UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

CHABAD LUBAVITCH OF LITCHFIELD COUNTY, INC. and RABBI JOSEPH EISENBACH	)	
Plaintiffs,	)	
v.	)	Civil Action No. 3:09-CV-1419 (JCH)
BOROUGH OF LITCHFIELD, CONNECTICUT, et al.	)	
Defendants.	)	

INTERVENOR UNITED STATES OF AMERICA'S MEMORANDUM IN DEFENSE OF THE CONSTITUTIONALITY OF THE RELIGIOUS LAND USE AND INSTITUTIONALIZED PERSONS ACT OF 2000

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INTRODUCTION

The United States of America has moved to intervene in this action to defend the constitutionality of the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA), Pub. L. No. 106-274, 114 Stat. 803-807, codified at 42 U.S.C. §§ 2000cc et seq.

Plaintiffs initiated this action alleging, inter alia, that Defendants violated RLUIPA by denying Plaintiffs' request to modify and expand existing property in Litchfield's Historic District for use as a Temple. Defendants have moved to dismiss the case on the grounds that Plaintiffs failed to state a claim upon which relief can be granted. In their Memorandum in Support of their Motion to Dismiss [dkt. no. 101-1], Defendants argue that RLUIPA § 2(a), 42 U.S.C. § 2000cc(a) – also known as the "substantial burden" provision – exceeds Congress's enforcement power under the Fourteenth Amendment and the Commerce Clause, and also violates principles embodied by the Separation of Powers and the Tenth Amendment.[1] Defendants also contend that RLUIPA § 2(b)(1), 42 U.S.C. § 2000cc(a) – also known as the "equal terms" provision – violates the Establishment Clause of the First Amendment. The United States hereby files this Memorandum in support of RLUIPA's constitutionality and in opposition to Defendants' arguments.[2]

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[1] It is not entirely clear whether Defendants intend to raise a Tenth Amendment argument. However, throughout their brief, Defendants characterize RLUIPA as federal intervention in an arena typically dominated by state and local governments. And Defendants' third footnote explicitly discusses the Tenth Amendment. See Defs.' Mem. in Support of Mot. to Dismiss ("Defs.' Mem.") [dkt. no. 101-1] at 36 n.3. Therefore, the United States assumes, for purposes of this Memorandum, that Defendants do advance a Tenth Amendment claim.

[2] In this Memorandum, the United States takes no position on the merits of Plaintiffs' claims – that is, whether RLUIPA applies to the particular facts before the Court and, if so, whether the statute has been violated. Nor does the United States take any position on Plaintiffs' non-RLUIPA claims at this time.

This Court should reject Defendants' arguments that RLUIPA's land-use provisions do not comply with the Constitution. As an initial matter, it should be noted that there is nothing novel about Defendants' challenges to RLUIPA. Every argument advanced by Defendants in this case has been rejected repeatedly by other courts – and several have been directly rejected by the Second Circuit, see Westchester Day Sch. v. Vill. of Mamaroneck, 504 F.3d 338 (2d Cir. 2007). Even more striking is the fact that all but one of the considerable number of federal courts to consider challenges to RLUIPA's land-use provisions of the type advanced by Defendants have rejected them – and the one exception was a district court case overturned on appeal.[3] In short, Defendants' arguments have been considered by federal courts throughout the country and have been consistently and overwhelmingly rejected.

Even if this history were ignored, Defendants' arguments would have no merit. First, RLUIPA § 2(a)(1), as applied through § 2(a)(2)(C), is within Congress's power under the Fourteenth Amendment. Congress enacted these provisions pursuant to its power under the Fourteenth Amendment to enforce well-established constitutional rights that it found were being violated. In doing so, Congress merely codified in the land-use context the Supreme Court's jurisprudence that individualized assessments substantially burdening Free Exercise rights require strict scrutiny. See, e.g., Sherbert v. Verner, 374 U.S. 398, 405-07 (1963). Moreover, even if these provisions were found to prohibit some conduct that is not itself unconstitutional, it nevertheless represents a congruent and proportional response to the problem of widespread discrimination against religious assemblies identified by Congress. See, e.g., Nevada Dep't of Human Res. v. Hibbs, 538 U.S. 721, 736-37 (2003) (finding the Family and Medical Leave Act to be a congruent and proportional

[3] See Elsinore Christian Ctr. v. City of Lake Elsinore, 291 F. Supp. 2d 1083 (C.D. Cal. 2003), rev'd, 197 F. App'x 718 (9th Cir. 2006).

response to sex discrimination); Kimel v. Florida Bd. Of Regents, 528 U.S. 62, 81 (2000) (applying the "congruence and proportionality" test to the Age Discrimination in Employment Act).

Second, RLUIPA § 2(a)(1), as applied through § 2(a)(2)(B), is a valid exercise of Congress's powers under the Commerce Clause. Section 2(a)(2)(B) contains a self-limiting provision, or jurisdictional element, that restricts its ambit to those cases in which "the substantial burden affects, or removal of that substantial burden would affect, commerce." 42 U.S.C. § 2000cc(a)(2)(B). The Supreme Court and the Second Circuit have both explicitly recognized Congress's power under the Commerce Clause to legislate by means of such jurisdictional elements. And of particular relevance to this case, the Second Circuit has previously upheld RLUIPA against a Commerce Clause challenge. See Westchester Day Sch., 504 F.3d at 354.

Third, RLUIPA does not undermine the Separation of Powers because it neither delegates the power to review judgments of the federal courts to the Legislative or Executive Branch, nor overrides the Supreme Court's interpretation of the First Amendment's Free Exercise Clause.

Fourth, RLUIPA does not violate the Tenth Amendment. RLUIPA was validly enacted pursuant to Congress's powers under Section 5 of the Fourteenth Amendment and the Commerce Clause, and it does not commandeer any state authority. Accordingly, it cannot violate the Tenth Amendment. Again, the Second Circuit has already decided this issue. See id. at 354-55.

Fifth and finally, RLUIPA's § 2(b)(1) does not violate the Establishment Clause of the First Amendment. The equal terms provision is simply a codification of prior Supreme Court precedent under the Free Exercise and Establishment Clauses of the First Amendment, as well as the Equal Protection Clause of the Fourteenth Amendment, and therefore must be consistent with the requirements of the Establishment Clause. Furthermore, as the Second Circuit has held, RLUIPA's protections represent permissible accommodations of religious exercise that do not run afoul of the

Establishment Clause. See id. at 355-56. RLUIPA itself does not promote or subsidize a religious belief or message; instead, it simply frees religious groups and individuals to practice as they otherwise would in the absence of unjustified government-created burdens on religious exercise.

Therefore, as the overwhelming majority of courts (and all courts whose opinions remain good law) have done, this Court should hold that RLUIPA is a constitutional exercise of congressional power to alleviate unjustified substantial burdens on religious practice.

STATUTORY BACKGROUND

RLUIPA, signed into law on September 22, 2000, addresses two areas in which Congress determined that state and local governments impose substantial burdens on religious liberty: (1) land-use decisions and (2) actions relating to institutionalized persons in the custody of states and localities. This case concerns only RLUIPA's land use provisions.

I. RLUIPA's Land-Use Provisions

Congress enacted RLUIPA's land-use provisions to enforce, by statutory right, several constitutional prohibitions that Congress found states and localities were frequently violating in the land-use context. See 146 Cong. Rec. S7774, S7775 (daily ed. July 27, 2000) (joint statement of Sen. Hatch and Sen. Kennedy) ("Each subsection [of RLUIPA's land-use provisions] closely tracks the legals standards in one or more Supreme Court opinions.").

RLUIPA § 2(a)(1) provides that no state or local 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 imposition of the burden on that person, assembly or institution" is both "in furtherance of a compelling governmental interest" and "is the least restrictive means" of furthering that interest.

Section 2(a)(2) limits the applicability of § 2(a)(1) to cases in which:

> (A) the substantial burden is imposed in a program or activity that receives Federal financial assistance, even if the burden results from a rule of general applicability;
>
> (B) the substantial burden affects, or removal of that substantial burden would affect, commerce with foreign nations, among the several States, or with Indian tribes, even if the burden results from a rule of general applicability; or
>
> (C) the substantial burden is imposed in the implementation of a land use regulation or system of land use regulations, under which a government makes, or has in place formal or informal procedures or practices that permit the government to make, individualized assessments of the proposed uses for the property involved.

42 U.S.C. § 2000cc(a)(2). As the constitutional bases for these three applications, Congress relied for § 2(a)(2)(A) on its authority under the Spending Clause (Art. I, § 8, cl. 1);[4] for § 2(a)(2)(B) on its authority under the Commerce Clause (Art. I, § 8, cl. 3); and for § 2(a)(2)(C) on its authority under Section 5 of the Fourteenth Amendment. See 146 Cong. Rec. at S7775.

RLUIPA § 2(b) contains three non-discrimination and non-exclusion provisions that protect religious assemblies or institutions. The only one of these provisions at issue in this case is § 2(b)(1), which is often referred to as the "equal terms" provision. This provision states that no state or local government "shall impose or implement a land use regulation in a manner that treats a religious assembly or institution on less than equal terms with a nonreligious assembly or institution." 42 U.S.C. § 2000cc(b)(1).[5] Congress enacted § 2(b) pursuant to its power under

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[4] Defendants do not challenge the constitutionality of § 2(a)(1) as applied through § 2(a)(2)(A).

[5] Section 2(b)(2) prohibits governmental entities from "impos[ing] or implement[ing] a land use regulation that discriminates against any assembly or institution on the basis of religion or religious denomination." 42 U.S.C. § 2000cc(b)(2). Section 2(b)(3) provides that "[n]o government shall impose or implement a land use regulation that . . . totally excludes religious assemblies from a jurisdiction; or . . . unreasonably limits religious assemblies, institutions, or structures within a jurisdiction." Id. § 2000cc(b)(3).

