**Nos. 13-354, 13-356**

IN THE
# Supreme Court of the United States

KATHLEEN SEBELIUS, SECRETARY OF HEALTH AND HUMAN SERVICES, *et al.*,
*Petitioners,*
v.
HOBBY LOBBY STORES, INC., *et al.*,
*Respondents.*

CONESTOGA WOOD SPECIALTIES CORPORATION, *et al.*,
*Petitioners,*
v.
KATHLEEN SEBELIUS, SECRETARY OF HEALTH AND HUMAN SERVICES, *et al.*,
*Respondents.*

**On Writs of Certiorari to the United States Courts of Appeals for the Tenth and Third Circuits**

## BRIEF OF THE NATIONAL LEAGUE OF CITIES, NATIONAL ASSOCIATION OF COUNTIES, INTERNATIONAL CITY/COUNTY MANAGEMENT ASSOCIATION, U.S. CONFERENCE OF MAYORS, AND INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION AS AMICI CURIAE IN SUPPORT OF THE GOVERNMENT

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## BRIEF OF THE NATIONAL LEAGUE OF CITIES, NATIONAL ASSOCIATION OF COUNTIES, INTERNATIONAL CITY/COUNTY MANAGMENT ASSOCIATION, U.S. CONFERENCE OF MAYORS, AND INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION AS AMICI CURIAE IN SUPPORT OF THE GOVERNMENT

### INTEREST OF AMICI CURIAE[1]

The National League of Cities (NLC), founded in 1924, is the oldest and largest organization representing municipal governments throughout the United States. Working in partnership with 49 state municipal leagues, NLC serves as a national advocate for the more than 19,000 cities, villages, and towns it represents. Its mission is to strengthen and promote cities as centers of opportunity, leadership, and governance.

The National Association of Counties (NACo) is the only national organization that represents county governments in the United States. Founded in 1935, NACo provides essential services to the Nation's 3,069 counties through advocacy, education, and research.

The International City/County Management Association (ICMA) is a nonprofit professional and educational organization of over 9,000 appointed chief executives and assistants serving cities, counties, towns, and regional entities. ICMA's mission is to

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[1] The parties have consented to the filing of this brief, and their letters of consent are on file with the Clerk (Rule 37.2). This brief was not written in whole or in part by the parties' counsel, and no one other than the amici made a monetary contribution to its preparation (Rule 37.6).

create excellence in local governance by advocating and developing the professional management of local governments throughout the world.

The U.S. Conference of Mayors (USCM), founded in 1932, is the official nonpartisan organization of all United States cities with a population of more than 30,000 people, which includes over 1,200 cities at present. Each city is represented in the USCM by its chief elected official, the mayor.

The International Municipal Lawyers Association (IMLA) has been an advocate and resource for local government attorneys since 1935. Owned solely by its more than 3,000 members, IMLA serves as an international clearinghouse for legal information and cooperation on municipal legal matters.

Amici are organizations whose members include municipal, county, and other local governments and officials from throughout the United States. These organizations regularly file amicus briefs in cases, like this one, that raise issues of concern to the Nation's cities and counties. These organizations also frequently participate as amici in cases implicating matters in which local governments, and their officials and agencies, have experience and expertise.

These cases implicate an issue with unique importance for local governments. In the present cases, the Court is asked to decide whether for-profit, closely held secular corporations may invoke the Religious Freedom Restoration Act of 1993 (RFRA), 42 U.S.C. §§ 2000bb *et seq*., to assert that they must not be required to comply with the federal government's regulations implementing the 2010 Patient Protection and Affordable Care Act.

Although RFRA does not apply to state and local governments, RFRA is closely related to the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA), 42 U.S.C. §§ 2000cc *et seq*. Among other things, RLUIPA bars state and local governments from enforcing land use regulations that impose a substantial burden on "the religious exercise of a person" unless the government can point to a compelling interest. Because amici represent local governments whose land use decisions are subject to RLUIPA, amici have expertise in RLUIPA's administration and an interest in ensuring that RLUIPA's reach is not unwarrantedly expanded.

That experience sheds light on an important issue in these cases: whether for-profit, secular corporations are "person(s)" who may invoke RFRA's protections. RLUIPA and RFRA are sister statutes that use near-identical language, and which courts have construed in tandem. Indeed, the Tenth Circuit relied in part on RLUIPA's definition of covered entities in construing RFRA's parallel provisions—and incorrectly concluded that RLUIPA extends to for-profit, secular corporations. The Petitioners in *Conestoga Wood Specialties Corp. v. Sebelius*, 724 F.3d 377 (3d Cir. 2013) make a similar argument about RLUIPA's definitions in seeking reversal of the Third Circuit's judgment against them. These cases will thus require the Court to ascertain the meaning of "person" in RLUIPA in construing RFRA's parallel language.

RLUIPA's context, application, and legislative history uniformly show that its protections are limited to individuals and entities like churches, religious educational institutions, and non-profit religious organizations. Amici respectfully urge the Court to reverse the Tenth Circuit's more expansive definition

of "person" in RFRA, and uphold the Third Circuit's decision refusing to allow for-profit corporations to invoke RFRA.

## SUMMARY OF ARGUMENT

RLUIPA is a closely related branch on the same tree that gave rise to RFRA, the statute whose reach is at issue in this case. RLUIPA and RFRA use virtually identical language extending protection to "person(s)" engaged in "religious exercise" from certain state and local land use decisions and federal government requirements, respectively. Because of the statutes' close relationship and use of near-identical means to achieve their ends, the courts, and Congress, have construed RLUIPA and RFRA congruently. Indeed, the Tenth Circuit in *Hobby Lobby Stores, Inc. v. Sebelius*, 723 F.3d 1114 (10th Cir. 2013), looked to RLUIPA's terms in construing the meaning of "person" in RFRA. RLUIPA, and the meaning of its provisions, thus plays an unusually important role in this case.

