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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW HAMPSHIRE

GRACE NEW ENGLAND; and

PASTOR HOWARD KALOOGIAN,

Plaintiffs,

v.

TOWN OF WEARE, NEW HAMPSHIRE;

TONY SAWYER, in his individual and official capacities; and

CRAIG FRANCISCO, in his individual and official capacities,

Defendants.

Civil Action No.: 1:24-cv-00041-PB-AJ

PLAINTIFFS' MEMORANDUM OF LAW IN SUPPORT OF THEIR MOTION FOR A PRELIMINARY INJUNCTION

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INTRODUCTION

Pastor Howard Kaloogian moved to Weare, New Hampshire (the "Town") hoping to connect with the community in a variety of ways. He has spent countless time and resources to do just that. From hosting well-attended political events to bringing together a small group for an intimate Bible study, Pastor Kaloogian has sought to make a difference in others' lives. Perhaps his biggest leap of faith was to follow God's calling to open a church—Grace New England (the "Church").

Given Pastor Kaloogian's history of hosting a wide range of events, public and private, small and large, he thought there would be no issue with hosting small religious services using the largest room at his home, the renovated barn. Indeed, the Town's Planning Board had already indicated that such gatherings would be acceptable and not subject to further regulation. But once the Church started meeting, the Town changed its mind. While allowing others in the Town to meet for a variety of secular reasons, the Town has now determined that Pastor Kaloogian and the Church need to undergo an extensive and onerous site plan process before hosting religious gatherings. This came as a surprise to Pastor Kaloogian, who did not think it was controversial to host peaceful and intimate gatherings on his property as he and others had done before and across the Town. However, the Town brought increased pressure on the Church to comply with its demands, threatening significant fines and legal action unless the Church complied with the Town's demands, citing N.H. Rev. Stat. § 674:43 and Weare Site Plan Review Regulations (collectively, the "Ordinances"). Lacking clear answers about the Town's differential treatment of the Church or why these burdens were needed ***now***, the Church filed suit to protect its constitutional rights.

Federal and state law protect the Church's religious activities. The Town has drawn a distinction between religious and non-religious assemblies without good reason. The Religious

Land Use and Institutionalized Persons Act ("RLUIPA") and the First Amendment do not tolerate such distinctions. *See* U.S. Const. amend. I; RLUIPA, 42 U.S.C. §§ 2000cc *et seq.* The application of the Ordinances also substantially burdens Pastor Kaloogian's religious exercise. And while the Town points to arbitrary regulations to support its position, it overlooks that other state statutes expressly forbid its actions.

Absent intervention by this Court, the Church faces fines and enforcement actions unless it ceases exercising its religious beliefs or undergoes an onerous and expensive regulatory process. A preliminary injunction is necessary to end the Town's disfavored treatment of religious land use compared to secular meetings. Enjoining such activity will not only unquestionably prevent the irreparable harm long recognized to accompany the loss of First Amendment rights, but will also serve the public interest by allowing Pastor Kaloogian and the Church to serve their community to the best of their abilities.

FACTUAL ALLEGATIONS

I. Pastor Kaloogian moves to New Hampshire, uses his home for community gatherings, and begins operating the Church.

Pastor Kaloogian moved to the Town in 2015. His home, situated on a spacious five-acres of land, consists of two main buildings: the primary residence and a renovated barn. The barn used to be a woodshop and party barn—well-known in the community for hosting acclaimed parties from the previous property owner—but has since undergone significant renovations. Now, the renovated barn consists of pews, a pulpit, an insulated ceiling, and an upgraded heating system. Pastor Kaloogian has also renovated the property to accommodate visitors, such as installing a retaining wall to allow off-street parking. Given Pastor Kaloogian's strong sense of community and desire to bring people together, he wanted to host events on his property. For example, Pastor Kaloogian and his wife considered using their home, specifically the barn, to host weddings,

dances for adults with disabilities, and other similar events.

But before hosting these events, Pastor Kaloogian and his wife went through the proper channels to see if any approvals were needed to proceed. Pastor Kaloogian and his wife went before the Town's Planning Board to present their idea. The Planning Board did not require the submission of a site plan, but informed them that, so long as they did not charge for the events, the barn could be used for whatever lawful purpose. These lawful purposes presumably allowed a wide range of events or gatherings, religious or non-religious. Pastor Kaloogian and his wife, therefore, proceeded with their plan to host events at their home, including their barn, for next several years.

