

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

CONGREGATION KOL AMI and	:	
RABBI ELLIOT HOLIN	:	CIVIL ACTION
	:	No.: 01-1919
v.	:	
	:	
ABINGTON TOWNSHIP; BOARD OF	:	
COMMISSIONERS OF ABINGTON	:	
TOWNSHIP; THE ZONING HEARING	:	
BOARD OF ABINGTON TOWNSHIP and	:	
LAWRENCE T. MATTEO, JR., in his official	:	
capacity as Director of Code Enforcement of	:	
Abington Township	:	

**PLAINTIFFS' MEMORANDUM OF LAW IN OPPOSITION TO
DEFENDANTS' MOTION TO DISMISS PLAINTIFFS' COMPLAINT
PURSUANT TO F.R.C.P. 12(b)(6) AND/OR, IN THE ALTERNATIVE, 56(b)**

(CORRECTED JULY 5, 2001)

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Version 6.0, §§ 301-304 (May 9, 1996) *passim*

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§§301.2.B.1.- 6 *passim*

§§301.2.B.2 - 4 *passim*

§§ 302-304 *passim*

§§ 304.B.1. - 2 *passim*

§§ 304.C.1. *passim*

§§706.E.8 *passim*

§§706.G.6 *passim*

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Thomas C. Berg, *The Constitutional Future of Religious Freedom Legislation*, 20 U. Ark. Little Rock L.J. 715 (1998) (arguing that RFRA is constitutional as applied to the federal government) 61

INTRODUCTION

Defendants' motion to dismiss and/or for summary judgment is an exercise in exaggeration, distortion, and glaring omission.

At the outset, defendants fail to set forth the applicable standard for assessing whether this motion should be treated as one to dismiss or for summary judgment. *See* Def. Mem. 13-14. Instead, they would rush this Court to final judgment on almost every issue in the case based exclusively on their account of the facts, which is incomplete and contains only scarce citations to competent evidence. *See* Memorandum of Law in Support of Their Motion to Dismiss Plaintiffs' Complaint Pursuant to F.R.C.P. 12(b)(6) and/or 56(b) (hereinafter "Def. Mem.") at 1-10. Moreover, as of this writing, defendants have yet formally to respond to *any* of plaintiffs' pending discovery requests, including those regarding the very issues on which Defendants presently seek ultimate disposition. *See* Rule 56(f) Declaration of Jonathan Auerbach, Esquire dated July 2, 2001, (hereinafter "Auerbach Decl.") attached hereto as Exhibit A.

Defendants then fail to cite controlling Third Circuit precedent under the Free Exercise and Free Speech Clauses of the First Amendment. *See* Def. Mem. 14-17 (moving to dismiss Plaintiffs' federal Free Exercise claim without citing applicable standard in *Fraternal Order of Police v. City of Newark*, 170 F.3d 359 (3d Cir. 1999)); *id.* at 44-46 (moving to dismiss federal Free Speech and Free Assembly claims without citing *any* Third Circuit authority, including applicable time, place and manner standard in *Phillips v. Borough of Keyport*, 107 F.3d 164 (3d Cir. 1997)).

Defendants proceed vastly to overstate the certainly broad authority of local governments to regulate land-use, as if they were virtually unconstrained by traditional federal constitutional protections against arbitrariness, discrimination, and burdens on the free exercise of religion, expression and association. *See, e.g.*, Def. Mem. 24 (suggesting that long tradition in constitutional

law of striking down *per se* bans on churches in residential neighborhoods, *see generally* Plaintiffs’ Motion for Partial Summary Judgment, “is contrary to the long tradition of local land use control in this country.”). Precisely because these federal parameters have long applied to local land-use laws – and because the new Religious Land Use and Institutionalized Persons Act, 42 U.S.C. §2000cc, *et seq.* (“RLUIPA”), merely restates and codifies them to facilitate enforcement – the sky will not fall if plaintiffs prevail here. *See, e.g.*, Def. Mem. 24, 36 (threatening “havoc” in local land-use laws).

And when it comes to assessing the constitutionality of RLUIPA, defendants play even faster and looser. Defendants hasten to ascribe brazenly defiant – albeit irrelevant – motives to Congress in passing RLUIPA, rather than acknowledge Congress’ conscientious attempt to legislate within the boundaries set by the Supreme Court’s recently refined Enforcement and Commerce Clause jurisprudence. *See, e.g.*, Def. Mem. 28 (“With RLUIPA, Congress has attempted to ... usurp[] the role of the judiciary.”); *id.* at 41 (“RLUIPA did not emerge from any honest concern about interstate commerce.”). Then, rather than setting forth and discussing all the elements constituting that jurisprudence, defendants give them short shrift and lead instead with their freshly minted “separation of powers” theory, which has no independent life of its own. *See* Def. Mem. 28–35. And notwithstanding their stated concern for separation of powers, defendants disregard the well-established principle that federal courts should afford Acts of Congress considerable deference – especially those passed unanimously and based on a mountain of evidence demonstrating the need for legislation – and instead urge this Court to strike down RLUIPA on its face, based in part on a mischaracterization of that evidence as merely “a short string of anecdotes.” Def. Mem. 37.

In opposing this motion, plaintiffs will take a different approach. First, plaintiffs will describe the applicable standards for deciding motions to dismiss and for summary judgment, as well as the standard for assessing when summary judgment motions are premature. Second, plaintiffs will provide their account of the facts, supported by citations to the allegations of the Complaint, as well as to the evidence currently available to plaintiffs in the absence of even a single formal discovery response from defendants. Third, plaintiffs will set forth the elements of each of its claims; will demonstrate how the Complaint alleges facts sufficient to satisfy each element of those claims; and – to the extent evidence is currently available to plaintiffs – will demonstrate the existence of a genuine issue of material fact as to each element. Fourth, plaintiffs will demonstrate how RLUIPA is constitutional. Finally, plaintiffs will explain why Defendant Matteo should not be dismissed from this action.

Accordingly, plaintiffs urge the Court: (1) to deny defendants’ motion to dismiss plaintiffs’ Complaint; and (2) either (a) to deny defendants’ motion for summary judgment, or (b) to continue that motion pursuant to Rule 56(f) of the Federal Rules of Civil Procedure to provide plaintiffs the opportunity further to develop their claims through pending and additional discovery. *See* Auerbach Decl., Exhibit A, hereto.

APPLICABLE LEGAL STANDARDS

Defendants have moved this Court to dismiss plaintiffs’ Complaint or, in the alternative, to enter summary judgment in favor of defendants. In deciding a motion to dismiss for failure to state a claim upon which relief can be granted:

“[T]he court must consider only those facts alleged in the complaint and accept all of the allegations as true. *Hishon v. King & Spalding*, 467 U.S. 69, 73 (1984). Unless the plaintiff can prove no set of facts

in support of the claim that would entitle him to relief, the complaint should not be dismissed. *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957); *D.P. Enters., Inc. v. Bucks County Community College*, 725 F.2d 943, 944 (3d Cir. 1984).”

ALA, Inc. v. CCAIR, Inc., 29 F.3d 855 (3d Cir. 1994).¹

Summary judgment, by contrast, is proper where ““the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.”” *Radich v. Goode*, 886 F.2d 1391, 1393-94, 1395 13 (3d Cir. 1989) (quoting Fed. R. Civ. P. 56(c)). The moving party has the initial burden of showing that no genuine issue of material fact exists. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). Upon that showing, the nonmoving party “must make a showing sufficient to establish the existence of every element essential to his case, based on the affidavits or by the depositions and admissions on file.” *Pastore v. Bell Telephone Co. of Penn.*, 24 F.3d 508, 511 (3d Cir. 1994).

**FACTUAL ALLEGATIONS, INCLUDING STATEMENT OF
DISPUTED AND UNDISPUTED FACTS**

A. Abington’s Zoning Ordinance

Abington Township’s current zoning ordinance prohibits houses of worship in all residential districts (R-1, R-2, R-3, and R-4), not even allowing them by special exception. Complaint ¶¶ 38-39; Abington Township Revised Zoning Ordinance, Version 6.0, §§ 301-304 (May 9, 1996)

¹ Plaintiffs agree that if this Court were to dismiss all other constitutional and statutory claims over which it has original jurisdiction, it should decline to exercise supplemental jurisdiction over the claim pursuant to the Pennsylvania Municipalities Planning Code and dismiss that Count without prejudice. Def. Mem. at 62-64; 28 U.S.C. § 1367(c)(3); *United Mine Workers v. Gibbs*, 383 U.S. 715 (1966).

(attached to Defendants’ Motion to Dismiss as Exhibit I) (hereinafter the “1996 Ordinance”); Opinion and Order of the Board, App. No. 99-36, Finding of Fact (“FF”) ¶ 38, at 6, Conclusion of Law (“CL”) ¶ 6, at 20 (March 20, 2001) (attached to Defendants’ Motion to Dismiss as Exhibit C) (hereinafter “2001 Bd. Op.”).

By contrast, in the R-1 residential district alone, the 1996 Ordinance allows various nonreligious assembly and institutional uses – such as “Municipal Complexes” (which include libraries and administration buildings), “Outdoor Recreation” uses (which include country clubs, club houses, pro shops, and snack bars used by patrons of recreational activities “operated on a commercial or membership basis”), and “Riding Academies” – by special exception. 1996 Ordinance §§ 301.2.B.2.-4., 706.E.8., 706.G.6. In the R-4 residential district, day care centers and nursing homes are allowed by special exception, and life care facilities are allowed as conditional uses. *Id.* § 304.B.1.-2., C.1. Similar exceptions do not apply to houses of worship. *See id.* §§ 301-304.

Similarly, the 1996 Ordinance prohibits houses of worship in all but three of the remaining zoning districts in the Township: Town Commercial, Special Commercial, Planned Business, Suburban Industrial, Recreation/Conservation, Flood Plain, Land Preservation and Steep Slope Districts. Complaint ¶¶ 40-43; 1996 Ordinance §§ 400-602. Nevertheless, in those same zones, various nonreligious assembly and institutional uses – such as “clubs,” “libraries,” “museums,” “performing theatres,” “amusement parks,” “cultural centers,” and “country clubs” – are permitted, whether by right, by special use, or otherwise. *Id.*

Although houses of worship are permitted in the Apartment/Office District by special exception, nonreligious assembly and institutional uses – such as “clubs,” “community centers,”

“cultural centers,” “libraries,” and “museums” – are permitted as of right. Complaint ¶¶ 44-45; 1996 Ordinance §§ 403, 500, 501. Places of worship are permitted as of right only in the Community Service and Mixed Use Districts. *Id.* Combined, these three districts represent a small percentage of the total acreage constituting the Township. *See* Defendants’ Exhibit C (March 20, 2001 Opinion and Order of the Board, Exhibit P-5 (“Zoning Map”). Moreover, the land in those zones is already developed and not for sale, or otherwise incompatible with use as a house of worship. *Id.* *See also* Declaration of Yael Milbert, dated May 9, 2001 at ¶¶ 4-7 (attached as Exhibit G to Plaintiffs’ Motion for Preliminary Injunction, dated May 11, 2001. For example, as of 1992, cemeteries alone occupied 3% to 4% of *all* acreage in Abington, thus excluding the bulk of Community Service zones from even potential use as a synagogue. Comprehensive Plan for Abington Township, Montgomery County, Pennsylvania, 1992, at 61, 69 (attached to Defendants’ Motion to Dismiss as Exhibit H) (hereinafter “1992 Plan”).

Before 1990, the predecessor of the “R-1” residential district was called the “V” residential district, which permitted single family homes, “tilling of the soil,” and public libraries, parks, and recreational areas as of right; as well as livestock and nursery uses, school and seminary uses, and private nonprofit libraries, parks, and recreational areas by special exception. 2001 Bd. Op. FF ¶¶ 38-39, at 6; 1978 Ordinance § 301, at 26-28. The pre-1990 ordinance also allowed by special exception a “Church, rectory, parish house, convent, monastery or similar religious institution.” 1978 Ordinance § 301.2.D.3.

On or about March 8, 1990, the Township amended the “V” zone to prohibit all uses but single family homes; to redefine certain accessory uses and lot requirements; and to impose a new height restriction of thirty-five (35) feet. Ordinance No. 1676. In 1996, the Township renamed the

“V” district “R-1,” and permitted once again – either as of right or by special exception – all the institutional and assembly uses prohibited in 1990 *except* for schools, seminaries, and the other religious institutional uses previously allowed. *Compare* 1978 Ordinance § 301, at 26-28 *with* 1996 Ordinance § 301, at 18-20.

Also before 1990, Abington Township made no legal distinction between “churches,” “convents,” “monasteries,” classifying and regulating all of them together, along with any other “similar religious *institution*.” 2001 Bd. Op. FF ¶ 37, at 6 (quoting language from 1966 ordinance, which was effective until 1990). Similarly, in 1992, the Planning Commission described “church,” “government,” and “educational” uses together as “institutional” uses, and identified a convent (other than the property at issue here) as the largest institutional use. 1992 Plan, at 68-69. After 1996, the Township defined the (rarely permitted) “Place of Worship” use broadly as “A tax-exempt institution that people regularly attend to participate in or hold religious services, meetings, and other activities related to religious ceremonies.” 1996 Ordinance § 706.E.10, at 112. The same definition provides that “The term church shall include those buildings and structures in which religious services are held,” but does not similarly define “synagogue.” *Id.*²

² In addition to the evidence cited above tending to show discrimination in the Township’s ordinances between religious and nonreligious uses, as well as between established religious and new religious groups, plaintiffs intend to gather more such evidence through pending discovery requests. *See* Plaintiffs’ First Set of Document Requests and Interrogatories to All Defendants, Request For Production No. 1, Interrogatory No. 4 (hereinafter “First Discovery Requests”) (attached hereto as Exhibit B).

B. The Property and the Neighborhood

The property at issue in this case is located at 1908 Robert Road, Abington Township, Pennsylvania (the “Property”), and is located in the R-1 district. Complaint ¶¶ 20, 38; 2001 Bd. Op. FF ¶ 9, at 2. The Property consists of approximately 10.9 acres of land, including structures occupying approximately 27,000 square feet. Complaint ¶¶ 20, 35; 2001 Bd. Op. FF ¶¶ 2, at 2. Among these structures is a 3,700 square-foot church that can seat approximately 200 to 250 worshippers. Complaint ¶ 35; Opinion and Order of the Board, App. No. 95-33, FF ¶¶ 7-11, at 2 (May 2, 1996) (attached to Defendants’ Motion to Dismiss as Exhibit B) (hereinafter “1996 Bd. Op.”). Built in 1957, the church contains, to this day, an altar, a sacristy, the stations of the cross, confessionals, and stained glass windows. Complaint ¶¶ 22-23; 2001 Bd. Op. FF ¶ 2, 65, at 2, 8; 1996 Bd. Opp. FF ¶¶ 8, 11, at 2; *see generally* Declaration of Mark Levin (May 16, 2001) (attached to Plaintiffs’ Motion for Partial Summary Judgment attached as Exhibit D thereto).

