

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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**BIKUR CHOLIM, INC., RABBI SIMON LAUBER,
FELLOWSHIP HOUSE OF SUFFERN, INC., MALKA
STERN, MICHAEL LIPPMAN, SARA HALPERN,
ABRAHAM LANGSAN and JACOB LEVITA,**

**Case No.
05-CV-10759 (SCR)**

Plaintiffs,

- against -

VILLAGE OF SUFFERN,

Defendant.

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**BRIEF FOR THE NATIONAL JEWISH COMMISSION
ON LAW AND PUBLIC AFFAIRS (“COLPA”)
AS *AMICUS CURIAE* IN SUPPORT OF THE PLAINTIFF**

INTEREST OF THE *AMICUS CURIAE*

This brief is being filed on behalf of organizations that represent the Orthodox Jewish community across the United States because the central legal issues to be decided by this Court in this case are of great importance to religiously observant Jews. The focused charitable program that the plaintiff organization has initiated has made it possible for thousands of devout Jews living in America to observe explicit religious commandments that have been fundamental to Judaism since Biblical days.

Because visiting patients confined to hospitals is a universally recognized act of compassion, its inherently religious significance might not be immediately apparent. And when this religiously obligatory act of human kindness coincides with the duty enshrined in the Ten Commandments to honor one’s parents, the religious character of the hospital visit is enhanced. At the same time, those who feel obligated on grounds of religious

conscience to visit their parents or other invalids in hospitals are barred, by another edict of the Ten Commandments, from desecrating the Sabbath by traveling in a car or other form of transportation in order to perform these religious observances. Bikur Cholim has alleviated this religious dilemma by supplying cost-free living quarters to Sabbath-observing visitors so that they are able freely to exercise their religious convictions.

It is hard to conceive, within the framework of Orthodox Judaism, of a more sharply focused welfare measure designed to preserve religious exercise. The contention made in this case by the Village of Suffern – *i.e.*, that the service performed by the existence of the Shabbos House is merely a “convenience” made available to hospital visitors and is not within the constitutional or statutory definition of “exercise of religion” -- is alarming to the Orthodox Jewish community. Hospital visits and Sabbath observance are not matters of “convenience”; they are at the heart of traditional Jewish religious observance.

The National Jewish Commission on Law and Public Affairs ("COLPA") is an organization of volunteer lawyers that advocates the position of the Orthodox Jewish community on legal issues affecting religious rights and liberties in the United States. See, *e.g.*, the COLPA *amicus curiae* briefs filed in the Supreme Court of the United States in *Van Orden v. Perry*, 125 S. Ct. 2854 (2005); *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1 (2004); *Locke v. Davey*, 540 U.S. 712, 735 (2004); *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002); *Good News Club v. Milford 1997Cent. School*, 533 U.S. 98 (2001); *Mitchell v. Helms*, 530 U.S. 793 (2000); *City of Boerne v. Flores*, 521 U.S. 507 (1997); *Agostini v. Felton*, 521 U.S. 203 (1997); *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993); *Lee v. Weisman*, 505 U.S. 577

