UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

CONGREGATION RABBINICAL COLLEGE OF TARTIKOV, RABBI MORDECHAI BABAD, RABBI WOLF BRIEF, RABBI HERMEN KAHANA, RABBI MEIR MARGULIS, RABBI GERGELY NEUMAN, RABBI MEILECH MENCZER, RABBI JACOB HERSHKOWITZ, RABBI CHAIM ROSENBERG, RABBI DAVID A. MENCZER, and RABBI ARYEH ROYDE, Plaintiffs, v. VILLAGE OF POMONA, NEW YORK; BOARD OF TRUSTEES OF THE VILLAGE OF POMONA, NEW YORK; NICHOLAS SANDERSON, as Mayor; IAN BANKS as Trustee and in his official capacity, ALMA SANDERS ROMAN as Trustee and in her official capacity, RITA LOUIE as Trustee and in her official capacity, and BRETT Y AGEL, as Trustee and in his official capacity, Defendants.	07 Civ. 6304 (KMK)

BRIEF OF THE UNITED STATES OF AMERICA IN INTERVENTION IN DEFENSE OF THE RELIGIOUS LAND USE AND INSTITUTIONALIZED PERSONS ACT OF 2000

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PRELIMINARY STATEMENT

Congress enacted the Religious Land Use and Institutionalized Persons Act of 2000 ("RLUIPA"), Pub. L. No. 106-274, 114 Stat. 803-807 (2000), *codified at* 42 U.S.C. §§ 2000cc *et seq.*, in order to combat a widespread pattern of religious discrimination in local land use decisions. The statute's land use provisions allow religious assemblies and institutions to challenge local land use decisions that impose a substantial burden on religious exercise. In enacting RLUIPA, Congress relied on its powers under the Commerce Clause and the Enforcement Clause of the Fourteenth Amendment, as well as its authority under the Spending Clause.[1]

In *Westchester Day School v. Village of Mamaroneck*, 504 F.3d 338 (2d Cir. 2007), the Second Circuit held that RLUIPA's land use provisions are a valid exercise of Congress's Commerce Clause authority, and that the provisions violate neither the Tenth Amendment nor the Establishment Clause. *Westchester Day School* is sufficient to decide the instant case. Although defendants also argue that general constitutional principles of federalism invalidate RLUIPA's land use provisions, they have cited no authority—nor does any exist—holding that an otherwise valid Congressional enactment offends the Constitution if it touches on local land use decisions.

For these reasons, the Court should reject defendants' challenge to RLUIPA.[2]

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[1] Neither Congress's power under the Spending Clause nor the RLUIPA section grounded in that power is at issue in this case.

[2] The United States expresses no view on any other issue pending before the Court, including the merits of plaintiffs' RLUIPA claims.

BACKGROUND

I. Statutory Background

President William J. Clinton signed RLUIPA into law on September 22, 2000. *See* Pub. L. No. 106-274, 114 Stat. 803-807, codified at 42 U.S.C. §§ 2000cc *et seq*. The statute addresses what Congress determined to be two areas where state and local governments have imposed burdens on religious liberty: state and local land use regulations, and rules governing persons in prisons, mental hospitals, and similar institutions. Only the statute's land use provisions are at issue in this case.

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 "the least restrictive means" of furthering that compelling interest. 42 U.S.C. § 2000cc(a)(1). Three subsections of section 2(a)(2) provide that this restriction on governmental action applies only when one or more specified jurisdictional nexus is satisfied:

> (A) the substantial burden is imposed in a program or activity that receives Federal financial assistance, even if the burden results from a rule of general applicability;
>
> (B) the substantial burden affects, or 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) the substantial burden is imposed in the implementation of a land use regulation or system of land use regulations, under which a government makes, or has in place formal or informal procedures or practices that

> permit the government to make, individualized assessments of the proposed uses for the property.