Primary access to the Property is from Valley Road, a main thoroughfare. To reach the Property, visitors would turn from Valley Road on to Frederick Road and proceed on Frederick for approximately 300 feet, passing only four residential lots, two on either side of the road. See Defendants’ Exhibit C (March 20, 2001 Opinion and Order of the Board, Exhibit P-5 (“Zoning Map”) and Exhibit P-19 (“Plan of E. Van Rieker dated 8/15/00”) attached thereto. Two of these lots – the first ones passed on either side of Frederick Road – are also bordered by Valley Road roughly to the east. *Id.* Visitors would then turn left on to Robert Road and proceed for approximately 100 feet before turning right into the driveway of the Property. See Defendants’ Exhibit C (March 20, 2001 Opinion and Order of the Board, Exhibit P-4 (“Proposed Site Plan dated 11/22/99”) and Exhibit P-5 (“Zoning Map”) attached thereto. During that brief stretch on Robert Road, visitors pass

completely only one lot on the right and one on the left (which is the same house already passed on the left while on Frederick Road), and cross in front of only part of another house on the left before turning right into the driveway. *Id.* Robert Road, which is approximately 30 feet wide, continues roughly south for another approximately 300 feet *past* the Property’s driveway before it widens into a cul-de-sac of approximately 120 feet in diameter. *Id.* In light of this layout, any traffic entering or exiting the Property could readily be directed to avoid driving any further down Robert Road toward the cul-de-sac, such as by a “No Right Turn” sign facing the Property’s driveway; a “No Outlet” sign facing north on Robert Road; a small saw-horse style barricade placed just south of the driveway at peak times to block the west lane of Robert Road; and/or a traffic cop. *See id.*

Abington Township contains approximately thirty-seven (37) houses of worship, approximately twenty-five (25) of which are located in residential zoning districts.³ Complaint ¶¶ 48, 50; 2001 Bd. Opp. CL ¶ 39, at 22. Among those in residential zones – where new ones are banned entirely – none are Jewish. *Id.* While the Jewish population constitutes approximately 20% of Abington Township, there is only one synagogue, which happens to be in a district zoned “PB” or “Planned Business.” *Id.*

³ Defendants have yet to identify, in response to plaintiffs’ document requests, the traffic, noise, parking and lighting impacts, if any, that they have documented in connection with other houses of worship and other institutional uses in residential zones, and what, if any, responsive measures they have taken to curtail those uses in order to reduce those impacts. *See* Discovery Requests RFP Nos. 2-5.

C. Prior Religious Institutional Uses of the Property by Catholic Nuns and Orthodox Monks

In 1951, the Sisters of the Holy Family of Nazareth (the “Sisters”) purchased the Property, which then included 38 acres. Complaint ¶ 22; 1996 Bd. Op. ¶ 14, at 2. Def. Mem. 3. Before then, the Property was used as a single family residence. *See* Complaint ¶ 22; Def. Mem. 3; 1996 Bd. Op. FF ¶ 7, at 2. The Sisters dramatically altered their Property in order to convert it from its prior, single family use to the institutional use of their convent, including by building the church described above and by adding one story to another building as a dormitory. Complaint ¶ 22; 1996 Bd. Op. FF ¶ 8-14, at 2.

Since it was built in 1957 until 1995, the Sisters daily attended the church on the Property to participate in or hold religious services, meetings, and other activities related to religious ceremonies, such as religious education, sharing meals, recreating, and working. Complaint ¶¶ 21, 22, 24-27, 29; *see* 1996 Ordinance § 706.E.10, at 112. At its peak, the Property accommodated approximately 80 Sisters engaging in these various activities. Complaint ¶ 22; 1996 Bd. Op. FF ¶ 15, at 2. In addition to daily celebration of mass, on numerous major Catholic holidays throughout the year, individuals from outside the Property entered it to join the Sisters in celebrating those days, packing the church to capacity. Complaint ¶ 28; *see* Testimony of Sr. Michaelann Delaney, Transcript of Public Hearing on Application No. 99-36 of Congregation Kol Ami, Vol. No. 1, Monday, January 18, 2000 at 42:4-47:9. Similarly, the Sisters allowed the Property to be used for retreats and special meetings, even as late as 1995 when the Sisters’ population had declined. Complaint ¶ 22; 1996 Bd. Op. FF ¶¶ 16, 30, at 2, 4. Thus, in 1977, the Abington Township Planning Commission classified the Property as a “convent” that serves “several purposes” – including use

as a chapel, novitiate, and retreat house – in contrast to another convent use whose “primary purpose is residential.” Abington Township Pennsylvania Comprehensive Plan 1977, at 71 (attached to Defendants’ Motion to Dismiss as Exhibit E) (hereinafter “1977 Plan”); *see* Complaint ¶ 22.

Due to the decline in the population of the Sisters, the Sisters leased the Property to the Greek Orthodox Monks in 1995, also for use as a religious institution. Complaint ¶ 31. Like the Sisters, the Monks desired to use the Property for religious services, family retreats, religious study, and prayer. Complaint ¶ 33; 1996 Bd. Opp. FF ¶¶ 23, 25, 28, at 3. In deciding to permit the use, Defendant Zoning Hearing Board (“ZHB”) repeatedly referred to the Sisters’ use of the Property as a convent as an “institutional” use, and correspondingly found it would have been prohibitively expensive for the Sisters to convert the convent back to a “residential” use. 1996 Bd. Opp. FF ¶¶ 8, 10, 14, 20, at 2, 3; *see* Complaint ¶ 32. The ZHB further found that use to be “nonconforming,” and that the Sisters did not intend to abandon that use, even though they desired to sell it. 1996 Bd. Opp. FF ¶ 17, at 2, CL ¶ 3, 4, at 4; *see* Complaint ¶ 32. Finally, the ZHB found that “to deny this application would impose an unnecessary hardship on the applicant,” namely the Monks who would otherwise have to seek another location for their religious exercise.

Thus, from 1995 through 1999, the Monks daily attended the church on the Property to participate in or hold religious services, meetings, and other activities related to religious ceremonies, such as religious education, sharing meals, recreating, and working. Complaint ¶¶ 33-34; 1996 Bd. Opp. ¶ 23, 25, 28, at 3; *see* 1996 Ordinance § 706.E.10, at 112.

D. Proposed Religious Institutional Use of the Property by Congregation Kol Ami

In August 1999, plaintiffs entered into an agreement with the Sisters to purchase the Property for use as a synagogue. Complaint ¶ 36. Plaintiffs proposed the following regularly scheduled uses of the Property: (1) *Shabbat* services on alternate Fridays and Saturdays for up to an hour and a half; (2) Hebrew classes on Wednesdays from 4:00pm to 8:00pm; (3) religious classes for 2 hours on Sunday mornings. Complaint ¶ 57; *See* testimony of David Sloviter, Transcript of Public Hearing on Application No. 99-36 of Congregation Kol Ami, Vol. No. 1, Monday, January 18, 2000, at 115:12 – 123:25 (hereinafter “Sloviter Testimony at ___”). This comprises less than 8 hours of regularly scheduled activity per week, and none on Mondays, Tuesdays, Thursdays and alternate Fridays and Saturdays. Complaint ¶ 57; Sloviter Testimony at 122:4-17. Other uses would include four High Holiday services per year, religious meetings and *Bar* and *Bat Mitzvah* services. Complaint ¶ 58; Sloviter Testimony at 124:2-134:5. The facilities of the Property would be used in a similar manner to that of the Sisters: worship services would be held in the Chapel; receptions would be held in the Dining Room; *Oneg Shabbat* gatherings would be held in the Hall; the Congregation would use the Sisters’ classrooms and dormitory rooms for its own religious education and administrative offices. Complaint ¶ 59; Sloviter Testimony at 134:16-139:3.

Driveways on the Property would be altered substantially, parking areas added to comply with Abington Township standards, as well as the addition of screening and buffering. Complaint ¶ 60; *see* Sloviter Testimony at 143:22-144:8. *See also*, Testimony of Stuart G. Rosenberg, Transcript of Public Hearing on Application No. 99-36 of Congregation Kol Ami, Vol. No. 2,

Tuesday, February 29, 2000 at 140:19-141:7, 172:12-21 (hereinafter “Rosenberg Testimony at ___”); Testimony of Charles L. Guttenplan, Transcript of Public Hearing on Application No. 99-36 of Congregation Kol Ami, Vol. No. 3, Thursday, March 2, 2000 at 54:11-57:24 (hereinafter “Guttenplan Testimony at ___”). *Compare* Defendants’ Exhibit C (March 20, 2001 Opinion and Order of the Board, Exhibit A-12 (“Amended Site Plan ”) attached thereto *with* Exhibit A-12B (“Existing Conditions”) attached thereto (demonstrating construction of new driveways and parking spots for proposed use as well as modified uses of buildings).

E. The Township’s Denial of Kol Ami’s Religious Institutional Use of the Property

Plaintiffs submitted an application to the ZHB requesting permission to use the Property as a place of worship, as above, either by the ZHB finding that the proposed use is a continuation of a prior, nonconforming, religious institutional use of the Property, or by the ZHB granting a variance to allow the proposed use. Complaint ¶ 54; 2001 Bd. Op. FF ¶ 15, 16, at 4. Several neighbors who objected to the location of a synagogue in their neighborhood intervened to protest plaintiffs’ application. Complaint ¶ 62; 2001 Bd. Op. FF ¶ 11, at 2. These intervenors objected to the synagogue in their neighborhood regardless of any conditions or restrictions upon the use. Complaint ¶ 62; *see* Testimony of William Francis Clinton, Transcript of Public Hearing on Application No. 99-36 of Congregation Kol Ami, Vol. No. 7, Tuesday, July 18, 2000 at 132:3-13; *see* Testimony of Elinur Maier, Transcript of Public Hearing on Application No. 99-36 of Congregation Kol Ami, Vol. No. 7, Tuesday, July 18, 2000 at 162:9-16⁴. Plaintiffs repeatedly

4 Q. Last question. Would there be any set of conditions under which you would find the
(continued...)

offered to make any reasonable alterations to minimize whatever impact – or perceived impact – the Congregation may cause, including installing berms, landscaping, and fencing, relocating driveways, hiring traffic monitoring personnel and curtailing evening activities. Complaint ¶ 65; *See* Sloviter Testimony. The intervenors rejected all of these suggestions. Complaint ¶ 65; *see* Maier Testimony 162:9-16.⁵

Experts testifying in support of the Application were a land planner, a civil engineer, a traffic engineer, an architect, an attorney. Complaint ¶ 61; 2001 Bd. Op. FF ¶¶ 93, 135, 160, 211, at 10, 13, 15, 19. Plaintiffs also offered the testimony of Sister Michaelann Delaney, Provincial Superior of the Sisters; David Sloviter, President of the Congregation; plaintiff Elliot Holin, Rabbi of the Congregation; and owners of homes on immediately adjacent properties who supported the Congregation’s proposed use. Complaint ¶ 61; 2001 Bd. Op. FF ¶¶ 53, 132, 152, at 7, 13, 14.

Now that the proposed use of the Property involved a new Jewish rather than an established Christian congregation, the ZHB changed its tune dramatically. *See* Complaint ¶ 47; *compare* 1996 Bd. Op. *with* 2001 Bd. Op. Rather than allow the Congregations’ proposed religious use subject to conditions designed to address the concerns asserted by neighbors – as it had done in 1996 – the

4(...continued)

presence of Kol Ami as it is currently constituted acceptable to you?

A. No.

Q. In other words, if limitations were put on them would there be a set of limitations that you - -

A. No. I’m just opposed to having them back there.

Maier Testimony at 162:9-16.

⁵ Plaintiffs expect to discover further evidence tending to show that the neighbors opposing the Congregation’s application were animated by discriminatory and / or irrational motives. *See* First Discovery Requests RFP Nos. 3, 4, 6, Int. No. 3.

ZHB denied the Application in its entirety. Complaint ¶ 63; 2001 Bd. Op. at 23. Suspicious determinations by the ZHB include, without limitation, the following:

- The ZHB backed away from its 1996 determination that the Sisters’ use was a prior nonconforming institutional use that they had wished to sell to the Monks, 1996 Bd. Op. FF ¶¶ 8, 10, 14, 17, 20, at 2, 3, now claiming that the Sisters’ use was a conforming residential use all along, so that they never had a nonconforming use to sell the Monks. 2001 Bd. Op. CL ¶ 7, 11, at 20.
- The ZHB argued, in the alternative, that even if the Sisters did have a nonconforming use, they intended to abandon it. 2001 Bd. Op. CL ¶ 13, at 20. But this inference of intent was based on conduct undertaken by the Sisters before 1996, 2001 Bd. Op. FF ¶¶ 49-51, 56-59, at 7, 8, CL ¶¶ 14-16, at 21, when the ZHB specifically found that the Sisters did *not* intend to abandon their nonconforming institutional use. 1996 Bd. Op. FF ¶ 17, at 2, CL ¶ 4, at 4.
- The ZHB found also more specifically that the Sisters’ use “was permitted in the V-Residential District as a residential use.” 2001 Bd. Op. CL ¶ 11, at 20. But the only residential use permitted in that district was “single family detached dwelling,” 1978 Ordinance § 301.2.A., which the convent plainly was not, both because the number of Sisters typically exceeded the number of individuals that reasonably could occupy any single family dwelling, and because the Sisters were not related to each other. 2001 Bd. Op. FF ¶¶ 69-71, at 8-9.
- Although the ZHB found that “The principal use of the Property by the Monks was residential,” the ZHB offered no explanation as to why that use required a variance in 1996. 2001 Bd. Op. CL ¶ 10, 17, at 20, 21.
- The ZHB rejected the sworn testimony of Sr. Michaelann Delaney – who lived on the Property herself for at least two years and later exercised religious authority over the activities occurring therein – as “not credible” regarding activity at the Property, and preferring instead the testimony of neighbors – who lack *any* inside knowledge of, or supervisory role over,

the activities of the convent – generalizing from activities they did *not* see occur at the Property. 2001 Bd. Op. FF ¶¶ 88-91, 199, 201, at 10, 18. The fact that neighbors did not witness certain activities does not even approach “directly contradict[ing]” other testimony tending to show that those activities nonetheless occurred: the neighbors simply did not see the activities when they happened. *Id.*

- Similarly throughout, whenever the ZHB assessed the credibility of the Congregation’s witnesses, it invariably found them lacking, and just as consistently found the intervenors’ witnesses credible. Complaint ¶ 63; *see, e.g.*, 2001 Bd. Op. FF ¶¶ 199, 203, 211, 215, at 18, 19.
- The ZHB omitted from its 2001 findings facts it had found in 1996 – and that were still both true and relevant – but tended to show the intensity of the Sisters’ use, such as: that the church occupies 3,700 square feet and could seat over 200 worshippers; that over 80 Sisters represented the peak use of the convent; that the Property had been expanded to sleep far more than any single family ever would; that modifying the Property back to single-family use would be prohibitively expensive. *See* 1996 Bd. Op. FF ¶ 10, 11, 15, 20, at 2, 3.
- Although the ZHB found the convent to involve the use of between 20 and 50 Sisters at a time through the 1970s (ignoring its 1996 finding of over 80), the ZHB credited testimony that deliveries to the Property were “limited” and that the Sisters’ use generated “no traffic” and “never [involved] large gatherings of people.” 2001 Bd. Op. FF ¶¶ 69-71, 201, at 9, 18.
- Although the ZHB lists all the Congregations proposed uses, the ZHB alternately omits and distorts uncontradicted evidence tending to show that most of these activities will occur regularly but infrequently, so that neighborhood impacts, if any, would typically occur during only a few hours per week.. *See, e.g.*, 2001 Bd. Op. FF ¶¶ 131, 139, at 13 (omitting that Wednesday classes would be limited to 4 hours, Sunday classes limited to 2 hours, and Shabbat services limited to 1.5 hours on *alternate* Fridays and Saturdays).

- Although the ZHB found that the Congregation consisted of 558 members and 207 families (an average of 2.7 members per family), it found more credible that members' vehicles would include 2 persons per trip (as the intervenors' expert testified) rather than 3 (as the Congregation's expert testified). 2001 Bd. Op. FF ¶¶ 127, 128, 169, at 12, 15.