(1992); *County of Allegheny v. American Civil Liberties Union Greater Pittsburgh Chapter*, 492 U.S. 573 (1989); *Bowen v. Kendrick*, 487 U.S. 589 (1988); *Corporation of Presiding Bishop of Church of Jesus Christ of Latter-day Saints v. Amos*, 483 U.S. 327 (1987); *Local No. 93, Intern. Ass'n of Firefighters, AFL-CIO C.L.C. v. City of Cleveland*, 478 U.S. 501 (1986); *Ohio Civil Rights Com'n v. Dayton Christian Schools, Inc.*, 477 U.S. 619 (1986); *School Dist. of City of Grand Rapids v. Ball*, 473 U.S. 373 (1985); *Aguilar v. Felton*, 473 U.S. 402 (1985); *Mueller v. Allen*, 463 U.S. 388 (1983); *Bob Jones University v. United States*, 461 U.S. 574 (1983); *Widmar v. Vincent*, 454 U.S. 263 (1981); *United Steelworkers of America, AFL-CIO-CLC v. Weber*, 443 U.S. 193 (1979); *Regents of University of California v. Bakke*, 438 U.S. 265 (1978); *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63 (1977); *United Jewish Organizations of Williamsburgh, Inc. v. Carey*, 430 U.S. 144 (1977); *Committee for Public Ed. and Religious Liberty v. Nyquist*, 413 U.S. 756 (1973); *Wisconsin v. Yoder*, 406 U.S. 205 (1972); *Dewey v. Reynolds Metals Co.*, 402 U.S. 689 (1971); *Lemon v. Kurtzman*, 403 U.S. 602 (1971); *Tilton v. Richardson*, 403 U.S. 672 (1971); *Walz v. Tax Commission of City of New York*, 397 U.S. 664 (1970); *Board of Ed. of Central School Dist. No. 1 v. Allen*, 392 U.S. 236 (1968).

COLPA submits this *amicus* brief on behalf of, and is joined by, the following national Orthodox Jewish organizations:

- Agudas Harabonim of the United States and Canada is the oldest Orthodox rabbinical organization in the United States. Its membership includes leading scholars and sages, and it is involved with educational, social and legal issues significant to the Jewish community.

- Agudath Israel of America is the nation's largest grassroots Orthodox Jewish organization, with chapters in 36 states and over 50 cities throughout the United States.
- National Council of Young Israel is a coordinating body for more than 300 Orthodox synagogue branches in the United States and Israel. It is involved in matters of social and legal significance to the Orthodox Jewish community.
- The Rabbinical Alliance of America is an Orthodox Jewish rabbinical organization with more than 400 members. It has for many years been involved in a variety of religious, social and educational areas affecting Orthodox Jews.
- The Rabbinical Council of America is the largest Orthodox Jewish rabbinical organization in the world. Its membership exceeds one thousand rabbis, and it is deeply concerned with issues related to religious freedom.
- Torah Umesorah-The National Society for Hebrew Day Schools is the coordinating body for more than 600 Jewish day schools across the United States and Canada.
- The Union of Orthodox Jewish Congregations of America (the "U.O.J.C.A.") is the largest Orthodox Jewish synagogue organization in North America, representing nearly one thousand congregations. Through its Institute for Public Affairs, the U.O.J.C.A. represents the interests of its national constituency on public policy issues.

ARGUMENT

INTRODUCTION

We are limiting this *amicus curiae* brief to a discussion of the applicability of the Religious Land Use and Institutionalized Persons Act (“RLUIPA”) to the Village of Suffern’s effort to prevent the operation of Shabbos House within the Village. It seems plain to the *amicus* that RLUIPA protects the activities of Shabbos House and that preventing its operation would be a restriction on First Amendment liberties that may not be tolerated for even the shortest duration. The Supreme Court said in *Elrod v. Burns*, 427 U.S. 347, 373 (1976) that “[t]he loss of First Amendment freedoms, even for minimal periods of time, unquestionably constitutes irreparable injury.” If RLUIPA applies to the operations of Shabbos House – as we contend it plainly does – interference by Suffern with its continued availability to Orthodox Jews making use of its facilities is a continuing form of irreparable harm. If Shabbos House is closed for even one Sabbath, those who would use it to observe the three religious obligations described in this brief would lose their First Amendment freedom for that day. Hence the legal argument we are presenting in this brief resolves issues pertaining to ripeness and exhaustion of administrative remedies at the present juncture and requires the entry of a preliminary injunction enabling the individual plaintiffs and others who will be in their situation to observe their religious practices with no interference or hindrance.

