n.34 ("[W]e agree with the Eleventh Circuit's conclusion" that "RLUIPA is Spending, not Commerce, Clause legislation[.]"). In fact, Congress expressly enacted RLUIPA pursuant to its Spending Clause, Commerce Clause, *and* Enforcement Clause powers. If the Fifth Circuit's erroneous statement concerning the constitutional powers under which RLUIPA was passed is left uncorrected, the Fifth Circuit and other lower courts will likely impose significant and unwarranted limitations in RLUIPA suits, no matter the outcome of this case.

This Court has long made clear that courts must give careful weight and consideration to Congress's purported exercise of its constitutional powers. The Fifth Circuit did not do so; it summarily rejected RLUIPA's Commerce and Enforcement Clause bases without analyzing the statutory text or legislative history that expressly invoke these sources of authority. This Court has also admonished courts not to anticipate a question of constitutional law in advance of the necessity of deciding it. Yet the Fifth Circuit did just that; the Commerce Clause and Enforcement Clause bases of RLUIPA were not on appeal to the Fifth Circuit and not necessary to the issues presented to the court.

If left uncorrected, the Fifth Circuit's summary rejection of RLUIPA's Commerce Clause and Enforcement Clause foundations threatens to severely curtail the remedies available under the Act. Money damages are properly available in RLUIPA's land use setting pursuant to the Enforcement Clause,

even in suits against states and state officials, regardless whether the entity being sued is the recipient of federal funds. Money damages are also properly available under the Commerce Clause in suits against local governments, local officials, and state officials in their individual capacities. By concluding that RLUIPA was not passed under either Congress's Commerce Clause or Enforcement Clause powers, the Fifth Circuit's decision severely curtails the availability of money damages under RLUIPA. This Court's silence on this issue risks the wholesale evisceration of this integral element of RLUIPA's enforcement mechanism, as it will likely be understood by the lower courts to be an endorsement of the Fifth Circuit's conclusion.

## ARGUMENT

### I. The Fifth Circuit Erred In Stating That RLUIPA Was Not Passed Under The Enforcement Clause Or The Commerce Clause.

In passing RLUIPA, Congress expressly invoked its Spending Clause, Commerce Clause, and Enforcement Clause powers. As discussed below, the Fifth Circuit erred in summarily concluding that RLUIPA was not passed under the Commerce Clause and Enforcement Clause powers by (i) neglecting to examine the statutory language or the legislative history of RLUIPA; (ii) reaching constitutional questions that were not before the court; and (iii) misconstruing this Court's discussion of RLUIPA in *Cutter v. Wilkinson*, 544 U.S. 709 (2005).

### A. The Fifth Circuit Failed To Give Any Consideration To Congress's Articulated Sources of Authority For Enacting RLUIPA.

In stating that RLUIPA was not passed pursuant to Congress's Commerce Clause and Enforcement Clause powers, the Fifth Circuit ignored the plain language of RLUIPA and its legislative history. Both show that Congress expressly passed RLUIPA pursuant to its Spending Clause, Commerce Clause, *and* Enforcement Clause powers.

RLUIPA has two sections governing conduct. Section 2 (42 U.S.C. § 2000cc) protects land use applicants from religious discrimination, and Section 3 (42 U.S.C. § 2000cc-1) protects the religious exercise rights of institutionalized persons, such as those in mental hospitals and prisons. Sections 2 and 3 both apply "in any case in which (1) the substantial burden [on religious exercise] is imposed in a program or activity that receives Federal financial assistance . . .," 42 U.S.C. §§ 2000cc(a)(2)(A), 2000cc-1(b)(1), or "(2) the substantial burden affects . . . commerce with foreign nations, among the Several states, or with Indian tribes . . . ." 42 U.S.C. §§ 2000cc(a)(2)(B), 2000cc-1(b)(2). By linking RLUIPA's application to situations in which Federal funding is received or a substantial burden affects interstate commerce, Congress made clear in the text of the statute that it was passing RLUIPA pursuant to its Spending Clause and Commerce Clause powers.

The legislative history confirms that RLUIPA was passed pursuant to Congress's Commerce Clause and Enforcement Clause powers. A joint statement by the bill's sponsors states explicitly under the heading "Constitutional Authority" that sections 2

and 3 were passed under Congress's Spending Clause and Commerce Clause powers. 146 Cong. Rec. S7774, S7775 (daily ed. July 27, 2000) (joint statement of Sen. Hatch and Sen. Kennedy) (referring to these provisions as the statute's "Spending Clause provisions" and "Commerce Clause provisions").