Section 5 of the Fourteenth Amendment. See 146 Cong. Rec. at S7775.

Finally, RLUIPA provides for private causes of action, as well as actions brought by the United States to enforce the statute. See 42 U.S.C. §§ 2000cc-2(a), 2(f).

II. Legislative History

Congress enacted RLUIPA's land-use provisions in response to a record of widespread state and local discrimination against religious institutions in the zoning context. See 146 Cong. Rec. at S7774; see also H.R. Rep. No. 106-219 (1999) (House of Representatives report on the Religious Liberty Protection Act of 1999); id. at 24 (concluding that the result of various forms of zoning discrimination is a "consistent, widespread pattern of political and governmental resistance to a core feature of religious exercise: the ability to assemble for worship"). In evaluating the need for legislation, Congress heard testimony in nine separate hearings over three years, which "addressed in great detail both the need for legislation and the scope of Congressional power to enact such legislation." 146 Cong. Rec. at S7774; see also H.R. Rep. 106-219, at 17-24 (summarizing testimony).

Witnesses presented "massive evidence" of a pattern of religious discrimination, which frustrated the ability to assemble for worship. See 146 Cong. Rec. at S7774-75; H.R. Rep. 106-219, at 21- 24. Specifically, the House Report indicates that land-use regulations implemented through a system of individualized assessments placed "within the complete discretion of land use regulators whether [religious] individuals had the ability to assemble for worship." H.R. Rep. 106-219, at 19. The Report further concluded that "[r]egulators typically have virtually unlimited discretion in granting or denying permits for land use and in other aspects of implementing zoning laws," id. at 20, and that the "standards in individualized land use decisions are often vague, discretionary, and subjective," id. at 24; see also id. at 17 ("Local land use regulation, which lacks objective, generally

applicable standards, and instead relies on discretionary individualized determinations, presents a problem that Congress has closely scrutinized and found to warrant remedial measures under its Section 5 enforcement authority.").

Congress further recognized that religious entities often face arbitrary and discriminatory treatment by local and state agencies, and that this problem required "federal protection of religious freedom." Id. at 9. In particular, Congress found that the individualized discretion common to zoning and land use decisions has led to restrictive or burdensome requirements and discrimination against religious entities. "The hearing record demonstrates a widespread practice of individualized decisions to grant or refuse permission to use property for religious purposes. These individualized assessments readily lend themselves to discrimination, and they also make it difficult to prove discrimination in any individual case." 146 Cong. Rec. at S7775.

The individualized nature of zoning decisions that Congress was concerned about specifically includes decisions by zoning boards. The congressional record notes that local zoning codes often "permit churches only with individualized permission from the zoning board, and zoning boards use that authority in discriminatory ways." Id. at S7774. The evidence also showed that "new, small, or unfamiliar churches" faced more discrimination than larger, well-established churches, and that racial or religious animus sometimes appeared in local land use decisions, "especially in cases of black churches and Jewish shuls and synagogues." Id. It also revealed that sometimes "zoning board members . . . explicitly offer race or religion as the reason to exclude a proposed church." Id.

Congress also heard testimony that religious assemblies receive less than equal treatment when compared to secular land uses. Specifically, Congress found that:

> banquet halls, clubs, community centers, funeral parlors, fraternal organizations, health clubs, gyms, places of amusement, recreation centers, lodges, libraries, museums, municipal buildings, meeting halls, and theaters are often permitted as of

> right in zones where churches require a special use permit, or permitted on special use permit where churches are wholly excluded.

H.R. Rep. 106-219, at 19-20.

Congress further determined that individualized land-use assessments readily lend themselves to discrimination against religious assemblies, yet render it difficult to prove such discrimination in any particular case. See 146 Cong. Rec. at S7775; H.R. Rep. 106-219, at 18-24. In reaching this conclusion, RLUIPA's sponsors relied on evidence from national surveys and studies of zoning codes, reported land-use cases, and the experiences of particular houses of worship, all of which demonstrated unconstitutional government conduct. See 146 Cong. Rec. at S7775; H.R. Rep. 106-219, at 18-24; 146 Cong. Rec. E1234, E1235 (daily ed. July 14, 2000) (statement of Rep. Canady). One study, conducted by Brigham Young University, concluded that Jews, small Christian denominations, and nondenominational churches are vastly overrepresented in reported zoning cases involving religious institutions. See H.R. Rep. 106-219, at 20. For example, the study revealed that 20% of the reported cases concerning the location of houses of worship involve members of the Jewish faith, despite the fact that Jews account for only 2% of the population in the United States. See id. at 21.

Congress also relied on evidence and testimony regarding numerous specific examples of unconstitutional discrimination from across the country – examples that witnesses with broad expertise and experience testified were representative of unconstitutional discrimination that occurred generally. See 146 Cong. Rec. at S7775; H.R. Rep. 106-219, at 18-24.[6] For example, in

[6] A number of the so-called "anecdotal" examples of religious discrimination documented in the House Report were actually cases in which a court found discrimination against religious entities. See H.R. Rep. 106-219, at 20 n.86 (citing Islamic Ctr. of Miss. v. City of Starkville, 840 F.2d 293 (5th Cir. 1988)); id. at 22 nn.97-98 (citing Family Christian Fellowship v. Cnty. of Winnebago, 503 N.E.2d 367 (Ill. App. 1986)); id. at 23 n.109 (citing Orthodox Minyan v.

one case, a "bustling beach community with busy weekend night activity" in Long Island, New York, barred a synagogue from locating there because "it would bring traffic on Friday nights." H.R. Rep. 106-219, at 23. In another case, a township "insisted that a synagogue construct the required number of parking spaces despite their being virtually unused" (because Orthodox Jews may not use motorized vehicles on their Sabbath). Id. at 22-23 (citing Orthodox Minyan v. Cheltenham Twp. Zoning Hearing Bd., 552 A.2d 772 (Pa. Com. 1989)). "When the synagogue finally agreed to construct the unneeded parking spaces, the city denied the permit anyway, citing the traffic problems that would ensue from cars for that much parking." Id. The synagogue's attorney testified that he had handled more than thirty other cases of similar religious discrimination. See id.

Based on this extensive testimony, Congress found that religious discrimination in the land-use arena is "widespread," 146 Cong. Rec. at S7775; H.R. Rep. 106-219, at 18-24, and that the "[s]tatistical and anecdotal evidence strongly indicates a pattern of abusive and discriminatory actions by land use authorities who have imposed substantial burdens on religious exercise." H.R. Rep. 106-219, at 17. In light of these findings, Congress determined that it was appropriate to provide a statutory remedy and judicial forum to address egregious and unnecessary burdens on the religious liberty of its citizens and institutions, when such burdens fall within its power under the Spending Clause, the Commerce Clause, or the Fourteenth Amendment. See id.

ARGUMENT

I. The Principle of Constitutional Avoidance Requires that the Court Resolve All Statutory Issues Before Deciding the Constitutionality of RLUIPA

As an initial matter, this Court should not address RLUIPA's constitutionality until all statutory issues in this lawsuit have been resolved. It is a well-established principle that if a case can

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Cheltenham Twp. Zoning Hearing Bd., 552 A.2d 772 (Pa. Com. 1989)).

be decided on other than constitutional grounds, the court should avoid reaching the constitutional issue:

> It is not the habit of the Court to decide questions of a constitutional nature unless absolutely necessary to a decision of the case. . . . The Court will not pass upon a constitutional question although properly presented by the record, if there is also present some other ground upon which the case may be disposed of.

Ashwander v. Tennessee Valley Authority, 297 U.S. 288, 346-47 (1936) (Brandeis, J., concurring) (citations and internal quotations omitted). This principle has been reaffirmed repeatedly. See, e.g., Slack v. McDaniel, 529 U.S. 473, 485 (2000); Allstate Ins. Co. v. Serio, 261 F.3d 143, 149-150 (2d Cir. 2001) ("It is axiomatic that the federal courts should, where possible, avoid reaching constitutional questions.").[7]

This Court should observe the principle of constitutional avoidance in this case and decline to rule on the constitutionality of RLUIPA until all statutory issues have been resolved. There are a number of ways that the Court's resolution of the statutory issues might obviate the need to consider RLUIPA's constitutionality. For instance, the Court might decide that Plaintiffs have not alleged or established a "substantial burden" on their religious practice. See 42 U.S.C. § 2000cc(a). Alternatively, the Court might decide that Defendants' conduct represents the least restrictive means of furthering a compelling government interest.[8] See id. A ruling on RLUIPA's constitutionality

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[7] Defendants argue that the constitutional avoidance principle should be given less weight where "core federalism principles" are implicated. Defs.' Mem. at 12-13. However, none of the cases cited by Defendants supports this point. To be sure, they are all cases where the Supreme Court ruled on the constitutionality of a statute. Defendants do not suggest that any of these cases could have been decided on non-constitutional grounds; nor does the Court state that it is disregarding the doctrine of constitutional avoidance to vindicate "core federalism principles." The United States also disputes that this case implicates "core federalism principles." As argued below, RLUIPA is entirely consistent with the Tenth Amendment. See infra at 27-28.

[8] This is not to suggest that these would be (or would not be) correct outcomes. These examples are simply intended as illustrations of outcomes that could obviate the need for a ruling

may therefore be unnecessary. Accordingly, this Court should avoid considering the constitutional issues raised by Defendants before it addresses the statutory questions at issue in this case.

