IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MINNESOTA

UNITARIAN UNIVERSALIST CHURCH OF MINNETONKA,	)	
Plaintiff,	)	
v.	)	Case No. 0:10-cv-00607-RHK-JJG
CITY OF WAYZATA,	)	
Defendant.	)	

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

INTRODUCTION

In this land-use suit, Plaintiff Unitarian Universalist Church of Minnetonka alleges, inter alia, that Defendant City of Wayzata violated 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., by refusing to permit a church building in a Wayzata residential district. In support of its summary judgment motion, Wayzata argues that RLUIPA exceeds Congress's power under the Fourteenth Amendment Enforcement Clause and the Commerce Clause, and violates separation of powers and the First Amendment's Establishment Clause. The United States of America has moved to intervene to defend RLUIPA's constitutionality.[1]

[1] The United States takes no position here on the merit of the church's RLUIPA claims – whether RLUIPA applies and, if so, whether Wayzata has violated RLUIPA – or the church's non-RLUIPA claims.

This Court should reject Wayzata's arguments and uphold the statute. Wayzata's arguments challenging RLUIPA are not novel, and the Eighth and other circuits have rejected similar arguments raised against RLUIPA and other statutes. E.g., Van Wyhe v. Reisch, 581 F.3d 639, 651 (8th Cir. 2009); In re: Young, 141 F.3d 854, 862-63 (8th Cir. 1998); World Outreach Conference Ctr. v. City of Chicago, 591 F.3d 531, 534 (7th Cir. 2009); Westchester Day Sch. v. Vill. of Mamaroneck, 504 F.3d 338, 354 (2d Cir. 2007); Guru Nanak Sikh Soc. of Yuba City v. Cnty. of Sutter, 456 F.3d 978, 993-95 (9th Cir. 2006). In fact, the only court to have struck down RLUIPA's land-use provisions was reversed on appeal. 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).

Even without this authority, Wayzata's arguments would fail. RLUIPA is within Congress's Fourteenth Amendment Enforcement Clause authority because the statute prohibits violations of existing First Amendment rights, and to the extent it may prohibit marginally constitutional conduct, the statue is a congruent and proportional response to documented constitutional violations. Applying RLUIPA to religious burdens that affect interstate commerce is within Congress's Commerce Clause authority because the statute's jurisdictional hook requires case-by-case proof of Congress's regulatory authority. RLUIPA maintains separation of powers because it responds to federal-court judgments, without attempting to revise or review them, and preserves the judiciary's ultimate constitutional interpretation authority. Finally, RLUIPA is consistent with the Establishment Clause because the statute merely codifies existing First and Fourteenth Amendment protections.

STATUTORY BACKGROUND

RLUIPA addresses state and local laws on land use and institutionalized persons, two regulatory areas Congress deemed burdensome to religion. The land-use provisions are challenged here.

I. RLUIPA's land-use provisions

Congress enacted RLUIPA's land-use provisions to provide statutory enforcement for constitutional rights that Congress found were frequently violated by state and local land-use regulations. 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 legal standards in one or more Supreme Court opinions.").

RLUIPA prohibits state and local land-use regulations that impose a "substantial burden" on "religious exercise," unless that burden is "the least restrictive means" of furthering a "compelling governmental interest." 42 U.S.C. § 2000cc-(a)(1). This restriction is limited, however, to cases in which the substantial burden:

> (B) . . . affects, or the 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) . . . 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.

Id. § 2000cc-(a)(2).[2] Applying the substantial burden provision in these situations is based on, respectively, Congress's power under the Commerce Clause and the Fourteenth Amendment's Enforcement Clause. See 146 Cong. Rec. at S7775. Under RLUIPA, "religious exercise" includes "[t]he use, building, or conversion of real property for the purpose of religious exercise." 42 U.S.C. § 2000cc-5(7). Other RLUIPA provisions prohibit religious discrimination and exclusion,[3] id. § 2000cc-(b), and permit private and public enforcement, id. § 2000cc-2(a), 2(f).