Many of these events included non-religious gatherings. For example, the Kaloogian's used the barn as a meeting place for an observance of the annual Pine Tree Riot—an event widely promoted by the community organization Americans for Prosperity. The property has also supported a range of political and social events. One of those events consisted of a visit from the well-known politician Robert F. Kennedy, Jr. and garnered hundreds of community members in attendance. Other events that have drawn a crowd and used the Kaloogian's barn include a Governor Asa Hutchinson meet-and-greet, local republican party meetings, congressional campaigns, political fundraisers, and meet the candidate events. Another included at least one wedding, in which the barn was used as part of the event. Other social events hosted in their home were less formal, including pinochle games, backgammon tournaments, Super Bowl parties, birthday parties, a military sendoff party, and an annual New Year's Eve party. Additionally, their home played host to many other events related to religious gatherings. For example, Pastor Kaloogian started to host weekly Bible studies in his family room with roughly 20 people in attendance. Pastor Kaloogian also met with other Church members in other parts of his home to

counsel and engage in fellowship, including hosting Thanksgiving meals and engaging in communion in his kitchen and dining room.

With this backdrop, Pastor Kaloogian began prayerfully considering what else he could use his home for to glorify God's kingdom. It soon became evident that God called him to begin a church. That is exactly what Pastor Kaloogian did in the summer of 2023 when he started a small church plant. Pastor Kaloogian, aware that the Town had noted previously that religious and non-religious uses could occur at his home absent charging a fee, thought that the renovated barn would be a comfortable and convenient place to start hosting services for the roughly 25 people who now attend the Church's weekly services. Pastor Kaloogian, and other Church members, enjoyed this intimate setting and did not think twice about whether this could possibly violate the law.

II. The Town engages in a coordinated effort to stop the Church from peacefully assembling.

Shortly after opening the Church doors, Pastor Kaloogian received an unannounced visit from Tony Sawyer, Zoning Officer for the Town. Mr. Sawyer saw an advertisement for a church gathering at Pastor Kaloogian's home address, and informed Pastor Kaloogian that he was not allowed to hold religious assemblies in his home because it was zoned residential. Mr. Sawyer indicated that Pastor Kaloogian needed to secure a conditional use permit for the Church to continue meeting in his home, although he noted that it was unlikely to be approved. Mr. Sawyer then provided Pastor Kaloogian with a form entitled "Planning Board Application for Conceptual or Design Review," and requested that it be submitted for consideration at an upcoming Planning Board meeting. Although Pastor Kaloogian offered to fill it out during the visit, Mr. Sawyer declined. Before leaving, Mr. Sawyer indicated that he did not want to get attorneys involved formally yet, nor would his personal beliefs—that he was an atheist—have any bearing on the

situation.

After Mr. Sawyer's visit, Pastor Kaloogian sent a letter to Chairman Craig Francisco documenting what had occurred. Pastor Kaloogian also expressed concerns that completing the form would be contrary to the U.S. Constitution and the Town's zoning ordinances. In his letter, Pastor Kaloogian outlined the many events that had transpired on his property in the past several years, many of which were widely promoted in the Town. As to the local zoning ordinances, Pastor Kaloogian's letter called attention to Section 17.2.1, which explicitly noted that churches are permitted as of right in districts zoned residential. Considering this, and the fact that he believed the First Amendment protected the Church's gathering, Pastor Kaloogian respectfully declined to submit the provided form. The Church, therefore, continued gathering on a weekly basis.

About a month later, on September 30, 2023, the Town sent a letter to Pastor Kaloogian informing him that the Planning Board determined that he would need to apply for a Site Plan to continue gathering as a church. The letter outlined certain Site Plan Regulations that allegedly applied to the Church. Nonetheless, Pastor Kaloogian maintained that the Town's application of the Ordinances to the Church violated state and federal law.

In October 2023, preparing for the upcoming winter, Pastor Kaloogian purchased a propane-powered radiant heater designed for barns like his. Although he was able to hang the unit himself, Pastor Kaloogian asked a licensed plumber to obtain a permit from the Town so that the unit could be connected to a gas line, which he sought from the Town on October 20, 2023. The Town employees laughed at the plumber's request when they realized that it would be for the Church's use. Ultimately, the Town employees refused to give the permit forms to the plumber because they knew that connecting the gas line to the radiant heater was in connection with the

Church hosting religious gatherings. But despite the Town's refusal, the Church continued to try to work with the town building inspector to fix this issue.

While permit issues continued, the Town sent another letter, on October 23, 2023, demanding that Pastor Kaloogian "Cease and Desist on [his] property" and "immediately stop any assembly regarding Grace New England Church." Compl., Ex. A. The letter indicated that the cease-and-desist notice "will remain in effect until a site plan is submitted, reviewed and there is a decision made by the Town Planning Board." *Id.* The letter also indicated that Pastor Kaloogian would be subject to significant daily fines for non-compliance—$275 for the first offense and $550 for subsequent offences each day that such violation is found. In response, Pastor Kaloogian retained legal representation and answered the cease-and-desist notice three days later. Counsel detailed how the notice violated the Free Exercise Clause, treats religious activity worse than comparable secular gatherings in individual homes, and runs afoul of the Town's own zoning ordinances. That same day, on October 27, 2023, Mr. Sawyer informed Paster Kaloogian's counsel that the cease-and-desist order would be lifted temporarily.

