06-1464-cv

To Be Argued By:
SARAH E. LIGHT

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 06-1464-cv

WESTCHESTER DAY SCHOOL,

Plaintiff-Appellee,

—v.—

VILLAGE OF MAMARONECK, THE BOARD OF APPEALS OF THE VILLAGE OF MAMARONECK, MAURO GABRIELE,

(*caption continued on inside front cover*)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES AS INTERVENOR AND AS *AMICUS CURIAE* IN SUPPORT OF PLAINTIFF-APPELLEE

WAN J. KIM,
Assistant Attorney General

MICHAEL J. GARCIA,
United States Attorney for the Southern District of New York, Attorney for the United States.

DAVID K. FLYNN,
ERIC W. TREENE,
SARAH E. HARRINGTON,
Attorneys,
U.S. Department of Justice, Civil Rights Division, Appellate Section

SARAH E. LIGHT,
SARA L. SHUDOFSKY,
Assistant United States Attorneys, Of Counsel.
86 Chambers Street, 3rd Floor
New York, New York 10007
(212) 637-2774

In his official capacity as member of the Board of Appeals of the Village of Mamaroneck, GEORGE MGRDITCHIAN, In his official capacity as member of the Board of Appeals of the Village of Mamaroneck, PETER JACKSON, In his official capacity as member of the Board of Appeals of the Village of Mamaroneck, BARRY WEPRIN, In his official capacity as member of the Board of Appeals of the Village of Mamaroneck, CLARK NEURINGER, In his official capacity as member of the Board of Appeals of the Village of Mamaroneck, and ANTONIO VOZZA, In his official capacity as a former member of the Board of Appeals of the Village of Mamaroneck,

Defendants-Appellants,

UNITED STATES OF AMERICA,

Intervenor.

TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES

PAGE

PAGE

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 06-1464-cv

———————————

WESTCHESTER DAY SCHOOL,

Plaintiff-Appellee,

—v.—

VILLAGE OF MAMARONECK, *ET AL.*,

Defendants-Appellants,

UNITED STATES OF AMERICA,

Intervenor.

———————————

BRIEF FOR THE UNITED STATES AS INTERVENOR AND AS *AMICUS CURIAE* IN SUPPORT OF PLAINTIFF-APPELLEE

———————————

Preliminary Statement

Defendants-Appellants (collectively, the "Village" or "Defendants") appeal from a final judgment of the United States District Court for the Southern District of New York (Hon. William C. Conner, J.), entered on March 16, 2006, granting partial judgment to Plaintiff Westchester Day School ("WDS") under 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*. Judgment was entered in accordance with an opinion and order dated March 2, 2006, in which the court: (1) rejected Defendants' as-applied challenge to RLUIPA under the Establishment Clause; (2) declined to revisit its prior holdings of September 2003 and July 2005 that RLUIPA was constitutionally enacted under Section 5 of the Fourteenth Amendment, the Commerce Clause, the Establishment Clause, and the Tenth Amendment; and (3) issued an injunction ordering the Village Zoning Board of Appeals ("ZBA") to grant WDS' application for a special permit modification, allowing the school to construct a new classroom structure and to renovate existing buildings on its property. (Special Appendix ("SPA") 88, 217, 250). *See Westchester Day Sch. v. Vill. of Mamaroneck*, 417 F. Supp. 2d 477 (S.D.N.Y. 2006).

The district court's decision upholding RLUIPA's constitutionality should be affirmed. First, RLUIPA § 2(a)(1), as applied through § 2(a)(2)(C), merely codifies in the land-use context the Supreme Court's jurisprudence that individualized assessments substantially burdening Free Exercise rights require strict scrutiny. By limiting RLUIPA's land-use provisions to protecting existing constitutional rights, Congress acted well within its broad authority under Section 5 of the Fourteenth Amendment to enforce those rights. Moreover, even if any of RLUIPA's provisions might be found to prohibit slightly more conduct than is prohibited in the Supreme Court's Free Exercise cases, the statute satisfies the Court's "congruence and proportionality" test. Congress' power to enforce the Fourteenth

Amendment includes the authority both to remedy and to deter violations of rights by prohibiting a somewhat broader swath of conduct, including some constitutional conduct, as long as the legislation is congruent and proportional to the injury identified by Congress, as is the case here.

Congress also validly enacted RLUIPA § 2(a)(1), as applied through § 2(a)(2)(B), pursuant to the Commerce Clause. The statute contains a self-limiting provision, or jurisdictional element, that restricts its ambit to those cases in which "the substantial burden affects, or removal of that substantial burden would affect, commerce." 42 U.S.C. § 2000cc(a)(2)(B). The Supreme Court and this Court have both explicitly recognized Congress' power under the Commerce Clause to legislate by means of such jurisdictional elements.

Nor does RLUIPA violate the Establishment Clause of the First Amendment. RLUIPA's protections represent permissible accommodations of religious exercise that do not run afoul of the Establishment Clause. RLUIPA does not itself promote or subsidize a religious belief or message; instead, it simply frees religious groups and individuals to practice as they otherwise would in the absence of unjustified government-created burdens on religious exercise.

Finally, because RLUIPA is a valid enactment pursuant to Congress' powers under Section 5 of the Fourteenth Amendment and the Commerce Clause, the statute does not violate the Tenth Amendment.

The district court's application of RLUIPA to the facts of this case should also be affirmed. The district court properly concluded that Plaintiff had met its burden of establishing that Defendants had imposed a substantial burden on WDS' religious exercise. Moreover, the district court correctly concluded that Defendants had failed to meet their burden of demonstrating that the denial of WDS' land-use application was the least restrictive means of furthering a compelling governmental interest. Finally, the district court correctly rejected Defendants' as-applied Establishment Clause challenge. Accordingly, the district court's decision should be affirmed.

Statement of Interest

Pursuant to 28 U.S.C. § 2403(a), the United States is authorized to intervene as of right whenever the constitutionality of an Act of Congress is called into question, for "argument on the question of constitutionality." Here, Defendants challenge the constitutionality of several of RLUIPA's land-use provisions, specifically 42 U.S.C. § 2000cc(a)(1), as applied through § 2000cc(a)(2)(C) (the "individualized assessment land-use provisions"); and 42 U.S.C. § 2000cc(a)(1), as applied through § 2000cc(a)(2)(B) (the "interstate commerce land-use provisions"). The United States therefore intervened in the prior appeal before the Court in this case (Docket No. 03-9042), and now files this brief, to defend the constitutionality of these provisions of RLUIPA.

This case also concerns the interpretation and application of certain provisions of RLUIPA, specifically whether Defendants imposed a substantial burden on Plaintiff's free exercise, and whether that burden was the least restrictive means of furthering a compelling governmental interest. The Department of Justice is charged with enforcing RLUIPA, *see* 42 U.S.C. § 2000cc-2(f), and therefore has a strong interest in how courts construe the statute. Accordingly, the United States also addresses, as *amicus curiae* pursuant to Fed. R. App. P. 29(a), the court's interpretation of RLUIPA and its application of the statute to the facts of this case.

Issues Presented for Review

1. Whether the district court correctly held that: (a) RLUIPA's individualized assessment land-use provisions were constitutionally enacted pursuant to Congress' enforcement power under Section 5 of the Fourteenth Amendment; (b) RLUIPA's interstate commerce land-use provisions were constitutionally enacted under Congress' Commerce Clause power; (c) RLUIPA's land-use provisions are consistent with the Establishment Clause, both facially and as-applied; and (d) RLUIPA's land-use provisions do not violate the Tenth Amendment.

2. Whether the district court properly interpreted and applied Section 2 of RLUIPA in holding that the Village substantially burdened WDS' religious exercise, and failed to demonstrate that it did so in furtherance of a compelling governmental interest by the least restrictive means.

Statement of Facts

A. The Statutory Framework

1. RLUIPA's Land-Use Provisions

RLUIPA was signed into law on September 22, 2000. The statute 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.

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* Joint Statement of Sen. Hatch and Sen. Kennedy, 146 Cong. Rec. S7774, S7775 (daily ed. July 27, 2000) (Appendix for the United States ("GA") 46) ("Each subsection [of RLUIPA's land-use provisions] closely tracks the legal standards in one or more Supreme Court opinions").*

Section 2(a)(1) of RLUIPA 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 im-

---

* The Appendix for the United States contains the unpublished opinions and legislative history cited herein.

position 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 interest. 42 U.S.C. § 2000cc(a)(1).

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

> (A) the substantial burden is imposed in a program or activity that receives Federal financial assistance, even if the burden results from a rule of general applicability;
>
> (B) the substantial burden affects, or 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 involved.

42 U.S.C. § 2000cc(a)(2). As the constitutional bases for these three applications, Congress relied for § 2(a)(2)(A) on its authority under the Spending Clause (Art. I, § 8, cl. 1); for § 2(a)(2)(B) on its authority under the Commerce Clause (Art. I, § 8, cl. 3); and for § 2(a)(2)(C) on its authority under

section 5 of the Fourteenth Amendment. *See* 146 Cong. Rec. S7774, S7775.*

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).

2. Legislative History

Congress enacted RLUIPA's land-use provisions based on a record of widespread state and local discrimination against religious institutions in the zoning context. 146 Cong. Rec. S7775; *see also* Religious Liberty Protection Act of 1999 Report, H.R. Rep. No. 219, 106th Cong., 1st Sess. 18 (1999) ("H.R. Rep. 106-219") (GA 2); *id.* at 24 (concluding that 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 such legislation, Congress heard testimony in nine separate hearings over three years that "addressed in great detail both the need for legislation and the scope of Congressional power to enact such legislation." 146 Cong. Rec. S7774. *See also* H.R. Rep. 106-219, at 17-24 (summarizing testimony).

Witnesses presented "massive evidence" of a pattern of religious discrimination, which frus-

---

* In addition, section 2(b) of RLUIPA contains three non-discrimination and non-exclusion provisions that protect religious assemblies or institutions. *See* 42 U.S.C. §§ 2000cc(b)(1)-(3). These provisions are not at issue on this appeal.

trated the ability to assemble for worship. *See* 146 Cong. Rec. at S7774-75; H.R. Rep. 106-219, at 21-24. Specifically, the House Report indicates that land-use regulations implemented through a system of individualized assessments placed "within the complete discretion of land use regulators whether [religious] individuals had the ability to assemble for worship." H.R. Rep. 106-219, at 19. The Report further concluded that "[r]egulators typically have virtually unlimited discretion in granting or denying permits for land use and in other aspects of implementing zoning laws," *id.* at 20, and that the "standards in individualized land use decisions are often vague, discretionary, and subjective," *id.* at 24; *see also id.* at 17 ("Local land-use regulation, which lacks objective, generally applicable standards, and instead relies on discretionary individualized determinations, presents a problem that Congress has closely scrutinized and found to warrant remedial measures under its section 5 authority.").

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. 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, 1235 (daily ed. July 14, 2000) (GA 44). 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, the City of Los Angeles "refused to allow fifty elderly Jews to meet for prayer in a house in the large residential neighborhood of Hancock Park," even though the city permitted secular assemblies. *See id.* at 22. In another 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." *Id.* 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). H.R. Rep. 106-219, at 22-23 (citing *Orthodox Minyan*, 552 A.2d 772). "When the synagogue finally agreed to construct the unneeded parking spaces, the city denied the permit anyway, citing the traffic problems that

---

* A number of the so-called "anecdotal" examples of religious discrimination documented in the House Report were actually cases in which a *court* had found discrimination against religious entities. *See* H.R. Rep. 106-219, at 20 n.86 (citing *Islamic Center of Miss. v. City of Starkville*, 840 F.2d 293 (5th Cir. 1988)); *id.* at 22 nn.97-98 (citing *Family Christian Fellowship v. County of Winnebago*, 503 N.E.2d 367 (Ill. App. 1986)); and *id.* at 23 n.109 (citing *Orthodox Minyan v. Cheltenham Township Zoning Hearing Bd.*, 552 A.2d 772 (Pa. Com. 1989)).

would ensue from cars for that much parking." *Id.* The synagogue's attorney testified that he had handled more than thirty other cases of similar religious discrimination. *See id.*

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

B. Factual Background and Procedural History

Since 1948, Plaintiff Westchester Day School, an Orthodox co-educational Jewish day school, has held a special permit to operate a day school on a 25.75-acre property in the Orienta Point neighborhood of the Village of Mamaroneck. 417 F. Supp. 2d at 485, 488-89. In October 2001, WDS submitted an application for modification of its special permit to allow it to construct a new classroom structure to connect two of its existing school buildings, and to renovate two of the buildings (the "Application"). 417 F. Supp. 2d at 505. WDS prepared and submit-

ted a full Environmental Assessment Form, supplemented by analyses and studies of the relevant potential environmental effects of the proposed improvements. *Id.* The school also hired a land-planning firm, which prepared and submitted an empirical analysis of the potential effects of the improvements on traffic in the surrounding area. *Id.*

In late 2001 and early 2002, the first series of public hearings on WDS' Application were held. 417 F. Supp. 2d at 508. The ZBA requested comments on the Application from various officials and agencies. *Id.* In response, the Fire Inspector advised the ZBA that WDS' plan complied with the current code. *Id.* Similarly, the Coastal Zone Management Commission determined that the plan was consistent with the city's Local Waterfront Revitalization Program. *Id.* By letter dated October 31, 2001, the Westchester County Planning Board noted that WDS had included more parking spaces in its plan than were required by the Village Code and suggested that WDS consider reducing the number of proposed spaces. *Id.* The ZBA's traffic consultant, however, reviewed and endorsed WDS' traffic assessment. *Id.* at 508-509. After WDS responded to a few expressed concerns regarding landscaping, lighting, parking, and internal traffic circulation, the ZBA unanimously voted on February 7, 2002, to issue a "Negative Declaration" under the state's environmental regulations—a determination by the ZBA that no significant adverse environmental impacts would result and that no Environmental Impact Statement process was required. *Id.* at 510.

Shortly thereafter, however, community opposition arose and the ZBA voted to hold a rehearing to review its "negative declaration" determination. 417 F. Supp. 2d at 510-12. The ZBA held additional public hearings in the spring and summer of 2002. *Id.* By letter dated June 17, 2002, WDS memorialized commitments that it had made in response to concerns expressed at the hearings concerning lighting, landscaping, emergency access, and internal traffic circulation. 417 F. Supp. 2d at 511. WDS also confirmed its agreement to eliminate and reallocate certain parking spaces. *Id.* at 511-12. WDS further agreed to cap its enrollment. *Id.* at 512. However, on August 1, 2002, the ZBA voted to rescind the "negative declaration," and to issue a "positive declaration," which would require WDS to prepare a full Environmental Impact Statement prior to issuance of the requested special permit. *Id.* at 511-12.

