Case No. 09-1188

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

ROCKY MOUNTAIN CHRISTIAN CHURCH, Plaintiff-Appellee, and UNITED STATES OF AMERICA, Intervenor Plaintiff-Appellee v. BOARD OF COUNTY COMMISSIONERS OF BOULDER COUNTY Defendant-Appellant.	AMICUS CURIAE BRIEF OF COLORADO COUNTIES, INC., THE COLORADO MUNICIPAL LEAGUE, THE NATIONAL LEAGUE OF CITIES, INC. and THE INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION

On Appeal from the United States District Court for the District of Colorado
The Honorable Robert E. Blackburn, District Judge
Civil Action No. 06-cv-00554-REB-BNB

AMICUS CURIAE BRIEF IN SUPPORT OF DEFENDANT-APPELLANT
and arguing in favor of vacating the judgment of the district court

Date: September 8, 2009

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

PAGE

FEDERAL CASES

STATE CASES

CONSTITUTIONAL PROVISIONS

FEDERAL STATUTES

STATE STATUTES

OTHER AUTHORITIES

PRIOR OR RELATED APPEALS: NONE

as a national advocate for the more than 19,000 cities, villages, and towns it represents.

The International Municipal Lawyers Association ("IMLA") is a non-profit, professional organization of over 3000 local government entities, including cities, counties, and special district entities, as represented by their chief legal officers, state municipal leagues, and individual attorneys. Since 1935, IMLA has served as a national, and now international, clearinghouse of legal information and cooperation on municipal legal matters. IMLA's mission is to advance the responsible development of municipal law through education and advocacy by providing the collective viewpoint of local governments around the country on legal issues before the United States Supreme Court, in the United States Courts of Appeals, and in state supreme and appellate courts.

Accordingly, the District Court's determination that Boulder County cannot regulate land uses in accordance with legitimate and neutral zoning laws, where the proposed landowner is a religious institution, is of paramount importance to all of the Colorado's counties and municipalities, and hence CCI and CML as a non-profit organizations involved with those local governments. Local government authority over land use decisions is the expressed policy of the state of Colorado and deference to local government decisionmaking in this arena has long been

recognized by the U.S. Supreme Court. Furthermore, the District Court's holding has potentially far-reaching impacts to those municipalities nationwide represented by NLC and IMLA.

The parties to this case have all agreed to the participation of CCI, CML, NLC and IMLA as Amici Curiae to submit an amicus curiae brief to present this Court with their insight and analysis of the issues presented by the District Court's March 31, 2009 Order in this matter.

STATEMENT OF ISSUES

Amici appear solely on the following issue identified by Defendant-Appellant, the Board of County Commissioners of the County of Boulder:

The substantial burden provision of RLUIPA is an unconstitutional exercise of congressional power because it exceeds Congress' enforcement power under Section 5 of the Fourteenth Amendment and under the Commerce Clause.

STATEMENT OF THE CASE

Amici Curiae CCI, CML, NLC and IMLA adopt the Statement of the Case and the Statement of Facts from the Opening Brief filed by Defendant-Appellant the Board of County Commissioners of the County of Boulder. [*See* Opening Brief, at pp. 2-14].

SUMMARY OF ARGUMENT

This case involves the tension between the sovereignty of state and local governments and the power of the federal government to enforce individual rights. The "substantial burden" provision contained in the Religious Land Use and Institutionalized Persons Act of 2000, 42 U.S.C. §§ 2000cc ("RLUIPA"), Section 2(a), exceeds Congress' powers to enforce constitutional guarantees against the states under Section 5 of the Fourteenth Amendment to the U.S. Constitution and under the Commerce Clause, U.S. Const. Art. I, § 8, cl.3.

In promulgating RLUIPA, Congress simply ignored considerable federal and state court precedent requiring deference to local government decisionmaking in regulating land uses.

Numerous federal and state courts recognize the fundamental power and authority of local government to plan for and regulate the use of land within their respective jurisdictions. This is also the expressed policy of the State of Colorado. Local governments must be vigilant and assure that all types of development are undertaken in harmony with the way local communities function, and assure the protection of their citizens from adverse effects of unregulated land uses. Both the

federal courts and the States recognize that local governments are in the best position to exercise that vigilance and make such decisions.

