UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

HUNT VALLEY BAPTIST CHURCH, INC.,	)	
Plaintiff,	)	
v.	)	Civil Action No. 1:17-cv-00804-SAG
BALTIMORE COUNTY, MD, *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

Congress enacted the land use provisions 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.* (2000)), in response to what it found to be a widespread pattern of discrimination in state and local zoning against religious assemblies and institutions. In enacting RLUIPA, Congress relied on its powers to regulate actions that substantially affect interstate commerce, to codify existing constitutional protections against substantial burdens on religious liberty arising from governments' individualized assessments, and to codify constitutional protections against the exclusion or disparate treatment of religious exercise. Every challenge to the constitutionality of RLUIPA's land use provisions, including challenges substantially similar to those raised here, has been rejected by the courts. Those courts have held the land use provisions to be valid exercises of Congress's powers under the Commerce Clause and the Enforcement Clause of the Fourteenth Amendment, and to be fully consistent with the requirements of the Tenth Amendment and the Establishment Clause.

Defendants nonetheless argue that in passing RLUIPA, Congress violated the Establishment Clause and principles of federalism. Defs.' Br. Challenging the Constitutionality of RLUIPA ("Def. Brief"), ECF No. 172; Defs.' Mem. in Supp. of Mot. for Summ. J. ("Def. SJ Memo.") at 31-32, ECF No. 108-1. In so arguing, Defendants provide nothing to distinguish the many prior cases upholding RLUIPA's constitutionality from the issues raised here. Nor do they point to any new authority, or provide any new analysis, that would justify overturning settled precedent.

Defendants also argue that summary judgment should be granted on several other grounds. The United States does not take any position on those arguments or on the merits of Plaintiff's claims, except to point out that, under well-settled constitutional avoidance principles,

the Court should resolve those issues first and only reach the constitutional issues if necessary.[1] If, however, the Court does reach the constitutional issues, it should follow every other court that has addressed these issues and uphold the statute.

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 legal 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, *inter alia*:

> (B) the substantial burden affects, or removal of that substantial burden would affect, commerce . . . among the several States, . . .; 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

[1] The United States intervened pursuant to Federal Rules of Civil Procedure 5.1(c) and 24(a)(1) solely to defend the constitutionality of RLUIPA's land use provisions. *See* Notice of Intervention by the United States of Am. to Defend the Constitutionality of a Federal Statute, ECF No. 175.

> 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)(B) and (C). Congress relied on its regulatory authority under the Commerce Clause (Art. I, § 8, cl. 3) as the constitutional basis for § 2(a)(2)(B); and on its enforcement authority under Section 5 of the Fourteenth Amendment as the constitutional basis for § 2(a)(2)(C). *See* 146 Cong. Rec. at S7775.[2]

In addition to the protection afforded by § 2(a)(1), RLUIPA § 2(b) contains three nondiscrimination and non-exclusion provisions that protect religious assemblies or institutions:

> (1) **Equal terms.** No 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.
>
> (2) **Nondiscrimination.** No government shall impose or implement a land use regulation that discriminates against any assembly or institution on the basis of religion or religious denomination.
>
> (3) **Exclusions and limits.** No government shall impose or implement a land use regulation that (A) totally excludes religious assemblies from a jurisdiction; or (B) unreasonably limits religious assemblies, institutions, or structures within a jurisdiction.

42 U.S.C. § 2000cc(b)(1)-(3). Congress enacted § 2(b) pursuant to its enforcement authority under 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.

[2] The constitutionality of § 2(a)(1) as applied through § 2(a)(2)(A), for which Congress relied on its authority under the Spending Clause (Art. I, § 8, cl. 1), is not at issue in this case, because there is no evidence that Defendants receive "Federal financial assistance" relating to their zoning functions. *See* RLUIPA § 2(a)(2)(A).

Rec. at S7774; *see also* H.R. Rep. No. 106-219 (1999) (House of Representatives report on the Religious Liberty Protection Act of 1999); H.R. Rep. No. 106-219, 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 2-24. 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 had 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.* And the evidence demonstrated 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. E1234-05, 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. In 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. Perhaps the most vivid cited example of religious discrimination in land use concerned the City of Cheltenham Township, Pennsylvania, "which 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." H.R. Rep. 106-219, at 23. The synagogue's attorney testified that he had handled more than thirty other cases of similar religious discrimination.[3] *See id.*

[3] 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. Cty. of Winnebago*, 503 N.E.2d 367 (Ill. App. 1986)); *id.* at 23 n.109 (citing *Orthodox Minyan v. Cheltenham Twp. Zoning Hearing Bd.*, 552 A.2d 772 (Pa. Com. 1989)).

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 citizens and institutions, and that providing such a remedy fell within its power under the Spending Clause, the Commerce Clause, or the Fourteenth Amendment. *See id.*

ARGUMENT

Plaintiff initiated this action alleging, among other things, that Defendants violated RLUIPA by denying Plaintiff's request to construct a church, parking lot, classrooms, nursery, kitchen, offices, and fellowship hall that would double as a gymnasium, on property Plaintiff bought in Baltimore County, Maryland, in a Resource Conservation - Watershed Protection Zone. Defendants have moved for summary judgment and filed an additional brief arguing, *inter alia*, that RLUIPA's land use provisions are unconstitutional because (1) they authorize federal interference with local land use decisions and therefore violate principles of federalism, Def. SJ Mem. at 32; and (2) they unduly favor religion in violation of the Establishment Clause, *id.* at 31-32. Federal courts have rejected similar challenges to the constitutionality of RLUIPA's land use provisions in at least sixteen cases. These cases, discussed at length below, confirm that Congress acted within the limits of its enumerated powers, and in a manner consistent with the Establishment Clause, when it enacted RLUIPA's land use provisions.[4] Consistent with this

[4] The chart at the end of this document lists, for each RLUIPA land use provision, the cases in which federal courts have held the provision to be a constitutional exercise of Congress's power and to be consistent with the Establishment Clause. Only one federal court has issued an opinion that did not uphold the constitutionality of RLUIPA's land use provisions; however, that district court decision was reversed on appeal. *See Elsinore Christian Ctr. v. City*

uniform body of case law, should this Court reach the issue, the Court should hold that RLUIPA is a constitutional exercise of congressional power to alleviate unconstitutional interference with religious practice.