The Town's attorney responded to counsel's letter on December 10, 2023. The attorney indicated that "use of the barn to hold religious services requires site plan approval, just as any other non-residential use would require." Compl., Ex. G. The Town's attorney further explained that church services are different from other gatherings that might occur at one's home because the public may attend the Church. The Town again demanded that Pastor Kaloogian apply for site plan approval, or the Town may "seek the assistance of the Hillsborough County Superior Court to require him to do so." *Id.* Also in December 2023, Pastor Kaloogian's plumber received the permit to connect the gas line to his new radiant heater. Bob Clark, the Town's building inspector, then came to the property and approved the gas line connection. But Mr. Clark did not grant final

approval, rather Mr. Clark noted that he needed time to read the radiant heater's manual and promised to return later with the fire chief. Neither Mr. Clark nor the fire chief came back to visit the property.

In late January, after speaking with one of the Town Board of Selectmen members, Pastor Kaloogian submitted a letter to the Town Board of Selectmen. He explained his concerns that the Town's employees were interfering with his right to engage in worship at his property. Pastor Kaloogian noted that his home—his residence and the barn—are not "church buildings" but are simply where the church meets. Compl., Ex. I. Pastor Kaloogian reiterated that he has held many previous community events and activities without issue, and asked whether the Town Board of Selectmen agrees with Mr. Sawyer and Mr. Francisco's position. On February 5, 2024, the Board of Selectmen met to discuss several agenda items, including Pastor Kaloogian's letter. The Board of Selectmen discussed the upcoming February 10, 2024 deadline for Pastor Kaloogian to respond about the Town's position regarding filing a site plan application. One member referenced a New Hampshire statute, which states that "no zoning ordinance or site plan review regulation shall prohibit, regulate or restrict the use of land or structures primarily used for religious purposes." N.H. Rev. Stat. § 674:76 ("RSA 674:76"). The Board of Selectmen then discussed whether this statute had been considered but did not resolve this open question.

Two days after the Board of Selectmen meeting, Jack Shephard, acting as an inspector for the Town, arrived to inspect the installed radiant heater. He noted that the radiant heater needed minor corrections, such as smoothing crinkled joint tape, but then clarified that as a place of public assembly, he was required to notify the state fire marshal about the Church's gatherings. In that regard, Mr. Shephard indicated that the radiant heater failed to get the room to 72-degrees, as would be required by the fire marshal, in the short time that he was there, and the lack of insulation

could be an issue. Thus, the Town created yet another reason to prevent the Church from gathering: Pastor Kaloogian now needed permission from the New Hampshire Fire Marshal. During this visit, Mr. Shephard indicated that he had a pew much like Pastor Kaloogian's in his garage, and that he would be filling that up with guests for an upcoming Super Bowl party. When asked, Mr. Shephard agreed that party was likely an assembly, but had not sought the same approvals—including from the State of New Hampshire—required of Pastor Kaloogian.

Pastor Kaloogian and the Church have not applied for site approval, as they maintain their objections that this violates both federal and state law. Doing so would also be futile, as evidence by the Town's employees indicate that it would likely not be approved. Indeed, going through with the site plan process would be unduly burdensome for someone simply wishing to use his property for small religious gatherings by needlessly requiring the expenditure of great expense and time. With the looming February 10, 2024 deadline, and the town attorney's threat of a lawsuit to force Pastor Kaloogian's compliance with the Zoning Board's demands, the Church and Pastor Kaloogian filed the instant lawsuit.

LEGAL STANDARD

A "district court faced with a motion for a preliminary injunction must weigh four factors: '(1) the plaintiff's likelihood of success on the merits; (2) the potential for irreparable harm in the absence of an injunction; (3) whether issuing an injunction will burden the defendants less than denying an injunction would burden the plaintiffs; and (4) the effect, if any, on the public interest.'" *Swarovski Aktiengesellschaft v. Bldg. No. 19, Inc.*, 704 F.3d 44, 48 (1st Cir. 2013) (quoting *United States v. Weikert*, 504 F.3d 1, 5 (1st Cir. 2007)); *see also Winter v. Nat. Res. Def. Council*, 555 U.S. 7, 20 (2008). "[W]hile each of the four factors is important," the plaintiff's likelihood of success on the merits carries the most weight. *Swarovski*, 704 F.3d at 48; *Borinquen Biscuit Corp. v. M.V. Trading Corp.*, 443 F.3d 112, 115 (1st Cir. 2006).

