UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

ROBERT MURPHY ET AL PLAINTIFFS VS. ZONING COMMISSION OF THE TOWN OF NEW MILFORD ET AL DEFENDANTS	CIVIL ACTION NO. 300CV2297HBF NOVEMBER 6, 2002

DEFENDANTS' MEMORANDUM IN SUPPORT
OF ITS MOTION FOR SUMMARY JUDGMENT

FACTS AND PROCEDURAL HISTORY

The Plaintiffs, Mr. and Mrs. Robert Murphy Jr., are the owners of a single family residence located at 25 Jefferson Drive, a cul-de-sac with approximately 8 other single family homes. This residence is located in the R-40 zone, a single family residential zone. Only single family dwellings, farms and the keeping of livestock are permitted uses in this zone. Other uses are only allowed by special permit.

The Plaintiffs' hold regularly scheduled meetings at their home, primarily on Sunday. In the past, the meetings have included over forty attendees, but since at least September of 2000 to the present, have not exceeded twenty five in number. Plaintiffs state that the meetings are from 2:00 p.m. to 6:00 p.m. but testimony showed that they may be from 12:00 noon to 9:00 p.m.

In order to accommodate the cars of those attending these meetings, the Plaintiffs have converted their back yard into a parking lot. At this time, the parking lot is gravel but they have expressed a desire to pave the parking area with asphalt.

At several of its meetings over a period of four months, the New Milford Zoning Commission sought to address the Plaintiffs' use of their property. During these meetings, testimony from the neighbors as well as from the Plaintiffs' son, Patrick Murphy, were taken. In addition, letters and photographs concerning the use of the Murphy's property were accepted. Evidence showed that there were traffic, drainage and safety concerns. Members of the Commission, as well as the zoning enforcement officer, made site visits to see in person what impact the use of the Murphy's home was having on this residential neighborhood.

At the November 28, 2000 meeting the Defendant Commission issued an opinion, finding in part, that the parking lot as well as the use of the property as a weekly meeting place for 25 to 40 people who are not family members were not permitted by the zoning regulations nor were they incidental uses customary to a single family residence and that if this illegal use continued, the ZEO was to issue a cease and desist order.

On or about November 29, 2000, the zoning enforcement officer of the Town of New Milford sent a letter to the Plaintiffs informing them that their present use of the property

as a weekly meeting place and parking lot violated Chapter 25 of the Zoning Regulations of the Town of New Milford.

On or about December 14, 2000, the Plaintiffs filed an amended complaint in Federal Court alleging that the Defendants' actions violated certain of their Constitutional rights, such as freedom of speech, assembly and exercise of religion as well as certain state and federal statutory rights. Only after this complaint was filed was any enforcement action taken by the New Milford Zoning Enforcement Officer which was in the form of a cease and desist order dated December 19, 2000. No appeal was taken of this order to the zoning board of appeals.

On or about December 21, 2000, at the request of the Plaintiffs, a temporary restraining order was granted by this Court. On or about January 18, 2001, a hearing was held on the Plaintiffs' application for a preliminary injunction which was granted on July 5, 2001. The Court also entertained the Plaintiffs' request to convert this hearing into a hearing on the merits which was subsequently denied. Then on August 21, 2001, the Plaintiffs' motion for a permanent injunction was denied.

On March 12, 2001, the Defendants filed a motion to dismiss this matter with the court. Said motion was based on three of its special defenses: that the Plaintiffs' claims are not ripe for review, that the Plaintiffs have not exhausted the administrative remedies available to them and/or the Defendants,

as agents of the State of Connecticut, have not consented to the jurisdiction of this Court as is required by the eleventh amendment of the United States Constitution. This motion was denied by the court in a written opinion on September 6, 2002.

Now, pursuant to the Rule 26(f) Report, the Defendants file this motion for summary judgment as to all claims in the Plaintiffs' fourth amended complaint as well as the Defendants' remaining special defenses because there are no material facts remaining in dispute and they are entitled to judgment as a matter of law.

LAW AND ARGUMENT

I. STANDARD OF REVIEW

All Parties in this matter have moved for Summary Judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure. Said rule permits judgment only if "... there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). On a motion for summary judgment, the moving party must meet a substantial burden before its motion can be granted. It must prove that there is no issue of material fact and that the movant is entitled to judgment as a matter of law. Berns v. Civil Service Community (DC NY 1975) 417 F.Supp. 17,20.

Any material facts relied on by the Defendants in this motion have been taken from the following sources: the record produced by

the hearing on the Plaintiffs' motion for a temporary injunction, statements of fact contained in this Court's decisions on that motion as well as the motion to dismiss, answers to interrogatories filed by both parties and any facts admitted to in the various pleadings. Both counsel are in agreement that no additional evidence is needed in order for this court to render a decision. Therefore, it is appropriate for this court to now consider whether the Defendants are entitled to judgment as a matter of law.

II. PLAINTIFFS' CLAIMS

The fourth amended complaint contains thirteen causes of action, only one of which has been withdrawn. Seven of these assert violations of rights protected by the United States Constitution. Essentially, the Plaintiffs claim that because the use of their property involves religion, they are immune from the application of the zoning regulations. As the following argument will show, this is a false premise.

Zoning is a long recognized function of the police power of the state. All property is held subject to this police power and its use may be regulated in the interest of the public health, safety and welfare. Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 47 S.Ct. 114 (1926). Religious beliefs cannot serve to bar this principle, for to hold otherwise, "would make the professed doctrines of religious belief superior to the law of the land, and in effect to permit every citizen to become a law unto

himself." Employment Division v. Smith, 494 U.S. 872, 879 (1990). The fact that the use of their home involves prayer does not place the Murphys beyond the restrictions imposed by the New Milford Zoning Regulations.

A. Standard of Review

It is well established that "[T]he federal courts have given states and local communities broad latitude to determine their zoning plans. Indeed, land use law is one of the bastions of local control, largely free of federal intervention. Regulation of land is perhaps the quintessential state activity." Kol Ami v. Abington Township, No. 013077 (3rd Cir. 10/16/02) at 22, (internal citations omitted). It is because of this that local zoning decisions that are subjected to a constitutional challenge are examined under a very forgiving standard of review. Id. at 20.

When addressing the issue of whether the exercise of authority by a local land use board violates any protections afforded by the United States Constitution, the Supreme Court has applied a very deferential standard of review. As long as the exercise of zoning authority is **rationally related** to a **legitimate** state objective, said action will be held constitutional. Id. at 20-21. These objectives are not "confined to elimination of filth, stench, and unhealthy places [but also] to lay out zones where family values, youth values, and the blessings of quiet seclusion and clean air make the area a sanctuary for people". Belle Terre v. Boraas, 416

U.S. 1, 9, 94 S.Ct. 1536 (1974).

As the following discussion will show, most of the Plaintiffs' claims fail simply because they are unsupported by the facts of this case. However, even if they are so supported, their claims still fail because the zoning authority exercised by the Defendants is rationally related to a legitimate state interest.

B. UNITED STATES CONSTITUTION CLAIMS

1. FREEDOM OF SPEECH - FIRST AMENDMENT OF THE UNITED STATES CONSTITUTION

In their first cause of action, the Plaintiffs' claim that their right to free speech was violated by the zoning regulations of the Town of New Milford because they are a content based restriction of religious speech. This claim is groundless. As already discussed in earlier motions before this Court, the zoning regulations applied to the Plaintiffs are a generally applicable, neutral law unrelated to the content of the landowner's speech. Plaintiffs have violated a garden variety occupancy requirement by using their home for regularly scheduled weekly meetings for more than twenty five non-family persons. A review of the cease and desist order issued as well as the zoning regulation cited therein clearly show that they are content neutral. Whether the speech that takes place at the meetings focuses on religious, political or just common topics is of no concern. Even if this court found that the complained of actions are based on content based restrictions, these actions do not

violate the free speech rights of the Plaintiffs.

"When zoning law constricts the realm of permissible expression ... we employ a heightened level of scrutiny to determine whether the law is valid under the first amendment to the United States Constitution." Husti v. Zuckerman Property Enterprises LTD, 199 Conn. 575, 580, 508 A.2d 735 (1986). "A content neutral zoning regulation that restricts the permissible time, place and manner of protected speech is Constitutional under the first amendment if the regulation is designed to serve a substantial government interest and allows for reasonable alternative avenues for communication." Husti, at 581, citing Renton v. Playtime Theatres Inc., 475 U.S. 41, 106 S.Ct 925(1986)

In Husti, the Defendant landowners sought to use their property for outdoor music concerts. This use was neither a permitted use in the residential zone wherein the property was located, nor was it found to be an accessory use to the existing nonconforming use, which was a country club. The land use commission found that the resulting noise, traffic and crowds from the outdoor concerts posed potential and real adverse consequences to the surrounding residential properties. Protecting the residential character of the community was found by the court to be a substantial government interest. Id. at 582.