42 U.S.C. § 2000cc(a)(2).[3]

II. Legislative History of RLUIPA

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

Witnesses presented "massive evidence" of a pattern of religious discrimination, which frustrated the ability to assemble for worship. *See* 146 Cong. Rec. at S7774-75; H.R. Rep. 106-

[3] In addition, RLUIPA also contains non-discrimination and non-exclusion provisions that protect religious assemblies or institutions. Specifically, sections 2(b)(1) and (2) provide, respectively, that no state or local government "shall impose or implement a land use regulation in a manner that treats a religious assembly or institution on less than equal terms with a nonreligious assembly or institution," 42 U.S.C. § 2000cc(b)(1), and that such governments shall not "impose or implement a land use regulation that discriminates against any assembly or institution on the basis of religion or religious denomination," 42 U.S.C. § 2000cc(b)(2). Finally, section 2(b)(3) provides that no state or local government shall "impose or implement a land use regulation that . . . totally excludes religious assemblies from a jurisdiction; or . . . unreasonably limits religious assemblies, institutions, or structures within a jurisdiction." 42 U.S.C. § 2000cc-(b)(3). Defendants do not challenge the constitutionality of these provisions. *See* Def. Mem. at 58 n.32.

219, at 2-24. Specifically, the House Report indicates that land use regulations implemented through a system of individualized assessments placed the decision of "whether [religious] individuals had the ability to assemble for worship" under "the complete discretion of land use regulators." H.R. Rep. 106-219, at 19. The Report further concluded that "[r]egulators typically have virtually unlimited discretion in granting or denying permits for land use and in other aspects of implementing zoning laws," *id.* at 20, and that the "standards in individualized land use decisions are often vague, discretionary, and subjective," *id.* at 24; *see also id.* at 17 ("Local land use regulation, which lacks objective, generally applicable standards, and instead relies on discretionary individualized determinations, presents a problem that Congress has closely scrutinized and found to warrant remedial measures under its section 5 enforcement authority.").

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

The individualized nature of zoning decisions that Congress was concerned about specifically includes decisions by zoning boards. The congressional record notes that local zoning codes often "permit churches only with individualized permission from the zoning board, and zoning boards use that authority in discriminatory ways." *Id.* at S7774. The evidence also

showed that "new, small, or unfamiliar churches" faced more discrimination than larger, well-established churches, and that racial or religious animus sometimes appeared in local land use decisions, "especially in cases of black churches and Jewish shuls and synagogues." *Id.* The evidence also demonstrated that sometimes "zoning board members . . . explicitly offer race or religion as the reason to exclude a proposed church." *Id.*

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." *Id.* The synagogue's attorney testified that he had handled more than thirty other cases of similar religious discrimination.[4] *See id.*

[4] 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

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

> banquet halls, clubs, community centers, funeral parlors, fraternal organizations, health clubs, gyms, places of amusement, recreation centers, lodges, libraries, museums, municipal buildings, meeting halls, and theaters are often permitted as of right in zones where churches require a special use permit, or permitted on special use permit where churches are wholly excluded.

H.R. Rep. 106-219, at 19-20. Congress further determined that individualized land use assessments readily lend themselves to discrimination against religious assemblies, yet render it difficult to prove such discrimination in any particular case. *See* 146 Cong. Rec. at S7775; H.R. Rep. 106-219, at 18-24. In reaching this conclusion, RLUIPA's sponsors relied on evidence from national surveys and studies of zoning codes, reported land use cases, and the experiences of particular houses of worship, all of which demonstrated unconstitutional government conduct. *See* 146 Cong. Rec. at S7775; H.R. Rep. 106-219, at 18-24; 146 Cong. Rec. E1234, E1235 (daily ed. July 14, 2000) (statement of Rep. Canady). One study, conducted by Brigham Young University, concluded that Jews, small Christian denominations, and nondenominational churches are vastly overrepresented in reported zoning cases involving religious institutions. *See* H.R. Rep. 106-219, at 20. For example, the study revealed that 20% of the reported cases concerning the location of houses of worship involve members of the Jewish faith, despite the fact that Jews account for only 2% of the population in the United States. *See id.* at 21.

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

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F.2d 293 (5th Cir. 1988)); *id.* at 22 nn.97-98 (citing *Family Christian Fellowship v. Cnty. of Winnebago*, 503 N.E.2d 367 (Ill. App. 1986)); *id.* at 23 n.109 (citing *Orthodox Minyan v. Cheltenham Twp. Zoning Hearing Bd.*, 552 A.2d 772 (Pa. Com. 1989)).