II. Alternatively, if the Court Reaches the Question of RLUIPA's Constitutionality, it Should Conclude that RLUIPA Is Constitutional

A. RLUIPA § 2(a)(1), As Applied Through § 2(a)(2)(C), Is a Valid Exercise of Congress's Authority Under Section 5 of the Fourteenth Amendment

Section 1 of the Fourteenth Amendment prohibits the States from "depriv[ing] any person of life, liberty, or property without due process of law," or from "deny[ing] to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend XIV, § 2. Section 5 provides Congress with the "power to enforce, by appropriate legislation, the provisions of this article." Id. § 2. Pursuant to this authority, Congress enacted the prohibitions in RLUIPA § 2(a)(1), as applied through § 2(a)(2)(C), in order to codify and secure the protections of the First Amendment, as applied to the states by the Fourteenth Amendment.[9] See 146 Cong. Rec. at S7775 ("Each subsection [of RLUIPA] closely tracks the legal standards in one or more Supreme Court opinions, codifying those standards for greater visibility and easier enforceability."); see also H.R. Rep. 106-219, at 12-13.

The Fourteenth Amendment empowers Congress to pass "corrective legislation . . . such as may be necessary and proper for counteracting . . . such acts and proceedings as the states may commit or take, and which by the amendment they are prohibited from committing or taking." The Civil Rights Cases, 109 U.S. 3, 13-14 (1883). "It is for Congress in the first instance to 'determin[e] whether and what legislation is needed to secure the guarantees of the Fourteenth Amendment.'"

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on the constitutionality of the statute.

[9] The First Amendment protects religious free exercise against state infringement through Section 1 of the Fourteenth Amendment. See Cantwell v. Connecticut, 310 U.S. 296, 303 (1940).

Kimel v. Florida Bd. of Regents, 528 U.S. 62, 80-81 (2000) (quoting City of Boerne v. Flores, 521 U.S. 507, 536 (1997)). Because RLUIPA § 2 directly enforces existing constitutional rights, it is necessarily a valid exercise of Congress's core power under Section 5 of the Fourteenth Amendment "to enforce, by appropriate legislation, the provisions of this article."[10]

1. RLUIPA § 2(a)(1), As Applied through § 2(a)(2)(C), Codifies the Supreme Court's "Individualized Assessments" Doctrine

Although the right of free exercise does not relieve a person of the obligation to comply with a neutral, generally applicable law, see Emp't Div. v. Smith, 494 U.S. 872, 890 (1990), the Free Exercise Clause "forbids subtle departures from neutrality" and "covert suppression of particular religious beliefs," Church of the Lukumi Babalu Aye v. City of Hialeah, 508 U.S. 520, 534 (1993) (internal quotation marks and citation omitted). To protect against such infringement, the Supreme Court has repeatedly distinguished between the rational-basis scrutiny of generally-applicable neutral laws and the strict scrutiny that applies "where the State has in place a system of individual exemptions," but "refuse[s] to extend that system to cases of 'religious hardship.'" Smith, 494 U.S. at 884; see also Fifth Ave. Presbyterian Church v. City of New York, 293 F.3d 570, 574 (2d Cir. 2002) ("Government enforcement of laws or policies that substantially burden the exercise of sincerely held religious beliefs is subject to strict scrutiny" absent application of a law that is "neutral and of general applicability.").

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[10] Defendants have not challenged RLUIPA § 2(b) on Fourteenth Amendment grounds. Accordingly, the United States has restricted its Fourteenth Amendment discussion to RLUIPA § 2(a)(2)(C). Nonetheless, as discussed infra at pages 29-34, the United States notes that the provisions of § 2(b) also enforce existing constitutional protections against religious discrimination. See Midrash Sephardi, Inc. v. Town of Surfside, 366 F.3d 1214, 1238-40 (11th Cir. 2004) ("Because § (b)(1) of RLUIPA codifies existing Free Exercise, Establishment Clause and Equal Protection rights against states and municipalities that treat religious assemblies or institutions 'on less than equal terms' than secular institutions, § (b) is an appropriate and constitutional use of Congress's authority under § 5 of the Fourteenth Amendment.").

The Supreme Court has long recognized that legislative schemes employing individualized assessments are often used by government officials to discriminate against religious adherents, and it has permitted such discrimination only when justified by a compelling interest. In Sherbert v. Verner, 374 U.S. 398 (1963), for example, the Court ruled that a state could not deny unemployment benefits to a Seventh Day Adventist whose religious convictions prevented her from working on Saturdays. Because the state statute permitted exceptions to the denial of unemployment benefits based on "good cause," the Court held that the state could not refuse to accept as "good cause" the Plaintiff's religious reason for not working on Saturdays without violating the Free Exercise Clause, where the state could not show that the denial of the exemption furthered a compelling state interest and did so by the least restrictive means available. See id. at 401-02, 407; see also Hobbie v. Unemp't Appeals Comm'n, 480 U.S. 136, 141-42 (1987) (applying strict scrutiny to state commission's denial of unemployment benefits to religious applicant, expressly rejecting application of lesser standard in individual assessment context); Thomas v. Review Bd. of Indiana Emp't Sec. Div., 450 U.S. 707, 718 (1981) (applying strict scrutiny in individualized assessment context to state's denial of unemployment compensation to applicant, who left his job because his religious beliefs prohibited him from participating in production of armaments).

The Supreme Court's holding in Smith reinforced this point. Although the Smith Court held that strict scrutiny did not apply to neutral laws of general applicability that incidentally burden religious exercise (in this case, an Oregon criminal law prohibiting the ingestion of peyote), it specifically distinguished situations involving a "system of individualized exemptions" administered by the government. 494 U.S. at 884. Indeed, the Court expressly affirmed the applicability of the strict scrutiny standard used in Sherbert and Thomas to such cases. See id. ("[W]here the State has in place such a system . . . it may not refuse to extend that system to cases of 'religious hardship'

without compelling reason."). The Court also specifically characterized the unemployment compensation schemes at issue in Sherbert and its progeny as "a context that lent itself to individualized governmental assessment of the reasons for the relevant conduct." Id. (emphasis added).

Subsequent to Smith, the Supreme Court again applied the Free Exercise Clause "individualized assessments" doctrine in Lukumi, where the Court struck down an animal cruelty ordinance that required local government officials to evaluate the justification for animal killings on the basis of whether such killings were "unnecessar[y]." 508 U.S. at 537. Because the ordinance required "an evaluation of the particular justification for the killing," including whether it was for religious purposes, the Court found that it created a system of "individualized assessments." Id. In such cases, the Court held, a "law burdening religious practice that is not neutral or not of general application must undergo the most rigorous of scrutiny." Id. at 546. In doing so, the Court "confirmed that the presence of 'individualized assessments' remains of constitutional significance in Free Exercise cases even outside of the unemployment compensation arena." Freedom Baptist Church of Delaware Cnty. v. Twp. of Middletown, 204 F. Supp. 2d 857, 868 (E.D. Pa. 2002).

In Fifth Ave. Presbyterian Church, the Second Circuit relied on the Sherbert/Smith/Lukumi line of cases in holding that New York City's attempt to prevent the church from allowing the homeless to sleep in their outdoor spaces violated the Free Exercise Clause. See 293 F.3d 570. The Court concluded that "[g]overnment enforcement of laws or policies that substantially burden the exercise of sincerely held religious beliefs is subject to strict scrutiny" unless the government can show that a neutral and generally applicable law applies. Id. at 574.

The vast majority of courts to have considered the question have determined that, because RLUIPA § 2(a)(1), as applied by § 2(a)(2)(C), applies only to land-use decisions that employ

individualized assessments, the provision merely codifies the Supreme Court's Free Exercise jurisprudence, and thus is well-within Congress's power under the Fourteenth Amendment.[11] See, e.g., Murphy v. Zoning Comm'n of Town of New Milford, 289 F. Supp. 2d 87, 119 (D. Conn. 2003) ("Subsection (a)(1) . . . and (a)(2)(C) . . . are essentially codifications of Supreme Court jurisprudence."), vacated on other grounds, 402 F.3d 342 (2d Cir. 2005); World Outreach Conference Ctr. v. City of Chicago, 591 F.3d 531, 534 (7th Cir. 2009) ("[S]ection 2000cc(a)(1) of RLUIPA codifies Sherbert."); Guru Nanak Sikh Soc'y of Yuba City v. Cnty. of Sutter, 456 F.3d 978, 993 (9th Cir. 2006) ("In this case, RLUIPA targets only 'individualized government assessment[s]' subject to strict scrutiny under the Supreme Court's free exercise jurisprudence."); Freedom Baptist, 204 F. Supp.2d at 868 (RLUIPA "codif[ies] the individualized assessments jurisprudence in Free Exercise cases that originated with the Supreme Court's decision in Sherbert v. Verner.") (citation omitted); United States v. Maui Cnty., 298 F. Supp. 2d 1010, 1016 (D. Haw. 2003) ("If, as the Court finds here, RLUIPA codified existing precedent regarding when to apply the strict scrutiny test (i.e., if a generally applicable and neutral law also contains exceptions based upon 'individualized assessments' which can be used in a pretextual manner – as is the special use permit process) then

[11] Even before the passage of RLUIPA, a number of courts applied Lukumi to land-use decisions that involved individualized assessments burdening religious practice, and held that the burden in question must "advance interests of the highest order" and be "narrowly tailored in pursuit of those interests" in order to pass constitutional muster. Keeler v. Mayor & City Council of Cumberland, 940 F. Supp. 879, 886 (D. Md. 1996) (quoting Lukumi, 508 U.S. at 546); see also Cottonwood Christian Ctr. v. Cypress Redevelopment Agency, 218 F. Supp. 2d 1203, 1222 (C.D. Cal. 2002) ("Even in the absence of RLUIPA, a strict scrutiny standard of review is appropriate in this case under the Free Exercise Clause," where church was denied conditional use permit to hold religious services); Al-Salam Mosque Found. v. City of Palos Heights, No. 00-C-4596, 2001 WL 204772, at *2 (N.D. Ill. Mar. 1, 2001) ("Land use regulation often involves individualized governmental assessment of the reasons for the relevant conduct," requiring strict scrutiny) (internal quotation marks omitted); Alpine Christian Fellowship v. Cnty. Comm'rs of Pitkin Cnty., 870 F. Supp. 991, 994 (D. Colo. 1994) (requiring the county to demonstrate a compelling governmental interest for its failure to provide a religious assembly with a use permit).