ARGUMENT

The Town has drawn an express distinction between religious and non-religious assemblies. For years, the Town has allowed secular events, both in and out of Pastor Kaloogian's home, to take place without issue. But once Pastor Kaloogian decided to start the Church and host intimate religious gatherings, the Town then objected. And this opposition does not require just a quick fix. Rather, the Town is attempting to force Pastor Kaloogian and the Church to comply with onerous site plan regulations, or else face substantial legal penalties, including fines. This not only violates both federal and state law, but it also runs counter to the very principles upon which this Nation was founded.

The Church is likely to succeed on the merits of its equal terms and substantial burden RLUIPA claims. Pastor Kaloogian is also likely to succeed on his First Amendment Free Exercise claim given that the Ordinances are not neutral nor generally applicable and fail strict scrutiny. And finally, Pastor Kaloogian is likely to succeed on his state constitution and state statutory claims. The Court should accordingly enjoin the Town from enforcing the Ordinances.

I. Pastor Kaloogian and the Church have a strong likelihood of success on their claims.

A. The Town's Ordinances violate RLUIPA.

Pastor Kaloogian and the Church are likely to succeed on the merits of their claims under RLUIPA, 42 U.S.C. §§ 2000cc *et seq*. RLUIPA prohibits the Town 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 that regulation is the "least restrictive means" of furthering a "compelling governmental interest." *Id.* § 2000cc(a)(1). RLUIPA also prohibits the Town 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." *Id.* § 2000cc(b)(1).

The Town has violated RLUIPA in two ways. First, the Town is applying its Ordinances to Pastor Kaloogian and the Church in a manner that violates RLUIPA's equal terms provision. Second, the Town is violating RLUIPA by imposing a substantial burden on Pastor Kaloogian's free exercise of religion without a compelling interest or narrow tailoring.

1. The Town's Ordinances violate RLUIPA's equal terms provision as applied to Pastor Kaloogian and the Church.

Where a regulation on land use applies unequal terms to religious use, it violates RLUIPA. *See* 42 U.S.C. § 2000cc(b)(1). The Ordinances easily constitute a land use regulation the Town is imposing against Pastor Kaloogian and the Church's desire to religiously assemble. *See id.* § 2000cc-5(5) (defining a land use regulation to include "a zoning or landmarking law, or the application of such a law"). Thus, the Church need only show that the Town is enforcing the Ordinances in a discriminatory manner that treats the Church unequally than its secular comparators. *See Signs for Jesus v. Town of Pembroke, NH*, 977 F.3d 93, 109 (1st Cir. 2020). But that is precisely what the Town is doing here.

The Town has threatened to levy daily fines and sue Pastor Kaloogian and the Church for refusing to stop exercising its constitutional rights. Although the Town asserts that the Ordinances now apply to the Church's intimate religious services, it did not take that position with other secular events. The Town does not require secular gatherings, some even more populated and formal than the weekly church service, to obtain a site plan—the Town's Planning Board admitted this policy to the Kaloogians. Indeed, the Town's practice for years has been to allow Pastor Kaloogian to use his property, including the barn, to host widely-publicized events—both private and public. These events have included everything from weddings to events with well-established community groups. The Kaloogian property has even hosted an assembly of *hundreds* for a political candidate meet-and-greet. The Town's actions therefore apply unequally to gatherings

on the same property depending upon whether such gatherings are secular or religious. But the Town's unequal treatment extends beyond gatherings at the Kaloogians' home without a site plan. Instead, the Town has also turned a blind eye to other residents' secular assemblies, from Super Bowl parties to book clubs. Many of these secular events have outsized the Church's intimate gatherings and been more burdensome on traffic and parking, but the Town did not object to or otherwise attempt to impose burdensome regulations on those events, thereby limiting its opposition only to religious gatherings.

To be sure, the First Circuit has held that secular comparators should "be similarly situated with respect to the purpose of the underlying regulation." *Signs for Jesus v. Town of Pembroke*, 977 F.3d 93, 109 (1st Cir. 2020). The Ordinances' stated purpose here is to, among other things, guard safety and health-related conditions, protect public welfare, and control vehicle and pedestrian movement. *See* Ex. H. Each of the secular comparators listed above similarly impact each of these regulatory purposes. *See Lighthouse Inst. for Evangelism, Inc. v. City of Long Branch*, 510 F.3d 253, 265 (3d Cir. 2007) (stating equal terms analysis should focus on the "impact of the allowed and forbidden [uses] . . . in light of the purpose of the regulation"). The only difference is that the Church's gatherings are religious while others are not.