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

III. Procedural History of this Case

On January 22, 2015, the parties made cross motions for summary judgment. *See* Plaintiffs' Motion for Summary Judgment, ECF No. 137; Defendants' Motion for Summary Judgment, ECF No. 140. On January 30, 2015, the defendants filed a notice, ECF No. 156, pursuant to Federal Rule of Civil Procedure 5.1. The notice stated that the defendants' summary judgment motion challenges the constitutionality of RLUIPA. By letter dated February 2, 2015, *see* ECF No. 157, the United States notified the Court of its receipt of the defendants' Rule 5.1 notice, and notified the Court and the parties that the government was considering whether to intervene or file a statement of interest in support of RLUIPA. By letter dated March 17, 2015, ECF No. 164, based on the parties' request for a revised briefing schedule, the government requested additional time to make its decision and file any supporting papers. The Court granted that request in an Order dated March 27, 2015, ECF No. 166.

On April 23, 2015, simultaneous with the filing of this brief, the government filed a letter notifying the Court of its decision to intervene in the case in order to defend RLUIPA's constitutionality.

ARGUMENT

Defendants argue that RLUIPA's land use provisions transgress general principles of federalism as well as the state sovereignty preserved by the Tenth Amendment. In defendants' view, RLUIPA ignores a presumption of local control over land use decisions. Defendants also argue that RLUIPA violates the Establishment Clause by affording religious land developers privileges not available to secular developers.[5]

Defendants' arguments are foreclosed by *Westchester Day School v. Village of Mamaroneck*, 504 F.3d 338 (2d Cir. 2007). The defendants in *Westchester Day School* also challenged RLUIPA's land use provisions as unconstitutional. The Second Circuit held that RLUIPA was a valid exercise of Congress's authority under the Commerce Clause, and that the project at issue in that case—substantial renovations to a Jewish religious school, with projected construction costs of about $9 million—fell within RLUIPA's protections. In addition, the Court held that RLUIPA's land use provisions do not violate the Establishment Clause of the First Amendment. And the *Westchester Day School* Court also held that RLUIPA's land use provisions do not exceed the limitations that federalism places on otherwise valid congressional power. Here, the defendants challenge the application of RLUIPA to the proposed construction of a religious school and raise similar arguments. This case is indistinguishable from *Westchester Day School*, and defendants' constitutional attacks on RLUIPA are meritless under that

[5] In addition, defendants' brief also claims that RLUIPA violates "the separation of powers," Def. Mem. at 55, but the rest of the argument section does not make clear what this argument might be, other than an argument about federalism. Any distinct argument about separation of powers is thus presented without sufficient specificity to be considered. *See, e.g., Lima v. Hatsuhana of USA, Inc.*, No. 13 CIV. 3389 JMF, 2014 WL 177412, at *1 (S.D.N.Y. Jan. 16, 2014) ("[I]ssues mentioned in a perfunctory manner, unaccompanied by some effort at developed argumentation, are deemed waived.").

controlling authority. Finally, to the extent the defendants here raise constitutional attacks on RLUIPA not addressed by *Westchester Day School*, these arguments are also without merit.

I. The Principle Of Constitutional Avoidance Requires That The Court Resolve All Other Issues Before Deciding The Constitutionality Of RLUIPA

As an initial matter, this Court should not address RLUIPA's constitutionality until all statutory and factual 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 the constitutional issue:

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

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

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. 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 establish the constitutionality of RLUIPA's application in this case. *See Westchester Day*, 504 F.3d at 354 ("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.").

II. RLUIPA's Land Use Provisions are a Valid Exercise of Congress's Commerce Clause Authority

Defendants do not specifically argue that Congress lacks authority to enact RLUIPA's land use provisions. Nonetheless, because the constitutionality of RLUIPA depends in part on Congress's affirmative authority to pass the law, the government briefly addresses the statute's grounding in the Commerce Clause and the Enforcement Clause of the Fourteenth Amendment.

The Second Circuit has already decided that RLUIPA's § 2(a)(2)(B), codified at 42 U.S.C. § 2000cc(a)(2)(B), which applies RLUIPA's substantial burden test to cases affecting interstate, foreign, or Indian commerce, is a valid exercise of Congress's Commerce Clause authority. *See Westchester Day School*, 504 F.3d at 354. The court first stated that "the Supreme Court has made plain [that] the satisfaction of [] a jurisdictional element," such as the one applied by RLUIPA, "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." *Id*. (citing *United States v. Morrison*, 529 U.S. 598, 611-12 (2000), and *United States v. Lopez*, 514 U.S. 549, 561 (1995)). 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*. 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). 504 F.3d at 354. Thus, controlling authority from the Second Circuit holds that RLUIPA's substantial burden test is a valid exercise of Congress's Commerce Clause authority.