In addition, the joint statement makes clear that "[t]he land use sections of the bill have a third constitutional base: they enforce the Free Exercise and Free Speech Clauses as interpreted by the Supreme Court" through Congress's Enforcement Clause powers under the Fourteenth Amendment. *Id.* The land use section thus prohibits the imposition or implementation of any land use regulation that "discriminates against any assembly or institution on the basis of religion or religious denomination" or that "treats a religious assembly or institution on less than equal terms with a nonreligious assembly or institution." 42 U.S.C. § 2000cc(b). Similarly, the land use section applies whenever "the substantial burden is imposed in the implementation of a land use regulation or system of land use regulations, under which a government makes . . . individualized assessments of the proposed uses for the property involved." 42 U.S.C. § 2000cc(a)(2)(C).

Congress also noted the bill's extensive legislative background, which was "based on three years of hearings . . . that addressed in great detail both the need for legislation and the scope of Congressional power to enact such legislation." 146 Cong. Rec. S7774, S7774. Within the two targeted areas—land use regulation and institutionalized persons—the bill applies "to the extent that Congress has power to regulate under the Commerce Clause, the Spending

Clause, or Section 5 of the Fourteenth Amendment." *Id.*

Against this backdrop, this Court's admonishment in *Fairbank v. United States* is particularly relevant:

> The constitutionality of an act of Congress is a matter always requiring the most careful consideration. The presumptions are in favor of constitutionality, and *before a court is justified in holding that the legislative power has been exercised beyond the limits granted . . . the excess or conflict should be clear*.

181 U.S. 283, 285 (1901) (emphasis added). This Court has explicitly stated its reasons for instituting a presumption of constitutionality and for requiring a clear showing before a statute is declared unconstitutional. Fundamentally, this approach is necessary because, "[i]n no matter should we pay more deference to the opinions of Congress than in its choice of instrumentalities to perform a function that is within its power." *Nat'l Mut. Ins. Co. of D.C. v. Tidewater Transfer Co.*, 337 U.S. 582, 603–04 (1949). Congress's "carefully considered view" that it has properly exercised its powers "is entitled to great respect." *Id.* Thus, "[w]hen this Court is asked to invalidate a statutory provision that has been approved by both Houses of the Congress and signed by the President . . . it should only do so for the most compelling constitutional reasons." *Mistretta v. United States*, 488 U.S. 361, 384 (1989) (*quoting Bowsher v. Synar,* 478 U.S. 714, 736 (1986) (Stevens, J., concurring)).

In this case, the Fifth Circuit did not give the proper weight to Congress's clearly articulated bases for exercising its powers in passing RLUIPA. In-

deed, the Fifth Circuit did not consider the statutory language or the legislative history of RLUIPA at all in reaching its conclusion on this point. *See Sossamon*, 560 F.3d at 328.

### B. The Fifth Circuit Erred In Addressing Constitutional Questions Which Were Not Before The Court.

The validity of the Commerce Clause and Fourteenth Amendment foundations for the statute were neither briefed to the court below nor squarely presented by the facts of this case. Fundamental principles of judicial minimalism require a court to refrain from considering a statute's constitutionality unless and until the issue is squarely and concretely presented. *Communist Party of the U.S. v. Subversive Activities Control Bd.*, 367 U.S. 1, 71–72 (1961) ("No rule of practice . . . is better settled than 'never to anticipate a question of constitutional law in advance of the necessity of deciding it.'") (quoting *Liverpool, N.Y. & Phila. S. S. Co. v. Comm'rs of Emigration*, 113 U.S. 33, 39 (1885)). Any other approach would not be "to decide a judicial controversy, but to assume a position of authority over the governmental acts of another and co-equal department, an authority which plainly we do not possess." *Massachusetts v. Mellon*, 262 U.S. 447, 488–89 (1923). This principle "represents a conception of the role of the judiciary in a government premised upon a separation of powers, a role which precludes interference by courts with legislative and executive functions which have not yet proceeded so far as to affect individual interests adversely." *Communist Party*, 367 U.S. at 72.

This reasoning applies equally to the premature review of portions of a statute: "Even where some of

the provisions of a comprehensive legislative enactment are ripe for adjudication, portions of the enactment not immediately involved are not thereby thrown open for a judicial determination of constitutionality" because "'[p]assing upon the possible significance of the manifold provisions of a broad statute in advance of efforts to apply the separate provisions is analogous to rendering an advisory opinion upon a statute or a declaratory judgment upon a hypothetical case.'" *Id.* at 71 (quoting *Watson v. Buck*, 313 U.S. 387, 402 (1941)). Following this conception of separation of power, it is imperative that courts leave the ultimate question of constitutionality to cases in which it is squarely raised and necessary for the result. The court below erred in failing to do so.