With respect to alternative means, since outdoor concerts were permitted as primary uses in some zones and as accessory

uses in others, the Court found that this part of the test was met also.

There is a striking similarity between Husti and the dispute at hand. First, the regulation involved is content neutral. It applies to all meetings, regardless of their purpose. Second, the Plaintiffs' use of their property as a meeting place is not permitted in the residential zone where it is located, and it was found to not be an accessory use. Third, it threatened the very substantial interest stated in Husti, the protection of the character of the neighborhood. Finally, alternative means are available to the Plaintiffs, they can simply meet in smaller groups or apply for a permit or a variance. Therefore, there is no violation of the Plaintiffs' free speech rights.

2. RIGHT TO PRIVACY - FIRST AMENDMENT TO THE UNITED STATES CONSTITUTION

Count three of the Plaintiffs' complaint alleges a violation of this first amendment right. The Constitution protects two kinds of privacy interests; neither of which is affected by the Defendants' actions here. One is an individual interest in avoiding disclosure of personal matters, and another is an interest in independence in making certain kinds of decisions. Doe v. Town of Plymouth, 825 F.Supp. 1102 (D.Mass. 1993), Doe v. Marsh, 918 F.Supp. 580, *affirmed* 105 F.3d 106 (1996).

The Plaintiffs cannot carry their burden of showing that the application of the zoning regulations to them intrudes on any

privacy right they have. Since these regulations are generally applicable content neutral laws, any subsequent enforcement would not require the Plaintiffs to disclose to anyone the nature of their meetings. It is the size and frequency of the meetings which the Defendants found violated the zoning regulations, not their content. The facts already disclosed to this court reveal that any eventual enforcement would not require the Plaintiffs to disclose or make a decision regarding what can be said at the meetings. The only type of information which would be needed to show compliance with the zoning regulations would be how many people attend. What they talk about is of no interest and is immaterial to this, or any, zoning enforcement activity. Therefore, since no privacy right has been intruded on, the Plaintiffs' claim must fail.

Even if the Plaintiffs show that a privacy right had been intruded upon by the Defendants, their claim must fail because the authority exercised by the Defendants is rationally related to a legitimate government interest. In Belle Terre, the Supreme Court found that an action taken by a local zoning board was rationally related to the legitimate government interest of protecting a single family residential zone. The action taken was placing within the zoning regulations a definition of family which limited its application to groups of individuals either related by blood/adoption or if unrelated, to no more than two

unrelated persons living together. The Supreme Court found that this action served the legitimate purpose of protecting "A quiet place where yards are wide, people are few and motor vehicles restricted." Id. at 1541.

Similarly, in this matter, the Defendants sought to protect the single family neighborhood from the Plaintiffs intrusive, nonresidential use of their property by placing a reasonable limit on the number of attendees at the meeting. By doing so, the Defendants sought to achieve the legitimate goal of keeping the numbers of people few and restrict the amount of traffic in this cul-du-sac neighborhood. It is clear that the means sought is rationally related to the legitimate government goal of protecting this residential area. (See also Lakewood Ohio Cong. of Jehovah's Witness Inc. v. Lakewood Ohio, 699 F.3d 303 (6th Cir 1983) finding that excluding all uses except single family homes from residential zone rationally related to legitimate government purpose of minimizing congestion, traffic, noise and off-street parking.)

3. ESTABLISHMENT OF RELIGION - FIRST AMENDMENT OF THE UNITED STATES CONSTITUTION

Just as in the Plaintiffs' claim regarding freedom of speech, the facts clearly show that this seventh claim equally has no merit. A reasonable reading of the cease and desist order, the applicable zoning regulations, as well as the opinion issued by the Commission show that the content of the speech

taking place at the regularly scheduled meetings held at the Plaintiffs' home are immaterial. Instead, it is the number of persons in attendance which is relevant.

Even if the Plaintiffs' groundless assertions are believed by this Court, the actions undertaken by the Defendants to protect the integrity of the zoning process as well as the quiet nature of this residential neighborhood pass constitutional muster as they are rationally related to these legitimate government interests as already shown.

4. DUE PROCESS CLAIM - FOURTEENTH AMENDMENT OF THE UNITED STATES CONSTITUTION

In their fifth cause of action, the Plaintiffs assert that their due process rights as guaranteed by the United States Constitution were violated because the zoning regulations require them to guess when they are having a religious service or activity as opposed to a nonreligious service or activity. Again, the facts of this case set forth in the Defendants' 9(c)(1) statement clearly show that the zoning regulations are neutral as to the nature and content of the meetings occurring at the Plaintiffs' home. Again, as already discussed above, it is the size and frequency of these meetings that is the source of the zoning violations.

Again, as already stated above, even if this court agrees with the Plaintiffs that the nature of the meetings is the true target of the Defendants' actions, no constitutional violation

has occurred because the Defendants' actions bear a rational relationship to serving a legitimate state purpose, the protection of the single family neighborhood as well as the integrity of the zoning process.

5. EQUAL PROTECTION CLAIM - FOURTEENTH AMENDMENT OF THE UNITED STATES CONSTITUTION

The Plaintiffs' equal protection claim, set forth as its sixth cause of action, is based on the false premise that only they are singled out for enforcement action while other similar, secular activities go unpunished. For this claim to proceed, the burden is squarely on the Plaintiffs to show that other, similar situated uses, are allowed to exist while their use is unfairly singled out by the Defendants. City of Cleburne v. Cleburne Living Center, 473 U.S. 432, 447-50 (1985). No such evidence has been offered. In fact, this court specifically found that there is no religious animus held by the Defendants against the Plaintiffs. [9(c)(1) #12]

Even if there was such evidence before this court, the actions taken by the Defendants was proper because "As long as a municipality has a rational basis for distinguishing between uses, and that distinction is rationally related to the municipalities legitimate goals, then federal courts will be reluctant to conclude that the [action] is improper." Kol Ami at 23. As already discussed in prior sections, the actions of the Defendants pass this test.

6. PEACEABLE ASSEMBLY - FIRST AMENDMENT OF THE UNITED STATES CONSTITUTION

In count two of their Fourth Amended Complaint, the Plaintiffs' assert that the zoning regulations somehow prevent them from praying with others of like mind in their home. As already discussed, they do no such thing. They are content neutral and are aimed at bringing into compliance the present use of the Plaintiffs' property. Since the Plaintiffs can still pray in their house with others according to their stated religious beliefs, they cannot carry their burden of proof showing that the opinion prevents them from assembling and associating with others. The evidence is clear that the number of persons able to attend these meetings in compliance with the zoning regulations is equal to, and often greater than, the number who actually now attend. [9(c)(1) #19-24]

If, for some reason, this Court finds that these stated rights have been directly and substantially interfered with by the Defendants, then the court must find that the Plaintiffs have met their burden of showing that the government interference is direct and substantial. Fernandez v. City of Poughkeepsie, 67 F.Supp.2d 222 (S.D.NY 1999), Hone v. Cortland City School District, 985 F.Supp. 262 (N.D.NY 1997). Only after this is done can the court consider whether this interference is rationally related to a legitimate government interest. As discussions in other portions of this memorandum show, these requirements have

been met by the Defendants. Therefore, this claim of the Plaintiffs must also fail.

7. FREE EXERCISE OF RELIGION - FIRST AMENDMENT OF THE UNITED STATES CONSTITUTION

The Supreme Court in Employment Division v. Smith, 494 U.S. 872 stated that if a Free Exercise Claim is joined with other Constitutional protections, then a compelling interest standard would apply. Smith at 881. A review of the Plaintiffs' forth amended complaint reveal that in addition to a Free Exercise Claim, 6 other U.S. Constitutional protections are raised. If these protections are found not to apply here, then the rational basis standard would apply to the free exercise claim as well. Cornerstone Bible Church v. City of Hastings, 948 F.2d 464, 473 (8th Cir. 1991).

Under the compelling interest test, "if a government regulation substantially burdens the free exercise of religion, then it is unconstitutional unless it is justified by a compelling government interest that cannot be served by a **less restrictive** means." K. YOUNG, ANDERSON'S LAW OF ZONING Sec. 21.21A (4th ed. 1996). As the law and facts reveal, the Defendant Commission's opinion passes even this test.

In the fourth count of their amended complaint, the Plaintiffs allege that their right to freely exercise their religion has been infringed upon. This claim is based in large part on the false premise that the religious nature of their

meetings has been targeted. Since this has already been discussed several times in this brief, it will not be addressed again here.

However, another basis of this claim relies on the assertion that since the zoning regulations do not state a specific limit on meetings held on single family residential property, the standards upon which the Defendants' actions are founded are too general in nature and thus gave it "unfettered discretion". This is not true.

