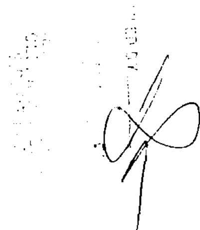
UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO.: 01-6530-CIV-FERGUSON

PRIMERA IGLESIA BAUTISTA
HISPANA OF BOCA RATON, INC.,
a Florida corporation;
AUGUSTO PRATTS; and
DAVID PRATTS,

Plaintiffs,

v.



BROWARD COUNTY, a political
subdivision of the State of Florida,

Defendant.
_________________________________/

BROWARD COUNTY'S CORRECTED MOTION TO DISMISS[1]

Defendant Broward County ("County"), through undersigned counsel and pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, Rule 7.1 of the Local Rules of the United States District Court for the Southern District of Florida, and this Court's Order dated July 9, 2001, moves the Court to dismiss on constitutional grounds Counts II and III of the Plaintiffs' Complaint with prejudice, and in support thereof, states:

I. INTRODUCTION

Plaintiffs, Primera Iglesia Bautista Hispana of Boca Raton, Inc., a Florida corporation, Augusto Pratts, and David Pratts (collectively, the "Plaintiffs"), who claim the County's application of the 1000 foot separation requirement in section 39-245(9)(a) of the Broward

[1]This Corrected Motion corrects typographical errors contained in the original motion.

County Zoning Code substantially burdens their free exercise of religion, seek in Counts II and III, respectively, declaratory and injunctive relief under both the Religious Land Use and Institutionalized Persons Act of 2000 ("RLUIPA"), 42 U.S.C. § 2000cc, *et seq.* and Florida's Religious Freedom Restoration Act of 1998 (the "Florida RFRA"), Section 761.03, *et seq.*, Florida Statutes. RLUIPA, which was signed into law on September 22, 2000, is unconstitutional in four respects: (1) it exceeds the scope of Congress' enforcement power under Section 5 of the Fourteenth Amendment of the United States Constitution; (2) it violates vital principles of federalism; (4) it violates the separation of powers doctrine; and (4) it violates the Establishment Clause of the First Amendment of the United States Constitution. Likewise, the Florida RFRA is unconstitutional as violative of the Establishment Clauses of the United States and Florida Constitutions and the separation of powers doctrine. This Court, therefore, should declare RLUIPA and FRFRA unconstitutional and dismiss Counts II and III of the Complaint with prejudice.

II. FACTS

Plaintiff Primera Iglesia Bautista Hispana of Boca Raton, Inc. ("Church") is a small Baptist Church affiliated with the Southern Baptist Convention. Complaint at ¶ 1. Plaintiff Augusto Pratts is the Pastor and official representative of the Church and Plaintiff David Pratts is the Director of the Church. *Id.* at ¶¶ 4 & 6. In December 1997, the Church purchased a .936 acre parcel of land ("property") located in unincorporated Broward County in the A-1 Agricultural Estate Zoning District. *Id.* at ¶¶ at 2, 12, 13, 19 & 26. Houses of worship are permitted in the A-1 District. *Id.* at ¶¶ at 13.

After purchasing the property, the Church began operating a church on the property, even

though it is located less than 1000 feet from other non-agricultural, non-residential uses--in particular, a school and church. *Id.* at ¶ 20. Section 39-245(9)(a) of the Broward County Zoning Code ("Code") requires a minimum distance of 1000 feet between any proposed non-agricultural, non-residential use and other non-agricultural and non-residential uses. *Id.* at ¶ 22 & 23. On May 28, 1998, the County cited the Church for using its structure as a place of worship in violation of the 1000 foot separation requirement. *Id.* at ¶ 28; Exhibit "A", Notice of Violation. On September 18, 2000, Broward County again cited the Church for "illegal[ly] conducting church services" in violation of the Zoning Code. *Id.* at ¶ 29; Exhibit "B", Notice of Repeat Violation and Hearing.

The Plaintiffs complain the County's application of the 1000 foot separation requirement prohibits them from using the Church property for "religious purposes," in violation of their constitutional and statutory rights under both federal and state law. *Id.* at ¶ 30 and 35. Specifically, Plaintiffs sue the County for declaratory and injunctive relief under 42.U.S.C. section 1983 (Count I), The Religious Land Use and Institutionalized Persons Act of 2000, 42 U.S.C. § 2000cc, *et seq.* (Count II), and Florida's Religious Freedom Restoration Act of 1998, section 761.03, *et seq.*, Florida Statutes (Count III).