Proper analysis of those provisions demonstrates that the Tenth Circuit was wrong to construe "person" in RFRA as encompassing for-profit and non-profit corporations alike. Congress's purpose—as made clear in both RLUIPA's text and its legislative history—was for RLUIPA to protect individuals, as well as churches, religious assemblies, and similar organizations, from the unreasonable application of state and local land use laws. RLUIPA, and thus RFRA, was intended to provide broad protections to a narrow subset of targets. This intention is irreconcilable with a construction that permits for-profit, secular corporations to invoke RLUIPA. Construing RLUIPA in this fashion would potentially allow a wide variety of groups to challenge local governments' use of generally applicable zoning

ordinances and planning codes, and would magnify the burden on local governments beyond what Congress envisioned.

Because RLUIPA does not include for-profit, secular corporations within its definition of "person," RFRA's parallel language should be given a similarly narrow interpretation. The Tenth Circuit's unfettered definition expands this term far beyond what Congress intended. This Court should reverse the Tenth Circuit's decision in *Hobby Lobby Stores* and uphold the Third Circuit's judgment in *Conestoga Wood Specialties*, and make clear that RFRA does not apply to for-profit corporations.

## ARGUMENT

### I. THE COURT SHOULD DEFINE "PERSON" IN RFRA CONSISTENTLY WITH "PERSON" IN RLUIPA.

RLUIPA and RFRA are sister statutes that both reflect Congress's reaction to this Court's decision in *Employment Division v. Smith*, 494 U.S. 872, 888 (1990). *See Sossamon v. Texas*, 131 S. Ct. 1651, 1655-56 (2011). In *Smith*, this Court held that religiously neutral, generally applicable laws are constitutional under the Free Exercise Clause even when those laws fail to provide exceptions for religious objectors. 494 U.S. at 890. Congress responded by passing RFRA, which sought to overturn the Court's decision in *Smith* and codify the Court's pre-*Smith* free-exercise jurisprudence by providing that "[g]overnment shall not substantially burden a person's exercise of religion" unless "it demonstrates that application of the burden to the person . . . is in furtherance of a compelling government interest and . . . is the least restrictive means of furthering that compelling

governmental interest." 42 U.S.C. § 2000bb-1(a). RFRA's mandate applied to any federal or state "branch, department, agency, instrumentality, and official (or other person acting under color of law)" and covered "all Federal and State law, and the implementation of that law, whether statutory or otherwise." *Id*. §§ 2000bb-2(1), 2000bb-3(a) (1993) (prior to 2000 amendments).

Although RFRA remains applicable to the federal government, its limitations no longer apply to state and local governments. *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 424 n.1 (2006). In enacting RFRA, Congress relied on its enforcement powers under Section 5 of the Fourteenth Amendment to the U.S. Constitution. This Court held, however, that RFRA was unconstitutional as applied to state and local governments because it exceeded Congress's Section 5 powers. *City of Boerne v. Flores*, 521 U.S. 507, 536 (1997). Those powers are limited to enacting legislation that is "remedial" in nature, meaning that it seeks to correct documented constitutional violations and that there is "congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end." *Id.* at 520. Because RFRA was "so out of proportion as to a supposed remedial or preventive object," and the legislative record "lack[ed] examples" of the wrongs Congress sought to correct, the Court invalidated RFRA's application to state and local governments. *Id*. at 530, 532, 536.

Congress responded to *City of Boerne* by again endeavoring to pass legislation aimed at protecting religious liberty; indeed, Congress began holding hearings on the matter within weeks of the *City of Boerne* decision. *See, e.g., Protecting Religious*

*Freedom After Boerne v. Flores: Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 105th Cong. (July 14, 1997). Members of Congress unsuccessfully introduced bills mandating broad protections for religious practices in 1998 and 1999. Religious Liberty Protection Act of 1998, H.R. 4019, 105th Cong.; Religious Liberty Protection Act of 1998, S. 2148, 105th Cong.; Religious Liberty Protection Act of 1999, H.R. 1691, 106th Cong.[2] In 2000, Congress enacted RLUIPA, a narrower version of these proposed laws. Pub. L. No. 106-274, 114 Stat. 803. RLUIPA applies to local and state governments but regulates only religious burdens on land use and institutionalized persons.

RLUIPA's land use provisions parallel RFRA's more generally applicable prohibitions. In part, RLUIPA prohibits the government from adopting or implementing land use regulations that substantially burden a person's exercise of religion, absent a showing of a compelling government interest:

> (a)(1) No government shall impose or implement a land use regulation in a manner that imposes a substantial burden on the religious exercise of a person, including a religious assembly or institution, unless the government demonstrates that the imposition of the burden on that person, assembly, or institution—

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[2] The Religious Liberty Protection Act of 1998 was referred to committee in both the Senate and the House of Representatives, but never received a congressional vote. It was reintroduced as the Religious Liberty Protection Act of 1999 and was approved by the House of Representatives, but stalled at committee in the Senate and never received a Senate vote. 146 CONG. REC. S7778 (daily ed. July 27, 2000) (statement of Sen. Reid).

(A) is in furtherance of a compelling governmental interest; and

(B) is the least restrictive means of furthering that compelling governmental interest.

42 U.S.C. § 2000cc(a)(1).

While the object of RLUIPA's land use provisions—the preservation of the Court's pre-*Smith* free-exercise standard as applied to land use regulations—is narrower than the generalized aim of RFRA, the means the two statutes use is identical. *See Knight v. Thompson*, 723 F.3d 1275, 1281 (11th Cir. 2013). In drafting RLUIPA's "substantial burden" language, Congress "track[ed] the substantive language" of RFRA's parallel provisions. 146 CONG. REC. E1563 (daily ed. Sept. 22, 2000) (statement of Rep. Canady). The test simply "applies the RFRA standard" to a more limited set of governmental actions. *Id*.[3]

RLUIPA's close relationship to RFRA derives not only from the statutes' common origins, but also from their parallel evolution since their enactment. In the wake of RLUIPA's adoption, Congress amended RFRA to bring the two statutes' definitions of "religious exercise" into harmony. While RFRA had previously defined religious exercise with reference to the First Amendment, *see* 42 U.S.C. § 2000bb-2(4) (1993), Congress amended RFRA in 2000 to link its religious exercise provision to RLUIPA's more expansive

[3] This limitation derives from Congress's obligation to satisfy the congruence and proportionality test this Court announced in *City of Boerne*. 521 U.S. at 530. Pre-RLUIPA hearings produced evidence that churches were frequently subject to discrimination through the application of land use regulations and zoning decisions. Congress sought to remedy this discrimination by adopting RFRA's substantial burden test in the land use context. See Section II(B), *infra* p. 14.

definition. *See* 42 U.S.C. § 2000bb-2(4) ("[T]he term 'exercise of religion' means religious exercise, as defined in section 2000cc-5 of this title."); *id*. § 2000cc-5(7)(A) ("The term 'religious exercise' includes any exercise of religion, whether or not compelled by, or central to, a system of religious belief."). The symbiosis between the two statutes demonstrates the need for a harmonious interpretation of their parallel provisions.