II. RLUIPA's legislative history

Congress enacted RLUIPA's land-use provisions in response to a record of widespread religious discrimination in state and local land-use regulations. 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). In nine hearings over three years, Congress heard detailed testimony on "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).

In these hearings, witnesses presented "massive evidence" of a pattern of religious discrimination in state and local land-use decisions, which frustrated the ability to assemble for worship. See 146 Cong. Rec. at S7774-75; H.R. Rep. 106-219, at 21- 24.

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[2] The substantial burden provision also applies when the burden is imposed in a program that received federal funds. 42 U.S.C. § 2000cc-(a)(2). Wayzata does not challenge this application of the substantial burden provision; therefore, this Memorandum does not address it.

[3] Because Wayzata directs its arguments only at the substantial burden provision, this Memorandum does not address other RLUIPA provisions.

As the House Report indicated, zoning discrimination resulted in a "consistent, widespread pattern of political and governmental resistance to a core feature of religious exercise: the ability to assemble for worship." H.R. Rep. No. 106-219 at 24. This report also indicates that land-use regulations allowing individualized assessments of proposed land-uses were particularly problematic because they placed religious groups' ability to assemble for worship "within the complete discretion of land use regulators." Id. at 19. The Report further concluded that "[r]egulators typically have virtually unlimited discretion in granting or denying permits for land use," 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."). In this system, "new, small, or unfamiliar churches" were more likely to face discrimination than larger, well-established churches. Id.

Congress further determined that, while individualized land-use assessments facilitate religious discrimination, proving a particular assessment discriminatory may be difficult. 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 anecdotes, 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). 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. Congress found that unconstitutional treatment of religion in state and local land-use laws was "very widespread," and noted that, although making separate findings on every jurisdiction would be impossible, the "cumulative and mutually reinforcing evidence" of discrimination demonstrated the existence of "a nationwide problem." See 146 Cong. Rec. at S7775; H.R. Rep. 106-219, at 18-24.

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 a statutory remedy with a judicial forum was appropriate to address egregious and unnecessary burdens on religion, when such burdens fall within Congress's constitutional authority. See id.

ARGUMENT

I. The principle of constitutional avoidance requires the Court to resolve all statutory issues before deciding RLUIPA's constitutionality

Under the principle of constitutional avoidance, the Court should not rule on RLUIPA's constitutionality if the case may be resolved on another basis. See Slack v.

McDaniel, 529 U.S. 473, 485 (2000); Perry v. Johnston, 641 F.3d 953, 956 n.1 (8th Cir. 2011). For example, if the Court decided that the church had not established a substantial burden on its religious exercise, or that Wayzata had used the least restrictive means to further a compelling government interest, a constitutional ruling would be unnecessary.[4]

II. Alternatively, if the Court reaches RLUIPA's constitutionality, the Court should conclude that RLUIPA is constitutional

If resolving the case requires a constitutional ruling, the Court should hold that RLUIPA is within Congress's powers under the Fourteenth Amendment and the Commerce Clause, and that the statute is consistent with separation of powers and the Establishment Clause.

A. RLUIPA's substantial burden provision, as applied to individualized assessments of land-use proposals, is within Congress's Fourteenth Amendment Enforcement Clause authority

RLUIPA's substantial burden provision, as applied to individualized assessments of land-use proposals, falls within Congress's Fourteenth Amendment Enforcement Clause authority because this provision codifies existing First Amendment protection of free exercise of religion.[5] To the extent this provision may prohibit marginally constitutional conduct, it is a proportional and congruent response to the widespread constitutional violations Congress found.

[4] The United States does not suggest that these outcomes would or would not be correct. These examples merely illustrate outcomes that would obviate the need for a constitutional ruling here.