I. The Principle of Constitutional Avoidance Requires That the Court Decide the Constitutionality of RLUIPA Only If Necessary

As an initial matter, the 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 be decided on other grounds, the court should avoid reaching constitutional issues: "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. Tenn. Valley Auth.*, 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); *Thompson v. Greene*, 427 F.3d 263, 267 (4th Cir. 2005) ("[A] reviewing court should 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.").

This Court should observe the principle of constitutional avoidance and decline to rule on the constitutionality of RLUIPA until all other 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 Plaintiff has not alleged or established a "substantial burden" on its religious practice. *See* 42 U.S.C. § 2000cc(a). Alternatively, the Court might decide that Defendants' conduct represents the least restrictive

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of Lake Elsinore, 291 F. Supp. 2d 1083 (C.D. Cal. 2003), *rev'd*, 197 Fed. App'x 718 (9th Cir. 2006).

means of furthering a compelling government interest.[5] *See id.* A ruling on RLUIPA's constitutionality may therefore be unnecessary. Accordingly, this Court should first address the other issues in this case before considering the constitutional issues raised by Defendants.

Moreover, even if the Court determines that a ruling on RLUIPA's constitutionality is necessary, the Court should limit its analysis to only those issues required to decide the constitutionality of RLUIPA's application in this case. *See Westchester Day Sch. v. Vill. of Mamaroneck*, 504 F.3d 338, 354 (2d Cir. 2007) ("In light of our determination that RLUIPA's application in the present case is constitutional under the Commerce Clause, there is no need to consider or decide whether its application could be grounded alternatively in § 5 of the Fourteenth Amendment."); *Chabad Lubavitch v. Borough of Litchfield, Conn.*, 796 F. Supp. 2d 333, 340 (D. Conn. 2011) (finding as a matter of law that, because the claims were based on refusal to allow construction of a 20,000 square-foot addition, any substantial burden at issue "necessarily affects interstate commerce," and therefore declining to address defendants' arguments under the Fourteenth Amendment).

II. If the Court Reaches the Question of RLUIPA's Constitutionality, It Should Hold That RLUIPA Is Constitutional

A. RLUIPA's Land Use Provisions Do Not Violate the Tenth Amendment Because They Are a Proper Exercise of Congress's Enumerated Powers

Contrary to Defendants' claim, *see, e.g.*, Def. Brief at 22-23, RLUIPA 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; *see Westchester Day*, 504 F.3d at 355. Even though local land use decisions have traditionally been within the purview of state and local governments, because

[5] The United States is not suggesting that these would be (or would not be) correct outcomes. These examples are intended merely as illustrations of outcomes that would obviate the need for a ruling on the constitutionality of the statute.

RLUIPA § 2 was enacted pursuant to Congress's enumerated powers, *see* discussions *infra* Sections II.B, II.C, and II.D, it does not violate the Tenth Amendment.

Throughout their brief, *see, e.g.*, Def. Brief at 9-10, 17, 20, 22-23, 26-27, 30, Defendants argue that RLUIPA violates federalism principles because it regulates in the arena of local land use, which traditionally has been recognized as within the power of the states. But the Supreme Court repudiated the premise of this argument in *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985). In *Garcia*, the Court "reject[ed], 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.'" *Id*. at 546-47; *see also Castle Hills First Baptist Church v. City of Castle Hills*, No. 01-1149, 2004 WL 546792, at *19 (W.D. Tex. Mar. 17, 2004) ("[RLUIPA's] validity cannot be challenged by general notions of federalism."); *Congregation of Kol Ami v. Abington Twp.*, No. 01-1919, 2004 WL 1837037, at *15 (E.D. Pa. Aug. 17, 2004) (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 thus 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*, 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*, 504 F.3d at 355 (finding that RLUIPA does not violate the 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 the Tenth Amendment because it is proper exercise of Congress's power under the

Fourteenth Amendment). Hence, there is no merit to Defendants' contention that RLUIPA is "a naked attempt by Congress to . . . impose its will on state and local governments," Def. Brief at 8; RLUIPA does not "directly compel[] states to require or prohibit any particular acts," but rather "leaves it to each state to enact and enforce land use regulations as [the state] deems appropriate," provided the state's actions do not violate RLUIPA's strictures. *Westchester Day*, 504 F.3d at 355.

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

Defendants' argument that RLUIPA exceeds Congress's power under the Commerce Clause, Def. Brief. at 28-29, should similarly be rejected. Because RLUIPA's substantial burden provision contains a jurisdictional element, Congress constitutionally enacted § 2(a)(1), 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 Congregation Rabbinical Coll. of Tartikov, Inc. v. Vill. of Pomona*, 138 F. Supp. 3d 352, 438-39 (S.D.N.Y 2015), *aff'd in part & rev'd in part on other ground*, 945 F.3d 83 (2d Cir. 2019); *Westchester Day*, 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. This jurisdictional element—often called a jurisdictional "hook"—triggers RLUIPA's application only in instances that fall within the reach of the Commerce Clause. Therefore, by definition, this provision restricts RLUIPA so that it applies as an exercise of Congress's Commerce Clause power *only* when such application falls within the bounds of the Commerce Clause. It requires courts to make case-by-case determinations regarding whether a substantial burden affects interstate commerce before applying strict scrutiny.