The Defendant Commission determined that the Plaintiffs' use of their property as a weekly meeting place for 25-40 non-family persons was not an accessory use. In reaching the opinion that it did, the Defendants relied on several well established principles of land use law.

a. Accessory Uses

The zoning regulations of the Town of New Milford are permissive in character. Hence, any use of land which is not specifically listed as a permitted use is automatically prohibited. [9(c)(1) #7].

Section 025-020 of the zoning regulations lists all of the permitted uses of land for the R-40 zone where the subject property is located. Weekly, regularly scheduled meetings for 25-40 people as well as parking lots are not listed and are therefore prohibited. If not for the legal creation of accessory

uses, our discussion would stop here for the Plaintiffs would need a special permit or a variance to continue their use.

An accessory use, defined in section 015-010 of the zoning regulations, is "A use or building subordinate to the main building on a lot and used for purposes **customarily incidental** to those of the main use or building." Both of these terms have been subjected to repeated judicial interpretation.

i. Incidental

Incidental has been defined to mean a use which is subordinate to the principle use of the property and also bears a reasonable relationship to it. "It is not enough that the use be subordinate, it must also be attendant or concomitant. To ignore this latter aspect of incidental would be to permit any use which is not primary, no matter how unrelated it is to the primary use." Lawrence v. North Branford Zoning Board of Appeals, 158 Conn. 509, 512, 264 A.2d 552 (1969).

ii. Customary

In defining this standard, "Courts have often held that use of the word customarily places a duty on the commission or court to determine whether it is usual to maintain the use in question." "The use must be further scrutinized to determine whether it has commonly, habitually and by long practice been established as reasonably associated with the primary use." "[T]he use should be more than unique or rare, even though it is

not necessarily found on a majority of similarly situated properties." Id. at p. 512-513, *emphasis added*

iii. Judicial Review

When determining whether or not a use is a permitted accessory use, a zoning agency is vested with broad discretion in applying these standards to a particular use of land. "The application of the concept to a particular situation may often present and depend upon questions of fact, or involve or be open to a legal exercise of discretion ..." Id. at p. 513. On appeal, the court should give deference to the board's decision and not substitute its judgment for that of the board's." Whittaker v. Zoning Board of Appeals, 179 Conn. 650, 654, 429 A.2d 910 (1980).

Thus, these standards are well defined and capable of being applied fairly to the Plaintiffs' property use. Even if this Court is unpersuaded that these terms are specific, the application of zoning regulations containing generalized requirements has been found to pass constitutional muster.

When the Defendant Commission considered the issue whether or not the use of the Plaintiffs' property as a meeting hall for 25-40 people on a regularly scheduled basis as well as a parking lot, it considered the evidence presented to it as well as the personal knowledge of the commission members. It then had to decide whether the use in question was the principle use of the property and if not, was it an accessory use.

According to well established legal precedent as well as the definition in the zoning regulations, the commission applied the standards which governed its discretion in determining that the Plaintiffs' nonresidential of their property was not an accessory use. Testimony showed that the use in question had grown far larger than typical meetings held in homes (cub scout and brownie troops typically do not exceed 8 to 10 persons), usually exceeding 40 persons and going as high as 75. The intensity of the use, both in its size and duration (noon to 9:00 p.m.) placed it beyond what could be considered as a use which was commonly, habitually and by long practice been established as reasonably associated with the primary use. Correctly, the Defendant Commission limited its gaze to residential zones in New Milford, particularly the R-40 zone.

While it has been held that what constitutes an accessory use of a primary religious use should be considered broadly in order to avoid Constitutional problems (Beit Haruvah v. Zoning Board of Appeals, 117 Conn. 440, 418 A.2d 82 (1979), Daughters of St.Paul Inc. v. Zoning Board of Appeals, 17 Conn. App. 53 (1988), this must be balanced by the fact that "... the objectives of the Comprehensive Plan will be jeopardized if accessory use is so broadly construed as to allow incompatible uses to invade the district." Lawrence at p. 511.

When the Defendant Commission considered the use of the

property in question, it exercised the discretion vested in it by law and limited by standards that have been found to pass Constitutional challenges.

b. Religious Uses and General Standards

Some examples of general standards that have been found by courts to pass constitutional muster have included such terms as "not adversely affect the public interest" Pylant v. Orange County, 328 So.2d 199 (1976), "protect public health, safety and welfare", and "no substantial injury to property values" South Side Move of God. Like accessory uses, the granting of a variance involves the application of general standards, such as "unusual hardship" to a particular situation. The denial of a variance, based on general standards, for a religious organization to increase the height of its temple was upheld by the court, such decision not violating either the state or federal Constitutions. Korean Buddhist Dae Won Sa Temple v. Sullivan, 87 Haw. 217, 953 P.2d 1315 (1998). In another variance case, the court found that "[R]eligious institutions ... are not wholly exempt from the requirement of establishing practical difficulty, and other standards applicable to the granting of zoning variances ..." Islamic Soc. of Westchester & Rockland Inc. v. Foley, 96 App Div 2d 536, 464 NYS 2d 844 (1983).

Therefore, just because a use happens to be religious in nature does not make it immune from zoning regulations based on

general standards. To hold otherwise would result in the paradox that a religious use would be freer from control when it is a prohibited use than when it is a permitted use.

C. ULTRA VIRES

The tenth cause of action alleges that the Defendants acted beyond the scope of their authority when they tried to place reasonable and proper restrictions on the Plaintiffs' use of their single family home as a location for large, weekly meetings. As already discussed in some length in the previous section, the Defendants acted well within the discretion granted to them under the Connecticut General Statutes and the New Milford Zoning Regulations when they determined that the meetings held by the Plaintiffs were not a permitted accessory use to this residential home.

D. CONNECTICUT CONSTITUTIONAL CLAIMS

In their Ninth and Eleventh causes of action, the Plaintiffs allege that certain of their rights protected by the Constitution of the State of Connecticut have been infringed upon by the actions of the Defendants. Unfortunately, these claims are vague as to exactly what rights are involved. From the contents of the complaint as a whole as well as the facts before this court, the Defendants feel justified in assuming that it is only those sections of the State Constitution that correspond or mirror those sections of the United States Constitution mentioned in the

complaint which are involved. This would limit the complaint to Article 1 sections 3, 4, 5, 7, 14 and 20 as well as Article 7 of the State Constitution. If other sections are claimed by the Plaintiffs to be involved, the Defendants respectfully reserve the right to dispute those claims as well.

For all the reasons stated in the previous sections of this legal memorandum addressing the various claims premised on the corresponding sections of the United States Constitution, the Defendants request that the Court render judgment in their favor as to these State Constitutional claims. While a state legislature may choose to enlarge the scope and coverage of those rights protected by federal authority, this would not include the standard of review employed by the courts in determining whether these rights were infringed upon by state governmental action. Pruneyard Shopping Center v. Robbins,100 S.Ct. 2035, 2040, 447 U.S. 74 (1980), Cologne v. Westfarms Associates, 469 A.2d 1201, 1206, 192 Conn. 48 (1984). Therefore, any review by this court of the rights protected by the United States Constitution would also cover similar rights protected by Connecticut's Constitution. Any discussion here would thus be redundant.

E. 42 USC sec. 2000cc - RLUIPA

Count twelve of the Plaintiffs' fourth amended complaint alleges that by applying the neutral, generally applicable zoning regulations to them, a violation of the Religious Land Use and

Institutionalized Persons Act occurred. "In order to establish a prima facia case that RLUIPA has been violated, [the Plaintiffs] must present evidence that the [zoning regulations] imposed a substantial burden on the religious exercise of a person, institution or assembly." San Jose Christian College v. City of Morgan Hill et al., No. C01-20857RMW (N.D. CA 3/5/02) copy attached

The New Milford land use laws at issue in this case do not impose a substantial burden on the religious conduct of the Plaintiffs as that term has been used in preceding cases. There is no question that RLUIPA is not intended to alter the meaning of substantial burden. 42 USC 2000cc(a)(1). The burden in this case is not a substantial burden on the religious conduct of the Plaintiffs, but rather the sort of incidental burden that is permissible under settled understandings of 'substantial burden'. Lakewood, Ohio Congregation of Jehovah's Witnesses v. City of Lakewood, 699 F.2d 303, 308-309 (6th Cir. 1983). "This interference must be more than an inconvenience; the burden must be substantial and an interference with a tenant or belief that is central to religious doctrine." Bryant v. Gomez, 46 F.3d 948, 949 (9th Cir. 1995).

The Plaintiff, Robert Murphy, stated that the central tenant or belief involved here was that his family be allowed to pray at home [9(c)(1) #15] and that only prayer, bible study and the

sharing of mails are connected with this belief [9(c)(1) #17]. In addition, testimony from the Plaintiffs showed that a limit placed on the number of non-family attendees at the Plaintiffs' meetings would not have an impact most of the time. [9(c)(1) # 23].