[5] First Amendment protections apply to the states through the Fourteenth Amendment. See Cantwell v. Connecticut, 310 U.S. 296, 303 (1940).

The Fourteenth Amendment's Enforcement Clause grants Congress "power to enforce, by appropriate legislation," constitutional protections including those guaranteed in First Amendment's Free Exercise Clause. Under the Fourteenth Amendment's Enforcement Clause, Congress may pass "corrective legislation . . . necessary and proper for counteracting . . . such acts and proceedings as the states may commit or take, and which may by the amendment they are prohibited from committing or taking." The Civil Rights Cases, 109 U.S. 3, 13-14 (1883). Congress may also apply its Enforcement Clause authority to prohibit "a somewhat broader swath of conduct, including that which is not itself forbidden by the Amendment's text," so long as the law maintains "congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end." Tennessee v. Lane, 541 U.S. 509, 518 (2004). Judicial deference to Congress is appropriate in construing legislation passed under this authority because "[i]t is for Congress in the first instance to 'determin[e] whether and what legislation is needed to secure the guarantees of the Fourteenth Amendment." Kimel v. Florida Bd. of Regents, 528 U.S. 62, 80-81 (2000) (quoting City of Boerne v. Flores, 521 U.S. 507, 517 (1997)).

1. RLUIPA's substantial burden provision, as applied to individualized assessments of land-use proposals, codifies existing First Amendment protections

RLUIPA's substantial burden provision, as applied to individualized assessments of land-use proposals, codifies existing First Amendment Free Exercise Clause rights; therefore, this provision falls within Congress's Fourteenth Amendment Enforcement Clause authority. Several courts have already reached this conclusion. E.g., World

Outreach Conference Ctr., 591 F.3d at 534; Guru Nanak Sikh Soc'y of Yuba City, 456 F.3d at 993-94; Freedom Baptist, 204 F. Supp.2d at 868; United States v. Maui Cnty., 298 F. Supp. 2d 1010, 1016 (D. Haw. 2003). Even without this authority, it is clear that RLUIPA's substantial burden provision, as applied to laws that permit individualized assessments of land-use proposals, was drafted to mirror the Supreme Court's individualized assessments doctrine in the First Amendment Free Exercise Clause context, and therefore to ensure constitutional soundness.

The First Amendment guarantees the right to free exercise of religion. Although the Free Exercise Clause does not relieve the obligation to comply with neutral laws of general applicability, Employment Division, Department of Human Resources of Oregon v. Smith, 494 U.S. 872, 890 (1990), that clause does forbid "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) (citations omitted). In First Amendment Free Exercise Clause challenges, therefore, rational basis review applies to generally-applicable laws that incidentally burden religion, while strict scrutiny review applies to laws that create "a system of individualized exemptions" without extending those exemptions to religion. Smith, 494 U.S. at 884.

As the Supreme Court has long recognized, individualized assessments of private actions may facilitate religious discrimination, and the First Amendment's Free Exercise Clause prohibits this discrimination unless justified by a compelling interest. For example, a state may not – unless it is the least restrictive means of furthering a compelling state interest – deny unemployment benefits to a person whose religion

prevents her from working on Saturdays, when that state has accepted non-religious reasons for not working Saturdays as "good cause" but has refused to accept this religious reason. Sherbert v. Verner, 374 U.S. 398, 401-02, 407 (1963); see also Hobbie v. Unemp't Appeals Comm'n, 480 U.S. 136, 141-42 (1987) (applying strict scrutiny to state's denial of unemployment benefits to religious applicant, rejecting lesser standard); Thomas v. Review Bd. of Indiana Emp't Sec. Div., 450 U.S. 707, 718 (1981) (applying strict scrutiny to state's denial of unemployment compensation to applicant who left his job because his religion prohibited him from producing armaments).