### C. The Fifth Circuit Misconstrued This Court's Decision In *Cutter*, As Well As The Decisions Of Its Sister Circuits, In Rejecting RLUIPA's Enforcement And Commerce Clause Foundations.

*Cutter v. Wilkinson* is instructive in the proper way for this Court and the lower courts to address individual constitutional issues against the backdrop of a statute with multiple sections and multiple constitutional bases. 544 U.S. 709 (2005). In *Cutter*, the petitioner raised an Establishment Clause challenge to Section 3 of RLUIPA. This Court specifically declined to address the Spending Clause and Commerce Clause bases of Section 3 because these issues "were not addressed by the Court of Appeals" and "we are a court of review, not of first view . . . ." *Id.* at 718 n.7. This Court also specifically declined to address the constitutionality of Section 2, because Section 2 was "not at issue" in the case, *id.* at 715

n.3. In the decision below, however, the Fifth Circuit misconstrued *Cutter*, erroneously reading its silence regarding RLUIPA's Fourteenth Amendment basis as a tacit rejection. *Sossamon*, 560 F.3d at 328 n.31.

The lower court also stated that its rejection of RLUIPA's Commerce and Enforcement Clause bases was supported by sister circuits that chose to rely on the Spending Clause as the "most natural source of congressional authority to pass RLUIPA." *Id.* at 328 n.34. But a review of the cases cited by the Fifth Circuit does not support this interpretation of sister-circuit precedent. Rather, these cases show proper judicial restraint on the part of the circuit courts, which declined to extend their judgments beyond that which was necessary for the questions presented in each case. Because the cases could be decided on the basis of the Spending Clause alone, no other basis was reached. *See Madison v. Virginia*, 474 F.3d 118, 126 n.1 (4th Cir. 2006) ("Because we hold that the Spending Clause is a valid and sufficient source of congressional power . . . , we need not decide whether RLUIPA exceeds Congress' Commerce Clause power."); *Cutter v. Wilkinson*, 423 F.3d 579, 590 (6th Cir. 2005) (same) ; *Charles v. Verhagen*, 348 F.3d 601, 609 (7th Cir. 2003) (same); *Mayweathers v. Newland*, 314 F.3d 1062, 1068 n.2 (9th Cir. 2002) (same). Ironically, these sister circuits were engaging in just the kind of judicial restraint that the court below failed to employ.[2] The Fifth Circuit mis-

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[2] The Fifth Circuit further erred in its reliance, without analysis, on the opinion of the Eleventh Circuit in *Smith v. Allen*, 502 F.3d 1255 (11th Cir. 2007). *Sossamon*, 560 F.3d at 327–29 & n.34. Though the Eleventh Circuit comes closer to reaching the conclusion for which it is cited, the issue was not

[Footnote continued on next page]

read this judicial restraint as an "implicit conclusion of the other circuits" that *only* the Spending Clause basis was valid. 560 F.3d at 328 n.34.

The court below also failed to acknowledge that where lower courts have had occasion to face this issue directly, they have uniformly held that RLUIPA *was* validly passed under the Commerce and Enforcement Clauses. *See, e.g.*, *Westchester Day Sch. v. Vill. of Mamaroneck*, 504 F.3d 338, 354 (2d Cir. 2007) (Commerce Clause); *World Outreach Conference Ctr. v. City of Chicago*, 591 F.3d 531, 533 (7th Cir. 2009) (same); *Freedom Baptist Church of Delaware County v. Twp. of Middletown*, 204 F. Supp. 2d 857, 867–68 (E.D. Pa. 2002) (same); *Guru Nanak Sikh Soc'y of Yuba City v. County of Sutter*, 456 F.3d 978, 995 (9th Cir. 2006) (Enforcement Clause); *Midrash Sephardi, Inc. v. Town of Surfside*, 366 F.3d 1214, 1240–41 (11th Cir. 2004) (same).

## II. This Court Should Clarify That The Fifth Circuit Overreached In Concluding That RLUIPA Was Not Enacted Under The Enforcement Clause Or The Commerce Clause.