There is no question that "[b]y applying different standards for religious gatherings and nonreligious gatherings having the same impact, [the Town's enforcement action] impermissibly targets religious assemblies." *Konikov v. Orange Cnty.*, 410 F.3d 1317, 1329 (11th Cir. 2005). Indeed, the facts of this case parallel those of the Eleventh Circuit's *Konikov* decision. There, the city attempted to shut down prayers in a rabbi's home while allowing gatherings of a social or family-related purpose, like a cub scout meeting, game night, or birthday party. *Id.* at 1327–29. The Eleventh Circuit concluded that this zoning policy violated RLUIPA's equal terms provision

as applied to the rabbi. *Id.* at 1329. The same is true here—the Town has given a free pass to secular uses of the Kaloogian's home and other comparable events around the Town. But once a safe and intimate religious gathering assembled, the Town then started to treat the Church's religious use of the barn on less than equal terms than non-religious uses. The Church and Pastor Kaloogian are therefore likely to succeed on their equal terms claim.

2. The Town's Ordinances violate RLUIPA's substantial burden provision.

RLUIPA also prohibits land use regulation where it imposes a substantial burden on religious use unless it can survive strict scrutiny. 42 U.S.C. § 2000cc(a)(1). As discussed above, the Ordinances are land use regulations under RLUIPA. Thus, if they substantially burden Pastor Kaloogian and the Church's assembly, they must be the least restrictive means of furthering a compelling interest.

When determining whether a land use regulation substantially burdens someone's religious use, the First Circuit "use[s] a functional approach to the facts of a particular case [and] recognize[s] different types of burdens and that such burdens may cumulate to become substantial." *Roman Cath. Bishop of Springfield v. City of Springfield*, 724 F.3d 78, 94 (1st Cir. 2013). In taking this approach, the First Circuit highlights several factors for determining whether a particular regulation imposes a substantial burden, including: "whether the regulation at issue appears to target a religion, religious practice, or members of a religious organization because of hostility to that religion itself"; "whether local regulators have subjected the religious organization to a process that may appear neutral on its face but in practice is designed to reach a predetermined outcome contrary to the group's requests"; and "whether the land use restriction was 'imposed on the religious institution arbitrarily, capriciously, or unlawfully.'" *St. Paul's Foundation v. Ives*, 29 F.4th 32, 39 (1st Cir. 2022) (quoting *Roman Cath. Bishop of Springfield*, 724 F.3d at 96–97).

Local municipalities may be found to have acted arbitrarily and capriciously when they "base their decisions on misunderstandings of legal principles," act "unlawful under state or local law," or where there is evidence that "the plaintiffs have been, are being, or will be (to use a technical term of art) jerked around." *Id.* at 40 (cleaned up).

These factors weigh heavily in Pastor Kaloogian and the Church's favor. For example, the evidence demonstrates that the Ordinances at issue are targeting religious practice based on apparent hostility to that religion itself. The Kaloogians went before the Town's Planning Board and received its blessing to host public and private events without a site plan. But when he started the Church and wanted to host religious services on the same property, the Town suddenly required a site plan. The distinction, and substantial burden, could be no clearer. Although the Town tries to paint its process as neutral, the process is anything but that. The Town has conducted a series of calculated moves to prevent or discourage the Church from using Pastor Kaloogian's barn for religious purposes, such as unannounced visits and requiring him to receive an extra layer of permission from the state fire marshal. Even the Town's own inspector agreed that what constitutes an assembly is unclear, further indicating the arbitrary way the Town may enforce these Ordinances in a discriminatory manner.

The Town's application of these Ordinances has also been done arbitrarily, capriciously, and unlawfully. Section 17.2.1 of the Town's Zoning Ordinances states that churches are permitted as of right in districts zoned residential. Despite this, the Town contends that the Church's religious gatherings in a resident's home constitute a "non-residential" use requiring "site plan approval." Compl., Ex. G. Assuming *arguendo* that position holds water, the Town ignores that religious uses are exempted from such site plan approval. *See* RSA 674:76. Specifically, the New Hampshire statutory scheme requires that "[n]o zoning ordinance or **site plan review**

regulation shall prohibit, regulate, or restrict the use of land or structures primarily used for religious purposes." *Id.* (emphasis added). This critical error shows that the Town's position is based on "misunderstandings of legal principles" and is itself "unlawful." *St. Paul's Foundation v. Ives*, 29 F.4th at 40. This misunderstanding is enough to confirm that the Town is imposing a substantial burden on the Church's religious practice and assembly. But even if that was not enough, the record also establishes that Pastor Kaloogian and the Church "have been, are being, or will be (to use a technical term of art) jerked around." *Id.* From unannounced visits to being laughed at when requesting routine permits, the Town has made clear that Pastor Kaloogian and the Church's religious exercise is unwelcomed.