III. RLUIPA's Land Use Provisions Are Also a Valid Exercise of Congress's Enforcement Clause Authority Under the Fourteenth Amendment

To decide the instant case, it is sufficient for the Court to apply the square holding of *Westchester Day School—i.e.*, that RLUIPA's substantial burden framework under § 2(a)(1) properly applies to the proposed construction through RLUIPA § 2(a)(2)(B), due to the effect of the construction on interstate commerce. Thus, this Court need not decide the question of whether RLUIPA's substantial burden test could also be applied to this case as an exercise of Congress's authority to enforce the Fourteenth Amendment. Indeed, after holding that RLUIPA's substantial burden test could be validly applied to school construction under Congress's Commerce Clause authority, the *Westchester Day School* court expressly reserved the question of Congress's Enforcement Clause authority to enact RLUIPA's land use provisions. *See* 504 F.3d at 354. The government submits that, for reasons of judicial economy as well as constitutional avoidance, that is the proper course in this case as well should the Court find that the commerce-clause jurisdictional hook is satisfied.[6] In any event, RLUIPA is a valid exercise of Congress's Enforcement Clause authority as well.

RLUIPA's § 2(a)(2)(C) codifies existing Free Exercise and Equal Protection case law. The statutory provision states that the RLUIPA § 2(a)(1) substantial burden test applies when

> the substantial burden is imposed in the implementation of a land use regulation or system of land use regulations, under which a government makes, or has in place formal or informal procedures or practices that permit the government to make, individualized assessments of the proposed uses for the property . . . .

[6] In the instant case, it appears that no party has introduced evidence on the economic value of the proposed construction. But based on an estimate of educational facilities and housing for at least 250 students and their families, the effect on interstate commerce of constructing the rabbinical college is at least similar to the effect of the school expansion in *Westchester Day School*. In any event, defendants have made no argument that the proposed construction here would not have at least a "minimal" effect on interstate commerce.

42 U.S.C. § 2000cc(a)(2)(C). Consistent with the First Amendment, when a neutral law of general applicability imposes a substantial burden on religious practice, affected individuals may only challenge the rational basis of the law. *See Employment Division, Department of Human Resources of Oregon v. Smith*, 494 U.S. 872, 879-85 (1990).[7] However, when a government's regulatory decision involves individualized assessments or exemptions, the regulation is no longer of "general applicability," and its actions must satisfy strict scrutiny if they impose a substantial burden on religious practice. *Sherbert v. Verner*, 374 U.S. 398 (1963). This rule was expressly preserved by the Court's ruling in *Employment Division v. Smith*. *See* 494 U.S. at 884-85. And it is this rule that RLUIPA's text specifically codifies: § 2(a)(2)(C) covers the government's "individualized assessments of the proposed uses for the property."

Because Congress simply codified existing constitutional jurisprudence, it is clear that RLUIPA provides for enforcement against *actual* violations of the First Amendment, as applied to the states through the Fourteenth Amendment. Providing for enforcement in the case of actual constitutional violations is exactly Congress's power under the Enforcement Clause. *See, e.g.*, *United States v. Georgia*, 546 U.S. 151, 158 (2006) ("While the Members of this Court have disagreed regarding the scope of Congress's 'prophylactic' enforcement powers under § 5 of the Fourteenth Amendment, no one doubts that § 5 grants Congress the power to 'enforce . . . the provisions' of the Amendment by creating private remedies against the States for *actual* violations of those provisions.") (internal citations omitted).

[7] However, when a government enacts a law neutral on its face, but which targets a religious practice or has the effect of treating religious practices differently, that law is also subject to strict scrutiny under the Free Exercise Clause. *See, e.g., Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 546 (1993) ("A law burdening religious practice that is not neutral or not of general application must undergo the most rigorous of scrutiny.").

For these reasons, federal courts have consistently found that RLUIPA § 2(a)(2)(C) is a permissible exercise of Congress's Enforcement Clause authority. *See, e.g., World Outreach Conference Ctr. v. City of Chicago*, 591 F.3d 531, 534 (7th Cir. 2009) (holding that RLUIPA's land use provisions are a valid exercise of Enforcement Clause authority); *Guru Nanak Sikh Soc. of Yuba City v. Cnty. of Sutter*, 456 F.3d 978, 992-95 (9th Cir. 2006) (same); *Freedom Baptist Church of Delaware Cnty. v. Twp. of Middletown*, 204 F. Supp. 2d 857, 868-69 (E.D. Pa. 2002) (same); *see also Murphy v. Zoning Comm'n of Town of New Milford*, 289 F. Supp. 2d 87, 119 (D. Conn. 2003) (rejecting Enforcement Clause challenge to RLUIPA), *vacated on other grounds*, 402 F.3d 342 (2d Cir. 2005) (holding suit was not ripe).