The fact that this Court did not explicitly state in *Cutter* that Congress passed RLUIPA under its Spending, Enforcement *and* Commerce Clause pow-

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squarely presented there either and did not need to be decided, and the court there also did not engage in any kind of thorough statutory analysis or any discussion of the relevant Commerce Clause and Enforcement Clause cases. Yet the Eleventh Circuit too rejected out of hand these explicit bases. 502 F.3d at 1272–73, 1274 n.9.

ers, coupled with the Fifth Circuit's explicit rejection of the latter two sources of authority, will likely lead the lower courts to read any silence on the issue by this Court to be an endorsement of the Fifth Circuit's conclusion, severely curtailing the availability of money damages under RLUIPA. If RLUIPA litigants are not permitted to recover damages against states and state officials in the institutionalized persons setting, serious doubts will be raised as to whether land use litigants are also barred from recovering damages, despite the independent Enforcement Clause basis for such awards. This risk is especially great in light of the broad question on which *certiorari* was granted, which does not differentiate between different categories of RLUIPA suits. Similarly, if RLUIPA litigants may recover compensatory damages only against the recipients of federal funds, serious doubt will be raised as to whether litigants suing local governments, local government officials, and state government officials in their individual capacities are also barred from recovering damages.

But money damages were made available against each of these governmental bodies, and in each of these settings, under the clear terms of the statute. The unavailability of a damages remedy will significantly undermine RLUIPA's effectiveness as a bulwark against decisions that substantially burden the religious mission of churches and religious assemblies, and substantially burden the exercise of religion by institutionalized persons. States, cities, zoning boards, and other governmental bodies will have little incentive to comply with the statute, thus compromising the intent of the Act and threatening religious freedom. Thus, this court should expressly reject the Fifth Circuit's summary dismissal of the

Commerce and Enforcement Clauses as constitutional sources of authority for RLUIPA.

### A. If Left Uncorrected, The Fifth Circuit's Erroneous Rejection Of RLUIPA's Enforcement Clause Basis Will Jeopardize Land Use Claims For Money Damages Against States and State Officials In Their Official Capacities.

In the decision below, the Fifth Circuit stated that "RLUIPA was enacted pursuant to Congress's Spending Clause power, not pursuant to the Section 5 power of the Fourteenth Amendment." 560 F.3d at 328. This pronouncement jeopardizes the award of money damages contemplated by Congress against a broad range of government entities and officials, including states and state officials in their officials capacities, in the land use setting. This risk is particularly strong in light of the fact that this Court granted *certiorari* on the broad question of whether an individual may sue "a state or state official in his official capacity for damages for violations of [RLUIPA]," which does not differentiate between the institutionalized persons and land use portions of the Act. This Court should therefore clarify that the Fifth Circuit overreached in making this unnecessary declaration of law, and that any decision denying money damages does not apply for claims brought under RLUIPA's land use provisions.

#### *1. RLUIPA's Land Use Provisions Properly Allow Money Damages Against States And State Officials In Their Official Capacities.*

It is well-established that Congress has plenary power under Section 5 of the Fourteenth Amendment

to abrogate Eleventh Amendment state sovereign immunity, provided that Congress (1) "makes its intention to abrogate unmistakably clear"; and (2) "acts pursuant to a valid exercise of its power." *Nev. Dep't of Human Res. v. Hibbs*, 538 U.S. 721, 726 (2003). *See also Fitzpatrick v. Bitzer*, 427 U.S. 445, 456 (1976) ("the Eleventh Amendment . . . [is] necessarily limited by the enforcement provisions of § 5 of the Fourteenth Amendment"); *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 99 (1984) (abrogation under Section 5 is valid if the Act evidences an "unequivocal expression of congressional intent"). Because both conditions are met in RLUIPA's land use provision, damages are properly available against States and state officials in their official capacities.

In *Hibbs*, this Court considered whether Congress intended to abrogate state sovereign immunity under the Family and Medical Leave Act ("FMLA"). This Act allowed employees to seek damages against a "public agency," which was defined as "the government of a State or political subdivision thereof" and "any agency of . . . a State, or a political subdivision of a State." This Court found the question "not fairly debatable," and held that this language unequivocally expressed Congress's intent to abrogate Eleventh Amendment immunity. 538 U.S. at 726. Similarly, in *Kimel v. Fla. Bd. of Regents*, this Court found that identical language in the Age Discrimination in Employment Act ("ADEA") "clearly demonstrates Congress' intent to subject the States to suit for money damages . . . ." 528 U.S. 62, 73–74 (2000).