In short, the ZHB bent over backwards to force the outcome against Congregation Kol Ami, as part of the Township's broader pattern of legal hostility to new and minority religious groups.⁶ Complaint ¶ 47. The ZHB made these decisions pursuant to a system of individualized assessments. See Complaint ¶¶ 67-69.

F. The Substantial Burden Imposed on Kol Ami by the Township's Denial of Its Religious Institutional Use of the Property

Congregation Kol Ami is a new Reform Jewish congregation, founded in 1994. Declaration of David Sloviter (May 10, 2001) ¶ 2 (hereinafter "Sloviter Decl.") (attached as Exhibit B to Memorandum of Law in Support of Plaintiffs' Motion for a Preliminary Injunction). Its religious mission has been suffering – and continues to suffer – for lack of a permanent facility. Complaint ¶¶ 11-18; Sloviter Decl. ¶¶ 17-27; Declaration of Elliot J. Holin (May 10, 2001) ¶¶ 6, 7, 18-22 (hereinafter "Rabbi Holin Decl.") (attached as Exhibit C to Memorandum of Law in Support of Plaintiffs' Motion for a Preliminary Injunction). It currently pursues parts of its mission at a variety of temporary locations, such as holding worship services at Gratz College, religious school at Congregation Melrose B'nai Israel Emanuel, Passover *Seder* at the Gymnasium of Abington Friends

⁶ Through outstanding discovery requests – including document requests, interrogatories, and scheduled depositions – plaintiffs intend to explore further the role of anti-religious animus in the determinations of the ZHB regarding Kol Ami's application. See, e.g., First Discovery Requests RFP Nos. 4, 6, Int. No. 3.

School, and High Holy Days at the Keswick Theater. Complaint ¶ 12; Rabbi Holin Decl. ¶¶ 6,7; Sloviter Decl. ¶¶ 11-15.

This wandering has resulted in a disjointed Congregation, forcing the cancellation and diminishing the quality and frequency of religious events; hindering both communication of the Rabbi's religious message – including education of the young – and fellowship among the congregants; eroding membership and financial support; and placing the Congregation's most sacred possession – an ancient *Torah* that has survived the Holocaust – at increased risk of destruction. Complaint ¶ 13, 15-18; Rabbi Holin Decl. ¶¶ 6-7, 17-19, 22; Sloviter Decl. ¶¶ 11-27. Moreover, plaintiffs religious convictions call for the Congregation to occupy a home that is both permanent and in a residential neighborhood. Complaint ¶ 13; Rabbi Holin Decl. ¶¶ 4, 5, 8, 9.

In order to fulfill these needs, a permanent home must contain structures adequate for religious worship and related gatherings, as well as some outdoor space for reflection and celebration of religious holidays such as *Sukkot*; it must be reasonably central to where members of the Congregation live; and it must accommodate the current members and allow for some future growth. Complaint ¶ 14; Rabbi Holin Decl. ¶¶ 4, 21; Sloviter Decl. ¶¶ 7, 25-27. Abington Township's zoning laws have made such a property especially difficult to find, because they have dramatically reduced the number of properties in the Township where religious assembly uses are permitted. Complaint ¶¶ 39-46; *See* Defendants' Exhibit C (March 20, 2001 Opinion and Order of the Board, Exhibit P-5 (“Zoning Map”).

After a long and exhaustive search, it was determined that the Property at 1908 Robert Road is the only property in Abington Township that fulfilled the Congregation's needs. Complaint ¶¶ 13, 19, 37; Sloviter Decl. ¶¶ 5-10; Declaration of Yael Milbert (May 9, 2001), ¶¶ 4-7 (hereinafter

“Milbert Decl.”). The Township has prohibited the Congregation from occupying that Property, which is otherwise available for sale to the Congregation, and which the Congregation has found would meet its religious needs. Complaint ¶¶ 19, 36, 37, 63; *see generally* 2001 Bd. Opp. Plaintiffs’ agreement with the Sisters to purchase the Property expires in May, 2002. Complaint ¶ 36. The agreement is contingent upon the Congregation’s ability to obtain all necessary approvals. *Id.*; 2001 Bd. Opp. FF ¶ 2, at 2. Plaintiffs have paid the Sisters \$137,500 in deposits and carrying costs. Complaint ¶ 36. Plaintiffs’ costs in carrying the Property continue to accrue at a rate of \$20,000 per year. *Id.*

ARGUMENT

I. THIS COURT SHOULD DECIDE THIS MOTION AS ONE TO DISMISS, AND NOT AS ONE FOR SUMMARY JUDGMENT

Defendants’ motion (in the alternative) for summary judgment is premature. Defendants have not yet even formally responded to plaintiffs’ first set of discovery requests. Plaintiffs have thus not yet had the opportunity to discover information vital to plaintiffs’ claims. Rule 56(f) of the Federal Rules of Civil Procedure provides that:

Should it appear from the affidavits of a party opposing the motion that the party cannot for reasons stated present by affidavit facts essential to justify the party's opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

The rule “explicitly provides that the party must file an affidavit setting forth why the time is needed.” *Pastore v. Bell Telephone Co. of Pa.*, 24 F.3d 508, 510-11 (3d Cir. 1994). “The purpose of subdivision (f) is to provide an additional safeguard against an improvident or premature grant of summary judgment and the rule generally has been applied to achieve that objective.” 10A

WRIGHT, MILLER, & KANE, FEDERAL PRACTICES AND PROCEDURE § 2740 (1983). *See also Mannington Mills, Inc. v. Congoleum Industries, Inc.*, 610 F.2d 1059, 1073 (3d Cir. 1979) (“district judge acted prematurely by ruling on the summary judgment motion before [plaintiff] had had fair opportunity to depose the officers and employees of [defendant] regarding the existence of an agreement between [defendant] and its licensees.”).

“[W]hether a Rule 56(f) motion should be granted “depends, in part, on ‘what particular information is sought; how, if uncovered, it would preclude summary judgment; and why it has not been previously obtained.’” *San Filippo v. Bongiovanni*, 30 F.3d 424, 432 (3d Cir. 1994) (quoting *Contractors Ass’n v. City of Philadelphia*, 945 F.2d 1260, 1266 (3d Cir. 1991) (quoting *Lunderstadt v. Colafella*, 885 F.2d 66, 71 (3d Cir. 1989))) *cert denied*. 513 U.S. 1082 (1995). Specifically, “[b]eyond the procedural requirement of filing an affidavit, Rule 56(f) also requires that a party indicate to the district court its need for discovery, what material facts it hopes to uncover and why it has not previously discovered the information.” *Radich v. Goode*, 886 F.2d 1391, 1393-94 (3d Cir. 1989) (citing *Hancock Industries v. Schaeffer*, 811 F.2d 225 (3d Cir. 1987)).

Plaintiffs seek information relating to their claims that: (i) Defendants violated their constitutional rights to free exercise, free speech, freedom of assembly, equal protection, and due process; (ii) Defendants violated their rights under the Religious Land Use and Institutionalized Persons Act; and (iii) Defendants violated the Pennsylvania Municipalities Zoning Code on the grounds that their March 20, 2001 decision was arbitrary and capricious.

These claims all create triable issues of fact that will likely preclude defendants’ Motion. Plaintiffs will depose and otherwise seek discovery from individual members of the Board of Zoning Appeals and employees of the Township, including Lawrence Matteo, Mark Penecal, and Barbara

Ferraro. Plaintiffs plan to seek discovery on various issues directly impacting the elements of the claims they are attempting to prove, including facts related specifically to discriminatory intent against new or minority religious groups, such as Congregation Kol Ami, on the part of the Township's officers and the Zoning Hearing Board, including the reasons for the denial of plaintiffs' applications and the granting of other applications to other non-residential uses of property within the Township's jurisdiction. Auerbach Decl., ¶¶10-12, Exhibit A hereto. Such discrimination is relevant to plaintiffs' claims of violation of their right to free speech, free exercise of religion, freedom of association, equal protection, and due process, and their rights under RLUIPA. Plaintiffs also seek discovery of facts pertaining to defendants' claims of their interests in depriving plaintiffs of the ability to use the target Property for purposes of religious assembly, expression, and worship. The reasons for defendants' actions will be relevant to these claims regardless of the appropriate standard of review: strict scrutiny, intermediate scrutiny, or rational basis. Also relevant will be the availability of any least restrictive means of achieving those stated interests. All of these facts lie within defendants' personal knowledge.

Plaintiffs have diligently pursued the pending discovery they currently await and expect soon to receive. *See* Auerbach Decl., Exhibit A hereto. The filing of defendants' motion for summary judgment, at this time, is premature since plaintiffs' first set of discovery requests remain unanswered, and plaintiffs' first depositions are not scheduled to begin until July 5, 2001. *Id.* This action was filed on April 18, 2001. Shortly after the trial date was set, plaintiffs and defendants served their first set of document requests and interrogatories on June 14, 2001 and June 21, 2001, respectively. These are due within 30 days. Defendants' depositions only recently began on June 20 and 29, 2001, and parties are currently awaiting expedited transcripts. By this Court's order,

counsel will be prepared for trial on July 24, 2001. This diligence in discovery efforts supports plaintiffs' request that this Court either refuse or continue defendants' summary judgment motion. *Costlow v. United States*, 552 F.2d 560, 564 (3d Cir. 1977) (“[B]y acting on the motion for summary judgment without argument, and without reference to what might be developed in discovery, which was being diligently pursued, the court erred.”).

Accordingly, plaintiffs respectfully request that the Court dismiss defendants' motion (in the alternative) for summary judgment without prejudice to renew at the appropriate time, or order a continuance to permit plaintiffs the discovery they have been seeking. *Sames v. Gable*, 732 F.2d 49, 51 (3d Cir. 1984) (“This court has criticized the practice of granting summary judgment motions at a time when pertinent discovery requests remain unanswered by the moving party”).

II. EVERY COUNT OF PLAINTIFFS COMPLAINT CONTAINS FACTUAL ALLEGATIONS SUFFICIENT TO STATE A CLAIM ON WHICH RELIEF MAY BE GRANTED

A. Count I States a Claim Under the Federal Free Exercise Clause

1. Plaintiffs have alleged that Abington's Ordinance, both on its face and as applied, discriminates based on religion

In *Church of the Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520 (1993), the Supreme Court set forth the general standard for assessing the constitutionality of state action under the Free Exercise Clause of the First Amendment:

“[I]f the object of a law is to infringe upon or restrict practices because of their religious motivation, the law is not neutral, *see Employment Division v. Smith*, 494 U.S. 872, 878-79 (1990), and it is invalid unless it is justified by a compelling interest and is narrowly tailored to advance that interest.”

Lukumi, 508 U.S. at 533.

Although defendants fail to cite the case even once in any of their papers, *Fraternal Order of Police v. City of Newark*, 170 F.3d 359 (3d Cir. 1999), represents controlling Third Circuit law further interpreting and applying the *Lukumi / Smith* standard. That case presented the question whether a no-beards policy involving an exception for medical reasons triggered heightened scrutiny for failure similarly to provide an exception for religious reasons. 170 F.3d at 365-66. The court found that the case did *not* present a circumstance of “individualized assessments,” such that the pre-*Smith* “substantial burden” test would apply. *Id.* at 365; *see infra*. Instead, the court applied strict scrutiny because it found the law to target conduct based on its religious motivation:

“[I]t is clear from [*Smith* and *Lukumi*] that the Court’s concern was the prospect of the government’s deciding that *secular motivations are more important than religious motivations*. If anything, this concern is only further implicated when the government does not merely create a mechanism for individualized exemptions, but instead, actually creates a categorical exemption for individuals with a secular objection but not for individuals with a religious objection. ... Therefore, we conclude that the Department’s decision to provide medical exemptions while refusing religious exemptions is sufficiently suggestive of discriminatory intent so as to trigger heightened scrutiny under *Smith* and *Lukumi*.

Id. (emphasis added). Thus, the Free Exercise Clause protects not only against the persecution of religious minorities or other forms of “sect discrimination,” Def. Mem. 16, but against targeting religiously motivated conduct for worse treatment than secular conduct. *Lukumi*, 508 U.S. at 532 (“At a minimum, the protections of the Free Exercise Clause pertain if the law at issue discriminates against some or all religious beliefs or regulates or prohibits conduct because it is undertaken for religious reasons.”).

Here, both forms of anti-religious animus are implicated. First, as detailed above, the 1996 Ordinance treats religious institutional and assembly uses differently and worse than nonreligious ones. *See supra* Factual Allegations Section A (discussing ordinance). Wherever religious assembly uses are banned, nonreligious uses are allowed at least by special exception, *see, e.g.*, 1996 Ordinance §§ 301-304 (defining Abington’s residential districts); where religious assembly uses are allowed by special exception, secular uses are allowed as of right. *See, e.g., id.* §§ 403, 500, 501 (defining Apartment / Office district). As if this were not “sufficiently suggestive of discriminatory intent so as to trigger heightened scrutiny,” 170 F.3d at 365, the circumstances of the amendments to the Ordinance – in which all nonreligious assembly uses but churches were restored to R-1 neighborhoods – only suggest more. *Compare* 1978 Ordinance § 301 *with* 1996 Ordinance § 301.

Second, the 1996 Ordinance institutes a system of sect preferences. By prohibiting houses of worship in the residential districts to which they gravitate – as well as by drastically limiting elsewhere the pool of real estate even potentially available for that use – the 1996 Ordinance unmistakably targets minority and less well-established religions for exclusion from Abington Township. The presence of this discriminatory motive is only confirmed by a careful examination of the ZHB’s opinion rejecting Kol Ami’s application: the dramatic inconsistencies of the opinion with the evidence presented to the ZHB, with its prior findings from 1996, within the opinion itself all evince an intent to exclude Kol Ami, without regard to the factual merits of its application. *See supra* Factual Allegations E (discussing suspicious findings of ZHB).

2. Plaintiffs have alleged that Abington’s Ordinance imposes a substantial burden on their free exercise of religion, both pursuant to a system of individualized assessments, and in conjunction with related fundamental rights

Notwithstanding defendants overbroad arguments to the contrary, the Supreme Court in *Smith* did not overrule its prior decisions applying the “substantial burden” test, but distinguished those cases and limited their future application. *See Smith*, 494 U.S. at 884. Specifically, the *Smith* Court, and later the *Lukumi* Court, found that those precedents – such as *Sherbert v. Verner*, 374 U.S. 398 (1963), *Thomas v. Review Board of Indiana*, 450 U.S. 707 (1981), and *Hobbie v. Unemployment Appeals Comm’n of Fla.*, 480 U.S. 136 (1987) – are still viable in situations involving “individualized governmental assessment of the reasons for the relevant conduct.” *Id.*; *Lukumi*, 508 U.S. 537; *see Fraternal Order of Police*, 170 F.3d at 364-65 (noting that “individualized assessments” exception to *Smith* general rule applies outside unemployment context). Thus, in those circumstances, the state is still required to justify a “substantial burden” on religious exercise “by showing that it is the least restrictive means of achieving some compelling state interest.” *Thomas*, 450 U.S. at 718.

Similarly, the *Smith* Court distinguished still other Free Exercise cases where it applied strict scrutiny to neutral and generally applicable laws burdening religious exercise, on the grounds that those cases involved a “hybrid situation” in which the Free Exercise claims were asserted “in conjunction with other constitutional protections, such as freedom of speech and of the press, or the right of parents ... to direct the education of their children ... And it is easy to envision a case in which a challenge on freedom of association grounds would likewise be reinforced by free exercise concerns.” *Smith*, 494 U.S. at 881-82. There, too, strict scrutiny still applies to substantial burdens.

See *Fraternal Order of Police*, 170 F.3d at 363 (acknowledging but not reaching “hybrid” free speech / free exercise argument).