It is the responsibility of local governments, representing their citizens, to decide whether or where a proposed use can occur. The District Court's decision in this case may be interpreted to allow any religious land use to occur, without regard to local citizens' interests or desires, even though such use conflicts with local governments' neutral and generally applicable zoning regulations. Under the direction of RLUIPA, the District Court in the instant case usurped local government legislative authority and placed itself in the position of determining whether a land use can occur in Boulder County. This action was taken by the District Court even though Boulder County established that it neither discriminated on the basis of religion nor violated the First Amendment free exercise protections in denying the church's request. The District Court's application of RLUIPA essentially eliminates all local control over establishing compatible land uses when the subject landowner is a religious institution.

If the District Court's decision is upheld, every Colorado county and municipality may be thwarted when an attempt is made to protect the utility, value and future of the land as a matter of public interest through land use regulation. This may place local governments in the position of allowing uses the State of

Colorado has deemed detrimental to Colorado. Further, many local governments simply lack the substantial resources necessary to defend a challenge brought in federal court. Under RLUIPA, local governments must either amend their land use laws or face the prospect of zoning decisions being made by federal judges after costly litigation. *See City of Boerne v. Flores*, 521 U.S. 507, 535 (1997) ("The substantial costs RFRA exacts, both in practical terms of imposing a heavy litigation burden on the States and in terms of curtailing their traditional general regulatory power, far exceed any pattern or practice of unconstitutional conduct under the Free Exercise Clause as interpreted in *Smith*[1].")

These concerns prompt amici to urge this Court to vacate the District Court's judgment in this case.

ARGUMENT

In the interest of brevity amici adopt the arguments advanced in the Opening Brief of Appellant Board of Commissioners of Boulder County and in the briefs of other amici curiae submitted in support of Appellant Board of Commissioners of Boulder County that address the Issue on Appeal outlined above.

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[1] *Employment Div., Dept. of Human Resources of Ore. V. Smith*, 494 U.S. 872 (1990).

I. THE SUBSTANTIAL BURDEN PROVISION OF RLUIPA IS AN UNCONSTITUTIONAL EXERCISE OF CONGRESSIONAL POWER UNDER SECTION FIVE OF THE FOURTEENTH AMENDMENT AND UNDER THE COMMERCE CLAUSE

RLUIPA Section 2(a) impermissibly subjects neutral land-use regulations "under which a government makes . . . individualized assessments of the proposed uses for the property involved" to strict scrutiny, if the land use determination applies to a religious landowner. 42 U.S.C. § 2000cc(a)(2)(C). Strict scrutiny also applies when "the substantial burden affects, or removal of that substantial burden would affect commerce...even if the burden results from a rule of general applicability." *Id.* at §2000cc(a)(2)(B). In addition to the constitutional infirmities identified in the Opening Brief of Appellant, this unconstitutional expansion of "free exercise" rights in the area of land use contravenes a long line of federal case law generally upholding local government's primary authority in land use governance.

A. FEDERAL COURTS HISTORICALLY FOLLOW THE CONSTITUTIONAL RULE THAT THE FEDERAL GOVERNMENT SHOULD DEFER TO LOCAL GOVERNMENTS IN LAND USE DECISIONS

Congress' powers under Section 5 of the U.S. Constitution extend only to "enforcing" the provisions of the Fourteenth Amendment not to determining what constitutes a constitutional violation. *Boerne*, 521 U.S. at 519. When Congress

enacts legislation "against the background of a judicial interpretation of the Constitution already issued, it must be understood that in later cases and controversies the Court will treat its precedents with the respect due them under settled principles, including *stare decisis*, and contrary expectations must be disappointed." *Id.* at 536 (Holding that the provisions of RFRA exceeded congressional authority).

In *Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926), the Supreme Court established that a municipality may invoke its police powers, under the Constitution and restrict the use of property in order to promote the public health, welfare and safety. A long line of cases decided after *Euclid* continued to uphold the constitutional rule that the federal government should defer to local governments in land use decisions. *See e.g. Solid Waste Agency v. Army Corps of Eng'rs,* 531 U.S. 159, 174 (2001) ("Regulation of land use [is] a function traditionally performed by local governments.") (citation omitted); *FERC v. Mississippi*, 456 U.S. 742, 767 n.30 (1982) ("[R]egulation of land use is perhaps the quintessential state activity.") (citation omitted); *Warth v. Seldin*, 422 U.S. 490, 508 n.18 (1975) ("[Z]oning laws and their provisions, long considered essential to effective urban planning, are peculiarly within the province of state and local

legislative authorities."); *Nectow v. City of Cambridge,* 277 U.S. 183, 187-88 (1928) (reviewing zoning restrictions under low level scrutiny).

