No. 13-1274

IN THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

EAGLE COVE CAMP & CONFERENCE CENTER, INC., et al.,

Plaintiffs-Appellants,

v.

TOWN OF WOODBORO, et al.,

Defendants-Appellees.

On appeal from the United States District Court
for the Western District of Wisconsin
No. 3:10-cv-118 – Hon. William M. Conley

AMICUS CURIAE BRIEF BY FOUNDATION FOR JEWISH CAMP AND UNION FOR REFORM JUDAISM IN SUPPORT OF PLAINTIFFS-APPELLANTS AND REVERSAL OF THE DISTRICT COURT

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Appellate Court No: 13-1274

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(1) Foundation for Jewish Camp;

(2) Union for Reform Judaism.

(2) The names of all law firms whose partners or associates have appeared for the party in the case (including proceedings in the district court or before an administrative agency) or are expected to appear for the party in this court:

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i) Identify all its parent corporations, if any; and

Neither amicus has parent corporations.

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Attorney's Signature: s/ James A. Sonne Date: 5/23/2013

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INTEREST OF AMICI

Foundation for Jewish Camp (FJC) and Union for Reform Judaism (URJ) submit this brief as amici curiae in support of plaintiffs-appellants Eagle Cove Camp & Conference Center, Inc., et al.[1] FJC and URJ are 501(c)(3) nonprofit organizations dedicated to supporting Jewish overnight recreational camps across the country. Their experience and unique perspective, and legal arguments not offered by the parties, will help resolve this appeal.

FJC serves as an advocate and resource for nonprofit Jewish overnight camps. It works with more than 150 facilities—including camps in Wisconsin, Indiana, and Illinois—that include at least 70,000 campers and 10,000 counselors each summer. URJ is the congregational arm of the Jewish Reform Movement in North America, with 900 congregations encompassing 1.5 million Reform Jews. URJ runs thirteen camps—including camps in Wisconsin and Indiana—that serve over 9,000 campers each summer. Countless FJC and URJ camps have dealt with state and local zoning regulations. FJC and URJ can therefore provide unique insights regarding the effect of state and local zoning rules on religious assemblies generally and religious camps in particular.

FJC and URJ seek to ensure that the Religious Land Use and Institutionalized Persons Act of 2000, 42 U.S.C. § 2000cc ("RLUIPA" or "the Act"), effectively addresses the subtle discrimination and burdens religious groups often face under local land-use laws. This case involves a particularized

[1] Per Federal Rule of Appellate Procedure 29(c)(5), no party's counsel authored this brief in whole or in part, and no persons other than amici, their members, or their counsel made any financial contribution intended for the brief's preparation or submission.

challenge to the refusal to allow religious camps in one Wisconsin town. But how this Court interprets RLUIPA's prohibition on the "total exclusion" of religious assemblies from "a jurisdiction" will affect faith-based groups throughout Wisconsin and the Seventh Circuit.

SUMMARY OF ARGUMENT

Congress enacted RLUIPA to remedy local land-use abuses targeted at religious groups. Among the chief concerns at the Act's passage was the ability of local governments to craft rules that would exclude disfavored—often tax-exempt—uses of land for religious purposes. RLUIPA provides therefore that "no government shall impose or implement a land use regulation that totally excludes religious assemblies from a jurisdiction." 42 U.S.C. § 2000cc(b)(3)(A) (2006).

Unfortunately, because RLUIPA does not expressly define "a jurisdiction," some cities and towns have tried to avoid responsibility for excluding religious assemblies from their midst by arguing they are not jurisdictions at all. These localities point to arrangements in their states where zoning power is uniquely reserved to states or counties, with lower-level governments simply ratifying (or not) such rules. In their view, RLUIPA's total exclusion provision applies only to regulating entities, not the areas they regulate. But RLUIPA's broad protection of religious freedom under federal law ought not depend on how a state allocates its power.