On the basis of these parallel terms and common origins, the Courts of Appeals have held that RLUIPA and RFRA should be interpreted in *pari materia*. Courts not only have relied on RFRA when construing RLUIPA as a successor statute, *see, e.g., Garner v. Kennedy*, 713 F.3d 237, 242 (5th Cir. 2013); *Redd v. Wright*, 597 F.3d 532, 535 n.2 (2d Cir. 2010); *Civil Liberties for Urban Believers v. City of Chicago*, 342 F.3d 752, 760-61 (7th Cir. 2003), but have also looked to RLUIPA and its case-law progeny in deciding questions arising out of RFRA's implementation, *Lebron v. Rumsfeld*, 670 F.3d 540, 557 (4th Cir. 2012); *United States v. Wilgus*, 638 F.3d 1274, 1289 (10th Cir. 2011).

Indeed, the Tenth Circuit itself recognized the relatedness of the two statutes by examining RLUIPA's terms to answer the question of RFRA interpretation before it. *Sebelius v. Hobby Lobby Stores, Inc.*, No. 13-354, Pet'rs' App. 25a n.6 (concluding that RLUIPA "encompasses both natural persons and anything that qualifies as an 'entity'—which of course would encompass corporations").[4]

[4] The Petitioners in *Conestoga Wood Specialties* likewise argue that RLUIPA's application to an "entity" demonstrates that both RLUIPA and RFRA apply to "corporations" and do not distinguish among "corporations based on their profit motive."

Further, the Tenth Circuit's holding that "person[s]" who may engage in religious exercise under RFRA includes for-profit, secular corporations is rooted in the Dictionary Act. That Act provides that "person" in a federal statute includes corporations unless "*the context indicates otherwise*." *Sebelius* Pet'rs' App. 24a (quoting 1 U.S.C. § 1) (emphasis added). In light of RFRA's close textual similarities and common origins with RLUIPA, that context necessarily includes RLUIPA. *See Cook County, Ill. v. United States ex rel. Chandler*, 538 U.S. 119, 127-28 (2003) (construing "context" in Dictionary Act to include history of statute at issue).

The meaning of "person" in RLUIPA is therefore of central importance to this case, as the Tenth Circuit's attention to that meaning indicates. Therefore, in defining the meaning of "person" in RFRA, this Court likewise should consider the meaning of that identical term in RLUIPA. Congress's intent regarding the meaning of "person" in RLUIPA provides helpful "context" for RFRA's parallel definition. The Court should thus consider whether an expansive reading of "person" in RFRA—a reading that should be harmonized with RLUIPA's identical language—would lead to absurd results under RLUIPA's substantively identical scheme. And it should arrive at a definition of "person" that can be sensibly applied to both RFRA and RLUIPA.

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*Conestoga Wood Specialties Corp. v. Sebelius*, No. 13-356, Pet'rs' Br. at 25.

## II. RLUIPA'S DEFINITION OF "PERSON" DOES NOT INCLUDE FOR-PROFIT, SECULAR CORPORATIONS.

RLUIPA's text, legislative history, and practical application make clear that those "person(s)" whose exercise of religion may be protected under RLUIPA's heightened review provisions include individuals as well as churches, religious assemblies, and similar institutions. These individuals and institutions may require local governments to demonstrate a compelling interest to justify a land use regulation that imposes a substantial burden on their exercise of religion. But nowhere in RLUIPA's text or legislative history did Congress evince any intent to extend RLUIPA's broad protections to for-profit corporations. And amici are unaware of any decision, reported or otherwise, by any court granting a for-profit, secular corporation the protections that RLUIPA provides.

Permitting for-profit corporations to invoke RLUIPA would be unworkable, as it would dramatically expand RLUIPA's scope and hinder the orderly implementation of local land use regulations. That RLUIPA cannot sensibly be (and has never been) interpreted to include for-profit corporations within its definition of "person(s)" exercising religious beliefs provides powerful support for limiting RFRA's parallel definition to individuals and non-profit religious organizations.

### A. RLUIPA's Language Strongly Suggests That "Person" Includes Individuals And Non-Profit Religious Organizations.

Although RLUIPA lacks a specific definition of the word "person," RLUIPA's language provides important contextual clues to the meaning of the

term. Those clues strongly suggest that RLUIPA—and, by extension, RFRA—applies to individuals and non-profit religious organizations like churches, assemblies, and similar entities, but does not reach more broadly to include for-profit corporations.

RLUIPA uses the term "person" in two subsections, neither of which can reasonably be read to include for-profit corporations. First, RLUIPA requires the government to justify its actions when it "impose[s] a substantial burden on the religious exercise of a person residing in or confined to an institution," such as a penal institution, government-run mental health facility, or pre-trial detention center. 42 U.S.C. §§ 2000cc, 2000cc-1. Clearly, only natural persons can be "institutionalized" in the facilities Section 2000cc-1 covers. This suggests that in RLUIPA the term "person" means natural persons only.[5]

Second, when Congress intended "person" to encompass entities other than natural persons, it added specific language clarifying that intent. Thus, in the land use provisions, Congress stated that RLUIPA applies when the government "impose[s] or implement[s] a land use regulation in a manner that imposes a substantial burden on the religious exercise of a person, including a religious assembly or institution." 42 U.S.C. § 2000cc(a)(1). This illustrative language expands the scope of the term "person" to include specific and limited entities, and it is precisely

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[5] Congress's use of "person" in RLUIPA's institutionalized persons provision also disproves Judge Jordan's contention in his dissenting opinion in *Conestoga Wood Specialties* that Congress uses the word "individual" to refer to natural persons and "person" when it intends a more expansive definition that embraces for-profit corporations. *Conestoga Wood Specialties Corp. v. Sebelius*, No. 13-356, Pet'rs' App. 71a n.23.

the type of "context" indicating that the broader Dictionary Act definition of "person" does not apply.