We begin our discussion with an enumeration of three specific Jewish religious observances that are threatened by the Village’s effort to close Shabbos House. We then present three discrete violations of RLUIPA committed by the Village in attempting to close Shabbos House: *First*, Suffern violates Section 2(a)(1) of RLUIPA because it can

show no “compelling governmental interest” to justify the “substantial burden” imposed on the religious exercise of Orthodox Jews who are seeking to engage in these observances. *Second*, Suffern violates Section 2(b)(2) of RLUIPA, 42 U.S.C. 2000cc(b)(2), by discriminating against Orthodox Jewish observance as contrasted with other forms of religious observance when it permits “houses of worship” in its R-10 zoning district while prohibiting an essentially similar facility necessary for religious observance in which “worship” is a peripheral activity. *Third*, Suffern violates Section 2(b)(3)(A) of RLUIPA, 42 U.S.C. 2000cc(b)(3)(A) by totally excluding from its R-10 zoning district “assemblies” of Orthodox Jews who are gathering within the Village on Sabbaths and ten Jewish Holy Days during the year in order to be able to engage in religious exercise within the meaning of RLUIPA.

I.

THE INDIVIDUALS WHO UTILIZE THE SHABBOS HOUSE ARE ENGAGED IN FUNDAMENTAL JEWISH RELIGIOUS OBSERVANCE

A. Visiting the Sick Is a Jewish Religious Obligation Dating Back to Abraham.

The Babylonian Talmud recites in the tractate *Sotah* (14a) that it is a *mitzvah* (religious obligation) for an observing practicing Jew to visit the sick because the Bible recites that God appeared to Abraham after his circumcision, and the rabbinical teaching is that this “appearance” was a visit to Abraham while he was recuperating. The Biblical duty of emulating God, derived from *Deuteronomy* 13:5, therefore obligates an Orthodox Jew to visit the sick. The religious obligation is also cited elsewhere in the Talmud. See *Shabbos* (127a); *Bava Metzia* (30b).

On this account, the author of *Halachos Gedolos* (“Behag”), an authoritative directory of religious commandments written between the eighth and tenth centuries, enumerated visiting the sick as Positive Commandment 36 of 248 Positive Commandments prescribed in the Torah. Maimonides (1135-1204) specified that it is a rabbinically ordained duty incumbent on observant Jews. *Mishneh Torah, Hilchos Avel* (14:1). And the pre-eminent sixteenth-century codifier of Jewish Law, Rabbi Joseph Karo, specified that the obligation of visiting the sick includes caring for the material needs of a patient and sitting with him. *Shulchan Aruch, Yoreh Deah* sec. 335. Hence there can be no doubt that the individual plaintiffs and others who come to spend a Sabbath or Jewish Holy Day at Shabbos House in order to visit a patient at Good Samaritan Hospital in Suffern are utilizing the facility in order to carry out a religious exercise.

B. Caring for a Sick Parent Is Part of the Jewish Religious Duty To Honor One’s Father and Mother.

The Fifth of the Ten Commandments (*Exodus 20:12; Deuteronomy 5:16*) imposes the obligation to honor one’s parents. Maimonides specifies that it is “a positive commandment of great importance” and is equated with the honor due to God. *Mishneh Torah, Hilchos Mamrim* (6:1). The duty to honor one’s parents includes, according to Maimonides, the obligation to care for their physical needs – to bring them food and drink and to clothe and cover them. *Mishneh Torah, Hilchos Mamrim* (6:3). And in enumerating this Positive Commandment as No. 210 of 248, Maimonides quotes the Talmud in *Kiddushin* (31b) and the *Sifra* (*Leviticus 19:3*) which add that the duty includes guiding their footsteps when they are old and infirm.

In *Shulchan Aruch, Yoreh Deah* sec. 240, Rabbi Joseph Karo specified that the duty to care for the physical needs of one's parents is an obligation that calls for *personal* service by a son or daughter (sec. 240(5)). Consequently, the duty to visit one's parent in a hospital if the parent is confined because of illness is a personal religious obligation and an observance of Jewish religious exercise.