The “substantial burdens” test applies in this case because both the “individualized assessments” and “hybrid” rights circumstances are present. The opinion of the ZHB rejecting Kol Ami’s application is a classic case of the kind of discretionary “individualized assessments” that can so readily mask discriminatory motive and that are so common to land-use laws. See, e.g., *First Covenant Church v. City of Seattle*, 840 P.2d 174, 181 (Wash. 1992); *Keeler v. Mayor & City Council of Cumberland*, 940 F. Supp. 879, 886 (D. Md. 1996); *Korean Buddhist Dae Won Sa Temple of Hawaii v. Sullivan*, 953 P.2d 1315 (Haw. 1998). Also, because the present Free Exercise claim is asserted in conjunction with related rights to freedom of speech and association, see *infra*, this is a case of “hybrid” rights, warranting the application of more stringent constitutional scrutiny than may otherwise apply. See *Smith*, 494 U.S. at 881-82.

Moreover, defendants’ conduct in this case has imposed a substantial burden on the religious exercise of plaintiffs. Denying plaintiffs a place of worship strikes at the heart of the Congregation’s religious exercise. Defendants argue otherwise, relying primarily on a Sixth Circuit case, *Lakewood, Ohio Congregation of Jehovah’s Witnesses, Inc. v. City of Lakewood*, 699 F.2d 303, 307 (6th Cir. 1983). Apart from the fact that the decision in *Lakewood* was dubious even in 1983 – holding that “building and owning a church is a desirable accessory of worship, not a fundamental tenet of the Congregation’s religious beliefs” and merely a “purely secular act,” *id.* at 307 – it has since lost relevance since the Supreme Court’s superceding decisions in *Smith* and *Lukumi*.

More importantly, the present case is completely distinguishable from *Lakewood*, where the plaintiffs alleged only that they had a financial and aesthetic interest in the property. *Id.* at 307 (“In

short, the burdens of the ordinance are the *increased cost of purchasing land* and the violation of the Congregation's aesthetic senses, if the Congregation chooses to build a new church in Lakewood.”) (emphasis added). See also *Christian Gospel Church v. City and County of San Francisco*, 896 F.2d 1221, 1224 (9th Cir. 1990) (“The burdens imposed by this action are therefore of *convenience and expense....*”) (emphasis added). By contrast, Congregation Kol Ami has alleged interests clearly related to its religious mission, has produced evidence in support of those allegations, and will produce even more evidence at trial. See *supra* Factual Allegation Section F (discussing allegations and disputed facts amounting to substantial burden).

Rather than rely on one questionable, outdated, and distinguishable Sixth Circuit opinion, the Court should follow the reasoning of the more recent (post-*Smith*) decisions of the other Courts of Appeals that have addressed the issue of land use laws burdening religious exercise. These courts have acknowledged that if the state were to prohibit a private party from building or improving its property as a place of worship or other religious use, the state would impose a substantial burden on that religious exercise. See *Ehlers-Renzi v. Connelly School of the Holy Child, Inc.*, 224 F.3d 283, 291 (4th Cir. 2000) (“And necessary to the fulfillment of this mission is the existence of facilities which Connelly School deems adequate to carry on its religious instruction.”); *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.*”) (emphasis added); *Cohen v. City of Des Plaines*, 8 F.3d 484, 492 (7th Cir. 1993) (“By exempting churches (which themselves do not require a special use permit to operate) from the special use requirement in the operation of nursery schools

and day care centers, the city has removed a *burden to the free exercise of religion.*”) (emphasis added). Thus, because the Congregation equitably owns the Property, the Court should find Abington to impose a substantial burden on religious exercise by prohibiting the Congregation from using the Property as a house of worship. It is no answer, moreover, to claim that the Congregation should have to relinquish its property interest in the Property and find another, any more than the Muslim police officers in *Fraternal Order of Police* could not have been told to give up their property interest in their jobs and find another.

3. Plaintiffs have alleged that Abington’s Ordinance fails strict scrutiny

Neither defendants’ religious discrimination against plaintiffs, nor the substantial burdens defendants have imposed on plaintiffs’ religious exercise, represents the least restrictive means to serve a compelling governmental interest. Plaintiffs offer no proof of a compelling governmental interest, and even argue that they do not need to prove one because plaintiffs have not proven a substantial burden. Def. Mem. 26. In any event, Abington Township has not proven – and will not be able to prove – that its prohibiting the Congregation’s religious use of the Property is the “least restrictive means” to further a “compelling governmental interest.” RLUIPA § 2(a)(1)(A), (B); *Lukumi*, 508 U.S. at 546; *Salvation Army*, 919 F.2d at 201. The various interests defendants have asserted – mainly traffic and aesthetics – fall short of “compelling” as a matter of law. In any event, there are various means to further those interests that are less restrictive of religious exercise, including means that the Congregation had previously suggested, but which the Neighbors refused to entertain.

The Supreme Court has described the “compelling government interests” that may justify burdens on religious exercise as “paramount interests,” *Sherbert*, 374 U.S. at 406, those ““of the highest order,”” *Lukumi*, 508 U.S. at 546. In the land use context, these interests have been described as those in preventing “a clear and present, grave and immediate danger to public health, peace and welfare,” such as fire safety and occupancy limits. See, e.g., *Antrim Faith Baptist Church v. Commonwealth Dep’t of Labor & Industry*, 460 A.2d 1228, 1230 (Pa. Cmwlth. 1983) (“[J]ust as the state is entitled to prevent church buildings from being constructed too flimsily over the heads of the worshipers, the state is entitled to see to it that fire-safety precautions are taken for the protection of a group which is primarily juvenile in its composition, whether that group meets in a public school building or an equally combustible church building.”).

More specifically, courts routinely reject the claim that “compelling governmental interests” include the interest in avoiding increases in traffic and parking in residential areas. See 2001 Opinion, Findings of Fact, ¶¶ 182, 188, 191, Exhibit E, hereto; see, e.g., *Love Church v. Evanston*, 671 F. Supp. 515, 519 (N.D. Ill. 1987), vacated based on standing, 896 F.2d 1082 (7th Cir. 1990) (“While traffic concerns are legitimate, we could hardly call them compelling.”); *American Friends of Soc’y of St. Pius v. Schwab*, 417 N.Y.S.2d 991, 993 (N.Y.A.D. 1979) (“[C]onsiderations of the surrounding area and potential traffic hazards ... are outweighed by the constitutional prohibition against the abridgement of the free exercise of religion and by the public benefit and welfare which is itself an attribute of religious worship in a community.”); *State ex rel. Tampa Company of Jehovah’s Witnesses, etc. v. Tampa*, 48 So. 2d 78, 79 (Fla. 1950) (“The contention that people congregating for religious purposes cause such congestion as to create a traffic hazard has very little in substance to support it. Religious services are normally for brief periods two or three days in the

week and this at hours when traffic is at its lightest.”). Indeed, creation of an abnormal traffic pattern does not even justify denial of a special exception under Pennsylvania zoning law, unless that traffic “will pose a substantial threat to the health and safety of the community.” *Orthodox Minyan of Elkins Park v. Cheltenham Twp. Zoning Hearing Bd.*, 552 A.2d 772, 774 (Pa. Cmwlth. 1989).

Nor are aesthetic considerations – such as avoiding any increase in noise and light or reduction of “residential character” – compelling interests. See 2001 Bd. Op. FF ¶¶ 182, 189, 190; see, e.g., *Open Door Baptist Church v. Clark County*, 995 P.2d 33, 41 (Wash. 2000) (furthering “aesthetic and cultural interests” is not a compelling interest); *Alpine Christian Fellowship v. County Comm’rs*, 870 F. Supp. 991, 994 (D. Colo. 1994) (rejecting asserted interest in avoiding additional “noise impacts” of religious school); *Society of Jesus v. Boston Landmarks Comm.*, 564 N.E. 2d 571, 574 (Mass. 1990) (“The government interest in historic preservation, though worthy, is not sufficiently compelling to justify restraints on the free exercise of religion, a right of primary importance.”). See also *Congregation Comm. v. City Council of Haltom City*, 287 S.W.2d 700, 704-05 (Tex. Civ. App. 1956) (“Neither is mere inconvenience to neighbors ... a valid reason to deny a church the right to exist in a residential district. It is hard to visualize a church being constructed in a residential district without inconveniencing someone. To restrict churches to areas where no one will be inconvenienced would be, in effect, excluding churches from residential districts.”). Again, these interests are not even strong enough to support the denial of a special exception under statutory law. *Berlant v. Zoning Hearing Board*, 279 A.2d 400, 402 (Pa. Cmwlth. 1971) (rejecting asserted interest in avoiding “greatly increased traffic congestion” and destruction of “the character of their neighborhood by increasing the presence of what [neighbors] refer to as ‘creeping institutionalism.’”)

Nor is the maintenance of property values. *See* 2001 Bd. Op. FF ¶¶ 183-85. In a case involving proposed land use for religious worship and instruction in an exclusive residential neighborhood, the Supreme Court of Indiana found insufficient the “private interest in protecting property from depreciation . . . and a desire to keep a neighborhood as exclusive as possible,” holding that “the general public interest in the moral and intellectual education of the young far outweighs the private interest affected by any depreciation in neighboring property values.” ***Board of Zoning Appeals v. Schulte***, 172 N.E.2d 39, 44 (Ind. 1961); *see Greentree at Murray Hill Condo. v. Good Shepherd Episcopal Church*, 550 N.Y.S.2d 981, 989 (1989).

Finally, defendants cannot plausibly claim that its interest in prohibiting these external effects is “compelling” unless it prohibits them throughout the Township. ***Lukumi***, 508 U.S. at 546-47 (“[A] law cannot be regarded as protecting an interest ‘of the highest order’ ... when it leaves appreciable damage to that supposedly vital interest unprohibited.”) (internal quotations and omitted); *see FOP Newark Lodge No. 12 v. City of Newark*, 170 F.3d 359, 366-67 (3d. Cir 1999); ***Gregoire v. Centennial School Dist.***, 907 F.2d 1366, 1379 (3d Cir. 1990). In fact, Abington Township does not prohibit these external effects completely even within the residential district where the Property is located. *See* 2001 Bd. Op. CL ¶ 1, at 20 (concluding that zoning ordinance covering Property allows municipal complex and emergency service facilities by special exception); § I(A), *supra* Factual Allegations Section A (describing other permitted uses in residential districts). If these problems posed such an immediate threat to public health and safety, Defendants would not tolerate them anywhere. Thus none of these interests is compelling. *See State ex rel. Lake Drive Baptist Church v. Village of Bayside Bd. Of Trustees*, 108 N.W. 2d 288, 300 (Wis. 1961) (concurring opinion) (“These factors, including traffic problems, traffic conditions and effect of

depreciating property values, loss of tax revenue, noise and other inconveniences, and that churches are detrimental and do not further public morals, have been considered and rejected in the previously cited cases.”).

Even if defendants’ asserted interests were “compelling,” the Township cannot prove that forbidding the Congregation from using the Property for worship is the “least restrictive means” to further that interest. See *State ex re. Lake Drive Baptist Church v. Village of Bayside Bd. Of Trustees*, 108 N.W. 2d 288, 300 (Wis. 1961) (concurring opinion) (“The exclusion of churches from residential districts *has no substantial relationship* to the promotion of public health, safety, morals or general welfare.”) (emphasis added); *FOP Newark Lodge No. 12 v. City of Newark*, 170 F.3d at 366 (finding city’s no-beard policy not narrowly tailored to government interest of safety); *Black Hawk v. Commonwealth of Penn.*, 114 F. Supp. 327, 333 (M.D. Pa. 2000) (finding state’s proposed killing of religiously significant bear not narrowly tailored to government interest of avoiding spread of rabies). Indeed, although it is not their burden, plaintiffs can readily show that there are various ways to address the government and neighborhood interests without significantly restricting religious exercise. For example, the Congregation long ago offered voluntarily to undertake various measures – all of which were rejected – to address the expressed concerns. Complaint ¶ 65. Of course, these measures are not exhaustive of ways both to address the asserted interests and to allow the Congregation to have a home for worship; one can easily imagine more. But these examples serve to illustrate, at the very least, that a flat-out prohibition on the proposed religious use of the Property is not the “least restrictive means” to serve any of the interests expressed.

Moreover, the Neighbors’ complete refusal to engage in a discussion with the Congregation about the Neighbors’ concerns, including a reasonable accommodation for the proposed use of the

Property by Kol Ami, and the corresponding insistence by the Neighbors on excluding the Congregation entirely from their neighborhood, further suggests discriminatory motive. *See, e.g., American Friends Soc’y of St. Pius v. Schwab*, 417 N.Y.S.2d 991, 993 (N.Y.A.D. 1979) (“Human experience teaches us that public officials, when faced with pressure to bar church uses by those residing in a residential neighborhood, tend to avoid any appearance of an antireligious stance and temper their decision by carefully couching their grounds for refusal to permit such use in terms of traffic dangers, fire hazards and noise and disturbance, rather than on such crasser grounds as lessening of property values or loss of open space or entry of strangers into the neighborhood or undue crowding of the area.”)

Thus, at the very least, plaintiffs have stated a claim for violations of the Free Exercise Clause and – if this Court is unwilling to continue defendants’ motion for summary judgment – have adduced evidence sufficient to create at least a genuine issue of material fact for trial on that claim.

B. Count II States a Claim Under the Pennsylvania Freedom of Conscience Clause

Similarly, plaintiffs’ Complaint states a claim under the Pennsylvania Constitution, Article I section 3. As with the Federal Constitution, the appropriate standard under the Pennsylvania Constitution is strict scrutiny. The text of this provision provides a more detailed, affirmative right to religious freedom than the federal free exercise clause:

Section 3. Religious freedom – All men have a natural and indefeasible right to worship Almighty God according to the dictates of their own consciences; no man can of right be compelled to attend, erect or support any place of worship, or to maintain any ministry against his consent; no human authority can, in any case whatever, control or interfere with the rights of conscience, and no preference shall ever be given by law to any religious establishments or modes of worship.

This provision explicitly contains a “no preference” clause that is directly implicated by defendants’

preference of prior religious institutional uses of the Property over the plaintiffs' proposed use. It also protects individuals' right to worship "according to the dictates of their own consciences," thereby preempting any argument by defendants that plaintiffs do not need this Property, or property within a residential district, to fulfill their religious requirements. The Ohio Supreme Court, in analyzing its own Constitution (which contains language nearly identical to Pennsylvania's provision), similarly held that its free exercise protection is broader than the federal provision, and mandates the strict scrutiny test even to neutral and generally applicable laws. *Humphrey v. Lane*, 728 N.E.2d 1039 (Ohio 2000).

Pennsylvania courts have applied the state constitution to permit infringement upon religious liberty only in the direst cases. See *Zummo v. Zummo*, 574 A.2d 1130, 1138-39 (Pa. Super. Ct. 1990) ("parental authority in matters of religious upbringing may be encroached upon, only upon a showing of a 'substantial threat' of 'physical or mental harm to the child, or to the public safety, peace, order, or welfare.'" (quoting *Wisconsin v. Yoder*, 406 U.S. at 230)); *In re Cabrera*, 552 A.2d 1114, 1118 (Pa. Super. Ct. 1989) ("The right to practice religion freely does not include the liberty to expose the community or the child to communicable disease or the latter to ill health or death." (quoting *Prince v. Massachusetts*, 321 U.S. 158, 166-67 (1944))). For the reasons described *supra*, II.A.3, defendants cannot justify this infringement.