If the Tenth Circuit were correct that Congress intended "person" in RLUIPA to be defined under the Dictionary Act, *Sebelius* Pet'rs' App. 24a, (quoting 1 U.S.C. § 1), it would have been unnecessary to specifically reference religious assemblies and institutions because the Dictionary Act already provides that "person" embraces such groups. 1 U.S.C. § 1 (providing that "person" includes "corporations, companies, associations, [and] societies"). Reading RLUIPA's definition of "person" to include these institutions—as well as any and all corporations—would thus offend the statutory interpretation canon against surplusage. *See Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 253 (1992).

A narrower reading that excludes for-profit corporations is also dictated by the commonplace principle of statutory construction that "a word is given more precise content by the neighboring words with which it is associated" to avoid giving a statute "unintended breadth." *Maracich v. Spears*, 133 S. Ct. 2191, 2201 (2013) (quoting *United States v. Williams*, 553 U.S. 285, 294 (2008) and *Jarecki v. G. D. Searle & Co.*, 367 U.S. 303, 307 (1961)). Thus, "person" must be read to embrace only entities similar in nature to the specific listed examples—"a religious assembly or institution"—as those examples shed light on the reach Congress intended RLUIPA to have. *See Wash. State Dep't of Soc. & Health Servs. v. Guardianship Estate of Keffeler*, 537 U.S. 371, 384-85 (2012). Churches, religious educational institutions, and non-profit religious corporations are all similar in kind to religious assemblies and institutions—and thus covered by RLUIPA. *See Sebelius v. Hobby Lobby*

*Stores, Inc.*, No. 13-354, Pet'rs' Br. at 17. Those organizations have as their primary purposes the worship of God, the teaching of religious precepts, or the facilitation of religious services. *See LeBoon v. Lancaster Jewish Cmty. Ctr. Ass'n*, 503 F.3d 217, 226 (3d Cir. 2007) (describing definition of "religious organization").

By contrast, for-profit, secular corporations bear little similarity to the entities RLUIPA describes. *Sebelius* Pet'rs' Br. at 18-19. They are organized for the purpose of financial profit, generally lack ties to a church or a religious group, and engage in commercial, secular activities. *See Grote v. Sebelius*, 708 F.3d 850, 856 (7th Cir. 2013) (Rovner, J., dissenting). Those corporations cannot qualify as "person[s]" under RLUIPA, when that term is read together with its accompanying examples. *Cf. West v. Gibson*, 527 U.S. 212, 225 (1999) (looking to "the specific examples given by the statute" in defining "appropriate remedies" provision). The only plausible construction of "person" in RLUIPA is thus the construction the federal government offers of the parallel RFRA term: "person" embraces individuals and religious institutions like churches and non-profit religious corporations—but reaches no more broadly than that. *Sebelius* Pet'rs' Br. at 20-21.

### B. RLUIPA's Legislative History Demonstrates Congress's Intention To Cabin The Definition Of "Person," Limiting It To Individuals And Religious Institutions.

Legislative history confirms what Congress made plain in RLUIPA's text: that the "person[s]" Congress intended to protect under RLUIPA include individuals as well as religious assemblies and institutions,

and similar organizations, but *exclude* for-profit, secular corporations. Congress enacted RLUIPA after compiling evidence showing that churches and religious organizations experienced overt discrimination in the zoning context. Congress enacted RLUIPA to address this specific problem. While Congress sought to ensure that incorporated religious institutions could invoke RLUIPA to the same extent as unincorporated religious groups, Congress stopped far short of evincing any intent for RLUIPA to protect other groups or entities. In fact, RLUIPA's legislative history shows that Congress included the clarification that "person" includes "religious assemblies and institutions" to make clear that the term does not encompass all corporations. The Tenth Circuit's conclusion that RLUIPA applies broadly to all entities, regardless of their "for-profit and non-profit status" is irreconcilable with Congress's intent. *Sebelius* Pet'rs' App. 25a n.6.

To interpret a statute and discern Congress's intent, courts look to the specific harm Congress sought to address. *City of Memphis v. Greene*, 451 U.S. 100, 135 (1981) (White, J., concurring) ("That was the problem Congress intended to address and that focus should determine the reach and scope of this statute."); *see also, e.g., Porter v. Comm'r of Internal Revenue*, 856 F.2d 1205, 1208-09 (8th Cir. 1988) (determining the meaning of a statutory term "in light of the problem [the statute] was intended to address"). Here, the evidence Congress relied on in enacting RLUIPA demonstrates that Congress was attempting to address the problem of overt discrimination against "[c]hurches in general" and other similar religious institutions. 146 CONG. REC. S7774 (daily ed. July 27, 2000) (joint statement of Sen. Hatch and Sen. Kennedy). The hearings Congress held in the wake of

this Court's decision in *City of Boerne* produced evidence showing that churches, "new, small, or unfamiliar churches, in particular," and similar organizations like religious schools and non-profit religious institutions were "frequently discriminated against on the fact of zoning codes and also in the highly individualized and discretionary processes of land use regulation." *Id*. While much of this evidence was anecdotal, it overwhelmingly focused on the obstacles that *religious institutions* faced in obtaining and developing "a physical space adequate to their needs and consistent with their theological requirements." *Id.*