On August 7, 2002, WDS sued the Village, the ZBA, and various officials for their failure to permit WDS to construct the new school building and undertake renovations to its existing facilities. *Id.* at 512. WDS thereafter moved for partial summary judgment, which was granted. *Id.* The district court concluded that the "negative declaration was not properly rescinded" and was still in full force and effect. *Westchester Day Sch. v. Vill. of Mamaroneck*, 236 F. Supp. 2d 349, 359 (S.D.N.Y. 2002).

Following that ruling, the ZBA held additional public hearings on WDS' Application. 417 F. Supp. 2d at 512. Ultimately, on May 13, 2003, the ZBA voted 3-2 to deny the Application. *Id.* at 515-16.

WDS thereafter pressed its complaint again in the district court. In its May 29, 2003 Amended Complaint (the "Complaint"), WDS asserted, among other things, that Defendants had violated Section 2 of RLUIPA in denying WDS' Application. (SPA 91). Subsequently, WDS moved for partial summary judgment on its RLUIPA claim. (SPA 91-92).

C. The District Court's September 2003 Decision

The district court granted summary judgment to Plaintiff by Opinion and Order dated September 5, 2003, amended on October 1, 2003. *See Westchester Day Sch. v. Vill. of Mamaroneck*, 280 F. Supp. 2d 230 (S.D.N.Y. 2003). The court rejected Defendants' constitutional challenges to RLUIPA, and granted summary judgment to Plaintiff on the merits of its RLUIPA claim.

1. The Constitutional Challenge

a. Section 5 of the Fourteenth Amendment

Distinguishing RLUIPA from the Religious Freedom Restoration Act ("RFRA"), Pub. L. No. 104-141, 107 Stat. 1488, *codified at* 42 U.S.C. § 2000bb *et seq.*, which the Supreme Court struck down in *City of Boerne v. Flores*, 521 U.S. 507 (1997), the district court found RLUIPA § 2(a)(1), as applied through § 2(a)(2)(C), to be a valid exercise of Congress' power under Section 5 of the Fourteenth Amendment. The court held that RLUIPA had avoided the flaws of RFRA by not targeting "neutral laws of general applicability." *Westchester Day Sch.*, 280 F. Supp. 2d at 234. Rather, the court found RLUIPA to

be consonant with the distinction set forth in *Employment Division, Dept. of Human Resources of Oregon v. Smith*, 494 U.S. 872 (1990), between neutral laws of general applicability and those situations where "'the State has in place a system of individual[ized] exemptions,' but nevertheless refuses 'to extend that system to cases of religious hardship.'" *Westchester Day Sch.*, 280 F. Supp. 2d at 238 (citing *Smith*, 494 U.S. at 884). The court found that by targeting "'low visibility decisions'" that carry the risk of "'idiosyncratic application,'" *Westchester Day Sch.*, 280 F. Supp. 2d at 237 (quoting *Freedom Baptist Church of Delaware County v. Township of Middletown*, 204 F. Supp. 2d 857, 873-74 (E.D. Pa. 2002)), RLUIPA avoids a fatal defect of RFRA, which intruded "'at every level of government, displacing laws and prohibiting official actions of almost every description and regardless of subject matter,'" *Westchester Day Sch.*, 280 F. Supp. 2d at 237 (quoting *City of Boerne*, 521 U.S. at 532). Moreover, the court held that RLUIPA codifies firmly established Supreme Court law under its Free Exercise and Equal Protection jurisprudence, and "does not 'attempt a substantive change in constitutional protections,' that led to the demise of RFRA in *City of Boerne*." *Westchester Day Sch.*, 280 F. Supp. 2d at 237 (citing *Freedom Baptist Church*, 204 F. Supp. 2d at 874).

Finally, the court held that RLUIPA § 2(a)(1), as applied through § 2(a)(2)(C), is the kind of "congruent and proportional" remedial provision that Congress is empowered to adopt under Section 5 of the Fourteenth Amendment. *Westchester Day Sch.*, 280

F. Supp. 2d at 237. The court noted that Congress is "'not limited to mere legislative repetition of [the Supreme] Court's constitutional jurisprudence,' but may also prohibit a 'somewhat broader swath of conduct.'" *Id.* (citing *Bd. of Trustees of the Univ. of Alabama v. Garrett*, 531 U.S. 356, 365 (2001)).

b. Commerce Clause

The district court further held that RLUIPA § 2(a)(1), as applied through § 2(a)(2)(B), is a valid exercise of Congress' power under the Commerce Clause. *See Westchester Day Sch.*, 280 F. Supp. 2d at 237-38. The Court reasoned that WDS' activities in operating an orthodox Jewish day school constitute an economic endeavor within the meaning of the Commerce Clause, *see id.*, although the court did not specifically discuss whether that economic endeavor affects interstate commerce. The court further held that because RLUIPA § 2(a)(2)(B) on its face has an interstate commerce jurisdictional element, the court, like the court in *Freedom Baptist Church*, was "in no position to quibble with Congress' ultimate judgment that the undeniably low visibility of land regulation decisions may well have worked to undermine the Free Exercise rights of religious organizations around the country." *Id.* at 238 (quoting *Freedom Baptist Church*, 204 F. Supp. 2d at 867).

c. Establishment Clause

The district court also held that RLUIPA passes constitutional muster under the three-part *Lemon*

test. *See id.* at 238 (citing *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971)).

d. Tenth Amendment

Finally, the district court held that because RLUIPA is a valid enactment pursuant to Congress' powers under the Commerce Clause and Section 5 of the Fourteenth Amendment, RLUIPA does not violate the Tenth Amendment. *See Westchester Day Sch.*, 280 F. Supp. 2d at 239.

2. The Merits

Finding no genuine issue of material fact in dispute on Plaintiff's RLUIPA claim, the district court granted summary judgment to Plaintiff, and ordered the ZBA to grant the Application. *Id.* at 239-40.

Noting that the Supreme Court has "articulated the substantial burden test differently over the years," the court concluded that the "complete" denial of the Application substantially burdened Plaintiff's religious exercise. *Id.* The court found that the proposed modifications were "both necessary and legitimate changes in furtherance of plaintiff's religious mission of educating students with a dual curriculum of secular and Judaic studies, making defendants' complete denial of plaintiff's Application a substantial burden on their exercise of religion." *Id.* at 241. The court rejected Defendants' claim that there is no substantial burden if the students have been, and continue to be, able to pray and be educated, noting that "[i]t is the burden on the quality of the religious education that concerns

us here. While it is true that the students of WDS may still, without the special permit modification, gather to pray and be educated, their religious experience is limited by the current size and condition of the school buildings." *Id.* at 241-42.

The court further concluded that Defendants had failed to meet their burden of demonstrating that the denial of the Application was the least restrictive means of furthering a compelling government interest, finding, *inter alia*, that "traffic concerns have never been deemed compelling government interests." *Id.* at 242. Moreover, the court held that Defendants' second stated concern, an insufficient number of parking spaces, was "even less compelling." *Id.* In light of these findings, the court did not consider whether the denial was the least restrictive means of furthering these interests. *Id.* at 243 n.9. Accordingly, finding no genuine issues of material fact in dispute, the court granted summary judgment to Plaintiff under RLUIPA. *Id.* Defendants appealed.

D. This Court's September 2004 Decision

On September 27, 2004, this Court vacated the district court's 2003 Order, holding that material issues of fact precluded summary judgment, and remanded the case for further proceedings. *See Westchester Day Sch. v. Vill. of Mamaroneck*, 386 F.3d 183 (2d Cir. 2004). The Court found that the district court's holding that Defendants had substantially burdened Plaintiff's religious exercise was based on two primary factual conclusions, neither of which was appropriate on summary judg-

ment: first, that the ZBA's denial was a "complete denial" of the Application " 'in its entirety,' apparently implying that the Board's action foreclosed reconsideration of all aspects of the proposal, so that no modification of the proposal would be considered;" and second, that "although the great majority of the proposed construction was of facilities designed to fulfill the secular functions of a school, . . . 'religious exercise,' as protected by RLUIPA, was at stake in all aspects of the proposed plan," and the proposed modifications were necessary to further WDS' "religious mission." *Id*. at 186.

As to the first point, the Court found that although the district court's conclusion regarding the completeness of the denial "may well be correct," reasonable fact finders could disagree as to whether the denial was "complete" and thus foreclosed consideration of a modified plan. *Id.* at 187-88. The Court added, however, that "in some circumstances denial of the precise proposal submitted may be found to be a 'substantial burden,' notwithstanding a board's protestations of willingness to consider revisions." *Id.* at 188 n.3.

As to the second point, the Court questioned the district court's apparent assumption that because the school itself was religious, the entire construction project was religious, absent any analysis of whether the specific facilities to be constructed would be "devoted to a religious purpose." *Id.* at 189. The Court "commend[ed certain] considerations" to the district court's attention on remand, including its "doubt" that RLUIPA can be interpreted so broadly as to protect "any improvement or

enlargement proposed by a religious school to its secular educational and accessory facilities" from "regulation or rejection by a zoning board so long as the proposed improvement would enhance the overall experience of the students." *Id.* at 189. The Court stated that "RLUIPA occupies a treacherous narrow zone between the Free Exercise Clause, which seeks to assure that government does not interfere with the exercise of religion, and the Establishment Clause, which prohibits the government from becoming excessively entwined with religion in a manner that would express preference for one religion over another, or religion over irreligion." *Id.* It further cautioned that "if RLUIPA means what the district court believes it does, a serious question arises whether it goes beyond the proper function of protecting the free exercise of religion into the constitutionally impermissible zone of entwining government with religion in a manner that prefers religion over irreligion and confers special benefits on it." *Id.* at 190. Accordingly, the Court advised the district court to make a careful factual assessment of whether denial of the Application substantially burdened Plaintiff's free exercise. *Id.*

This Court also concluded that summary judgment was improper as to the "least restrictive means" prong of the inquiry, because the district court's conclusion that the concerns expressed by the ZBA did not represent compelling government interests was not "compelled by the record." *Id.* at 190. Noting that there is no controlling authority holding that "traffic problems are incapable of being deemed compelling," the Court cautioned that

"[p]rudence counsels against reaching out to establish a far-reaching constitutional rule when there are many other bases upon which this case may ultimately be decided." *Id.* at 191. The Court further noted that the district court's conclusions regarding the persuasiveness of traffic experts and other experts were findings of fact, and required a trial. *Id.* In light of the disputed factual issues precluding summary judgment, the Court vacated and remanded the matter for further proceedings. *Id.*

E. The District Court's July 2005 Decision

Following remand, Defendants moved to dismiss WDS' Complaint pursuant to Rule 12(b)(6) or, in the alternative, for summary judgment, on the grounds that, *inter alia*, the ZBA's denial was not a "complete denial," the alleged purpose of the project was "largely secular" and therefore did not meet the standard for religious exercise under RLUIPA, and RLUIPA was unconstitutional on its face. (SPA 74-75). Defendants' constitutional challenge raised no new arguments, but merely referred back to arguments presented to the district court prior to the district court's 2003 decision. (SPA 76).

By decision dated July 27, 2005, the district court rejected Defendants' facial constitutional challenge, and reaffirmed in a sentence its prior holding that RLUIPA is constitutional under Section 5 of the Fourteenth Amendment, the Commerce Clause, the Establishment Clause, and the Tenth Amendment. *See Westchester Day Sch. v. Vill. of Mamaroneck*, 379 F. Supp. 2d 550, 554 n.3 (S.D.N.Y. 2005). (SPA 77).

F. The District Court's March 2006 Decision

In November 2005, the court held a bench trial. (SPA 90, 93). In post-trial briefing, Defendants argued that RLUIPA's land-use provisions, as applied to this case, violate the Establishment Clause. (SPA 216-17). The United States filed a brief in support of the constitutionality of RLUIPA, as applied, under the Establishment Clause. (JA 13 (R. Doc. 86)).

On March 2, 2006, the district court issued a decision upholding RLUIPA's constitutionality as applied under the Establishment Clause and granting judgment to WDS on the merits. *See Westchester Day Sch.*, 417 F. Supp. 2d 477. As a threshold matter, the district court concluded that Plaintiff had established the jurisdictional prerequisites for a suit under RLUIPA § 2(a)(1), as applied through § 2(a)(2)(B), in that the school employs out-of-state teachers and enrolls out-of-state students, and that the proposed construction would affect commerce. *Id.* at 541. The district court also found that the "individualized assessment" criterion of § 2(a)(2)(C) was satisfied, as the ZBA's standards for reviewing the Application constituted an "individualized assessment." *Id*. at 542. The court then held that Defendants violated RLUIPA in this case.

1. The District Court's Findings of Fact

The district court's findings of fact, all of which are amply supported by the record, are summarized in relevant part below.

a. WDS' Integrated Curriculum, and the Deficiencies in the School's Existing Facilities

At the outset, the court noted WDS' mission: to provide its students with a dual curriculum education, enabling them to become "observant practicing members of the Orthodox Jewish community" who are proud of both their Jewish and American heritage. 417 F. Supp. 2d at 495. The "dual curriculum at WDS integrates both Judaic and general studies such that religious education and practice permeates the students' education in all grades." *Id.* In pre-kindergarten and kindergarten, "there is no division between Judaic and general studies." *Id.* In grades one through eight, while the school day is split roughly in half between Judaic studies and general studies, "virtually all of the general studies courses are permeated with religious aspects and the entire faculty (including general studies teachers) cooperate on various Judaic and Jewish-themed activities." *Id.* at 496. "Religious instruction is integrated, to varying degrees, in general studies classes such as language arts, social studies, math and science, as well as music and art." *Id.* Prayers are also "integrated into the school day," and the school adheres to kosher dietary laws and a dress code dictated by religious observance. *Id.*

The court further found that WDS' existing facilities are "inadequate in several critical respects," including that the school: (1) "lacks sufficient classroom space to accommodate its dual curriculum Judaic and general studies education," forcing WDS to increase class size, to the detriment of the Judaic

studies program, and to use closets and hallways as instruction spaces; (2) "does not have adequate space" for "small-group instructional rooms;" and (3) "does not have a large room to use for, *inter alia*, religious instruction, group prayer and Jewish performances and assemblies." *Id.* at 491.