it is Constitutional."); Church of the Hills of Twp. of Bedminster v. Twp. of Bedminster, No. Civ. 05-3332 (SRC), 2006 WL 462674, at *7 (D.N.J. Feb. 24, 2006) ("Applying the heightened level of scrutiny imposed by the RLUIPA's general rule, as established in Section (a)(1), to these types of individualized assessments merely codifies the jurisprudence in Free Exercise cases that originated with the Supreme Court's decision in Sherbert."); Castle Hills First Baptist, Church v. City of Castle Hills, No. SA-01-CA-1149-RF, 2004 WL 546792, at *19 (W.D. Tex. Mar. 17, 2004) ("RLUIPA's § 2(a) codified existing Supreme Court 'individualized assessment' jurisprudence."). But see Congregation Kol Ami v. Abington Twp,, No. Civ. A. 01-1919, 2004 WL 1837037, at *9-*11 (E.D. Pa. Aug. 17, 2004) (concluding that RLUIPA goes beyond merely codifying the individualized assessments doctrine, but holding that it is still within Congress's power under Section 5 of the Fourteenth Amendment).[12]

Defendants simply ignore the entire individualized assessments doctrine and the long line of cases concluding that RLUIPA is a codification of that doctrine. Instead, Defendants argue that RLUIPA requires strict scrutiny of laws that were traditionally subject to rational basis review. Defs.' Mem. in Support of Mot. to Dismiss ("Defs.' Mem.") [dkt. no. 101-1] at 28-30. But this argument is not supported by the language of § 2(a)(2)(C), which provides that before a governmental action will be subject to strict scrutiny, a jurisdictional determination must be made that the governmental action arises in the implementation of a land-use regulation under which the

[12] Kol Ami incorrectly relied on the proposition that in "deciding what burdens amount to a prohibition of free exercise, the nature and centrality of the religious activity is a major consideration." 2004 WL 1837037 at *5. The court mistakenly determined that because RLUIPA applies to matters not central to one's religious beliefs, it "applies to cases where the burdens on free exercise are less than those that were previously actionable." Id. at *5-*9. However, this centrality principle is inconsistent with Supreme Court precedent. See Smith, 494 U.S. at 887 ("Judging the centrality of different religious practices" violates the principle that "courts must not presume to determine the place of a particular belief in a religion.").

government makes "individualized assessments" of the proposed uses of the property involved. Thus, by the statute's explicit terms, it cannot be applied to those zoning ordinances and land-use decision that are, in fact, neutral laws of general applicability. See Life Teen, Inc. v. Yavapai Cnty., No. 3:01-CV-1490 (RCB), 2003 WL 24224618, at *14 (D. Ariz. Mar. 26, 2003) ("RLUIPA first requires a jurisdictional determination that the relevant government action is based on an individualized assessment before that action will be subject to strict scrutiny.").

Congress chose to limit RLUIPA in this manner specifically to make it consistent with the Supreme Court's individualized assessments doctrine, in order to ensure that the statute did not encounter the same fate as its predecessor, the Religious Freedom Restoration Act (RFRA), Pub. L. No. 104-141, 107 Stat. 1488, codified at 42 U.S.C. § 2000bb et seq. In City of Boerne v. Flores, 521 U.S. 507 (1997), the Court held that RFRA, which targeted virtually all laws and official actions at every level of government, was unconstitutional as applied to the states and their subdividions because it would necessarily apply even to generally applicable laws that incidentally burdened religion. See id. at 531. Indeed, RFRA's stated purpose was to overrule Smith and to guarantee the application of strict scrutiny in "all cases where free exercise of religion is substantially burdened." City of Boerne, 521 U.S. at 515 (citing RFRA, 42 U.S.C. § 2000bb(b)). RLUIPA's codification of the Supreme Court's individualized assessment doctrine – a doctrine explicitly reaffirmed in Smith – stands in sharp contrast to the expansive provisions of its predecessor.

In sum, RLUIPA § 2(a)(1), as applied through § 2(a)(2)(C), applies only to laws involving a system of individualized assessments, and thus merely codifies preexisting Free Exercise jurisprudence. Therefore, it is well within Congress's power under the Fourteenth Amendment.

2. Even If RLUIPA § 2(a) Extends Beyond Settled Constitutional Protections, It Nevertheless Represents a Permissible Exercise of Congress's Power to Enforce the Fourteenth Amendment

The crux of Defendants' Fourteenth Amendment argument is that RLUIPA is not within Congress's Section 5 power because it is not a congruent and proportional response to the problem of discrimination against religious institutions in the land-use context. However, as discussed above, this argument misses the point. Because RLUIPA § 2(a)(1), as applied through § 2(a)(2)(C), simply codifies the protections of the First Amendment, this Court need not address the question of whether, if these provisions were to exceed existing constitutional requirements, they would satisfy the City of Boerne "congruence and proportionality" test. As explained below, however, even if this Court were to determine that the Fourteenth Amendment provisions of RLUIPA § 2(a) extend beyond the proscriptions of the Constitution, the Court should find that they nevertheless represent a permissible exercise of Congress's Section 5 enforcement power.

The power to enforce the Fourteenth Amendment also allows Congress to prohibit a "somewhat broader swath of conduct, including that which is not itself forbidden by the Amendment's text," as long as such "prophylactic" legislation is "congruent" and "proportional" to the injury to be prevented or remedied. Kimel v. Florida Bd. of Regents, 528 U.S. 62, 81 (2000) (citing City of Boerne, 521 U.S. at 518); see also Tennessee v. Lane, 541 U.S. 509, 518 (2004) (stating that Congress' power to enforce the Fourteenth Amendment includes "the authority both to remedy and to deter violation of rights guaranteed by the Fourteenth Amendment by prohibiting a somewhat broader swath of conduct, including that which is not itself forbidden by the Amendment's text," and holding that Title II of Americans with Disabilities Act was congruent and proportional to statute's object of enforcing right of access to courts (internal alterations omitted)).

Section 5 legislation that reaches beyond the scope of Section 1's actual guarantees and prohibitions is valid so long as there exists a "congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end." City of Boerne, 521 U.S. at 520. As explained by the Second Circuit, "[d]etermining whether Congress properly exercised its powers under Section 5 of the Fourteenth Amendment . . . requires a two-part test. First, we ask whether Congress identified a history and pattern of unconstitutional [conduct]. . . . Second, we ask whether the legislation under question passes the 'congruence and proportionality' test." CSX Transp., Inc. v. New York State Office of Real Prop. Servs., 306 F.3d 87, 96-97 (2d Cir. 2002). Before enacting RLUIPA, Congress identified a broad pattern of unconstitutional conduct in land-use decisions against religious organizations, and enacted congruent and proportional legislation in response. Therefore, RLUIPA satisfies the requirements of congruence and proportionality, and is a valid exercise of Congress's Section 5 powers.

a. Congress Had Evidence of a Pattern of Local Government Land-Use Decisions Burdening Free Exercise

The first step in analyzing whether Congress properly exercised its prophylactic powers under Section 5 of the Fourteenth Amendment is to determine whether Congress had evidence of a pattern of government land-use decisions burdening the free exercise of religion. See Hibbs, 538 U.S. at 729 (in determining whether Family Medical Leave Act was congruent and proportional response to targeted gender discrimination, Court inquired "whether Congress had evidence of a pattern of constitutional violations on the part of the States in this area"). Defendants argue that the legislative history of RLUIPA "does not . . . establish widespread and persisting constitutional violations against religious institutions in local and state land use processes." Defs.' Mem. at 22. They also criticize the record as unsupported, scant, biased, and anecdotal (to paraphrase Defendants'

criticisms). See generally id. at 22-29. But these contentions fly in the face of the extensive record, as well as the conclusions reached by other courts that have examined the legislative history.

As an initial matter, Congress's factual findings are "entitled to a great deal of deference, inasmuch as Congress is an institution better equipped to amass and evaluate the vast amounts of data bearing on such an issue." Walters v. Nat'l Ass'n of Radiation Survivors, 473 U.S. 305, 330 n.12 (1985); see also City of Boerne, 521 U.S. at 531-32 ("As a general matter, it is for Congress to determine the method by which it will reach a decision."). In the case of RLUIPA, Congress held nine hearings on the need for legislation over a period of three years.[13] See supra at 6-9. "The hearing record compiled massive evidence that this right [of religious communities to assemble] is frequently violated." See 146 Cong. Rec. at S77774. Congress heard testimony and reviewed evidence from national surveys, studies of zoning codes, reported land-use cases, and the experiences of particular religious institutions. See id. at S7775; H.R. Rep. 106-219, at 18- 24; 146 Cong. Rec. at E1235. In short, Congress had before it ample evidence of local land-use decisions burdening free exercise to warrant the enactment of corrective legislation. See, e.g., Murphy, 289 F. Supp. 2d at 118 (examining the legislative history and determining that "Congress adequately identified a history and pattern of unconstitutional conduct that needed to be addressed"); Guru Nanak, 456 F.3d at 994 ("In nine hearings preceding the enactment of RLUIPA, Congress compiled a substantial amount of statistical and anecdotal data demonstrating that governmental entities nationwide purposefully exclude unwanted religious groups by denying them use permits through discretionary and subjective

[13] Defendants make much of the fact that a significant portion of the legislative record was compiled during consideration of the Religious Liberty Protection Act of 1999 (RLPA). See Defs.' Mem. at 23. However, this historical point is a red herring. The RLPA was simply one stage in the legislative process that led to RLUIPA. See Freedom Baptist, 204 F. Supp. 2d at 861-62 (describing the evolution of RLUIPA). Therefore, the legislative history of the RLPA is the legislative history of RLUIPA.

standards and processes."); Church of the Hills, 2006 WL 462674, at *7 n.3 ("The legislative record of the RLUIPA amply supports the notion that zoning laws are often applied in a manner that is hostile to the free exercise of religion.").

b. RLUIPA § 2(a) Satisfies the Congruence and Proportionality Test

RLUIPA § 2(a)(1), as applied through § 2(a)(2)(C), is "narrowly drawn" to address the burdens on free exercise identified by Congress that occur in discretionary applications of zoning laws, and is thus congruent and proportional to the constitutional violations identified by Congress. See Guru Nanak, 456 F.3d at 994-95 ("RLUIPA . . . targets only regulations that are susceptible, and have been shown, to violate individuals' religious exercise"); Kol Ami, 2004 WL 1837037, at *11 (same); Freedom Baptist, 204 F. Supp. 2d at 873-74 (RLUIPA "is targeted solely to low visibility decisions with the obvious – and, for Congress, unacceptable – concomitant risk of idiosyncratic application").