The subjects of the discrimination Congress sought to remedy in RLUIPA were either individuals or organized religious assemblies or groups. Several of the instances of discriminatory treatment Congress relied upon in enacting RLUIPA involved individuals who were punished for holding prayer meetings at their homes. *See* 146 CONG. REC. E1566 (daily ed. Sept. 22, 2000) (statement of Rep. Hyde) (describing cease-and-desist letter a Denver, Colorado couple received for holding monthly prayer meetings at their home); *id*. at E1564-57 (describing complaints filed by the mayor of Onalaska, Wisconsin against a pastor and his wife for holding weekly bible study meetings in their home). The remaining incidents concerned difficulties that churches and similar religious institutions faced in navigating the zoning process and other land use regulations when seeking space for religious meetings. Congressional hearings showed that these institutions were subject to targeted opposition likely stemming from religious prejudice. *See id*. at E1564 (describing effort by local zoning officials in Palos Heights, Illinois to prevent a mosque from locating in their city). And even when they did

not encounter such unconcealed prejudice, religious groups faced more obstacles in the planning process than did similarly situated non-religious institutions and were disproportionately the subject of complaints before zoning boards and planning commissions. *Id.* at E1565 (describing opposition to relocation of a church to a residential neighborhood because residents feared that the church would "bring indigent people to the neighborhood"). Congress enacted RLUIPA "to remedy" these instances of "well-documented discriminatory and abusive treatment suffered by *religious individuals and organizations* in the land use context." 146 CONG. REC. E1235 (daily ed. July 14, 2000) (statement of Rep. Canady) (emphasis added); *see also* 146 CONG. REC. S6687 (daily ed. July 13, 2000) (statement of Sen. Hatch) (describing RLUIPA as a "narrowly focused bill that . . . will provide protection for houses of worship and other religious assemblies from restrictive land use regulation that often prevents the practice of faith").

Nowhere did Congress indicate that for-profit corporations encountered such prejudice. Indeed, Congress made clear that the evidence showed "a widespread pattern of discrimination against churches" that "*secular* places of assembly" did not experience. 146 CONG. REC. S7775 (daily ed. July 27, 2000) (joint statement of Sen. Hatch and Sen. Kennedy) (emphasis added). Members of Congress emphasized the "nonprofit" nature of religious organizations that they believed federal law should protect against discrimination. 146 CONG. REC. E1567 (daily ed. Sept. 22, 2000) (statement of Rep. Hyde) (describing Youngstown, Ohio zoning board's denial of a permit to a "nonprofit corporation operated by Ursuline nuns who run job training and transitional housing programs"). Congress evinced no intent to

allow RLUIPA to apply broadly to corporations that might claim to engage in religious practices.

To the contrary, congressional debates and legislative statements suggest that Congress intended to prevent the definition of "person" in RLUIPA from embracing for-profit, secular corporations. Congress added RLUIPA's language clarifying that "person" includes a religious institution or assembly in response to concerns that "person" might otherwise be interpreted to include for-profit corporations. H.R. 1691, the predecessor to RLUIPA drafted after the *City of Boerne* decision, provided simply that "[e]xcept as provided in subsection (b), a government shall not substantially burden a person's religious exercise . . . ," without including any language illustrating the meaning of "person." Religious Liberty Protection Act of 1999, H.R. 1691, 106th Cong. § 2(a). That phrasing introduced the concern that "a business corporation could make a claim under H.R. 1691." H.R. Rep. No. 106-219, at 13 n.49 (1999). Members of Congress expressed opposition to this possibility and suggested the bill be revised to prevent corporations and companies from asserting "the religious liberty defense" to generally applicable laws. *See, e.g.*, 145 CONG. REC. H5584 (daily ed. July 15, 1999) (statement of Rep. Conyers). Even supporters of the bill as written argued that the bill should not be construed to protect for-profit, secular corporations. *Id.* at H5599 (statement of Rep. Canady) (asserting that for-profit corporations could not "come within a mile of showing that anything that was done would substantially infringe on their religious beliefs").

After the Religious Liberty Protection Act of 1999 failed to receive a Senate vote, Congress introduced the version of the bill that would eventually become

RLUIPA. That bill, S. 2869, included the language referring to religious assemblies and institutions. *See* 42 U.S.C. § 2000cc. The inclusion of this clarifying language, in light of the legislative history documenting concerns about the possibility that H.R. 1691's unqualified use of the term "person" could create confusion about whether its protections extended to for-profit corporations, suggests that Congress intended to eliminate the possibility that "person" in RLUIPA could be construed to embrace for-profit corporations. Indeed, supporters of S. 2869 emphasized that RLUIPA did not protect "secular commerce" but was limited to "religious services" and similar activities. 146 CONG. REC. E1563 (daily ed. Sept. 22, 2000) (statement of Rep. Canady).

RLUIPA's legislative history also shows that Congress considered a wholesale exclusion of "corporations" from RLUIPA's predecessor bills, but rejected this approach in order to protect *religious organizations* that choose to incorporate. Congress understood that "[c]hurches, synagogues, other religious organizations, and their affiliates" are often "incorporated" or "organized as trusts, corporations sole, unincorporated associations, and sometimes in other ways." *See S. 2148, A Bill to Protect Religious Liberty: Hearing on S. 2148 Before the S. Comm. on the Judiciary*, 105th Cong. 174 (1998) (written response of Douglas Laycock); *id.* at 234 (written response of Christopher Eisgruber) ("Churches are often incorporated under state law. For that reason, it might be difficult to exclude corporations from the ambit of the word 'persons' in S. 2148 without thereby excluding churches from coverage."). Therefore, rather than excluding corporations in their entirety, Congress added language to RLUIPA affirmatively identifying the types of entities the statute was

designed to protect: religious assemblies and institutions.