Further, the court found that the "inadequacy of WDS's existing facilities also significantly interferes with and has had a chilling effect on its ability to attract and retain students." *Id.* at 494. Enrollment at WDS, the court found, "has been declining since 1999," a decline caused, "at least in part," by the Village's actions, "which have precluded WDS from remedying the inadequacies of its facilities and constructing facilities available at other Orthodox Jewish day schools." *Id.* The court concluded that the continued loss of students, as well as faculty, "will undercut the objectives of the mission and ultimately imperil the School's viability." *Id.*

b. WDS' Efforts to Address Any Concerns

The district court also detailed WDS' sustained efforts to meet any concerns presented by its proposed construction, including its efforts following the initiation of this litigation. *See id.* at 511-14; *supra* at 12-14.

On January 10, 2003, after WDS filed this lawsuit, the district court held a conference with the parties, at which the court directed the ZBA to provide WDS with a list of outstanding concerns that might impede approval of the Application. *Id.* at 513. The ZBA sent a letter with that information to

WDS, identifying concerns related to parking and requesting additional information about traffic at two intersections. *Id.* Prior to sending this letter, none of the ZBA's traffic consultants had identified either of these two intersections as locations that should be studied. *Id.* On January 30, 2003, WDS responded to each of the ZBA's concerns. *Id.*

On February 6, 2003, the ZBA held a public hearing to "wrap up" WDS' application. *Id.* At the meeting, the ZBA did not inform WDS that its January 30 responses were in any way deficient and did not raise any issues other than the possibility of reducing the overall square footage of the proposed project and clarifying certain traffic issues. *Id.* at 513-14. WDS provided tentative architectural plans that reduced the size of the new building, and agreed to proceed with those plans instead of the plans it had previously submitted, if the ZBA "was more inclined to accept [this] proposal." *Id.* at 514. The ZBA continued to deliberate on April 3, May 1, and May 13, 2003. *Id.* During that time period, the ZBA's consultants advised the ZBA about conditions it could impose on WDS if it approved the permit and provided a draft resolution approving the permit subject to certain conditions. *Id.* at 514-15. That draft resolution was never circulated to members of the ZBA, however, and on May 13, 2003, the ZBA voted 3-2 to deny the Application. *Id.* at 515-16. The May 13 resolution denied WDS' Application on the following three grounds: (1) traffic; (2) parking; and (3) intensity of use, including "the overall physical size of the structure, its location on campus and the effect it would have on the surrounding neighbors." *Id.* at 517.

After denying the Application, every member of the ZBA destroyed all of his or her documents, including handwritten notes, relating to WDS' Application, despite the existence of this lawsuit. *Id.* at 516. ZBA members testified that they considered the May 13 vote to be the "final resolution" of WDS' Application. *Id.* at 516.

c. The Denial of the Application

Regarding the Village's denial of the Application, the district court noted that "[m]any of the grounds identified in the [denial] were conceived after the ZBA closed the hearing process, affording WDS no opportunity to respond." *Id.* at 518. At no time, moreover, did any member of the ZBA move to reopen the hearing. *Id.* Against this backdrop, the court reviewed each of the three stated bases for the ZBA's denial of the Application. *Id.* at 519-39.

First, the court found that while the ZBA stated in its denial that the "single most important element" it considered in assessing the Application was the impact of the project on traffic, the ZBA had disregarded not only the traffic study submitted by WDS, but also the opinions of its own traffic experts, as well as its own findings in the Negative Declaration. *Id.* at 519. Moreover, the court found, the ZBA "disregarded these conclusions and opinions despite the lack of any contradictory traffic study, or any inconsistent empirical data in the public record." *Id.* The ZBA's decisionmaking, the court found, "evidences a lack of fairness in the hearing process afforded WDS." *Id.* at 521.

More specifically, the court concluded that "the ZBA's key traffic findings are clearly wrong," and that "[t]hose that are not demonstrably false are conclusory, and do not in any material respect detract from the conclusions of the WDS [traffic study]." *Id.* at 521. Among a long litany of the Village's "demonstrably false" statements in denying the Application, *see id.* at 519-34, the court noted that in denying the Application, the ZBA found WDS' alleged refusal to provide enhanced traffic studies "[m]ost disturbing," *id.* at 532. At trial, however, Defendants conceded that WDS had not refused to conduct any traffic studies and, indeed, had provided, in addition to its initial study, a supplemental traffic assessment. *Id.* at 532-33. As to that supplemental assessment, the court found that the ZBA had never shown it to its own traffic experts; nor was it clear whether the person who drafted the denial had even reviewed the assessment prior to drafting. *Id.* at 522. Further, the court found that in the "months leading up to the [denial of the Application]," the ZBA's "own traffic experts also had repeatedly suggested that any potential impact of the Project on traffic could be reasonably mitigated through an enrollment cap and a traffic management plan." *Id.* at 534. In fact, the consultant had sent to the ZBA a draft resolution *approving* the Application, subject to certain conditions (including an enrollment cap and a traffic management plan). *Id.* at 514-16. That draft, however, was not circulated to the ZBA members before the May 13, 2003 hearing; the ZBA members did not discuss

approving the Application subject to any conditions; and instead the chairman of the ZBA presented a single resolution denying the Application. *Id*.

The court similarly rejected the Village's stated concerns relating to parking. *See id.* at 534-36. The court found, *inter alia*, that: (1) the ZBA's "indication" in its denial of the Application that the proposed renovation would result in twenty-five additional classrooms "is patently false;" (2) at no time before the denial did the ZBA inform WDS that its project "provided for insufficient parking, or required any parking variance;" and (3) the determination that the parking was insufficient was inconsistent with the ZBA's earlier determination that the proposed parking complied with zoning requirements, and inconsistent with "repeated requests" by the Village that WDS actually *reduce* the number of parking spaces. *Id.* at 534.

Finally, as to the ZBA's third stated reason for the denial, the court found that the evidence failed to support the conclusion that the intensity of use of the property would pose a threat to health, safety, or welfare, and that "no rational decisionmaker could conclude that it did." *Id.* at 536. On this point, the court noted that during the Application process, WDS had "clearly and repeatedly" responded to the ZBA's alleged concern that it intended to expand upon its property, and found that the evidence "establishes the veracity of WDS's assertions, and, therefore, the unreasonableness of the ZBA's speculations to the contrary." *Id.* at 537. The court further noted that WDS had agreed to cap its enroll-

ment if asked to do so, and that no evidence in the record suggested that the size of the proposed building, in and of itself, posed any threat to the neighborhood. *Id.* at 538. The court also noted elsewhere in its findings that at the March 2003 hearing, WDS had provided a "detailed presentation by its architect on a tentative proposal that reduced the size" of one of the structures, and had "advised the ZBA that it would secure approval to construct this smaller structure if the ZBA was more inclined to accept this modified proposal." *Id.* at 514. WDS also proposed to add "additional evergreen screening" to address any concerns at issue regarding aesthetics and visual impacts. *Id.* Notwithstanding these proposals by WDS, and notwithstanding that the ZBA's own consultants had proposed conditions that could be imposed on an approval of the Application, the ZBA closed the hearing and thereafter denied the Application. *Id.*

Based on the extensive record before it, the court concluded:

> [T]he stated reasons for denying the Application . . . are not substantiated by evidence in the public record before the ZBA, and are, to a substantial extent, based on serious factual errors. The Application apparently was denied not because it failed to comply with the Village Code or otherwise would have an adverse impact on public health, safety or welfare, but rather upon undue deference to the opposition of a

> small but politically well-connected group of neighbors.

Id. at 539.

2. Substantial Burden on Religious Exercise

The district court then held that Defendants' denial of the Application substantially burdened Plaintiff's religious exercise. *Id.* at 542-44. The court was "mindful of the Second Circuit's caution that RLUIPA cannot be so broad as to protect any construction plan merely because an institution pursues a religious mission." *Id.* at 543. Accordingly, the district court inquired into whether the facilities to be constructed were to be "devoted to a religious purpose." *Id.* at 544 (citing *Westchester Day Sch.*, 386 F.3d at 189). The court stressed the need for a "careful, fact-sensitive balancing of secular purposes and religious purposes in relation to the spaces being constructed, as opposed to a strict requirement of exclusive use for religious purposes, which would be inconsistent with the text and legislative history of RLUIPA." *Id.* at 544.

Applying these principles, the court found that a "major portion of the proposed facilities will be used for religious education and practice or are inextricably integrated with, and necessary for WDS's ability to provide, religious education and practice—*i.e.*, engage in 'religious exercise.'" *Id.* at 545-46. Among other things, the court found that the proposed construction was for classrooms and special instruction rooms dedicated to the teaching of "Hebrew, Talmud and other strictly Judaic topics, as well as a multi-purpose room designed to enable

group prayer and events devoted to expressions of Judaism." *Id.* at 544.

The court next concluded that the denial of the Application constituted a "substantial burden" on Plaintiff's religious exercise. *Id.* at 546-50. Surveying relevant case law, the court held that "for purposes of Section 2(a)(1) of RLUIPA, a 'substantial burden' exists when a governmental action seriously impedes religious exercise." *Id.* at 547. The court held that Defendants' denial of the Application was a "substantial burden" because the denial precluded the construction of much-needed facilities and significantly interfered with "WDS's ability to provide an adequate and effective dual curriculum of Judaic and general studies education, and so limited its ability to retain and attract students and faculty as to imperil its continued existence." *Id.* at 547 (citing cases).

Finally, acknowledging this Court's determination that a factual question existed with respect to the district court's pre-trial conclusion that the ZBA's denial was "complete," the court concluded that the "facts adduced at trial prove it so." *Id.* at 548. Noting that the "mere opportunity to continue filing applications does not preclude the finding of a substantial burden," the court concluded: "[B]ased on the extensive record before the Court, it is clear that any purported willingness on the part of the ZBA even to consider fairly, much less approve, another application actually filling WDS's needs is, at the least, highly suspect." *Id.* at 549-50. In light of Plaintiff's long special permit history with the

Village, the court concluded that the denial of the Application was, in fact, complete. *Id.*

3. Compelling Governmental Interest/Least Restrictive Means

Next, the court held that Defendants had failed to meet their burden of demonstrating that the denial of the Application was the least restrictive means of furthering any compelling governmental interest. *Id.* at 554.

Assuming without deciding that concerns about traffic constitute a compelling governmental interest, the court held that the denial was not the least restrictive means of furthering that interest, because "measures existed to mitigate any potential increase in traffic." *Id.* at 551. Indeed, the court found that the ZBA's own consultants had proposed such mitigating measures. *Id.* at 551-52. Moreover, the court found no evidence of damage to property values, and in any event held that any adverse impacts due to the size of the building and the setback from the street could have been mitigated by measures other than a complete denial of the Application. *Id.* at 552-53. Regarding "potentially adverse visual impacts," the court found that WDS had presented a "comprehensive landscaping plan" that had not been proven deficient in any way. *Id.* at 553. Nor had the Defendants demonstrated that no alternatives were available. *Id.*

Finally, the court rejected Defendants' argument that lack of parking posed a threat to public safety, in light of Defendants' repeated demands during the application process that Plaintiff decrease the num-

ber of proposed parking spaces: "[D]efendants cannot reasonably demand for one-and-a-half years that WDS reduce the number of parking spaces only to turn around and—without affording WDS any opportunity to respond—contend that the lack of parking somehow poses a threat to public safety. . . . The parking issue is obviously an afterthought effort to bolster a flimsily supported decision." *Id.* at 554.

4. The As-Applied Establishment Clause Challenge

Having resolved the statutory claims in WDS' favor, the district court rejected Defendants' as-applied challenge to RLUIPA under the Establishment Clause.* Defendants had contended that a "finding in favor of WDS on its RLUIPA claim violates the Establishment Clause of the First Amendment by impermissibly favoring religion over nonreligion and providing WDS with a sword that no atheist or agnostic can obtain." *Id.* at 555 (internal quotation marks and citations omitted). That argument relied on Defendants' assumption that because the beit midrash (*i.e.*, Jewish library) and shul (*i.e.*, chapel) had already been built, the re-

---

* The court noted that Defendants' facial challenge to RLUIPA's constitutionality was "fully considered and rejected by the court" in its prior orders, and that because Defendants did not raise any new arguments with respect to the challenge, the court would not "revisit th[e] issue." *Id.* at 555 n.86.

mainder of the construction project concerned only "secular" facilities. *Id.*

As a threshold matter, the district court held that RLUIPA's land-use provisions were constitutional because they alleviated "exceptional government-created burdens on private religious exercise" while taking "adequate account of the burdens a requested accommodation may impose on non-beneficiaries," and ensuring neutral application "among different faiths." *Id.* at 557 (citing *Cutter v. Wilkinson*, 544 U.S. 709, 720 (2005)). The court held that Congress passed RLUIPA for the proper purpose of "lifting a regulation that burdens the exercise of religion." *Id.*

The court then rejected Defendants' assumptions that the building project "can be neatly cleaved into its secular and religious components," and that the Second Circuit "mandated such a clean division in its remand decision." *Id.* at 558. Instead, the court noted, the Second Circuit had remanded the case for further factual development, and on remand the evidence at trial established that many of the "so-called secular classrooms and small-group instructional rooms would be devoted exclusively to teaching purely Judaic studies." *Id.* In addition, "other supposedly secular facilities such as the multi-purpose room will be frequently or even predomina[nt]ly used to accommodate WDS's religious needs." *Id.* at 558. Accordingly, the court concluded that WDS' proposed use of the property was for religious exercise, and therefore held that as applied to the Application, RLUIPA § 2(a)(1) does not violate the Establishment Clause. *Id.*

Having resolved both the merits and the constitutional issues, the Court granted judgment to Plaintiff. *Id.* Defendants filed a timely notice of appeal on March 28, 2006. (Joint Appendix ("JA") 6767).

Summary of Argument

The district court's decision upholding the constitutionality of RLUIPA's land-use provisions should be affirmed. Because the challenged provisions of RLUIPA were constitutionally enacted pursuant to Congress' powers under Section 5 of the Fourteenth Amendment, *see* Point I.A, *infra*, and the Commerce Clause, *see* Point I.B, *infra*, and violate neither the Establishment Clause, *see* Point I.C, *infra*, nor the Tenth Amendment, *see* Point I.D, *infra*, the Village's constitutional challenge should be rejected.

Moreover, the district court's application of RLUIPA to the facts of this case should also be affirmed, because the evidence established that Defendants substantially burdened Plaintiff's religious exercise, *see* Point II.A, *infra*, and failed to demonstrate that they were furthering a compelling governmental interest in the least restrictive manner, *see* Point II.B, *infra*.

Standard of Review

This Court reviews the constitutionality of a statute *de novo*. *United States v. Pettus*, 303 F.3d 480, 482 (2d Cir. 2002). This Court reviews the district court's findings of fact for clear error, and conclusions of law *de novo*. *Contship Containerlines, Ltd. v. PPG Indus., Inc.*, 442 F.3d 74, 77 (2d Cir. 2006).