Unlike RFRA, RLUIPA does not attempt to impose strict scrutiny on neutral laws of general applicability. Nor does RLUIPA exempt religious institutions from zoning laws. Rather, RLUIPA requires strict scrutiny of negative decisions in the land-use context where individualized assessments are made, as a prophylactic way to prevent local government officials from discriminating against religious institutions. This precision stands in sharp contrast to RFRA's wholly untargeted provisions, which sought to apply strict scrutiny to all laws, in all contexts. In short, RLUIPA does not provide the "sweeping coverage" of RFRA found objectionable by the Supreme Court in City of Boerne.

As numerous courts have already held with respect to RLUIPA, "[w]here, as here, [the challenged] legislation closely tracks constitutional guarantees, any marginal conduct that is covered by the statute, but not the Constitution, 'nevertheless constitutes the kind of congruent, and, above

all, proportional remedy Congress is empowered to adopt under section 5 of the Fourteenth Amendment.'" Murphy, 289 F. Supp. 2d at 120 (quoting Freedom Baptist, 204 F. Supp. 2d at 874); see also Life Teen, 2003 WL 24224618, at *14 (same); Guru Nanak, 456 F.3d at 994-95 (RLUIPA "is a congruent and proportional response to free exercise violations"); Freedom Baptist, 204 F. Supp. 2d at 874 ("To the extent that, conceivably, the RLUIPA may cover a particular case that is not on all fours with an existing Supreme Court decision, it nevertheless constitutes the kind of congruent, and, above all, proportional remedy Congress is empowered to adopt under § 5 of the Fourteenth Amendment."); Church of the Hills, 2006 WL 462674, at *7 n.3 (same); Kol Ami, 2004 WL 1837037, at *11 ("RLUIPA is sufficiently congruent and proportional to fall under Section V of the Fourteenth Amendment.").

In sum, even if this Court were to determine that RLUIPA covers more conduct than the Fourteenth Amendment itself, it should nevertheless conclude that RLUIPA represents a congruent and proportional response to the nationwide problem of religious discrimination in state and local land-use regulation that has been identified by Congress.

B. RLUIPA § 2(a)(1), As Applied Through § 2(a)(2)(B), Is a Valid Exercise of Congress' Authority Under the Commerce Clause

Defendants' second argument, that RLUIPA exceeds Congress's power under the Commerce Clause, has been directly addressed and rejected by the Second Circuit. See Westchester Day Sch., 504 F.3d at 354. As the Second Circuit held in Westchester Day School, because RLUIPA contains a jurisdictional element, Congress constitutionally enacted § 2(a)(1) of RLUIPA, as applied through § 2(a)(2)(B), pursuant to its power "[t]o regulate Commerce . . . among the several States." U.S. Const. Art. I, § 8, cl. 3; see Westchester Day Sch., 504 F.3d at 354.

RLUIPA § 2(a)(2)(B) provides that strict scrutiny applies in those instances when a land use regulation imposes a substantial burden upon the religious exercise of a person or institution, and that burden "affects," or its removal "would affect," interstate commerce. 42 U.S.C. § 2000cc(a)(2)(B). This jurisdictional element – often called a jurisdictional "hook" – triggers RLUIPA's application only in instances that properly fall within the reach of the Commerce Clause. Therefore, by definition, this provision permissibly restricts RLUIPA so that it applies as an exercise of the Commerce Clause power only when the Commerce Clause would allow it to do so, thus preventing RLUIPA from exceeding the bounds of the Commerce Clause. It allows courts to make case-by-case determinations of whether interstate commerce is implicated before Congress's authority is exercised. If a court were to find that the burden on religion (or its removal) does not affect interstate commerce, RLUIPA § 2(a)(1) would not apply through § 2(a)(2)(B) as a statutory matter, and therefore no constitutional issue would arise. If, on the other hand, a court were to find that the burden on religion or its removal does affect interstate commerce, RLUIPA would apply as a valid exercise under Congress's Commerce Clause authority. In neither event would RLUIPA exceed Congress's commerce power.

In Westchester Day School, the Second Circuit considered this very issue, and concluded that the existence of a jurisdictional hook was sufficient to make the statute constitutional:

> As the Supreme Court has made plain, the satisfaction of such a jurisdictional element – common in both civil and criminal cases – is sufficient to validate the exercise of congressional power because an interstate commerce nexus must be demonstrated in each case for the statute in question to operate. . . . Following suit, this Court has consistently upheld statutes under the Commerce Clause on the basis of jurisdictional elements. . . . Consistent with this precedent, we now hold that, where the relevant jurisdictional element is satisfied, RLUIPA constitutes a valid exercise of congressional power under the Commerce Clause.

504 F.3d at 354 (internal citations omitted). Defendants have no way to distinguish the current case

from Westchester Day School, and thus the Second Circuit's ruling controls.[14]

Finally, Defendants' assertion that RLUIPA regulates noneconomic activity is meritless. Defs.' Mem. at 32-33. Defendants attempt to equate RLUIPA § 2(a) to the statutes at issue in United States v. Lopez, 514 U.S. 549 (1995), and United States v. Morrison, 529 U.S. 598 (2000), is unavailing, as the statutes in those cases did not contain a jurisdictional hook. "In both cases, the Supreme Court acknowledged that a jurisdictional element like § 2(b)(2) of RLUIPA, may have been sufficient to save the constitutionality of these infirm statutes." Life Teen, 2003 WL 24224618, at *12 (citing Lopez, 514 U.S. at 561-62; Morrison, 529 U.S. at 613). The existence of a jurisdictional hook in RLUIPA ensures, on a case-by-case basis, that § 2(a)(1) will only be applied through § 2(a)(2)(B) where the activity at issue has an effect on interstate commerce.

C. RLUIPA § 2(a) Does Not Violate the Separation of Powers

RLUIPA is not a congressional exercise of judicial power, and therefore does not violate the Separation of Powers doctrine. That doctrine precludes the Executive and Legislative Branches from reviewing and revising specific judgments of the federal courts, see Miller v. French, 530 U.S. 327, 342 (2000); Plaut v. Spendthrift Farm, Inc., 514 U.S. 211, 218-19 (1995); Hayburn's Case, 2 U.S. 408 (1792), and assigns to the Judicial Branch the ultimate authority to interpret the Constitution, see Marbury v. Madison, 5 U.S. 137, 177 (1803). RLUIPA neither delegates power to review and revise the judgments of federal courts to the Legislative or Executive Branches, nor overrides the Supreme Court's interpretation of the First Amendment.

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[14] Every other court to have issued a ruling on this issue that remains good law has reached the same conclusion as the Second Circuit. See, e.g., World Outreach Conference Ctr., 591 F.3d at 533; Fortress Bible Church v. Feiner, 734 F. Supp. 2d 409, 509-10 (S.D.N.Y. 2010); Freedom Baptist, 204 F. Supp. 2d at 867-68; Maui Cnty., 298 F. Supp. 2d at 1015; Church of the Hills, 2006 WL 462674, at *8; Castle Hills, 2004 WL 546792, at *19; Kol Ami, 2004 WL 1837037, at *11-*12; Life Teen, 2003 WL 24224618, at *12-*13.

Defendants argue that RLUIPA violates the Separation of Powers doctrine because it imposes a standard of review and reassigns the burden of persuasion, areas Defendants argue are reserved to the Judiciary. See Defs.' Mem. at 34-36. Defendants' argument is premised upon a fundamental misunderstanding of RLUIPA. As previously discussed, by enacting RLUIPA Congress simply codified existing First and Fourteenth Amendment jurisprudence, and specifically the "individualized assessments doctrine." See supra at 12-17. Therefore, the statute "does not 'attempt a substantive change in constitutional protections,' . . . that came to constitutional grief in City of Boerne," Freedom Baptist, 204 F. Supp. 2d at 874 (quoting City of Boerne, 521 U.S. at 532), and it "honors Marbury's distinction between the Constitution as 'superior paramount law' and 'ordinary legislative acts.'" Id.

Although RLUIPA was clearly enacted as a response to Smith and City of Boerne, it is not an attempt to review or revise those decisions of the Court. See id. at 873; Church of the Hills, 2006 WL 462674, at *9; Castle Hills, 2004 WL 546792, at *19. In fact, by codifying the individualized assessments doctrine, "the statute draws the very line Smith itself drew when it distinguished neutral laws of general applicability from those" involving individualized considerations. Freedom Baptist, 204 F. Supp. 2d at 873. "Nor is the RLUIPA hostile to City of Boerne." Id. To the contrary, in enacting RLUIPA, Congress addressed the shortcomings of RFRA identified by the Court, showing proper respect for the judiciary's role.