III. RLUIPA IS UNCONSTITUTIONAL

In Count II, Plaintiffs contend the County's application of the 1000 foot separation requirement set forth in section 39-245(9)(a) of the Code substantially burdens their free exercise of religion because it "prohibit[s] them from conducting formal and informal religious and church services on the property." Complaint at ¶¶ 49, 50 and 51. Plaintiffs claim this burden on their religious practices violates RLUIPA, since the 1000 foot requirement fails to advance a

compelling governmental interest, or, in the alternative, if it does advance a compelling interest, is not the least restrictive means of furthering that interest. RLUIPA, however, is unconstitutional. Count II, therefore, must be dismissed with prejudice.

A. The Free Exercise Clause

The Free Exercise Clause of the First Amendment, which has been made applicable to the States and local governments by incorporation into the Fourteenth Amendment, *see Cantell v. Connecticut*, 310 U.S. 296, 303, 60 S. Ct. 900, 903, 84 L.Ed. 1213 (1940), provides that "Congress shall make no law respecting an establishment of religion or ***prohibiting the free exercise thereof*** ("Free Exercise Clause"). . . ." U.S. Const., Amdt. 1 (emphasis added). The United States Supreme Court, in *Employment Division, Department of Human Resources v. Smith*, 494 U.S. 872, 878 -890, 110 S. Ct. 1595, 108 L.Ed.2d 876 (1990), adopted a narrow interpretation of the Free Exercise Clause, holding that neutral laws of general applicability are not subject to heightened judicial scrutiny, even if such laws have the incidental effect of burdening religious practices.[2] The *Smith* Court used strong and unequivocal language in

---

[2]*Smith* arose out of an unemployment compensation dispute involving two Native Americans who were fired from their jobs at a private drug and alcohol rehabilitation facility in Oregon after admitting to ingesting peyote, a sacrament of the Native American Church, during a religious ceremony. *Id.* at 874. The Oregon Employment Division determined that because the possession of peyote was illegal under Oregon law, the employees were properly discharged for "cause" and, therefore, were not entitled to unemployment benefits. *Id.* The employees sued, arguing the application of the Oregon law violated their free exercise of religion. *Id.* The Supreme Court rejected the employees' free exercise claim, holding that while one has the right to believe in a religion and be free from religious discrimination, one does not have a right under the Free Exercise Clause to practice religion in a manner inconsistent with general laws of neutral applicability. *Id.* at 877-879. Simply put, religion-neutral laws which have the effect of placing incidental burdens on religious practices do not implicate the Free Exercise Clause. *Id.* at 890.

adopting this restrictive standard, stating that "[t]o make an individual's obligation to obey a [neutral] law [of general applicability] contingent upon the law's coincidence with his religious beliefs, except where the State's interest is 'compelling'- - permitting him, by virtue of his beliefs, 'to become a law unto himself,'- -contradicts both ***constitutional tradition and common sense.***" *Id.* at 885 (citing *Reynolds v. United States*, 98 U.S. 145 (1878) (emphasis added)). As a result of *Smith*, the Free Exercise Clause is essentially limited to a prohibition on purposeful governmental discrimination against religion. *Id.* at 877-888.

An unhappy Congress responded to the *Smith* decision by passing the Religious Freedom Restoration Act of 1993 (the "Federal RFRA"), which was designed to override *Smith* and provide greater protection for religious freedom through the application of the "compelling interest test" to governmental actions, including neutral laws of general applicability, that substantially burden religious practices. *See* 42 U.S.C. § § 2000bb(a)(4) & (b)(1). The Federal RFRA's primary substantive provision provided that "Government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability," unless the government can "demonstrate[] that application of the burden to the person is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest." 42 U.S.C. § § 2000bb-1(a) & (b).

In 1997, the United States Supreme Court, in *City of Boerne v. Flores*, 521 U.S. 507, 117 S. Ct. 2157, 138 L.Ed.2d 624 (1997), declared the Federal RFRA unconstitutional, at least as applied to the states,[3] on the basis that it exceeded Congress' power under Section 5 of the

---

[3]There is considerable disagreement among the courts as to whether the Federal RFRA is constitutional as applied to the federal government. *See e.g., Adams v. Commissioner*, 170 F. 3d

Fourteenth Amendment of the federal Constitution.[4] In reaching its decision, the *Boerne* Court made clear that while Section 5 gives Congress the power "to enforce" the Free Exercise Clause through remedial legislation, Congress does not have the authority to determine the substantive scope of the Free Exercise Clause.[5] *Id.* Rather, the power to interpret the Free Exercise Clause belongs exclusively to the judiciary. *Id.* at 524.