This Court has historically held that land use decisions are matters of local concern and that principals of federalism strongly limit federal involvement in this area. "Land use policy such as zoning customarily has been considered a feature of local government and an area in which the tenets of federalism are particularly strong." Deane v. United States, 2009 U.S. App. LEXIS 10344 at 14 (10th Cir. May 14, 2009) (citation omitted); See also Nichols v. Bd. of County Comm'rs, 506 F.3d 962, 971 (10th Cir. 2007) ("Federal courts should be reluctant to interfere in zoning disputes which are local concerns.") (citations omitted); Mount Olivet Cemetery Ass'n v. Salt Lake City, 164 F.3d 480, 487 (10th Cir. 1998) ("A local government has broad power to implement its land use policies by way of zoning classifications.") (citation omitted); Evans v. Board of County Comm'rs, 994 F.2d 755, 761 (10th Cir. 1993) ("Land use policy customarily has been considered a feature of local government and an area in which the tenets of federalism are particularly strong.") (citation omitted).

Congress ignored this long standing federal deference to local government control of land use when promulgating RLUIPA.[2] Moreover, the law's substantial burden test for land use determinations is not proportional or congruent to the legitimate end to be achieved. *See Boerne*, 521 U.S. at 519-20, 526. In *Borne*, the Supreme Court reaffirmed local government sovereignty over land use in striking down RFRA's "substantial burden" test, stating:

> RFRA's substantial burden test, however, is not even a discriminatory effects or disparate impact test. It is a reality of the modern regulatory state that numerous state laws, such as the zoning regulations at issue here, impose a substantial burden on a large class of individuals. When the exercise of religion has been burdened in an incidental way by a law of general application, it does not follow that the persons affected have been burdened any more than other citizens, let alone burdened because of their religious beliefs. In addition, the Act imposes in every case a least restrictive means requirement--a requirement that was not used in the pre-Smith jurisprudence RFRA purported to codify--which also indicates that the legislation is broader than is appropriate if the goal is to prevent and remedy constitutional violations.

521 U.S. at 535.

Court's deference to local government authority over land uses is well established in federal jurisprudence. RLUIPA's imposition of strict scrutiny to

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[2] *See*, Marci A. Hamilton, *Federalism and the Public Good: The True Story Behind the Religious Land Use and Institutionalized Persons Act*, 78 IND. L.J. 311, 335-41 (2002). (Discussing congressional hearings on The Religious Liberty Protection Act Bills ("RLPA")).

land use determinations involving individualized assessments and substantial burdens that affect interstate commerce ignores the constitutional doctrine of deference to local government decisionmaking in this area. Given the broad interpretation the District Court and other courts have applied to "individualized assessments" and "affecting interstate commerce," land use decisionmaking, because of its very nature, may require "individualized assessments" or "affect interstate commerce" in almost every instance. This is because as soon as a use is established, the community changes and the next proposed use must be considered in light of both the pre-existing uses and the planned uses. However, under RLUIPA, if a covered landowner can show a substantial burden on his free exercise, the government must demonstrate a compelling interest and show that the law is the least restrictive means of furthering its interest. As was the case with RFRA, "[t]his is a considerable congressional intrusion into the States' traditional prerogatives and general authority to regulate for the health and welfare of their citizens." *Boerne*, 521 U.S. at 534.

B. RLUIPA UNDERMINES THE STATE OF COLORADO'S AUTHORITY TO REGULATE FOR THE HEALTH AND WELFARE OF ITS CITIZENS AND IS CONTRARY TO EXPRESS PUBLIC POLICY PLACING LAND USE DECISIONS UNDER LOCAL GOVERNMENT CONTROL

Colorado enacted its first land use statutes in 1929, three years after the Supreme Court's decision in *Euclid*. This law provided Colorado's statutory cities and towns with authority over land use planning.[3] Currently, four different enactments of the Colorado General Assembly provide local governments with authority in the area of land use determinations: The County Planning Act, §§ 30-28-101 to 404 C.R.S.; The Local Government Land Use Controlling Act of 1974, §§ 29-20-101 to 108 C.R.S.; The Areas and Activities of State Interest Act, §§ 24-65.1-101 to 502 C.R.S., and The Municipal Planning and Zoning Act, §§ 31-23-101 to 314 C.R.S.

