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March 18, 2008

VIA FAX

Members of the Town Board
Town of Morristown
604 Main St.
Morristown, NY 13664
Fax: (315) 375-4723

Re: Selective Prosecution of the Amish under the Building Code

To the Members of the Town Board:

We are writing you to express our deep concern over Morristown's decision—after years of peaceful coexistence—to engage in selective prosecution of 10 Old Order Amish men for alleged violations of the Town's building code. In our opinion, continued prosecution of these cases would result in the violation of a number of federal constitutional and statutory provisions that protect religious exercise and prohibit discrimination based upon religion or national origin. Continued prosecution may also violate New York's own constitutional protections for religious exercise. You should be aware that these violations could result in significant financial liabilities for the Town and Town officials in the form of damages and attorneys fees, as well as investigation by relevant federal government agencies.

The primary reason for this conclusion is the United States Constitution's Free Exercise Clause.[1] Under the Free Exercise Clause, as applied in *Employment Division* v. *Smith,* 494 U.S. 872 (1990), and *Church of the Lukumi Babalu Aye* v. *City of Hialeah,* 508 U.S. 520 (1993), it is illegal to selectively enforce a law against a particular religious group unless there is a demonstrated compelling government interest in that enforcement and the government uses the least restrictive means available. In addition, other federal and state statutes penalize municipalities that restrict access to housing based upon religious belief or national origin. As you are aware, the Old Order Amish, including defendants' Swartzentruber subgroup, have both distinctive religious beliefs and a linguistic and cultural identity derived from their Swiss-German origins.

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[1] We have reviewed the Town's filings in several of the cases and find them unpersuasive. Among other errors, the Town fails to distinguish between the federal Free Exercise and Establishment Clauses and to address New York's state Free Exercise clause.

Our conclusion about the potential liabilities the Town is facing is based on our experience with similar cases across the country. As an international, interfaith, public interest law firm, the Becket Fund is dedicated to protecting the free expression of ***all*** religious traditions and the freedom of all people of faith to participate fully in public life without discrimination. The Becket Fund has represented Buddhists, Christians, Hindus, Jews, Muslims, Native Americans, Sikhs and Zoroastrians, along with members of a number of other faith traditions, in state and federal courts throughout the United States.

In particular, we have litigated cases against municipalities in more than 30 states under the Religious Land Use and Institutionalized Persons Act and the Free Exercise Clause, resulting in settlements establishing our clients' rights to religious expression.[2] The Becket Fund has also provided court-mandated sensitivity training for municipal employees found guilty of federal civil rights violations.

We have reviewed Morristown's pattern of prosecution in light of this experience. As an initial matter, we are puzzled why Morristown has suddenly decided to single out the Amish and their homes for inspection and enforcement. We are unaware of any building collapses, fires, or other public emergencies caused by the use of the Amish' own stringent building codes, which they refer to as the *Ordnung*. The lack of any demonstrated public safety threat, combined with the sudden spike in prosecutions of a discrete religious minority, leads to an inference of selective code enforcement against that minority group.

That inference is all the stronger because, as you are well aware, if the Town succeeds in its prosecution, the result will not be Amish compliance with the building code. Rather, because compliance with building code would violate their religiously-formed consciences, the Amish would have to leave Morristown and build homes in another town that allowed them to live in accordance with their beliefs. Thus the Town's campaign of selective enforcement is in effect—if not in purpose—an attempt to drive the Amish out of Morristown.[3]

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[2] *See, e.g., Elsinore Christian Center* v. *City of Lake Elsinore*, No. CV-01-4842 (E.D.Cal. 2007) (settlement in Becket Fund case for undisclosed amount); *Congregation Kol Ami* v. *Abington Township,* No. 01-1919, 2004 WL 1837037 (E.D. Pa. Aug. 14, 2004) (rejecting township's claims; township later settled Becket Fund client's religious freedom claims for six-figure amount); *Haven Shores Community Church* v. *City of Grand Haven,* No. 1:00-CV-175 (W.D. Mich. 2000) (Becket Fund case settled for damages and attorneys fees). Some similar cases with Becket Fund involvement have settled for disclosed amounts. *See, e.g., Westchester Day School* v. *Village of Mamaroneck,* No. Civ. 02-6291-WCC (S.D.N.Y 2008) Dkt. No. 100 (settlement for $4.75 million paid by village which refused to grant construction permits to Orthodox Jewish school in Westchester County).

