

No.

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IN THE  
**Supreme Court of the United States**

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CONGREGATION RABBINICAL COLLEGE  
OF TARTIKOV, INC., *et al.*,

*Petitioners,*

*v.*

VILLAGE OF POMONA, N.Y., *et al.*,

*Respondents.*

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED  
STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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**APPENDIX VOLUME 2 OF 2**

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**APPENDIX C — OPINION AND ORDER OF THE  
UNITED STATES DISTRICT COURT FOR THE  
SOUTHERN DISTRICT OF NEW YORK,  
FILED SEPTEMBER 29, 2015**

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

Case No. 07-CV-6304 (KMK)

CONGREGATION RABBINICAL COLLEGE  
OF TARTIKOV, INC., RABBI MORDECHAI  
BABAD, RABBI WOLF BRIEF, RABBI HERMEN  
KAHANA, RABBI MEIR MARGULIS, RABBI  
AKIVA POLLACK, RABBI MEILECH MENCZER,  
RABBI JOSEPH HERSHKOWITZ, RABBI CHAIM  
ROSENBERG, AND RABBI DAVID A. MENCZER,

*Plaintiffs,*

-v-

VILLAGE OF POMONA, BOARD OF TRUSTEES  
OF THE VILLAGE OF POMONA, NICHOLAS  
SANDERSON, AS MAYOR, IAN BANKS, AS  
TRUSTEE, ALMA SANDERS-ROMAN, AS  
TRUSTEE, RITA LOUIE, AS TRUSTEE, AND  
BRETT YAGEL, AS TRUSTEE,

*Defendants.*

September 29, 2015, Decided  
September 29, 2015, Filed

*Appendix C***OPINION & ORDER**

KENNETH M. KARAS, District Judge:

Plaintiffs bring challenges to certain zoning and environmental ordinances enacted by Defendant Village of Pomona (the “Village”), alleging they are unlawful under the First and Fourteenth Amendments of the United States Constitution, the Religious Land Use and Institutionalized Persons Act of 2000 (“RLUIPA”), 42 U.S.C. § 2000cc *et seq.*, the Fair Housing Act (“FHA”), 42 U.S.C. § 3601 *et seq.*, New York Civil Rights Law § 40-c(1) and (2), §§ 3, 8, 9 and 11 of the New York State Constitution, and New York common law. Specifically, Plaintiffs challenge the enactment and enforcement of portions of the Village of Pomona, New York Code (“Village Code”) §§ 130-4 (defining educational institutions and dormitories) (“Accreditation Law”), 130-10(F)(12) (limiting the size of dormitories) (together with the definition of “dormitory” in § 130-4, the “Dormitory Law”), and 126 (establishing wetlands protections) (“Wetlands Law”) (together, the “Challenged Laws”).<sup>1</sup> Plaintiffs move for Summary Judgment on several of their claims and Defendants’ affirmative defenses, and for sanctions due to the spoliation of evidence. Defendants cross-move for Summary Judgment on all of Plaintiffs’ claims, and for certain evidence to be stricken from the record. For

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1. Full versions of the Challenged Laws can be found attached to the Ulman Affidavit. (Dkt. No. 145.) They can also be found online at <http://www.ecode360.com/12718511> (Wetlands Law) and <http://www.ecode360.com/12718574> (Accreditation Law and Dormitory Law).

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the reasons discussed below, the Court grants summary judgment to Defendants on Plaintiffs' Free Speech and New York Common law claims, grants summary judgment to Plaintiffs on Defendants' affirmative defenses, denies summary judgment to all Parties as to all other claims, grants Plaintiffs' Motion for Sanctions as discussed below, and grants Defendants' Motion to Strike in part.

**I. Background**

The Court assumes familiarity with the basic allegations of Plaintiffs' Second Amended Complaint, (Second Am. Compl. ("SAC") (Dkt. No. 27)), as discussed in the Court's January 7, 2013 Opinion and Order, (Dkt. No. 53.) See *Congregation Rabbinical Coll. of Tartikov, Inc. v. Vill. of Pomona*, 915 F. Supp. 2d 574, 607 (S.D.N.Y. 2013) ("2013 Opinion and Order"). In short, Plaintiffs bring this Action alleging that the Challenged Laws prohibit the owning, holding, building, and operation of a rabbinical college within the Village (the "Village"). (SAC ¶ 1.) While Plaintiffs specifically claim that the Challenged Laws prohibit Plaintiff Congregation Rabbinical College of Tartikov (the "Congregation") from building its planned rabbinical college on a 100-acre tract (the "Subject Property") located in the Village and owned by the Congregation, the Court dismissed Plaintiffs' as-applied challenges, as well as their New York Civil Rights Law § 40-c claim, in its 2013 Opinion and Order. *Congregation Tartikov*, 915 F. Supp. 2d at 607. It is for this reason that Plaintiffs now proceed based solely on facial challenges to the Challenged Laws. The Court briefly reviews the salient factual background below.

*Appendix C***A. Factual Background<sup>2</sup>****1. The Parties**

Plaintiffs are a corporation and individuals affiliated with the Orthodox Jewish community, including various sects of the Hasidic community, all of whom allege an interest in the construction of a rabbinical college on the Subject Property. (Pls.' Rule 56.1 Statement of Material Facts in Supp. of Pls.' Mot. for Summ. J. ("Pls.' 56.1") ¶¶ 1, 88, 90, 92, 94-95, 97, 525 (Dkt. No. 139).) The Congregation, officially "the Rabbinical College of Tartikov, Inc.," the owner of the Subject Property, is a religious corporation that was formed on August 1, 2004. (*Id.* ¶¶ 1, 69-70, 101; Defs.' Response Pursuant to Local Rule 56.1(b) to Pls.' Statement of Material Facts ("Defs.' Counter 56.1") ¶ 121 (Dkt. No. 175) (citing *Aff. of Amanda E. Gordon* ("Gordon *Aff.*") Ex. 18 (Certificate of Incorporation) (Dkt. No. 150); *see also* Defs.' Local Rule 56.1(a) Statement in Supp. of their Mot. for Summ. J. ("Defs.' 56.1") ¶ 5 (Dkt. No. 142).) At the time of incorporation, the Congregation's trustees included Chaim Babad ("C. Babad"), who indirectly financed the Congregation at least in part, Abraham Halberstam, Naftali Babad, Samuel Chimmel, Michael Tauber ("Tauber"), and Asher Mandel. (Defs.' 56.1 ¶¶ 6, 10; Pls.' Opp'n to Defs.' Local Rule 56.1 Statement of Facts ("Pls.' Counter 56.1") ¶ 6 (Dkt. No. 176) (citing *Gordon Aff.*

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2. The following facts are derived from undisputed portions of the Parties' Rule 56.1 Statements, unless otherwise noted. The Court has reviewed the evidence offered in support of certain disputed statements, as noted, where applicable, below.