C. **Refraining from Desecration of the Sabbath and Holy Days Is a Jewish Religious Observance.**

The Fourth of the Ten Commandments not only directs that the Sabbath day be "remembered" (*Exodus* 20:8) and "guarded" (*Deuteronomy* 5:12), but commands that "you shall not do any work" on the Sabbath day (*Exodus* 20:10; *Deuteronomy* 5:14). Both Maimonides in the *Mishneh Torah* and Rabbi Joseph Karo in the *Shulchan Aruch* devote extensive discussion to the prohibitions against weekday labor on the Sabbath. See *Mishneh Torah, Hilchos Shabbos*, Ch. 7; *Shulchan Aruch, Orach Chaim*, secs. 301-344.

Rabbi Shlomo Ganzfried, the author of an authoritative summary Code of Jewish Law called the *Kitzur Shulchan Aruch* published in 1870, called the holy Sabbath day "the foundation of our faith." *Kitzur Shulchan Aruch*, Ch. 72, para. 1. The *Mishneh Brurah*, a commentary on the *Shulchan Aruch* by Rabbi Yisroel Meir Kagan that is widely accepted by Ashkenazic Jewry today as binding authority on Jewish law, states in the introduction to the volume on the laws of the Sabbath that "the Sabbath is the foundation of our faith in that it teaches us that the world has a Creator . . . and that we are obligated to serve Him." The *Mishneh Brurah* adds that "our Sages state that 'everyone who keeps the Sabbath is regarded as if he kept the entire Torah, and everyone

who transgresses the Sabbath is regarded as if he denied the entire Torah' because the Sabbath is a foundation of our faith." Similar observance applies to certain Holidays during the Jewish calendar year: the two days of Rosh Hashanah, Yom Kippur, the first two days of Sukkot, Shemini Atzeret and Simchat Torah, the first two and the final two days of Passover, and the two days of Shavuot.

Desecration of the Sabbath or Jewish Holy Days includes conduct that comes within 39 broadly defined forms of labor. *Talmud, Shabbos* 49b. These include the kindling of fire, thereby effectively prohibiting initiating electrical power and driving an automobile. Other categories of prohibited activity effectively bar riding in a car or on public transportation. See Rabbi Moshe Feinstein, *Igrot Moshe* (YD vol. I §44, New York 1959). It is, therefore, now well-known that Orthodox Jews cannot travel on the Sabbath or on Holy Days and are able to attend synagogue services or otherwise visit outside their own homes only by walking. See e.g., *LeBlanc-Sternberg v. Fletcher*, 763 F. Supp. 1246, 1248 (SD.N.Y. 1991). (“Travel by car on the Sabbath and on holidays is barred by Jewish law.”)

II.

BY UTILIZING ITS ZONING CODE TO PREVENT ORTHODOX JEWS FROM OBSERVING THE RELIGIOUS DUTIES OF VISITING THE SICK, HONORING PARENTS, AND OBSERVING THE SABBATH WITH NO “COMPELLING GOVERNMENTAL INTEREST,” SUFFERN VIOLATES SECTION 2(a)(1) OF RLUIPA

Section 2(a)(1) of RLUIPA prohibits implementation of a land use regulation “in a manner that imposes a substantial burden on the religious exercise of a person” unless the government agency implementing the regulation demonstrates “a compelling governmental interest” in the particular implementation. Section 5(b) of RLUIPA directs that the words of the Act, including “religious exercise,” are to be construed “in favor of a broad protection of religious exercise, to the maximum extent permitted by the terms of [RLUIPA] and the Constitution.” Moreover, courts in the Second Circuit have acknowledged that the definition of “religious exercise” set forth in RLUIPA is broader than the definition in its predecessor, the Religious Freedom Restoration Act.

Westchester Day School v. Village of Mamaroneck, 379 F. Supp. 2d 550, 558 n.5 (S.D.N.Y. 2005); *Marria v. Broaddus*, 2003 U.S. Dist. LEXIS 13329, at * 45-46, 2003 WL 21782633, at * 12 (S.D.N.Y. 2003).