ARGUMENT

POINT I

THE DISTRICT COURT CORRECTLY UPHELD THE CONSTITUTIONALITY OF RLUIPA*

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

RLUIPA § 2(a)(1), as applied through § 2(a)(2)(C), is a constitutional exercise of Congress' Fourteenth Amendment power, because it codifies constitutional prohibitions against discrimination. 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." U.S. Const. amend. XIV, § 1. Section 5 of that Amendment pro-

---

* Although it is well established that if a case can be decided on other than constitutional grounds the court should avoid reaching the constitutional issues, *see Ashwander v. Tennessee Valley Authority*, 297 U.S. 288, 346-47 (1936) (Brandeis, J., concurring); *Slack v. McDaniel*, 529 U.S. 473, 485 (2000), this case requires the Court to reach the constitutional issues. As discussed *infra*, Point II, the district court correctly determined that Defendants substantially burdened Plaintiff's free exercise, without furthering a compelling governmental interest by the least restrictive means.

vides Congress with the "power to enforce, by appropriate legislation, the provisions of this article." U.S. Const. amend. XIV, § 5. Congress' Section 5 power allows it to pass "corrective legislation . . . such as may be necessary and proper for counteracting . . . such acts and proceedings as the states may commit or take, and which by the amendment they are prohibited from committing or taking." *The Civil Rights Cases*, 109 U.S. 3, 13-14 (1883); *United States v. Georgia*, 126 S. Ct. 877, 881 (2006) (holding that Congress has the power to remedy violations of the Fourteenth Amendment through corrective legislation); *Nevada Dep't of Human Resources v. Hibbs*, 538 U.S. 721 (2003) (same).

Congress enacted RLUIPA § 2(a)(1), as applied through § 2(a)(2)(C), to "secure the guarantees" of the First Amendment as applied to the states by the Fourteenth Amendment. *See* 146 Cong. Rec. at S7775; *see also* H.R. Rep. 106-219, at 17. Because these provisions of RLUIPA enforce existing constitutional rights, they are necessarily a valid exercise of Congress' core power under Section 5 of the Fourteenth Amendment "to enforce, by appropriate legislation," the rights of free exercise.

1. The Supreme Court Requires Strict Scrutiny of Individualized Assessments That Substantially Burden Free Exercise

Although the right of free exercise does not relieve a person of the obligation to comply with a neutral, generally applicable law, *see Smith*, 494 U.S. at 890, the Free Exercise Clause "forbids subtle departures from neutrality" and "covert suppres-

sion of particular religious beliefs," *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 534 (1993). To protect against such infringement, the Supreme Court has repeatedly distinguished between the rational basis scrutiny that applies to generally applicable neutral laws, and the strict scrutiny that applies "where the State has in place a system of individualized exemptions," but "refuse[s] to extend that system to cases of 'religious hardship.'" *Smith*, 494 U.S. at 884; *Fifth Avenue 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").

In *Sherbert v. Verner*, 374 U.S. 398 (1963), the Court held that a state could not deny unemployment benefits to a member of the Seventh Day Adventist Church who became unemployed because her religious convictions prevented her from working on Saturdays. Because the state permitted exemptions to the denial of unemployment benefits based on "good cause," the Court held that it could not refuse to accept as "good cause" the Plaintiff's religious reason for not working on Saturdays without violating the Free Exercise Clause, where the state could not show that the denial of the exemption furthered a compelling state interest and did so by the least restrictive means available. *See id.* at 401-02, 407. *See also Hobbie v. 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, ex-

pressly rejecting application of lesser standard of scrutiny in individualized assessment context); *Thomas v. Review Bd. of Indiana Employment 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* reaffirmed this rule. Although the Court in *Smith* held that the strict scrutiny test did not apply to neutral laws of general applicability that incidentally burden religious exercise (in *Smith*, an Oregon criminal law prohibiting the ingestion of peyote), *see* 494 U.S. at 885, the Court specifically distinguished those situations involving "a system of individualized exemptions" administered by the government. *See id.* at 884. Indeed, the Court expressly reaffirmed the applicability of the strict scrutiny standard used in *Sherbert* and *Thomas* to such cases. *See id.* at 884 ("[W]here the State has in place such a system . . . it may not refuse to extend that system to cases of 'religious hardship' *without compelling reason*.") (emphasis added). The Court in *Smith* also specifically characterized the unemployment compensation regimes 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.* at 884 (emphasis added).

Subsequent to its *Smith* decision, the Supreme Court again applied the Free Exercise Clause "individualized assessments" doctrine in *Lukumi*, where

the Court struck down an animal cruelty ordinance that required local government officials to evaluate the justification for animal killings on the basis of whether such killings were "unnecessar[y]." *Lukumi*, 508 U.S. at 537. Because the ordinances required "an evaluation of the particular justification for the killing," including whether the killing was for religious purposes, the Court found the ordinances to be a system of "individualized assessments" of the reasons for the relevant conduct. *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.

The Court then held that the ordinance at issue did not survive strict scrutiny, because the City of Hialeah had devalued the unpopular Santeria Church's religious reasons for killing animals in connection with its practice of animal sacrifice, "judging [these reasons] to be of lesser import than nonreligious reasons" such as hunting, slaughter for food, or euthanasia. *Id.* at 537. Further, the Court held that the ordinances were not the least restrictive means to achieve their stated ends. *Id.* at 529-30. Thus, the Supreme Court reaffirmed the rule set forth in *Sherbert* and its progeny that where governments employ individualized assessments, decisions that substantially burden free exercise must be evaluated under the strict scrutiny standard.

In doing so, moreover, the Court "confirmed that the presence of 'individualized assessments' remains of constitutional significance in Free Exer-

cise cases even outside the unemployment compensation arena." *Freedom Baptist*, 204 F. Supp. 2d at 868. Accordingly, the Village's assertion in this case that strict scrutiny is limited to the unemployment benefits context, Brief for Defendants-Appellants ("Br.") at 60, is plainly wrong. *See also Rader v. Johnston*, 924 F. Supp. 1540, 1552 n.23 (D. Neb. 1996) ("[T]he Supreme Court's latest free exercise decision, *Lukumi Babalu Aye*, removes much of the doubt about the role of individualized exemptions outside the unemployment compensation context.").

2. RLUIPA § 2(a)(1), As Applied Through § 2(a)(2)(C), Codifies the Supreme Court's Free Exercise Jurisprudence

Because RLUIPA § 2(a)(1), as applied through § 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.

In enacting RLUIPA, Congress determined that land-use decisions frequently involve a system of discretionary individualized assessments. *See* 146 Cong. Rec. at S7775 (record during Congressional hearings demonstrates "a widespread practice of individualized decisions to grant or refuse permission to use property for religious purposes"); H.R. Rep. 106-219, at 20 (finding that regulators "typically have virtually unlimited discretion in granting or denying permits for land use and in other aspects of implementing zoning laws"). Indeed, zoning ordinances "must by their nature impose individual assessment regimes. That is to say, land use

regulations through zoning codes necessarily involve case-by-case evaluations of the propriety of proposed activity against extant land use regulations." *Freedom Baptist*, 204 F. Supp. 2d at 868. *See also Guru Nanak Sikh Soc'y v. County of Sutter*, __ F.3d __, 2006 WL 2129737, at *5 (9th Cir. Aug. 1, 2006) (holding that RLUIPA applies "when the government may take into account the particular details of an applicant's proposed use of land when deciding to permit or deny that use").

Consistent with these principles, lower courts have faithfully applied the *Smith/Lukumi* individualized assessments doctrine to local land-use decisions challenged directly under the First Amendment. *See Cottonwood Christian Ctr. v. Cypress Redevelopment Agency*, 218 F. Supp. 2d 1203, 1222 (C.D. Cal. 2002) ("Even in the absence of RLUIPA, a strict scrutiny standard of review is appropriate in this case under the Free Exercise Clause," where church was denied conditional use permit to hold religious services); *Al-Salam Mosque Foundation v. City of Palos Heights*, No. 00-4596, 2001 WL 204772, at *2 (N.D. Ill. Mar. 1, 2001) ("Land use regulation often involves individualized governmental assessment of the reasons for the relevant conduct," requiring strict scrutiny) (internal quotation marks omitted); *Keeler v. Mayor & City Council of Cumberland*, 940 F. Supp. 879, 886 (D. Md. 1996) (applying strict scrutiny to historic preservation ordinance, which called for assessment of the "best interest of a majority of persons in the community," as a system of individualized assessments); *Alpine Christian Church v. County Comm'rs of Pitkin Cty.*, 870 F. Supp. 991, 994-95 (D. Colo. 1994) (applying

strict scrutiny to denial of special use permit for operation of school within Church building pursuant to discretionary standard of "appropriate-[ness]"); *First Covenant Church of Seattle*, 120 Wash. 2d 203, 840 P.2d 174, 215 (1992) (holding city landmark ordinances not generally applicable because they "invite individualized assessments of the subject property and the owner's use of such property, and contain mechanisms for individualized exemptions"); *Korean Buddhist Dae Won Sa Temple of Haw. v. Sullivan*, 87 Haw. 217, 953 P.2d 1315, 1345 n.31 (1998) (holding that zoning code created individualized exemptions and thus was subject to strict scrutiny).*

---

* *Rector, Wardens, and Members of Vestry of St. Bartholomew's Church v. City of New York*, 914 F.2d 348 (2d Cir. 1990), in which this Court held New York's landmark law to be a neutral, generally applicable law, is inapposite. Decided before the Supreme Court's decision in *Lukumi*, this Court neither cited the individualized assessments language set forth in *Smith*, nor evaluated whether the landmark law at issue in that case constituted a governmental system in which individualized assessments were made. The Court merely held that strict scrutiny did not apply to the denial of the zoning permit at issue because the church, which had sought to replace its landmarked church building with a commercial office tower, had not proven that the denial substantially burdened its free exercise of religion. *See id.* at 355. ("[W]e understand Supreme Court decisions to indicate that neutral regulations that diminish the income of a

When it enacted RLUIPA § 2(a)(1), as applied through § 2(a)(2)(C), Congress merely codified the individualized assessments doctrine in the land-use context, and specifically ensured that the statute did not contain the same flaws as in RFRA, which the Supreme Court had struck down in *City of Boerne*. In *City of Boerne*, the Court reasoned that the expansive provisions of RFRA were unconstitutional as applied to the states because they would necessarily apply even to generally applicable laws that incidentally burdened religion. *See* 521 U.S. at 531. Indeed, that was RFRA's stated purpose—to overrule *Smith* and to guarantee the application of the compelling interest test in "*all* cases where free exercise of religion is substantially burdened." *City of Boerne*, 521 U.S. at 515 (citing RFRA, 42 U.S.C. § 2000bb(b)) (emphasis added).

In sharp contrast, RLUIPA § 2(a)(1) is expressly and constitutionally limited by § 2(a)(2)(C), which provides that, before a governmental action will be subject to strict scrutiny, a jurisdictional determination must be made that the governmental action arises in the implementation of a land-use regulation under which the government makes "individualized assessments" of the proposed uses for the property involved. *See* 42 U.S.C. § 2000cc(a)(2)(C). Thus, by this provision's explicit terms, it cannot be applied to those zoning ordinances and land-use

---

religious organization do not implicate the free exercise clause."); *see also Cottonwood Christian Center*, 218 F. Supp. 2d at 1224 (distinguishing *Rector, Wardens* on this basis).

decisions that are, in fact, neutral laws of general applicability. *See Life Teen, Inc. v. Yavapai County*, No. 3:01-CV-1490 (RCB), 2003 WL 24224618, at *14 (D. Ariz. Mar. 26, 2003) ("RLUIPA first requires a jurisdictional determination that the relevant government action is based on an individualized assessment before that action will be subject to strict scrutiny."). Therefore, unlike RFRA, RLUIPA respects the constitutional distinction between neutral laws of general applicability and laws that require individualized assessments, as set forth in *Smith* and *Lukumi*.

Nor is there any merit to the Village's claim that the individualized assessments doctrine should not apply to zoning laws because zoning laws do not involve inquiry into the *reasons* for an application, just the proposed *uses* of the property. *See* Br. at 61-62. As the district court in *Life Teen* noted in rejecting an identical argument, "[t]his is a distinction without a difference." *Life Teen*, 2003 WL 24224618, at *14. In the land-use context, the proposed reason for the permit or variance request is coterminous with the proposed use for the land. More fundamentally, the Village's argument misses the point of the individualized assessments doctrine set forth in *Smith*, *Lukumi*, and *Sherbert*. These cases established the rule that strict scrutiny is applicable where the government has in place a system of individualized assessments under a broad and discretionary standard such as "good cause," or, in *Lukumi*, whether killings were "unnecessary." The discretion inherent in such a system raises the specter that the government's denial of a claim may have resulted from the improper devaluation of

religious interests. That rationale is fully applicable to land-use laws that apply subjective, discretionary standards. Accordingly, contrary to the Village's assertion, the individualized assessment doctrine plainly applies in the land-use context. RLUIPA simply codifies in the zoning context the general rule that religious practices may not be singled out for discriminatory treatment through a system of individualized assessments without compelling governmental justification. *See Lukumi*, 508 U.S. at 538.