While Congress's power to enforce the Free Exercise Clause is "broad," it is not without limit. *Id.* at 518-519 (citing to *Oregon v. Mitchell*, 400 U.S. 112, 91 S. Ct. 260, 27 L.Ed. 2d 272 (1970)). In exercising its enforcement power, Congress must show a "***congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end.***" *Id.* at 520. Without such a connection, legislation may be deemed substantive in nature. *Id.*

Applying the remedial theory of Congress' Section 5 enforcement power, the *Boerne* Court concluded the Federal RFRA was wholly **out of proportion** to the purported constitutional injury to be prevented, i.e., purposeful religious discrimination. *Id.* at 532. In so

---

173, 175 n. 1 (3d Cir. 1999).

[4] In *Boerne, a* Catholic church located in a historic district sought to renovate its building to accommodate its growing parish. 521 U.S. at 512. The Boerne City Council which, by ordinance, must preapprove construction affecting buildings in a historic district, denied the Church's application for a building permit. *Id.* The Church sued, claiming the Council's refusal to issue a permit substantially burdened their religious practices in violation of the Federal RFRA. *Id.*

[5] The Court stated: "Congress' power under § 5, however, extends only to 'enforc[ing]' the provisions of the Fourteenth Amendment . . . . Legislation which alters the meaning of the Free Exercise Clause cannot be said to be enforcing the Clause. Congress does not enforce a constitutional right by changing what the right is. It has been given the power 'to enforce', not the power to determine what constitutes a constitutional violation." *Id.* at 519.

holding, the Court noted that the legislative record lacked sufficient evidence showing that laws based on "***religious bigotry***" were a significant problem in this country. *Id.* at 530-531. To the contrary, the Court observed that the congressional hearings on the Federal RFRA focused primarily on "laws of general applicability which place incidental burdens on religion." *Id.* at 530. Without evidence of legislation enacted or enforced due to religious "***animosity or hostility***", the Federal RFRA simply could not be regarded as a reasonable means of protecting the free exercise of religion as defined by *Smith*. *Id.* at 529 and 531.

In addition to the inadequate legislative record, another serious problem identified by the *Boerne* Court was the Federal RFRA's strikingly broad application of strict scrutiny to ***all*** laws substantially burdening the free exercise of religion, "without regard to whether they had the object of stifling or punishing free exercise." *Id.* at 532-534. In the Court's view, such "sweeping coverage" could not be understood as an effort merely to remedy violations of the Free Exercise Clause, as defined in *Smith*. *Id.* at 532. Instead, the Federal RFRA's overinclusiveness constituted an illegal substantive alteration of the Free Exercise Clause and intruded into the States' general authority to regulate for the health and welfare of their citizens, in violation of "vital principles necessary to maintain separation of powers and the federal balance." *Id.* at 532-536.

Three years after *Boerne*, Congress, pursuant to its Section 5 enforcement power, passed the Religious Land Use and Institutionalized Persons Act of 2000 ("RLUIPA")[6], which applies

[6]RLUIPA was signed into law on September 22, 2001.

strict scrutiny to land use regulations[7] substantially burdening the free exercise of religion[8], **provided that** the substantial burden is imposed as part of a land use regulation under which the government is permitted to make individualized assessments of the proposed uses for the property involved. *See* 42 U.S.C. §§ 2000cc(a)(1) and (2).[9] A person has a private right of action against a government for violating RLUIPA's free exercise protections. 42 U.S.C. § 2000cc-2(a).

---

[7] RLUIPA also applies strict scrutiny to laws substantially burdening an institutionalized person's free exercise of religion, a subject not implicated in this litigation. *See* 42 U.S.C. § 2000cc-1(a) & (b)..