Applying these facts to the law, it is clear that application by the Defendants of the zoning regulations causes at best an inconvenience to the Plaintiffs. It is certainly not the sort of burden necessary to trigger the RLUIPA. For this reason, this claim should be found in favor of the Defendants.

F. CGS. sec. 52-571b - CONNECTICUT RFRA

In their final cause of action, the Plaintiffs assert that this state statute was violated when the use of their property as weekly meeting place for large numbers of people was 'burdened' by the local land use laws. As stated in the previous section addressing the RLUIPA, the New Milford Zoning Regulations impose at the most an inconvenience to the Plaintiffs in the use of their property. Therefore, since there simply is no burden, this law has not been violated and this Court should render judgment for the Defendants.

III. SPECIAL DEFENSES

Defendants raised Constitutional challenges to both the RLUIPA as well as Connecticut's RFRA statute answer. These will now be addressed.

A. THE LAND USE PROVISIONS OF THE RLUIPA ARE FACIALLY UNCONSTITUTIONAL

The land use provisions of the Religious Land Use and Institutionalized Person's Act, 42 U.S.C. 2000cc, et. seq. ("RLUIPA") are unconstitutional on their face, like their predecessor, The Religious Freedom and Restoration Act, 42 U.S.C. Sections 2000bb-2000bb(4) ("RFRA"). Boerne v. Flores, 521 U.S. 507 (1997) (holding RFRA unconstitutional). They (1) are beyond Congress's power, (2) overtake the Constitution's inherent limits of federalism and the Tenth Amendment, (3) violate the separation of powers,[1] (4) ignore the amendment procedures detailed in Article V of the Constitution and (5) violate the Establishment Clause.

Section (a) of RLUIPA states in pertinent part:

PROTECTION OF LAND USE AS RELIGIOUS EXERCISE

> (a) SUBSTANTIAL BURDENS-
> (1) No 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 can demonstrate that imposition of the burden on that

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[1] RLUIPA violates the separation of powers for precisely the same reasons as RFRA did. Boerne, *supra* at 536; see also In re Rowland, No. HC4172, at 9 n.7 (Sup. Ct. Cal., Monterey County, July 31, 2002) ("Although City of Boerne addressed whether the RFRA, not the RLUIPA, was a permissible exercise of Congress's Enforcement Clause powers, City of Boerne's separation of powers analysis is analogous to the RLUIPA, even if the latter involves Congress's spending and commerce powers.").

person, assembly or institution-

(A) is in furtherance of a compelling governmental interest; and

(B) is the least restrictive means of furthering that compelling governmental interest.

(2) Scope of Application. This subsection applies in any case 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; or

(B) the substantial burden affects, or removal of that substantial burden would affect, commerce with foreign nations, among the several States, or with Indian tribes, even if the burden results from a rule of general applicability; or

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

Section (a) of RLUIPA applies the strictest scrutiny-the compelling interest test and the least restrictive means test-to every land use law that substantially burdens a religious landowner. It is a poorly disguised attempt by Congress to institute its preferred reading of the Free Exercise Clause and to takeover the state and local governments' sovereign power to regulate the quintessentially local issue of land use.

1. SECTION (a) of RLUIPA REGULATES A TRADITIONAL ARENA OF LOCAL CONTROL

RLUIPA defies the Supreme Court's states' rights cases

by attempting to regulate a traditional arena of local control, land use law. Boerne, *supra* at 534-35; Univ. of Ala. at Birmingham Bd. of Trustees v. Garrett, 531 U.S. 356, 372 (2000); Kimel v. Fla. Bd. of Regents, 528 U.S. 62, 88-89 (2000); Fla. PrePaid Post Secondary Expense Bd. v. Fla. Bd. of Regents, 527 U.S. 627, 646-47 (1999).

With the land use provisions of RLUIPA, Congress has attempted to take over one of the most, if not *the* most, clearly recognized arenas of local and state control. Congregation Kol Ami v. Abington Township, copy enclosed (3d Cir. 2002) (referring to land use law as "last bastion" of local control). Land use law always has been a creature of state and local law. See Robert I. McMurry, *Using Federal Laws and Regulations to Control Local Land Use*, A.L.I. - A.B.A. Continuing Legal Education (August 16-18, 2001), *available at* WESTLAW, SG021 ALI-ABA 357 quoting MacFadden v. City of Baltimore, 2001 WL 83277(D. Md. 2001).

Land use law is enacted by state and local governing bodies and implemented by locally elected or appointed boards, with publicized public hearings an integral component in altering the law and in applying it. The Supreme Court consistently has recognized "the States' traditional and primary power over land and water use. Hess v. Port Authority Trans-Hudson Corporation, 513 U.S. 30, 44 ("Regulation of land use [is] a function traditionally performed by local governments."). Solid Waste

Agency v. Army Corps of Eng'rs, 531 U.S. 159, 174 (2001); ("[R]egulation of land use is perhaps the quintessential state activity."); Village of Belle Terre v. Boraas, 416 U.S. 1 (1974); Berman v. Parker, 348 U.S. 26, 32 (1954) (upholding Congress's police power over District of Columbia to enact redevelopment project in order to improve public health); Nectow v. City of Cambridge, 277 U.S. 183, 187 (1928) (reviewing zoning restrictions under low level scrutiny); Gorieb v. Fox, 274 U.S. 603, 610 (1927) (upholding local setback requirement); Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 397 (1926) (local ordinance imposing building restrictions upheld). None of these principles were voiced during the hearings on RFRA or RLPA. See Ada-Marie Walsh, Note, *Religious Land Use and Institutionalized Persons Act of 2000*, 10 WM. MARY BILL RTS. J. 189, 196 (2001).

There is no indication in the Court's case law that these principles of deference become inapplicable when the landowner is a religious entity or individual. To the contrary, the Court dismissed an appeal brought by a church claiming the right to locate in a residential district as lacking a substantial federal question. The Court characterized that dismissal as follows:

> "When the effect of a statute or ordinance upon the exercise of First Amendment freedoms is relatively small and the public interest to be protected is substantial, it is obvious that a rigid test requiring a showing of imminent danger to the security of the nation is an absurdity."

American Communications Assn. v. Douds, 339 U.S. 382, 397-98

(1950) [(*referring to* Corp. of the Presiding Bishop of the Church of Latter-Day Saints v. Porterville, 338 U.S. 805 (1949)].

The federal courts' recognition that land use law is a state and local power has meant that each state has been left to develop its own land use jurisprudence. The federal courts have "emphasized [their] reluctance to substitute [their] judgment for that of local decision makers, particularly in matters of such local concern as land-use planning. . . ." Sameric Corp. v. Philadelphia, 142 F.2d 582, 596 (3d Cir. 1998). See also Congregation Kol Ami v. Abington Township, (3d Cir. 2002).

Section (a)(2)(C) triggers strict scrutiny of every state and local land use law whenever the zoning or land use authority employs "individualized assessments." Because every piece of land is distinct, land use law cannot be carried out in any way other than individualized assessments of the application of the general law to the particular piece of land or building project. Thus, this element means that the intended scope of Section (a)(2)(C) is every land use law.[2]

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[2] There are those who might try to argue that Section (a)(2)(C)'s reference to "individualized assessments" is a codification of dictum in Employment Div. v. Smith, 494 U.S. 872 (1990), which states that the unemployment schemes held unconstitutional under Sherbert v. Verner deserved strict scrutiny, because they permitted "individualized exemptions." Id. at 884. This is a huge leap from the existing case law. This statement in *Smith* was only meant to explain the unemployment compensation cases, as is plain from the Court's opinion. It does not begin to rebut the fact that the Court has never applied strict scrutiny to religious land use decisions. Nor does it take into account the

2. RLUIPA IS NOT A PROPER EXERCISE OF CONGRESS'S POWER UNDER SECTION V OF THE FOURTEENTH AMENDMENT

Congress has the "power to enforce, by appropriate legislation, the provisions of the [Fourteenth Amendment]". U.S. Const. Amend. XIV, Section 5. "Congress's power is limited to enforcement; the Fourteenth Amendment does not give Congress the power 'to determine what constitutes a constitutional violation'" Nanda v. Bd. Of Trustees of the Univ. of Illinois, No. 01-3348, 2002 WL 31056992, at *10 (7th Cir. September 17, 2002) citing Boerne, *supra* at 519. Rather, determining constitutional violations is a power properly lodged with the courts. Id. *referring to* Garrett, *supra* at 365.

Under Section 5 of the Fourteenth Amendment, Congress may not regulate the states' regulation of land use unless there is proof that the states have engaged in "widespread and persisting" constitutional violations in the land use context and that the federal law is "congruent and proportional" to those violations. Garrett, *supra* at 356, 365; Kimel, *supra* at 81; Florida Prepaid, *supra* at 645; Alden v. Maine, 527 U.S. 706, 756 ; Boerne, *supra* at 519-20, 533-34; RLUIPA fails both requirements.[3]

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fact that the Court consistently has dictated rationality review of the constitutionality of local land use decisions. See generally Congregation Kol Ami v. Abington Township.