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Ex. 18.) Plaintiffs Rabbi Mordechai Babad (“M. Babad”), Rabbi Wolf Brief (“W. Brief”), Rabbi Hermen Kahana (“H. Kahana”), Rabbi Meir Margulis (“M. Margulis”), Rabbi Akiva Pollack (“A. Pollack”), Rabbi Meilech Menczer (“M. Menczer”), Rabbi Jacob Hershkowitz (“J. Hershkowitz”), Rabbi Chaim Rosenberg (“C. Rosenbenberg”), and Rabbi David A. Menczer (“D. Menczer”) (collectively, the “Individual Plaintiffs”) are rabbis who seek to live, teach, and/or study at the Congregation’s proposed rabbinical college. (Defs.’ 56.1 ¶ 14; *see also* Pls.’ 56.1 ¶¶ 88, 90, 92, 94-95, 97.) Defendants consist of the Village, its Board of Trustees, its current Mayor Brett Yagel (“Mayor Yagel”), its former mayor and Trustee Nicholas Sanderson (“Former Mayor Sanderson”), and other members of its Board of Trustees—Ian Banks (“Banks”), Alma Sanders Roman (“Roman”), and Rita Louie (“Louie”)—each sued in his or her official capacity. (Defs.’ 56.1 ¶¶ 1, 3-4.)

## 2. Rabbinical Colleges

According to Orthodox Jewish belief, Orthodox Jews are not permitted to resolve conflicts in the secular court system, but rather must have their conflicts adjudicated in rabbinical courts, before rabbinical judges applying Jewish law. (Pls.’ 56.1 ¶¶ 49, 52.) For this reason, Orthodox Jews require rabbinical courts sufficiently proximate to their homes. (*See id.* ¶ 51.) However, there are very few rabbinical judges, and very few rabbinical courts, in the United States today, and those courts are overburdened. (*See id.* ¶¶ 50-51, 59-61.)

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In response to this growing need, the Congregation's proposed rabbinical college would enroll students, at no charge, who have completed a "high school level program in the Talmud" and who are deemed qualified by M. Babad, some of whom have already received offers of admission. (*Id.* ¶¶ 550, 552-53, 555, 558; Defs.' Counter 56.1 ¶ 555 (citing Decl. of Paul Savad in Supp. of Pls.' Mot. for Summ. J. ("Savad Decl.") Ex. 29 (M. Babad Tr.) 133 (Dkt. No. 155)); Defs.' 56.1 ¶ 51). The rabbinical college would therefore have no entrance examination, written examination, or written criteria for admission. (Pls.' 56.1 ¶ 551; Defs.' 56.1 ¶¶ 37, 39-40.) For 13 to 15 years, between 6:00 a.m. and 10:30 p.m. on Sunday through Thursday and in study sessions on Friday and Saturday, the students would study the four books, or "divisions," of the Shulchan Aruch, a compellation of Jewish laws of the Orthodox Hasidic tradition. (*See* Pls.' 56.1 ¶¶ 36-37, 65-66, 68, 528, 531, 537.) Of central importance here, Plaintiffs "believe that Jewish men are religiously obligated to marry at a young age and have large families," (*id.* ¶ 38), that "Judaism . . . directs [them] to dwell among a community that is directed to the Torah," (*id.* ¶ 44), and that "Jewish males [must] . . . learn the Torah day and night," (*id.* ¶ 46). Accordingly, Plaintiffs believe that students of the proposed rabbinical college must live, study, and pray in the same place, full-time, in a "Torah Community" separated from the outside world, which in turn requires that their education be free and that multi-family housing be available such that students can live with their families. (*Id.* ¶¶ 71-74; 450 (citing, inter alia, Decl. of Meilech Menczer ¶ 55 (Dkt. No. 147), 499 (citing, inter alia, Savad Decl. Ex. 27 (M. Tauber Tr.) 84), 539-540, 559, 562.) The proposed rabbinical college



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would therefore include “somewhere between 50 and 250 units of housing, which will be apartments that have 3 or 4 bedrooms, ranging in size from 1800-2000 square feet.” (Defs.’ 56.1 ¶ 44.) The rabbinical college would also include at least four rabbinical courtrooms, ritual baths (“mikvahs”), synagogues, and multiple libraries. (Pls.’ 56.1 ¶¶ 513, 518.)<sup>3</sup>

While there are three other schools that currently train rabbinical judges in the area, namely Kollel Belz and Mechon L’Horoya near Monsey, NY and Kollel Beth Yechiel Mechil of Tartikov in Brooklyn, NY, the Congregation’s proposed rabbinical college is the only one that offers an immersive Torah Community, which enables the college to train full-time rabbinical judges. (*See id.* ¶¶ 565, (citing, inter alia, Savad Ex. 34 (Steven Resnicoff Dep. Tr.) 19-22), 568-71; Defs.’ Counter 56.1 ¶ 570-71.) Plaintiffs also contend that Kollel Belz and Mechon L’Horoya “only teach certain sections of the Shulchan Aruch,” that Kollel Beth Yechiel Mechil of Tartikov “does not have the same program” as the proposed rabbinical college, and that none of the three schools has on-campus housing essential to “the Torah Community environment

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3. Beyond the Torah Community being part of Plaintiffs’ “religious belief,” (Pls.’ 56.1 ¶ 539), Plaintiffs allege a variety of benefits attendant to studying in a Torah Community, including the ability to study day and night, to isolate oneself from outside influences, and to study all four books of the Shulchan Aruch. (*See, e.g.*, Pls.’ 56.1 ¶¶ 449-457, 459-469, 473, 529-30, 655; Defs.’ 56.1 ¶ 49.) Defendants dispute the necessity of a Torah community, as well as the purported need for libraries and mikvahs on campus. (Defs.’ Counter 56.1 ¶¶ 449-457, 459-469, 473, 516, 520; Defs.’ 56.1 ¶ 46.)