Thus, if a court were to find that a burden on religion (or removal of a burden on religion) 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 a burden on religion, or removal of a burden on religion, *does* affect interstate commerce, RLUIPA would apply as a valid exercise of Congress's Commerce Clause authority. In neither event would RLUIPA exceed Congress's Commerce Clause power.

For this reason, Defendants' assertion that RLUIPA regulates activity not covered by the Commerce Clause, Def. Brief. at 30, is meritless. *See Nat'l Fed'n of Indep. Bus. (NFIB) v. Sebelius*, 567 U.S. 519, 536 (2012) ("Congress may regulate . . . 'those activities that substantially affect interstate commerce.'" (quoting *United States v. Morrison*, 529 U.S. 598, 609 (2000))). [6] With the exception of one district court that was reversed on appeal, every court that has considered this issue has concluded that the existence of the jurisdictional hook ensures that the statute is constitutional. *See Congregation Rabbinical Coll.*, 138 F. Supp. 3d at 438-39; *World Outreach Conference Ctr. v. City of Chicago*, 591 F.3d 531, 533 (7th Cir. 2009); *Fortress Bible Church v. Feiner*, 734 F. Supp. 2d 409, 509-10 (S.D.N.Y. 2010); *Church of the Hills of the Twp. of Bedminster v. Twp. of Bedminster*, No. 05-3332, 2006 WL 462674, at *8 (D. N.J. Feb. 24, 2006); *Kol Ami*, No. 01-1919, 2004 WL 1837037, at *11-12; *Castle Hills First Baptist Church*, No. 01-1149, 2004 WL 546792, at *19; *United States v. Maui Cty.*, 298 F. Supp. 2d 1010, 1015 (D. Hawaii 2003); *Life Teen, Inc. v. Yavapai Cty.*, No. 01-1490, 2003 WL 24224618,

[6] Defendants claim that Justice Thomas has questioned whether RLUIPA exceeds Congress's power under the Commerce Clause. Def. Brief at 28 (citing *Cutter v. Wilkinson*, 544 U.S. 709, 727 n.2 (2005) (Thomas, J., concurring)). At most, Justice Thomas has suggested that RLUIPA "may well exceed Congress' authority under . . . the Commerce Clause" based on his view that the Supreme Court should reconsider its "substantial effects" test. *Cutter*, 544 U.S. at 727 n.2 (Thomas, J. concurring). Justice Thomas expressly declined to reach that issue as "outside the question presented" in *Cutter*, *id.*, however, and he has since joined the Court's application of RLUIPA without questioning the statute's constitutionality, *see Holt v. Hobbs*, 574 U.S. 352 (2015). Defendants further claim that in *Sossamon v. Texas*, 563 U.S. 277 (2011), the Supreme Court included language "on RLUIPA's constitutional pitfalls." Def. Brief at 19. But in that case, all the Supreme Court did was note that, because no party had challenged Congress's power under the Spending Clause to implement RLUIPA's provisions related to incarcerated persons, the Court would not address that issue. *Sossoman*, 563 U.S. at 282 n.1.

at *12-13 (D. Ariz. Mar. 26, 2003); *Freedom Baptist v. Twp. of Middleton*, 204 F. Supp. 2d 857, 867-68 (E.D. Pa. 2002).

For example, in *Westchester Day*, the Second Circuit explained that, "[a]s the Supreme Court has made plain, the satisfaction of such a jurisdictional element 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." 504 F.3d at 354 (citing *United States v. Morrison*, 529 U.S. 598, 611-12 (2000), and *United States v. Lopez*, 514 U.S. at 561). The court then noted that, consistent with other Commerce Clause cases, the effect on interstate commerce need only be "minimal" in order for RLUIPA's jurisdictional nexus provision to apply. *See id.* And on that basis, the Second Circuit affirmed the district court's finding that $9 million in construction costs was sufficient to bring a proposed school expansion under RLUIPA § 2(a)(2)(B). *Id.* Defendants have not even attempted to distinguish the current case from the persuasive reasoning of *Westchester Day* and the other above-cited cases.

Defendants' reliance on *United States v. Lopez*, Def. Brief at 18, 28-29, is unavailing, because the statute in that case did not contain a jurisdictional hook. Indeed, in *Westchester Day*, the Second Circuit relied on *Lopez* in upholding RLUIPA § 2(a)(2)(B) under the Commerce Clause based on the § 2(a)(2)(B)'s jurisdictional hook. 504 F.3d at 354 (citing *Lopez*, 514 U.S. at 561); *see also Chabad Lubavitch*, 796 F. Supp. 2d at 340 ("The Westchester Day decision was handed down well after the Supreme Court cases [(*Morrison* and *Lopez*)] defendants ask this court to apply, and indeed, it relies on those decisions.").

Because the substantial burden provision of RLUIPA, as applied through § 2(a)(2)(B), has effect only when a state or local government action affects interstate commerce, it is a valid exercise of Congress's power under the Commerce Clause.

C. 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," and from "deny[ing] to any person within its jurisdiction the equal protection of the laws." Section 5 of the Fourteenth Amendment provides Congress with the "power to enforce, by appropriate legislation, the provisions of this article." 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 through the Fourteenth Amendment.[7] *See* 146 Cong. Rec. at S7775 ("Each subsection 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. No. 106-219 at 12-13. Because RLUIPA § 2(a)(1), as applied through § 2(a)(2)(C), directly enforces existing constitutional rights, it is 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."[8]

In their briefing, Defendants fail entirely to address Congress's power under the Enforcement Clause of the Fourteenth Amendment to codify existing legal standards defining the extent of Fourteenth Amendment rights as set forth by the Supreme Court, even where there is no evidence of past violations of such rights by the States. *See, e.g.*, *The Civil Rights Cases*, 109 U.S. 3, 13-14 (1883) (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."). Furthermore, Defendants' assertions regarding the alleged inadequacy of the legislative history, *see* Def. Brief at 17-18, are incorrect: the legislative record

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

[8] As discussed in Section II.D, *infra*, Congress also enacted RLUIPA § 2(b) as an exercise of its enforcement authority under Section 5 of the Fourteenth Amendment.

documents a pattern of local government land use decisions that violate the constitutional rights of religious organizations such that, even if RLUIPA's land use provisions were found to exceed constitutional protections that the Supreme Court has previously recognized, those provisions are a "congruent" and "proportional" response to the injuries Congress sought to remedy and thus are well within the limits of Congress's powers under the Enforcement Clause of the Fourteenth Amendment. *See Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 81 (2000) (citing *City of Boerne v. Flores*, 521 U.S. 507, 518 (1997)).