In sum, RLUIPA § 2(a)(1), as applied through § 2(a)(2)(C), merely codifies the Free Exercise jurisprudence that applies to laws involving a system of individualized assessments. Accordingly, every court to have considered the constitutionality of these provisions—except one California district court, in a decision that now conflicts with a more recent ruling of the Ninth Circuit—has upheld RLUIPA's constitutionality, and this Court should do so as well. *See Guru Nanak*, 2006 WL 2129737, at **10-11 (holding RLUIPA § 2(a)(1), as applied through § 2(a)(2)(C), to be constitutional under Section 5 of the Fourteenth Amendment); *Midrash Sephardi, Inc. v. Town of Surfside*, 366 F.3d 1214, 1237-40 (11th Cir. 2004) (upholding RLUIPA § 2 under Section 5 of the Fourteenth Amendment), *cert. denied*, 125 S. Ct. 1295 (2005); *Congregation Kol Ami v. Abington Township*, No. 01-1919, 2004 WL 1837037 (E.D. Pa. Aug. 17, 2004), *as amended on denial of reconsideration*, 2004 WL 2137819 (E.D. Pa. Sept. 21, 2004) (same); *Life Teen Inc.*, 2003 WL 24224618 (finding that RLUIPA codifies Free Exercise jurisprudence by applying strict scru-

tiny in the individualized assessments context); *Hale O Kaula Church v. Maui Planning Comm'n*, 229 F. Supp. 2d 1056, 1072 (D. Haw. 2002) (holding that RLUIPA "codifies the 'individualized assessments' doctrine, where strict scrutiny applies"); *Cottonwood Christian Ctr.*, 218 F. Supp. 2d at 1221 (holding that RLUIPA "merely codifies numerous precedents holding that systems of individualized assessments, as opposed to generally applicable laws, are subject to strict scrutiny"); *Freedom Baptist Church*, 204 F. Supp. 2d at 869 ("it should by now be apparent that subsection (a)(2)(C) faithfully codifies the 'individual assessments' jurisprudence in the *Sherbert* through *Lukumi* line of cases").* Because RLUIPA simply codifies existing

---

* *See also Mintz v. Roman Catholic Bishop of Springfield*, 424 F. Supp. 2d 309 (D. Mass. 2006); *Church of Hills of Twp. of Bedminster v. Twp. of Bedminster*, No. Civ-05-3332 (SRC), 2006 WL 462674 (D.N.J. Feb. 24, 2006); *Williams Island Synagogue, Inc. v. City of Aventura*, 2004 WL 1059798 (S.D. Fla. May 6, 2004); *Fortress Bible Church v. Feiner*, 03 Civ. 4235 (SCR), 2004 WL 1179307 (S.D.N.Y. March 29, 2004); *Castle Hills First Baptist Church v. City of Castle Hills*, 2004 WL 546792 (W.D. Tex. March 17, 2004); *Primera Iglesia Bautista Hispana of Boca Raton v. Broward County*, No. 01-6530-CV, slip. op. at 12-14 (S.D. Fla. Jan. 5, 2004) (GA 62), *aff'd in part, rev'd in part on other grounds*, 450 F.3d 1295 n.14 (11th Cir. 2006) (noting abandonment of cross-appeal regarding RLUIPA's constitutionality); *United States v. Maui County*, 298 F. Supp. 2d 1010 (D. Haw. 2003); *Murphy v. Zoning Comm'n of Town of New Milford*, 289 F.

law, it is a valid exercise of Congress' authority under Section 5 of the Fourteenth Amendment.

3. RLUIPA Falls Well Within Congress' Power Under Section 5 of the Fourteenth Amendment to Enact a Congruent and Proportional Remedy

Because RLUIPA § 2(a)(1), as applied through § 2(a)(2)(C), simply codifies the protections of the First Amendment, this Court need not address the question of whether, if these provisions were to exceed existing constitutional requirements, they would satisfy the *City of Boerne* "congruence and proportionality" test. As explained below, however, RLUIPA § 2(a)(1), as applied through § 2(a)(2)(C), would be a permissible exercise of Congress' Section 5 power even if the Court were to find that it extends slightly beyond the proscriptions of the Constitution in some unanticipated respect.

As the Supreme Court has recently reaffirmed, Congress' power to enforce the Fourteenth Amendment includes "the authority both to remedy and to deter violation of rights guaranteed by the Four-

---

Supp. 2d 87 (D. Conn. Sept. 30, 2003), *vacated on other grounds*, 402 F.3d 342 (2d Cir. 2005); *Christ Universal Mission Church v. City of Chicago*, Civ. No. 01-C-1429 (N.D. Ill. Sept. 11, 2002) (GA 50), *rev'd on other grounds*, 362 F.3d 423 (7th Cir. 2004), *cert. denied*, 125 S. Ct. 897 (2005). *But see Elsinore Christian Center v. City of Lake Elsinore*, 291 F. Supp. 2d 1083 (C.D. Cal. 2003), *appeal docketed*, No. 04-55320 (9th Cir.) (appeal argued and submitted Oct. 17, 2005).

teenth Amendment by prohibiting a somewhat broader swath of conduct, including that which is not itself forbidden by the Amendment's text." *Tennessee v. Lane*, 541 U.S. 509, 518 (2004) (internal alterations omitted) (holding that Title II of Americans with Disabilities Act was congruent and proportional to statute's object of enforcing right of access to courts); *Hibbs*, 538 U.S. at 727 (holding that Family and Medical Leave Act was congruent and proportional response to problem of gender discrimination in caring for family members); *see also Varner v. Illinois State Univ.*, 226 F.3d 927, 932-36 (7th Cir. 2000) (upholding Equal Pay Act's burden-shifting procedures even though effect would be "to prohibit at least some conduct that is constitutional," because "the Act is targeted at the same kind of discrimination forbidden by the Constitution").

Section 5 legislation that reaches beyond the scope of Section 1's actual guarantees and prohibitions is valid as long as there is "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. Here, Congress identified a broad pattern of unconstitutional conduct in land-use decisions against religious organizations, and enacted congruent and proportional legislation in response to it.

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

The first step in analyzing whether Congress properly exercised its prophylactic powers under Section 5 of the Fourteenth Amendment is to determine whether Congress had evidence of a pattern of government land-use decisions burdening the free exercise of religion. *See Hibbs*, 538 U.S. at 729 (in determining whether Family Medical Leave Act was congruent and proportional response to targeted gender discrimination, Court inquired "whether Congress had evidence of a pattern of constitutional violations on the part of the States in this area"). Contrary to the Village's contention, *see* Br. at 62-64, the record before Congress was extensive and amply demonstrated the need for the legislation.

Specifically, Congress held extensive hearings on the need for legislation over a period of three years. *See supra* at 8-12. "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* 146 Cong. Rec. at S7775; H.R. Rep. 106-219, at 18-24; 146 Cong. Rec. E1234, 1235. When Congress makes findings on essentially factual issues, those 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, 331 n.12 (1985) (collecting cases). Here, Congress had before it ample evidence of local land-use decisions burdening free exercise to warrant the enactment of corrective legislation.

b. RLUIPA 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. *See Guru Nanak*, 2006 WL 2129737, at *12 ("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 does not attempt to impose strict scrutiny on neutral laws of general applicability. Nor does RLUIPA exempt religious institutions from zoning laws. Rather, RLUIPA requires strict scrutiny of negative decisions in the land-use context where individualized assessments are made—as a prophylactic way to prevent local government officials from discriminating against religious institutions. This precision stands in sharp contrast to RFRA's wholly untargeted provisions, which sought to apply strict scrutiny to all

laws, in all contexts. In short, RLUIPA does not provide the "sweeping coverage" of RFRA found objectionable by the Supreme Court in *City of Boerne,* 521 U.S. at 532. *See also* Point I.A.2, *supra*.

As numerous courts have already held with respect to RLUIPA, "[w]here, as here, the challenged legislation closely tracks constitutional guarantees, any marginal conduct that is covered by the statute, but not the Constitution, 'nevertheless constitutes the kind of congruent, and, above all, proportional remedy Congress is empowered to adopt under section 5 of the Fourteenth Amendment.'" *Life Teen, Inc.*, 2003 WL 24224618, at *14 (quoting *Freedom Baptist*, 204 F. Supp. 2d at 874). *See also Guru Nanak*, 2006 WL 2129737, at *12 (RLUIPA "is a congruent and proportional response to free exercise violations"); *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.").

The Village argues on appeal that RLUIPA is not congruent and proportional because it applies to "every municipality, regardless of whether it has ever violated the Free Exercise Clause through its zoning regulations," and because it contains "no termination provision, [and] no expiration date."

Br. at 66 n.32. These arguments miss the mark. A nationwide pattern of discrimination against religion is precisely the kind of showing that should justify a nationwide response to that problem, just as Title VII, the Equal Pay Act, and other civil rights statutes apply to all municipalities nationwide, regardless of whether any particular municipality has in fact ever violated the laws. *See generally Guru Nanak*, 2006 WL 2129737, at **11-12 (finding RLUIPA record more than sufficient to show a widespread, national problem of religious discrimination in the land-use context, noting that "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"); *Freedom Baptist*, 204 F. Supp. 2d at 874 (same).

Further, Congress reasonably determined that it would be impossible to make separate findings about every jurisdiction, to target only those jurisdictions where discrimination had occurred or was likely to occur, or, for constitutional reasons, to extend protection only to minority religions. *See* 146 Cong. Rec. at S7775. Nor does the Village provide any support for its assertion that a termination provision is required to establish congruence and proportionality. *See City of Boerne*, 521 U.S. at 533 ("This is not to say, of course, that § 5 legislation requires termination dates, geographic restrictions, or egregious predicates."). Finally, every state and local government is already prohibited from discriminating on the basis of religion in land-use deci-

sions by virtue of the Constitution. Since RLUIPA merely codifies existing constitutional rights, it does not "sweep too broadly" merely because it applies to every municipality that has a land-use scheme.

Because RLUIPA § 2(a)(1), as applied through § 2(a)(2)(C), falls well within Congress' power under Section 5 of the Fourteenth Amendment, the district court's order upholding its constitutionality should be affirmed.

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

Congress constitutionally enacted § 2(a)(1) of RLUIPA, as applied through § 2(a)(2)(B), pursuant to its power "[t]o regulate Commerce . . . among the several States." U.S. Const. Art. I, § 8, cl. 3. As discussed below, RLUIPA contains a jurisdictional element, through which Congress ensured RLUIPA's constitutionality.

1. Congress Routinely Relies on Jurisdictional Elements

The Supreme Court has made clear that jurisdictional elements—common in both civil and criminal statutes—are valid exercises of congressional power, because they allow for case-by-case determinations of whether interstate commerce is implicated before Congress' authority is exercised. The Supreme Court has held that Congress may regulate purely intrastate activity pursuant to its Commerce Clause powers if that activity, in the aggre-

gate, "substantially affect[s] interstate commerce." *United States v. Lopez*, 514 U.S. 549, 558-59 (1995) (discussing line of cases, including *Wickard v. Filburn*, 317 U.S. 111 (1942)). Congress may also employ a "jurisdictional element" to target only those individual acts that themselves affect commerce. *See id.* at 561-62. A jurisdictional element restricts the applicability of a statute to those cases in which a court, based on a case-by-case analysis, determines that the activity being regulated "affects interstate commerce." *Lopez*, 514 U.S. at 558-59. This approach ensures that the statute is only applied in situations where Congress has acted pursuant to its constitutional authority. *See Lopez*, 514 U.S. at 561-62 (observing that Gun Free School Zones Act did not contain a jurisdictional element, "which would ensure, through case-by-case inquiry, that the firearm possession in question affects interstate commerce"). *See also United States v. Morrison*, 529 U.S. 598, 612 (2000) ("Such a jurisdictional element may establish that the enactment is in pursuance of Congress' regulation of interstate commerce.").

Consistent with these principles, Congress routinely employs jurisdictional elements to target individual activities, within a larger class, that affect interstate commerce. *See, e.g.*, 18 U.S.C. § 844(i) (federal arson statute, applicable to damage of property "affecting interstate . . . commerce"); 18 U.S.C. § 922(g) (felony firearms possession law, applicable to firearms "in or affecting interstate commerce"); 18 U.S.C. § 1951(b)(3) (Hobbs Act, prohibiting robbery or extortion that "affects commerce"); 18 U.S.C. § 2119 (federal carjacking stat-

ute, applicable when car has been transported in interstate commerce).*

In turn, this Court and other appellate courts have consistently upheld statutes under the Commerce Clause on the basis of jurisdictional elements. *See, e.g.*, *United States v. Santiago*, 238 F.3d 213, 216 (2d Cir. 2001) (holding that by expressly including jurisdictional element in criminal statute prohibiting possession of firearm by convicted felon, "Congress effectively limited the statute's reach to a discrete set of firearm possessions that have an explicit connection with or effect on interstate commerce," consistent with the Commerce Clause) (internal quotation marks and alterations omitted); *United States v. Griffith*, 284 F.3d 338 (2d Cir. 2002) (rejecting as-applied challenge under Commerce Clause to constitutionality of criminal statute where jurisdictional element ensured sufficient

---

* A statute need only contain "affecting commerce" language to invoke full Congressional authority under the Commerce Clause. *See Jones v. United States*, 529 U.S. 848, 854 (2000); *Allied-Bruce Terminix Co. v. Dobson*, 513 U.S. 265, 273 (1995). The Village's suggestion that RLUIPA's jurisdictional element is inadequate because the statute references a "substantial burden" that "affects," rather than "substantially affects," commerce, *see* Br. at 71 n.34, is therefore meritless. *Lopez* itself consistently used the term "affecting commerce" when discussing the nexus required in statutes containing a jurisdictional element. *Lopez*, 514 U.S. at 561.

nexus to interstate commerce); *United States v. Grassie*, 237 F.3d 1199, 1211 (10th Cir. 2001) ("[B]y making interstate commerce an element of the [Church Arson Prevention Act] . . . to be decided on a case-by-case basis, constitutional problems are avoided."); *United States v. Baker*, 197 F.3d 211, 218 (6th Cir. 1999) ("[T]he jurisdictional element applicable to 18 U.S.C. § 922(g)(8) insulates the statute from a Commerce Clause challenge."); *United States v. Harrington*, 108 F.3d 1460, 1464-67 (D.C. Cir. 1997) (holding that jurisdictional element employed in the Hobbs Act ensured the statute's facial constitutionality); *United States v. Bishop*, 66 F.3d 569, 588 (3d Cir. 1995) ("[T]he jurisdictional element in [the federal carjacking statute] independently refutes appellants' arguments that the statute is constitutionally infirm.").

2. RLUIPA's Jurisdictional Element Ensures On a Case-By-Case Basis That the Commerce Clause Is Not Offended

RLUIPA § 2(a)(2)(B) provides that the strict scrutiny required by § 2(a)(1) applies only in those instances when "the substantial burden [on religious exercise] affects, or removal of that substantial burden would affect, commerce . . . among the several States, . . . even if the burden results from a rule of general applicability." 42 U.S.C. § 2000cc(a)(2)(B). This jurisdictional element permissibly restricts RLUIPA so that it applies as an exercise of the Commerce Clause power only when the Commerce Clause would allow it to do so, thus preventing RLUIPA from exceeding the Commerce Clause's bounds. To the extent a court were to find

that the burden on religion (or its removal) does not affect interstate commerce, RLUIPA would not apply as a statutory matter, and therefore no constitutional issue would arise. If, on the other hand, a court were to find (as here) that the burden on religion or its removal *does* affect interstate commerce, RLUIPA would apply as a valid exercise under Congress' Commerce Clause authority. In neither event would RLUIPA exceed Congress' commerce power.*

Finally, RLUIPA provides a second limiting provision:

> If the only jurisdictional basis for applying a provision of this chapter is a claim that a substantial burden by a government on religious exercise affects, or that removal of that substantial burden would affect, commerce . . . among the several States . . . the provision shall not apply if the government

---

* Here, the district court made specific findings of fact in support of its conclusion that the jurisdictional element was triggered, and that conclusion should be affirmed. *See* 417 F. Supp. 2d at 541. Moreover, the Village's suggestion that WDS failed to plead reliance on the jurisdictional element under the Commerce Clause, Br. at 68, is immaterial, as it is well established that pleadings may be conformed to the proof at trial. *Vermont Plastics Inc. v. Brine*, 79 F.3d 272, 279 (2d Cir. 2006) (district court retains discretion under Fed. R. Civ. P. 15(b) to conform pleading to evidence received at trial).