[8] RLUIPA prohibits a government from "impos[ing] or implement[ing] 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 burden is the least restrictive means of furthering a compelling governmental interest. 42 U.S.C. § 2000cc(a)(1). RLUIPA also prohibits a government from imposing or implementing 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, discriminates against any assembly or institution on the basis of religion or religious denomination, excludes religious assemblies from a jurisdiction, or unreasonably limits religious assemblies, institutions, or structures within a jurisdiction. 42 U.S.C. § 2000cc(b).

[9] RLUIPA's strict scrutiny test also applies to substantial burdens which are imposed in connection with a program or activity that receives federal financial assistance or which affect, or whose removal would affect, commerce with foreign nations, among the several states, or with Indian tribes. *See* 42 U.S.C. §§ 2000cc(a)(1) and (2). In the Complaint, Plaintiffs do not allege that the County's 1000 foot separation requirement in section 39-245(9)(a) of the County Zoning Code is either part of a program that receives federal financial assistance or has an affect on commerce. Rather, Plaintiffs only allege that the 1000 foot separation requirement is part of a land use regulation under which the County is permitted to make individualized assessments of the proposed uses for the property involved. *See* Complaint at ¶ 52.

B. RLUIPA Exceeds the Scope of Congress' Enforcement Power Under Section Five of the Fourteenth Amendment of the United States Constitution

To the extent RLUIPA applies strict scrutiny to religious practices burdened as a result of a land use regulation under which the government is able to make individualized assessments concerning the use of the property, RLUIPA is unconstitutional for the same reason the Supreme Court declared its predecessor, the Federal RFRA, unconstitutional in *Boerne*– it exceeds Congress' Section 5 enforcement power. Just like the legislative record in RFRA, RLUIPA's legislative record lacks examples of "modern instances of generally applicable [land use regulations] passed because of religious bigotry." *Boerne*, 521 U.S. at 530. In fact, the legislative history cites to no reported instances of ***purposeful*** religious discrimination. *See* Religious Land Use and Institutionalized Persons Act of 2000, Bill Report and Summary, Senate Bill 2869, 106th Cong. (July 27, 2000); H.R. Rep. 106-219 at 14-18, 27, Committee on the Judiciary, 106th Cong., 1st Session (1999). Instead, the congressional hearings emphasize "anecdotal evidence" of zoning and historic preservation laws, which as an incident of their normal operation, have adverse effects on religious institutions. H.R. Rep. 106-219 at 14-18, 27. As explained by the Supreme Court in *Smith and Boerne*, such laws fall outside the reach of the Free Exercise Clause. *See Smith*, 494 U.S. at 885; *Boerne*, 521 U.S. at 514. In the absence of evidence showing a widespread pattern of intentional religious discrimination, RLUIPA simply cannot be considered a reasonable means of enforcing the Free Exercise Clause as defined in *Smith*. *See Boerne*, 521 U.S. at 529-531.

Not only is RLUIPA unsupported by an adequate legislative record, RLUIPA also reflects an utter lack of "congruence and proportionality between the means adopted and the end

to be achieved." *Id.* at 520. In *Smith*, the Supreme Court held that laws which incidentally burden the free exercise of religion do not implicate the Free Exercise Clause. 494 U.S. at 885. Instead, the Court held that the Free Exercise Clause provided protection to those religious practices burdened as a result of deliberate religious discrimination. *Id.* at 877-878. Despite *Smith*, RLUIPA applies the compelling interest test to **all** land use regulations substantially burdening religious practices, irrespective of whether such regulations are based on religious hostility or animosity. *See* 42 U.S.C. § 2000cc(a)(1). As a result of this overinclusiveness, laws valid under *Smith* are now subject to invalidation under RLUIPA. Considered in this light, it is clear RLUIPA cannot be regarded merely as "remedial, preventive legislation, if those terms are to have any meaning." *Boerne*, 117 S. Ct. at 2170. In fact, RLUIPA is "so out of proportion to a supposed remedial or preventive object, that it cannot be understood as responsive to, or designed to prevent, unconstitutional behavior." *Id.*