To the extent that this Court determines – contrary to the assertion of the United States, see supra at 18 – that RLUIPA provides heightened protections that go beyond those required by the Constitution, the statute would still not violate the Separation of Powers doctrine. As previously discussed, "'Congress is not limited to mere legislative repetition of [the Supreme Court's] constitutional jurisprudence,' but may also prohibit 'a somewhat broader swath of conduct.'" Id. at

874 (quoting Bd. of Trs. of Univ. of Alabama v. Garrett, 531 U.S. 356, 365 (2001) (internal quotation marks and citation omitted); see also supra at 18-24.

Federal statutes that respond to Supreme Court decisions by providing heightened statutory protections of individual rights in addition to the constitutional protections enunciated by the Supreme Court are neither uncommon nor constitutionally problematic. See, e.g., Cutter v. Wilkinson, 544 U.S. 709, 722 (2005) (discussing Goldman v. Weinberger, 475 U.S. 503 (1986), which held that the Free Exercise Clause did not give military personnel the right to wear religious headgear while on duty, and subsequent legislation that extended to members of the military the right to wear religious head coverings); Texas Monthly, Inc. v. Bullock, 489 U.S. 1, 18 n.8 (1989) (explicitly noting that Congress could enact law giving members of military broad rights to wear religious head coverings in response to Goldman); In re Young, 141 F.3d 854, 860 (8th Cir. 1998) ("Congress has often provided statutory protection of individual liberties that exceed the Supreme Court's interpretation of constitutional protection."); In re Hodge, 220 B.R. 386, 397 (D. Idaho 1998) ("Congress may permissibly create new statutory rights giving greater protection to constitutionally-protected interests than the Constitution itself does."). Indeed, in Smith, the Supreme Court expressly invited enactment of such legislation. See 494 U.S. at 890 (stating that Court's holding only delineates constitutional floor, and noting that "a society that believes in the negative protection accorded to religious belief can be expected to be solicitous of that value in its legislation").

In sum, the "relevant inquiry for separation of powers" is not whether Congress disagreed with a court's decision. Castle Hills, 2004 WL 546792, at *19. "The inquiry must instead focus upon whether or not Congress acted beyond the scope of its constitutional authority." Id. Congress' decision to provide statutory protections for the religious exercise in the context of land-use

regulation – whether simply a codification of prior Supreme Court precedent or providing heightened protections – does not violate the Separation of Powers doctrine. See Freedom Baptist, 204 F. Supp. 2d at 873-74; Church of the Hills, 2006 WL 462674, at *9; Castle Hills, 2004 WL 546792, at *19.

D. RLUIPA § 2(a) Does Not Violate the Tenth Amendment

Defendants acknowledge that the Second Circuit has already held that RLUIPA does not violate the Tenth Amendment. See Defs.' Mem. at 36 n.3; Westchester Day Sch., 504 F.3d at 354-55. Nonetheless, somewhat quixotically, they argue that the Second Circuit failed to "take into account the entrenched doctrine of due deference to local and state land use officials and their determinations." Defs.' Mem. [dkt. no. 101-1] at 36 n.3. But it is Defendants who have missed the point. Even though local land-use decisions have traditionally been within the purview of state and local governments, because RLUIPA § 2(a)(1) was enacted pursuant to Congress's enumerated powers, it does not violate the Tenth Amendment's mandate that the "powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. Const. amend. X.

Throughout their brief, Defendants essentially argue that RLUIPA violates federalism principles because it regulates in an arena that traditionally has long been recognized as within the power of the states to regulate. The Supreme Court, however, repudiated this argument in Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528,546-47 (1985) ("We therefore now reject, as unsound in principle and unworkable in practice, a rule of state immunity from federal regulation that turns on a judicial appraisal of whether a particular governmental function is 'integral' or 'traditional.'"); see also Castle Hills, 2004 WL 546792, at *19 ("[RLUIPA's] validity cannot be challenged by general notions of federalism."); Kol Ami, 2004 WL 1837037, at *15 (that land use may be "traditionally under local control" "does not put it beyond the reach of congressional

authority when Congress acts within the confines of its constitutional powers").

The relevant inquiry for Tenth Amendment purposes is not whether a particular activity is local in nature, but whether the federal statute was enacted pursuant to Congress's constitutional authority. "If a power is delegated to Congress in the Constitution, the Tenth Amendment expressly disclaims any reservation of that power to the States." New York v. United States, 505 U.S. 144,156 (1992); see also Westchester Day Sch., 504 F.3d at 355 (same). Because RLUIPA is a valid enactment under Section 5 of the Fourteenth Amendment and the Commerce Clause, it is necessarily consistent with the Tenth Amendment. See, e.g., Westchester Day Sch., 504 F.3d at 355 (finding that RLUIPA does not violate Tenth Amendment because it is a proper exercise of Congress's power under the Commerce Clause); Midrash Sephardi, Inc. v. Town of Surfside, 366 F.3d 1214, 1242-43 (11th Cir. 2004) (finding that RLUIPA does not violate Tenth Amendment because it is a proper exercise of Congress's Fourteenth Amendment power).

E. RLUIPA § 2(b)(1) Does Not Violate the Establishment Clause

Defendants focus their arguments against RLUIPA's constitutionality on § 2(a) of the statute. However, their final argument turns on a different provision: § 2(b)(1), which is often referred to as the "equal terms" provision. RLUIPA § 2(b)(1) prohibits imposition or implementation of a land use regulation in a manner that treats a religious assembly or institution "on less than equal terms" with a nonreligious assembly or institution. 42 U.S.C. 2000cc(b)(1). While, as compared to § 2(a), few courts have considered constitutional challenges to the equal terms provision, every court to have done so has found the provision to be constitutional. See, e.g., Midrash Sephardi, 366 F.3d 1214; Rocky Mountain Christian Church v. Bd. of Cnty. Comm'rs of Boulder Cnty., 612 F. Supp. 2d 1163 (D. Colo. 2009); Freedom Baptist, 204 F. Supp. 2d 857. For the reasons that follow, this Court should do the same.

As an initial matter, Defendants' argument relies on their contention that the equal terms provision requires local governments to treat religious entities more favorably than secular entities. See Defs.' Mem. at 36-37. But a glance at the plain language of the provision makes clear that Defendants are simply wrong. "The bottom line . . . is that RLUIPA's Equal Terms provision requires equal treatment, not special treatment." Primera Iglesia Bautista Hispana of Boca Raton, Inc. v. Broward Cnty., 450 F.3d 1295, 1313 (11th Cir. 2006) (emphasis added); see also Midrash Sephardi, 366 F.3d at 1241 (RLUIPA mandates "equal as opposed to special treatment for religious institutions"). To be sure, the provision does not prevent local governments from giving certain advantages to religious institutions; but it does not in any way require favorable treatment – it simply requires equal treatment.

In requiring equal treatment of religious institutions, § 2(b)(1) simply codifies existing First and Fourteenth Amendment jurisprudence.[15] This alone is sufficient grounds for this Court to hold that the provision is consistent with the Establishment Clause. However, even if the Court decides

[15] There is some disagreement between the circuits as to how the equal terms provision should be interpreted. See Third Church of Christ, Scientist, of New York City v. City of New York, 626 F.3d 667, 670 (2d Cir. 2010) (describing the different interpretations adopted by the Third, Seventh, and Eleventh Circuits); Third Church of Christ, Scientist, of New York City v. City of New York, 617 F. Supp. 2d 201, 209-11 (S.D.N.Y. 2008) (same); Centro Familiar Cristiano Buenas Nuevas v. City of Yuma, 615 F. Supp. 2d 980, 993-96 (D. Ariz. 2009) (same). The Second Circuit has not yet adopted its own interpretation. See Third Church of Christ, 626 F.3d at 669-70. However, the United States need not elaborate on this question here, because all of the circuits to have considered the issue agree that the equal terms provision codifies preexisting constitutional jurisprudence. See Lighthouse Inst. for Evangelism, Inc. v. City of Long Branch, 510 F.3d 253, 264 (3d Cir. 2007) ("It is undisputed that, when drafting the equal terms provision, Congress intended to codify the existing jurisprudence interpreting the Free Exercise Clause."); River of Life Kingdom Ministries v. Vill. of Hazel Crest, 611 F.3d 367 (7th Cir. 2010) (en banc) (largely adopting the Third Circuit's approach); Midrash Sephardi, 366 F.3d at 1239-40 (concluding that the equal terms provision codifies "existing Free Exercise, Establishment Clause and Equal Protection rights"); see also Centro Familiar, 615 F. Supp. 2d at 993 (noting "wide agreement that the equal terms provision codifies the Supreme Court's Free Exercise Clause jurisprudence").

to apply the three-prong test articulated by Lemon v. Kurtzman, 403 U.S. 602 (1971), to determine whether a law violates the Establishment Clause, it should still hold that the equal terms provision falls well within constitutional limits. See Midrash Sephardi, 366 F.3d at 1240-42 (applying the Lemon test and holding that the equal terms provision does not violate the Establishment Clause).[16]

1. RLUIPA § 2(b)(1) Enforces The Constitution's Prohibitions Against Disadvantageous Treatment Of Religious Assemblies Compared To Analogous Secular Land Uses

RLUIPA's equal terms provision is a codification of preexisting Free Exercise, Establishment Clause, and Equal Protection jurisprudence. See id. at 1232-33, 1239-40 (holding that the "equal terms provision codifies the Smith-Lukumi line of precedent" and "existing Free Exercise, Establishment Clause and Equal Protection rights"); Freedom Baptist, 204 F. Supp. 2d at 869-70 (same). Therefore, it is necessarily consistent with the Establishment Clause.

a. Non-Discrimination Elements of the Free Exercise Clause

In enacting the equal terms provision, Congress intended to codify the Supreme Court's holding in Lukumi that the Free Exercise Clause forbids a legislature from deciding that "the governmental interests it seeks to advance are worthy of being pursued only against conduct with a religious motivation." 508 U.S. at 542-543; see 146 Cong. Rec. at S7776 (the equal terms provision "enforce[s] the Free Exercise rule against laws that burden religion and are not neutral and generally applicable"); 146 Cong. Rec. E1563 (Sept. 22, 2000) (daily ed.) (statement of Rep. Canady); H.R. Rep. 106-219, at 17. In Lukumi, the Supreme Court held that the Free Exercise

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[16] The Second Circuit has also concluded that "RLUIPA's land use provisions do not violate the Establishment Clause." Westchester Day Sch., 504 F.3d at 356. While Westchester Day School involved a challenge to RLUIPA § 2(a), the logic of the Second Circuit's opinion certainly extends to the equal terms provision. Furthermore, the Court cited Midrash Sephardi – a case that did reject an Establishment Clause challenge to § 2(b)(1) – favorably in its analysis. See Westchester Day Sch., 504 F.3d at 356 (citing Midrash Sephardi, 366 F.3d at 1241).