C. Counts III and IV State Claims Under the Federal and Pennsylvania Free Speech Clauses

Defendants devote only three paragraphs to their argument that plaintiffs' Free Speech and Freedom of Association claim cannot survive their motion to dismiss, claiming simply that they "must be rejected on their face." Def. Mem. at 44. This flies in the face of countless zoning

decisions upholding free speech claims against zoning ordinances.⁷ “There is no question that religious discussion and worship are forms of speech and association protected by the first amendment.” *Gregoire v. Centennial School Dist.*, 907 F.2d 1366, 1370 (3d Cir. 1990). *Cert. denied* 498 U.S. 899 (1990). Plaintiffs’ activities – worship and other religious expressive activities – fall within the heart of First Amendment protections. Defendants’ Zoning Ordinance violates the Free Speech Clauses of the federal and Pennsylvania Constitutions. The standards applied under Article I, sec.7 of the Pennsylvania Constitution are the same as those of the Free Speech Clause of the First Amendment to the United States Constitution. *Bureau of Prof’l. & Occupational Affairs v. State Bd. of Physical Therapy*, 728 A.2d 340 (Pa. 1999).

The Supreme Court set forth the appropriate standard of review for zoning restrictions that burden expressive activity in *Schad v. Mt. Ephraim*, 452 U.S. 61, 68 (1981): “[W]hen a zoning law infringes upon a protected liberty, it must be narrowly drawn and must further a sufficiently substantial government interest.” *Id.* at 68 n.7.

Even where a challenged regulation restricts freedom of expression only incidentally or only in a small number of cases, we have scrutinized the governmental interest furthered by the regulation and have stated that the regulation must be narrowly drawn to avoid unnecessary intrusion on freedom of expression.

⁷ See, e.g., *Schad v. Borough of Mt. Ephraim*, 452 U.S. 61, 68 (1981) (holding unconstitutional an ordinance that excluded any “live entertainment,” which included nude dancing); *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490 (1981) (holding that ordinance prohibiting certain types of billboards violated the free speech clause); *Erznoznik v. City of Jacksonville*, 422 U.S. 205 (1975) (holding ordinance prohibiting the showing of films with nudity by a drive-in theater invalid on its face); *U.S. Sound & Service, Inc. v. Township of Brick*, 126 F.3d 555 (3d Cir. 1997) (holding that conditions imposed on adult video store’s “change of use” application violated the First Amendment); *Loftus v. Township of Lawrence Park*, 764 F. Supp. 354 (W.D. Pa. 1991) (enjoining township from enforcing ordinance prohibiting the posting of political yard signs).

Id. (emphasis added). It is ironic – and even more so since defendants here claim that a place of worship would “jeopardize the safety and welfare of the residents,” Def. Mem. At 45 – that in the zoning context, the Congregation must rely on cases involving adult entertainment to support its Free Speech claims. *See Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 767 (1995) (“It will be a sad day when this Court casts piety in with pornography, and finds the First Amendment more hospitable to private expletives, than to private prayers.”) (citation omitted). However, plaintiffs are certainly entitled to at least the same level of protections against zoning restrictions that are granted to such uses.

The fact that the Ordinance may not “interfere with ecclesiastical issues, such as dissemination of materials, appointments to church positions and disciplines,” Def. Mem. at 46, is irrelevant. The law need not target religion as such (although this particular Ordinance does: it regulates “Places of Worship” explicitly, Zoning Ordinance § 706.E.10), the fact that it severely regulates other assembly uses – but not all – places it under First Amendment scrutiny. The ordinance at issue in *Schad* did not prohibit only nude dancing, it prohibited all “live entertainment,” 452 U.S. at 65, a subset of which was nude dancing.

The Zoning Ordinance forbids places of worship absolutely from Abington’s residential districts. Churches are only permitted in three other districts. Complaint ¶¶ 45. Not only has the Congregation been unable to locate any other suitable property in Abington Township after a nearly four-year search, but the districts where it could theoretically locate are unsuitable for plaintiffs’ religious purposes. Sloviter Decl. ¶¶ 5-11. *See also* Milbert Decl., ¶¶ 4-7 (“I have not found any properties that are currently available in the [CS, M, and AO] zoning districts in Abington Township that met Congregation Kol Ami’s requirements.”). The First Amendment does not force plaintiffs

to alter their message based on a municipality's view that its residential neighborhoods have enough churches:

The defendants' argument that these rights would not be burdened by an order restricting the times that the plaintiffs could hold religious services in the church to weekends and Wednesday evenings, *because the plaintiffs would be free to congregate and worship elsewhere*, misses the mark: “[O]ne is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place.” *Schad v. Borough of Mount Ephraim*, 452 U.S. 61, 76-77 This principle applies with particular force to places, such as church buildings, which have a special spiritual significance to the persons who wish to worship there.

McCurry v. Tesch, 738 F.2d 271, 275 (8th Cir. 1984) (emphasis added) *cert. denied* 469 U.S. 1211 (1985). The burden on plaintiffs' ability to engage in religious expression is apparent.

Furthermore, defendants discriminate between religious groups in deciding whether they may exist in residential districts. Numerous Christian churches are located in the four R-Districts. Complaint ¶ 48. In fact, the target Property has been used by religious institutions for 50 years. Defendants' stated interests in forbidding churches from these districts is undermined by this fact. Discrimination based on religion is as illicit under Free Speech analysis as under Free Exercise analysis: both are impermissible viewpoint discrimination.

Even if defendants had not discriminated against plaintiffs' religious activity, their actions are not reasonable time, place, and manner restrictions. Instead, such restrictions must “serve significant state interests but also must leave open adequate alternative channels of communication.” *Schad*, 452 U.S. at 75-76. In the context of an adult entertainment zoning case, the Third Circuit held *en banc* that “regulations that restrict the time, place and manner of expression in order to ameliorate undesirable secondary effects of sexually explicit expression” must satisfy “intermediate

scrutiny.” *Phillips v. Borough of Keyport*, 107 F.3d 164 (3d Cir. 1997) *cert. denied*, 522 U.S. 932 (1997). Time, place and manner restrictions to ameliorate “undesirable secondary effects” of religious expression certainly deserve at least equivalent scrutiny. As discussed above, Defendants cannot assert a “significant state interest,” and more importantly, they provide practically no alternative channels of communication for plaintiffs. The Free Speech Clause bars so restrictive a limit on religious property uses. *Schad*, 452 U.S. at 75-76 (“[T]he Borough totally excludes all live entertainment,”); *Keego Harbor Co.*, 657 F.2d at 96 (“The ordinance . . . prohibits adult theatres.”). Defendants’ Motion to Dismiss Counts III and IV must therefore be denied.

D. Counts V and VI State Claims for Violation of the Federal and Pennsylvania Rights to Freedom of Assembly

Defendants’ policy of refusing to allow plaintiffs to use their Property for religious purposes also violates their right to freely associate for expressive purposes. The ability of Congregation Kol Ami to worship together in a permanent home conducive to its religious exercise, as well as to pursue other religious activities falls, within the core of this protected activity. Plaintiffs’ mission is to provide a welcoming, intimate atmosphere in a tranquil environment that is an alternative to the larger synagogues in the area. Holin Decl. ¶¶ 3, 8, 9, 22. The Community Service, Mixed, and Apartment/Office districts in which synagogues are permitted do not provide the sort of community-based location that the Plaintiffs require. *Id.* ¶¶ 8-9. Furthermore, contrary to defendants’ contention, there are no available “alternative avenues for the Congregation beyond this solitary parcel.” Def. Mem. at 45. *See* Milbert Decl. ¶ 6-7 (stating that, after a search of the Multiple Listing Service, newspaper listings, and a number of brokers handling commercial real estate, no properties are currently available that meet the Congregation’s requirements).

The Supreme Court has recognized that the First Amendment implicitly protects an independent right of freedom of association, and has repeatedly mentioned religious associations as among those entitled to this protection. *NAACP v. Alabama*, 357 U.S. 449, 461 (1958). More importantly, the Court has held that “state action *which may have the effect of curtailing the freedom to associate* is subject to the closest scrutiny. *Id.* (emphasis added). Abington Township has made the determination that religious congregations cannot locate a ministry in a residential district.⁸ Being able to worship together in the manner plaintiffs view as necessary falls squarely within this protection:

An individual's freedom to . . . *worship* . . . could not be vigorously protected from interference by the State unless a correlative freedom to engage in group effort toward those ends were not also guaranteed. According protection to collective effort on behalf of shared goals is especially important in preserving political and cultural diversity and in shielding dissident expression from suppression by the majority. Consequently, we have long understood as implicit in the right to engage in activities protected by the First Amendment a corresponding right to associate with others in pursuit of a wide variety of political, social, economic, educational, *religious*, and cultural ends.

Roberts v. United States Jaycees, 468 U.S. 609, 622 (1984) (citations omitted; emphases added).

See also Doe v. Butler, 892 F.2d 315, 323 (3d Cir. 1989) (discussing, in the context of a zoning case,

“the right to associate for the purpose of engaging in those activities protected by the First Amendment - - speech, assembly, petition for the redress of grievances, *and the exercise of*

⁸ Actually, the Township only forbids *new* congregations from locating in these districts. For some reason, the 25 places of worship that currently exist in residential districts, Def. Mem. at 8, do not harm the “significant government interests” which necessitated the denial of plaintiffs’ application. The reason for this is simple: Places of worship are inherently proper uses in residential districts. *See* Plaintiffs’ Motion for Partial Summary Judgment.

religion.”) (emphasis added). The Third Circuit has further defined the contours of the right to freely associate for purposes of religious expression:

Roberts also made clear that the government action must not only be “intrusive,” but must have an actual, rather than speculative, impact on the group in its exercise of First Amendment rights of expression. *Id.* at 626-28. Thus far, courts have recognized two different types of impact: (1) the challenged state action may have a demonstrable effect on the group's message, *e.g.*, ***Democratic Party of United States v. Wisconsin***, 450 U.S. 107 (1981); . . . , or (2) the state action may diminish the organization's effectiveness by discouraging individuals from associating with the organization, *e.g.* ***NAACP v. Alabama***.

Salvation Army, 919 F.2d at 200-01.

Plaintiffs meet this standard. Defendants’ Ordinance is “intrusive”: Plaintiffs are totally unable to use their Property for religious purposes. Defendants’ actions “have a demonstrable effect on the group's message.” The Congregation desires to “provide stability, inspiration and hope” to the residential community. Rabbi Holin Decl. ¶ 9. “A synagogue is known by its place of worship.” *Id.* ¶ 5. Kol Ami is “eager to have a spiritual home of [its] own in a residential community because everything that we teach our children and our adults emphasizes the importance of involvement and service to the community.” “Do not separate yourself from the community,” [Ethics of the Fathers], *Pirkei Avot* 2.4.” *Id.* ¶ 8. *See also* Sloviter Decl. ¶¶ 16-25. Defendants’ actions also “diminish the organization's effectiveness by discouraging individuals from associating with the organization.” Sloviter Decl. ¶ 18 (“Due to the fact that Kol Ami does not have a permanent home, a number of its members have resigned to join congregations with a permanent physical home or synagogue.”); *Id.* ¶ 24 (“Because of the Abington Zoning Hearing Board’s decision to reject Kol Ami’s application, a few members have rescinded their commitments to contribute to our capital campaign”). Thus,

Abington Township's Zoning Ordinance operates to "have the effect of curtailing" the Congregation's "freedom to associate," and, as *Salvation Army* requires, there is an "actual, rather than speculative impact on the group in its exercise of First Amendment rights of expression."

Since strict scrutiny must be applied to such restrictions on association, *Salvation Army*, 919 F.2d at 201 (requiring law to be "narrowly tailored to a compelling interest."), and defendants fail to meet this standard, *see supra* Section II..A.3., Defendants' Motion to Dismiss Counts V and VI must also be denied.

E. Counts VII, VIII, and IX State Claims Under the Federal and Pennsylvania Equal Protection Clauses and the Federal Due Process Clause

1. Plaintiffs have alleged that Abington's Ordinance, both on its face and as applied, fails rational basis scrutiny

Since virtually the advent of zoning, local ordinances have been subject to constitutional scrutiny – at a minimum – under the rational basis test, which is defined similarly under the Due Process and Equal Protection Clauses of the Fourteenth Amendment. *See, e.g., Seattle Title Trust Co. v. Roberge*, 278 U.S. 116, 121 (1928) (striking down zoning ordinance under Due Process Clause for failure to "bear a substantial relation to the public health, safety, morals, or general welfare"); *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 440 (1985) (striking down zoning ordinance under Equal Protection Clause because not "rationally related to a legitimate state interest"). In applying this general requirement of reasonableness, the vast majority of courts have found that it is unreasonable to prohibit houses of worship in residential areas. *See* Memorandum of Law in Support of Plaintiffs' Motion for Partial Summary Judgment (June 13, 2001), at 7-11

(citing numerous cases and treatises in support of this proposition of law) (hereinafter “Partial SJ Memo”).

Rather than repeat them here, plaintiffs incorporate by reference and respectfully direct this Court to plaintiffs’ arguments in their Partial SJ Memo to the effect that plaintiffs have alleged facts sufficient to state a claim – and supported those allegations with undisputed evidence sufficient to warrant summary judgment – that the 1996 Ordinance fails rational basis scrutiny on its face because the Ordinance prohibits houses of worship in every residential district in Abington. *See* Partial SJ Memo 3-4, 12-13; 1996 Ordinance §§ 301-304.

2. Plaintiffs have alleged that Abington’s Ordinance, both on its face and as applied, triggers and fails strict scrutiny

Strict scrutiny applies under the Due Process Clause when government infringes a fundamental right – such as the free exercise of religion – and under the Equal Protection Clause when government employs a suspect classifications – such as religion. *See City of New Orleans v. Dukes*, 427 U.S. 297, 303 (1976) (listing “race, religion [and] alienage” as suspect classifications that trigger heightened scrutiny under the Equal Protection Clause); *Johnson v. Robison*, 415 U.S. 361, 375 n.14 (1974) (“Unquestionably, the free exercise of religion is a fundamental constitutional right.”); *Fellowship Baptist Church v. Benton*, 815 F.2d 485, 497 (8th Cir. 1987) (holding that “[b]ecause religion is a fundamental right, any classification of religious groups is subject to strict scrutiny.”).

For all the reasons set forth above that plaintiffs have stated a claim of discrimination based on religion under the Free Exercise Clause (and/or generated issues of fact on that claim), *see supra* Section II.A.1., plaintiffs also state claims and/or generate factual issues as to whether defendants

have infringed plaintiffs fundamental right to the free exercise of religion (triggering strict scrutiny under the Due Process Clause) and have engaged in government action according to the suspect classification of religion (triggering strict scrutiny under the Equal Protection Clause). For all the reasons set forth above that defendants will fail to satisfy strict scrutiny under the Free Exercise Clause, *see supra* Section II.A.3.. Defendants will similarly fail to satisfy strict scrutiny under the Due Process and Equal Protection Clauses.

F. Counts X, XI, and XII State Claims Under RLUIPA

1. Plaintiffs have alleged a violation of RLUIPA Section 2(a)

RLUIPA Section 2(a)(1) provides, in relevant part, as follows:

- (1) GENERAL RULE- 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 demonstrates that imposition of the burden on that 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--

* * *

(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*.

(Emphasis added.)

As discussed above in connection with plaintiffs' Free Exercise/substantial burden claim, the Township has burdened the Rabbi's and the Congregation's religious exercise pursuant to a system of "individualized assessments." *See supra* Section II.A.2. And as will be discussed below in

connection with the constitutionality of RLUIPA under the Commerce Clause, the burden imposed by the Township also directly suppresses economic activities – namely, repaving and renovation of the Property, as well as its ongoing use as a house of worship – which, in the aggregate, substantially affect interstate commerce. *See infra* Section III.B.2. Therefore, plaintiffs have stated a claim – and, as needed, generated an issue of fact – that the substantial burden test of Section 2(a)(1) applies here for two independently sufficient reasons, namely, that the facts of this case satisfy both Section 2(a)(2)(B) and Section 2(a)(2)(C).