C. RLUIPA Violates Vital Principles Of Federalism

Even if RLUIPA could be considered remedial in nature, which it cannot, the substantial costs RLUIPA exacts, both in terms of imposing a heavy litigation burden on the states and local governments and in terms of substantially curtailing their general authority to protect the public health, safety, and welfare through the implementation of zoning legislation, "far exceed any pattern or practice of unconstitutional conduct under the Free Exercise Clause as interpreted in *Smith*." *Boerne*, 521 U.S. at 534; *see also Village of Belle Terre v. Boraas*, 416 U.S. 1 (1974) (the historical function of zoning laws is the protection of public health and welfare). Under RLUIPA, if one can demonstrate a substantial burden on his or her free exercise arising from the application of a land use regulation, the government must demonstrate a compelling

governmental interest and show that the law is the least restrictive means of furthering that interest– the most demanding test in constitutional law. *Boerne*, 521 U.S. at 534. Many, if not most, zoning laws will fail this test, opening up the prospect of constitutionally required religious exemptions from zoning laws of almost every kind--thereby permitting individuals and institutions, by virtue of their religious beliefs, to become laws unto themselves. *Smith*, 494 U.S. at 885 (citing *Reynolds v. United States*, 98 U.S. 145, 167, 25 L.Ed. 244 (1879)). As a result of these mandatory religious exemptions, governments will be significantly hampered in their ability to use zoning regulations as an exercise of the police power to manage and preserve communities, stimulate economic growth, address social concerns, and protect citizens from the ill effects of urbanization, such as overcrowding, traffic congestion, pollution, and noise. Entire zoning schemes will be defeated without regard to whether such laws were even motivated by religious animus in the first place.[10] RLUIPA's "federalization" of land use regulation--one of the last areas of local community control--constitutes an unwarranted congressional intrusion into the states' and local governments' "traditional prerogatives and general authority to regulate for the health and welfare of their citizens." *Id.* at 534. This Court has the power and obligation to check this excessive and unconstitutional exercise of congressional power. *See e.g., New York v. United States*, 505 U.S. 144 (1992); *Printz v. United States*, 521 U.S. 898 (1997).

---

[10] As the Supreme Court noted in *Boerne*, "it is a reality of the modern regulatory state that numerous state laws, such as zoning regulations at issue here, impose a substantial burden on a large class of individuals. When the exercise of religion has been burdened in an incidental way by a law of general application, it does not follow that the persons affected have been burdened any more than other citizens, let alone burdened because of their religious beliefs." 521 U.S. at 535.

D. RLUIPA Violates the Separation of Powers

In addition to holding that the Federal RFRA exceeded Congress' Section 5 enforcement power and violated principles of federalism, *Boerne* also held that the Federal RFRA violated the separation of powers doctrine by invading the "province of the Judicial Branch" as the sole interpreter of the Free Exercise Clause. 521 U.S. at 536. Through the Federal RFRA's application of strict scrutiny to all laws substantially burdening religious practices, irrespective of whether such laws were motivated by religious discrimination, Congress attempted to impose upon the judiciary a standard of review for interpreting the Free Exercise Clause different from the narrow standard crafted by the Court in *Smith*. *Id.* at 534-536. Such an attempt, the Court held, was a serious breach of the separation of powers doctrine. *Id.* at 524, 524-536. As the *Boerne* Court explained, "[t]he power to interpret the Constitution in a case or controversy remains in the Judiciary." *Id.* at 524. Therefore, the ability of an individual to seek redress from laws substantially burdening the free exercise of religion is wholly dependent upon the Supreme Court's, not Congress', definition of what constitutes a violation of the Free Exercise Clause. *Id.* at 536 ("When the Court has interpreted the Constitution, it has acted within the province of the Judicial Branch, which embraces the duty to say what the law is."). Although Congress' Section 5 enforcement power is broad, Congress is simply powerless to impose and enforce a free exercise right at odds with the Supreme Court's substantive interpretation of the Free Exercise Clause. *Id.* at 519, 534-536.

Like the Federal RFRA, RLUIPA violates the separation of powers doctrine by applying a free exercise standard of review different from the standard crafted by the judiciary. Before RLUIPA was enacted reinstating the compelling interest test, religion-neutral laws of general