Indeed, the approach urged by defendants and adopted by the district court—i.e., a county's promulgation of zoning regulations in accordance with

state law permits the total exclusion of religious assemblies from a town—runs contrary to RLUIPA's text, legislative history, and purpose.

First, the plain language of RLUIPA's total exclusion term distinguishes between the regulating entity—"no government"—and the regulated entity—"a jurisdiction." As such, the prohibition on exclusion applies to any regulated jurisdiction, and not just the regulating entity. If Congress had intended that "jurisdiction" would refer only to a regulating "government," it would not have used the indefinite article "a" but the possessive noun "its" or the definite article "the"—e.g., Congress would have said "no government shall exclude religious assemblies from its jurisdiction" or "no government shall exclude religious assemblies from the jurisdiction over which it has authority." It did neither. Further, under established norms of statutory interpretation, use of the indefinite article "a" refers to more than one object and thus cannot constitute a mere reflexive reference to "government"—i.e., "a jurisdiction" is not limited to the government that implements the regulations. Government and jurisdiction are independent terms under RLUIPA.

Second, legislative history amply reflects that the chief target of RLUIPA's total exclusion provision is local bias. Time and again, those who sponsored RLUIPA—which was adopted unanimously—emphasized the particular harm to religious freedom that arises from the exclusion of new or unpopular faiths by local governments. By no means did Congress intend its protections against such parochialism to vary by the mere fortuity of state zoning arrangements.

Third, allowing the total exclusion term to depend on variations in state zoning arrangements undermines RLUIPA in the very place it is most needed—locally. The chief purpose of the total exclusion provision is to protect against the manipulation of land-use rules by narrow-minded local officials to the detriment of disfavored religious assemblies. To permit local governments to evade RLUIPA's reach simply because they acquiesced to a general county or state zoning approach guts the total exclusion protections of the Act.

ARGUMENT

I. RLUIPA'S PLAIN TEXT FORBIDS THE EXCLUSION OF RELIGIOUS GROUPS FROM ANY JURISDICTION, REGARDLESS WHETHER THAT EXCLUSION ARISES FROM STATE OR LOCAL LAW.

A. RLUIPA's use of the indefinite article "a" means the Act prohibits total exclusion from any jurisdiction.

Nothing in the text of RLUIPA's total exclusion provision suggests its protections against the barring of religious assemblies from "a jurisdiction" vary depending on the nature and size of the entity enacting the land-use rule at issue. To the contrary, use of the indefinite article "a" means RLUIPA prohibits total exclusion from *any* regulated jurisdiction, regardless which level of government is technically responsible for the exclusion. Moreover, the Act's distinguishing between "no government" and "a jurisdiction" requires they be treated separately, and in that order. In other words, jurisdiction-based liability considers the area not of the regulating authority but of any regulated entity.

Interpreting the total exclusion provision "begin[s] with the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose." *Engine Mfrs. Ass'n v. S.*

Coast Air Quality Mgmt. Dist., 541 U.S. 246, 252 (2004) (citation omitted); *see also United States v. Miscellaneous Firearms, Explosives, Destructive Devices & Ammunition*, 376 F.3d 709, 712 (7th Cir. 2004). The indefinite article "a," which is used in the Act, means "any" and applies to more than one object. *Black's Law Dictionary* 1 (9th ed. 2009); *see also Merriam-Webster's Collegiate Dictionary* 1 (10th ed. 2002) (indefinite article "a" means "any" as in "a man who is sick can't work"); *The Random House Collegiate Dictionary* 1 (1980) (indefinite article "a" means "any one of some class or group").

When using the indefinite article "a," Congress intends for modified terms to have one of several referents. *See, e.g.*, *Lee v. Weisman*, 505 U.S. 577, 614 n.2 (1991) (Souter, J., concurring) ("the indefinite article before the word 'establishment' is better seen as evidence that the [Establishment] Clause forbids *any* kind of establishment") (emphasis added); *United States v. Jain*, 174 F.3d 892, 898 (7th Cir. 1999) (noting that the use of the indefinite article "a" suggests additional referents besides those expressly enumerated); *Renz v. Grey Adver., Inc.*, 135 F.3d 217, 222 (2d Cir. 1997) ("use of the indefinite article 'a' implies that the modified noun is but one of several of that kind"). Thus, use of the indefinite article "a" before "jurisdiction" means a land-use regulation may not totally exclude religious assemblies from *any* jurisdiction.