Finally, to the extent that RLUIPA's substantial burden test, as applied through § 2(a)(2)(C), might reach conduct that is not itself unconstitutional, RLUIPA is nonetheless permissible as a prophylactic rule. "'Congress' power "to enforce" the [Fourteenth] Amendment includes the authority both to remedy and to deter violation of rights guaranteed thereunder by prohibiting a somewhat broader swath of conduct, including that which is not itself forbidden by the Amendment's text.'" *Nevada Dep't of Human Res. v. Hibbs*, 538 U.S. 721, 727 (2003) (quoting *Board of Trustees of Univ. of Ala. v. Garrett*, 531 U.S. 356, 365 (2001)). Permissible prophylactic legislation must exhibit "congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end." *City of Boerne v. Flores*, 521 U.S. 507, 520 (1997).

As explained by the Second Circuit, "[d]etermining whether Congress properly exercised its powers under Section 5 of the Fourteenth Amendment . . . requires a two-part test. First, we ask whether Congress identified a history and pattern of unconstitutional [conduct]. . . . Second,

we ask whether the legislation under question passes the 'congruence and proportionality' test." *CSX Transp., Inc. v. N.Y. State Office of Real Prop. Servs.*, 306 F.3d 87, 96-97 (2d Cir. 2002).

As to the first prong, Congress's extensive legislative findings, discussed above, show a widespread pattern of discrimination against religious assemblies in land use decisions before RLUIPA. "The hearing record compiled massive evidence that this 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."); *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").[8]

As to the second prong, RLUIPA is a congruent and proportional response to the problem of widespread discrimination against religious assemblies. RLUIPA § 2(a)(1), as applied through

[8] Defendants make much of the fact that a significant portion of the legislative record was compiled during consideration of the Religious Liberty Protection Act of 1999 (RLPA). *See* Def. Mem. at 57-58. 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.

§ 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").

Unlike the original provisions of the Religious Freedom Restoration Act ("RFRA"), which Congress passed in the wake of *Employment Division v. Smith*, the substantial burden provision of RLUIPA, as applied through § 2(a)(2)(C), does not attempt to impose strict scrutiny on neutral state or local laws of general applicability. Nor does RLUIPA exempt religious institutions from zoning laws. Rather, RLUIPA § 2(a)(2)(C) requires strict scrutiny of negative land use decisions in which individualized assessments are made. This precision stands in sharp contrast to RFRA's untargeted provisions, which sought to apply strict scrutiny to all laws, in all contexts. In short, RLUIPA does not provide the "sweeping coverage" of RFRA found objectionable by the Supreme Court in *City of Boerne*.

As numerous courts have already held with respect to application of the substantial burden provision of RLUIPA to individualized land-use assessments by state and local governments, "[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); *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 of Twp. of Bedminster v. Twp. of Bedminster, No. Civ. 05-3332 (SRC), 2006 WL 462674, at *7 n.3 (D.N.J. Feb. 24, 2006).

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

IV. RLUIPA's Land Use Provisions Do Not Violate the Tenth Amendment or Any Other Constraint of Federalism

Defendants' primary argument appears to be that the substantial burden provisions of RLUIPA violate the Tenth Amendment or other principles of federalism. *See* Def. Mem. at 54-58. This argument is mistaken: RLUIPA violates neither the Tenth Amendment nor any other constitutional constraint.

The Second Circuit held in *Westchester Day School* that RLUIPA's land use provisions do not violate the Tenth Amendment. *See* 504 F.3d at 354-55. The court first noted that "'[i]f a power is delegated to Congress in the Constitution, the Tenth Amendment expressly disclaims any reservation of that power to the States.'" *Id*. at 355 (quoting *New York v. United States*, 505 U.S. 144, 156 (1992)). Because the court had found that RLUIPA was within Congress's Commerce Clause authority,[9] the Tenth Amendment did not bar RLUIPA's enactment. *Id*. (This same reasoning applies to those portions of RLUIPA passed pursuant to Congress's power to enforce the Fourteenth Amendment.) In addition, the court went on to hold that RLUIPA does

[9] As demonstrated in section II above, RLUIPA's land use provisions are also a valid exercise of Congress's power to enforce the Fourteenth Amendment.

not violate the anti-commandeering principle of the Tenth Amendment, since RLUIPA neither coerces state legislatures to enact any laws, nor does it conscript local officials to administer a federal regulatory program. *Id*.