applicability which had the incidental effect of burdening religious practices simply did not implicate the Free Exercise Clause. *See Smith*, 494 U.S. at 885; *Boerne*, 521 U.S. at 514. Moreover, the Eleventh Circuit, in the specific context of zoning legislation, applied its own three-part balancing test to determine whether a violation of the Free Exercise Clause had occurred. *See First Assembly of God v. Collier County*, 20 F. 3d 419, 424 (11th Cir. 1994); *Grosz v. City of Miami Beach*, 721 F. 2d 729, 733 (11th Cir. 1983); *Daytona Rescue Mission, Inc. v. City of Daytona Beach*, 885 F. Supp. 1554, 1558-59 (M.D. Fla. 1995). Under the balancing test, a zoning law was valid if it (1) regulated religious conduct, not religious beliefs; (2) had a secular purpose and effect; (3) and the government's interest in applying the law outweighed the burden on free exercise. *See Grosz*, 721 F. 2d at 733. These standards of review crafted by the Supreme Court in *Smith* and the Eleventh Circuit in *First Assembly and Grosz* have been effectively overridden by RLUIPA's application of the compelling interest test to all zoning regulations, whether or not they purposefully discriminate against religion. RLUIPA's substantive alteration of the Free Exercise Clause in this regard exceeds the boundaries of Congress' Section 5 enforcement power and impermissibly usurps the judiciary's powers as the sole interpreter of the Free Exercise Clause. *See Boerne*, 521 U.S. at 519, 524, 532-536.

In addition to the compelling interest test, RLUIPA's definition of "religious exercise"[11] is another aspect of RLUIPA that illegally alters the substance of the Free Exercise Clause as defined by the judiciary. Prior to RLUIPA's enactment, the federal courts generally construed the free exercise clause to protect only those practices which were compulsory, or central to, an

---

[11] RLUIPA defines "religious exercise" as "any exercise of religion, whether or not compelled by, or central to a system of religious belief." 42 U.S.C. § 2000cc-5(7)(A).

individual's religious tradition. *See e.g.*, *Smith*, 494 U.S. at 887 n. 14. (If general laws are to be subject to a religious practice exception, both the importance of the law at issue and the ***centrality*** of the practice at issue must reasonably considered) (emphasis added); *Bryant v. Gomez*, 46 F. 3d 948, 949 (9th Cir. 1995) (a substantial burden on the free exercise of religion occurs where state action prevents one from engaging in conduct or having a religious experience that is ***central*** to the religious doctrine) (emphasis added). RLUIPA's express admonition in its definition of "religious exercise" that a practice need not be "compelled by or central to, a system of religious belief" in order to fall within the Free Exercise Clause's reach reveals a clear intent by Congress to expand the scope of protection afforded to religious practices beyond that provided by the judiciary's interpretation of the Free Exercise Clause. 42 U.S.C. § 2000cc-5(7)(A). As already mentioned, this substantive change of free exercise rights is an impermissible exercise of congressional power. *Boerne*, 521 U.S. at 536 ("When the political branches of the Government act against the background of a judicial interpretation of the constitution already issued, it must be understood that in later cases and controversies the Court will treat its precedents with the respect due them under settled principles, including stare decisis, and contrary expectations must be disappointed").

E. RLUIPA Violates the Establishment Clause

The First Amendment of the United States Constitution provides that "Congress shall make no law respecting an establishment of religion ("Establishment Clause")." U.S. Const., Amdt. 1. The purpose of the Establishment Clause is to protect against sponsorship, financial support, and active involvement of the sovereign in religious activities. *Lemon v. Kurtzman*, 403 U.S. 602, 612, 91, S. Ct. 2105, 2111, 29 L.Ed.2d 745, 755 (1971). RLUIPA is a "law respecting

an establishment of religion," and, therefore violates the Establishment Clause.

RLUIPA gives religious institutions and believers an exemption from land use regulations that substantially burden the free exercise of religion, unless the government can show the regulation is the least restrictive means of furthering a compelling interest. 42 U.S.C. § 2000cc(a)(1). In this case, the Plaintiffs claim RLUIPA exempts the Church from complying with the 1000 foot separation requirement set forth in section 39-245(9) of the County's Zoning Code. If, however, the property owned by the Church in the A-1 District happened to be a school, museum, or business owned by an atheist or agnostic, it would not be eligible for an exemption from the 1000 foot requirement. *Id.* RLUIPA, therefore, provides religious believers and institutions with a legal remedy unavailable to those engaging in purely secular conduct. This preference for religion over irreligion runs afoul of the Establishment Clause. *See Boerne*, 521 U.S. at 537 (the Federal RFRA's preference for religion, as opposed to irreligion, violates the Establishment Clause) (Stevens, J., concurring); *Wallace v. Jaffree*, 472 U.S. 38, 52-55, 105 S. Ct. 2479, 2487-2489, 86 L.Ed.2d 29 (1985) (a statute violates the Establishment Clause if it is entirely motivated by a purpose to serve religion).