The legislative history is thus consistent with the language and structure of RLUIPA in demonstrating that Congress intended "person" to be construed in precisely the manner the federal government has construed it in these cases—as embracing non-profit religious corporations but not profit-seeking enterprises. *Sebelius* Pet'rs' Br. at 17-20. No other reading makes sense in light of Congress's desire to remedy the different treatment of "churches" and "secular places of assembly" in the land use context, 146 CONG. REC. S7775 (daily ed. July 27, 2000) (joint statement of Sen. Hatch and Sen. Kennedy), and to protect against overt discrimination against houses of worship, 146 CONG. REC. E1235 (daily ed. July 14, 2000) (statement of Rep. Canady).[6]

[6] Interpreting RLUIPA to embrace for-profit corporations could also threaten RLUIPA's viability as an exercise of Congress's Section 5 powers. Remedial legislation Congress enacts under Section 5 must be targeted to the "evil" or "wrong" that Congress intended to remedy, and "the propriety of any [Section] 5 legislation 'must be judged with reference to the historical experience . . . it reflects.'" *Fla. Prepaid Postsecondary Educ. Expense Bd. v. College Sav. Bank*, 527 U.S. 627, 639-40 (1999) (quoting *City of Boerne*, 521 U.S. at 525). Congress enacted RLUIPA in the face of evidence of a specific "evil"—discrimination against churches and religious organizations in the land use context. If the "person[s]" RLUIPA protects includes entirely different entities, RLUIPA's reach would be disproportionate to the evidence Congress considered—and might thereby exceed Congress's Section 5 authority. *Id.* at 640.

## III. RLUIPA CANNOT SENSIBLY BE APPLIED TO FOR-PROFIT, SECULAR CORPORATIONS.

Interpreting RLUIPA to provide protections to for-profit, secular corporations is also impractical and inadministrable. RLUIPA prohibits state and local governments from implementing "land use regulations in a manner that imposes a substantial burden on the religious exercise of a person" unless the government can demonstrate that the regulation is the "least restrictive means of furthering [a] compelling governmental interest." 42 U.S.C. § 2000cc(1). Both Congress and the federal courts have given several terms in RLUIPA's text—"religious exercise," "substantial burden," and "land use regulation"—broad meanings. Thus, when a "person" is a protected entity under RLUIPA, that entity's religious exercise is afforded heightened protections in the land use context. In light of these broad protections, "person" must be defined narrowly if Congress's intention that RLUIPA be "narrowly focused" is to be given any effect. 146 CONG. REC. S6687 (daily ed. July 13, 2000) (statement of Sen. Hatch). Including for-profit corporations would greatly expand RLUIPA's reach, leading to results Congress did not and could not have intended, and magnifying the burden that RLUIPA would place on the local administration of land use regulations.

### A. RLUIPA Provides Broad Protections To Covered Persons And Entities.

A covered entity may invoke RLUIPA whenever activities that constitute religious exercise are substantially burdened by a state or local land use regulation or planning decision. Congress and the courts have placed few limits on the types of activities

that may potentially qualify as the exercise of religion. RLUIPA itself makes clear that its terms "shall be construed in favor of a broad protection of religious exercise, to the maximum extent permitted by the chapter and the Constitution." 42 U.S.C. § 2000cc-3(g). Protected activity need not be "compelled by, or central to, a system of religious belief." *Id*. § 2000cc-5(7)(A). And RLUIPA places no limits on the activities that can constitute religious exercise, but does clarify that "[t]he use, building, or conversion of real property for the purpose of religious exercise shall be considered to be religious exercise . . . ." *Id*. § 2000cc-5(7)(B).

Courts have thus construed "religious exercise" under RLUIPA to include a broad set of activities, beyond what the Free Exercise Clause might protect. *See Grace United Methodist Church v. City of Cheyenne*, 451 F.3d 643, 663 (10th Cir. 2006) (noting that RLUIPA "substantially modified and relaxed the definition of 'religious exercise'"). These activities include not only the construction of a church or other facility for purposes of gathering for worship, *see, e.g., Int'l Church of Foursquare Gospel v. City of San Leandro*, 673 F.3d 1059, 1062-63 (9th Cir. 2011); but also the preservation of historic architecture, *Roman Catholic Bishop of Springfield v. City of Springfield*, 724 F.3d 78, 97-98 (1st Cir. 2013); the management of a home as a religious retreat, *DiLaura v. Township of Ann Arbor*, 112 Fed. Appx. 445 (6th Cir. 2004); the operation of a day care center, *Grace United Methodist Church*, 451 F.3d at 663; and the operation of a private school, *Westchester Day Sch. v. Vill. of Mamaroneck*, 504 F.3d 338, 347-48 (2d Cir. 2007).

Courts are generally required to accept a covered entity's claim that the activity at issue is religiously motivated. While a court may question whether the

claimant is "sincere" in its religious beliefs, the court may not examine whether the activity at issue is "fundamental" to the claimant's religious beliefs. *See Grace United Methodist Church*, 451 F.3d at 664; *see also Moussazadeh v. Tex. Dep't of Criminal Justice*, 703 F.3d 781, 790-92 (5th Cir. 2012) ("Though the sincerity inquiry is important, it must be handled with a light touch, or judicial shyness." (internal quotation marks and citation omitted)). Indeed, RLUIPA prohibits courts from determining whether a particular practice "is compelled by, or central to, a system of religious belief." 42 U.S.C. § 2000cc-5(7)(A). Consistent with this Court's warnings in the First Amendment context, which have prohibited courts from "undertak[ing] to dissect religious beliefs" and made clear that courts are "not arbiters of scriptural interpretation," *Thomas v. Review Bd. of the Indiana Employment Sec. Div.*, 450 U.S. 707, 715-16 (1981), courts applying RLUIPA are generally reluctant to question whether a covered entity's purportedly protected activities are in fact religious in nature. *See, e.g., Washington v. Klem*, 497 F.3d 272, 277 (3d Cir. 2007).