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that Plaintiffs believe” is necessary for the course of study to be offered and “essential to [the] exercise their religious belief[s].” (See Pls.’ 56.1 ¶¶ 563, 568-571; Pls.’ Counter 56.1 ¶¶ 55, 58.)<sup>4</sup>

As of the date of this Opinion and Order, the Congregation has not yet provided a formal plan for, or submitted an application to the Village seeking to construct, their proposed rabbinical college; only a “preliminary concept plan” exists. (Defs.’ 56.1 ¶¶ 19, 22; Pls.’ Counter 56.1 ¶ 22.) Additionally, the proposed curriculum at this point consists only of a document prepared at Tauber’s request (he thought that his “counsel wanted to see [the curriculum] in writing,”) by M. Menczer, which only includes class names and “reflects the religious source of the studies,” namely the four “divisions” of the Shulchan Aruch. (Defs.’ 56.1 ¶¶ 26-28; Gordon Aff. Ex. 10 (M. Tauber Dep. Tr.) 22-23 (explaining that M. Tauber asked M. Menczer to prepare the curriculum, and that there is no

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4. Kollel Beth Yechiel Mechil of Tartikov also has no synagogue, libraries, or mikvah on campus. (Defs.’ 56.1 ¶¶ 62-64.) Moreover, J. Hershkowitz and C. Rosenberg aver that their studies at Kollel Belz “will not allow [them] to become a full-time rabbinical judge[s]” because they cannot “learn the entire four categories of Jewish Law” at Kollel Belz. (Decl. of Jacob Hershkowitz ¶¶ 42, 44 (Dkt. No. 146); Decl. of Chaim Rosenberg ¶¶ 44-46 (Dkt. No. 149).)

It is not clear from the record how different the programs at these other schools are from the putative rabbinical college in this case. Tauber, for example, characterized Mechon L’Horoya Kollel Beth Yechiel Mechil of Tartikov as providing “the same course of study” as that of the proposed rabbinical college and noted that a student at Kollel Beth Yechiel Mechil of Tartikov can “get the same studies done” as a student at the proposed rabbinical college. (Savad Decl. Ex. 27 (Tauber Dep. Tr.) 44, 46.)

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other document describing “what a specialized kollel” is); Gordon Aff. Ex. 21 (proposed curriculum.) Additionally, the Congregation has not hired any teachers, the would-be dean has done “[n]othing” thus far, and the Congregation does not yet know how many students will attend the rabbinical college. (Defs.’ 56.1 ¶¶ 34-35 (citing Gordon Aff. Ex. 2 (M. Babad Depo.) 83), 66.)

### 3. Chronology of the Challenged Laws

The Village, incorporated in 1967, adopted a master plan in 1974 which it updated in 1997 “to maintain the low density residential character of the Village” in response to rapid growth. (Defs.’ 56.1 ¶¶ 1, 73-76 (internal quotation marks omitted) (quoting Aff. of Doris Ulman (“Ulman Aff.”) Ex. 17 (1997 Master Plan Update) 17 (Dkt. No. 145).) Around the same time, in May 1996, the Village Attorney, then Ruben Ortenberg, advised residents to contact the Town of Ramapo to object to the expansion of an Orthodox Hasidic school, whose development the Village had challenged in court and had been “involved [with] for two years” at the time. (*See* Pls.’ 56.1 ¶ 376; Savad Decl. Ex. 187 (May 20, 1996 Board of Trustees meeting minutes), at 7-8.)

At a December 1999 Village Planning Board meeting, Yeshiva Spring Valley, in an “informal appearance,” laid out plans to build a Yeshiva on the Subject Property. (*Id.* ¶ 121; Defs.’ Counter 56.1 ¶ 121.)<sup>5</sup> That same month, the

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5. Yeshiva Spring Valley had been granted tax exempt status that year, and in subsequent years through 2003. (Pls.’ 56.1 ¶ 324; Defs’ Counter 56.1 ¶ 324.)

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Village’s planning consultant, Mark A. Haley (“Haley”), reviewed the zoning provisions of the Village Code “in conjunction with” Yeshiva Spring Valley’s appearance. (Defs.’ 56.1 ¶ 92.) Subsequently, in January 2000, he circulated a memorandum entitled “Proposed Primary School and Pre-School ([Yeshiva Spring Valley] Pomona) and the Village Zoning Regulations regarding schools,” noting the existence of only “scant” regulations on schools and recommending that the Village amend the pertinent laws. (Pls.’ 56.1 ¶ 123; Defs.’ 56.1 ¶ 94; Pls.’ Counter 56.1 ¶ 94 (citing Ulman Aff. Ex. 28 (memorandum)).) Haley and the Village Attorney subsequently drafted Local Law 1 of 2001 and “included many of the recommendations from the January[] 2000 memos by the Village Planner.” (Pls.’ 56.1 ¶ 124.)<sup>6</sup>

On January 22, 2001, following a public hearing, the Board of Trustees adopted Local Law 1 of 2001. (Defs.’ 56.1 ¶¶ 96, 98.) Local Law 1, in relevant part, defined educational institution, for the first time, as “[a]ny school or other organization or institution conducting a regularly scheduled comprehensive curriculum of academic and/or alternative vocational instruction similar to that furnished by kindergartens, primary[,] or second schools and operating under the Education Law of New York State,

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Yeshiva Spring Valley only filed a formal application for a “25-lot single-family residential development,” together with a Yeshiva, in June 2001. (Defs.’ 56.1 ¶ 104.) It subsequently failed to submit an environmental study required for a New York State Environmental Equality Review Act determination. (*Id.*)

6. It bears noting that there were no schools in the Village at the time. (*See* Pls.’ 56.1 ¶ 129.)

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and duly licensed by the State of New York,” and subjected such institutions to certain restrictions under the special permit approval process, including minimum net lot area, maximum development intensity, frontage, access, set back, parking, and noise guidelines. Local Law 1 of 2001, as codified at Village Code §§ 130-4, 130-10. (*See also* Defs.’ 56.1 ¶¶ 88-90; Ulman Aff. Exs. 1 (Local Law 1 of 2001), 7 (Village Code § 130-4), 10 (Village Code § 130-10).)