In *Lemon*, the Court held that to withstand an Establishment Clause challenge, a law must (1) have a secular legislative purpose; (2) its principle or primary effect must be one that neither advances nor inhibits religion; and (3) the statute must not foster an excessive government entanglement with religion. 403 U.S. at 612-613. RLUIPA does not satisfy any, much less all, of these elements. First, RLUIPA has a sectarian, rather than a secular, purpose-- it is designed to aid persons in obtaining religious exemptions from zoning laws that would otherwise be applicable. This, standing alone, makes RLUIPA unconstitutional. *See Texas Monthly, Inc. v.*

Bullock. 489 U.S. 1, 14 (1989) (a state sales tax exemption for religious publications violates the Establishment Clause). Second, RLUIPA has the sole effect of advancing religion by exempting religious, but not secular, conduct from compliance with religion-neutral land use regulations. *See Wallace*, 472 U.S. at 52-55 (a statute violates the Establishment Clause if it is entirely motivated by a purpose to serve religion). Finally, RLUIPA fosters an excessive government entanglement with religion because governments, in an effort to forestall lawsuits under RLUIPA, will be required to make determinations as to what conduct constitutes an "exercise of religion," what is a substantial burden of free exercise as opposed to an insubstantial one, and what persons or institutions qualify for religious exemptions. Such comprehensive entanglement is forbidden by the Establishment Clause. *Lemon*, 403 U.S. at 614-15.

IV. THE FLORIDA RFRA IS UNCONSTITUTIONAL

In Count III, Plaintiffs contend the County's application of the 1000 foot separation requirement set forth in section 39-245(9)(a) of the County's Zoning Code substantially burdens their free exercise of religion because it prohibits them from conducting, and engaging in, formal and informal religious and church services on the property. Complaint at ¶¶ 59. Plaintiffs complain that this burden on their religious practices violates the Florida RFRA, which prohibits the government[12] from "substantially burden[ing] a person's exercise of religion, even if the burden results from a rule of general applicability" unless the government can demonstrate the burden is the least restrictive means of furthering a compelling governmental interest. § 761.03,

---

[12] RLUIPA defines "government" as "any branch, department, agency, instrumentality, or official or other person acting under color of law of the state, **a county**, special district, municipality, or any other subdivision of the state." § 761.02, Fla. Stat.

Fla. Stat. The Florida RFRA defines the "exercise of religion" as "an act or refusal to act that is *substantially motivated by a religious belief, whether or not the religious exercise is compulsory* or central to a larger system of religious belief." § 761.02, Fla. Stat. The Florida RFRA, like RLUIPA, violates the Establishment Clauses of the United States and Florida Constitutions and the separation of powers doctrine. This Court, therefore, must dismiss Count III with prejudice.

A. The Florida RFRA Violates The Establishment Clause of the United States and Florida Constitutions

Like the federal Constitution's Establishment Clause, Florida's Establishment Clause prohibits laws "respecting an establishment of religion." Fla. Const., Art. 1, Sec. 3. When considering an establishment clause claim under Florida's Constitution, a test similar to the *Lemon* test is applicable, with one additional consideration: the law must not authorize the use of public moneys, directly, or indirectly, in aid of any sectarian institution. *See* Fla. Const., Art. 1, Sec. 3.

Here, the Florida RFRA violates the federal and Florida Establishment Clauses because it gives preferential treatment to religion by exempting religious, but not secular, conduct from compliance with neutral laws of general applicability. In this case, the Plaintiffs claim the Florida RFRA exempts the Church from complying with the 1000 foot separation requirement set forth in section 39-245(9) of the County's Zoning Code. If, however, the property owned by the Plaintiffs in the A-1 District happened to be a school, museum, or business owned by an atheist or agnostic, it would not be eligible under the Florida RFRA for a religious exemption from the 1000 foot separation requirement. *Id.* By providing religious believers and institutions with a legal remedy unavailable to those engaging in purely secular conduct, the Florida RFRA

has afforded preferential treatment to religion in violation of the federal and Florida Establishment Clauses.[13] This Court, in *Warner v. The City of Boca Raton*, 64 F. Supp.2d 1272, 1287 n. 11 (S.D. Fla. 1999) (Judge Ryskamp), expressed a serious concern about the constitutionality of the Florida RFRA, noting that its "preference for religion arguably runs afoul of the Establishment Clause of the First Amendment." *See also Boerne*, 521 U.S. at 537 (the Federal RFRA's preference for religion, as opposed to irreligion, violates the Establishment Clause) (Stevens, J., concurring); *Wallace*, 472 U.S. at 52-55 (a statute violates the Establishment Clause if it is entirely motivated by a purpose to serve religion).