In addition, forcing Pastor Kaloogian and the Church to jump through these extensive and expensive site plan requirements is substantially burdensome. The Town would no doubt require Pastor Kaloogian and the Church to implement upgrades and commercial standards that are not meant to apply to a small, intimate religious gathering in someone's home. Those requirements would likely force Pastor Kaloogian and the Church out of its current worship space. And even if the Church did implement all upgrades required by the Town, there is still no guarantee the Church would be allowed to host its religious gatherings at Pastor Kaloogian's home. In fact, the Town's agents have indicated just the opposite. Any alternative space in his home would be too small and, at this point, any other location would be too expensive for the Church to support. Should the Church's regular attendance exceed 50 people, the Church would become more financially sustainable and intends to relocate to a larger space.

In sum, implementing these measures is simply infeasible and thus an independent substantial burden in violation of RLUIPA. *Int'l Church of Foursquare Gospel v. City of San Leandro*, 673 F.3d 1059, 1068 (9th Cir. 2011) ("expense . . . indicative of substantial burden"

because "a burden need not be found insuperable to be held substantial") (cleaned up); *Sts. Constantine & Helen Greek Orthodox Church, Inc. v. City of New Berlin*, 396 F.3d 895, 901 (7th Cir. 2005) ("delay, uncertainty, and expense" associated with relocating to another property for worship constitutes a substantial burden).

Nor can the Town carry its burden to demonstrate that its requirements are narrowly tailored to accomplish a compelling government interest. 42 U.S.C. §§ 2000cc(a)(1), 2000cc-2(b). Compelling governmental interests must be "interests of the highest order." *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 546 (1993). Not only has the Town not identified a compelling reason to deny Pastor Kaloogian the use of his property for religious purposes, there is no compelling government interest justifying the restriction of religious meetings within a citizen's home. Forcing intimate religious gatherings to go through onerous site plan requirements, that is both lengthy and expensive, also cannot be deemed "the least restrictive means of furthering that" interest. *Int'l Church of Foursquare Gospel*, 673 F.3d at 1070. There is no compelling reason to bar Pastor Kaloogian and the Church from hosting their weekly religious services.

Even if the Town could identify a compelling justification for burdening religious exercise, it cannot meet the demands of the least restrictive means standard. *See Holt v. Hobbs*, 574 U.S. 352, 364–65 (2015) (describing the standard as being "exceptionally demanding" and requiring the government to "show that it lacks other means of achieving its desired goal without imposing a substantial burden on the exercise of religion by the objecting party" (cleaned up)). Here, the Town could simply treat the Church's religious gatherings the same way it treats other secular gatherings. Indeed, it could treat them the same way the Planning Board explicitly told the Kaloogians the Town treats other secular events, that no site plan was required.

Pastor Kaloogian and the Church are therefore likely to succeed on the merits of their RLUIPA claims.

B. The Town is violating Pastor Kaloogian and the Church's First Amendment right to Free Exercise.

The United States Constitution, as incorporated against the state, bars laws "prohibiting the free exercise" of religion. U.S. Const. amend. I; amend. XIV. The Supreme Court and First Circuit have interpreted this provision to require that for state and local governments to avoid strict scrutiny, laws that burden religious exercise must be both neutral and generally applicable. *See Roman Cath. Bishop of Springfield*, 724 F.3d 78 at 101.

There can be no question that the Church "seeks to engage in a sincerely motivated religious exercise." *Kennedy v. Bremerton Sch. Dist.*, 597 U.S. 507, 525 (2022). An essential part of its religious activities involve celebrating Christian holidays, engaging in communion with family and friends, conducting Bible studies, and holding weekly services. But more critically, the Town's Ordinances here are not neutral or generally applicable. Regulations flunk the test "whenever they treat ***any*** comparable secular activity more favorably than religious exercise." *Tandon v. Newsom*, 141 S. Ct. 1294, 1296 (2021). That is true here based on how these Ordinances have been applied in the Town.