> demonstrates that all substantial burdens on, or the removal of all substantial burdens from, similar religious exercise throughout the Nation would not lead in the aggregate to a substantial effect on commerce . . . among the several States. . . .

42 U.S.C. § 2000cc-2(g). This savings clause—an affirmative defense for state and local governments that Congress was not constitutionally required to include—provides that RLUIPA does not apply if the municipality demonstrates that the aggregate effects do not substantially affect commerce. *See Johnson v. Martin*, 223 F. Supp. 2d 820, 829 n.8 (W.D. Mich. 2002) (noting that "even if RLUIPA is viewed as regulating intrastate activity . . . it only applies if the *Wickard* test is satisfied. That is, the intrastate activity must have an aggregate effect on interstate activity.").

On the basis of RLUIPA's jurisdictional element, every court to consider the issue, save one, has held that RLUIPA § 2(a)(1), as applied through § 2(a)(2)(B), was validly enacted pursuant to the Commerce Clause. *See, e.g.*, *Kol Ami*, 2004 WL 1837037, at **11-12 (jurisdictional element "sufficient to satisfy the Commerce Clause"); *Castle Hills,* 2004 WL 546792, at *19 (jurisdictional element satisfies commerce clause); *United States v. Maui County*, 298 F. Supp. 2d at 1015 (same); *Hale O Kaula*, 229 F. Supp. 2d at 1072-73 ("*Lopez* itself recognized that if a statute includes a jurisdictional element, the statute avoids such a jurisdictional challenge [under the Commerce Clause]. RLUIPA

contains such an element."); *Life Teen, Inc.*, 2003 WL 24224618, at **12-13 (same); *Freedom Baptist Church*, 204 F. Supp. 2d at 866-68 (same). *But see Elsinore Christian Center*, 291 F. Supp. 2d at 1102-03.

In sum, because RLUIPA contains a jurisdictional element ensuring that Congress' Commerce Clause power is invoked only in those instances in which interstate commerce is affected, the district court correctly held that RLUIPA § 2(a)(1), as applied through § 2(a)(2)(B), was constitutionally enacted under Congress' Commerce Clause power.

3. The Village's Arguments Are Unavailing

The Village contends that RLUIPA does not regulate "economic activity," only local land-use decisions, and that even if local land-use decisions do constitute economic activity, they do not substantially affect interstate commerce. Br. at 70. This argument is fatally flawed.

As a threshold matter, the Supreme Court has held that the activities of non-profit religious institutions are economic and do affect interstate commerce. *See Camps Newfoundland/Owatonna v. Town of Harrison*, 520 U.S. 564 (1997) (holding that non-profit religious camp engaged in commerce, noting that non-profits are major participants in interstate commerce for goods and services, use interstate communications and transportation, and raise and distribute revenues interstate); *see also Grassie*, 237 F.3d at 1209-10 ("[T]he Commerce Clause applies to charitable and non-profit entities . . . Religion and, in particular[,] religious buildings

actively used . . . for a full range of activities, easily falls within the holding of *Camps*.").

Further, while Congress "normally is not required to make formal findings as to the substantial burdens that an activity has on interstate commerce," *Lopez*, 514 U.S. at 562-63, RLUIPA's legislative history amply supports Congress' determination that religious institutions suffer from the discriminatory application of local zoning codes, and that this has a significant impact on interstate commerce: "Religious organizations, as a division of the charitable and non-profit sector, . . . impact the national economy in orders of magnitude." *Grassie*, 237 F.3d at 1209 n.7 (citing the Religious Liberty Protection Act of 1998: Hearings on H.R. 4019 Before the Subcomm. on the Constitution of the House Comm. on the Judiciary, 105th Cong. 57-62). *See also* 146 Cong. Rec. at S7775; H.R. Rep. 106-219, at 28 (identifying construction projects as specific economic transactions in commerce that discriminatory land-use regulations may burden, and noting that aggregate effects are substantial); *Johnson*, 223 F. Supp. 2d at 828-29 (finding that free exercise of religion affects interstate commerce "in a multitude of ways").

Finally, the Village's argument completely ignores the dispositive factor on this point: that RLUIPA has a jurisdictional element requiring a case-by-case determination that the activity in question affects interstate commerce. The Village's conclusory statement that this element would require a court to "pile inference upon inference" to establish a link to interstate commerce, *see* Br. at

71, is simply wrong. Unlike in *Morrison*, in which the Supreme Court found that the link between gender-related violence and interstate commerce was too attenuated, *see Morrison*, 529 U.S. at 612-13, or in *Lopez*, 514 U.S. at 563-67, in which possession of a firearm in a school zone only tenuously related to interstate commerce, the link between interstate commerce and the activities of a religious institution is direct. As noted above, religious institutions are participants in interstate commerce, and the construction of buildings requires the use of goods, services, and labor that travel in interstate commerce. Most crucially, however, if a court finds in a given case that the burden on religious exercise does *not* affect interstate commerce, RLUIPA by definition would simply not apply.* Accordingly, the

---

* RLUIPA also satisfies the concern this Court expressed in *United States v. Holston*, 343 F.3d 83 (2d Cir. 2003), that the nexus between the jurisdictional element and the regulated conduct not be too attenuated. The provision at issue in *Holston*, 18 U.S.C. § 2251(a), imposed criminal liability on individuals who manufactured child pornography when one of the materials from which the pornography was created had traveled in interstate commerce. The Court found that the interstate commerce components underpinning the jurisdictional element (for example, shipment of a video camera across state lines) were too attenuated from the criminal conduct regulated by the statute, such that the jurisdictional element was not in fact a limiting provision. *See id.* at 89. In contrast, under § 2(a)(2)(B) of RLUIPA, it is the state or local govern-

Village's arguments are entirely misplaced. RLUIPA § 2(a)(1), as applied through § 2(a)(2)(B), is a valid exercise of Congress' Commerce Clause authority, and the district court's finding on this point should be affirmed.

C. RLUIPA Does Not Violate the Establishment Clause

Every court that has considered the issue has concluded that RLUIPA's land-use provisions fully comply with the Establishment Clause. *See, e.g.*, *Midrash Sephardi*, 366 F.3d at 1240-42; *Primera Iglesia*, slip op. at 12-14; *Kol Ami*, 2004 WL 1837037, at **12-14; *Williams Island Synagogue*, 2004 WL 1059798, at *6; *Castle Hills First Baptist Church*, 2004 WL 546792, at *18; *Maui County*, 298 F. Supp. 2d at 1014-15; *Murphy*, 2003 WL 22299219, at **27-29; *Freedom Baptist Church*, 204 F. Supp. 2d at 863-65. This Court should likewise hold that RLUIPA constitutes a constitutional exercise of congressional power to alleviate unjustified substantial burdens on religious exercise.

---

ment's imposition of a substantial burden on religious exercise—the very object of the statute itself—that must affect interstate commerce. Accordingly, RLUIPA requires a clear nexus between the jurisdictional element and the regulated conduct.

1. RLUIPA's Land-Use Provisions Are Constitutional Under the Standards Set Forth in *Cutter*

The Supreme Court's cases "leave no doubt that in commanding neutrality the Religion Clauses do not require the government to be oblivious to impositions that legitimate exercises of state power may place on religious belief and practice." *Board of Educ. of Kiryas Joel Village Sch. Dist. v. Grumet*, 512 U.S. 687, 705 (1994). "The Court has long recognized that the government may (and sometimes must) accommodate religious practices and that it may do so without violating the Establishment Clause." *Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327, 334 (1987). Thus, the Supreme Court has upheld a broad range of statutory accommodations against Establishment Clause challenges, including the exemption of religious organizations from Title VII's prohibition against employment discrimination on the basis of religion, *see Amos*, 483 U.S. at 335-39; a state property tax exemption for religious organizations, *see Walz v. Tax Commission of City of New York*, 397 U.S. 664, 672-80 (1970); and a state program releasing public school children during the school day to receive religious instruction at religious centers, *see Zorach v. Clauson*, 343 U.S. 306, 315 (1952).*

---

* *See also Lynch v. Donnelly*, 465 U.S. 668, 673 (1984) ("Nor does the Constitution require complete separation of church and state; it affirmatively mandates accommodation, not merely tolerance, of

Moreover, the Supreme Court recently ruled unanimously that Section 3 of RLUIPA, which protects institutionalized persons, does not violate the Establishment Clause. *See Cutter*, 544 U.S. at 720. Relying on past Supreme Court decisions finding that there is "some space for legislative action neither compelled by the Free Exercise Clause nor prohibited by the Establishment Clause," the Court ruled that Section 3 of RLUIPA "fits within the corridor between the Religion Clauses: On its face, the Act qualifies as a permissible legislative accommodation of religion that is not barred by the Establishment Clause." *Id.* at 719-20. The Court noted that Section 3 is "compatible with the Establishment Clause because it alleviates exceptional government-created burdens on private religious exercise." *Id.* at 720. It further held that RLUIPA "does not differentiate among bona fide faiths." *Id.* at 723.

---

all religions, and forbids hostility toward any."); *Lee v. Weisman*, 505 U.S. 577, 627 (1992) (Souter, J., concurring) (stating that the Establishment Clause is not violated when the government accommodates religious beliefs "by relieving people from generally applicable rules that interfere with their religious callings"); *Boyajian v. Gatzunis*, 212 F.3d 1, 8 (1st Cir. 2000) ("[T]he state's decision to give religion an assist in the local land-use planning process is consistent with the Supreme Court's holding in *Amos* that legislation isolating religious groups for special treatment is permissible when done for the 'proper purpose' of alleviating a burden on the exercise of religion.") (citation omitted).

Although RLUIPA's land-use provisions were not at issue in *Cutter*, and the Court "therefore express[ed] no view on the validity of that part of the Act," *id.* at 715 n.3, the Court's reasoning in upholding RLUIPA's institutionalized-persons provisions applies with equal force to RLUIPA's land-use provisions. The provision at issue in *Cutter* is nearly identical to Section 2(a)(1). Both prohibit substantial burdens on religious exercise absent a showing that the burden is the "least restrictive means" of furthering a "compelling governmental interest." *Compare* Section 2(a)(1) (42 U.S.C. § 2000cc(a)(1)) *with* Section 3 (42 U.S.C. § 2000cc-1(a)). Like RLUIPA's institutionalized-persons provisions, RLUIPA's land-use provisions accommodate religious beliefs by "alleviate[ing] exceptional government-created burdens on private religious exercise." *Cutter*, 544 U.S. at 715 n.3.

Nor do RLUIPA's land-use provisions "differentiate among bona fide faiths," *id.* at 723, or, as Defendants argue, *see* Br. at 74, grant greater protection to religious rights than other constitutionally protected rights. As the Supreme Court held in *Cutter* with respect to RLUIPA's institutionalized-persons provisions, because RLUIPA merely codifies existing Free Exercise jurisprudence and serves as a permissible accommodation of religion, it does not advance religion by granting additional substantive rights. *Cutter*, 544 U.S. at 722-23. Thus, Defendants' argument that RLUIPA elevates religious entities above others in land-use decisions is simply wrong.

Further, RLUIPA's land-use provisions comply with *Cutter*'s requirement that "an accommodation must be measured so that it does not override other significant interests." *Id.* at 722-23. In *Cutter*, the Supreme Court cited its earlier decision in *Estate of Thornton v. Caldor, Inc.*, 472 U.S. 703, 709 (1985), which struck down a law that gave Sabbath observers "an absolute and unqualified right not to work on whatever day they designate[d] as their Sabbath." *Cutter*, 544 U.S. at 722. The flaw in that law, the Court found, was that it "unyielding[ly] weigh[ted] the interests of Sabbatarians over all other interests." *Id.* at 722 (internal quotation marks omitted) (citing *Caldor*, 472 U.S. at 710). The Court then confirmed that RLUIPA did not require courts to afford such "unyielding weight" to the religious interests protected, pointing to legislative history that anticipated "due deference to the experience and expertise of prison and jail administrators" when applying RLUIPA. *Id.* at 723. Unlike the law at issue in *Caldor*, and like RLUIPA's institutionalized-persons provisions, RLUIPA § 2(a)(1) does not provide "an absolute and unqualified right" to religious institutions to build whatever they want, wherever they want. Moreover, reviewing courts consider the context of the land-use regulation being challenged in applying the compelling-interest standard. *See Cutter*, 544 U.S. at 722-23 ("While the Act adopts a 'compelling governmental interest' standard, . . . '[c]ontext matters' in the application of that standard.") (quoting *Grutter v. Bollinger*, 539 U.S. 306, 327 (2003)). Accordingly, RLUIPA § 2 does not override other sig-

nificant interests in violation of the Establishment Clause.

2. RLUIPA Is Constitutional Under the *Lemon* Test

Further, even if *Cutter* is not dispositive, RLUIPA's land-use provisions pass muster under *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971). The sole court of appeals to have decided an Establishment Clause challenge to RLUIPA in the land-use context has upheld RLUIPA under the *Lemon* test. *See Midrash Sephardi*, 366 F.3d at 1240-42. Applying *Lemon*, the Eleventh Circuit found that the land-use provisions of RLUIPA: (1) serve the secular purpose of alleviating governmental interference with religious exercise; (2) have a permissible primary effect that neither advances nor inhibits religion, because they merely mandate equal treatment for religious institutions by "forbidding states from imposing impermissible burdens on religious worship;" and (3) avoid entanglement because they do not require the government to supervise or oversee religion, but only to avoid discriminating against religious institutions. *See* 366 F.3d at 1240-41.

This Court should similarly uphold the constitutionality of RLUIPA under the *Lemon* test. First, RLUIPA's alleviation of the burdens on religious exercise imposed by land-use regulations represents a permissible secular purpose under *Lemon*. *See Midrash Sephardi*, 366 F.3d at 1240-41 (alleviation of discrimination is proper secular purpose); *see also Boyajian*, 212 F.3d at 8 (same); *Cohen*, 8 F.3d at 491

("We think that [the government's] zoning ordinance has the secular purpose of minimizing governmental meddling in religious affairs . . . ").