Clause prohibits the government from allowing secular exemptions to otherwise generally applicable government policy, but denying a religious exemption that would cause no greater harm to the government's interests than the secular exemptions allowed. As the Court explained, "[t]he principle that government, in pursuit of legitimate interests, cannot in a selective manner impose burdens only on conduct motivated by religious belief is essential to the protection of the rights guaranteed by the Free Exercise Clause." 508 U.S. at 543. To do otherwise, through a regulation that is either not neutral or not of general applicability, triggers strict scrutiny. Id. at 521-32.

The ordinances at issue in Lukumi sought to prevent the mistreatment of animals and the improper disposal of carcases. See id. at 543-45. Although the ordinances had legitimate ends (protecting public health and preventing animal cruelty), because they excluded from their purview almost all nonreligious animal killing and disposal, they "fail[ed] to prohibit nonreligious conduct that endangers these interests in a similar or greater degree" as the prohibited, religiously-motivated conduct. Id. at 543. Therefore, because the ordinances regulated religious activity but not other categories of activity within the same ambit, the Court held the ordinances unconstitutional under the Free Exercise Clause. As the Court explained, "[a]ll laws are selective to some extent, but categories of selection are of paramount concern when a law has the incidental effect of burdening religious practice." Id. at 542.

The lower federal courts have faithfully applied this principle in cases decided subsequent to Lukumi. For example, in Fraternal Order of Police Newark Lodge No. 12 v. Newark, 170 F.3d 359 (3d Cir. 1999), the Third Circuit applied the equal treatment doctrine in a case where a secular interest was accommodated to the exclusion of religion. Fraternal Order of Police involved a police department policy that prohibited officers from wearing beards but allowed an exception for health reasons. The Third Circuit held that this policy violated the Free Exercise Clause as applied by the

police department, which denied an exception for Sunni Muslim officers who were required to wear beards for religious reasons. See id. at 360-61, 367. Such unequal treatment of analogous activities, the Third Circuit explained, "indicates that the [government] has made a value judgment that secular (i.e., medical) motivations for wearing a beard are important enough to overcome its general interest . . . but that religious motivations are not." Id. at 366. Citing Lukumi, the Third Circuit held that the Free Exercise Clause precludes the government from making that kind of value judgment. See id. at 365-66. Accord Tenafly Eruv Ass'n v. Borough of Tenafly, 309 F.3d 144, 168 (3d Cir. 2002) ("[S]elective, discretionary application" of ordinance barring citizens from affixing signs and other items to telephone poles in a manner that disfavors religion "violates the neutrality principle of Lukumi and Fraternal Order of Police."); Cottonwood Christian Ctr. v. Cypress Redev. Agency, 218 F. Supp. 2d 1203, 1224 (C.D. Cal. 2002) (Free Exercise Clause, as interpreted in Lukumi, prohibits discrimination against religion in land-use matters).

RLUIPA § 2(b)(1) codifies this Free Exercise Clause principle by ensuring that zoning authority is not implemented or exercised in a manner that selectively discriminates against religious assemblies or institutions. See Lighthouse Inst., 510 F.3d at 264 ("It is undisputed that, when drafting the equal terms provision, Congress intended to codify the existing jurisprudence interpreting the Free Exercise Clause."); Midrash Sephardi, 366 F.3d at 1232 ("RLUIPA's equal terms provision codifies the Smith-Lukumi line of precedent."); Freedom Baptist, 204 F. Supp. 2d at 869 ("On the face of [the equal terms provision], the echoes of Lukumi . . . are unmistakable."); Centro Familiar, 615 F. Supp. 2d at 993 (noting "wide agreement that the equal terms provision codifies the Supreme Court's Free Exercise Clause jurisprudence").

b. Non-discrimination Elements of the Establishment Clause

The Supreme Court has also held that unequal treatment of religion vis-a-vis secular activities violates the Establishment Clause. The Court has noted that the Establishment Clause requires the government to be "neutral" with respect to religion, see Bd. of Educ. of Kiryas Joel Vill. Sch. Dist. v. Grumet, 512 U.S. 687, 704 (1994), and that the "principal or primary effect [of government action] must be one that neither advances nor inhibits religion." Lemon, 403 U.S. at 612 (citation omitted). In Lukumi, the Supreme Court referenced the broad principle of neutrality set forth in its Establishment Clause cases: "In our Establishment Clause cases we have often stated the principle that the First Amendment forbids an official purpose to disapprove of a particular religion or of religion in general." 508 U.S. at 532 (citing cases).

By insisting in neutrality on land-use decisions, RLUIPA § 2(b)(1) codifies this Establishment Clause jurisprudence. See Midrash Sephardi, 366 F.3d at 1238-39; Freedom Baptist, 204 F. Supp. 2d at 870 (concluding that the equal terms provision is "rooted in Establishment Clause jurisprudence where the Supreme Court has disapproved of unequal treatment of religious activities measured against secular ones").

c. Non-discrimination Mandate of the Equal Protection Clause

The Equal Protection Clause provides a third constitutional basis for RLUIPA § 2(b)(1). See Lukumi, 508 U.S. at 540 ("In determining if the object of a law is a neutral one under the Free Exercise Clause, we can also find guidance in our equal protection cases."); Freedom Baptist, 204 F. Supp. 2d at 870 ("As the Supreme Court noted in Lukumi, the Equal Protection Clause of the Fourteenth Amendment is often yoked with the Free Exercise Clause."). The Supreme Court has indicated that discrimination against religion is inconsistent with the principles embodied in the Equal Protection Clause. Kiryas Joel, 512 U.S. at 715 (O'Connor, J., concurring). Thus, zoning

provisions that treat religious activity on less than equal terms with nonreligious activity discriminate against religious exercise and violate the Equal Protection Clause. See Vineyard Christian Fellowship v. City of Evanston, 250 F. Supp. 2d 961, 979 (N.D. Ill. 2003) (city violated Equal Protection Clause by excluding churches from district where similar secular uses are allowed). Therefore, RLUIPA § 2(b)(1) also codifies existing Supreme Court precedent regarding the Equal Protection Clause by prohibiting discrimination against religious institutions. See Midrash Sephardi, 366 F.3d at 1239; Freedom Baptist Church, 204 F. Supp. 2d at 870.

* * *

In sum, the equal terms provision codifies well-established Free Exercise, Establishment Clause, and Equal Protection precedent. As Justice O'Connor noted in her concurrence in Kiryas Joel:

> [T]he Religion Clauses – the Free Exercise Clause, the Establishment Clause, the Religion Test Clause, Art. VI, cl. 3, and the Equal Protection Clause as applied to religion – all speak with one voice on this point: Absent the most unusual circumstances, one's religion ought not affect one's legal rights or duties or benefits.

512 U.S. at 715 (O'Connor, J., concurring). RLUIPA § 2(b)(1) is a direct application of the precedent of which Justice O'Connor spoke.

> On the face of RLUIPA's equal terms provision, the echoes of these constitutional principles are unmistakable. Simply put, to deny equal treatment to a church or a synagogue on the grounds that it conveys religious ideas is to penalize it for being religious. Such unequal treatment is impermissible based on the precepts of the Free Exercise, Establishment and Equal Protection Clauses.

Midrash Sephardi, 366 F.3d at 1239.[17]

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[17] RLUIPA § 2(b)(1) also furthers the Free Speech Clause of the First Amendment. That clause prevents governmental viewpoint discrimination, and thus requires equal treatment of religious speech where secular speech is permitted. See Good News Club v. Milford Cent. Sch., 533 U.S. 98 (2001); Rosenberger v. Rector and Visitors of Univ. of Virginia, 515 U.S. 819 (1995); Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist., 508 U.S. 384 (1993). RLUIPA's legislative

2. Even if this Court Applies the Lemon Test, RLUIPA § 2(b)(1) Is Consistent With the Establishment Clause

Because the equal terms provision is a codification of First and Fourteenth Amendment precedent, this Court need not apply the Lemon test to determine whether it violates the Establishment Clause. Nonetheless, the provision easily passes that test, which requires that "government action that interacts with religion must: (1) have a secular purpose, (2) have a principal effect that neither advances nor inhibits religion, and (3) not bring about an excessive government entanglement with religion." Westchester Day Sch., 504 F.3d at 355 (describing the Lemon test).