3For the same reason Section (a)(2) fails, Section (b)(1) fails under the "widespread and persisting" requirements.

a. No Widespread and Persisting Pattern of Constitutional Violations Towards Religious Landowners

For Congress to properly exercise the power to enact a law pursuant to Section 5 of the Fourteenth Amendment, there must be a pattern of "widespread and persisting" constitutional violations by the states. Kimel, *supra* at 81-82; Garrett, *supra* at 365; Boerne, *supra* at 519-520, 530; CSX Transp., Inc. v. N.Y. State Office of Real Property, No. 01-7966, 2002 U.S. App. LEXIS 20402 (2d Cir. September 25, 2002); Nanda, *supra* at *18. This principle exists to square Congress's Section 5 powers with the Constitution's inherent limits on federalism. Boerne, at 524.

Those limits were never more in need than with RLUIPA, which attempts to federalize a true bastion of state and local control: land use governance. Under RLUIPA, the state and local governments and the people they serve are no longer able to determine local neighborhood requirements, to ensure peaceful enjoyment of private property, especially that of homeowners, or to enforce the many master plans that spread uses throughout the community to ensure harmonious use. RLUIPA hands the religious landowner a unique "legal weapon" to battle laws restricting traffic, noise, and intense uses, and in effect, steals state and local government power to make such determinations. See Boerne, *supra* at 534-35.

After a decade of searching for examples, the supporters of

RLUIPA cobbled together a short string of land use anecdotes that do not begin to illustrate the sort of widespread and persisting constitutional violations by the states necessary to justify such massive congressional intervention in such a substantial and traditional arena of state and local control. Id. Compare CSX Transp. Inc., supra (finding record of persistent constitutional violations against train industry justifying federal legislation under Section 5 of the Fourteenth Amendment). While it is true that religious landowners, like every other land-owning entity, bear incidental burdens imposed by generally applicable, neutral land use regulations, such burdens do not amount to constitutional violations. In fact, there is little, if any, proof that churches have been the target of discrimination by local zoning boards, including in this case.[4]

The RLPA legislative history attempts to prove a widespread and persisting pattern of constitutional violations by state and local land use lawmakers with nothing but the following: (1) two cases where a court found land use authorities had violated the Constitution in dealing with religious landowners;[5] (2) two

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[4]A legislative record is not necessary to prove that Congress has the power to enact law if there is general knowledge that the government persistently violates constitutional law.. See Nanda, *supra* at *10; Boerne, supra. That situation is not presented here.

[5]*Religious Liberty Protection Act of 1999: Hearing on H.R. 1691 Before the Subcomm. on the Constitution of the House Comm. on the Judiciary*, 106th Cong. (1999), *available at*

instances where allegations were made that facts not unconstitutional on their face in fact were unconstitutional;[6] (3) one instance where a court rejected a constitutional challenge;[7] (4) eleven instances where religious organizations

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http://www.house.gov/judiciary/keet0512.htm (appendix to the statement of Von G. Keetch, Counsel to the Church of Jesus Christ of Later-Day Saints) *citing* Orthodox Minyan of Elkins Park v. Chetenham Tp. Zoning Hearing Bd., 552 A.2d 772 (Pa. Commw. 1989); *Religious Liberty Protection Act of 1998: Hearing on H.R. 4019 Before the Subcomm. on the Constitution of the House Comm. on the Judiciary*, 105th Cong. (1998), *available at* http://www.house.gov/judiciary/mauck.pdf (statement of John Mauck, Attorney at Law) *citing* Love Church v. City of Evanston, Ill., 869 F.2d 1082 (7th Cir. 1990) *cert. denied*, 498 U.S. 898 (1990)

[6]*Religious Liberty Protection Act of 1998: Hearing on H.R. 4019 Before the Subcomm. on the Constitution of the House Comm. on the Judiciary*, 105th Cong. (1998), *available at* http://www.house.gov/judiciary/222498.htm (statement of Douglas Laycock, Prof. of Law, University of Texas School of Law); *Religious Liberty Protection Act of 1998: Hearing on H.R. 4019 Before the Subcomm. on the Constitution of the House Comm. on the Judiciary*, 105th Cong. (1998), *available at* http://www.house.gov/judiciary/222498.htm (statement of Douglas Laycock, Prof. of Law, University of Texas School of Law) *citing* *Religious Liberty Protection Act of 1998: Hearing on H.R. 4019 Before the Subcomm. on the Constitution of the House Comm. on the Judiciary*, 105th Cong. (1998), *available at* http://www.house.gov/judiciary/mauck.pdf (statement of John Mauck, Attorney at Law)

[7]*Religious Liberty Protection Act of 1999: Hearing on H.R. 1691 Before the Subcomm. on the Constitution of the House Comm. on the Judiciary*, 106th Cong. (1999), *available at* http://www.house.gov/judiciary/keet0512.htm (statement of Von G. Keetch, Counsel to the Church of Jesus Christ of Later-Day Saints) *citing* The Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Bd. of Commissioners of the City of Forest Hills, Nos. 95-1135, 96-868, 96-1421 (TN Chancery

complained about the application of garden-variety, generallyapplicable, neutral land use laws to religious landowners;[8] and (5) five instances of expressions by private

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Court Jan. 27, 1998).

[8]*Religious Liberty Protection Act of 1998: Hearing on H.R. 4019 Before the Subcomm. on the Constitution of the House Comm. on the Judiciary*, 105th Cong. (1998), *available at* http://www.house.gov/judiciary/222494.htm (statement of Mark E. Chopko, General Counsel, United States Catholic Conference); *Religious Liberty Protection Act of 1998: Hearing on H.R. 4019 Before the Subcomm. on the Constitution of the House Comm. on the Judiciary*, 105th Cong. (1998), *available at* http://www.house.gov/judiciary/222494.htm (statement of Mark E. Chopko, General Counsel, United States Catholic Conference); *Religious Liberty Protection Act of 1998: Hearing on H.R. 4019 Before the Subcomm. on the Constitution of the House Comm. on the Judiciary*, 105th Cong. (1998), *available at* http://www.house.gov/judiciary/222494.htm (statement of Bruce D. Shoulson, Attorney at Law); *Religious Liberty Protection Act of 1998: Hearing on H.R. 4019 Before the Subcomm. on the Constitution of the House Comm. on the Judiciary*, 105th Cong. (1998), *available at* http://www.house.gov/judiciary/mauck.pdf (statement of John Mauck, Attorney at Law) *citing* Family Christian Center v. County of Winnebego, 503 N.E.2d 367 (1986); *Religious Liberty Protection Act of 1998: Hearing on H.R. 4019 Before the Subcomm. on the Constitution of the House Comm. on the Judiciary*, 105th Cong. (1998), *available at* http://www.house.gov/judiciary/mauck.pdf (statement of John Mauck, Attorney at Law); *Oversight Hearing Regarding "The Need for Federal Protection of Religious Freedom and Boerne v. Flores" Before the Subcomm. on the Constitution of the House Comm. on the Judiciary*, 105th Cong. (1998), *available at* http://www.house.gov/judiciary/22383.htm (statement of Dr. Richard Robb, Member, First Presbyterian Church of Ypsilanti, Michigan); *Oversight Hearing Regarding "The Need for Federal Protection of Religious Freedom and Boerne v. Flores II" Before the Subcomm. on the Constitution of the House Comm. on the Judiciary*, 105th Cong. (1998), *available at* http://www.house.gov/judiciary/222390.htm (statement of Marc D. Stern, Director, Legal Department, The American Jewish Congress); *Oversight Hearing Regarding "The Need for Federal Protection of Religious Freedom and Boerne v. Flores II" Before the Subcomm. on*

individuals, which lack state action, and therefore do not implicate a constitutional violation.[9]

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the Constitution of the House Comm. on the Judiciary, 105th Cong. (1998), *available at* http://www.house.gov/judiciary/222355.htm (statement of Steven T. McFarland, Director, Center for Law and Religious Freedom) *citing* Abierta v. City of Chicago, 129 F.3d 899 (7th Cir. 1997); *Religious Liberty Protection Act of 1998: Hearing on H.R. 4019 Before the Subcomm. on the Constitution of the House Comm. on the Judiciary*, 105th Cong. (1998), *available at* http://www.house.gov/judiciary/mauck.pdf (statement of John Mauck, Attorney at Law) *citing* Love Church v. City of Evanston, Ill., 869 F.2d 1082 (7th Cir. 1990) *cert. denied*, 498 U.S. 898 (1990); *Religious Liberty Protection Act of 1998: Hearing on H.R. 4019 Before the Subcomm. on the Constitution of the House Comm. on the Judiciary*, 105th Cong. (1998), *available at* http://www.house.gov/judiciary/222495.htm (statement of Rev. Elenora Giddings Ivory, Director, Washington Office, Presbyterian Church); *Religious Liberty Protection Act of 1999: Hearing on H.R. 1691 Before the Subcomm. on the Constitution of the House Comm. on the Judiciary*, 106th Cong. (1999), *available at* http://www.house.gov/judiciary/sapeo512.htm (statement of Rabbi David Saperstein, Director &Counsel, Religious Action Center of Reform Judaism);