Notably, Congress selected the indefinite article "a" instead of a definite article or a possessive pronoun such as "its." In so doing, RLUIPA distinguishes within its text the *government* implementing a land-use regulation from the *jurisdiction* in which exclusion takes place. *Jama v. Immigration & Customs*

Enforcement, 543 U.S. 335, 357 (2005) (use by a legislature of two different words strongly implies a difference of meaning was intended). Had Congress wished for "jurisdiction" to refer exclusively to a regulating entity, it would have employed the possessive noun "its." Instead, by use of an indefinite article the provision applies to all subordinate jurisdictions of a government.

B. "Jurisdiction" as used in Section (b)(3)(A) refers to a regulated geographic area or political subdivision within that area.

The plain meaning of the word "jurisdiction" in Section (b)(3)(A) also confirms that the total exclusion provision prohibits the exclusion of religious assemblies from any jurisdiction to which a land-use regulation applies. While, as this Court has recognized, "jurisdiction is a 'word that may have different meanings in different contexts,'" *Martin v. Luther*, 689 F.2d 109, 114 (7th Cir. 1982) (citation omitted), the only applicable definitions of "jurisdiction" here are "[a] geographic area within which political or judicial authority may be exercised" and "[a] political or judicial subdivision within such an area." *Black's Law Dictionary* 927-28 (9th ed. 2009). The absence of a possessive noun preceding "jurisdiction" (e.g., "a state's jurisdiction") means Congress could not have contemplated a meaning of "jurisdiction" referring to a government's general power to exercise authority. Rather, the plain meaning of "jurisdiction" as used in the statute, and confirmed by *Black's*, is a geographic area over which land-use regulatory authority is exercised, or any political subdivision within such an area.

While RLUIPA does not expressly define "jurisdiction," the term is defined elsewhere in the federal code in a manner consistent with its plain meaning—

i.e., it is a unit of general local government. *See, e.g.*, Cranston-Gonzalez National Affordable Housing Act of 1990, 42 U.S.C. § 12704 (2000) (defining "jurisdiction" as "a State or unit of general local government"); United States Housing Act of 1937, as amended, 42 U.S.C. § 1437bbb-8 (2000) (defining "jurisdiction" as a "unit of general local government"). Undefined terms should be interpreted in a manner consistent with definitions of the same term elsewhere in the Code. *See* 82 C.J.S. *Statutes* § 373 (2013) ("Definitions contained in one statute are persuasive, although not conclusive, in construing the same term in another statute."). Accordingly, "jurisdiction" must be interpreted to include any political subdivision in a geographic area.

The district court expressed concern that the foregoing analysis might go too far, as jurisdiction-based liability could perhaps extend not only to towns or cities but to "zoning districts." (District Court's Opinion and Order, Appellants' Short App'x 23.) The court's concern, however, is unfounded. First, the plain meaning of "jurisdiction" limits the total exclusion provision's reach to political subdivisions. No definition of "jurisdiction" includes a zoning district. Second, it is well settled that while counties, cities, and towns are municipal corporations with legislative powers, zoning districts are not political subdivisions and lack subordinate legislative authority. *Compare Laramie Cnty. Comm'rs v. Albany Cnty. Comm'rs*, 92 U.S. 307, 308 (1875), *and* 1 McQuillin Mun. Corp. § 2:55 (3d ed. 2012) (counties, cities and towns are political subdivisions), *with* 101A C.J.S. *Zoning and Land Planning* § 40 (2013) (zoning districts are but portions of political subdivisions).