RLUIPA claimants also enjoy broad protections under the "substantial burden" prong of the statute's land use provisions. Under the First Amendment, and even under RLUIPA's institutionalized persons provisions, a claimant must show that the challenged government action or policy "put[s] substantial pressure on an adherent to modify his behavior and to violate his beliefs." *Lovelace v. Lee*, 472 F.3d 174, 187 (4th Cir. 2006); *see Thomas*, 450 U.S. at 718. That is, a substantial burden exists only when an individual is required to "choose between following the precepts of her religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of her religion . . .

on the other hand." *Sherbert v. Verner*, 374 U.S. 398, 404 (1963). RLUIPA land use plaintiffs need not make this stringent showing, *i.e.*, they need not demonstrate that their failure to comply with the challenged land use regulation would cause them to violate their religious obligations. *See Westchester Day Sch.*, 504 F.3d at 349. Rather, a claimant need only show that the "government regulation puts substantial pressure on it to modify" the religious behavior at issue. *Bethel World Outreach Ministries v. Montgomery County Council*, 706 F.3d 548, 556 (4th Cir. 2013); *see also Guru Nanak Sikh Soc'y of Yuba City v. County of Sutter*, 456 F.3d 978, 988-89 (9th Cir. 2006) ("[A] substantial burden on 'religious exercise' must impose a significantly great restriction or onus upon such exercise."). For example, a RLUIPA claimant challenging a city's denial of a permit to build new facilities for the purpose of religious activity need not show that the chosen site is the only place where such new facilities could be built, but instead must show only that the "alternatives require substantial 'delay, uncertainty, and expense.'" *Westchester Day Sch.*, 504 F.3d at 349 (quoting *Saints Constantine and Helen Greek Orthodox Church, Inc. v. City of New Berlin*, 396 F.3d 895, 901 (7th Cir. 2005)).

RLUIPA's expansive protections have significant consequences for local governments, which must already consider RLUIPA in numerous land use regulations and planning decisions. RLUIPA applies to "the implementation of a land use regulation or a 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(2)(C). RLUIPA broadly defines a land use regulation to mean any "zoning or landmarking law, or the application of such a law, that limits or

restricts a claimant's use or development of land (including a structure affixed to land) . . . ." *Id.* § 2000cc-5(5). In practice, RLUIPA applies to a local government's enforcement of a variety of land use regulations, ordinances, and policies.

Challenges to denials of rezoning applications or conditional use permits—*i.e.*, requests from an entity to use its property for a different use than that permitted by the zoning code—comprise a substantial number of RLUIPA cases. *See, e.g., Int'l Church of Foursquare Gospel*, 673 F.3d at 1062 (challenging denial of rezoning application and conditional use permit for church to build facility in area zoned for industrial use); *Bethel World Outreach Ministries*, 706 F.3d at 552-53 (challenging county zoning regulation preventing construction of church in area designated as an agricultural reserve). But courts have found that RLUIPA applies to a variety of additional types of planning requirements, such as: environmental review processes, *Fortress Bible Church v. Feiner*, 694 F.3d 208, 218 (2d Cir. 2012) (holding RLUIPA applicable to New York's State Environmental Quality Review Act); eminent domain proceedings, *Cottonwood Christian Ctr. v. Cypress Redevelopment Agency*, 218 F. Supp. 2d 1203, 1222 n.9 (C.D. Cal. 2002); parking variances, *Lighthouse Cmty. Church of God v. City of Southfield*, No. 05-40220, 2007 WL 30280, at *7 (E.D. Mich. Jan. 3, 2007); local bed-and-breakfast regulations, *DiLaura*, 112 Fed. Appx. 445, at *1; and signage ordinances, *Trinity Assembly of God of Baltimore City, Inc. v. People's Counsel*, 941 A.2d 560, 565-66 (Md. App. 2008). Commentators have argued that RLUIPA applies even more broadly than these cases demonstrate, contending that building codes, housing codes, plumbing codes, and other laws enacted pursuant to the police power to protect public

health, safety, and welfare should also be subject to RLUIPA scrutiny. *See, e.g.*, Shelley Ross Saxer, *Assessing RLUIPA's Application To Building Codes And Aesthetic Land Use Regulation*, 2 ALB. GOV'T L. REV. 623, 633 (2009).

Because RLUIPA may prevent local governments from enforcing a host of public health, safety, and environmental laws as to those whom it protects, RLUIPA can be given the "narrow" effect Congress intended only if its protections extend to a limited set of entities—namely, individuals, religious groups, and non-profit religious entities. As explained below, if the protections apply to for-profit corporations as well, RLUIPA's effect would be almost limitless.

### B. Permitting For-Profit Corporations To Qualify As "Person[s]" Under RLUIPA Would Expand The Statute, Destabilize Markets, And Unnecessarily Burden Local Planning Departments.

Interpreting RLUIPA to protect for-profit, secular corporations would dramatically expand the statute's reach. For-profit corporations could avail themselves of RLUIPA's broad definition of religious exercise to characterize secular commercial activity as religious in nature. They would have an incentive to do so to gain a competitive advantage in the marketplace. The likely result would be a dramatic increase in the number of for-profit corporations claiming to engage in "religious exercise," with a concomitant increased burden on local governments administering land use regulations.

RLUIPA's broad definition of religious exercise already encompasses the use of property by non-profit religious organizations for activities such as movie

nights, community events, the hosting of private catered functions, and the operation of overnight retreat centers and housing facilities. *See Opulent Life Church v. City of Holly Springs*, 697 F.3d 279, 282 (5th Cir. 2012) (church challenged zoning ordinance that prevented it from obtaining larger space to "host certain community outreach events" like "Bible School" and movie nights); *Third Church of Christ, Scientist v. City of New York*, 626 F.3d 667, 668 (2d Cir. 2010) (use of church facilities for private, catered functions); *Bikur Cholim, Inc. v. Vill. of Suffern*, 664 F. Supp. 2d 267, 271 (S.D.N.Y. 2009) (operation of facility providing overnight accommodations to families of hospital patients).