Similarly, for the reasons set forth previously, *see supra* Section II.A.2., plaintiffs have stated a claim, and/or generated issues of fact, regarding whether the Township has imposed a “substantial burden” on plaintiffs’ religious exercise by excluding them from the Property, which the Congregation equitably own, which meets their religious needs (including for a permanent home), which is the only available property in Abington that meets those needs; and which exclusion threatens the continuing viability of the Congregation.

Moreover, even though plaintiffs do not need to do so in order to state a claim under RLUIPA Section 2(a), plaintiffs have shown that defendants will be unable to prove that the burden defendants impose on plaintiffs’ religious exercise is the least restrictive means to serve a compelling government interest. *See supra* Section II.A.3. Thus, the Court should find that plaintiffs have stated a claim under RLUIPA Section 2(a) and, if necessary, that plaintiffs have created a genuine issue of material fact as to that claim.

2. Plaintiffs have alleged a violation of RLUIPA Section 2(b)(1)

RLUIPA Section 2(b)(1) prohibits a government from “impos[ing] or implement[ing] a land use regulation in a manner that treats a *religious* assembly or institution on *less than equal terms*

with a *nonreligious* assembly or institution.” (Emphasis added.) Here, the 1996 Ordinance applies more favorable terms to nonreligious institutional and assembly uses than to religious ones in virtually every zone in the Township, including in the R-1 zone where the Property is located. *See supra* Section II.A.1. *This facial discrimination is reinforced by the legislative history of the R-1 provision, which used to allow houses of worship by special exception, was amended to ban all nonresidential uses, but was then amended again to restore almost all of those uses to the area – with the exception of the religious ones. See id.* Therefore, the Court should reject defendants’ motion to dismiss or for summary judgment on this claim.

3. Plaintiffs have alleged a violation of RLUIPA Section 2(b)(2)

RLUIPA Section 2(b)(2) provides that “[n]o government shall impose or implement a land use regulation that *discriminates* against any assembly or institution on the basis of religion or religious denomination.” (Emphasis added.) In this case, the 1996 Ordinance discriminates in favor of older, more established denominations and against newer and minority ones, such as the Congregation here, by banning such new churches in all residential zones, and by severely limiting elsewhere the acreage zoned even potentially for religious assembly or institutional use. *See supra* Section II.A.1. Consistent with this pattern, the ZHB rejected the Congregation’s application to use the Property with such disregard for previous rulings, internal consistency, and the evidence presented to it that the decision only makes sense when viewed as motivated by discriminatory or otherwise irrational motive to exclude the Congregation from the neighborhood. *See id.* Thus, Defendants motion should be rejected with respect to this claim.

4. Plaintiffs have alleged a violation of RLUIPA Section 2(b)(3)(B)

RLUIPA Section 2(b)(3)(B) prohibits “government using or mandating zoning authority ... [from] *unreasonably* limit[ing] within a jurisdiction a religious assembly, institution, or structure.” (Emphasis added.) As plaintiffs have argued elsewhere in their Partial SJ Memo, and have referenced here again in this brief, *supra* II.E.1, local governments unreasonably limit religious assembly uses in a jurisdiction by prohibiting them from all residential areas in that jurisdiction. The same argument should apply under this section of RLUIPA, which – like other provisions passed pursuant to the Enforcement Clause – is designed to codify existing Fourteenth Amendment standards for easier enforcement.

III. PLAINTIFFS STATE CLAIMS UNDER RLUIPA BECAUSE THE ACT IS CONSTITUTIONAL, BOTH ON ITS FACE AND AS APPLIED HERE

Defendants argue that RLUIPA is unconstitutional because Congress lacked the authority to pass it under the Enforcement Clause of the Fourteenth Amendment⁹ or the Commerce Clause of Article I,¹⁰ and because the Act violates the Establishment Clause and Defendants’ own “separation of powers” theory. *See* Def. Mem. 27-44. Defendants’ arguments are misplaced and fail to make the “plain showing” necessary to overcome the presumption of constitutionality afforded congressional acts. *United States v. Morrison*, 120 S. Ct. 1748 (2000).

⁹ Section 5 of the Fourteenth Amendment provides that “The Congress shall have power to enforce, by appropriate legislation, the provisions of this article,” which include the prohibition in Section 1 against “any State[’s] depriv[ing] any person of life, liberty, or property, without due process of law,” or “deny[ing] to any person within its jurisdiction the equal protection of the laws.” U.S. Const. amend. XIV, §§ 1, 5.

¹⁰ Section 8 of Article I provides in relevant part that “The Congress shall have power ... [t]o regulate commerce with foreign nations, and among the several states, and with the Indian tribes.” U.S. Const. art. I, § 8, cls. 1, 3.

A. RLUIPA Is a Proper Exercise of Congress’ Enumerated Power Under Section 5 of the Fourteenth Amendment

Defendants’ Enforcement Clause argument consists primarily of overstatement of the scope of RLUIPA’s application and of the autonomy of local zoning authorities, along with understatement of the record before Congress demonstrating the widespread religious discrimination in which those local authorities engage. Def. Mem. 35-39. This argument is flawed because RLUIPA – in sharp contrast to RFRA – represents a painstaking effort by legislators and legal scholars to codify those constitutional standards that congressional fact-finding have shown are frequently violated nationwide.

There can be no reasonable dispute that Congress’ power “to enforce” the Fourteenth Amendment includes the power to provide by legislation judicial remedies for constitutional violations in the narrow sense of monetary damages, injunctive relief, and attorneys’ fees. *See, e.g.*, 42 U.S.C. §§ 1983, 1988. In *Flores*, the Supreme Court reaffirmed a long line of cases holding that Section 5 *also* authorizes Congress to fashion legislation that “deters” or “prevent[s]” constitutional violations, “even if in the process it prohibits conduct which is not itself unconstitutional and intrudes into ‘legislative spheres of autonomy previously reserved to the States.’” *Flores*, 521 U.S. at 518, 524 (quoting *Fitzpatrick v. Bitzer*, 427 U.S. 445, 455 (1976)); *See Board of Trustees of the University of Alabama v. Garrett*, 121 S. Ct. 955, 963 (2001) (“Congress is not limited to mere legislative repetition of this Court’s constitutional jurisprudence,” but may also prohibit “a somewhat broader swath of conduct”).

Although this power is “broad,” it does not authorize Congress “to decree the substance of the Fourteenth Amendment’s restrictions on the States,” or otherwise “to determine what constitutes a constitutional violation.” *Flores*, 521 U.S. at 518, 519. Therefore, “§ 5 legislation reaching beyond the scope of § 1’s actual guarantees must exhibit ‘*congruence and proportionality* between the injury to be prevented or remedied and the means adopted to that end.’” *Garrett*, 121 S. Ct. at 963 (quoting *Flores*, 521 U.S. at 520) (emphasis added). More specifically, “[p]reventive measures prohibiting certain types of laws may be appropriate when there is reason to believe that many of the laws affected by the congressional enactment have a significant likelihood of being unconstitutional.” *Flores*, 521 U.S. at 532.

In a sharp contrast to RFRA, RLUIPA readily satisfies this standard. First, far from redefining the substance of constitutional law, RLUIPA provisions based on the Enforcement Clause merely restate current First and Fourteenth Amendment standards. Second, RLUIPA’s legislative history contains an extensive factual record establishing that these standards are violated frequently and nationwide. Third, to the extent RLUIPA contains “preventive” or “deterrent” measures at all, they are “congruent” and “proportional” to these constitutional injuries. *Flores*, 521 U.S. at 520. Thus, Congress had ample “reason to believe that many of the laws affected by [RLUIPA] have a significant likelihood of being unconstitutional.” *Id.* at 532.

1. RLUIPA precisely targets, according to Supreme Court precedent, those state land-use laws that are unconstitutional.

RLUIPA provisions based on the Enforcement Clause affect only unconstitutional state land-use laws, because those RLUIPA provisions were designed to do little, if anything, more than codify current First and Fourteenth Amendment jurisprudence:

- RLUIPA Sections 2(a)(1), 2(a)(2)(C). Where a land-use regulation involving “individualized assessments of the proposed uses for ... property” imposes a “substantial burden on ... religious exercise,” these Sections require a showing that the law furthers “a compelling governmental interest” using the “least restrictive means.” This essentially restates the constitutional standard articulated most recently in *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 537 (1993): “As we noted in *Smith*, in circumstances in which individualized exemptions from a general requirement are available, the government ‘may not refuse to extend that system to cases of “religious hardship” without compelling reason.’”

- RLUIPA Section 2(b)(1). This prohibits land use laws from “treat[ing] a religious assembly or institution on less than equal terms with a nonreligious assembly or institution.” Again, this reflects the First Amendment ban on official preference for the secular over the religious. *Lukumi*, 508 U.S. at 532 (“[T]he First Amendment forbids an official purpose to disapprove . . . of religion in general.”); *Employment Div. v. Smith*, 494 U.S. 872, 877 (1990) (“The government may not . . . impose special disabilities on the basis of religious views or religious status.”); *Abington Sch. Dist. v. Schempp*, 374 U.S. 203, 225 (1963) (“[T]he State may not . . . affirmatively oppos[e] or show[] hostility to religion, thus preferring those who believe in no religion over those who believe.”) (internal quotations omitted).
- RLUIPA Section 2(b)(2). This provision, which bars “land use regulation that discriminates . . . on the basis of religion or religious denomination,” reflects the constitutional prohibition against government preference among sects, and for irreligion over religion also covered by Section 2(b)(1). *Lukumi*, 508 U.S. at 532 (“[T]he First Amendment forbids an official purpose to disapprove of a particular religion. . . .”); *Epperson v. Arkansas*, 393 U.S. 97, 104 (1968) (“The First Amendment mandates governmental neutrality between religion and religion, and between religion and nonreligion.”)
- RLUIPA Section 2(b)(3). RLUIPA’s ban on “land use regulation that--totally excludes religious assemblies” or “unreasonably limits” them in a given jurisdiction is based on the Free Speech Clause requirement of heightened scrutiny for land-use regulations that wholly exclude “a broad category of protected expression.” *Schad v. Borough of Mount Ephraim*, 425 U.S. 61, 67 (1981). Although the category of expression excluded by zoning in *Schad* was “live entertainment,” religious expression enjoys no less protection under the Free Speech Clause. See, e.g., *Rosenberger v. Rector and Visitors of the Univ. of Va.*, 515 U.S. 819 (1995); *Lamb’s Chapel v. Center Moriches Union Free Sch. Dist.*, 508 U.S. 384 (1993). The statutory prohibition against “unreasonabl[e land-use] limits [on] religious assemblies” also reflects the Equal Protection Clause requirement that legislation pass rational basis scrutiny. See *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432 (1985) (finding that land-use law excluding group homes for mentally retarded fails rational basis scrutiny).

Because these provisions so closely track First and Fourteenth Amendment standards, Congress did not just have a “reason to believe” – *but knew* – that not just “many” – *but virtually all* – of the state laws affected by these RLUIPA provisions did not just “have a significant

likelihood of being” – *but actually were* – unconstitutional. *Flores*, 521 U.S. at 532. The tight correspondence of legislative and constitutional standards puts to rest any claim that these RLUIPA provisions “alter the meaning of the Free Exercise Clause,” as RFRA did. *Id.* at 519.

2. RLUIPA’s legislative history firmly establishes a pattern of constitutional violations by state land-use laws.

Congress has “compiled massive evidence,” 146 CONG. REC. S7774 – based on nine (9) hearings over a period of three (3) years – that clearly establishes what the RFRA record did not: a “widespread pattern of religious discrimination in this country” in land-use regulation, including “examples of legislation enacted *or* enforced due to animus or hostility to the burdened religious practices.”¹¹ *Flores*, 521 U.S. at 531 (emphasis added).

This evidence was presented to Congress in various forms, which were cumulative and mutually reinforcing. Some evidence was statistical, including national surveys of churches, zoning

¹¹ The congressional record reflects that land-use laws are commonly enacted out of hostility to religion. See 146 CONG. REC. S7774 (“Churches in general, and new, small, or unfamiliar churches in particular, are frequently discriminated against *on the face* of zoning codes.”) (emphasis added); Douglas Laycock, *State RFRA’s and Land Use Regulation*, 32 U.C. Davis L. Rev. 755, 773 (1999) (discussing examples from congressional record of “evidence of discrimination *in the zoning codes themselves*.”) (emphasis added). Even if land use laws were never *enacted* out of anti-religious bigotry, they are plainly *applied* with that animus. See 146 CONG. REC. S7774 (“Sometimes, zoning board members or neighborhood residents explicitly offer race or religion as the reason to exclude a proposed church, especially in cases of black Churches and Jewish shuls and synagogues. More often, discrimination lurks behind such vague and universally applicable reasons as traffic, aesthetics, or ‘not consistent with the city’s land use plan.’”). Discriminatory application of zoning laws is particularly common because, as here, zoning laws across the country are overwhelmingly discretionary; in other words, the “generally applicable land use laws” to which Defendants refer are virtually nonexistent. See H.R. Rep. 106-219, at 17 (finding local land-use regulation “lacks objective, generally applicable standards, and instead relies on discretionary, individualized determinations”).

codes, and public attitudes.¹² Some was judicial, including “decisions of the courts of the States and ... the United States [reflecting] extensive litigation and discussion of the constitutional violations.”¹³ *Garrett*, 121 S. Ct. at 968 (Kennedy, J., concurring). Some was anecdotal evidence *paired with* testimony by experienced witnesses indicating that the anecdotes were representative.¹⁴

Cf. Garrett, 121 S. Ct. at 965 (finding “half a dozen examples from the record” insufficient alone to establish pattern of constitutional violation).

¹² See, e.g., *Protecting Religious Freedom after Boerne v. Flores (III), Hearing Before the Subcomm. on the Constitution of the House Comm. on the Judiciary*, 105th Cong., 2d Sess., at 127-154 (Mar. 26, 1998) (statement of Von Keetch, Counsel to Mormon Church, <http://commdocs.house.gov/committees/judiciary/hju57227.000/hju57227_0f.htm>) (“Keetch Statement”) (summarizing and presenting findings of Brigham Young University study of religious land use conflicts); *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., 2d Sess., at 364-75 (June 16 and July 14, 1998) (“June-July 1998 House Hearings”) (statement of Rev. Elenora Giddings Ivory, Presbyterian Church (USA), <http://commdocs.house.gov/committees/judiciary/hju59929.000/hju59929_0f.htm>) (discussing survey by Presbyterian Church (USA) of zoning problems within that denomination); *id.* at 405, 415-16 (statement of Prof. Douglas Laycock, U. Texas Law School) (discussing Gallup poll data indicating hostile attitudes toward religious minorities); John W. Mauck, *Tales from the Front: Municipal Control of Religious Expression Through Zoning Ordinances*, at 7-8 (July 9, 1998) (statement submitted to Congress, <<http://www.house.gov/judiciary/mauck.pdf>>, to supplement live testimony of June 16, 1998) (“Mauck Statement”) (compiling zoning provisions affecting churches in 29 suburbs of northern Cook County).

¹³ See Keetch Statement, at 131-53 (listing numerous state and federal zoning cases involving religious assemblies).

¹⁴ See, e.g., Mauck Statement, at 1-5 (describing 22 representative cases based on 25 years experience representing churches in land-use disputes); June-July 1998 House Hearings, at 360-64 (statement of Bruce D. Shoulson, attorney) (describing experiences representing Jewish congregations in land-use disputes, and concluding that “the implications of these examples, which I believe are not unique, are obvious, and the need for assurances to Americans of all faiths that they will be free to exercise their religions should be equally obvious.”). See also 146 CONG. REC. E1564-E1567 (Sept. 22, 2000) (listing 19 additional instances of land-use burdens on religious exercise arising since conclusion of hearings).