In March of the same year, then-Mayor Herbert Marshall (“Mayor Marshall”) emphasized in a letter that nothing could be done to prevent the construction of a group home facility in the Village and that it “must be treated no different[ly] than any other residences or planned residences within the community” because residents “simply do not have the right to choose who [their] neighbors will be.” (Savad Decl. Ex. 184 (Open Letter from Mayor Marshall (March 5, 2001).) Additionally, in May 2002, all but one Village Trustee expressed no objection to the concept of Barr Laboratories’ constructing an office building with parking in the Village. (Savad Decl. Ex. 176 (May 21, 2002 Board of Trustees meeting minutes) 3.)

Starting in 2003, Village Attorney Doris Ulman (“Ulman”), who was appointed in July of that year, “began to review the Village laws” and recommended that further amendments be made due to “deficiencies or inaccuracies in the laws.” (Defs.’ 56.1 ¶ 106-07.)<sup>7</sup> That same year, at a

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7. In the interim, namely from December 2002 through 2004, the Parties dispute whether the Board of Trustees actively supported the incorporation of Ladentown, which Plaintiffs contend was a response to the proposed development of adult student housing for

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February 17, 2003 Board of Trustees Meeting, the Board of Trustees determined not to weigh in on a neighboring municipality's open space proposal because it "could not tell another municipality how to spend [its] money or what to do with [its] property." (Savad Decl. Ex. 188 (Feb. 17, 2003 Board of Trustees meeting minutes) 4.)

Subsequently, on August 17, 2004, the same year in which the Village denied Yeshiva Spring Valley tax exempt status for the first time, (Pls.' 56.1 ¶ 324), the Congregation purchased the Subject Property from Yeshiva Spring Valley, (Defs.' 56.1 ¶ 17.)<sup>8</sup> The Subject Property is a 100-acre parcel located in the Village at the intersection of Route 202 and Route 306, and zoned, like the rest of the Village, as an R-40 district (40,000 square feet per lot for the development of single-family homes), (*id.* ¶¶ 4, 99.) It is the only property that the Congregation owns, (Pls.' 56.1

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the Orthodox Hasidic Jewish community at a site called Patrick Farms, (*see* Pls.' 56.1 ¶¶ 136, 313, 368-72; Defs.' Counter 56.1 ¶¶ 136, 313, 368-72), though the Parties agree that Ulman "performed free legal work for the appeal regarding the efforts to incorporate Ladentown," (Pls.' 56.1 ¶ 373.)

8. The Parties dispute the exact day on which the Subject Property was purchased in August. Plaintiffs' claim it was purchased on August 4, 2004, (Pls.' 56.1 ¶ 101), while Defendants contend it was purchased on August 17, 2004, (Defs.' Counter 56.1 ¶ 101 (citing Savad Decl. Ex. 291).) Plaintiffs admit their error in their Counter Rule 56.1 Statement. (Pls.' Counter 56.1 ¶ 17.)

Additionally, while the Village denied Yeshiva Spring Valley tax exempt status in 2004, the local Humane Society did receive a tax exemption despite not having "timely filed its application for exemption." (Pls.' 56.1 ¶ 380.)

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¶ 106 (citing Savad Ex. Ex. 31 (C. Babad Dep. Tr.) 76-78)), and appears to be the only available parcel suitable for Plaintiffs' proposed rabbinical college under Village law, (*id.* ¶ 616 (citing Decl. of Barbara B. Beall ("Beall Decl.") ¶ 16 (Dkt. No. 153)).) In June of that same year, the Village filed suit to challenge the Town of Ramapo's Adult Student Housing Law ("ASHL"). (Pls.' 56.1 ¶¶ 138, 360.)<sup>9</sup>

On September 7, 2004, Ulman presented the Board of Trustees with her recommendations for amendments to the zoning law pertaining to educational institutions, which addressed removing the half-acre-per-student lot area requirement, adding a provision allowing dormitories, clarifying the definition of educational institution, and removing the requirement that educational institutions be on a state or county road. (Defs.' 56.1 ¶¶ 110, 112; Pls.' Counter 56.1 ¶ 113.) Subsequently, on September 27, 2004, following a public hearing, the Board of Trustees adopted Local Law 5 of 2004, (Defs.' 56.1 ¶¶ 114, 116), which, in relevant part, re-defined "educational institution" as "[a]ny private or religious elementary, junior high or high school, college, graduate[,] or post-graduate school conducting a full-time curriculum of instruction . . . accredited by the New York State Education Department or similar recognized accrediting agency," and amended the minimum lot area, frontage, access, setback, and screening guidelines, Local Law 5 of 2004, as codified

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9. The Adult Student Housing Law "permits married, adult, student, multi-family, high-density housing in single-family residential zones . . . in the unincorporated portion of Ramapo." *Vill. of Chestnut Ridge v. Town of Ramapo*, No. 07-CV-9278, 2008 U.S. Dist. LEXIS 76881, 2008 WL 4525753, at \*1 (S.D.N.Y. Sept. 30, 2008).

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at Village Code § 130-4. (*See also* Defs.’ 56.1 ¶¶ 105, 122; Ulman Aff. Exs. 2 (Local Law 5 of 2004), 7 (Village Code § 130-4).)

Local Law 5 also addressed dormitories, providing that “[a] dormitory is permitted as an accessory use to an educational use and that there shall be not more than one dormitory building on a lot,” Local Law 5 of 2004, as codified at Village Code § 130-10(F)(12). (*See also* Defs.’ 56.1 ¶ 117; Ulman Aff. Exs. 2, 10). It further defined a dormitory as “a building . . . [which contains] sleeping quarters for administrative staff, faculty[,] or students,” and provided that “[d]ormitory rooms shall not contain separate cooking, dining[,] or housekeeping facilities except that one dwelling unit with completed housekeeping facilities may be provided for a use of a Superintendent or supervisory staff for every fifty dormitory rooms.” Local Law 5 of 2004, as codified at Village Code § 130-4. (*See also* Ulman Aff. Exs. 2, 10.) Local Law 5 also explicitly provided that “[s]ingle-family, two-family, and/or multi-family dwelling units other than as described above shall not be considered to be dormitories or part of dormitories.” Local Law 5 of 2004, as codified at Village Code § 130-4. (*See also* Defs.’ 56.1 ¶ 118; Ulman Aff. Exs. 2, 10.)