The Supreme Court "'has long recognized that the government may (and sometimes must) accommodate religious practices and that it may do so without violating the Establishment Clause.'" Corp. of Presiding Bishop of Church of Jesus Christ of Latter Day Saints v. Amos, 483 U.S. 327, 334 (1987) (quoting Hobbie, 480 U.S. at 144-45). To hold otherwise, the Court has noted, would require the government to be "oblivious to impositions that legitimate exercises of state power may place on religious belief and practice." Kiryas Joel, 512 U.S. at 705. The Supreme Court has applied the accommodation principle to a wide variety of contexts to uphold, inter alia, the following: Title VII's exemption of religious organizations from its general prohibition against discrimination in employment on the basis of religion, see Amos, 483 U.S. at 335-39; a state property tax exemption for religious organizations, see Walz v. Tax Comm'n of New York, 397 U.S. 664, 672-80 (1970); and a state program releasing public school children during the school day to

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history explicitly cites Free Speech jurisprudence as a basis for the statute's land-use provisions. See 146 Cong. Rec. at S7775 ("The land use sections of the bill . . . enforce the Free Exercise and Free Speech Clauses as interpreted by the Supreme Court."). And at least two courts have held that the Free Speech Clause prohibits discrimination against religious institutions with respect to land use. See Cornerstone Bible Church v. City of Hastings, 948 F.2d 464, 468-71 (8th Cir. 1991); Vineyard Christian Fellowship, 250 F. Supp. 2d at 984.

receive religious instruction at religious centers, see Zorach v. Clauson, 343 U.S. 306, 315 (1952).

Based on these decisions, this Court should hold that RLUIPA's equal terms provision is a permissible accommodation of religion consistent with the Establishment Clause. The provision has the permissible secular purpose and effect of lifting a significant government-imposed burden on the exercise of religion, and does not require any excessive entanglement between government and religion. See Midrash Sephardi, 366 F.3d at 1240-42 (applying three-part Lemon test to RLUIPA § 2(b)(1) and concluding that it does not violate the Establishment Clause).

a. RLUIPA § 2(b)(1) Has a Permissible Secular Purpose

The Supreme Court in Amos held that it is a permissible legislative purpose to alleviate a government-created burden on religious belief and practice. See 483 U.S. at 335. Thus, a legislative purpose need not be unrelated to religion in order to satisfy the first prong of Lemon. "[T]hat would amount to a requirement that the government show a callous indifference to religious groups, and the Establishment Clause has never been so interpreted." Id. at 335 (internal quotation marks and citation omitted). RLUIPA's equal terms provision, like the "substantial burden" provisions of § 2(a), is intended to free religious institutions from governmental restrictions that otherwise would prevent them from engaging in religiously motivated activity – the religious use of land for worship, teaching, and good works, etc. – without sufficient justification. See generally 146 Cong. Rec. E1235 (statement of Rep. Canady) (RLUIPA was "designed to protect the free exercise of religion from unnecessary government interference"). The equal terms provision specifically targets the unequal treatment of religious entities as compared to secular entities. As such, it clearly removes a government-created burden – in the form of discrimination – on the exercise of religion.[18]

[18] Defendants briefly argue that RLUIPA does not "'alleviate exceptional government-created burdens on private religious exercise'" because "land use laws regulate the location and size of

As previously mentioned, Defendants suggest that RLUIPA § 2(b)(1)'s prohibition of treating a religious assembly on less than equal terms with a secular assembly violates the Establishment Clause because it improperly provides a special preference for, or deference to, religion. See Defs.' Mem. at 36-37. First, as already explained, that is an incorrect reading of the equal terms provision. See supra at 29. Furthermore, even if the provision were construed to provide a benefit to religious institutions, it would still not run afoul of the Establishment Clause. In Amos, the Supreme Court held that a law that lifts a significant government-imposed burden on religion can serve a valid secular purpose even though it "singles out religious entities for a benefit." 483 U.S. at 338; see also id. (explaining that, "[w]here . . . government acts with the proper purpose of lifting a regulation that burdens the exercise of religion, we see no reason to require that the exemption comes packaged with benefits to secular entities"); Murphy, 289 F. Supp. 2d at 124 (same). Accord Texas Monthly, Inc. v. Bullock, 489 U.S. 1, at 2 (1989) (plurality opinion) (noting that a subsidy directed exclusively to religious entities is permissible if it is "required by the Free Exercise Clause" or "can [] reasonably be seen as removing a significant state-imposed deterrent to the free exercise of religion").

Thus, "[w]here, as here, a law's purpose it to alleviate significant government interference with the exercise of religion, that purpose does not violate the Establishment Clause." Midrash Sephardi, 366 F.3d at 1241; see also Rocky Mountain Christian Church, 612 F. Supp. 2d at 1178-79 (same); Westchester Day Sch., 504 F.3d at 355 (applying similar logic to RLUIPA § 2(a)).

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buildings, not whether worship will occur." Defs.' Mem. at 37 (quoting Cutter, 544 U.S. at 714). But this is a false dichotomy. The Second Circuit has held that RLUIPA is consistent with the Establishment Clause because it "lift[s] government-created burdens on private religious exercise," Westchester Day Sch., 504 F.3d at 355, which necessarily implies that land-use laws can impose a burden on religious exercise. Therefore, Defendants' argument is without merit.

b. RLUIPA § 2(b)(1) Has a Permissible Secular Effect

The Supreme Court in Amos held that an otherwise permissible religious accommodation does not have the "primary effect" of advancing religion merely because it allows individuals or institutions to "better . . . advance their [religious] purposes." 483 U.S. at 336. To the contrary, the Court held, a law that lifts a significant, government-imposed burden on the free exercise of religion has the primary effect of advancing religion only if it involves the government itself advancing religion through its own activities and influence. Id. at 337; see also Midrash Sephardi, 366 F.3d at 1241 ("For purposes of analyzing the second prong of Lemon, a relevant and meaningful distinction exists between statutes whose effect is to advance religion and statutes whose effect is to allow religious organizations to advance religion.").

RLUIPA's equal terms provision has no such unconstitutional effects. It does not involve the government itself advancing religion, any more than did the accommodations upheld in Amos, Walz, and Zorach. As the Eleventh Circuit has explained, "RLUIPA does not allow religious assemblies to avoid the application of zoning regulations," nor does it "impose affirmative duties on states that would require them to facilitate or subsidize the exercise of religion." Midrash Sephardi, 366 F.3d at 1241. Rather, all the equal terms provision does is "forbid[] states from imposing impermissible burdens on religious worship." Id.; see also Westchester Day Sch., 504 F.3d at 355 ("Under RLUIPA, the government itself does not advance religion; all RLUIPA does is permit religious practitioners the free exercise of their religious beliefs without being burdened unnecessarily by the government."); Rocky Mountain Christian Church, 612 F. Supp. 2d at 1179-81 (holding that "an objective observer who is aware of the purpose, context, and history of the RLUIPA could not conclude that the Act's equal treatment requirement causes the government itself to advance religion

through its own activities and influence").[19]

c. RLUIPA § 2(b)(1) Does Not Create Excessive Entanglement Between Government and Religion

In Agostini v. Felton, 521 U.S. 203 (1997), the Supreme Court held that two factors the Court previously had considered relevant to whether there is "excessive entanglement" between government and religion no longer have any force: whether a program requires "administrative cooperation" between government and religious institutions, and whether a program might increase the dangers of "political divisiveness" on account of religion. See id. at 233-34. Thus, after Agostini, the excessive entanglement prong of the Lemon test focuses solely on whether the government program in question would require "pervasive monitoring by public authorities" to ensure that there is no government indoctrination of religion. See id. RLUIPA's equal terms provision easily satisfies this standard, since it requires no monitoring by public authorities of the religious activities of any organization. As the Eleventh Circuit has explained:

> RLUIPA does not call on the government to supervise land use regulations to make sure governmental funds do not sponsor religious practice, nor does it require state or local officials to develop expertise on religious worship or to evaluate the merits of different religious practices or beliefs. RLUIPA requires only that states avoid discriminating against or among religious institutions. As such, RLUIPA passes muster under Lemon's third prong.

Midrash Sephardi, 366 F.3d at 1241; see also Westchester Day Sch., 504 F.3d at 355 ("RLUIPA's land use provisions do not foster an excessive government entanglement with religion."); Rocky Mountain Christian Church, 612 F. Supp. 2d at 1182 ("[T]he assessments a government must make

[19] Thus, merely granting religious institutions an exemption from certain land-use laws does not involve direct government subsidization of religious activity, cf. Bowen v. Kendrick, 487 U.S. 589 (1988); government endorsement of religious views, cf. Cnty. of Allegheny v. ACLU Greater Pittsburgh Chapter, 492 U.S. 573 (1989); or any other form of active government participation in religious advocacy or conduct. See Lamb's Chapel, 508 U.S. 384 (no government endorsement of religion involved where religious organizations use public schools after hours).

under RLUIPA do not require a pervasive monitoring of religious institutions or a detailed examination of those institutions that might support a claim of excessive entanglement.").

In sum, RLUIPA's equal terms provision is perfectly consistent with the Establishment Clause. In fact, the provision embodies principles of constitutional law inherent in that clause, as well as the Free Exercise and Equal Protection Clauses. "That the Constitution's prohibition of the 'establishment of religion' also allows – and sometimes mandates – equal treatment of religion seems obvious." Midrash Sephardi, 366 F.3d at 1241. "Because RLUIPA accommodates religion by remedying and preventing discriminatory zoning in accordance with principles established by the First and Fourteenth Amendments, RLUIPA does not violate the Establishment Clause." Id. at 1242. Thus, even if this Court reaches the Lemon test – which the United States believes is unnecessary – it should hold that the equal terms provision does not run afoul of the Establishment Clause.

CONCLUSION

Should this Court reach the question of the constitutionality of the provisions of RLUIPA at issue in this case, the Court should uphold those provisions as consistent with the Constitution.

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CERTIFICATE OF SERVICE

I hereby certify that, on April 5, 2011, a copy of the foregoing Intervenor United States of America's Memorandum in Defense of the Constitutionality of the Religious Land Use and Institutionalized Person's Act of 2000 was filed electronically and served by mail on anyone unable to accept electronic filing. Notice of this filing will be sent by e-mail to all parties by operation of the court's electronic filing system or by mail to anyone unable to accept electronic filing as indicated on the Notice of Electronic Filing. Parties may access this filing through the court's CM/ECF system.

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