RLUIPA also complies with *Lemon*'s second and third prongs because it neither "advances nor inhibits religion," nor fosters an excessive government "entanglement" with religion. *Lemon*, 403 U.S. at 612-13. As discussed *supra*, Point I.A.1, RLUIPA § 2(a)(1), as applied through § 2(a)(2)(C), merely codifies existing Free Exercise jurisprudence. RLUIPA does not promote or subsidize a religious belief or message, but merely frees religious groups and individuals to practice as they otherwise would in the absence of certain state-imposed regulations. *See Midrash Sephardi*, 366 F.3d at 1241 ("RLUIPA, by mandating *equal* as opposed to *special* treatment for religious institutions, does not advance religion by making it easier for religious organizations themselves to advance religion."); *cf*. *Boyajian*, 212 F.3d at 10 (finding that state law prohibiting municipal authorities from excluding religious uses of property from a zoning area "does not itself advance religion but clears the way so that churches themselves may do so.") (citation omitted). Further, RLUIPA does not "require 'pervasive monitoring' to prevent the government from indoctrinating religion," require the government "to supervise land use regulations to make sure governmental funds do not sponsor religious practice, [or] require state or local officials to develop expertise on religious worship or to evaluate the merits of different religious practices or beliefs." *Midrash Sephardi*, 366

F.3d at 1241-42. Accordingly, RLUIPA satisfies the *Lemon* test.*

3. The Village's As-Applied Challenge Is Meritless

Finally, Defendants' purported "as-applied" Establishment Clause challenge, Br. at 30-36, presents nothing more than the typical balancing of interests RLUIPA contemplates. Defendants argue that as applied in this case, RLUIPA violates the Establishment Clause because granting Plaintiff the requested accommodation would permit WDS to construct and build "what it wants, where it wants and when it wants, irrespective of Mamaroneck's zoning code, solely because of its religious affiliation." Br. at 36. If, however, Defendants' burdening of Plaintiff's religious practice were, as Defendants claim, the least restrictive means of furthering a compelling governmental interest, then RLUIPA would not require any further accommodation of

---

* Moreover, the RLUIPA provisions challenged by Defendants are virtually identical to those in RFRA, which remain effective as to the federal government, and which this Court recently held do not violate the Establishment Clause. *See Hankins v. Lyght*, 441 F.3d 96, 107-09 (2d Cir. 2006). RLUIPA strikes the same balance of religious accommodation as RFRA, but on a far more modest scale, applying only in the limited contexts of land-use regulation and institutionalized persons. *See Freedom Baptist*, 204 F. Supp. 2d at 864; *Life Teen*, 2003 WL 24224618, at **16-18.

Plaintiff's religious practices. As the district court correctly found, for example, "had defendants been able to produce any evidence equating the background increases in traffic in the Orienta Point neighborhood in the more than three years between the rejection of the Application and the bench trial with increased danger to pedestrians or vehicles, defendants might well have established a compelling governmental interest warranting denial of the Application. But there is no such evidence." 417 F. Supp. 2d at 558.

More fundamentally, Defendants' argument is based on the faulty premise that WDS' proposed expansion and use of its facilities is merely secular activity undertaken by a religious entity. That is flatly wrong. As the district court correctly found, and as discussed *infra*, Point II.A.1, WDS' proposed expansion and use of its facilities constitutes religious exercise. First, a "substantial number of the so-called secular classrooms and small-group instructional rooms would be devoted exclusively to teaching purely Judaic studies," and "other supposedly secular facilities such as the multi-purpose room will be frequently or even predomina[nt]ly used to accommodate WDS's religious needs." *Id.* at 558. Second, even if some parts of the new facility will not "at all times" be used exclusively for religious purposes, those facilities are nevertheless "inextricably integrated and reasonably necessary to facilitate" the school's religious exercise. *Id.* at 544. In short, as the court found to be true of WDS' existing facilities, WDS' proposed facilities, "in whole and in all of their constituent parts, are used

for religious education and practice—*i.e.*, devoted to religious purposes." *Id.* at 498.

As the district court also correctly concluded, the premise of Defendants' Establishment Clause argument—that "unless a room is used for purely religious purposes 100% of the time, it must be classified as secular"—is certainly wrong; indeed, such an approach would have the impermissible effect of "hindering religious exercise by punishing the economical, multi-purpose utilization of spaces." *Id.* at 558; *cf. Amos*, 483 U.S. at 330, 336-37 (in holding that application of Title VII's religious employment exemption to the secular nonprofit activities of a religious organization does not violate the Establishment Clause, noting that the line between secular and religious activities "is hardly a bright one"). Because the Establishment Clause permits the alleviation of government-created burdens on religious exercise, and because WDS' use and proposed use of its school constitutes such exercise, the district court correctly found that RLUIPA does not violate the Establishment Clause, either facially or as applied to the facts of this case.

D. RLUIPA Does Not Violate the Tenth Amendment

Because RLUIPA § 2(a)(1) was enacted pursuant to Congress' enumerated powers, it does not violate the Tenth Amendment's mandate that the "powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. Const. amend. X.

Defendants essentially argue that RLUIPA violates federalism principles because it regulates in an arena that traditionally has "long been recognized" as within the power of the states to regulate. Br. at 72. The Supreme Court, however, repudiated this argument in *Garcia v. San Antonio Metropolitan Transit Auth.*, 469 U.S. 528, 546-47 (1985) ("We therefore now reject, as unsound in principle and unworkable in practice, a rule of state immunity from federal regulation that turns on a judicial appraisal of whether a particular governmental function is 'integral' or 'traditional.' "); *see also Kol Ami*, 2004 WL 1837037, at *15 (that land use may be "traditionally under local control" "does not put it beyond the reach of congressional authority when Congress acts within the confines of its constitutional powers").

The relevant inquiry for Tenth Amendment purposes is not whether a particular activity is local in nature, but whether the federal statute was enacted pursuant to Congress' 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 United States v. Von Foelkel*, 136 F.3d 339, 341 (2d Cir. 1998) (per curiam) (holding that where criminal statute was validly enacted pursuant to Congress' Commerce Clause power, statute did not violate Tenth Amendment). Because RLUIPA is a valid enactment under Section 5 of the Fourteenth Amendment and the Commerce Clause, *see* Points I.A and I.B, *supra*, it is necessarily consistent with the Tenth Amendment. *See Midrash Sephardi*, 366

F.3d at 1214 (finding that RLUIPA does not violate Tenth Amendment because it is a proper exercise of Congress' Fourteenth Amendment power) (citing *New York*, 505 U.S. at 156); *Kol Ami*, 2004 WL 1837037, at *15; *Maui County*, 298 F. Supp. 2d at 1015-16.

Relying on *New York*, 505 U.S. at 166, the Village argues that RLUIPA violates the Tenth Amendment "because it improperly seeks to regulate the manner in which states regulate private conduct." Br. at 73. That argument is misguided. In *New York*, and in *Printz v. United States*, 521 U.S. 898 (1997), the Supreme Court held that Congress cannot force the states to enact a federal regulatory program, or commandeer state officers directly to enforce federal regulations. *See New York*, 505 U.S. at 175; *Printz*, 521 U.S. at 935. RLUIPA, however, does neither. The statute does not compel the states "to enact or enforce" a federal program through state legislation; nor does it "conscript[ ] the States' officers directly" to enforce federal legislation. *Printz*, 521 U.S. at 935; *cf. Reno v. Condon*, 528 U.S. 141, 149-50 (2000) (upholding Driver's Privacy Protection Act of 1994 against similar challenges). Rather, states and local governments retain the discretion to enact land-use regulations. "While RLUIPA may preempt laws that discriminate against or exclude religious institutions entirely, it leaves individual states free to eliminate the discrimination in any way they choose, so long as the discrimination is actually eliminated." *Midrash Separdi*, 366 F.3d at 1242. RLUIPA is implicated only if a state or locality chooses to impose a substantial burden on religious exercise in a manner

that does not represent the least restrictive means of furthering a compelling governmental interest. *See, e.g.*, *Midrash Sephardi*, 366 F.3d at 1243 ("RLUIPA's core policy is not to regulate the states or compel their enforcement of a federal regulatory program, but to protect the exercise of religion, a valid exercise of Congress's § 5 power under the Fourteenth Amendment. . . ."); *Life Teen*, 2003 WL 24224618, at *16 ("RLUIPA does not require State or local governments to legislate on behalf of the federal government, or require State officials to administer any federal program."). Accordingly, RLUIPA does not violate the Tenth Amendment.

POINT II

THE DISTRICT COURT PROPERLY CONCLUDED THAT DEFENDANTS SUBSTANTIALLY BURDENED PLAINTIFF'S RELIGIOUS EXERCISE, AND FAILED TO DEMONSTRATE THAT THE SUBSTANTIAL BURDEN WAS IMPOSED TO FURTHER A COMPELLING GOVERNMENTAL INTEREST IN THE LEAST RESTRICTIVE MANNER

A. Defendants Imposed a Substantial Burden on Plaintiff's Religious Exercise

The district court properly concluded that the Village substantially burdened WDS' religious exercise.

1. WDS' Proposed Use of Its Property Qualifies As Religious Exercise

RLUIPA defines religious exercise to include "any exercise of religion, whether or not compelled

by, or central to, a system of religious beliefs." 42 U.S.C. § 2000cc-5(7)(A). Further, RLUIPA expressly states that "[t]he use, building, or conversion of real property for the purpose of religious exercise shall be considered to be religious exercise of the person or entity that uses or intends to use the property for that purpose." *Id.* § 2000cc-5(7)(B). Finally, RLUIPA provides that the Act is to be "construed in favor of a broad protection of religious exercise, to the maximum extent permitted by the terms of th[e] Act and the Constitution." 42 U.S.C. § 2000cc-3(g).

Contrary to the Village's contention, *see* Br. at 29, 60, RLUIPA's definition of "religious exercise" does not expand the definition of that term as contained in First Amendment Free Exercise jurisprudence. In *Smith*, the Supreme Court expressly held that a plaintiff in a Free Exercise Clause case need not prove that the government's action burdens a "central" tenet of his or her religion. *See Smith*, 494 U.S. at 886-87. Similarly, this Court has held that "courts are not permitted to inquire into the centrality of a professed belief to the adherent's religion or to question its validity in determining whether a religious practice exists." *Fifth Avenue Presbyterian*, 293 F.3d at 574 (internal quotation marks omitted). An individual "claiming violation of free exercise rights need only demonstrate that the beliefs professed are 'sincerely held' and in the individual's 'own scheme of things, religious.'" *Id.* at 574 (quoting *Patrick v. LeFevre*, 745 F.2d 153, 156-57 (2d Cir. 1984)). Accordingly, RLUIPA's defi-

nition of "religious exercise" is entirely consistent with the Supreme Court's jurisprudence.*

Here, the district court properly concluded that WDS' proposed use of its property constitutes religious exercise. As a threshold matter, the court found that "religious education and practice permeates the students' education in all grades." *Id.* at 495. In pre-kindergarten and kindergarten, there is "no division between Judaic and general studies," as the children receive "simultaneous instruction in both Judaic and general studies." *Id.* Through all grades, the district court found, students study and celebrate Jewish holidays and participate in daily prayer, and religious instruction is "integrated, to varying degrees, in general studies classes such as language arts, social studies, math and science, as well as music and art." *Id.* at 496. Moreover, WDS adheres to kosher dietary laws, and its students follow a dress code dictated by religious observance. *Id.* at 496-97.

---

* The district court nonetheless concluded in this case that "religious education of children is in fact central to modern Orthodox Judaism." 417 F. Supp. 2d at 545. Numerous other courts have also found facilities used for religious education to be protected under RLUIPA. *See Living Water*, 384 F. Supp. 2d at 1129-30; *Castle Hills*, 2004 WL 546792, at *8; *Cottonwood*, 218 F. Supp. 2d at 1213, 1224, 1232; *Shepherd Montessori Ctr. Milan v. Ann Arbor Twp.*, 259 Mich. App. 315, 329, 675 N.W.2d 271, 280-81 (Mich. Ct. App. 2003).

With respect to the proposed project, the Application provides for "classrooms and special instruction rooms dedicated to the teaching of Hebrew, Talmud and other strictly Judaic topics, as well as a multi-purpose room designed to enable group prayer and events devoted to expressions central to Judaism." *Id.* at 544. More specifically, the court heard "convincing evidence that a substantial number of the so-called secular classrooms and small-group instructional rooms would be devoted exclusively to teaching purely Judaic studies," and that "other supposedly secular facilities such as the multi-purpose room will be frequently if not predomina[nt]ly used to accommodate WDS's religious needs." *Id.* at 558.

As the court properly held, "where a building is to be used for the purpose of 'religious exercise,' the building is not denied protection under RLUIPA merely because it includes certain facilities that are not at all times themselves devoted to" religious exercise—as long as those facilities are "inextricably integrated with and reasonably necessary to facilitate" such religious exercise. 417 F. Supp. 2d at 544. Here, the court made precisely that finding: a "major portion of the proposed facilities will be used for religious education and practice or are inextricably integrated with, and necessary for WDS' ability to provide, religious education and practice." *Id.* at 545-46. Accordingly, contrary to Defendants' Argument, *see* Br. at 29, 60, WDS' proposed use of its property is not secular in nature; in fact, the Application goes to the heart of WDS' religious exercise. *See also supra* Point I.C.3.

Based upon its careful review of the record, the court correctly concluded that WDS' religious exercise was at stake in connection with the proposed construction, and that determination should be upheld. *See San Jose Christian College v. City of Morgan Hill*, 360 F.3d 1024, 1034 (9th Cir. 2004) (college's intention to convert property from use as hospital to use as place for religious education constituted "religious exercise" under RLUIPA); *Castle Hills*, 2004 WL 546792, at *9 (noting that substantial burden on religious exercise exists where the "proposed use" of a facility is "religious education"); *Living Water*, 384 F. Supp. 2d at 1133 (finding substantial burden on religious exercise in denial of permit to construct facility including classrooms, sanctuary, gymnasium, offices, and meeting rooms); *Cottonwood*, 218 F. Supp. 2d at 1213, 1224, 1232 (application for 300,000 square-foot complex including worship center, multiple classrooms, study rooms, multi-purpose room, youth activity center, gymnasium, child daycare facility, and space for community service programs implicated "religious exercise" under RLUIPA).