The Village learned that the Congregation had purchased the subject property, and, in general, that it would be used as a rabbinical college in November 2004. (Pls.’ 56.1 ¶¶ 148-49; Defs.’ 56.1 ¶ 17.)<sup>10</sup> The

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10. On November 8 of that year, the Village resolved not to oppose an agricultural project outside the Village because it was the “policy of the village” not to comment on projects that did “not



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Village subsequently, in late 2005 or 2006, learned of the Congregation's actual development plans for the Subject Property. (See Pls.' 56.1 ¶¶ 152-53.) Nonetheless, the Village approved the Congregation's tax exemption applications in both years. (*Id.* ¶ 322.)

On December 11, 2006, Ulman, after reviewing the wetlands laws of Chestnut Ridge, New Hempstead, and South Nyack, and the New York State Environmental Conservation Law, distributed a memo to Mayor Marshall discussing a proposed Wetlands law. (*Id.* ¶ 183; Defs.' 56.1 ¶ 151.) On December 18, 2006, the Board of Trustees held a public hearing entitled "Amending the Zoning Law of the Village of Pomona in Relation to Dormitory Buildings," at which a proposed law regarding dormitories was to be discussed. (Pls.' 56.1 ¶ 157; Defs.' Counter 56.1 ¶ 157; Defs.' 56.1 ¶ 133.) The Board of Trustees adjourned discussion of the proposed local law, at the request of Plaintiffs' counsel, to the next board meeting. (Defs.' 56.1 ¶ 134.) Early the next year, on January 9, 2007, Preserve Ramapo, a political action group in the region, leaked tentative plans for the Congregation's proposed rabbinical college to the public. (See Defs.' 56.1 ¶ 135; Pls.' Counter 56.1 ¶ 135; see also Pls.' 56.1 ¶ 158; Defs.' Counter 56.1 ¶ 158.) A week later, on January 14, 2007, an article in *The Journal News* reported that the proposed rabbinical college would bring 4,500 additional residents to the Village. (Defs.' 56.1 ¶ 137.)

Subsequently, on January 22, 2007, the Board of Trustees held another hearing on the proposed law

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directly affect the Village." (Pls.' 56.1 ¶ 37; Savad Decl. Ex. 185 (Board of Trustees Meeting Agenda) 2.)

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regulating dormitories and on the proposed law regarding wetlands, but most public comments “were aimed at the plans for the proposed rabbinical college.” (Pls.’ 56.1 ¶ 159; Defs.’ 56.1 ¶ 140.) For the first time, the Congregation had a videographer and court reporter record and transcribe the meeting. (Defs.’ 56.1 ¶ 141.)<sup>11</sup>

After the hearing, the Village adopted Local Law 1 of 2007, (Defs.’ 56.1 ¶ 142), which provided, in relevant part, that “[a] dormitory building shall not occupy more than twenty (20) percent of the total square footage of all buildings on the lot,” Local Law 1 of 2007, as codified at Village Code § 130-10(F)(12). (*See also* Defs.’ 56.1 ¶ 143; Ulman Aff. Exs. 3, 16.)<sup>12</sup> The Board of Trustees extended the public hearing on the proposed wetlands law because it “had not yet received a response from [the] Rockland County Planning Department.” (Defs.’ 56.1 ¶ 153.) In the interim, from January 2007 through March 2007, Plaintiffs allege that Mayor Marshall campaigned for reelection as Mayor on a slate with Alan Lamer, who ran for reelection as Trustee, and Former Mayor Sanderson ran for Mayor on a slate with Yagel and Louie, who were running for election as Trustees. (Pl.’s 56.1 ¶ 269.)<sup>13</sup> The

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11. The Village also denied the Congregation’s application for tax exempt status that year. (*Id.* ¶ 323.)

12. There remained no schools in the Village at the time. (Pls.’ 56.1 ¶ 172.)

13. While Plaintiffs fail, pursuant to Local Rule 56.1, to support this statement with admissible evidence, Defendants admit its contents in its responses to subsequent statements. (*See* Defs.’ Counter 56.1 ¶¶ 273 (admitting timing of campaign), 270 (admitting

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proposed rabbinical college “was a significant issue” during the campaign, and Sanderson, Yagel, and Louie promised “they would fight the rabbinical college.” (*Id.* ¶¶ 273, 276.)

On February 26, 2007, the Board of Trustees continued its public hearing on the proposed wetlands law, which was attended by Plaintiffs’ attorney, Susan Cooper, who requested that the public be given “further opportunity” to comment. (Defs.’ 56.1 ¶¶ 154-55.) In response, the Board of Trustees held another public hearing on the proposed wetlands law on March 26, 2007. (*Id.* ¶¶ 156-57.) On April 23, 2007, the Board of Trustees adopted Local Law 5 of 2007, (*id.* ¶ 158), which added a chapter to Village Law pertaining to wetlands and provided, in relevant part, and except for certain exceptions that are inapplicable here, that

it shall be unlawful to conduct, directly or indirectly, any of the following activities upon any wetland . . . or within 100 feet of the boundary of any wetland . . . unless a permit is issued therefor . . . (A) [a]ny form of draining dredging, excavation[,] or removal of material, except removal of debris or refuse[;] (B) [a]ny form of depositing of any material such as but not limited to soil, rock, debris, concrete, garbage, chemicals, etc.[;] (C) [e]recting any building or structure of any

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that Mayor Marshall served as Mayor, and Alan Lamer as Trustee, during the campaign), 274 (admitting that Sanderson, Louie, and Yagel ran on a ticket together).

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kind, roads, driveways, the driving of pilings or placing of any other restrictions, whether or not they change the ebb and flow of water[;]  
(D) [i]nstalling a septic tank, running a sewer outfall, discharging sewage treatment effluent or other liquid waste into or so as to drain into any wetland, water body[,] or watercourse[;]  
(E) [a]ny other activity which substantially impairs any of the several functions served by wetlands . . . .