[9]*Religious Liberty Protection Act of 1998: Hearing on H.R. 4019 Before the Subcomm. on the Constitution of the House Comm. on the Judiciary*, 105th Cong. (1998), *available at* http://www.house.gov/judiciary/222494.htm (statement of Bruce D. Shoulson, Attorney at Law); *Religious Liberty Protection Act of 1998: Hearing on H.R. 4019 Before the Subcomm. on the Constitution of the House Comm. on the Judiciary*, 105th Cong. (1998), *available at* http://www.house.gov/judiciary/mauck.pdf (statement of John Mauck, Attorney at Law) *citing* Family Christian Center v. Country of Winnebego, 503 N.E.2d 367 (1986); *Religious Liberty Protection Act of 1998: Hearing on H.R. 4019 Before the Subcomm. on the Constitution of the House Comm. on the Judiciary*, 105th Cong. (1998), *available at* http://www.house.gov/judiciary/mauck.pdf (statement of John Mauck, Attorney at Law) *citing* Abierta v. City of Chicago, 949 F.Supp. 637 (N.D.Ill. 1996) *rev'd*, 129 F.3d 899 (7th Cir. 1997); C.L.U.B. (Civil Liberties for Urban Believers), Christ Center v. City of Chicago, 1997 WL 43226 (N.D.Ill. 1997); *Oversight Hearing Regarding "The Need for Federal Protection of Religious Freedom*

Not only is the legislative history deficient of proof of a pattern of constitutional malfeasance, but also it is bereft of the expertise of the many state or local officials or government organizations that could have testified authoritatively regarding zoning practices and religious landowners. In other words, the views of those with the most knowledge and the most experience on the subject are not reflected in the legislative record.

This gaping hole in the record brings into question the reliability of the unsupported and uncontested anecdotes provided and makes the legislative built on these anecdotes suspect. The most scientific study done to date on land use and congregations also brings the abstract conclusions of the Congress into doubt. See Mark Chaves & William Tsitsos, *Are Congregations Constrained by Government? Empirical Results from the National Congregations Study*, 42 J. Church and State 335, 342 (2000). Although land use laws may have an "effect" on churches, just as they have an effect on homeowners and developers, there is no evidence of widespread and persisting discrimination against religious

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and Boerne v. Flores II" Before the Subcomm. on the Constitution of the House Comm. on the Judiciary, 105th Cong. (1998), *available at* http://www.house.gov/judiciary/222390.htm (statement of Marc D. Stern, Director, Legal Department, The American Jewish Congress); *Oversight Hearing Regarding "The Need for Federal Protection of Religious Freedom and Boerne v. Flores II" Before the Subcomm. on the Constitution of the House Comm. on the Judiciary*, 105th Cong. (1998), *available at* http://www.house.gov/judiciary/222390.htm (statement of Marc D. Stern, Director, Legal Department, The American Jewish Congress)

landowners that would justify the federal overreaching of RLUIPA.

b. RLUIPA is Not Congruent and Proportional to Any Evidence of State Constitutional Malfeasance

When it examined RFRA's constitutional infirmities, the Supreme Court explained that "[t]here must be a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end. Lacking such a connection, legislation may become substantive in operation and effect." Boerne, *supra* at 519-520, 530; See also Hale v. Mann, 219 F.3d 61, 67 (2d Cir. 2000) ("Congress' power under §5 must be linked to constitutional injuries and there must be a 'congruence and proportionality' between the harms to be prevented and the statutory remedy."); Philbrick v. University of Connecticut, 90 F. Supp.2d 195, D. Conn. 2000); Nanda, *supra* at *18; Garrett, at 365; Kimel, at 81; Florida Prepaid, at 645-46; Alden, at 756; Boerne, at 519-520, 530, 545-46; M. Hamilton & D. Schoenbrod, *The Reaffirmation of Proportionality Analysis Under Section 5 of the Fourteenth Amendment*, 21 Cardozo L. Rev. 469 (1999).

Even if this Court were to find widespread and persisting free exercise violations by local land use lawmakers across the country, RLUIPA's resort to strict scrutiny for every instance in which a land use law is applied to any religious landowner is clearly incongruent and disproportional to any problems such landowners are claiming in the land use context. Id; Philbrick v. University of Connecticut, 90 F. Supp.2d 195, 200-01 (D. Conn.

2000) ("Congruence and proportionality required this court to balance the injury that Congress has attempted to remedy against the means Congress has chosen to achieve its remedial purpose."); Boerne, *supra* at 530-32; Garrett, *supra* at 368, 369, 370, 372; Kimel, *supra* at 90-91.

3. SECTION (a)(2)(B) of RLUIPA IS NOT A PROPER EXERCISE OF CONGRESS'S COMMERCE CLAUSE POWER

The Commerce Clause provides Congress with the authority to enact legislation to regulate commerce with foreign nations, among the states and with the Indian tribes. U.S. Const. art. 1, sec. 8, cl.3.

The Supreme Court has identified three broad categories of activity that Congress may regulate under the Commerce Clause. See U.S. v. Lopez, 514 U.S. 549 (1995). The first two categories involve laws that either "regulate the use of the channels of interstate commerce" or "regulate and protect the instrumentalities of interstate commerce, and the persons or things in interstate commerce, even though the threat may come only from intrastate activities," such as interstate highways, telecommunications, shipping, etc. Lopez, *supra* at 561. RLUIPA does not fit into either of these two categories. The third category includes the power to regulate intrastate activities where the activity has a substantial effect on interstate commerce. Id. at 559. The Court has stated that this last category includes only those activities that are economic in

nature and that have a substantial effect on commerce. See U.S. v. Morrison, 529 U.S. 598, 613 (2000); Lopez, *supra* at 559; In re Rowland, No. HC4172 (Sup. Ct. Cal., Monterey County, July 31, 2002) (holding RLUIPA unconstitutional as applied to prisons).

a. That Which RLUIPA Regulates - the States' Regulation of Land Use Law - Is Not Economic in Nature and Does Not Substantially Affect Commerce

"The Commerce Clause . . . authorizes Congress to regulate interstate commerce directly; it does not authorize Congress to regulate state governments' regulation of interstate commerce." Printz v. U.S., 521 U.S. 898, 924 (1997). Yet, that is precisely what RLUIPA does. RLUIPA does not regulate the economic aspects of land use or even land use itself; but rather, it regulates land use *law*. See also In re Rowland, *supra* at 4 (invalidating RLUIPA as applied to prisons and explaining, "[t]he religious practices of institutionalized persons is not an economic activity. . . .").

Those defending RLUIPA have hung their hopes on the theory that Congress has carte blanche to regulate the state and local governments so long as it provides a "jurisdictional element." Lopez, *supra* at 561. The "jurisdictional element" of RLUIPA requires a showing that the "substantial burden affects . . . commerce . . . among the several states." Sec. (a)(2)(B). The jurisdictional element, however, does not save RLUIPA from constitutional violation, because the jurisdictional element of

RLUIPA simply cannot be satisfied.

State and local law, *by their nature*, do not affect interstate commerce for purposes of Commerce Clause analysis. Printz, supra, at 924. RLUIPA is not triggered by an economic action in the land use context, but rather by imposition of state or local land use law. It is not even applicable if the state or local government has not enforced a land use law. Thus, RLUIPA regulates a non-economic activity, land use law, that, for purposes of Commerce Clause analysis, cannot satisfy the necessary "nexus with interstate commerce," see Lopez, *supra* at 562. RLUIPA's "jurisdictional element" can never trigger the impact on commerce that is required for Commerce Clause analysis. See also In re Rowland, *supra* at 5-6 (noting the Supreme Court's directive in Morrison, *supra*, that regulation of intrastate activity must be economic in nature and asserting that "particularly where Congress attempts to regulate activity traditionally regulated by the states . . . the court finds unpersuasive petitioner's contention that the jurisdictional element alone can rescue the statute from invalidation.").

The universe of that which is being regulated pursuant to the Commerce Clause must "substantially affect" interstate commerce. Lopez, *supra* at 558. Although individual instances of economic activity may not by themselves substantially affect interstate commerce, their aggregation may. Wickard v. Filburn,

317 U.S. 111 (1942). Yet, where that which is being regulated is not economic in nature-like state and local regulation-- such aggregation does not amount to a substantial effect on interstate commerce. See Morrison, *supra* at 617-18 (stating commerce power does not extend to traditional local regulation even if, in the aggregate, such activities substantially affect commerce).