C. Consistent with RLUIPA's remedial purpose, the meaning of "a jurisdiction" should be construed broadly.

To the extent there is ambiguity over the meaning of "a jurisdiction" (and there is not), the statute should be construed broadly in favor of the total exclusion provision reaching *any* jurisdiction. In its own rules of construction, RLUIPA mandates that courts construe its terms "in favor of a broad protection of religious exercise, to the maximum extent permitted by the terms of this chapter and the Constitution." 42 U.S.C. § 2000cc-3(g) (2006). Consistent with that rule, this Court has recognized that because "RLUIPA enforces Free Exercise Clause rights . . . its land-use provisions are to be broadly construed in favor of protecting religious exercise." *River of Life Kingdom Ministries v. Vill. of Hazel Crest, Ill.*, 611 F.3d 367, 391 (7th Cir. 2010).

Notably, Congress felt so strongly about the need for broad construction of RLUIPA that it did not leave the Act's interpretation to the general rule that remedial statutes must be interpreted broadly, *Tcherepnin v. Knight*, 389 U.S. 332, 336 (1967), but instead reinforced this well-established rule of construction with an express legislative statement. 42 U.S.C. § 2000cc-3(g). Consistent with this rule, "a jurisdiction" must be interpreted broadly, with all interpretive disputes resolved in favor of expanding religious liberty.

II. LEGISLATIVE HISTORY DEMONSTRATES THAT RLUIPA'S CHIEF CONCERN IS THE UNFAIR TREATMENT OF RELIGIOUS GROUPS IN THEIR USE OF LAND, WHETHER BY STATES OR LOCALITIES.

A. Congress replaced a prior version of the Act to broaden the reach of the total exclusion provision.

Legislative history confirms RLUIPA's total exclusion provision forbids exclusion in *any* jurisdiction. In the two years before RLUIPA's unanimous passage, Congress debated the Religious Liberty Protection Act ("RLPA"), which would have enhanced religious liberty in areas beyond land use. *See* Religious Liberty Protection Act of 1998, H.R. 4019, 105th Cong.; Religious Liberty Protection Act of 1999, H.R. 1691, 106th Cong. RLPA, while never enacted, nonetheless informs the passage of its land-use cousin, RLUIPA. *See* 146 Cong. Rec. S7775 (daily ed. July 27, 2000) (joint statement of Sens. Kennedy and Hatch) (citing RLPA testimony at H.R. Rep. No. 106-219, at 18-24, in support of RLUIPA's passage); 146 Cong. Rec. E1563 (daily ed. Sep. 22, 2000) (statement by Rep. Canady) (noting RLUIPA was "patterned after" RLPA); Douglas Laycock & Luke W. Goodrich, *RLUIPA: Necessary, Modest, and Under-Enforced*, 39 Fordham Urb. L.J. 1021, 1022 n.3 (2012) (noting Congress's reliance on RLPA in passing RLUIPA). The Supreme Court, in fact, has relied on RLPA legislative history in interpreting RLUIPA. *See Cutter v. Wilkinson*, 544 U.S. 709, 716-17 & n.5 (2005). That history is directly relevant to the total exclusion issue here.

The total exclusion provision's evolution through RLPA reveals that RLUIPA was meant to reach any jurisdiction where religious assemblies are excluded. Both the 1998 and 1999 versions of RLPA contained exclusion provisions similar to the one in RLUIPA. Notably, though, and unlike RLUIPA,

these earlier provisions contained language suggesting they covered only the implementing government's jurisdiction. The 1998 version of RLPA stated:

> No government shall impose a land use regulation that . . . denies religious assemblies a reasonable location in *the* jurisdiction.

Religious Liberty Protection Act of 1998, H.R. 4019, 105th Cong., § (3)(b)(1)(B) (emphasis added). The 1999 version contained similar language:

> [N]o government with zoning authority shall unreasonably exclude from *the* jurisdiction over which it has authority, or unreasonably limit within *that* jurisdiction, assemblies or institutions principally devoted to religious exercise.

Religious Liberty Protection Act of 1999, H.R. 1691, 106th Cong., § (3)(b)(D) (emphases added).