Local Law 5 of 2007, codified at Village Code § 126-3(A). (*See also* Defs.’ 56.1 ¶ 159; Ulman Aff. Exs. 4-5.) The law further provided that “[t]he aforesaid one-hundred-foot buffer . . . shall not apply to lots that are improved with single-family residences.” Local Law 5 of 2007, codified at Village Code § 126-3(D). (*See also* Defs.’ 56.1 ¶ 160; Ulman Aff. Exs. 4-5.) Soon thereafter, in a May 9, 2007 email, Former Mayor Sanderson indicated her opposition to an Orthodox middle school proposed to be constructed near the Village, noting that it did “not sound good” and encouraging others to attend public hearings on the matter. (Pls.’ 56.1 ¶ 375 (citing Savad Decl. Ex. 11 (Sanderson Dep. Tr.) 224-26)); Savad Ex. 170 (May 9, 2007 email.)

Both prior to and after the passage of the Wetlands Law, the Congregation sent letters to the Village regarding its plans for the proposed rabbinical college, specifically on March 28, April 25, and June 22, 2007, and Susan Cooper spoke about the Congregation’s plans at a Board of Trustees meeting on April 12, 2007. (Pls.’ 56.1

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¶ 409.) While what requests those letters and statements contained, and whether they constituted a proper application for a meeting, is in dispute, (*see* Defs.’ Counter 56.1 ¶ 409-10), the Parties agree that the Congregation was never granted any type of meeting to discuss its proposal, (Pls.’ 56.1 ¶ 411). Nonetheless, in May 2007, the Congregation held a meeting “to present information to the public about the proposed rabbinical college,” and Village officials appear to have, on a few occasions, encouraged residents not to attend. (Pls.’ 56.1 ¶¶ 429-30, 432-34; Defs.’ Counter 56.1 ¶¶ 432-33.)

#### **4. The Impact of the Challenged Laws**

Plaintiffs allege that, collectively, the Challenged Laws prevent the construction of the rabbinical college in the Village. Because the entire Village, as noted, is zoned R-40, the Village Code permits only a limited number of land uses in the normal course, namely houses, libraries, museums, public parks, and playgrounds, *see* Village Code § 130-9, and, by special use permit, some other developments, including educational institutions, *see* Village Code § 130-10(F), and houses of worship, *see* Village Code § 130-10(G).<sup>14</sup> Plaintiffs contend that their rabbinical college is foreclosed by the Challenged Laws because (1) the Accreditation Law requires that educational institutions be “accredited by the New York State Education Department or similar recognized accreditation agency” and Plaintiffs’ rabbinical college

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14. As noted, R-40 refers to residential district zoning, requiring a minimum of 40,000 square feet per lot. (*See* Pls.’ 56.1 ¶ 4.) *See also* Village Code § 130-5.

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allegedly cannot be accredited, (2) the Dormitory Law excludes rooms that “contain separate cooking, dining or housekeeping facilities” as well as “single-family, two-family, and/or multifamily dwelling units,” constrains dormitory use to administrative staff, faculty, and students, and limits dormitory construction to 20% “of the total square footage of all buildings on the lot,” which effectively bar Plaintiffs from building the housing they desire, and (3) the Wetlands Law requires a 100-foot buffer around wetlands of 2,000 square feet or more on properties not improved with single family homes, which renders it impossible for Plaintiffs’ to build a suitable access road to the rabbinical college on the Subject Property, the only available property on which an educational institution can be built in the Village. (*See* Mem. of Law in Supp. of Pls.’ Mot. for Summ. J. (“Pls.’ Mem.”) 4-9, 18 (Dkt. No. 138).) Plaintiffs also allege that the Congregation cannot obtain a variance for its hoped-for use, (*id.* at 8), and that the Challenged Laws were motivated by discrimination, (*id.* at 4.) Accordingly, as limited by the Court’s 2013 Opinion and Order, Plaintiffs seek a declaratory judgment finding the Challenged Laws unconstitutional and illegal. (SAC 64.)

**B. Procedural History**

Plaintiffs’ filed their first Complaint on July 10, 2007, (Dkt. No. 1), and then filed an Amended Complaint on July 30, 2007, (Dkt. No. 12). Plaintiffs filed a Second Amended Complaint on November 19, 2007, (Dkt. No. 27).<sup>15</sup> Defendants filed a Motion to Dismiss, (Dkt. No. 36),

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15. Plaintiffs appear to have filed an identical version of their Second Amendment Complaint on two occasions. (*See* Dkt. Nos. 27, 28.)

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which the Court granted in part in an Opinion and Order dated January 7, 2013, (Dkt. No. 53).

Following discovery, the Court held a pre-motion conference on October 27, 2014, (*see* Dkt. (minute entry for Oct. 27, 2014)), at which the Court adopted a Scheduling Order for summary judgment motions, (Dkt. No. 135). Pursuant to that Order, Plaintiffs filed their Motion for Partial Summary Judgment and associated documents, (Dkt. Nos. 137-139, 143-144, 146-149, 151-155), and Defendants filed their Motion for Summary Judgment and associated documents, (Dkt. Nos. 140-142, 145, 150), on January 22, 2015. Pursuant to an extension of time granted by the Court, (*see* Dkt. Nos. 163, 187), the Parties filed opposition papers on April 2, 2015, (Dkt. Nos. 167-173, 175-76), and replies on May 21, 2015, (Dkt. Nos. 190, 193). Defendants also filed their Counter Statement to Plaintiffs' Supplemental Rule 56.1 Statement on May 21, 2015. (Dkt. No. 194.) Additionally, pursuant to an extension of time granted by the Court, (Dkt. No. 166), the United States of America ("United States") filed a Motion to Intervene and a brief defending the constitutionality of RLUIPA on April 23, 2015, (Dkt. Nos. 182-183), which Motion the Court granted on April 24, 2015, (Dkt. No. 184).

On April 27, 2015, the Court held a pre-motion conference on Plaintiffs' putative motion for sanctions for spoliation of evidence. (*See* Dkt. (minute entry for April, 27, 2015).) Pursuant to a Scheduling Order of the same date, (Dkt. No. 185), and an extension of time granted by the Court, (Dkt. No. 189), Plaintiffs filed their Motion for Sanctions and associated documents on June 3, 2015,

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(Dkt. Nos. 195-197). Defendants filed their Opposition and associated documents on July 1, 2015, (Dkt. Nos. 200-204), and Plaintiffs filed their Reply on July 15, 2015, (Dkt. No. 205). The Court held Oral Argument on the pending Summary Judgment Motions on July 8, 2015. (*See* Dkt. (minute entry for July 8, 2015).)