Defendants' application of the Town's Ordinances violates Pastor Kaloogian and the Church's right to the free exercise of religion by substantially burdening this religious exercise in an individualized and discretionary way. As noted above, the Planning Board, for years, has allowed the Kaloogians to use their property, including the barn, to host widely-publicized events—both private and public. From a wedding to political events garnering hundreds of attendees, the Town has not required site plans for secular events. But it has restricted religious gatherings at Pastor Kaloogian's home. This underscores the fact that Defendants' Ordinances are

not applied in a neutral or generally applicable manner. Therefore, the Town's actions are subject to strict scrutiny. As with the RLUIPA substantial burden claim, strict scrutiny means the government must demonstrate its course was "justified by a compelling state interest and was narrowly tailored in pursuit of that interest." *Kennedy*, 597 U.S. at 525. "That standard is not watered down; it really means what it says." *Tandon*, 141 S. Ct. at 1298 (quotation marks omitted). Accordingly, when strict scrutiny applies, a state law "rare[ly]" survives. *Carson v. Makin*, 142 S. Ct. 1987, 1997 (2022). And, for the same reasons as above, the Town's actions cannot survive the narrow tailoring requirement, no matter what compelling interest Defendants may divine.

"Where the government permits other activities to proceed with precautions, it must show that the religious exercise at issue is more dangerous than those activities even when the same precautions are applied. Otherwise, precautions that suffice for other activities suffice for religious exercise too." *Tandon*, 141 S. Ct. at 1297 (citations omitted). The Town allows comparable secular non-residential uses to operate freely, no matter what mild zoning risks they might pose. The neutral application of its ordinances should suffice to protect any compelling governmental interests from the mild effects (if any) of the Church's religious gatherings, just as they suffice to protect the public from comparable secular activity.

But requiring Pastor Kaloogian to undergo extensive site plan regulations to stop him from hosting religious services in accordance with his faith, the Town burdens the free exercise of religion in a manner that is likely to be held in violation of the Free Exercise Clause. A preliminary injunction should issue on this basis as well.

C. The Town is violating its own statutory scheme, namely RSA 674:76.

As shown above, section 17.2.1 of the Zoning Ordinances of the Town of Weare, NH, is clear that churches are permitted as of right in districts zoned residential. Despite this, the Town has indicated that "all non-residential uses in Weare require site plan approval." Compl., Ex. G.

The Town's position, however, overlooks that the New Hampshire statutory scheme is clear that "[n]o zoning ordinance or **site plan review regulation** shall prohibit, regulate, or restrict the use of land or structures primarily used for religious purposes." *Id.* (emphasis added). To be sure, the statute does indicate that religious land use "may be subject to objective and definite regulations concerning the height of structures, yard sizes, lot area, setbacks, open space, and building coverage requirements," *id.*, but that is far from what the Town is seeking to do here. The Town is seeking to implement the very onerous regulation that RSA 674:76 calls out—site plan review. And if that was not enough, the statute continues: "as long as said requirements are applicable regardless of the religious or non-religious nature of the use of the property and do not substantially burden religious exercise." *Id.* Even if Defendants contend that they are subjecting Pastor Kaloogian and the Church to "objective and definite regulations," the arguments above show that these Ordinances are not neutral and generally applicable, and they substantially burden Plaintiffs' religious exercise. For those reasons, Pastor Kaloogian and the Church are likely to succeed on the merits of this claim too.

D. The Town is in violation of Part I, Article 5 of the New Hampshire Constitution.

Part 1, Article 5 of the New Hampshire Constitution states that "Every individual has a natural and unalienable right to worship God according to the dictates of his own conscience, and reason; and no subject shall be hurt, molested, or restrained, in his person, liberty, or estate, for worshipping God in the manner and season most agreeable to the dictates of his own conscience; or for his religious profession, sentiments, or persuasion; provided he doth not disturb the public peace or disturb others in their religious worship." The New Hampshire Supreme Court has indicated that, as it relates to the free exercise clause, the State Constitution provides more protection than the Federal Constitution. *See State v. Mack*, 249 A.3d 423, 442−43 (N.H. 2020).

As outlined above, Defendants' application of the Town's Ordinances substantially burdens Pastor Kaloogian and the Church's free exercise of religion, and Defendants do not have a compelling interest in preventing the religious use and assembly. And even so, Defendants conduct is not the least restrictive means of achieving that interest. Therefore, Plaintiffs are likely to succeed on the merits of this claim.

II. Pastor Kaloogian and the Church are suffering irreparable harm absent an injunction.

Absent an injunction, Plaintiffs will continue to suffer the loss of their federal and state constitutional and statutory rights. The Town's actions to prevent Pastor Kaloogian from using his home to host religious gatherings mean that without a preliminary injunction, the Town "will almost certainly bar" members of the Church "from attending services before judicial relief can be obtained," *Roman Cath. Diocese of Brooklyn v. Cuomo*, 592 U.S. 14, 20 (2020) (per curiam). The violation of Plaintiffs' First Amendment rights is sufficient on its own to establish irreparable harm in the absence of an injunction: "The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Id.* at 19 (quoting *Elrod v. Burns*, 427 U.S. 347, 373 (1976) (plurality op.)). "Accordingly, irreparable injury is presumed upon a determination that the movants are likely to prevail on their First Amendment claim." *Sindicato Puertorriqueño de Trabajadores v. Fortuño*, 699 F.3d 1, 11 (1st Cir. 2012). Because Pastor Kaloogian and the Church have established a "likelihood of success on the merits of the First Amendment claim, it follows that the irreparable injury component of the preliminary injunction analysis is satisfied as well." *Id.* at 15.