The Supreme Court reinforced this point in Smith, 494 U.S. at 884. There, the Court held that neutral laws of general applicability that incidentally burden religious exercise are subject to only rational basis review, but the Court distinguished these generally-applicable laws from those that impose a "system of individualized exemptions" administered by the government. Id. As the Court acknowledged, "where the State has in place a system of individual exemptions, it may not refuse to extend that system to cases of 'religious hardship' without compelling reason." Id.

After Smith, the Supreme Court applied this individualized assessments doctrine of its First Amendment Free Exercise jurisprudence to strike down an animal cruelty ordinance that required local government officials to evaluate the necessity of animal killings. Lukumi, 508 U.S. at 537. Because the law required individualized assessments of whether the killing was necessary – including for religious purposes – the Court held that the law was subject to strict scrutiny review under the Free Exercise Clause. Id. at 546. This holding signaled broad application of the individualized assessments doctrine

in First Amendment Free Exercise claims, Freedom Baptist Church of Delaware Cnty. v. Twp. of Middletown, 204 F. Supp. 2d 857, 868 (E.D. Pa. 2002); see Rader v. Johnston, 924 F.Supp. 1540, 1550 (D. Neb. 1996), and other courts followed this precedent and applied strict scrutiny to land-use decisions involving individualized assessments, even before RLUIPA's passage, e.g., Keeler v. Mayor & City Council of Cumberland, 940 F. Supp. 879, 886 (D. Md. 1996); Alpine Christian Fellowship v. Cnty. Comm'rs of Pitkin Cnty., 870 F. Supp. 991, 994 (D. Colo. 1994).

Therefore, the use of strict scrutiny in RLUIPA's substantial burden provision, as applied to state laws that permit individualized assessments of land-use proposals, merely codifies the First Amendment Free Exercise jurisprudence that existed when RLUIPA was enacted.

Wayzata argues that RLUIPA's use of strict scrutiny review exceeds Congress's Fourteenth Amendment Enforcement Clause authority. Def.'s Br. 20. The Ninth Circuit specifically rejected this argument in Guru Nanak Sikh Soc. of Yuba City, 456 F.3d at 994 n.21, and Wayzata's contention ignores the Supreme Court's pre-RLUIPA First Amendment jurisprudence. RLUIPA applies strict scrutiny only within the substantial burden provision's limits – here, the requirement of an individualized assessment of a land-use proposal – and because that provision tracks First Amendment Free Exercise jurisprudence, that provision and its application of strict scrutiny necessarily falls within Congress's Fourteenth Amendment Enforcement Clause authority.

2. Even if it prohibits constitutional conduct, RLUIPA's substantial burden provision, as applied to individualized assessments of land-use proposals, is a valid exercise Fourteenth Amendment authority

To the extent that RLUIPA's substantial burden provision, as applied to individualized assessments of land-use proposals, may prohibit marginally constitutional conduct, this provision is a proportional and congruent response to the widespread religious discrimination Congress found and therefore a valid exercise of Congress's Fourteenth Amendment authority. Because the substantial burden provision, as applied to individualized assessments, simply codifies First Amendment protections, this Court need not address whether these provisions are a proportional and congruent response to constitutional violations. If the Court does consider this question, however, this provision is certainly a proportional and congruent remedy for First Amendment violations Congress found, within the meaning of City of Boerne, 521 U.S. at 520, and therefore permissible under the Fourteenth Amendment's Enforcement Clause. Several courts have reached this conclusion. E.g., Guru Nanak Sikh Soc'y of Yuba City, 456 F.3d at 994-5; Freedom Baptist, 204 F. Supp. 2d at 874.

a. Congress had evidence of a pattern of discrimination in state and local land-use regulation

Before enacting RLUIPA, Congress held nine hearings over three years on the need for legislation and gathered statistical and anecdotal evidence demonstrating unconstitutional religious discrimination in state and local governments' land-use decisions. Congress found that this evidence demonstrated a pattern of widespread religious discrimination in state and local land-use laws, and Congress noted that laws permitting individualized assessments of land-use proposals were particularly likely to result in religious discrimination. Congress's findings here are entitled to deference.