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

Although the Supreme Court has held that the right of free exercise of religion 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 the "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 generally applicable, neutral laws and situations "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. The former need pass only rational basis scrutiny, whereas the latter must satisfy strict scrutiny. *See id*.; *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.").

The Supreme Court has long recognized that legislative schemes employing individualized assessments are often used by government officials to discriminate against religious adherents, and the Court 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, because 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 400-01, 406-07; *see also Hobbie v. Unemployment Appeals Comm'n*, 480 U.S. 136, 141-42 (1987) (applying strict scrutiny to state commission's denial of unemployment benefits to religious applicant in individualized assessment context and expressly rejecting application of lesser standard); *Thomas v. Review Bd. of Ind. 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 that case, an Oregon criminal law prohibiting the ingestion of peyote), it specifically distinguished situations involving a system of individualized exemptions administered by the government. *See* 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 a system [of individualized exemptions] . . . 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 governmental assessments" doctrine in *Lukumi*, where the Court struck down animal cruelty ordinances and a zoning 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 ordinances required "an evaluation of the particular justification for the killing," including whether it was for religious purposes, the Court found that the ordinances created a system of "individualized governmental assessment." *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 so holding, 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 Del. Cty. v. Twp. of Middletown*, 204 F. Supp. 2d 857, 868 (E.D. Pa. 2002).

The vast majority of courts to have considered the question and 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 Section 5 of the Fourteenth Amendment.[9] *See, e.g.*, *World Outreach Conference Ctr.*, 591 F.3d at 534 ("[S]ection 2000cc(a)(1) of RLUIPA codifies *Sherbert*."); *Guru Nanak Sikh Soc'y of Yuba City v. Cty. of*

[9] Although Defendants argue that RLUIPA "puts federal courts in the position of second-guessing nondiscriminatory local land use determinations," Def. Brief at 22, 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) (holding that "[e]ven 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. 00C-4596, 2001 WL 204772, at *2 (N.D. Ill. Mar. 1, 2001) (noting that "[l]and use regulation often involves individualized governmental assessment of the reasons for the relevant conduct," triggering strict scrutiny under *Lukumi*) (internal quotation marks omitted); *Alpine Christian Fellowship v. Cty. Comm'rs of Pitkin Cty.*, 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).

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."); *Church of the Hills of Twp. of Bedminster v. Twp. of Bedminster*, No. 05-3332, 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. 01-1149, 2004 WL 546792, at *19 (W.D. Tex. Mar. 17, 2004) ("RLUIPA's § 2(a) codifies existing Supreme Court 'individualized assessment' jurisprudence."); *Maui Cty.*, 298 F. Supp. 2d at 1016 ("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 it is Constitutional."); *Murphy v. Zoning Comm'n of Town of New Milford*, 289 F. Supp. 2d 87, 119 (D. Conn. 2003) ("Subsections (a)(1) . . . and (a)(2)(C) . . . are essentially codifications of Supreme Court jurisprudence."), *vacated on other grounds*, 402 F.3d 342 (2d Cir. 2005); *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). *But cf. Kol Ami*, 2004 WL 1837037, at *9-11 (concluding that RLUIPA goes beyond merely codifying the individualized assessments doctrine, but holding that RLUIPA is still within Congress's power under Section 5 of the Fourteenth Amendment).[10]

[10] Relying on the erroneous 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, *Kol Ami* 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." 2004 WL 1837037, at *5-9. This centrality

In arguing that § 2(a)(1), as applied through § 2(a)(2)(C), exceeds Congress's powers, Defendants simply ignore the entire individualized assessments doctrine and the long line of cases concluding that RLUIPA is a codification of that doctrine. The language of § 2(a)(2)(C) provides that before a governmental action will be subject to strict scrutiny, a jurisdictional determination must be made that the action arises in the implementation of a land use regulation under which the government makes "individualized assessments" of the proposed uses for the property involved. Thus, by the statute's explicit terms, it does not apply to zoning ordinances and land use decisions that are, in fact, neutral laws of general applicability. *See Life Teen, Inc. v. Yavapai Cty.*, No. 01-1490, 2003 WL 24224618, at *14 ("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 of 1993 (RFRA), Pub. L. No. 103-141, 107 Stat. 1488, *codified at* 42 U.S.C. § 2000bb *et seq*. In *City of Boerne v. Flores*, 521 U.S. 507 (1997), cited by Defendants, *see* Def. Brief at 2-3, 8; Def. SJ Memo. at 32, the Court held that RFRA, which targeted virtually all laws and official actions at every level of government, was unconstitutional as applied to States and their subdivisions because it would necessarily apply even to generally applicable laws that only incidentally burden religion. *See 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 (citing RFRA, 42 U.S.C. § 2000bb(b)).

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principle, however, 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.").

RLUIPA's codification of the Supreme Court's individualized assessment doctrine, which *Smith* explicitly reaffirmed, stands in sharp contrast to the expansive scope 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)(1), as Applied Through § 2(a)(2)(C), Extends Beyond Established Constitutional Protections, It Nevertheless Represents a Permissible Exercise of Congress's Power to Enforce the Fourteenth Amendment

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 protections, they would satisfy the *City of Boerne* "congruence and proportionality" test. However, even if this Court were to determine that § 2(a)(1), as applied through § 2(a)(2)(C), extends beyond established constitutional protections, the Court should find that the provisions nevertheless represent a permissible exercise of Congress's Section 5 enforcement power.