In both of the RLPA iterations comparable to the RLUIPA total exclusion provision, Congress used the definite articles "the" and "that" to indicate it was referring to the jurisdiction of the government imposing the regulation at issue. "[I]t is a rule of law well established that the definite article 'the' particularizes the subject which it precedes. It is a word of limitation as opposed to the indefinite or generalizing force of 'a' or 'an.'" *Am. Bus Ass'n v. Slater*, 231 F.3d 1, 4-5 (D.C. Cir. 2000) (citation omitted); *cf. Rumsfeld v. Padilla*, 542 U.S. 426, 434 (2004) (use of the definite article means "there is generally only one"). The change from the definite article "the" to the indefinite article "a" shows Congress intended the total exclusion provision to reach any jurisdiction that totally excludes religious assemblies, not just the mere regulating jurisdiction.

B. Congress meant for RLUIPA to remedy local abuse.

The legislative history for both RLUIPA and RLPA also jointly indicates Congress was particularly concerned that religious groups are susceptible to manipulations by local governments designed to exclude religious practice from cities and towns.[2] Consequently, interpreting "a jurisdiction" to mean any jurisdiction subject to a zoning regulation, state or local, is most consistent with Congress's goal of remedying local abuses through zoning.

Throughout the debate over RLPA and up to its modified passage in RLUIPA, congressional sponsors emphasized that municipalities are tempted to disfavor religious assemblies through generally-applicable land-use laws because they "may not want non-tax-generating property taking up space where tax-generating property could locate." H.R. Rep. No. 106-219, at 20 (statement by Rep. Canady). The result, according to Representative Canady, a chief sponsor of both RLPA and RLUIPA, was "that some land use regulations deliberately exclude all new churches from an entire city." *Id.* at 18.

New religious assemblies are particularly vulnerable, as the "result of these zoning patterns is to foreclose or limit new religious groups from moving into a municipality." *Id.* at 19. And such exclusionary zoning is of special concern at the smallest governmental level, such as in towns, villages, or smaller cities. *See* 146 Cong. Rec. E1564-01 (daily ed. Sept. 22, 2000) (statement by Rep. Hyde) (citing Lucinda Harper, *Upscale Stores Craft Bans*

[2] As already noted, Congress relied on the legislative history of RLPA when adopting RLUIPA. *See supra* Section II.A.

Against Storefront Churches, Wall St. J., Mar. 15, 2000) (describing bias against storefront churches "in many towns across the rural south").

In light of Congress's concerns about exclusionary zoning at the local level, RLUIPA should be construed to minimize the possibility of local abuses and manipulation. Consistent with that purpose, "a jurisdiction" must be interpreted to include any jurisdiction governed by a land-use regulation, not merely the regulating government entity. A contrary interpretation would allow small localities to lobby counties to zone towns (effectively immunizing those towns from challenge) in order to totally exclude new religious assemblies from their borders—a result plainly contrary to the broad purpose of RLUIPA.

III. RLUIPA'S PROTECTIONS SHOULD NOT VARY DEPENDING ON HOW PARTICULAR STATES ENACT THEIR LAND-USE RULES.

A. States differ widely in how their land-use rules are imposed.

It is well established that municipal governments owe their origin to, and derive their powers and rights from, states. *See Atkin v. Kansas*, 191 U.S. 207, 220-21 (1903). Thus, land-use controls are based primarily upon state enabling statutes, and as a result, "the actual systems of law vary . . . sharply as between different states." Norman Williams, Jr. & John M. Taylor, *American Land Planning Law* 490 (2003).