Therefore, RLUIPA's passage was based on evidence of a pattern of religious discrimination in state and local land-use decisions.

Wayzata complains that the evidentiary basis for Congress's religious discrimination findings is insufficient because Congress did not document discrimination in every jurisdiction and against every religion. Def.'s Br. 21-23. Congress relied on evidence from numerous witnesses, surveys, and statistics, however, and found that this evidence was mutually reinforcing and representative of a national problem. As Congress noted, making findings for every jurisdiction would be impossible, and reliance on massive statistical and anecdotal evidence that is representative and mutually reinforcing provides a sufficient basis for the legislation.

b. RLUIPA is proportional and congruent

Based on the evidence it gathered of widespread religious discrimination in state and local land-use decisions, Congress drafted RLUIPA and its substantial burden provision to address this discrimination. By specifically limiting the substantial burden provision to laws permitting individualized assessments of land-use proposals, Congress sought to address the types of laws it found particularly likely to facilitate religious discrimination in violation of First Amendment Free Exercise rights.

RLUIPA is significantly narrower than its predecessor statute, the Religious Freedom Restoration Act (RFRA), Pub. L. No. 104-141, 107 Stat. 1488, codified at 42 U.S.C. § 2000bb et seq. RFRA, as applied to state and local governments, was struck down because it targeted virtually all laws and official actions at every level of government, and would necessarily apply even to generally applicable state and local

laws that incidentally burdened religion. City of Boerne, 521 U.S. 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." Id. at 515. RLUIPA, by contrast, explicitly codifies the individualized assessment doctrine applied in First Amendment Free Exercise Clause cases, and limits that standard to state and local land-use laws, an area in which Congress made extensive findings of widespread religious discrimination.

Wayzata argues that RLUIPA's "religious exercise" definition, which includes use, building, or conversion of physical space for religious exercise, exceeds the Fourteenth Amendment's Enforcement Clause. Def.'s Br. 19. The Ninth Circuit specifically rejected this argument in Guru Nanak Sikh Soc. of Yuba City, 456 F.3d at 994 n.21, and this Court should as well. Congress sufficiently documented that denials of religious property use stifle religion, stated specifically that the right to build or rent adequate physical space indispensable to First Amendment rights, and found that zoning codes frequently violate this right. Even assuming that the Constitution would permit burdening religion in the use, building, or conversion of real property for religious exercise, prohibiting such constitutionally marginal conduct is certainly a proportional and congruent response to the widespread violations of First Amendment Free Exercise rights that Congress documented were carried out through zoning laws. Therefore, RLUIPA's protection of building or use of physical space for religions exercise is within Congress's power under the Fourteenth Amendment's Enforcement Clause.

B. RLUIPA's substantial burden provision, as applied to burdens that affect interstate commerce, is consistent with the Commerce Clause

The Court need not reach Wayzata's Commerce Clause argument because the church's substantial burden claim is based on an individualized assessment of a potential land-use. Compl. ¶ 110. Assuming the church shows that its application was subject to an individualized assessment, RLUIPA's substantial burden provision would apply independent of any effect on commerce. See 42 U.S.C. § 2000cc-(a)(2)(C); Sherbert v. Verner, 374 U.S. 398, 405-07 (1963).

If the Court reaches the argument, it should hold that applying the substantial burden provision to burdens that affect interstate commerce falls within Congress's Commerce Clause authority. This so-called jurisdictional hook requires case-by-case proof of Congress's authority to regulate, and therefore, as other circuits have held, this application of RLUIPA's substantial burden provision necessarily falls within Congress's Commerce Clause authority. World Outreach Conference Ctr., 591 F.3d at 533; Westchester Day Sch., 504 F.3d at 354. The Eighth Circuit has upheld such jurisdictional hooks in other statutes. United States v. Crenshaw, 359 F.3d 977, 985-87 (8th Cir. 2004).