The power to enforce the Fourteenth Amendment 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*, 528 U.S. at 81 (citing *City of Boerne*, 521 U.S. at 518); *see also Tennessee v. Lane*, 541 U.S. 509, 518 (2004) (stating that Congress's 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 the statute's objective of enforcing right of access to courts (internal alterations omitted)).

Legislation that reaches beyond the scope of the Fourteenth Amendment's protections is thus 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 the Second Circuit has explained, "[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. N.Y. State Office of Real Prop. Servs.*, 306 F.3d 87, 96-97 (2d Cir. 2002) (internal citations omitted). 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, even if § 2(a)(1) of RLUIPA, as applied through § 2(a)(2)(C), extends beyond established constitutional protections, it 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 decisions burdening the free exercise of religion. *See Nev. Dep't of Human Res. v. Hibbs*, 538 U.S. 721, 729 (2003) (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 was composed of one-sided complaints by religious entities without input from state or local officials or organizations dedicated to land use issues. Def. Brief at 17-18. Defendants further contend that Congress enacted RLUIPA "negligently or intentionally" without reference to the most relevant Supreme Court case law. *Id.* at 18.

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.[11] *See* sec. II, Legislative History, *supra*. "The hearing record compiled massive evidence that th[e] right [of religious communities to assemble] is frequently violated." *See* 146 Cong. Rec. at S7774. 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. No. 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.*, *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 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."); *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").

[11] Defendants allege that a significant portion of the legislative record was compiled during consideration of the Religious Liberty Protection Act of 1999 (RLPA). *See* Def. Brief at 17. 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.

b. RLUIPA § 2(a)(1), As Applied Through § 2(a)(2)(C), 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' free 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 § 2(a)(1), as applied through § 2(a)(2)(C), 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 decisions that burden religion 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 significantly broader scope, which sought to apply strict scrutiny to all laws that burden religion, in all contexts. In short, RLUIPA does not provide the "sweeping coverage" that the Supreme Court found objectionable 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 § 5 of the Fourteenth Amendment.'" *Murphy*, 289 F. Supp. 2d at 120 (quoting *Freedom Baptist*, 204 F. Supp. 2d at 874); *Life Teen*, 2003 WL 24224618, at *14 (same); *see also Guru Nanak*, 456 F.3d at 994-95 (RLUIPA "is a congruent and proportional response to free exercise violations"); *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"); *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.").

In sum, even if this Court were to determine that RLUIPA § 2(a)(1), as applied through § 2(a)(2)(C), covers more conduct than the Fourteenth Amendment itself, the Court should nevertheless conclude that these provisions represent a congruent and proportional response to the nationwide problem of religious discrimination in state and local land use regulation that Congress identified.

D. RLUIPA § 2(b) Is a Valid Exercise of Congress's Authority Under Section 5 of the Fourteenth Amendment Because It Enforces the Constitution's Prohibitions on Discrimination Against, or Exclusion of, Religious Assemblies

RLUIPA § 2(b) prohibits the imposition or implementation of a land use regulation (1) in a manner that treats a religious assembly or institution "on less than equal terms" with a nonreligious assembly or institution (the "equal terms provision"), (2) that discriminates on the basis of religion or religious denomination (the "nondiscrimination provision"), or (3) that totally excludes religious assemblies from a jurisdiction or unreasonably limits religious assemblies, institutions, or structures within a jurisdiction (the "exclusions and limits provision"). 42 U.S.C. 2000cc(b). While, as compared to § 2(a), few courts have considered constitutional challenges to RLUIPA §§ 2(b), every court to have done so has found the provisions to be constitutional. *See, e.g.*, *Midrash Sephardi*, 366 F.3d 1214; *Rocky Mountain Christian Church v. Bd. of Cty. Comm'rs of Boulder Cty.*, 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.

1. RLUIPA §§ 2(b)(1) and (2) Enforce the Constitution's Prohibitions on Discrimination Against Religious Assemblies as Compared to Analogous Secular Land Uses and on the Basis of Religion or Religious Denomination

RLUIPA's equal terms and nondiscrimination provisions, §§ 2(b)(1) and (2), are a codification of preexisting Free Exercise, Establishment Clause, and Equal Protection jurisprudence. *See Midrash Sephardi*, 366 F.3d 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 (holding that both the equal terms and nondiscrimination provisions "codify existing Free Exercise, Establishment Clause and Equal Protection rights"). Therefore, they are 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." *See, e.g.*, *Midrash Sephardi*, 366 F.3d at 1238-40 ("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.").

a. Non-Discrimination Elements of the Free Exercise Clause

In enacting the equal terms and nondiscrimination provisions, Congress intended to enforce "the Free Exercise Clause rule against laws that burden religion and are not neutral and generally applicable." 146 Cong. Rec. at S7776; 146 Cong. Rec. E1563 (Sept. 21, 2000) (daily ed.) (statement of Rep. Canady); H.R. Rep. 106-219, at 17. As the Supreme Court has repeatedly reaffirmed, "[t]he Free Exercise Clause bars even 'subtle departures from neutrality.'" *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n*, 138 S. Ct. 1719, 1731 (2018) (quoting *Lukumi*, 508 U.S. at 534). The equal terms and nondiscrimination provisions also

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 542-43; *see also Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012, 2020 (2017) (noting that the Court "ha[s] been careful distinguish" neutral, generally applicable laws "from those that single out religion for disfavored treatment"). In *Lukumi*, the Supreme Court held that the Free Exercise 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." *Id.* at 543. Failing to treat religiously motivated conduct on equal terms with secular conduct, through a regulation that is either not neutral or not of general applicability, triggers strict scrutiny. *Id.* at 521-32. Put differently, "[t]he Free Exercise Clause protect[s] religious observers against unequal treatment." *Id.* at 542-43 (citation omitted).