RLUIPA rests on the backward theory that Congress may directly regulate state and local land use law affecting religious landowners, because the religious landowners themselves make decisions that affect the interstate market, and the aggregation of their individual decisions substantially affects interstate commerce. This sort of attenuated reasoning was soundly rejected in Lopez, *supra* at 564. It is even more suspect here, where the federal law is triggered not by the economic activity of that which the state regulates, but rather religious conduct, which in itself is not economic. See In re Rowland, *supra* at 4 ("[T]he link between the religious practices of institutionalized persons and interstate commerce is tenuous at best and the legislative history contains no specific findings in this regard."). If RLUIPA were good law, then Congress could take over any arena of state or local law by claiming that the economic interests of those being regulated by state and local governments satisfy the requirements of the Commerce Clause.

b. RLUIPA Violates the Constitution's Inherent Principles of Federalism and the Tenth Amendment

RLUIPA is a violation of three federalism principles. First, Lopez emphasized the concern that Congress cannot regulate *areas that are traditionally relegated to local control*. See Lopez, *supra* at 561; Morrison, *supra* at 617-18. State and local land use laws clearly occupy an area of traditional local control.[10]

Second, no court has held that the "jurisdictional element" hands Congress the power to directly regulate the states *in their sovereign capacity*. The "jurisdictional element" dictum in Lopez is intended to ensure that the limits of federalism are observed, not to introduce a means of circumventing those limitations.

Third, RLUIPA *singles out* the state and local governments in their sovereign capacity. No other entity in interstate commerce is regulated by RLUIPA. These three features make RLUIPA unique among all federal laws invoking the Commerce Clause. It is a bold attempt by Congress to expand its power against the states, and a particularly egregious violation of federalism principles.

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[10] The Constitution's inherent limits of federalism and the Tenth Amendment dramatically limit the reach of the Commerce Clause in the arena of land use law. Regents of the Univ. of Mich. v. Ewing, 474 U.S. 214, 226 (1985). Land use policy has customarily been a feature of local government and an area in which the tenets of federalism are particularly strong. See, e.g., Solid Waste Agency, *supra* at 159; Euclid, *supra* at 365: Village of Belle Terre, *supra* at 1; Izzo v. Borough of River Edge, 843 F.2d 765 (3d Cir. 1988).

While the states have been permitted to be regulated as part of a congressional policy to regulate economic activity, RLUIPA presents the circumstance where they are being regulated in their sovereign capacity and not as economic actors. See Printz, at 924 ("Even where Congress has the authority under the Constitution to pass laws requiring or prohibiting certain acts, it lacks the power to directly compel the States to require or prohibit those acts. . . . The Commerce Clause, for example, authorizes Congress to regulate interstate commerce directly; it does not authorize Congress to regulate state governments' regulation of interstate commerce." Id. citing New York v. United States, 505 U.S. 144, 166 (1992)). As the Court explained in Reno v. Condon, 528 U.S. 141 (2000), when it upheld the Driver's Privacy Protection Act of 1994, the Act did not regulate the states in their sovereign capacity, but rather as "initial suppliers of . . . information in interstate commerce and private resellers or redisclosers of that information in commerce." Id. at 151. With the DPPA, Congress was regulating the flow of information in the "stream of interstate commerce," and not the "'manner in which States regulate private parties.'" Id. at 150 (*relying on* and citing South Carolina v. Baker, 485 U.S. 505, 514-15 (1988)).

The reasoning of Condon means that the federal government may regulate an economic market under the Commerce Clause, but it

may reach the states thereby only if they are acting as economic actors in that market. RLUIPA regulates the states in their role as lawmakers, not economic actors. The Condon Court distinguished a federal law like RLUIPA that "regulates the States exclusively," saying that issue was not presented by the DPPA. Condon, at 151. The Court's Commerce Clause cases lead to the conclusion that where the federal law targets and disables the states acting in their sovereign capacity to regulate private parties, and the states are the sole target of the federal law, the law transgresses the limits of federalism.

4. RLUIPA VIOLATES THE ESTABLISHMENT CLAUSE

Even if Congress were found to have the power to pass this extraordinary law, the Establishment Clause, which prohibits Congress from making any law "respecting an establishment of religion," U.S. Const. amend. I, would prohibit RLUIPA's direct handout to religious landowners in the arena of local land use. RLUIPA hands religion a blanket privilege in the land use arena that is unavailable to other similarly situated individuals or entities. "Whether the church would actually prevail under the [land use law] or not, the statute has provided the church with a potent legal weapon that no atheist or agnostic can obtain." Boerne, *supra* at 537 (Stevens, J. concurring); citing Wallace v. Jaffree, 472 U.S. 38 (1985); M. Hamilton, *The Religious Freedom Restoration Act is Unconstitutional, Period,* 1 Penn. J. Const. L.

1 (1998). RLUIPA does not satisfy the traditional test set forth in Lemon v. Kurtzman, *infra*. It also endorses religion in violation of the Establishment Clause. Lee v. Weisman, 505 U.S. 577, 585 (1992). For every neighbor to a religious landowner, for every hardworking local and state government official guarding local land use law, RLUIPA is a plain endorsement of religious landowners and their religious missions. See Ada-Marie Walsh, Note, *Religious Land Use and Institutionalized Persons Act of 2000*, 10 Wm. Mary Bill Rts. J. 189, 204 (2001)

a. RLUIPA Violates the *Lemon* Test

The Supreme Court announced the test to be applied in Establishment Clause cases in Lemon v. Kurtzman, 403 U.S. 602 (1971). "First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances not inhibits religion, . . . finally, the statute must not foster 'an excessive government entanglement with religion.'" Id. at 612-13. RLUIPA fails all three prongs.

First, there is no secular purpose behind RLUIPA. The plain purpose is to provide statutory protection for the incidental burdens on religious landowners flowing from constitutional, generally applicable and neutral land use laws. Moreover, the persons or institutions benefitting from RLUIPA are purely religious in character. This clearly violates the Establishment Clause.

Second, RLUIPA causes privileges to flow directly toward religious landowners because of their religious character. Agostini v. Felton, 521 U.S. 203, 220 (1991). Religious landowners are made privileged members of every community, in every land use context. The purpose of the statute, after all, is to establish a new balance between religious landowners and government, a balance entirely different from the baseline neutrality mandated by the Court in Smith. In re Rowland, at 8 (applying RLUIPA to prisoners' religious practices and determining "the exemption would never operate to benefit atheists or secular groups; prison administrators would never have to justify their actions or rules under the strict scrutiny standard to non-religious inmates. Consequently, prison administrators would effectively promote religion over irreligion."); see also Commack Self-Service Kosher Meats, Inc. v. Weiss, 294 F.3d 415, 430 (2d Cir. 2002) holding New York State laws regulating Kosher food preparation unconstitutional in violation of the Establishment Clause, explaining "the use of the State's enforcement authority to prevent labeling of food products that do not meet Orthodox Hebrew religious requirements as kosher confers a substantial benefit on Orthodox Jews and not on others. We find that this constitutes an impermissible advancement of religion in violation of the Establishment Clause"

Third, RLUIPA fails the entanglement prong because by

protecting religious entities to this degree, the government must excessively entangle itself with religion. In re Rowland, at 7 (invalidating RLUIPA on the second and third prongs of the Lemon test and determining that RLUIPA "fosters impermissible entanglement between church and state."); see also Commack Self-Service Kosher Meats, *supra* at 429-30 (finding excessive entanglement between the State of New York and religion in connection with the application of the Kosher food laws). There is now necessary entanglement every time a state or local government seeks to enact or apply land use law. To avoid expensive litigation, which is spurred by RLUIPA's attorney's fee provision, Sec. (2)(d), the government must investigate whether the law will be the means of accomplishing its goal that is the least restrictive of every religion's requirements. Government cannot avoid becoming expert in the needs and requirements of the religious landowners in the community, and that sort of necessary oversight of theology and belief is antithetical to the Establishment Clause. In re Rowland, at 7. In sum, RLUIPA places state, local and municipal governments in the position of considering every potential religious objection to every land use law, from the perspective of each religious believer.

b. Section (a) Is Patent Government Endorsement Of Religion

In Lee v. Weisman, 505 U.S. 577, 585 (1992), the Supreme

Court held that government may not endorse the message of a particular religion or religion in general. RLUIPA is a plain endorsement by the federal government of religious landowners and their religious building projects. RLUIPA, like RFRA, endorses the global message that the government prefers religious organizations over all others, and in the land use context, that means residential neighbors, business enterprises, and public spaces. This message violates the fundamental constitutional requirement of neutrality on issues of conscience. See Board of Educ. of Kiryas Joel v. Grumet, 512 U.S. 687, 696 (1994).