**II. Discussion****A. Standard of Review**

Summary judgment is appropriate where the movant shows that “there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(a); *see also Psihoyos v. John Wiley & Sons, Inc.*, 748 F.3d 120, 123-24 (2d Cir. 2014) (same). “In determining whether summary judgment is appropriate,” a court must “construe the facts in the light most favorable to the non-moving party and . . . resolve all ambiguities and draw all reasonable inferences against the movant.” *Brod v. Omya, Inc.*, 653 F.3d 156, 164 (2d Cir. 2011) (internal quotation marks omitted); *see also Borough of Upper Saddle River v. Rockland Cty. Sewer Dist. No. 1*, 16 F. Supp. 3d 294, 314 (S.D.N.Y. 2014) (same). Additionally, “[i]t is the movant’s burden to show that no genuine factual dispute exists.” *Vt. Teddy Bear Co. v. 1-800 Beargram Co.*, 373 F.3d 241, 244 (2d Cir. 2004); *see also Aurora Comm. Corp. v. Approved Funding Corp.*, No. 13-CV-230, 2014 U.S. Dist. LEXIS 49363, 2014 WL 1386633, at \*2 (S.D.N.Y. Apr. 9, 2014) (same). “However, when the burden of proof at trial would fall on the nonmoving party, it ordinarily is sufficient for the movant to point to



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a lack of evidence to go to the trier of fact on an essential element of the nonmovant's claim," in which case "the nonmoving party must come forward with admissible evidence sufficient to raise a genuine issue of fact for trial in order to avoid summary judgment." *CILP Assocs., L.P. v. PriceWaterhouse Coopers LLP*, 735 F.3d 114, 123 (2d Cir. 2013) (alterations and internal quotation marks omitted). Further, "[t]o survive a [summary judgment] motion . . . , [a non-movant] need[s] to create more than a 'metaphysical' possibility that his allegations were correct; he need[s] to 'come forward with specific facts showing that there is a genuine issue for trial,'" *Wrobel v. Cty. of Erie*, 692 F.3d 22, 30 (2d Cir. 2012) (emphasis omitted) (quoting *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586-87, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986)), and "cannot rely on the mere allegations or denials contained in the pleadings," *Walker v. City of N.Y.*, No. 11-CV-2941, 2014 U.S. Dist. LEXIS 41287, 2014 WL 1244778, at \*5 (S.D.N.Y. Mar. 26, 2014) (internal quotation marks omitted).

"On a motion for summary judgment, a fact is material if it might affect the outcome of the suit under the governing law." *Royal Crown Day Care, LLC v. Dep't of Health & Mental Hygiene of City of N.Y.*, 746 F.3d 538, 544 (2d Cir. 2014) (internal quotation marks omitted). At summary judgment, "[t]he role of the court is not to resolve disputed issues of fact but to assess whether there are any factual issues to be tried." *Brod*, 653 F.3d at 164 (internal quotation marks omitted); see also *In re Methyl Tertiary Butyl Ether ("MTBE") Prods. Liab. Litig.*, MDL No. 1358, No. M21-88, 2014 U.S. Dist. LEXIS 28287, 2014 WL

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840955, at \*2 (S.D.N.Y. Mar. 3, 2014) (same). Accordingly, “[a] [party] opposing a motion for summary judgment must lay bare his proof in evidentiary form and raise an issue of fact sufficient to send to the jury.” *Weiss v. La Suisse, Société D’Assurances Sur La Vie*, 293 F. Supp. 2d 397, 408 (S.D.N.Y. 2003) (internal quotation marks omitted). A court’s goal should, therefore, be “to isolate and dispose of factually unsupported claims.” *Geneva Pharms. Tech. Corp. v. Barr Labs., Inc.*, 386 F.3d 485, 495 (2d Cir. 2004) (quoting *Celotex Corp. v. Catrett*, 477 U.S. 317, 323-24, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986)); *see also Schatzki v. Weiser Capital Mgmt., LLC*, No. 10-CV-4685, 2013 U.S. Dist. LEXIS 168572, 2013 WL 6189465, at \*14 (S.D.N.Y. Nov. 26, 2013) (same).

**B. Analysis****1. Standing**

The Court begins, as it did in the 2013 Opinion and Order, with the threshold issue of standing. *See Pettus v. Morgenthau*, 554 F.3d 293, 298 (2d Cir. 2009) (“[S]tanding . . . is intended to be a threshold issue at least tentatively decided at the outset of the litigation.”). Defendants argue that Plaintiffs lack standing to challenge two of the Challenged Laws: the Dormitory Law and the Wetlands Law. (*See* Defs.’ Mem. of Law in Supp. of Their Mot. for Summ. J. (“Defs.’ Mem.”) 11-14 (Dkt. No. 14).)

Generally, under Article III, to obtain retrospective relief, a plaintiff must show (1) that he or she suffered an injury in fact which is concrete and particularized and

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actual or imminent, (2) that the injury is fairly traceable to the alleged unlawful conduct of the defendant, and (3) that it is likely that the injury will be redressed by a favorable federal court decision. *See Marcavage v. The City of N.Y.*, 689 F.3d 98, 103 (2d Cir. 2012) (citing *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560-61, 112 S. Ct. 2130, 119 L. Ed. 2d 351 (1992)); *see also Pac. Capital Bank, N.A. v. Conn.*, 542 F.3d 341, 350 (2d Cir. 2008) (“[T]o satisfy Article III’s standing requirements, a plaintiff must show (1) it has suffered an ‘injury in fact’ that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.” (alteration in original) (quoting *Friends of the Earth, Inc. v. Laidlaw Envt’l. Servs. (TOC), Inc.*, 528 U.S. 167, 180-81, 120 S. Ct. 693, 145 L. Ed. 2d 610 (2000)). Additionally, “[t]o establish standing to obtain prospective relief,” e.g., declaratory relief, “a plaintiff must show a likelihood that he will be injured in the future,” *Carver v. City of N.Y.*, 621 F.3d 221, 228 (2d Cir. 2010) (internal quotation marks omitted); *see also Abidor v. Napolitano*, 990 F. Supp. 2d 260, 272 (E.D.N.Y. 2013) (“An action for declaratory judgment does not provide an occasion for addressing a claim of alleged injury based on speculation as to conduct which may or may not occur at some unspecified future date.”), “[t]hat is, a plaintiff must demonstrate a certainly impending future injury,” and to do so, “a plaintiff cannot rely solely on past injuries; rather, the plaintiff must establish how he or she will be injured prospectively and that injury would be prevented by the equitable relief sought,” *Marcavage*,

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689 F.3d at 103. As indicated above, each of these factors “must be supported in the same way as any other matter on which . . . Plaintiff bears the burden of proof.” *Lujan*, 504 U.S. at 561.