Wayzata argues that the substantial burden provision, as applied to burdens that affect interstate commerce, exceeds the Commerce Clause because it regulates non-economic activity, Def.'s Br. 24, but this argument fails on the very terms of the jurisdictional hook, which require an effect on commerce, and therefore, economic activity. Accordingly, RLUIPA's substantial burden provision, as applied to burdens that affect interstate commerce, is within Congress's Commerce Clause authority.

C. RLUIPA maintains separation of powers

RLUIPA maintains proper separation of powers by merely responding to federal-court judgments, without attempting to review or revise them, and by preserving the judiciary's ultimate constitutional interpretation authority.

The separation of powers doctrine precludes executive or legislative review or revision of particular federal-court judgments, see Miller v. French, 530 U.S. 3327, 342 (2000); Plaut v. Spendthrift Farm, Inc., 514 U.S. 211, 218-19 (1995); Hayburn's Case, 2 U.S. 408 (1792), and assigns the judiciary ultimate constitutional interpretation authority, see Marbury v. Madison, 5 U.S. 137, 177 (1803). RLUIPA is merely a response to – not a review or a revision of – the Supreme Court's decisions in Smith, 494 U.S. at 879, and City of Boerne, 521 U.S. at 507. In fact, RLUIPA "draws the very line Smith itself drew when it distinguished neutral laws of general applicability from those 'where the State has in place a system of individual exemptions,' but nevertheless 'refuse[s] to extend that system to cases of 'religious hardship,'" Freedom Baptist, 204 F.Supp.2d at 873 (quoting Smith, 494 U.S. at 884).

Wayzata argues that RLUIPA violates separation of powers because it attempts to rewrite Supreme Court precedent and apply strict scrutiny review to all constitutional Free Exercise Clause claims. Def.'s Br. 24-25. But RLUIPA does no such thing. It requires strict scrutiny review only for certain types of claims and only when certain jurisdictional conditions are met. See supra pp. __. Furthermore, RLUIPA's substantial burden provision, as applied to individualized assessments (the only application relied on by Plaintiff here), does not rewrite Supreme Court precedent, but codifies existing First

Amendment jurisprudence. Id. pp. _. Even to the extent RLUIPA does impose a higher standard of review, the Eighth Circuit has recognized – in a case involving the statute's federal funding provision – that such heightened scrutiny would not constitute a change in the standard for constitutional Free Exercise Clause claims, but rather "establish[] a statutory free exercise claim encompassing a higher standard of review than that which applies to constitutional free exercise claims." Van Wyhe, 581 F.3d at 651 (internal quotation marks omitted). By creating a separate statutory standard, the Eighth Circuit has noted, RLUIPA simply "provides additional statutory protection for religious worship in a particular context," land use. Id. This heightened legislative protection of religion was contemplated by and explicitly left to the political branches in Smith, 494 U.S. at 890; therefore, RLUIPA maintains proper separation of powers.

D. RLUIPA is consistent with the First Amendment Establishment Clause

RLUIPA is consistent with the First Amendment Establishment Clause because the statute codifies existing First and Fourteenth Amendment law. 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," Hobbie v. Unemployment Appeals Commission, 480 U.S. 136, 144-45 (1987), and Congress may enact laws to "alleviate significant governmental interference with the ability of religious organizations to define and carry out their religious missions," Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos, 483 U.S. 327, 335 (1987). Because RLUIPA codifies existing constitutional rights and

merely accommodates religious practices by alleviating significant governmental interference with religion, the statute is consistent with the Establishment Clause.