As demonstrated in the preceding section of this brief, the persons using Shabbos House are engaged in the religious exercise of visiting the sick on Saturdays and weekdays that coincide with Jewish Holy Days while observing the religious command to honor – and not desecrate – the Sabbath. In the frequent instances when the hospital patient is a parent of the individual visitor – as was true of plaintiffs Jacob Levita,

Michael Lippman , and Sara Halperin -- they are also fulfilling the religious duty of the Fifth Commandment to honor one's parents.

This is more than adequate to establish that the facility that Suffern is seeking to close is "devoted to a religious purpose" within the meaning of the Second Circuit's ruling in *Westchester Day School v. Village of Mamaroneck*, 386 F.3d 183, 189 (2d Cir. 2004). Suffern's assertion that the living facility that serves this three-part religious function in a very focused and concentrated manner is merely a "convenience" and not a form of religious exercise is plainly wrong. And by prohibiting use of the Shabbos House, Suffern "imposes a substantial burden" on this religious exercise because Orthodox Jews simply will be unable to make hospital visits to their parents in Good Samaritan Hospital on the Sabbath if they cannot sleep within walking distance of the hospital. Many persons are unable to walk 1.7 miles several times during the 25-hour period covered by a Sabbath or Holy Day.

It is relevant, we submit, to note several critical distinctions between the operations of Shabbos House and the ordinary hotel or rooming house:

First, Shabbos House is not operated for profit. Indeed, it does not even require those using its facilities to cover the cost of the operation. The service is entirely free of charge. The operators of the living facility are patently motivated by the religious command of their consciences to facilitate religious observance. It demeans their religious motivation and the integrity of the project to characterize it as a hotel or rooming house.

Second, Shabbos House is totally shuttered on days other than those when it is put to religious use. Although the facility is near Good Samaritan Hospital, it is not opened

for visitors to the hospital on any day other than those when transportation by car is prohibited to Orthodox Jews. This limitation proves again – if repeated proof is needed – that its operation is singularly religious. In this respect, Shabbos House is distinguishable from the Ronald McDonald Houses that are made available, for non-religious charitable motives, to families of children who are hospitalized.

Third, even on days when it is available, use of the building is limited to the religious needs of those using it. They must have a place to sleep on Friday nights in order to avoid desecration of the Sabbath. Hence sleeping accommodations are provided in the various rooms of the building. But use of the kitchen for cooking is not permitted and food is not sold to visitors because the visitors can bring prepared foods with them for use on the Sabbath. This limitation on the use of the facility demonstrates that it is not a hotel or rooming house which, in the ordinary commercial context, provides not just room but also some form of board for its occupants. Here again the *religious* aspect of this highly meritorious charitable enterprise is distinguishable from the charitable motives that are behind the Ronald McDonald Houses.

Suffern cannot demonstrate any “compelling governmental interest” in preventing the operation of Shabbos House. This term “is the most demanding test known to constitutional law.” *City of Boerne v. Flores*, 521 U.S. 507, 534 (1997). It requires that government establish “interests of the highest order.” *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 546 (1993), quoting from *Wisconsin v. Yoder*, 406 U.S. 205, 215 (1972). Interests such as alleged traffic congestion, adverse visual impacts or adverse effects on property values, or parking problems do not qualify as “compelling governmental interests.” *Westchester Day School v. Village of Mamaroneck*, 417 F. Supp.

2d 477, 562-563 (S.D.N.Y. 2006); *Guru Nanak Sikh Society of Yuba City v. County of Sutter*, 326 F. Supp. 2d 1140 (E.D. Cal. 2003); *Elsinore Christian Center v. City of Lake Elsinore*, 291 F. Supp. 2d 1083 (C.D. Cal. 2003). Hence the effort to close Shabbos House violates Section 2(a)(1) of RLUIPA.