In RLUIPA, Congress showed its unmistakable intention to abrogate state sovereign immunity by using language that is highly similar to that of the

FMLA and ADEA. RLUIPA provides for suits against a "government," 42 U.S.C. § 2000cc-2(a), which is defined as, *inter alia*, "a State . . . or other governmental entity created under authority of a State" and "any branch, department, agency, instrumentality, or official of [a State]." 42 U.S.C. § 2000cc-5(4).

This Court has recognized two circumstances in which an individual may bring suit in federal court against a state: (a) waiver of sovereign immunity by the state; and (b) congressional abrogation under Section 5 of the Fourteenth Amendment. "The two distinct methods should not be confused. One requires only action by the Congress; the other requires *knowing action* by the state." *Van Wyhe v. Reisch*, 581 F.3d 639, 652 n.4 (8th Cir. 2009) (emphasis added). The lower court's discussion regarding state sovereign immunity relates only to waiver under the Spending Power; it is therefore inapposite to apply this logic to RLUIPA provisions that were passed under the Enforcement Clause. But the Fifth Circuit did just that when it recognized that "RLUIPA is clear enough to create a right for damages on the cause-of-action analysis," but then held that it was not clear enough to "abrogate[] state sovereign immunity." *Sossamon*, 560 F.3d at 331.

This conflation of waiver and abrogation has clouded the discussion of RLUIPA and Eleventh Amendment immunity. The lower court held that the phrase "appropriate relief" is not clear enough to manifest waiver—that is, "knowing action"—by a state. But abrogation of immunity under the Enforcement Clause does not require any action by the states, only the unmistakably clear intention of Con-

gress. The plain language of this Act shows that Congress did have this intention.[3]

In addition to the statutory language of RLUIPA itself, Congress also unequivocally expressed its intent to abrogate state sovereign immunity through the Civil Rights Remedies Equalization Act of 1986 ("CRREA"), which provides for Eleventh Amendment abrogation for violations of four enumerated acts, or "the provisions of any other Federal statute prohibiting discrimination by recipients of Federal financial assistance." 42 U.S.C. § 2000d-7(a)(1).

The plain language of RLUIPA expressly prohibits "discriminat[ion] . . . on the basis of religion or religious denomination." 42 U.S.C. § 2000cc(b)(2). And the legislative history makes it even clearer that RLUIPA is a "Federal statute prohibiting discrimination." A joint statement by the Act's sponsoring senators noted that churches are "frequently discriminated against" by zoning authorities, which apply individualized assessments in "discriminatory ways." 146 Cong. Rec. S7774, S7774 (daily ed. July 27, 2000) (joint statement of Sen. Hatch and Sen. Kennedy). It also notes that such discrimination is "very widespread" and is a "nationwide problem." *Id.* at 7775. *See also* H.R. Rep. No. 106-219, at 17 (1999) (RLUIPA's land use provision "specifically targets the established evidence of discriminatory land use

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[3] This is not to say that RLUIPA's "appropriate relief" language is not clear enough to effect a waiver under the Spending Clause. *See* Br. for the Pet'r 27–34. Instead, the point is simply that this Court's decision regarding waiver should not control the issue of abrogation under the Enforcement Clause.

regulations based on Congress' remedial power under Section 5 of the 14th Amendment").[4]

### *2. RLUIPA's Land Use Provisions Were Validly Passed Under Section 5 of the Fourteenth Amendment.*

In order to abrogate Eleventh Amendment state sovereign immunity under Section 5 of the Fourteenth Amendment, Congress must not only "make its intention to abrogate unmistakably clear," but must also act "pursuant to a valid exercise of its power." *Hibbs*, 538 U.S. at 726. In passing RLUIPA,

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[4] While some lower courts have taken the position that CRREA only applies to RLUIPA's Section 2 (the land use provisions) and not Section 3 (the institutionalized persons provisions), *see Madison*, 474 F.3d at 132–33; *Van Wyhe*, 581 F.3d at 654–55; *Holley v. Cal. Dep't of Corr.*, 599 F.3d 1108, 1113–14 (9th Cir. 2010), because the word "discriminate" does not appear in Section 3, there is in fact no reason to read CRREA so narrowly. *See* Br. for the Pet'r at 34–41; *Kaimowitz v. Bd. of Trs. of the Univ. of Ill.*, 951 F.2d 765, 768 (7th Cir. 1991) (finding that § 1983 is designed to prohibit discrimination, despite the absence of the word "discrimination" in the statute, and dismissing CRREA argument on alternate grounds). Because RLUIPA as a whole—and in each of its parts—prohibits discrimination, CRREA should effect an abrogation or waiver of state sovereign immunity even in the institutionalized persons setting. *See* 146 Cong. Rec. S7774, S7775 (discussing examples of religious discrimination directed towards prisoners in litigated cases); *id.* (discussing Catholic priest who was "forced to do battle over bringing a small amount of sacramental wine into prisons"); *The Need for Federal Protection of Religious Freedom After Boerne v. Flores II: Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 105th Cong. (1998) (statement of Isaac M. Jaroslawicz, Director of Legal Affairs for The Aleph Institute) (testimony regarding Michigan prison officials who refused to provide unleavened bread to Jewish prisoners during Passover, despite one organization's offer to donate the bread).