The ordinances at issue in *Lukumi* sought to prevent the mistreatment of animals and the improper disposal of carcasses. *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. Because the ordinances regulated religious activity but not other categories of nonreligious 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 held that a police department policy that prohibited officers from wearing beards but allowed an exception for health reasons violated the Free Exercise Clause as applied in that case, because the department had 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) and (2) codify 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. 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."); *Midrash Sephardi*, 366 F.3d at 1232 ("RLUIPA's equal terms provision codifies the *Smith-Lukumi* line of precedent."); *Centro Familiar Christiano Buenas Nuevas v. City of Yuma*, 615 F. Supp. 2d 980, 993 (D. Ariz. 2009) (noting "wide agreement that the equal terms provision codifies the Supreme Court's Free Exercise Clause jurisprudence"), *rev'd on*

other grounds, 651 F.3d 1163 (9th Cir. 2011); *Freedom Baptist*, 204 F. Supp. 2d at 869 ("On the face of [the equal terms and nondiscrimination provisions], the echoes of *Lukumi* . . . are unmistakable.").

b. Non-Discrimination Elements of the Establishment Clause

The Supreme Court has also held that the unequal treatment of religion vis-a-vis secular activities or the activities of persons of other religions violates the Establishment Clause. In *Lukumi*, the Supreme Court referenced the broad principle of neutrality the Court has set forth in its Establishment Clause cases, a principle that is similar to the protections of the Free Exercise Clause: "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). The Court has also instructed that the Establishment Clause generally protects against departures from neutrality. *See Bd. of Educ. of Kiryas Joel Vill. Sch. Dist. v. Grumet*, 512 U.S. 687, 704 (1994).

By insisting on neutrality in land use decisions, the equal terms and nondiscrimination provisions of RLUIPA codify 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 and nondiscrimination provisions are "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) and 2(b)(2). *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."). Discrimination against religion is inconsistent with the principles embodied in the Equal

Protection Clause. *See e.g.*, *Kiryas Joel*, 512 U.S. at 715 (O'Connor, J., concurring); *Plyler v. Doe*, 457 U.S. 202, 216-17 (1982). For this reason, the Equal Protection Clause subjects laws that discriminate on the basis of religion to strict scrutiny. *See, e.g., Plyler v. Doe*, 457 U.S. at 217; *New Orleans v. Dukes*, 427 U.S. 297, 303 (1976). Thus, zoning provisions that treat religious activity on less than equal terms with nonreligious activity or that discriminate on the basis of religion or religious denomination 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). RLUIPA §§ 2(b)(1) and 2(b)(2), therefore, codify existing Supreme Court precedent regarding the Equal Protection Clause by prohibiting discrimination against religious institutions. *See Midrash Sephardi*, 366 F.3d at 1239 (§ 2(b)(1)); *Freedom Baptist Church*, 204 F. Supp. 2d at 870 (§§ 2(b)(1) and 2(b)(2)).

* * *

In sum, the equal terms and nondiscrimination provisions of RLUIPA codify well-established Free Exercise, Establishment Clause, and Equal Protection precedent:

> 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; *see also Freedom Baptist*, 204 F. Supp. 2d at 870 ("Thus, §§ 2(b)(1) and (2) of the RLUIPA are constitutional because they codify 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 or which 'discriminate[ ]' against them based on their religious affiliation.").[12]

2. RLUIPA §§ 2(b)(1) and (2) Enforce the Constitution's Prohibitions Against Categorical Exclusion of Activities Protected By the First Amendment

RLUIPA's exclusions and limits provision, § 2(b)(3), codifies the long-established rule that a jurisdiction cannot totally exclude, or unreasonably limit, activities protected by the First Amendment. In *Schad v. Borough of Mount Ephraim*, the Supreme Court struck down as incompatible with the First Amendment a town zoning ordinance that "totally excludes all live entertainment, including nonobscene nude dancing that is otherwise protected by the First Amendment." 452 U.S. 61, 76 (1981). Although the Court acknowledged "the breadth of municipal power to control land use," it also noted that "when a zoning law infringes upon a protected liberty, it must be narrowly drawn and must further a sufficiently substantial government interest." *Id.* at 68. Therefore, Courts are obliged "to assess the substantiality of the justification offered for a regulation that significantly impinge[s] on freedom of speech." *Id.* at 69 (citing *Schneider v. State*, 308 U.S. 147, 161 (1939)).

The Court distinguished the total exclusion at issue in *Schad* from permissible zoning regulations that do not have "the effect of suppressing, or greatly restricting access to, lawful speech." *Id.* at 76 (quoting *Young v. Am. Mini Theatres, Inc.*, 427 U.S. 50, 71, n.35 (1976))

[12] The Free Speech clause also arguably underlies the equal terms and nondiscrimination provisions. That clause prevents the government from engaging in 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 Va.*, 515 U.S. 819 (1995); *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384 (1993). RLUIPA's legislative 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 have a third constitutional base: they 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.

(internal quotation marks omitted). And the Court rejected the argument that exclusion of live entertainment throughout a town was permissible because live entertainment is available in other nearby towns. *Id.* at 77-78; *see also City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 54 (1986) ("[T]he First Amendment requires . . . that [a jurisdiction] refrain from effectively denying [landowners] a reasonable opportunity" to engage, within its borders, in activities protected by the First Amendment.).