B. The Florida RFRA Violates the Separation of Powers Doctrine

In addition to violating the Establishment Clause, the Florida RFRA, like RLUIPA, violates the separation of powers doctrine by expanding the substantive scope of the Free Exercise Clause through legislation. As the Supreme Court made clear in *Boerne*, it is the function of the judiciary, not the legislature, to interpret the Constitution and "to say what the law is." 521 U.S. at 524 and 536 (citing *Marbury v. Madison*, 1 Cranch 137, 177 (1804)). Despite the Court's pronouncements *in Boerne*, the Florida legislature, through its enactment of the Florida RFRA, has imposed upon the judiciary a standard of review for interpreting constitutional rights–the compelling interest test-- which is broader than the standard crafted by

---

[13] Not only does the Florida RFRA have a religious purpose and effect, as explained above, it also fosters an excessive government entanglement with religion in violation of the *Lemon* test. *See Lemon*, 403 U.S. at 614-15. In an effort to forestall lawsuits under the Florida RFRA, governments will be required to make determinations as to what conduct constitutes an "exercise of religion," what is a substantial burden of free exercise as opposed to an insubstantial one, and what persons and/or institutions qualify for a religious exemption. Such comprehensive entanglement is forbidden by the Establishment Clause. *Lemon*, 403 U.S. at 614-15.

the United States Supreme Court in *Smith*. *See* Religious Freedom Restoration Act of 1998, Laws of Florida, Chapter 98-412 (1998) (it is "intent of the legislature of the State of Florida "to establish the compelling interest test... to guarantee its application in all cases where free exercise is substantially burdened"). In so doing, the Florida legislature has exceed the boundaries of its authority and has impermissibly invaded the "province of the Judicial Branch . . . to say what the law is." *Boerne*, 521 U.S. at 534-536.

V. CONCLUSION

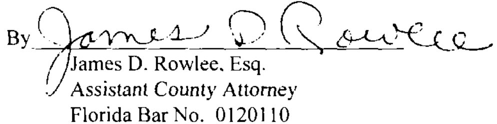
The separation and independence of the coordinate branches of the Federal government serve to prevent the accumulation of excessive power in any one branch. *United States v. Lopez*, 514 U.S. 549, 552, 115 S. Ct. 1624, 1626, 131 L.Ed.2d 626 (1995). Maintaining the separation of powers is an essential part of the Constitutional structure and plays a vital role in securing freedom for all. *Lopez*, 514 U.S. at 578 (Kennedy, J., concurring). "[T]he courts retain the power, as they have since *Marbury v. Madison*, to determine if Congress has exceeded its authority under the Constitution." *Id.* With the passage of RLUIPA and the Florida RFRA, Congress and the Florida Legislature have exceeded their legislative authority and, by doing so, have undermined vital principles necessary to maintain separation of powers, the federal balance, and governmental neutrality toward religion." *Boerne*, 521 U.S. at 536; *Lemon* 403 U.S. at 612-613.

WHEREFORE, the County respectfully requests that this Court declare RLUIPA and the Florida RFRA unconstitutional and dismiss Counts II and III of the Plaintiffs' Complaint with prejudice.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Motion to Dismiss has been furnished by U.S. Mail to all parties on the attached list on this 10th day of August, 2001.

EDWARD A. DION
County Attorney for Broward County
Governmental Center, Suite 423
115 South Andrews Avenue
Fort Lauderdale, Florida 33301
Telephone: (954) 357-7600
Facsimile: (954) 357-7641
E-Mail: jrowlee@co.broward.fl.us

By 

James D. Rowlee, Esq.
Assistant County Attorney
Florida Bar No. 0120110

SERVICE LIST

Vanessa L. Prieto, Esq.
Sidney C. Calloway, Esq.
Shutts & Bowen LLP
200 East Broward Boulevard, Suite 2000
Fort Lauderdale, Florida 33301

Stephanie S. Curd, Esq.
Office of the Attorney General
110 S.E. 6th Street, 10th Floor
Fort Lauderdale, Florida 33301