Congress did just that. Congress validly passes remedial legislation pursuant to the Enforcement Clause where there is "reason to believe that many of the laws affected by the congressional enactment have a significant likelihood of being unconstitutional" and the legislation is a "congruen[t] and proportional[]" response to the constitutional violations identified by Congress. *City of Boerne v. Flores*, 521 U.S. 507, 520, 532 (1997). The massive congressional investigation that took place prior to enacting RLUIPA, coupled with the attention given to ensure that its application in the statute reflected existing Court precedent, demonstrate that both of the *Boerne* requirements are met.

Mindful that RLUIPA's statutory predecessor, RFRA, was declared unconstitutional in part because the legislative record supporting that act was inadequate, Congress conducted three years of hearings in which it heard extensive testimony from numerous witnesses and compiled "massive evidence" on the issue of religious discrimination in land use regulations. 146 Cong. Rec. S7774, S7774. RLUIPA's extensive legislative history confirms that Congress had in front of it substantial evidence of discrimination against religious groups in the application of land use statutes nationwide. The extent of this congressional examination was reflected in the sponsoring Senators' joint statement, which noted that "the committees in each house have examined large numbers of cases, and the hearing record reveals a widespread pattern of discrimination against churches as compared to secular places of assembly, and of discrimination against small and unfamiliar denominations as compared to larger and more familiar ones." *Id.* at 7775.

Based on the evidence presented to it, Congress determined that discrimination against religious groups by land use authorities was a pervasive aspect of the American landscape. *See Freedom Baptist Church of Delaware County v. Twp. of Middletown*, 204 F. Supp. 2d 857, 860–62 (E.D. Pa. 2002) (summarizing the "massive evidence" of religious discrimination uncovered in the congressional hearings on RLUIPA); *Midrash Sephardi, Inc. v. Town of Surfside*, 366 F.3d 1214, 1239 (11th Cir. 2004) (holding that "Congress's findings regarding the widespread discrimination against religious institutions are plausible and provide a basis for concluding that RLUIPA remedies and prevents discriminatory land use regulations").

As courts have uniformly recognized, "[e]ach subsection closely tracks the legal standards in one or more Supreme Court opinions, codifying those standards for greater visibility and easier enforceability." 146 Cong. Rec. S7774, S7775–76 (citing *Employment Div., Dep't of Human Res. of Or. v. Smith*, 494 U.S. 872 (1990) and *Church of Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520 (1993) as precedential bases). *See, e.g., Freedom Baptist*, 204 F. Supp. 2d at 869 (RLUIPA "codifies the 'individual assessments' jurisprudence in the *Sherbert* [*v. Verner*, 374 U.S. 398 (1963)] through *Lukumi* line of cases."); *Murphy v. New Milford Zoning Comm'n*, 402 F.3d 342, 352 (2d Cir. 2005) (RLUIPA's individualized assessments analysis is based on *Sherbert* and *Lukumi*); *World Outreach Conference Ctr. v. City of Chicago*, 591 F.3d 531, 534 (7th Cir. 2009) (the land use section of RLUIPA "codifies *Sherbert v. Verner*"); *Petra Presbyterian Church v. Vill. of Northbrook*, 489 F.3d 846, 849 (7th Cir. 2007) (RLUIPA codifies *Lukumi*); *see also* H.R. Rep. No. 106-219. Because RLUIPA's land

use provisions closely track the constitutional standards for free exercise, against a backdrop of "massive evidence" of religious discrimination, RLUIPA is unquestionably a "congruent and proportional response to free exercise violations." *Guru Nanak Sikh Soc'y of Yuba City v. County of Sutter*, 456 F.3d 978, 994–95 (9th Cir. 2006); *see also, e.g., Midrash Sephardi, Inc. v. Town of Surfside*, 366 F.3d 1214, 1240–41 (11th Cir. 2004) (same) .

### B. If Left Uncorrected, The Fifth Circuit's Erroneous Rejection Of RLUIPA's Commerce Clause Basis Will Jeopardize Claims For Money Damages Against Local Governments, Local Officials, And State Officials In Their Individual Capacities.