Because RLUIPA therefore merely codifies existing constitutional rights, the Court need not apply the Establishment Clause test in Lemon v. Kurtzman, 403 U.S. 602 (1971). If the Court applies that test, however, RLUIPA easily passes. Under Lemon, a statute survives an Establishment Clause claim if it (1) has "a secular legislative purpose," (2) has a "principal or primary effect . . . that neither advances nor inhibits religion," and (3) does not "foster excessive government entanglement with religion." Id. at 612-13 (internal citations and quotation marks omitted). Other circuits have rejected Establishment Clause challenges to RLUIPA under Lemon, e.g., Westchester Day Sch., 504 F.3d at 355-56, and the Eighth Circuit rejected an Establishment Clause challenge to RFRA's federal-government provisions under that test, In re: Young, 141 F.3d at 862-63.

RLUIPA has a secular legislative purpose that satisfies the first Lemon test prong – alleviating government interference with religion. See Corp. of the Presiding Bishop v. Amos, 483 U.S. 327, 335 (1987); In re: Young, 141 F.3d at 862; Westchester Day Sch., 504 F.3d at 355. Wayzata is correct that RLUIPA responds to Smith and City of Boerne, but Wayzata is not correct in contending that the statute seeks to overturn the Supreme Court's Free Exercise jurisprudence. Def.'s Br. 25-26. Instead, to the extent it imposes a higher standard of review, RLUIPA treats the Supreme Court's rulings as a constitutional floor for free exercise protection, and creates a statutory free exercise claim with additional protection in the land-use context.

RLUIPA also passes the second Lemon test prong because the statute's principal or primary effect allows churches to advance religion but does not cause the government itself to advance or inhibit religion. In re: Young, 141 F.3d at 862; Westchester Day Sch., 504 F.3d at 355. Wayzata quotes Justice Stevens's concurrence in City of Boerne for the proposition that a law is unconstitutional if it provides religious property owners with a "legal weapon that no atheist or agnostic can obtain." Def.'s Br. 26. A Supreme Court plurality has recently questioned Justice Stevens's statement, however, Van Orden v. Perry, 545 U.S. 677, 684 n.3 (2005), and regardless, RLUIPA merely prohibits government interference with First Amendment Free Exercise rights; therefore the statute passes the second Lemon test prong.

Finally, RLUIPA passes the third Lemon test prong because the statute actually separates religion and government and prevents a continuing relationship between the government and religion. In re: Young, 141 F.3d at 863; Westchester Day Sch., 504 F.3d at 355-56. The Lemon test's third prong focuses on whether a law requires "pervasive monitoring by public authorities" to avoid public indoctrination of religion. Agostini v. Felton, 521 U.S. 203, 233-34 (1997). RLUIPA separates government from religion by limiting land-use laws' impact on religion and by preventing state and local governments from making land-use decisions based on religion. Wayzata argues that RLUIPA empowers churches to override municipal decisions that are based on neutral laws of general applicability and subjects laws to strict scrutiny that would otherwise be subject to rational basis review. Def.'s Br. 27-28. This argument is incorrect, however, because RLUIPA's substantial burden provision and its application of strict scrutiny review is

limited to land-use laws that allow individualized assessments of land-use proposals and religious burdens that affect interstate commerce. Because RLUIPA does not require pervasive monitoring by public authorities to avoid public indoctrination of religion, the statute passes the Lemon test's third prong.

Accordingly, if the Court examines RLUIPA under the Lemon test, that test demonstrates that RLUIPA is consistent with the Establishment Clause.

CONCLUSION

If the Court reaches RLUIPA's constitutionality, the Court should conclude that RLUIPA is constitutionally sound.

Dated:_____

Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE
PURSUANT TO LOCAL RULE 7.1(d)
OF THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MINNESOTA

This memorandum of law submitted under LR 7.1(a) complies with the type-size limitation of LR 7.1(f) and the length limitation of LR 7.1(d). This memorandum contains ____ words, excluding the parts of the memorandum exempted by LR 7.1(d), and was prepared in a proportionally spaced typeface using Microsoft Word 2007 in Times New Roman with a 13-point font.

Dated: _____

_____

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