Moreover, no other constraint of federalism bars Congress from enacting RLUIPA. Defendants appear to argue that the Constitution forbids Congress from passing any law that has an effect on local land use decisions. *See* Def Mem. at 55. But the defendants' citations do not support such a rule, nor does one exist. Rather, defendants' citations stand for the uncontroversial point that when federal courts assess the constitutionality of local land use decisions, they generally apply the deferential rational basis test—unless a claim of discrimination or violation of a fundamental right is at issue.

For example, *Gorieb v. Fox*, 274 U.S. 603 (1927), rejected a federal constitutional challenge to a local setback ordinance. The previous year, in *Village of Euclid, Ohio v. Ambler Realty Co.*, 272 U.S. 365, 386 (1926), the Supreme Court had rejected a *Lochner*-type substantive due process challenge to a local zoning law. Relying on *Euclid*, the *Fox* court upheld the validity of the requirement that new construction be a minimum distance from the street. 274 U.S. at 609-10. Contrary to defendants' characterization, *Fox* does not "forbid[] federal courts from overtaking local authorities in adjudicating issues of land use," Def. Mem. at 55. Rather, the Court noted that the land use decisions of local authorities "should not be disturbed by the courts, unless clearly arbitrary and unreasonable." *Fox*, 274 U.S. at 608. That sentence, which foreshadows the end of the *Lochner* era a decade later, is a statement about the division of authority between legislatures and courts in the absence of any law other than the Due Process Clause. It does not forbid Congress from enacting any law touching land use decisions.

Similarly, in *Congregation Kol Ami v. Abington Township*, 309 F.3d 120, 135-36 (3d Cir. 2002), the Third Circuit noted that local land use decisions have typically received deference from federal courts. But the *Kol Ami* court was discussing courts' usual treatment of constitutional challenges to ordinances. The Third Circuit's 2002 opinion only decides a facial attack on the constitutionality of a municipality's ordinances under the Equal Protection and Due Process clauses. On remand, the district court rejected the defendants' constitutional challenge to RLUIPA. *See Congregation Kol Ami v. Abington Twp.*, No. CIV.A. 01-1919, 2004 WL 1837037, at *9-15 (E.D. Pa. Aug. 17, 2004).

None of defendants' other citations undermine RLUIPA's constitutionality. In particular, in *Kelo v. City of New London, Conn.*, 545 U.S. 469 (2005), the Supreme Court rejected the claim that a taking for economic development was not for public use. *Kelo* does not lay down any general prohibition on federal legislation that has an effect on land use, much less on a federal civil rights law aimed at reining in discriminatory or unjustifiably burdensome government action. In sum, the defendants' citations do not establish a general rule barring a federal role in land use.[10]

Finally, it is important to note the limited scope of RLUIPA. Defendants' allusion to the legislative history of RLUIPA and citation to Justice Kennedy's concurrence in *United States v. Lopez*, 514 U.S. 549, 580 (1995), does not establish that "Congress enacted RLUIPA negligently or intentionally without reference to the most relevant Supreme Court doctrine in derogation of federalism." Def. Mem. at 58. Rather, as the statutory text makes clear, Congress limited the

[10] Defendants also cite *Sossamon v. Texas*, 131 S. Ct. 1651 (2011). *Sossamon* decided an unrelated issue—whether the institutionalized persons provisions of RLUIPA waive state sovereign immunity for damages actions.

scope of RLUIPA's substantial burden provision to three areas of federal power: federal spending, interstate commerce, and enforcement of the Fourteenth Amendment. The law only affects a small set of land use decisions: those that impose a substantial burden on religious exercise and meet one of the jurisdictional prerequisites (covered by RLUIPA § 2(a)), and those that discriminate against or exclude religious groups (covered by § 2(b), not at issue here). Congress acted with a narrow purpose: to prevent discrimination in land use decisions. Congress has passed a number of other laws that have an effect on local land use decisions—for example, environmental laws such as the Clean Air Act and Clean Water Act, as well as antidiscrimination laws such as the Fair Housing Act and Americans with Disabilities Act. Much as federal criminal law complements, but does not displace, state and local criminal law, Congress's limited forays into land use protect specific federal interests while leaving the vast majority of land use decision-making in the exclusive control of state and local governments.