In the decision below, the Fifth Circuit agreed with the Eleventh Circuit that "RLUIPA is Spending, not Commerce, Clause legislation." 560 F.3d at 328 n.34. This pronouncement jeopardizes the award of money damages contemplated by Congress in both the land use and institutionalized persons setting against local governments, local government officials, and state government officials in their individual capacities. This Court should therefore clarify that the Fifth Circuit overreached in making this unnecessary declaration of law.

#### *1. RLUIPA Properly Permits Money Damages Against Local Governments, Local Officials, And State Officials In Their Individual Capacities.*

The Commerce Clause unquestionably permits suits for money damages against local authorities and state officials in their individual capacities, as

these categories of defendants do not enjoy state sovereign immunity. Thus, although Congress cannot abrogate the Eleventh Amendment sovereign immunity of states pursuant to its Commerce Clause power, *Seminole Tribe v. Florida*, 517 U.S. 44 (1996), "[o]nly States and state officers acting in their official capacity" enjoy such immunity. *Buckhannon Bd. & Care Home, Inc. v. West Virginia Dep't of Health and Human Res.,* 532 U.S. 598, 609 n.10 (2001). "Plaintiffs may bring suit for damages against all others, including municipalities and other political subdivisions of a State." *Id.* This is because, "when a State creates subdivisions and imbues them with a significant measure of autonomy . . . these subdivisions are too separate from the State" to justify sovereign immunity. *Port Auth. Trans-Hudson Corp. v. Feeney*, 495 U.S. 299, 313 (1990) (Brennan, J., concurring). Similarly, "a suit for money damages may be prosecuted against a state officer in his individual capacity for unconstitutional or wrongful conduct fairly attributable to the officer himself, so long as the relief is sought not from the state treasury but from the officer personally." *Alden v. Maine*, 527 U.S. 706, 757 (1999).

RLUIPA authorizes suits against "a State, county, municipality, or other governmental entity created under the authority of the State; any branch, department, agency, instrumentality, or official of an entity . . ., and any other person acting under color of State law." 42 U.S.C. § 2000cc-5(4). Therefore, when interstate commerce has been impacted, land use and institutionalized persons litigants may properly obtain compensatory damages for violations of RLUIPA against local governments, local government officials, and state government officials in their

official capacities, whether they receive federal moneys or not.[5]

*2. RLUIPA Was Validly Passed Under The Commerce Clause.*

The Constitution grants Congress the power "[t]o regulate Commerce . . . among the several States." U.S. Const. art. I, § 8, cl. 3. Sections 2 and 3 of RLUIPA both directly regulate interstate commerce. In their Joint Statement to the Senate during congressional hearings on the Act, Senators Hatch and Kennedy noted that the jurisdictional nexus "will most commonly be proved by showing that a burden prevents a specific economic transaction in commerce, such as a construction project, purchase or rental of a building, or an interstate shipment of religious goods." 146 Cong. Rec. S7774, S7775. Zoning and land use provisions are very likely to impact the construction, purchase, and rental of buildings for religious use, and were clearly contemplated by the Senators during the passage of the Act.[6]

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5 In addition, because the land use provisions were validly passed under the Enforcement Clause, *see supra* pp. 16–19, suits for money damages against these governmental bodies and officials are available in the land use setting regardless whether interstate commerce has been impacted.

6 Courts regularly award money damages against local authorities in RLUIPA land use suits. *See, e.g.*, *Lighthouse Inst. for Evangelism v. City of Long Branch*, 510 F.3d 253, 273 (3d Cir. 2007) (remanding "to determine compensatory damages" against the city and noting that "[s]ince Lighthouse's claim for injunctive relief . . . is moot, only monetary relief is available to it"); *Lighthouse Cmty. Church of God v. City of Southfield*, No. 05-40220, 2007 WL 756647, at *3 (E.D. Mich. March 7, 2007) ("the Court finds that Plaintiff can pursue damages against Defendant City . . . under RLUIPA"); *Chase v. City of Ports-*

[Footnote continued on next page]

Regulations of prisoners' free exercise rights can also impact interstate commerce, for example through affecting the "interstate shipment of religious goods," *id.* , as was envisioned by the Act's sponsors. In fact, just such a situation arose in *Charles v. Verhagen*, in which prisoners challenged a variety of rules governing religious possessions by state inmates. 348 F.3d 601 (7th Cir. 2003) . The Wisconsin Department of Corrections ("DOC") admitted sending roughly 4,000 inmates out of state due to overcrowding, but applied its religious possession rules to both in-state and out-of-state inmates. Although the Seventh Circuit declined to reach the Commerce Clause issue, it noted that the facts in *Charles* "lend[] validity to RLUIPA's constitutionality under the Commerce Clause" as the "DOC certainly engages in interstate commerce to properly handle the requests for religious and other personal property from inmates housed outside Wisconsin." *Id.* at 609 n.3. This specific example underscores Congress's concern that the free exercise of religion by the institutionalized population can have an effect on interstate commerce.