These Acts expressly delineate Colorado's strong policy of protecting compatible land uses. The County Planning Act, enacted in 1939, grants Colorado counties the power to "provide for the physical development of the unincorporated territory within the county and for the zoning of all or any part of such

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[3] Act of May 20, 1929 ("City and Regional Planning Act"), 1929 Colo. Sess. Laws, Ch. 67 at 219; *See* Joseph B. Dischinger, *Local Government Regulations Using 1041 Powers*, 34 Colo. Lawyer 79 (Dec. 2005) (History of land use planning laws in Colorado).

unincorporated territory." Section 30-28-102 C.R.S. In the County Planning Act, the legislature specifically instructs that zoning regulations promulgated by Colorado counties "shall be designed and enacted for the purpose of promoting the health, safety, morals, convenience, order, prosperity, or welfare of the present and future inhabitants of the state, including lessening the congestion in the streets or roads or reducing the waste of excessive amounts of roads, promoting energy conservation, securing safety from fire, floodwaters, and other dangers, providing adequate light and air, classifying land uses and distributing land development and utilization, protecting the tax base, securing economy in governmental expenditures, fostering the state's agricultural and other industries, and protecting both urban and nonurban development." Section 30-28-115 C.R.S.;[4] *See Bd. of County Comm'rs v. Thompson*, 493 P.2d 1358, 1362 (1972). ("The board of county

[4] Similarly, The Municipal Planning and Zoning Act, directs that zoning "regulations shall be made in accordance with a comprehensive plan and designed to lessen congestion in the streets; to secure safety from fire, panic, floodwaters, and other dangers; to promote health and general welfare; to provide adequate light and air; to prevent the overcrowding of land; to avoid undue concentration of population; to promote energy conservation; and to facilitate the adequate provision of transportation, water, sewerage, schools, parks, and other public requirements. Such regulations shall be made with reasonable consideration, among other things, as to the character of the district and its peculiar suitability for particular uses and with a view to conserving the value of buildings and encouraging the most appropriate use of land throughout such municipality." § 31-23-303, C.R.S. (2008).

commissioners, as the legislative body, has a wide prerogative under [§ 30-28-115 C.R.S.], in classifying and regulating uses of land . . . and it is not the function of the courts to determine how uses shall be defined or what uses shall be permitted in various districts under comprehensive zoning resolutions.")

In the Local Government Land Use Control Enabling Act, the Colorado General Assembly conferred "broad authority on local governments to plan for and regulate the use of land within their respective jurisdictions." *Board of County Comm'rs v. Bowen/Edwards Assoc.*, 830 P.2d 1045, 1056 (Colo. 1992); Section 29-20-102 C.R.S. ("The purpose of the Enabling Act is to provide for planned and orderly development within Colorado and a balancing of basic human needs of a changing population with legitimate environmental concerns, the policy of this state is to clarify and provide broad authority to local governments to plan for and regulate the use of land within their respective jurisdictions.") The Enabling Act "vests counties with the power to regulate development and activities in hazardous areas, to protect land from activities that would cause immediate or foreseeable material damage to wildlife habitat, to preserve areas of historical and archaeological importance, to regulate the location of activities and development which may result in significant changes in population density, to provide for the phased development of services and facilities, to regulate land use on the basis of

its impact on the community or surrounding areas, and to otherwise plan for and regulate land use so as to provide for the orderly use of land and the protection of the environment consistent with constitutional rights." *Bowen/Edwards Assoc.*, 830 P.2d at 1056; Section 29-20-104 C.R.S.

Most recently, in 1974, the General Assembly enacted the "Areas and Activities of State Interest Act." The purpose of the Act is to describe areas and activities which may be of state interest and establish criteria for the administration of these areas and activities. Further, this Act is intended to encourage local governments to designate areas and activities of state interest, and to administer and promulgate guidelines for the administration of these areas and activities." The Colorado legislature specifically directed counties to consider and "state reasons why the particular area or activity is of state interest, the dangers that would result from uncontrolled development of any such area or uncontrolled conduct of such activity, and the advantages of development of such area or conduct of such activity in a coordinated manner." Section 24-65.1-401 C.R.S.