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

Defendants also argue, in a single sentence, that RLUIPA's land use provisions violate the Establishment Clause. This argument is foreclosed by *Westchester Day School*.

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 Comm'n*, 480 U.S. 136, 144-45 (1987). Moreover, the Court has expressly held that "it is a permissible legislative purpose 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) (holding that Title VII's exemption from religious

discrimination claims for religious organizations' secular activities did not violate the Establishment Clause).

Consistent with these principles, *Westchester Day School* held that RLUIPA's land use provisions do not violate the Establishment Clause. 504 F.3d at 355-56. The Second Circuit held that the land use provisions of RLUIPA satisfy the test the Supreme Court set forth in *Lemon v. Kurtzman*, 403 U.S. 602 (1971). Under the *Lemon* test, a statute does not violate the Establishment Clause if it "(1) ha[s] a secular purpose, (2) ha[s] a principal effect that neither advances nor inhibits religion, and (3) [does] not bring about an excessive government entanglement with religion." *Westchester Day Sch.*, 504 F.3d at 355 (citing *Lemon*, 403 U.S. at 612-13). The *Westchester Day School* court held that RLUIPA satisfied all of these factors. In particular, the Court noted that "RLUIPA cannot be said to advance religion simply by requiring that states not discriminate against or among religious institutions." *Id.* at 355.[11]

Defendants do not mention, let alone address, this binding precedent. Rather, they cite three inapposite cases that address financial subsidies to religious institutions. For example, in *Texas Monthly, Inc. v. Bullock*, the Supreme Court struck down a sales-tax exemption for religious publications because "[e]very tax exemption constitutes a subsidy." 489 U.S. 1, 14 (1989). Nothing akin to a cash subsidy exists here. Moreover, the Supreme Court in *Texas Monthly* found that government benefits directed toward religious institutions were consistent with the Establishment Clause when such benefits could "reasonably be seen as removing a

[11] Other circuits have also rejected Establishment Clause attacks on RLUIPA, including to its § 2(b), which is not at issue in this case. *See, e.g.*, *River of Life Kingdom Ministries v. Vill. of Hazel Crest, Ill.*, 611 F.3d 367, 370 (7th Cir. 2010) (en banc) (assessing proposed standards for evaluating RLUIPA equal terms claims in light of Establishment Clause); *Midrash Sephardi, Inc. v. Town of Surfside*, 366 F.3d 1214, 1240-42 (11th Cir. 2004) (rejecting Establishment Clause challenge to equal terms land use provision).

significant state-imposed deterrent to the free exercise of religion." *Id.* at 15. The Second Circuit in *Westchester Day School* expressly held that the purpose of RLUIPA's substantial burden provisions—"to lift government-created burdens on private religious exercise"—was compatible with the Establishment Clause. 504 F.3d at 355.

The two other cases Defendants cite are similarly irrelevant. The first rejected an absolute veto by religious institutions over certain uses of private property owned by third parties. *Larkin v. Grendel's Den*, 459 U.S. 116, 120 (1982). The second held that a school board was not required to make its own facilities available to a church during non-school hours for religious worship services. *Bronx Household of Faith v. Bd. of Educ.*, 750 F.3d 184 (2d Cir. 2014), cert denied ___ U.S. ____ (March 30, 2015). Neither situation provides any support for Defendants' argument here, especially in light of the clear, binding decision in *Westchester Day School*.

Indeed, for reasons similar to those stated by the Second Circuit in *Westchester Day School*, the Supreme Court unanimously rejected an Establishment Clause attack on RLUIPA's institutionalized persons provisions. *See Cutter v. Wilkinson*, 544 U.S. 709 (2005). The Court held that the institutionalized persons provisions of RLUIPA permissibly "alleviate[] exceptional government-created burdens on private religious exercise." *Id*. at 720. The same is true of RLUIPA's land use provisions.

VI. Applying RLUIPA's Substantial Burden Framework to this Case Would Not Result in an As-Applied Constitutional Violation

Defendants' arguments primarily focus on the facial constitutionality of RLUIPA's land use provisions. But the Village also argues that, if the court applied RLUIPA's substantial burden test in this case—where the plaintiffs have never attempted to present their proposed building project to any local body, and there have been no hearings on the matter—it would be

an as-applied constitutional violation. The Village does not clearly articulate a specific constitutional problem with such a scenario.