The legislative history, moreover, reflects that Congress found substantial evidence of violations of each of the constitutional standards that RLUIPA codifies:

- Individualized assessments that substantially burden religious exercise. “The hearing record demonstrates a widespread practice of individualized decisions to grant or refuse permission to use property for religious purposes. These individualized assessments readily lend themselves to discrimination, and they also make it difficult to prove discrimination in any individual case.” 146 CONG. REC. S7775; *see* RLUIPA §§ 2(a)(1), 2(a)(2)(C).
- Discrimination between religious and nonreligious assemblies. “[T]he hearing record reveals a widespread pattern of discrimination against churches as compared to secular places of assembly....” 146 CONG. REC. S7775; *see* RLUIPA § 2(b)(1).
- Discrimination among religious assemblies. “[T]he hearing record reveals a widespread pattern ... of discrimination against small and unfamiliar denominations as compared to larger and more familiar ones.” 146 CONG. REC. S7775; *see* RLUIPA § 2(b)(2).
- Total exclusions or other unreasonable limits on religious assemblies. “Other testimony revealed that some land use regulations deliberately exclude all churches from an entire city. ... The result of these zoning patterns is to foreclose or limit new religious groups from moving into a municipality.” H.R. Rep. 106-219, at 19; *see* RLUIPA § 2(b)(3).¹⁵

The Court should therefore disregard Defendants’ conclusory assertion that the congressional record reflects only “short string of anecdotes” Def. Mem. 37.

3. To the extent RLUIPA “prevents” or “deters” constitutional injuries, it employs “congruent” and “proportional” means.

The prohibitions of RLUIPA based on the Enforcement Clause correspond so closely to current First and Fourteenth Amendment jurisprudence that they scarcely require justification as

¹⁵ We respectfully direct the Court’s attention to a useful summary of this evidence, including extensive citation to primary sources. Douglas Laycock, *State RFRA’s and Land Use Regulation*, 32 U.C. DAVIS L. REV. 755, 769-83 (1999); *see* Laycock Testimony before Senate Judiciary Committee, Sept. 9, 1999, <<http://www.senate.gov/~judiciary/9999dlay.htm>>.

“preventive” or “deterrent” measures that trigger the congruence / proportionality inquiry under *Flores*. Rather than “prohibit[] conduct which is not itself unconstitutional,” *Flores*, 521 U.S. at 518, they merely restate frequently violated constitutional standards and provide familiar judicial remedies for their violation. Specifically, RLUIPA provides a federal cause of action for “appropriate relief,” including attorneys’ fees, RLUIPA § 4(a) (d), and facilitates those actions by shifting the burden of persuasion to the government on certain issues, under certain circumstances. RLUIPA § 4(b). Notably, none of these remedies “alters the meaning of the Free Exercise Clause.” *Flores*, 521 U.S. at 519.

Moreover, these remedies apply only in the area of “land use regulation,” which the statute defines quite narrowly, *see* RLUIPA § 8(5), and where enforcement is amply justified by the congressional record. *See supra* Section III.A.2. RFRA, by contrast, applied to all areas of law, and so was faulted for “[s]weeping coverage ... displacing laws and prohibiting official actions of almost every description and regardless of subject matter.” *Flores*, 521 U.S. at 532.

Defendants also suggest that RLUIPA’s application of the compelling interest test is a disproportionate remedy, as the Supreme Court found with respect to RFRA. Def. Mem. 38-39. But unlike RFRA, RLUIPA applies the compelling interest test pursuant to the Enforcement Clause power *only* where land-use laws involve “individualized assessments,” *i.e.*, where the compelling interest standard *already applies*. Compare RLUIPA § 2(a)(2)(C), with *Lukumi*, 508 U.S. at 537.¹⁶

¹⁶ To the extent that RLUIPA applies the compelling interest standard to land-use laws that do *not* involve “individualized assessments” – rare though they may be – RLUIPA does *not* rely on Enforcement Clause authority. Instead, in those rare cases, the compelling interest standard applies only if the facts of the case authorize congressional action under the Commerce or Spending Clauses of Article I. *See* RLUIPA § 2(a)(2)(A) (application based on commerce
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Codifying the Supreme Court’s constitutional standard to facilitate its enforcement cannot be a disproportionate means of enforcement.¹⁷

In sum, having identified widespread and substantial constitutional injuries to religious liberty in the area of land-use regulation, Congress passed RLUIPA to codify those precise constitutional standards and to provide judicial remedies – in the narrowest sense – for violations of those standards. To the extent RLUIPA’s provisions are “preventive” or “deterrent” at all, they are “congruent” and “proportional” to the constitutional injuries targeted. RLUIPA thus contrasts sharply with the “sweeping coverage” of RFRA, and so falls well within the boundaries of Congress’ Enforcement Clause authority, as defined in *Flores* and *Garrett*. Therefore, Defendants’ Motion to Dismiss Plaintiffs’ RLUIPA claims on Enforcement Clause grounds should be denied.

B. RLUIPA Is a Proper Exercise of Congress’ Enumerated Power Under the Commerce Clause of Article I

After discussing some of the facts of *United States v. Lopez*, 514 U.S. 549 (1995), and setting out a small portion of the Commerce Clause analysis set forth therein, defendants malign the motives of Congress and ignore the substantial commercial activity that defendants have burdened by their discriminatory regulation, concluding that RLUIPA does not reach the activity involved in this case. Def. Mem. 39-41.¹⁸ The RLUIPA provision at issue here contains an “express

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power); *id.* § 2(a)(2)(B) (application based on spending power).

¹⁷ See 146 CONG. REC. S7775 (“Each subsection closely tracks the legal standards in one or more Supreme Court opinions, codifying those standards for greater visibility and easier enforceability.”).

¹⁸ Even if Congress lacks the authority under the Commerce Clause to apply the compelling interest test to substantial burdens on religious exercise, that test may still be applied in this case
(continued...)

jurisdictional element,” and regulates “economic activity”—namely, burdens on the use and development of land—whose connection to interstate commerce is not “attenuated,” but “visible to the naked eye,” and is further supported by evidence in the legislative history. See *Lopez*, 514 U.S. at 561-63; *United States v. Morrison*, 120 S. Ct. 1749-51 (2000). Therefore, defendants’ challenge to the application of RLUIPA Section 2(a)(1) here should be rejected.

The Supreme Court recently clarified the factors courts should consider when assessing whether congressional legislation represents “regulation of an activity that substantially affects interstate commerce,” *Lopez*, 514 U.S. at 559: (1) whether the statute contains an express “jurisdictional element which would ensure, through case-by-case inquiry, that the [regulated activity] in question affects interstate commerce,” *Lopez*, 514 U.S. at 561; *Morrison*, 120 S. Ct. at 1750-51; (2) whether the statute regulates “economic activity,” *Lopez*, 514 U.S. at 559; *Morrison*, 120 S. Ct. at 1749-50; (3) whether “the link between [the regulated activity] and a substantial effect on interstate commerce was attenuated,” *Morrison*, 120 S. Ct. at 1751 (citing *Lopez*, 514 U.S. at 563-67); and (4) whether the statute’s “legislative history contain[s] express congressional findings regarding the effects upon interstate commerce,” *Morrison*, 120 S. Ct. at 1751 (quoting *Lopez*, 514 U.S. at 562). Although no factor is required, all are satisfied here.

1. RLUIPA contains an “express jurisdictional element.”

In contrast to *Lopez* and *Morrison*, Section 2(a)(1) of RLUIPA is supported by an “express jurisdictional element which might limit its reach to a discrete set of [discriminatory burdens on land

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– pursuant to Congress’ Enforcement Clause authority – where the burdens are imposed through a system of “individualized assessments.” See *supra* Section III.A.; RLUIPA § 2(a)(2)(C).

use] that additionally have an explicit connection with or effect on interstate commerce.” *Morrison*, 120 S. Ct. at 1751; *see* RLUIPA § 2(a)(2)(B). As a matter of law and logic, the presence of this provision ensures the *facial* constitutionality of the statute under the Commerce Clause: by its own terms, the statute applies only to conduct affecting “commerce with foreign nations, among the several States, or with Indian tribes.”¹⁹ Thus, the jurisdictional element narrows the Commerce Clause question to whether the substantial burden test may be applied *in this case*; if the facts satisfy the jurisdictional requirement of Section 2(a)(2)(B), they may be regulated under the commerce power.²⁰ As detailed below, these facts satisfy the requirement.

2. RLUIPA regulates “economic activity.”

RLUIPA clearly regulates “economic activity” here: discriminatory burdens on the use or development of land that also substantially affect interstate commerce. *See* RLUIPA §§ 2(a)(2)(B), 8(5). Recently, the Fifth Circuit Court of Appeals found that congressional regulation of local zoning laws to combat housing discrimination fell within the commerce power, based in part on a finding that Congress was regulating “economic activity.” *Groome Resources Ltd. v. Parish of Jefferson*, 234 F.3d 192, 205-206 (5th Cir. 2000) (upholding constitutionality of Fair Housing Amendments Act.) The court reasoned that “an act of discrimination that directly interferes with a commercial transaction” – there, the purchase, sale, or rental of residential property – “is an act that

¹⁹ Compare RLUIPA § 2(a)(2)(B), with U.S. Const. Art. I., § 8, cls. 3; *see United States v. Chesney*, 86 F.3d 564, 568-69 (6th Cir. 1996) (concluding “presence of the jurisdictional element defeats [defendant’s] facial challenge”).

²⁰ *See Morrison*, 120 S. Ct. at 1750-51; *Lopez*, 514 U.S. at 561 (noting that jurisdictional element ensures “through case-by-case inquiry” that regulated activity falls within Commerce Clause authority).

can be regulated to facilitate an economic activity.” *Id.* at 205-06. The development of land, especially involving construction of new driveways and parking lots and the rehabilitation of the buildings as here, is at least as “commercial” or “economic” as the purchase or sale of that land.²¹ *See* Compl. ¶¶ 25, 26, 54. Indeed, the legislative history of RLUIPA repeatedly identifies the “construction project” as an example of “a specific economic transaction in commerce” that discriminatory land-use regulations may burden. 146 CONG. REC. S7775; H.R. Rep. 106-219, at 28. Therefore, unlike the statutes at issue in *Lopez* and *Morrison*, both of which pertained to violent crime, RLUIPA regulates “economic activity.”

3. The link between the class of activity RLUIPA regulates and interstate commerce is direct, not “attenuated.”

Even after *Lopez* and *Morrison*, courts will assess whether the regulated economic activity “substantially affects interstate commerce” by examining the activity at issue “taken together with

²¹ The development of land is no less an “economic activity” when undertaken by a religious group or nonprofit organization. *See Camps Newfound / Owatonna, Inc. v. Town of Harrison*, 520 U.S. 564, 585 (1997) (“Nothing intrinsic to the nature of nonprofit entities prevents them from engaging in interstate commerce.”); H.R. Rep. 106-219, at 28 (noting that bill “does not treat religious exercise itself as commerce,” but “recognizes that the exercise of religion sometimes requires commercial transactions, such as the construction of churches”). Courts consistently hold that the commercial activities of religious institutions are subject to regulation under the Commerce Clause. *See, e.g., Tony & Susan Alamo Fdn. v. Sec’y of Labor*, 471 U.S. 290, 295 (1985) (finding religious foundation to be an “[e]nterprise engaged in commerce or in the production of goods for commerce” under Fair Labor Standards Act); *Volunteers of America v. NLRB*, 777 F.2d 1386, 1389 (9th Cir. 1985) (noting that nonprofit charitable employers are subject to National Labor Relations Act when they affect commerce, and finding statute to cover church-operated alcohol rehabilitation center). If commercial activities of religious entities fall *within* the commerce power when Congress would regulate them, they cannot fairly be said to fall *beyond* that power when Congress would exempt them from regulation. *Cf. Camps Newfound / Owatonna*, 520 U.S. at 583-87 (dormant Commerce Clause invalidates state real estate tax imposing discriminatory burden on economic activity of small church camp).

that of many others similarly situated.”²² Even these aggregated effects, however, fall beyond the commerce power if they are “so indirect and remote that to embrace them ... would effectually obliterate the distinction between what is national and what is local.”²³

Here, plaintiffs have pled that defendants impose the substantial burden of prohibiting both the use of the Property as a synagogue, and the one-time rehabilitation and construction that is a predicate to that use. Complaint ¶¶ 38, 46, 63. That burden *directly stifles* the multiple, large-scale, commercial activities necessary to complete the construction and rehabilitation project in the short run: employing construction workers, purchasing and transporting building materials and supplies, raising and transferring funds, entering contracts, and others. Just as surely, the burden precludes smaller-scale but longer-term economic activities associated with mere use of the improvements: employment of maintenance workers and any additional paid staff for activities there, as well as ongoing purchase and consumption of supplies and utilities. *Id.*

There can be little doubt that these discriminatory burdens, “taken together with ... many others similarly situated,” would “substantially affect interstate commerce.” *Lopez*, 514 U.S. at 556, 559. In fact, the effect on commerce of the ongoing *use* of the Property alone – not to mention *construction* on it – is enough to bring this case within the sweep of the commerce power. *See, e.g., United States v. Grassie*, 237 F.3d 1199, 1210 (10th Cir. 2001) (“Religion and, in particular religious

²² *Lopez*, 514 U.S. at 556 (quoting *Wickard v. Filburn*, 317 U.S. 111, 127-28 (1942)); *see, e.g., Camps Newfound / Owatonna, Inc. v. Town of Harrison*, 520 U.S. 564, 586 (1997) (relying on “interstate commercial activities of nonprofit entities *as a class*” in Commerce Clause determination, citing *Lopez* and *Wickard*) (emphasis added).

²³ *Lopez*, 514 U.S. at 557 (quoting *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 37 (1937)).

buildings actively *used* as the site and dynamic for a full range of activities, easily falls within” the commerce power) (emphasis added). Even if every commercial transaction suppressed in the instant case would have occurred exclusively in the State of Pennsylvania – unlikely though that may be – the aggregate effect of similar suppression elsewhere would still implicate the commerce power.²⁴ By contrast, the regulated activity in *Lopez* – possessing a gun in a school zone – was not one “that might, through repetition elsewhere, substantially affect any sort of interstate commerce.” *Lopez*, 514 U.S. at 567.

Moreover, the court need not “pile inference upon inference,” *Lopez*, 514 U.S. at 567, Def. Mem. 40, to get from the regulated category of activity to an effect on interstate commerce: application of discriminatory land-use restrictions *directly* and *immediately* prohibit the commercial activities of construction and ongoing operation and maintenance. *See also Groome Resources*, 234 F.3d at 213 (noting that “the connection between racial discrimination and its effect on interstate commerce had been established [by Supreme Court] in *Heart of Atlanta Motel* and *McClung*.”)

Finally, applying RLUIPA here does not remotely threaten “the distinction between what is national and what is local.” *Lopez*, 514 U.S. at 557, 567. RLUIPA neither replaces local zoning systems with a federal one, nor provides religious uses a blanket exemption from such local laws; instead, RLUIPA requires local authorities to provide *additional justification* for a *limited category* of land-use restrictions, namely, those that both burden religious exercise and affect interstate

²⁴ *See, e.g., Camps Newfound / Owatonna*, 520 U.S. at 586 (“[A]lthough the [Christian Scientist] summer camp involved in this case may have a relatively insignificant impact on the commerce of the entire Nation, the interstate commercial activities of nonprofit entities as a class are unquestionably significant.”)

commerce.²⁵ Therefore, the class of land-use restrictions involved here affects national commerce sufficiently to enable congressional regulation under the Commerce Clause.