The Colorado General Assembly has specifically delegated the power and authority to Colorado counties to plan for and regulate the use of land within their respective jurisdictions. Section 29-20-104(1) C.R.S. The statutes pertaining to county planning, vest broad authority in the county to regulate 'uses of land for

trade, industry, recreation, public activities, or other purposes through zoning and land use controls" *C & M Sand & Gravel, Div. of C & M Ready Mix Concrete Co. v. Board of County Comm'rs*, 673 P.2d 1013, 1016 (Colo. App. 1983); Section 30-28-111 C.R.S.

The Colorado Supreme Court recognizes the power of local government in land use determinations. "A board of county commissioners, as the legislative body, has a wide prerogative in classifying and regulating uses of land and it is not the function of the courts to determine how uses shall be defined or what uses shall be permitted in various districts under comprehensive zoning resolutions." *Thompson*, 493 P.2d at 1358; *Baum v. Denver*, 363 P.2d 688, 697 (Colo. 1961) ("This Court does not sit as a super-zoning commission. Our laws have wisely committed to the people of a community themselves the determination of their municipal destiny, the degree to which the industrial may have precedence over the residential, and the areas carved out of each to be devoted to commercial pursuits.")

Over eighty years ago, the U.S. Supreme Court in *Euclid* upheld the police powers of local government to protect the health, safety and welfare of its citizens. Colorado placed the power to determine compatible uses of land in the hands of local governments elected by local citizens. As stated by the Colorado Supreme

Court in *Baum*: "This court is not equipped to zone particular parcels of land. We do not see the land, we do not see the community, we do not grapple with its day-to-day problems." *Id.* at 695.

Congress ignored longstanding federal and state jurisprudence, as well as express state interests in managing their land, when it enacted RLUIPA. As evidenced by the District Court's conclusion in this case, a local government, acting neutrally in applying its zoning regulations, can have its decision overturned simply because the permit applicant is a religious landowner. Under the District Court's reasoning, once a local government allows a similar land use to that requested by a religious landowner, the government cannot deny the religious landowner's request. This conclusion ignores the ever-evolving nature of land use determinations. As populations grow and communities develop, a once acceptable land use may no longer be in the community's best interest, no matter who the landowner happens to be. As this court recently held, a "church has no constitutional right to be free from reasonable zoning regulations nor does a church have a constitutional right to build its house of worship where it pleases." *Grace United Methodist Church v. City of Cheyenne*, 451 F.3d 643, 658 (10th Cir. 2006). In unconstitutionally increasing its power, by taking over inherently local and state power to regulate land use, Congress has ignored the constitutional doctrine of

deference in land use established by the court and has revised free exercise rights. RLUIPA "reflects a lack of proportionality or congruence between the means adopted and the legitimate end to be achieved." *Boerne* at 533. RLUIPA is a substantial intrusion of the rights of state governments to regulate for the heath and welfare of their citizens.

For the reasons stated in this brief and the brief of Defendant-Appellant the Board of County Commissioners of the County of Boulder, RLUIPA's substantial burden provision is facially unconstitutional because it exceeds Congress' power to enforce constitutional guarantees against the states under Section 5 of the Fourteenth Amendment and exceeds Congress' power under the Commerce Clause.

CONCLUSION

In conclusion, for all of the foregoing reasons, Amici Curiae Colorado Counties, Inc., Colorado Municipal League, the National League of Cities and the International Municipal Lawyers Association respectfully submit that this Court should vacate the District Court's Order, and for all other and further relief as this Court deems just and appropriate.

Dated this 10th day of September, 2009.

Original Signatures on File at the Law Offices of Hall & Evans, L.L.C.

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CERTIFICATE OF COMPLIANCE WITH FED. R. APP. P. 32(a)(7)(B)

The undersigned hereby certifies that the above Amicus Curiae Brief contains 3,458 words as counted by the undersigned's word-processing program and is printed in the font Times New Roman with a point size of 14 with no more than 10 ½ characters per inch. Accordingly, the undersigned hereby certifies the Amicus Curiae Brief is in compliance with Fed. R. Civ. P. 32(a)(7)(B).

CERTIFICATION OF DIGITAL SUBMISSION

I hereby certify that I have not redacted any documents; that every document submitted in Digital PDF and/or Scanned PDF Format is an exact copy of the signed original document on file at Hall & Evans, L.L.C. and that the Digital Submissions have been scanned for viruses with Enterprise McAfee version 8.5, updated today, and are free of viruses.

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CERTIFICATE OF SERVICE (CM/ECF)

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