Moreover, the jurisdictional nexus required by the Act ensures that only cases that impact interstate commerce will be found to have a Commerce Clause basis. This Court has made clear that Commerce Clause requirements can be satisfied by a congressional expression of jurisdictional nexus. *United*

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*mouth*, 428 F. Supp. 2d 487, 490 (E.D. Va. 2006) (it is "well-settled" that damages are available against a local authority under RLUIPA).

*States v. Morrison*, 529 U.S. 598, 612 (2000) ("Such a jurisdictional element may establish that the enactment is in pursuance of Congress' regulation of interstate commerce."); *United States v. Lopez*, 514 U.S. 549, 561 (1995) (stating that legislation under the commerce power should contain a "jurisdictional element which would ensure, through case-by-case inquiry, that the [burden on religious exercise] in question affects interstate commerce."). In contradistinction to the legislation at issue in *Morrison* and *Lopez*, RLUIPA contains an express jurisdictional nexus limiting its application to cases in which "the substantial burden affects, or removal of that substantial burden would affect, commerce . . . among the several States." 42 U.S.C. § 2000cc(a)(2)(B). *See* H.R. Rep. 106-219, at 16 ("[I]n line with the requirement articulated in *Lopez*, [RLUIPA] includes an express jurisdictional element, and would require a case-by-case analysis of the [e]ffect on interstate commerce."). This express jurisdictional element is sufficient to validate the invocation of congressional authority for both RLUIPA provisions under the Commerce Clause.

By providing for this nexus, Congress ensured that RLUIPA was "tautologically constitutional," in that it protects religious exercise "to the extent that the commerce power reaches" the substantial burden, but does not protect religious exercise "to the extent that [the commerce power] does not reach the burden." H.R. Rep. 106-219, at 16. Thus, Congress ensured that non-commercial effects on religious exercise are not protected under this particular clause of the statute, but rather that the commercial nexus "must be proved in each case." *Id.* at 28. As the jurisdictional nexus for Commerce Clause authority is present in both the land use and free exercise sec-

tions of RLUIPA, both provisions are equally valid exercises of Congress's commerce power.[7]

## CONCLUSION

Contrary to the lower court's conclusion, RLUIPA was not enacted solely under Congress's Spending Clause power; Congress properly invoked its Enforcement and Commerce Clause powers as well. This distinction matters greatly. Under the Enforcement Clause, RLUIPA litigants in the land use setting may properly obtain money damages against states and state officials in their official capacities. Under the Commerce Clause, litigants may properly recover money damages against local governments, local government officials and individual state government actors for violations of any of RLUIPA's operative provisions. The United States Court of Appeals for the Fifth Circuit's dismissal of Congress's exercise of its powers—without rigorous analysis, in a case in which it did not need to reach the constitutional issues at all—would broadly foreclose such suits. This risk is especially great in light of the broad question on which *certiorari* was

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7 The validity of RLUIPA's Commerce Clause foundation has been recognized by numerous courts. *See, e.g.*, *Westchester Day Sch. v. Vill. of Mamaroneck*, 504 F.3d 338, 354 (2d Cir. 2007) ("Consistent with [*Lopez*] precedent, we now hold that, where the relevant jurisdictional element is satisfied, RLUIPA constitutes a valid exercise of congressional power under the Commerce Clause."); *World Outreach*, 591 F.3d at 533 (RLUIPA is "based on Congress's power to regulate commerce"); *Freedom Baptist Church*, 204 F. Supp. 2d at 867 ("[I]nsofar as state or local authorities 'substantially burden' the economic activity of religious organizations, Congress has ample authority to act under the Commerce Clause.").

granted, which does not differentiate between different categories of RLUIPA suits. Though this Court need not reach the question of Enforcement and Commerce Clause validity, it should expressly reject the Fifth Circuit's dismissal of those sources of authority, lest the lower courts continue to interpret this Court's silence as acquiescence to a constricted view of RLUIPA.

Respectfully submitted.

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