[3] You have recently stated, in a letter to the editor of the *Ogdensburg Advance News*, that "We have no choice but to prosecute these violations." "Building Codes," *Ogdensburg Advance News*, March 16, 2008. But the Town faces no penalty for ***failing*** to prosecute the Amish. The "ten costly trials" you are facing were imposed by the ***Town's*** decision to prosecute. *Id.* The easiest way to avoid the costs of prosecution, and the potential damages and attorneys fees you would have to pay as a result of a civil rights lawsuit, is simply to stop prosecuting the Amish.

The Free Exercise Clause prohibits this kind of targeted selective enforcement. Cities have been liable for First Amendment violations when they selectively enforce ordinances against a religious group;[4] when they adopt facially neutral ordinances which in effect target a religious practice;[5] and when they give exemptions to secular entities, but not religious entities.[6] Our review of the record suggests that some or all of these constitutional violations may be taking place in Morristown.[7]

For the same reasons, Morristown appears to be engaging in national origin discrimination. As you are aware, the Old Order Amish men being prosecuted speak a distinctive dialect of German (sometimes referred to by others as "Pennsylvania Dutch") and therefore require an interpreter to understand the court proceedings you have brought against them. Both federal government agencies like the EEOC and federal courts "recognize[ ] linguistic discrimination as national origin discrimination[.]"[8] Thus to the extent the Town is singling out a specific linguistic group—here speakers of a specific dialect of German—for disfavor, its actions are doubly discriminatory.

Morristown therefore faces significant liability unless it can demonstrate that it has a "compelling governmental interest" for selectively prosecuting the Amish. The lack of any proven dangers in Amish housing precludes Morristown from establishing such a compelling government interest.[9] In addition, it seems clear that some of the building code requirements being applied to the Amish are completely unrelated to compelling interests—surely homes are not in danger because their lumber is professionally milled according to centuries-old customs at a mill that happens not to use ink stamps.[10]

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4 *See, e.g., Lukumi,* 508 U.S. at 532-33.

5 *Id.*

6 *See, e.g., Fraternal Order of Police* v. *City of Newark,* 170 F.3d 359 (3d Cir. 1999); *Tenafly Eruv* v. *Ass'n* v. *Borough of Tenafly*, 309 F.3d 144 (3d Cir. 2002). The existence of building code variances demonstrate that Morristown is willing to make exceptions for others which it refuses to make for the Amish.

7 Nor does prosecutorial discretion provide a defense: "the decision whether to prosecute may not be based on 'an unjustifiable standard such as race, religion, or other arbitrary classification.'" *United States* v. *Sanchez*, — F.3d —, 2008 WL 553517 at *18 (2d Cir. Feb. 29, 2008) (quoting *Oyler* v. *Boles*, 368 U.S. 448, 456 (1962) and citing *Yick Wo* v. *Hopkins*, 118 U.S. 356, 373-74 (1886)).

8 *In re Rodriguez,* 487 F.3d 1001, (6th Cir. 2007). *See also Blackmoon* v. *Charles Mix County*, 505 F.Supp.2d 585 (D.S.D. 2007) (discussing "language group discrimination" in the context of a Voting Rights Act lawsuit).

9 The compelling government interest standard is "the most rigorous of scrutiny… [A] law restrictive of religious practice must advance interests of the highest order and must be narrowly tailored in pursuit of those interests. The compelling interest standard that we apply once a law fails to meet the *Smith* requirements is not water[ed] . . . down but really means what it says." *Lukumi,* 508 U.S. at 546 (internal quotations and citations omitted). Courts rarely find government interests "compelling," because compelling interests are those so overwhelmingly important that they might justify racial discrimination or forced sterilization. *See Richmond* v. *J.A. Croson Co.*, 488 U.S. 469 (1989); *Skinner* v. *Oklahoma*, 316 U.S. 535 (1942).

10 *See* Town's Affirmation and Legal Memorandum ¶ 28, *People* v. *Miller,* (January 8,

One particularly glaring example of how uncompelling the Town's interests are here is the Town's smoke detector requirement. The Amish refuse to purchase and install smoke detectors because their faith does not allow them to use electricity. The Town's response has been that the Amish must have smoke detectors, but only during the inspection. According to the Town, the Amish could remove the smoke detectors without penalty once the inspections are completed. This sort of evasion of the spirit, if not the letter, of the law, is no help to the Amish, who consider such behavior fraudulent and deceptive. More importantly, it is also no help to the Town, which cannot possibly have a compelling safety interest in requiring smoke detectors if it allows them to be removed immediately after inspection.