Although the precise basis of defendants' argument is not clear, nonetheless, this Court's January 4, 2013 decision on the motion to dismiss in this case allays the Village's concerns. *See Congregation Rabbinical Coll. of Tartikov, Inc. v. Vill. of Pomona*, 915 F. Supp. 2d 574, 596 (S.D.N.Y. 2013), ECF No. 53.

In the context of land disputes, the ripeness doctrine—which generally bars a federal court from ruling in a land use case until state authorities have reached a final decision—protects federalism interests. *See Murphy*, 402 F.3d at 348. The ripeness requirement affords local officials an opportunity to adjudicate an application before the dispute may be brought to federal court. Here, the Court's decision on the motion to dismiss protects the Village's decision-making process by barring the plaintiffs' as-applied RLUIPA claims on ripeness grounds. The Court held that the plaintiffs' as-applied RLUIPA challenges to the ordinances are not ripe, *see* 915 F. Supp. 2d at 596-607, primarily because the Village had not been afforded an opportunity to make a final decision on any specific proposal, *see id*. at 599-600.

But the Court also held the plaintiffs' facial RLUIPA challenges are ripe, since "'facial' challenges to regulation[s] are generally ripe the moment the challenged regulation or ordinance is passed," 915 F. Supp. 2d at 595 (quoting *Suitum v. Tahoe Reg'l Planning Agency*, 520 U.S. 725, 736 (1997)).[12] That is because in making a facial challenge, plaintiffs argue that "'the mere enactment of a piece of legislation'" has deprived them of their rights under RLUIPA. 915 F.

[12] As the district court noted, the Second Circuit has applied ripeness jurisprudence developed in property disputes under the Takings Clause (such as *Suitum*) to many other claims relating to property, including "RLUIPA, the First Amendment, the Equal Protection Clause, and the Due Process Clause." 915 F. Supp. 2d at 597 (citing, *inter alia*, *Murphy*, 402 F.3d at 349-50).

Supp. 2d at 611 (quoting *Cranley v. Nat'l Life Ins. Co. of Vt.*, 318 F.3d 105, 110 (2d Cir. 2003)) (internal quotation marks omitted). As the Court also noted, while it may be more straightforward as a procedural matter to make a facial challenge to an ordinance, the plaintiffs' argument on the merits is difficult: the plaintiffs face an "'uphill battle because it is difficult to demonstrate that the mere enactment of a piece of legislation'" has deprived them of their rights under RLUIPA. 915 F. Supp. 2d at 611 (quoting *Cranley v. Nat'l Life Ins. Co. of Vt.*, 318 F.3d 105, 110 (2d Cir. 2003)) (internal quotation marks omitted). No "application, public hearing, [or] appropriate process[]," Def. Mem. at 59, is necessary to adjudicate plaintiffs' *facial* RLUIPA arguments, since these claims attack the very enactment of the challenged laws. Thus, the process of adjudicating the facial RLUIPA challenges does not short circuit the Village's ordinary land use decision-making process.

Furthermore, contrary to defendants' argument, a federal court's facial assessment of an ordinance does not turn the court into a zoning board. If a court finds a challenged ordinance to be facially noncompliant with RLUIPA, the United States submits that the "appropriate relief" under RLUIPA, 42 U.S.C § 2000cc-2(a), is generally to strike down the facially impermissible ordinance, not to order that proposed construction be permitted without an application. Such a procedure maintains the proper balance between the municipality's general power over land use decisions and the judiciary's role in deciding particular cases.[13] Of course, the ultimate decision rests in the court's discretion to fashion appropriate remedies.

[13] By way of analogy, in *Covenant Christian Ministries, Inc. v. City of Marietta, Georgia*, 654 F.3d 1231, 1239-44 (11th Cir. 2011), a church brought a facial attack under RLUIPA to a 2004 ordinance. The church sought injunctive relief in the form of an order that would permit construction of a church building. However, the Court found that the injunctive claims were mooted by a 2008 amendment to the ordinance. Since the challenged law was no longer in effect,

CONCLUSION

For the preceding reasons, the government respectfully submits that the land use provisions of RLUIPA are consistent with the Constitution of the United States.

Date: New York, New York
April 23, 2015

Respectfully submitted,

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the Court declined to order that a building permit be granted.