State zoning systems differ based on which levels of government have zoning authority. In a majority of states, county zoning is authorized for all or some counties. *See* 8 McQuillin Mun. Corp. §§ 25:38, 25:40 (3d ed. 2012). In other states, however, towns and cities have ultimate zoning authority. *Id.* Some states require towns to work with counties in the implementation of

zoning regulations; others require towns to ratify county zoning regulations for them to be enforceable; and in still others both counties and towns may regulate, but the county regulations preempt those of a town. *Id.*

Among the states in the Seventh Circuit there is substantial variation. All three states—Wisconsin, Indiana, and Illinois—enable county zoning under certain, but distinct, circumstances. In Wisconsin, cities and villages have authority to zone within their territory. *See* Wis. Stat. §§ 61.35, 62.23 (2012). As this case demonstrates, Wisconsin also allows for shared zoning authority between towns and counties. A county may promulgate regulations for unincorporated areas and towns, but formal adoption by a town is still required for a county zoning plan to become effective. *See* Wis. Stat. §§ 59.69(3)(a), 59.69(5)(c), 60.61(3) (2012).

In comparison, in Illinois the zoning authority of municipalities (cities, villages, or incorporated towns) supersedes that of a county. *See* 55 Ill. Comp. Stat. 5/5-12001 (2005). But county zoning ordinances supersede those of townships, which, unlike incorporated towns, are not municipalities. *See* 60 Ill. Comp. Stat. 1/110-5(b) (2005); 65 Ill. Comp. Stat. 5/1-1-2 (2005).

Lastly, in Indiana, counties and municipalities join together in area planning commissions that adopt comprehensive plans and zoning ordinances for the county and participating municipalities. *See* Ind. Code § 36-7-4-202(b) (2012); Ind. Code § 36-7-4-203(b) (2012). The plan must be approved by each "governmental entity within the territorial jurisdiction where the plan is in effect." Ind. Code § 36-7-4-504(a) (2012). Once an area planning commission is

established, other municipalities within the county, while not required to, "may adopt ordinances adopting the area planning law." Ind. Code § 36-7-4-204 (2012). Municipalities may also enact their own zoning ordinances if they do not participate in area plan commissions. *See* Ind. Code § 36-7-4-202(a).

In sum, Wisconsin, Illinois, and Indiana vary as to the circumstances under which a county or municipality has controlling and superseding authority to zone, and whether a municipality need ratify county regulations. This of course characterizes only the variation in law across states in the Seventh Circuit. States outside the Seventh Circuit vary further, with primary zoning authority being vested in all levels of government—from municipalities to the state. In Hawaii, for example, zoning occurs on a state-wide level, meaning, there is functionally one regulatory body for the entire state. *See generally* David L. Callies, *Land Use Control in an Island State: Hawaii's State-Wide Zoning*, 2 Third World Planning Rev. 187 (1980).

B. RLUIPA protects religious assemblies no matter their location.

In light of the substantial variation in state zoning arrangements, under the district court's interpretation, the protection of RLUIPA's total exclusion provision would turn on which level of government has zoning authority under state law. This cannot be the law where important federal rights are at stake.

Under the district court's interpretation, "a jurisdiction" would generally refer in Wisconsin to a county, and not towns, because counties typically promulgate land-use regulations. In Illinois, by contrast, "a jurisdiction" would typically refer to cities and towns since their zoning regulations supersede

those of a county. In Indiana, a court would be confronted with a fact-intensive inquiry in determining what constitutes "a jurisdiction," as most zoning ordinances are promulgated by planning commissions made up of a county and municipalities. In Hawaii, "a jurisdiction" could refer exclusively to the entire state. The net result of all these differences under the trial court's approach is a disparity in federal religious liberty protection across states, with greater scrutiny of local exclusion in some states than others.

Congress intended no such thing. Accordingly, this Court should reject a state-dependent, and thus inherently uncertain, definition of "a jurisdiction" in favor of a uniform meaning under federal law.

CONCLUSION

For the foregoing reasons, FJC and URJ ask this Court to interpret RLUIPA's total exclusion provision to forbid the total exclusion of religious assemblies from any jurisdiction, and reverse the district court's finding to the contrary.

Dated: May 23, 2013

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CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION, TYPEFACE REQUIREMENTS, AND TYPE STYLE REQUIREMENTS

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 3,690 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Office Word 2003 in 12-point Bookman Old Style Font.

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