In addition to showing a compelling government interest in enforcement—something it has singularly failed to do—the Town would also need to show that it used the least restrictive means available to enforce its interests. Less restrictive means of ensuring safe housing are surely available—reliance upon the *Ordnung*, the Amish building code that has been in use for hundreds of years, would achieve the town's safety goals while accommodating religious exercise. The Town could easily provide an exemption to the building code for Old Order Amish who follow the *Ordnung*.

You should also be aware that towns do not escape liability merely because their Free Exercise violations are based upon state law. In the *Lukumi* case, the City passed animal cruelty ordinances which merely codified Florida state law on the subject. *Id.*, 508 U.S. at 526-27. Nevertheless, the Supreme Court struck down the ordinances as unconstitutional. Those ordinances were used to restrict certain religious practices (there, animal sacrifice) the town wished to prohibit. The defense that they were just following state law did not allow the City of Hialeah to escape liability.

Moreover, it is not clear that any such statute or ordinance could actually be called "New York law." The New York Constitution contains its own, separate Free Exercise Clause, which is interpreted ***more*** strictly than the federal Free Exercise Clause. In *Catholic Charities of Diocese of Albany* v. *Serio,* 859 N.E. 2d 459, 467 (N.Y. 2006), the Court of Appeals explained that laws that place extraordinarily high burdens on religious practice violate the New York Constitution. The Court of Appeals' reasoning indicates that there is just such a burden in forcing the Amish to choose between following the *Ordnung*—religious rules they have followed for centuries—and time in jail.

Interference with the housing practices of the Amish may also result in a violation of the Fair Housing Act, which prohibits any discrimination in the "terms, conditions or privileges" of housing based upon "race, color, religion, sex, familial status, or national origin." Because the Old Order Amish form both a distinctive religious society and an ethnic/linguistic minority, maintaining the customs and language of their national origin, interference with their ability to construct housing may violate 42 U.S.C. § 3604 in more than one way. The Justice Department regularly investigates actions of unfair housing code enforcement based upon religious or national origin, and these investigations have resulted in consent decrees reforming city ordinances, retraining city employees,

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2008).

and requiring damages payments.[11]

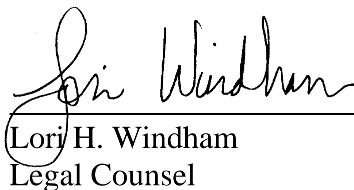
Failure to abide by the Fair Housing Act is unlawful in any case, but it is particularly troubling here, since it endangers the Town's ability to obtain future Community Development Block Grants. The Code of Federal Regulations allows New York's Small Cities Program to award block grants to only those municipalities that commit to fair housing and equal opportunity. 24 C.F.R. 570.421(a)(iv). Interference with the housing rights of some citizens—particularly citizens from a distinctive ethnic and religious group—would surely endanger Morristown's application for competitive grants.

What is perhaps the strangest aspect of the current wave of prosecutions is that the people of St. Lawrence County have a proven ability to accommodate both safety concerns and the Amish way of life. In the early 1980s, when the Amish refused to use legally required orange safety signs on their buggies, the County began prosecuting them for violations. After a public controversy, the County and the Amish came to a workable compromise: a combination of grey reflectors, lanterns and driving restrictions which ensured road safety while accommodating the Amish way of life. We see no reason why a similar agreement could not be reached in this case, permitting the Amish to build their homes according to Amish building standards recognized as safe by the Town.

For these reasons, we write to note our concern and to ensure the Town has fully considered the serious legal ramifications of its actions. We stand ready to help Morristown and the Amish reach a solution that will allow the Amish to follow their consciences and the Town to meet its interests without violating the law.

Regards,

The Becket Fund for Religious Liberty



Lori H. Windham
Legal Counsel

cc: U.S. Department of Justice, Civil Rights Division, Housing and Civil Enforcement
Andrew Cuomo, Attorney General of New York

[11] *See, e.g., United States* v. *City of Hollywood,* No. 0:04-cv-61212 (S.D. Fla. consent decree approved Jul. 7, 2006) (consent decree requiring code enforcement reform, sensitivity training for city employees, and $2,000,000 in damages); *United States* v. *Borough of Bound Brook* (D.N.J. consent decree entered March 12, 2004) (consent decree requiring code enforcement reform, sensitivity training for borough employees, and $425,000 in damages); *United States* v. *Village of Hatch*, No. 2:94-cv-00493 (D.N.M. consent decree approved Dec. 16, 1996) (consent decree requiring new zoning code and ordering $260,500 in damages).