For these reasons, the Defendants respectfully respect that that this Court find the RLUIPA unconstitutional.

B. THE CONNECTICUT RELIGIOUS FREEDOM RESTORATION ACT IS UNCONSTITUTIONAL

The CRFRA attempts to institute the strictest judicial standard known to constitutional law in all cases involving the free exercise of religion. It states:

> The state or any political subdivision of the state may burden a person's exercise of religion only if it demonstrates that application of the burden to the person (1) is in furtherance of a compelling governmental interest, and (2) is the least restrictive means of furthering that compelling governmental interest. Conn. Gen. Stat Ann. § 52-571b(b) (West Supp 2001).

The Connecticut Religious Freedom Restoration Act ("CRFRA") violates the Connecticut Constitution's separation of powers and the state and federal Establishment Clauses. The Connecticut legislature overstepped its constitutional bounds when it enacted

the CRFRA, by attempting to take over the core judicial function of applying the Constitution to the law and determining the final meaning of the Connecticut Constitution's provisions. See Boerne v. Flores, 521 U.S. 507, 536 (1997) (holding that federal RFRA violates separation of powers). See also Chotkowski v. State, 690 A.2d 368, 375 (Conn. 1997) ("It is the court's duty to ensure that legislative action falls within constitutional boundaries."); Sheff v. O'Neill, 678 A.2d 1267, 1275 (Conn. 1996) ("[I]t is the role and the duty of the judiciary to determine whether the legislature has fulfilled its affirmative obligations within constitutional principles."). The CRFRA also violates the Establishment Clauses of the federal and state constitutions by providing a special privilege to religious individuals and institutions. Boerne, *supra* at 534-35 (Stevens, J., concurring).

1. THE CONNECTICUT RFRA VIOLATES THE SEPARATION OF POWERS DOCTRINE

The Connecticut Constitution states that the separation of powers must be observed:

> The powers of government shall be divided into three distinct departments, and each of them confided to a separate magistracy, to wit, those which are legislative, to one; those which are executive, to another; and those which are judicial, to another.

Ct. Const. Art. 2. See also State v. Stoddard, 13 A.2d 586, 588 (1940) ("In the establishment of three distinct departments of government, the constitution, by necessary implication, prescribes those limitations and imposes those duties which are

essential to the independence of each, and to the performance by each of the powers of which it is made the depositary"). Under the Connecticut Constitution, like the federal Constitution, the role of the judiciary is to interpret the law, including the Constitution. Boerne, at 536 *citing* Marbury v. Madison, 1 Cranch 137, 177 (1803). "Whether a statute is in conflict with the [Connecticut] state constitution is the duty of the judiciary to determine." Preveslin v. Derby & Ansonia Developing Co., 112 Conn. 129, 145 (1930). With the CRFRA, the state legislature attempted to impose its interpretation of the Connecticut Constitution's free exercise protections on the courts.

This is especially clear in the land use context, where the state courts have required deference to local authorities even against constitutional challenges. See St. John's Roman Catholic Church Corp. v. Town of Darien, 184 A.2d 42, 47 (1962) ("In order to hold a zoning regulation unconstitutional as violative of the due process of law or equal protection clauses of the state or federal constitution, it must appear 'that . . . [the] provisions are clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare.'" Euclid v. Ambler Realty Co., 272 U.S. 365, 395 (1926); State v. Hillman, 110 Conn. 92, 105 (1929)). This approach to land use regulation was just reaffirmed by the United States Court of Appeals for the Third Circuit. See Congregation Kol Ami

v. Abington Township, at *20 n.5. ("[A] conclusion that religious uses may not be excluded from residential districts takes away the deference that has been granted to local municipalities to make a determination whether or not such a use is suited for a residential district. As stated at oral argument, it creates a "cookie-cutter" approach to zoning that seems contrary to, at the very least, the Supreme Court's observation that "regulation of land use is perhaps the quintessential state activity.").

In 1992, the Connecticut Supreme Court stated that religious beliefs do not excuse noncompliance with otherwise valid laws governing conduct under the Connecticut Constitution. State v. Ephraim, 610 A.2d 1320, 1322 (1992). See also First Church Of Christ, Scientist v. Historic District Commission Of The Town Of Ridgefield, 738 A.2d 224, 231 (1998), aff'd, 55 Conn. App. 59, 737 A.2d 989 (1999) (holding that plaintiff's free exercise rights were not burdened by the commission's application of the historical district regulations - deemed to be furthering a legitimate interest of a historical district - in its denial of the church's application to reclad its structure with aluminum siding); Grace Community Church v. Bethel, 30 Conn. App. 765, 773-774 (1993) (determining that the city's content-neutral zoning regulations were not violative of plaintiff's free exercise rights, rather, they were meant to address the substantial government interest of reducing traffic and parking

problems that undermine the residential character of a community.); St. John's Roman Catholic Church (holding that the church's free exercise rights were not burdened by the town zoning commission's denial of its special permit where the church had not complied with the reasonable requirements of the zoning ordinance.)

There is a large chasm between the standard applied by the Connecticut courts under the state's free exercise clause and the standard imposed by the state legislature in the CRFRA. The CRFRA increases religious liberty protections well beyond the state's constitutional requirements. When the legislature substitutes its judgment for the courts in this way it violates the separation of powers. Boerne, at 536; Kinsella v. Jaekle, 475 A.2d 243, 254 (Conn. 1984) ("It is axiomatic that no branch of a government organized under a constitution may exercise any power that is not explicitly bestowed by that constitution or that is not essential to the exercise thereof.").[1]

2. THE CONNECTICUT RELIGIOUS FREEDOM RESTORATION ACT VIOLATES THE ESTABLISHMENT CLAUSE OF THE FEDERAL AND STATE CONSTITUTIONS

The CRFRA hands religious entities a valuable "legal weapon" no other landowner is permitted and therefore violates the

[1] The CRFRA also violates the Connecticut Constitution's amendment procedures by unilaterally altering constitutional protections through simple majority vote. Ct. Const. Art. 12. See also Boerne, *supra* at 529 (stating RFRA violated Article V's amendment procedures).

federal and state constitutional rules against establishment of religion. Boerne, *supra* at 534-35 (Stevens, J., concurring). Only religious entities can overcome generally applicable laws by forcing the government to prove it has a "compelling interest" and that its law is the "least restrictive means" of regulating this particular religious entity. In other words, CRFRA requires each and every generally applicable law to be tailored to each religious individual and entity.

a. CRFRA Violates the Federal Establishment Clause

For all those reasons already stated in the proceeding section of this brief addressing the constitutionality of the RLUIPA, the Connecticut version of the RFRA is also unconstitutional because it clearly violates the federal establishment clause.

b. CRFRA Violates the Connecticut Establishment Clause

The Connecticut Constitution institutes an even stronger separation of church and state than does the federal constitution.

> "It being the right of all men to worship the Supreme Being, the Great Creator and Preserver of the Universe, and to render that worship in a mode consistent with the dictates of their consciences, no person shall by law be compelled to join or support, nor be classed or associated with, any congregation, church or

> religious association. No preference shall be given by law to any religious society or denomination in the state. Each shall have and enjoy the same and equal powers, rights and privileges, and may support and maintain the ministers or teachers of its society or denomination, and may build and repair houses for public worship."

Ct. Const. Art. 7. See also Snyder v. Newtown, 161 A.2d 770, 776, 778 (Conn. 1960) (remarking that the purpose of the Connecticut constitution of 1955 was to erect "a wall of separation between Church and State" and that the Constitution prohibits law which "aid one religion, aid all religions, or prefer one religion over another."); Griswold Inn, Inc. v. State, 441 A.2d 16, n.2 (Conn. 1981) (noting that, as compared to the 1955 version of the Connecticut constitution, the current version of the Constitution "shows a greater awareness of religious freedom, and of the separation of church and state."). The arguments for invalidation under the federal Constitution, therefore, are even stronger in the context of the Connecticut Constitution. See Griswold Inn, Inc., *supra* at 565 (holding Good Friday liquor prohibition law unconstitutional under both the Connecticut State and Federal constitutions because: (1) it had a religious purpose; (2) it advanced religion; and (3) it required excessive entanglement between church and state).

Thus, it is clear that not only does this state law violate the Federal Constitution, it also violates the State

Constitution. It is respectfully requested by the Defendants that this Court so rule.

CONCLUSION

For all the reasons stated herein as well as those which may be raised at any oral argument, the Defendants ask this Court to render judgment in their favor as a matter of law on all counts of the Plaintiffs' fourth amended complaint as well as their special defenses addressing the constitutionality of the RLUIPA as well as CGS 52-571b (CRFRA).

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CERTIFICATION

This is to certify that a copy of the above was mailed postage prepaid to the following counsel and pro se parties this 6TH day of November, 2002.

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