In enacting RLUIPA § 2(b)(3), Congress acted to enforce the principle set forth in *Schad* against total exclusion of a category of First Amendment activity, namely, "the right to assemble for worship or other religious exercise under the Free Exercise Clause, and the hybrid free speech and free exercise right to assemble for worship or other religious exercise." 146 Cong. Rec. at S7776. Other courts have recognized this connection between RLUIPA § 2(b)(3) and the holding in *Schad*. *See Vision Church v. Vill. of Long Grove*, 468 F.3d 975, 989 (7th Cir. 2006) ("A similar First Amendment protection [against the total exclusion at issue in *Schad*], albeit limited to religious freedoms, is embodied in RLUIPA § 2(b)(3)."); *Freedom Baptist Church*, 204 F. Supp. 2d at 871 (holding that RLUIPA § 2(b)(3)(A) "codifies" the *Schad* rule and that § 2(b)(3)(B) codifies existing Supreme Court Equal Protection jurisprudence under the Fourteenth Amendment) (citing *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 447-48 (1985)). RLUIPA § 2(b)(3), therefore, is a valid exercise of Congress's enforcement power under Section 5 of the Fourteenth Amendment.

E. RLUIPA's Land Use Provisions Do Not Violate the Establishment Clause

RLUIPA's land use provisions easily satisfy the Establishment Clause. As the Supreme Court has long recognized, "'the government may (and sometimes must) accommodate religious practices and . . . 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); *see also Freedom Baptist*, 204 F. Supp. 2d at 865 n.9 (agreeing with the government's argument that "'the Supreme Court has repeatedly stated that

government may legislatively accommodate religious exercise consistent with the Establishment Clause'" in rejecting an Establishment Clause challenge to RLUIPA's land use provisions). The Supreme Court has applied this accommodation principle to a wide variety of contexts to uphold, for example, 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, and a state program releasing public school children during the school day for religious instruction at religious centers, *see Zorach v. Clauson*, 343 U.S. 306, 315 (1952). RLUIPA's land use provisions fit well within this framework.

As an initial matter, the Supreme Court has already upheld RLUIPA's institutionalized persons provision, 42 U.S.C. § 2000cc-1, against an Establishment Clause challenge, *see Cutter v. Wilkinson*, 544 U.S. 709 (2005), and the reasons the Court gave in *Cutter* likewise apply here. Like RLUIPA's institutionalized persons provision—which applies strict scrutiny to government actions that substantially burden the religious exercise of a person confined to an institution, *see* 42 U.S.C. § 2000cc-1(a)— RLUIPA's land use provisions "alleviate[] exceptional government-created burdens on private religious exercise," proper application of the provisions requires "tak[ing] adequate account of the burdens a requested accommodation may impose on nonbeneficiaries" and the provisions "do[] not differentiate among bona fide faiths." *Id.* at 720. Defendants offer no basis for distinguishing *Cutter*.[13]

[13] As discussed extensively above, RLUIPA's land use provisions codify existing First and Fourteenth Amendment jurisprudence. Specifically, RLUIPA § 2(a)(1), as applied through § 2(a)(2)(c), codifies the Supreme Court's preexisting Free Exercise jurisprudence concerning the "individualized assessments" doctrine, *see* Section II.C.1, *supra*; RLUIPA §§ 2(b)(1) and 2(b)(2) codify the preexisting nondiscrimination elements of the Free Exercise, Establishment, and Equal Protection clauses, *see* Section II.D.1.a-c, *supra*; and RLUIPA § 2(b)(3) codifies the categorical exclusion elements of the Free Speech clause, *see* Section II.D.2, *supra*. This alone is sufficient grounds for this Court to hold that the land use provisions are consistent with the Establishment Clause, without applying *Cutter* or the test in *Lemon v. Kurtzman*, 403 U.S. 602 (1971).

RLUIPA's land use provisions similarly pass the three-prong test articulated by *Lemon v. Kurtzman*, 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*, 504 F.3d at 355 (describing the *Lemon* test).[14] RLUIPA's land use provisions have the permissible secular purpose and effect of lifting a significant government-imposed burden on the exercise of religion, and do not require any excessive entanglement between government and religion. *See Westchester Day*, 504 F.3d at 355 (applying three-part *Lemon* test to RLUIPA § 2(a) and concluding it does not violate the Establishment Clause).[15] There is simply no basis for invalidating the provisions under the Establishment Clause.

1. RLUIPA's Land Use Provisions Have a Permissible Secular Purpose

"RLUIPA's land use provisions plainly have [the] secular purpose . . . to lift government-created burdens on private religious exercise" and are therefore "'compatible with the Establishment Clause.'" *Westchester Day*, 504 F.3d at 355 (rejecting a constitutional challenge to RLUIPA § 2(a)(1)) (quoting *Cutter*, 544 U.S. at 720); *see also Midrash Sephardi*, 366 F.3d at 1241 ("[w]here, as here, a law's purpose is to alleviate significant government interference with

[14] Last Term, in *American Legion v. American Humanist Association*, 139 S. Ct. 2067 (2019), the Supreme Court cast into doubt the continuing vitality of the *Lemon* test. *See id.* at 2081–85 (plurality op.) (describing the *Lemon* test's "shortcomings" and declining to apply it in Establishment Clause challenge to religious display on public property); *id.* at 2092 (Kavanaugh, J. concurring) (stating that the Court "no longer applies the old test articulated in *Lemon*"); *id.* at 2102 (Gorsuch, J., concurring in the judgment) (describing the *Lemon* test as "shelved"). For the reasons described *infra*, even if the *Lemon* test retains some degree of applicability following *American Legion*, RLUIPA easily satisfies that test.