4. RLUIPA’s legislative history contains evidence that RLUIPA regulates activity that “substantially affects interstate commerce.”

Both *Lopez* and *Morrison* make clear that Congress is not generally required to make formal findings of the regulated activity’s effect on interstate commerce. *Morrison*, 120 S. Ct. at 1751 (quoting *Lopez*, 514 U.S. at 562). Instead, congressional findings may help courts assess whether that effect is substantial when “no such substantial effect [is] visible to the naked eye.” *Id.* (quoting *Lopez*, 514 U.S. at 563). Because the substantial effect on commerce of the regulated activity here is abundantly “visible,” *see supra*, Section III.A.2., the Court need not rely on congressional findings to conclude that Congress has acted within its bounds.

Nevertheless, Congress still found in RLUIPA’s legislative history that the particular type of burden on religious land use at issue here – a “construction project” – substantially affect interstate commerce. *See* legislative history cited *supra*, Section III,B.2.. These findings, moreover, are based on extensive testimony, studies, and other evidence indicating the nationwide magnitude of the commercial activity of religious institutions, in construction and otherwise. For example, according to one study cited, in 1992 alone, religious communities spent \$6 billion on capital

²⁵ *See* RLUIPA §§ 2(a)(1), 2(a)(2)(B); *See also Camps Newfound / Owatonna*, 520 U.S. at 574-75 (rejecting argument that dormant Commerce Clause cannot invalidate discriminatory state real estate tax because Congress cannot impose real estate tax itself); *Groome Resources*, 234 F.3d at 215 (rejecting “incantation of ‘local zoning’ and ‘traditional’ authority,” because “it does not serve the balance of federalism to allow local communities to discriminate against the disabled”).

investments and new construction, up from \$4.8 billion five years earlier.²⁶ Paired with the substantial evidence of widespread discriminatory land-use regulation discussed above, *see supra* Section III.A.2, Congress had far more than a “rational basis . . . for concluding that [such regulation] sufficiently affected interstate commerce.” *Lopez*, 514 U.S. at 557. Because the application of RLUIPA here satisfies all four factors of the *Lopez-Morrison* analysis, this Court should reject the argument that Plaintiffs’ RLUIPA claim exceeds the commerce power.

C. RLUIPA Does Not Violate the Establishment Clause of the First Amendment

Defendants’ argument that RLUIPA violates the Establishment Clause adopts a radical position that is held by only one current member of the Supreme Court. *City of Boerne v. Flores*, 521 U.S. 507, 536-37 (1997) (Stevens, J., concurring). Every Court of Appeals that has ruled on the question of whether exemptions from zoning laws for religious institutions violate the Establishment Clause has answered the question in the negative. *See Ehlers-Renzi v. Connelly School of the Holy Child*, 224 F.3d 283, 291 (4th Cir. 2000) (upholding county zoning ordinance exempting from special exception requirement parochial schools located on land owned by religious organization); *Boyajian v. Gatzunis*, 212 F.3d 1 (1st Cir. 2000) (upholding state law and town by-law prohibiting municipal authorities from excluding religious uses of property from any zoning area); *Cohen v. Des Plaines*, 8 F.3d 484 (7th Cir. 1993) (upholding zoning ordinance that allowed churches to operate day-care centers in single-family residential districts, while requiring other operators of day-care centers to obtain special use permits).

²⁶ *See, e.g.*, June-July 1998 House Hearings, at 125, 134 (statement of Marc D. Stern, American Jewish Congress) (“Stern Statement”); 146 Cong. Rec. S7775 (citing Stern Statement in support of Commerce Clause authority).

Interestingly, defendants cite no Court of Appeals decisions involving the same question in the context of the much broader protections in the RFRA. Perhaps this is because the statute has repeatedly been upheld against Establishment Clause attack. *Christians v. Crystal Evangelical Free Church (In re Young)*, 141 F.3d 854, 863 (8th Cir.) (“RFRA fulfills each of the elements presented in the *Lemon* test, and we conclude that Congress did not violate the Establishment Clause in enacting RFRA.”), *cert. denied*, 525 U.S. 811 (1998); *E.E.O.C. v. Catholic University of America*, 83 F.3d 455, 470 (D.C. 1996) (“We agree with the Fifth Circuit that RFRA represents nothing more sinister than a ‘legislatively mandated accommodation of the exercise of religion.’”); *Flores v. City of Boerne*, 73 F.3d 1352, 1364 (5th Cir. 1996) (“RFRA’s lifting of ‘substantial burdens’ on the exercise of religion does not amount to the Government coercing religious activity through ‘its own activities and influence.’”), *rev’d on other grounds*, 521 U.S. 507; *Sasnett v. Sullivan*, 91 F.3d 1018, 1022 (7th Cir. 1996) (“We defer to the Fifth Circuit’s analysis of why [RFRA] also does not violate . . . the establishment clause of the First Amendment.”), *vacated on other grounds*, 521 U.S. 1114 (1997). The Third Circuit has recognized this trend. *Adams v. C.I.R.*, 170 F.3d 173, 175 n.1 (3d Cir. 1999) (“In general, courts that have addressed the question of constitutionality have found that RFRA is constitutional as applied to the federal government.”); *Belgard v. State of Hawaii*, 883 F. Supp. 510, 517 (D. Haw. 1995) (“the Court does not believe that the RFRA fosters government entanglement in or promotion of religion and is thus susceptible to a challenge under the Establishment Clause.”).²⁷

²⁷ See also Thomas C. Berg, *The Constitutional Future of Religious Freedom Legislation*, 20 U. ARK. LITTLE ROCK L.J. 715, 727-748- (1998) (arguing that RFRA is constitutional as applied to the federal government).

RLUIPA has both a secular purpose and effect. The Supreme Court has long held that when the government accommodates people’s private religious practices – as Congress did in enacting RLUIPA – it “follows the best of our traditions. For it then respects the religious nature of our people and accommodates the public service to their spiritual needs.” *Zorach v. Clauson*, 343 U.S. 306, 314 (1952) (accommodating students’ ability to attend religious instruction classes off school grounds). As the Court noted generally in *Lynch v. Donnelly*, 465 U.S. 668, 673 (1984), the Constitution “affirmatively mandates accommodation, not merely tolerance, of all religions, and forbids hostility toward any. . . . Anything less would require the ‘callous indifference’ we have said was never intended by the Establishment Clause.”

That the government has substantial leeway under the Establishment Clause to “follow[] the best of our traditions” and accommodate private religious activities was made clear in *Corporation of Presiding Bishop of Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327, 338 (1987), in which the Court held that “there is ample room for accommodation of religion under the Establishment Clause.” The Court in *Amos* unanimously upheld Title VII’s exemption permitting employment discrimination by religious organizations on the basis of religion – an act forbidden by Title VII to all other employers. The Court observed that “[t]his Court has long recognized that the government may (and sometimes must) accommodate religious practice and that it may do so without violating the Establishment Clause.” *Id.* at 334. The Court recognized that legislatures have an important role in accommodating private religious activity, stressing that there is no *per se* rule against “giv[ing] special consideration to religious groups” through legislative accommodations, *id.* at 338, and that “the limits of permissible state accommodation to religion are by no means coextensive with the noninterference mandated by the Free Exercise Clause.” *Id.* at 334 (quoting

Walz v. Tax Comm’r of the City of New York, 397 U.S. 664, 673 (1970)). This was particularly true in *Amos*, which, as with zoning laws, involved exempting religious organizations from a regulatory scheme that could potentially intrude on the religious organizations’ autonomy: “Where . . . government acts with the proper purpose of lifting a regulation that burdens the exercise of religion, we see no reason to require that the exemption comes packaged with benefits to secular entities.” *Id.* at 338.

The Court in *Smith* magnified its statement in *Walz* that legislatures may accommodate faith. Indeed, *Smith* held that the Free Exercise Clause does little to protect people of faith from generally applicable laws. For such protection, *Smith* instructs, people of faith should turn to the legislative and executive branches, and not the courts, for protection of their religious liberty:

Values that are protected against government interference through enshrinement in the Bill of Rights are not thereby banished from the political process. Just as a society that believes in the negative protection accorded to the press by the First Amendment is likely to enact laws that affirmatively foster the dissemination of the printed word, so also a society that believes in the negative protection accorded to religious belief can be expected to be solicitous of that value in its legislation as well.

Smith, 494 U.S. at 890. In short, the government may – and should – accommodate private religious practice.

Such legislative reactions to the Supreme Court's retreat from enforcing fundamental religious liberty values through the courts are commonplace. While *Smith* rejected a Free Exercise Clause-mandated exemption to drug laws, religious peyote use accommodations have been made at both the federal and state levels. These are constitutional, even though others wishing to use peyote for secular reasons are not offered the exemption. See *Lee v. Weisman*, 505 U.S. 577, 628-29

(1992) (Souter, J., concurring) (“in freeing the Native American Church from federal laws forbidding peyote use, see Drug Enforcement Administration Miscellaneous Exemptions, 21 C.F.R. § 1307.31 (1991), the government conveys no endorsement of peyote rituals, the Church, or religion as such; it simply respects the centrality of peyote to the lives of certain Americans.”); *Smith*, 494 U.S. at 890 (“a number of States have made an exception to their drug laws for sacramental peyote use.”). After the Supreme Court ruled that an Air Force psychotherapist had no right under the Free Exercise Clause to wear a yarmulke while on duty in *Goldman v. Weinberger*, 475 U.S. 503 (1986), Congress responded by statutorily enacting such a right in the National Defense Authorization Act for Fiscal Years 1988 and 1989 (10 U.S.C. § 774), a permissible accommodation of the religious liberty of service members. See *Texas Monthly v. Bullock*, 489 U.S. 1, 18 (1989) (plurality opinion of Brennan, Marshall, and Stevens) (“if the Air Force provided a sufficiently broad exemption from its dress requirements for servicemen whose religious faiths commanded them to wear certain headgear or other attire, see *Goldman v. Weinberger* . . . that exemption would not be invalid under the Establishment Clause even though this Court has not found it to be required by the Free Exercise Clause.”) (citation omitted).

Accommodating the religious exercise of citizens by granting a measure of autonomy to religious organizations from intrusive zoning regulation is quite simply not, as the defendants claim, “endorsement by the federal government of religion in general.” Def. Mem. at 44. Rather, it is a permissible and sufficient legislative purpose “to alleviate significant governmental interference with the ability of religious organizations to define and carry out their religious missions.” *Amos*, 483 U.S. at 327, *335; 146 CONG. REC. E1234, E1235 (daily ed. July 14, 2000) (RLUIPA was “designed to protect the free exercise of religion from unnecessary government interference” (statement of Rep.

Canady)). The Seventh Circuit applied this principle in the zoning context: “[I]t is clear that the legitimate purpose of minimizing governmental interference with the decision making processes of a religious organization can extend to seemingly secular activities of the organization. *Amos* makes precisely this point.” *Cohen v. City of Des Plaines*, 8 F.3d 484, 490 (7th Cir. 1993), *cert. denied*, 512 U.S. 1236 (1994).

It is also clear that alleviating the burdens on religious exercise caused by zoning regulation does not have the effect of advancing religion. It merely reduces intrusion and oversight by the government as to how they carry out their mission. While this may enable various religious institutions to advance their religious purposes, the Supreme Court has held this to be a permissible effect:

A law is not unconstitutional simply because it allows churches to advance religion, which is their very purpose. For a law to have forbidden “effects” under *Lemon*, it must be fair to say that the government itself has advanced religion through its own activities and influence. As the Court observed in *Walz*, “for the men who wrote the Religion Clauses of the First Amendment the ‘establishment’ of a religion connoted sponsorship, financial support, and active involvement of the sovereign in religious activity.”

Amos, 483 U.S. at 337 (quoting *Walz*, 397 U.S. at 668).

Finally, RLUIPA has a provision that specifically ensures that its application not violate the Establishment Clause:

SEC. 6. ESTABLISHMENT CLAUSE UNAFFECTED. Nothing in this Act shall be construed to affect, interpret, or in any way address that portion of the first amendment to the Constitution prohibiting laws respecting an establishment of religion (referred to in this section as the ‘Establishment Clause’). Granting government funding, benefits, or exemptions, to the extent permissible under the Establishment Clause, shall not constitute a violation of this Act. In this section, the term ‘granting’, used with respect to government funding, benefits, or exemptions, does not include the denial of government funding, benefits, or exemptions.

RLUIPA § 6. Therefore, any chance that RLUIPA could possibly violate the Establishment Clause in a particular circumstance is foreclosed by this subsection, and ensures its conformity with the First Amendment.

D. Defendants' Novel "Separation of Powers" Theory Is Not an Independent Ground for Challenging the Constitutionality of RLUIPA

By far the longest portion of defendants' argument against the constitutionality of RLUIPA is their idiosyncratic "separation of powers" theory. The primary case on which defendants rely is *City of Boerne v. Flores*, 521 U.S. 507 (1997), which specifically decided the question "whether RFRA can be considered enforcement legislation under § 5 of the Fourteenth Amendment." *Id.* at 529. Accordingly, the Court reviewed the text and history of Section 5, as well as the Court's prior precedents interpreting it, and then refined and clarified the Section 5 analysis. *Id.* at 516-529. The Court ultimately concluded that RFRA exceeded Congress' broad enforcement power under the Fourteenth Amendment. *Id.* at 536. Notwithstanding defendants' wishful thinking to the contrary, *Flores* contains no other holdings. For example, the *Flores* Court does not find (at page 519 or elsewhere) that "Congress violates Art. V of the Constitution, which prescribes the procedures for constitutional amendment, when it attempts through simple majority vote to amend the meaning of the Constitution." Def. Mem. 28. Instead, the Court notes that if Section 5 were construed to afford Congress substantive rather than merely broad remedial power, "[s]hifting legislating majorities could change the Constitution and effectively circumvent the difficult and detailed amendment process contained in Article V." *Flores*, 521 U.S. at 519. Thus, throughout the *Flores* decision, separation of powers, as well as federalism and other considerations, are discussed for the purpose of formulating a sound interpretation of Section 5 - not as independent grounds potentially for

striking down an Act of Congress. Accordingly, subsequent decisions of the Court – including some cited by defendants in its Enforcement Clause argument but ignored in its "separation of powers" section – have not cited *Flores* for any such independent theory, but instead for its Section 5 analysis. See, e.g., *Board of Trustees of the University of Alabama v. Garrett*, 121 S. Ct. 955, 963 (2001); *Kimel v. Fla. Board of Regents*, 120 S. Ct. 631, 644 (2000). In short, if RLUIPA satisfies the Enforcement Clause analysis of *Flores*, there is no other basis in *Flores* – separation of powers or otherwise – for striking the statute down. Thus, the Court need not – and should not – even reach that theory as a separate issue for decision.

IV. DEFENDANT MATTEO SHOULD NOT BE DISMISSED FROM THIS ACTION.

Defendants argue that defendant Larry Matteo should be dismissed from this action because he may be entitled to qualified immunity. The doctrine of qualified immunity "hold[s] that government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800 (1982). Regardless of whether Mr. Matteo is liable for damages for his and the Township's actions against plaintiffs, to the extent that he – as Director of Code Enforcement of Abington Township – is responsible for enforcing the Township's laws against plaintiffs, he is subject to equitable relief enjoining such illegal behavior, and should not be dismissed as a defendant. See *Anderson v. Davila*, 125 F.3d 148, 161 (3d Cir. 1997) (holding that doctrine of qualified immunity is inapplicable to injunctive relief).

CONCLUSION

For the foregoing reasons, Defendants' Motion to Dismiss Plaintiffs' Complaint and/or for Summary Judgment should be denied.

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