III. The balance of equities and the public interest favor an injunction.

The remaining factors—the balance of equities and the effect of an injunction on the public interest, *see Ross-Simons of Warwick, Inc. v. Baccarat, Inc.*, 102 F.3d 12, 15 (1st Cir. 1996)—

strongly favor a preliminary injunction. The strength of Plaintiffs' case on the merits makes clear that Defendants' unconstitutional actions must be enjoined. And Defendants' inconsistent and discriminatory enforcement of the Town's Ordinances proves that a return to the status quo will not harm either Defendants or the public interest.

A preliminary injunction is equitable because of the strength of Plaintiffs' claims. District courts in this Circuit have frequently found that when a plaintiff demonstrates a likelihood of success on a constitutional claim—especially a First Amendment claim—the balance of hardships and the public interest both favor a preliminary injunction. *See, e.g.*, *Faraone v. City of E. Providence*, 935 F. Supp. 82, 90 (D.R.I. 1996) ("[T]he public interest will be served by issuance of an injunction which will safeguard a most sacrosanct constitutional right."); *Jones ex rel. Jimmy v. Mass. Interscholastic Athletic Ass'n*, 2022 WL 6819608, at *7 (D. Mass. Oct. 11, 2022) ("It is always in the public interest to prevent the violation of a party's constitutional rights."); *Condon v. Andino, Inc.*, 961 F. Supp. 323, 331 (D. Me. 1997) ("It is hard to conceive of a situation where the public interest would be served by enforcement of an unconstitutional law or regulation."); *Cutting v. City of Portland*, 2014 WL 580155, at *10 (D. Me. Feb. 12, 2014) ("Plaintiffs' interest in avoiding interference with their rights to free speech outweighs the City's interest in enforcing an unconstitutional ordinance.").

In addition, as a practical matter, enjoining Defendants from enforcing the Town's Ordinances against Plaintiffs "simply restores the *status quo ante*." *Faraone*, 935 F. Supp. at 90. Defendants' actions and inaction together prove that the balance of hardships and the public interest favor a preliminary injunction. Prior to Defendant Sawyer's August 23, 2023 visit, Pastor Kaloogian hosted weekly Bible studies and church services in his home, including his barn, exactly as he had hosted many secular gatherings over the years: free from interference from the Town

and without needing to seek pre-approval. Many of those secular community gatherings had been widely promoted throughout the community, and the Town never required the Kaloogians to seek approval for those gatherings. Indeed, when Pastor Kaloogian and his wife approached the Planning Board to discuss the Kaloogians' idea to use their home, including the barn, to host events including weddings and dances for adults with disabilities, the Town did not require the Kaloogians to submit a site plan. The Kaloogians' home has even hosted an assembly of *hundreds* for a candidate meet-and-greet. The Town has also turned a blind eye to other citizens' secular assemblies, from Super Bowl parties to book clubs. That all these assemblies occurred without burdensome applications and time-consuming approvals indicates that restoring the status quo will harm neither Defendants nor the public.

Furthermore, even when the Town decided to take action against one of Pastor Kaloogian's gatherings for the first time in 2023 after eight years of hosting other gatherings, Defendants continued to ignore secular gatherings. Although the Planning Board's September 30, 2023 letter to Pastor Kaloogian suggested that he would need to apply for a site plan for "religious and/or other gatherings," Compl., Ex. D, the Cease and Desist letter was explicitly limited to "any assembly regarding Grace New England Church," Compl., Ex. A. The Town claims that religious services are "not the same" as "a birthday party or reading group," Compl., Ex. G, but there is no reason that its cited concerns about issues such as "parking" and "lighting," *id.*, would apply any differently depending on whether a group gathered to read a novel or to read the Bible. That the Town sought to prevent any and all religious gatherings at Pastor Kaloogian's home but continued to take no action to prevent secular gatherings indicates that even in the Town's own view, enforcing the Ordinances against assemblies in Pastor Kaloogian's home is not necessary to serve any public interest.

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that the Court grant a preliminary injunction barring Defendants from enforcing the site plan requirement against Plaintiffs.

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Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this date, I electronically filed the foregoing document using CM/ECF system, which will send notification of such filing(s) to all those registered with the ECF system.

/s/ Phillip E. Marbury