[15] The defendants in *Westchester Day* challenged only the equal terms provision under the Establishment Clause, but the court's reasoning in that case applies equally to RLUIPA's other land use provisions, all of which address government-imposed burdens on religious exercise. *See, e.g.*, *Chabad Lubavitch*, 796 F. Supp. 2d at 341 (applying the *Lemon* test and noting that defendants' argument that the equal terms provision violates the Establishment Clause is "easily disposed of").

the exercise of religion, that purpose does not violate the Establishment Clause."); *Chabad Lubavitch*, 796 F. Supp. 2d at 341-42 (finding that "[p]reventing discriminatory regulatory treatment of religious entities" is a permissible secular purpose); *Rocky Mountain Christian Church*, 612 F. Supp. 2d at 1178-79. Thus, the provisions satisfy the first prong of the *Lemon* test.

2. RLUIPA's Land Use Provisions Have 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 land use provisions do not have an impermissible effect. The statute does not involve the government itself advancing religion, any more than the accommodations upheld in *Amos* and *Zorach* (or *Cutter*, for that matter). As the Second Circuit has explained, "[u]nder 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." *Westchester Day*, 504 F.3d at 355. "RLUIPA cannot be said to advance religion simply by requiring that states not discriminate against or among religious institutions." *Id.* at 355-56; *see also Midrash Sephardi*, 366 F.3d at 1241 (RLUIPA merely "forbid[s] states from imposing impermissible burdens on religious worship"; it "does not allow religious assemblies to avoid the application of zoning regulations" or "impose affirmative duties on states that would require them to facilitate or subsidize the exercise of religion"); *Chabad Lubavitch*,

796 F. Supp. 2d at 342 (noting that the Supreme Court in *Amos* "specifically rejected the argument . . . that, by singling out religious entities for a benefit (in this case, the benefit of being free from discriminatory treatment), RLUIPA is *per se* invalid"); *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").[16]

3. RLUIPA's Land Use Provisions Do Not Create Excessive Entanglement between Government and Religion

The "excessive entanglement" prong of the *Lemon* test focuses on whether the government program in question requires "pervasive monitoring by public authorities" to ensure that there is no government indoctrination of religion. *Agostini v. Felton*, 521 U.S. 203, 233-34 (1997). RLUIPA's land use provisions easily satisfy this standard, since they require no monitoring by public authorities of the religious activities of any organization. *See Westchester Day*, 504 F.3d at 355 ("RLUIPA's land use provisions do not foster an excessive government entanglement with religion."); *see also Midrash Sephardi*, 366 F.3d at 1241 (finding that RLUIPA does not result in excessive entanglement between church and state); *Chabad Lubavitch*, 796 F. Supp. 2d at 342 (same); *Rocky Mountain Christian Church*, 612 F. Supp. 2d at 1182 (same).

* * *

[16] 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. Cty. 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 (finding no government endorsement of religion where religious organizations are permitted to use public schools after hours).

In sum, RLUIPA's land use provisions are fully consistent with the Establishment Clause. "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." *Midrash Sephardi*, 366 F.3d at 1242.

CONCLUSION

Congress properly enacted the RLUIPA land use provisions pursuant to its enumerated powers under the Commerce Clause and Section 5 of the Fourteenth Amendment, in a manner consistent with both the Tenth Amendment and the Establishment Clause. Therefore, should this Court reach the question of the constitutionality of the land use provisions of RLUIPA at issue in this case, the Court should uphold those provisions as consistent with the Constitution.

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Chart of Federal Cases Addressing Constitutionality of RLUIPA Land Use Provisions

RLUIPA Provision	Cases Holding Provision to be a Constitutional Exercise of Congressional Power	Cases Holding Provision to be Consistent with Establishment Clause
Substantial burden provision, § 2(a)(1), as applied through § 2(a)(2)(B), Commerce Clause	• *Congregation Rabbinical Coll.*, 138 F. Supp. 3d at 438-39 • *Westchester Day*, 504 F.3d at 354 • *Chabad Lubavitch*, 796 F. Supp. 2d at 340 • *World Outreach Conference Ctr.*, 591 F.3d at 533 • *Fortress Bible Church*, 734 F. Supp. 2d at 509-10 • *Freedom Baptist*, 204 F. Supp. 2d at 867-68 • *Maui Cty.*, 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	• *Westchester Day Sch.*, 504 F.3d at 355 • *Rocky Mountain Christian Church*, 612 F. Supp. 2d at 1178-79 • *Midrash Sephardi*, 366 F.3d at 1241
Substantial burden provision, § 2(a)(1), as applied through § 2(a)(2)(C), individualized assessment	• *Murphy*, 289 F. Supp. 2d at 119 • *World Outreach Conference Ctr.*, 591 F.3d at 534 • *Guru Nanak Sikh Soc'y*, 456 F.3d at 993	*See above*.

RLUIPA Provision	Cases Holding Provision to be a Constitutional Exercise of Congressional Power	Cases Holding Provision to be Consistent with Establishment Clause
Substantial burden provision, § 2(a)(1), as applied through § 2(a)(2)(C), individualized assessment), *continued*	• *Freedom Baptist*, 204 F. Supp. 2d at 868 • *Maui Cty.*, 298 F. Supp. 2d at 1016 • *Church of the Hills*, 2006 WL 462674, at *7 • *Castle Hills*, 2004 WL 546792, at *19 • *Kol Ami*, 2004 WL 1837037, at *9-11	
Equal terms provision, § 2(b)(1)	• *Midrash Sephardi*, 366 F.3d at 1232-33, 1239-40 • *Freedom Baptist*, 204 F. Supp. 2d at 869-70 • *Centro Familiar*, 615 F. Supp. 2d at 993	• *Chabad Lubavitch*, 796 F. Supp. 2d at 341
Nondiscrimination provision, § 2(b)(2)	• *Freedom Baptist*, 204 F. Supp. 2d at 869-70	*No cases have directly addressed an Establishment Clause challenge to § 2(b)(2).*
Exclusion and limits provision, § 2(b)(3)	• *Vision Church*, 468 F.3d at 989 • *Freedom Baptist*, 204 F. Supp. 2d at 871	*No cases have directly addressed an Establishment Clause challenge to § 2(b)(3).*