2. WDS' Religious Exercise Was Substantially Burdened

The district court also correctly determined that the denial of the Application constituted a "substantial burden" on Plaintiff's religious exercise because it "seriously impede[d]" such religious exercise. *Id.* at 547.

a. The Denial of the Application Was a "Complete" Denial

Mindful of this Court's caution that "rejection of a submitted plan, while leaving open the possibility of approval of a resubmission with modifications . . . is less likely to constitute a substantial burden than definitive rejection of the same plan," the district court properly concluded on the factual record before it that the denial of WDS' Application was "final, definitive and complete." *Id.* at 548-49.

As the court found, WDS had worked for more than a year and a half to address the ZBA's concerns, offering to make changes to, *inter alia*, parking, the size of the proposed building, and landscaping. *Id.* WDS had also offered to agree to an "enrollment cap" and a "bus departure management plan." *Id.* Notwithstanding "these and other significant concessions," however, the ZBA "denied the Application in its entirety." *Id.* at 549. In doing so, the ZBA: (1) ignored the conclusions of its own traffic experts, who had recommended *approval* of the Application with the imposition of certain conditions, and did so in the absence of any study that conflicted with WDS' traffic study, *id.* at 519-34; (2) gave reasons for the denial that were "conceived after the ZBA closed the hearing process, affording WDS no opportunity to respond," *id.* at 518; and (3) did not even respond to WDS' proposal to reduce the square footage of the proposed building and relocate it on the property, or "at any point indicate" that it would permit WDS to modify its Application, *id.* at 549. On this record, given WDS' "long special permit history with the Village," the court correctly

found "much reason to doubt the sincerity of the ZBA's professed willingness reasonably to consider another application addressing WDS's needs in an acceptably efficient and practical manner." *Id.* at 548, 517. Accordingly, the court correctly ruled that Defendants' denial of the Application was "complete."

b. The Burden Caused by the Denial Was Substantial

RLUIPA does not define the term "substantial burden," and courts interpreting RLUIPA have not settled upon a uniform definition for that term. However, when "Congress adopts a new law incorporating sections of a prior law, Congress normally can be presumed to have had knowledge of the interpretation given to the incorporated law, at least insofar as it affects the new statute." *Lorillard v. Pons*, 434 U.S. 575, 581 (1978). Accordingly, courts should be guided in defining "substantial burden" by prior cases under the Free Exercise Clause and RFRA. The legislative history of RLUIPA further demonstrates that Congress intended for the term "substantial burden" to be given the same definition as in Free Exercise Clause cases. *See* 146 Cong. Rec. S7776 ("The Act does not include a definition of the term 'substantial burden' because it is not the intent of this Act to create a new standard for the definition of 'substantial burden' on religious exercise. Instead, that term as used in the Act should be interpreted by reference to Supreme Court jurisprudence."). *See Guru Nanak*, 2006 WL 2129737, at *7; *Sts. Constantine & Helen Greek Orthodox Church v. City of New Berlin*, 396 F.3d 895, 897 (7th Cir. 2005); *Midrash*, 366 F.3d at 1226.

The Supreme Court has not adopted a single definition of the term "substantial burden" under the Free Exercise Clause. In *Sherbert*, the Court found a substantial burden where an individual was subjected to the "pressure" of being "force[d] . . . to choose between following the precepts of her religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of her religion in order to accept work, on the other hand." 374 U.S. at 404. In the context of a Free Exercise challenge, this Court has ruled that "a substantial burden exists where the state 'put[s] substantial pressure on an adherent to modify his behavior and to violate his beliefs.'" *Jolly v. Coughlin*, 76 F.3d 468, 477 (2d Cir. 1996) (citation omitted).

In interpreting RLUIPA, courts have sought to apply the definition of "substantial burden" in a new context. The Eleventh Circuit ruled in *Midrash Sephardi* that a "substantial burden" under RLUIPA means more than an inconvenience on religious exercise, and is "akin to significant pressure . . . that tends to force adherents to forego religious precepts." 366 F.3d at 1227. The Ninth Circuit has defined "substantial burden" under RLUIPA as a "significantly great restriction or onus" on religious exercise. *San Jose Christian College*, 360 F.3d at 1034; *Guru Nanak*, 2006 WL 2129737, at *7 (following *San Jose Christian College*). The Seventh Circuit has found that the burden need not be "insuperable" to be deemed "substantial," and that unreasonable delay, uncertainty, and expense can constitute a substantial burden. *See Sts. Constantine*, 396 F.3d at 900-901 (finding that denial of application constituted substantial burden, and noting that while

plaintiff could have searched for other parcels of land to develop, "there would have been delay, uncertainty, and expense. That the burden would not be insuperable would not make it insubstantial.").*

Consistent with these principles, numerous courts have found a substantial burden on religious exercise where religious schools and congregations have been significantly inhibited in their need to build or expand their facilities and retain or attract students. *See Guru Nanak*, 2006 WL 2129737, at *9

---

* The Seventh Circuit, ruling in the context of a facial challenge to Chicago's zoning ordinance under RLUIPA, has interpreted RLUIPA to require that the burden bear "direct, primary, and fundamental responsibility for rendering religious exercise—including the use of real property for the purpose thereof within the regulated jurisdiction generally—effectively impracticable." *Civil Liberties for Urban Believers v. City of Chicago*, 342 F.3d 752, 761 (7th Cir. 2003) ("*CLUB*"). In facial challenges, the "challenger must establish that no set of circumstances exists under which the [law] would be valid." *City of Chicago v. Morales*, 527 U.S. 41, 78-79 (1999). This case, in contrast, involves a challenge to a single zoning decision regarding a specific property; WDS has not raised a facial challenge to the Village's entire zoning code. Thus, the standard set forth in *CLUB* is inapposite. Indeed, the Seventh Circuit's more recent decision in *Sts. Constantine*, discussed above, applied a more flexible approach outside the context of a facial challenge.

(finding substantial burden where county's denials of Sikh temple's applications for special use permits "to a significantly great extent lessened the prospect of Guru Nanak being able to construct a temple in the future"); *Living Water Church of God v. Charter Twp. of Meridian*, 384 F. Supp. 2d 1123, 1133 (W.D. Mich. 2005) (finding substantial burden where plaintiff was "severely limited in its ability to recruit for the school because of the uncertainty about future space and the current lack of programming"); *Kol Ami*, 2004 WL 1837037, at **8-9 (denial of variance preventing development and operation of place of worship constitutes "substantial burden"); *Castle Hills*, 2004 WL 546792, at **9-10 (denial of special use application to expand facility used for religious education may violate RLUIPA if it significantly limits the "number of children who can be educated and the quality of the educational programs offered"); *Cottonwood*, 218 F. Supp. 2d at 1212 (substantial burden may exist where the "physical constraints of its current facility [ ] limit [Plaintiff's] ability to conduct many of its different programs" and "to conduct outreach to potential new members"); *cf. Alpine Christian Fellowship*, 870 F. Supp. at 994-95 (finding substantial burden under Free Exercise Clause where county denied permit to operate religious school in church); *Western Presbyterian Church v. Bd. of Zoning Adjustment*, 862 F. Supp. 538, 546 (D.D.C. 1994) (church's inability to offer food to homeless on its premises was substantial burden under Free Exercise Clause); *Jesus Ctr. v. Farmington Hills Zoning Bd. Of Appeals*, 544 N.W.2d 698 (Mich. Ct. App. 1996) (finding substantial burden under RFRA where

zoning board denied congregation permission to operate shelter for the poor in its church).

In harmony with these cases, the district court in this case properly found that the Village's denial of the Application constituted a substantial burden on WDS' religious exercise by "seriously imped[ing]" that exercise. 417 F. Supp. 2d at 547. The record below amply demonstrated the many hardships experienced by WDS due to the inadequacies of its current facilities and the Defendants' denial of the Application. *See supra*, Section F.1.a. By "precluding the construction of much-needed facilities, defendants significantly interfered with WDS's ability to provide an adequate and effective dual curriculum of Judaic and general studies education, and so limited its ability to retain and attract students and faculty as to imperil its continued existence." *Id.* at 547. Accordingly, "WDS's religious exercise is substantially burdened by denial of the Application." *Id.* at 548.

Relying heavily on the district court's decision in this case, the Ninth Circuit recently found, in *Guru Nanak*, that a local government had imposed a substantial burden on the religious exercise of a Sikh temple. As was the case here, the applicant in *Guru Nanak* had "readily agreed to every mitigation measure suggested by the Planning Division, but the County, without explanation, found such cooperation insufficient," 2006 WL 2129737, at *7, and never "suggested additional conditions that would render satisfactory Guru Nanak's application," *id.* at *9. Further, the "broad reasons" given for the government's denial in that case "could easily apply

to all future applications" by the temple. *Id.* at *7. Under these circumstances, the court concluded that "the County's actions have to a significantly great extent lessened the prospect of Guru Nanak being able to construct a temple in the future," and therefore "the County has imposed a substantial burden on Guru Nanak's religious exercise." *Id.* at *9.

As in *Guru Nanak* and *Living Water*, WDS has endured years of negotiation, expense, effort, and delay, and the district court correctly determined that "any purported willingness on the part of the ZBA even to consider fairly, much less approve, another application actually filling WDS's needs is, at the least, highly suspect." 417 F. Supp. 2d at 549-50. Because the hardships caused by the Village's denial of WDS' Application impose a "significantly great restriction or onus" on WDS' religious exercise, *Guru Nanak*, 2006 WL 2129737, at *7, the district court's ruling on this point should be upheld. *See Westchester Day School*, 386 F.3d at 188 n.3 ("[I]n some circumstances denial of the precise proposal submitted may be found to be a substantial burden, . . . for example, where the board's stated willingness [to consider alternatives] is disingenuous"); *Living Water Church of God*, 384 F. Supp. 2d at 1134 (finding substantial burden where Township denied church's proposed land-use application after church had "worked diligently and in good faith with the Township to address its concerns"); *Castle Hills*, 2004 WL 546792, at **9-10 (finding substantial burden where City failed to conduct substantive review of Church's permit application); *supra* at 85.

B. Defendants Failed to Demonstrate That They Acted in the Least Restrictive Manner to Further a Compelling Governmental Interest

Finally, this Court should also affirm the district court's conclusion that Defendants failed to meet their burden of demonstrating that the denial of the Application was the least restrictive means of furthering a compelling governmental interest. 417 F. Supp. 2d at 554.

Under RLUIPA, once the plaintiff has demonstrated a substantial burden on its religious exercise, the burden shifts to defendants to prove that imposition of this substantial burden is in furtherance of a compelling governmental interest, and is the least restrictive means of furthering that interest. *See* 42 U.S.C. § 2000cc(a)(1). To survive strict scrutiny, the governmental action must "advance interests of the highest order and must be narrowly tailored in pursuit of those interests." *Lukumi*, 508 U.S. at 546 (internal quotation marks omitted). To satisfy the "least restrictive means" standard, the defendants are required to establish that there are "no alternative forms of regulation" that would further the alleged governmental interest. *Sherbert*, 374 U.S. at 407.

Here, without deciding whether the interests advanced by Defendants—relating to traffic, preservation of property values, and aesthetics, drainage, and parking—were compelling, the district court concluded, correctly on this record, that these concerns could have been mitigated by methods other than outright denial of the Application, and thus the denial was not the least restrictive means of

advancing the stated governmental interests. 417 F. Supp. 2d at 551-54.

The United States takes no position as to whether traffic, parking, or the other interests advanced by Defendants were "compelling" governmental interests. But the district court properly found, based upon substantial evidence in the record, that Defendants failed to meet their burden to show the absence of less restrictive alternatives. First, less restrictive alternatives plainly existed with respect to any traffic concerns the ZBA could have had; indeed, the ZBA's own experts recommended *approval* of the Application coupled with certain traffic-related mitigating conditions, but the ZBA completely ignored that recommendation. *See id.* at 515, 551-52 (addressing less restrictive alternatives, including re-timing of the traffic lights, widening the approaches to the school, adding turning lanes, re-routing traffic, a more aggressive busing program, or an enrollment cap). Moreover, the ZBA had before it no study that in any way contradicted WDS' extensive traffic assessment. *See id.* at 519 & n.45.

As to parking, the ZBA's wildly inconsistent positions on this issue—first declaring that WDS' parking proposal was sufficient, *see id.* at 534, then requiring that WDS reduce the number of parking spaces, *see id.* 534-35, and ultimately concluding that the Application was deficient because the property required *more* parking spaces, *see id.* at 535-36, 554—emphatically demonstrates that Defendants' purported traffic concerns, which the court described as "an afterthought" to "bolster a flimsily

supported decision," *see id.* at 554, were susceptible to less restrictive alternative solutions than outright denial of the Application. Finally, as to the issue of property values and the aesthetic considerations relating to the Application, Defendants never demonstrated that WDS' "comprehensive landscaping plan" was in any way defective, and certainly did not demonstrate that "no alternatives were available" in this area. *Id.* at 553.

Thus, because less restrictive alternatives could have addressed the Village's concerns, the district court properly held that the Village had failed to sustain its burden. *See Cottonwood*, 218 F. Supp. 2d at 1229 (even assuming compelling governmental interest, City failed to demonstrate that there was no other way to further its interest other than outright denial of conditional use permit). The district court's decision should therefore be upheld on this point as well.

CONCLUSION

The judgment of the district court should be affirmed.

Dated: New York, New York
August 11, 2006

Respectfully submitted,

MICHAEL J. GARCIA,
United States Attorney for the Southern District of New York, Attorney for the United States as Intervenor and as Amicus Curiae.

SARAH E. LIGHT,
SARA L. SHUDOFSKY,
Assistant United States Attorneys, Of Counsel.

WAN J. KIM
Assistant Attorney General

DAVID K. FLYNN,
ERIC W. TREENE,
SARAH E. HARRINGTON,
Attorneys,
U.S. Department of Justice,
Civil Rights Division,
Appellate Section

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(C), the undersigned attorney for the United States certifies that this brief complies with the type volume limitation of Fed. R. App. P. 32(a)(7)(B). As measured by the word processing system used to prepare this brief, there are 21,528 words in this brief. The United States is filing herewith a motion for permission to file an oversized brief consisting of no more than 22,000 words.

ANTI-VIRUS CERTIFICATION

Case Name: Westchester v. Village

Docket Number: 06-1464-cv

I, Natasha R. Monell, hereby certify that the Appellee's Brief submitted in PDF form as an e-mail attachment to **briefs@ca2.uscourts.gov** in the above referenced case, was scanned using Norton Antivirus Professional Edition 2003 (with updated virus definition file as of 8/11/2006) and found to be VIRUS FREE.

Natasha R. Monell, Esq.
Staff Counsel
Record Press, Inc.

Dated: August 11, 2006