III.

**BY ALLOWING ONLY A CONVENTIONAL
“HOUSE OF WORSHIP” IN ITS R-10 ZONE
AND EXCLUDING AN OBJECTIVELY SIMILAR
INSTITUTION WHOSE EXCLUSIVE PURPOSE
IS TO ASSIST RELIGIOUS OBSERVANCE OF
ORTHODOX JEWS, SUFFERN VIOLATES
SECTION 2(b)(2) OF RLUIPA**

Section 2(b)(2) of RLUIPA, 42 U.S.C. 2000cc(b)(2), prohibits discrimination against “any assembly or institution on the basis of religion or religious denomination.” Suffern violates this provision of RLUIPA by limiting uses in its R-10 zone to residences and houses of worship, thereby excluding a religious use that is not a traditional “house of worship” but that serves an assembly of persons engaged in religious exercise in a somewhat unconventional manner.

What practical real-life difference is there between the use to which Shabbos House would be put if it were a conventional “house of worship” and the use to which it is put by the Orthodox Jews who engage its facilities on Sabbaths and Jewish Holy Days? Just as conventional “houses of worship” are principally utilized for services one day a week (Fridays for Muslims, Saturdays for Jews, and Sundays for Christians), Shabbos House is primarily used one day a week. When “houses of worship” are attended, there are temporary traffic, parking, and noise problems. The same is true – albeit to a lesser

degree because of the sleeping capacity of Shabbos House and because of the restriction on the Sabbath of travel by car – of the use of a building for the religious purposes served by Shabbos House. And conventional “houses of worship” routinely provide parsonages or other sleeping and living quarters on the premises to resident or visiting clergy.

In every material respect, the refusal of Suffern to permit Shabbos House to operate within an R-10 zone in the Village while traditional “houses of worship” are authorized is discrimination against a “religion or religious denomination” that demands of its followers more than attendance at a formalized prayer service or textual Biblical study in a classroom. Hence it violates Section 2(b)(2) of RLUIPA.

IV.

**BY EXCLUDING FROM ITS R-10 ZONE THE
ASSEMBLY OF ORTHODOX JEWS WHO GATHER
ON SABBATHS AND HOLY DAYS TO OBSERVE
THE RELIGIOUS PRECEPTS OF VISITING
THE SICK, HONORING PARENTS, AND OBSERVING
THE SABBATH, SUFFERN VIOLATES
SECTION 2(b)(3) OF RLUIPA**

Section 2(b)(3) of RLUIPA, 42 USC 2000cc(b)(3), prohibits the implementation of any land use regulation that “totally excludes religious assemblies from a jurisdiction.” Suffern violates that provision of RLUIPA by enforcing a limitation regarding its R-10 zone that totally excludes the “religious assembly” of Orthodox Jews who seek to gather at Shabbos House on Saturdays and Jewish Holy Days in order to observe the religious commandments of visiting the sick, honoring one’s parents, and honoring the Sabbath by avoiding its desecration. That is a “religious assembly” consisting of a varying group of

Orthodox Jews who may not, under the terms of RLUIPA, be totally excluded from the Village of Suffern.

Subsection 3 of Section 2(b) of RLUIPA was plainly designed to serve a purpose different from Section 2(a) and from the first two subsections of Section 2(b), which relate to discrimination. This case, involving not merely discriminatory treatment of a group of religious observers but their actual exclusion from the Village of Suffern under the guise of enforcement of the Village's zoning code, presents the paradigmatic instance in which Section 2(b)(3) should be invoked to invalidate governmental suppression of religious exercise.

CONCLUSION

For the foregoing reasons, the Court should find that the Village of Suffern violates RLUIPA by hindering or preventing the operation of Shabbos House through the administration of its zoning code and should enter a preliminary and permanent injunction as requested by the plaintiffs in this action.

Dated: July 5, 2006

Respectfully submitted,

Of Counsel

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