If for-profit corporations may characterize their "pursuit of profit" as related to their "exercise of religion," then there would be no end to the types of "religious exercise" for which corporations could seek protection under RLUIPA. *Conestoga Wood Specialties Corp. v. Sebelius*, No. 13-356, Pet'rs' Br. at 26 (internal quotations and citation omitted). Indeed, the Tenth Circuit's opinion, if applied to RLUIPA, would open the door to precisely such possibilities. *Sebelius* Pet'rs' App. 39a. A facility hosting for-profit community events could be protected under RLUIPA if the relevant entity claimed to be performing a religious obligation by so gathering the public. *Mintz v. Roman Catholic Bishop of Springfield*, 424 F. Supp. 2d 309, 319 (D. Mass. 2006) (involving a parish meeting center). A for-profit amusement park could invoke RLUIPA if it claimed a religious obligation to provide wholesome entertainment to children. *Cf. Grace United Methodist Church*, 451 F.3d at 656 (applying RLUIPA to non-profit religious group operating a day-care center); *Westchester Day Sch.*, 504 F.3d at 347-48 (applying RLUIPA to a religious

private day school). Or a for-profit hotel and convention center could avoid generally applicable zoning requirements by claiming its services to be religiously motivated. *Cf. World Outreach Conference Ctr. v. City of Chicago*, 591 F.3d 531, 533-34 (7th Cir. 2009) (applying RLUIPA to non-profit religious group operating community center and single-room-occupancy facilities). While courts reviewing these claims could determine whether these assertions of religious belief were sincere, they could do little else to question whether these activities were religious in nature. *See Thomas*, 450 U.S. at 715-16.

For-profit corporations would have strong incentives to claim "religious exercise" to gain a commercial advantage over competitors, if they could qualify as "person[s]" under RLUIPA. A corporation building a factory could evade local land use regulations—and build its factory more quickly and more cheaply—by asserting that the factory related to the corporation's "exercise of religion." This corporation would have a significant advantage over all of its competitors that remained subject to local land use requirements. At an extreme, this unequal playing field could disrupt commercial markets and hinder competition by non-religious corporations, which would be at a disadvantage in the initial stages of acquiring property and getting products or services to market. At a minimum, the consequence would be a vastly greater number of entities seeking to invoke RLUIPA to avoid land use restrictions, and the concomitant diminution of local government power to control land uses.

The result would also be a dramatically increased burden on local planning commissions, boards of appeal, and similar entities tasked with enforcing land use regulations and addressing requests for variance.

Allowing for-profit corporations to invoke RLUIPA would likely lead to a sharp increase in cases in which the government must make land use decisions with the possibility of RLUIPA litigation looming in the background. As an *amicus* brief filed with the Tenth Circuit makes clear, arguments about statutory religious protections do not surface for the first time in court, but may arise during the administrative process that precedes the government decision. Br. of Sen. Orrin G. Hatch et al. as Amici Curiae Supporting Plaintiffs-Appellants at 4-5, *Hobby Lobby Stores, Inc. v. Sebelius*, 723 F.3d 1114 (10th Cir. 2013) (No. 12-6294) (criticizing the federal Department of Health and Human Services for failing to address RFRA during administrative process).

Protected entities already invoke RLUIPA when seeking conditional use permits or other individualized assessments at the local administrative level. *See, e.g., Trinity Assembly of God of Baltimore City, Inc.*, 941 A.2d at 562; *Timberline Baptist Church v. Washington County*, 154 P.3d 759, 760 (Or. App. 2007). Indeed, some courts have required local commissions to first determine RLUIPA's applicability to a particular action before a claimant can seek judicial relief. *See, e.g., Lyster v. Woodford County Bd. of Adjustment Members*, No. 2005-CA-001336-MR, 2007 WL 542719, at *4 (Ky. App. Feb. 23, 2007) (remanding to County Board of Adjustment to "consider the provisions of RLUIPA when making its determination of whether to issue a conditional use permit"); *Trinity Assembly of God of Baltimore City, Inc.*, 941 A.2d at 561 (same). Allowing for-profit corporations to invoke RLUIPA would add to the plethora of issues that local planning commissions must already address in making zoning exceptions or granting use permits. *See, e.g.*, CAL. GOV. CODE

§ 65906 (providing that variances may be granted "because of special circumstances applicable to the property, including size, shape, topography, location or surroundings"); *see also O'Hagen v. Bd. of Zoning Adjustment*, 96 Cal. Rptr. 484, 488 (Cal. Ct. App. 1971) (setting forth showing that applicant seeking use permit must make).

And expansion of RLUIPA would entangle local boards and commissions in particularly thorny matters, as they would be required to determine the sincerity of a claimant's religious belief and weigh the magnitude of any harm to the claimant's religious exercise—determinations that may be challenging and arguably inappropriate for commissions to make. *See Sebelius* Pet'rs' App. 124a-130a (Briscoe, C.J., concurring in part and dissenting in part); *Korte v. Sebelius*, 735 F.3d 654, 703-05 (7th Cir. 2013) (Rovner, J., dissenting); *cf. Smith*, 494 U.S. at 889 n.5 (remarking that "it is horrible to contemplate that federal judges will regularly balance against the importance of general laws the significance of religious practice"). Limiting RLUIPA's definition of "person" to individuals, religious assemblies, and other non-profit religious institutions both minimizes RLUIPA's sheer impact on local government agencies and relieves these agencies from having to make thorny inquiries into claimants' religious motivations.

The negative practical effects of reading RLUIPA to include for-profit corporations within its definition of covered entities counsel strongly in favor of a more narrow reading of "person" in RLUIPA. *See Freeman v. Quicken Loans, Inc.*, 132 S. Ct. 2034, 2041 (2012). Congress clearly intended RLUIPA to operate narrowly and to benefit a limited set of potential claimants: individuals and religious assemblies and

institutions. *See generally* 146 CONG. REC. E1567 (daily ed. Sept. 22, 2000) (statement of Rep. Hyde). The creation of skewed market incentives, expansion of protected activity, and interference with the administration of local land use ordinances cannot be squared with Congress's intent. RLUIPA should thus be read as applying only to individuals and non-profit religious organizations.

* * *

RLUIPA uses the term "person" to include individuals, religious assemblies, churches, and similar non-profit religious institutions, but to exclude for-profit corporations. In light of RLUIPA's extraordinarily close relationship to RFRA, RFRA's parallel definition should be construed in the same way.

## CONCLUSION

Amici respectfully urge this Court to reverse the Tenth Circuit's judgment based on its erroneous conclusion that RFRA applies to for-profit corporations, and to affirm the Third Circuit's judgment.

Respectfully submitted,

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