In addition to the requirements of Article III, there are also prudential limits on standing. *See Lerman v. Bd. of Elections*, 232 F.3d 135, 143 (2d Cir. 2000) (“The question of standing encompasses both constitutional and prudential considerations.”). Generally, a plaintiff may not “rest his claim to relief on the legal rights or interest of third parties.” *Warth v. Seldin*, 422 U.S. 490, 499, 95 S. Ct. 2197, 45 L. Ed. 2d 343 (1975). In the First Amendment context, however, “litigants . . . are permitted to challenge a statute not because their own rights . . . are violated, but because of a judicial prediction or assumption that the statute’s very existence may cause others not before the court to refrain from constitutionally protected [conduct].” *Va. v. Am. Booksellers Assn.*, 484 U.S. 383, 392-93, 108 S. Ct. 636, 98 L. Ed. 2d 782 (1988) (internal quotation marks omitted). More specifically, while “[t]he issue of whether a facial challenge may be entertained is one prudential consideration . . . .,” *Lerman*, 232 F.3d at 143, in the First Amendment context a plaintiff “need only demonstrate a substantial risk that application of the provision will lead to the suppression” of First Amendment rights, *id.* at 144 (internal quotation marks omitted); *see also Dickerson v. Napolitano*, 604 F.3d 732, 742 (2d Cir. 2010) (“[T]he plaintiff is allowed to challenge a law that may be legitimately applied to his or her own expressive conduct if the law has the potential to infringe unconstitutionally on the expressive conduct of others.”); *Roman Catholic*

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*Archdiocese of N.Y. v. Sebelius*, 907 F. Supp. 2d 310, 322 (E.D.N.Y. 2012) (noting, with respect to standing in a facial challenge to statute on free exercise grounds, that “[a] plaintiff bringing a pre-enforcement facial challenge against a statute need not demonstrate a certainty that it will be prosecuted under the statute to show injury, but only that it has an actual and well-founded fear that the law will be enforced against it”) (some internal quotation marks omitted) (quoting *Vt. Right to Life Comm., Inc. v. Sorrell*, 221 F.3d 376, 382 (2d Cir. 2000)); *Savago v. Vill. of New Paltz*, 214 F. Supp. 2d 252, 254 (N.D.N.Y. 2002) (“Exceptions . . . in the First Amendment context allow a plaintiff to challenge a law on its face on the grounds that it is content-based [and] that it might chill the First Amendment rights not only of the plaintiff, but of others before the court.”).

In its 2013 Opinion and Order, the Court held that the Congregation “ha[d] shown that it ha[d] standing to challenge the ordinances at issue because, accepting as true the allegations in the Second Amended Complaint, the Congregation ha[d] alleged a particularized injury that would be redressed if the Court granted the requested relief.” *Tartikov*, 915 F. Supp. 2d at 591. While it remains “the burden of the party invoking federal jurisdiction to establish standing,” *Lujan*, 504 U.S. at 561, the Court cannot merely rely on the allegations of the Second Amended Complaint at this stage of the case. Rather, “[t]o defend against summary judgment for lack of standing, . . . [P]laintiff must set forth by affidavit or other evidence specific facts supporting standing . . .” *N. Res. Def. Council, Inc. v. U.S. Food and Drug Admin.*,

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710 F.3d 71, 79 (2d Cir. 2013) (internal quotation marks omitted).

The Court previously found standing on the basis of five separate allegations in the Second Amended Complaint, namely:

- (1) the Congregation owns the Subject Property;
- (2) it purchased the Subject Property with the intention of building a rabbinical college thereon;
- (3) it already has begun to develop plans to build the rabbinical college;
- (4) the Subject Property is subject to [§§] 130-4, 130-9, and 130-10 of the Village Zoning Code, as well as [§] 126 (the Village's wetlands ordinance), which on their face prohibit unaccredited educational institutions and some of the Congregation's planned accessory uses; and
- (5) those provisions were enacted unlawfully to prevent the Congregation from building its rabbinical college.

*Tartikov*, 915 F. Supp. 2d at 591. As outlined above, there is no dispute among the Parties as to the first and third allegations, that the Congregation owns the Subject Property and has at least begun to develop plans to build a rabbinical college, though the extent of that development is in dispute, (*compare* Defs.' 56.1 ¶¶ 26-27, *with* Pls.' Counter 56.1 ¶¶ 26-27 (discussing the state of the curriculum)), and Defendants have offered no evidence to rebut Plaintiffs' second allegation, which *is* supported by evidence, that the Congregation *purchased the Subject*

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*Property* to build a rabbinical college. (See Pls.’ 56.1 ¶ 102 (citing Decl. of Michael Tauber (“Tauber Decl”) ¶ 3 (Dkt. No. 148)).)<sup>16</sup> Moreover, Plaintiffs need not prove the fifth allegation—that the provisions were enacted to prevent the rabbinical college from being built—in order to establish standing to challenge them. See *Chabad Lubavitch v. Borough of Litchfield*, 796 F. Supp. 2d 333, 338 (D. Conn. 2011) (holding that religious corporation which owned property had standing to challenge zoning ordinance); cf. *Lamar Advert. of Penn, LLC v. Town of Orchard Park*, 356 F.3d 365, 373-75 (2d Cir. 2004) (finding that standing requirements were satisfied where an ordinance prevented the plaintiff from building certain signs); *M.J. Entm’t Enter. v. City of Mount Vernon*, 234 F. Supp. 2d 306, 310 (S.D.N.Y. 2002) (determining that the plaintiff had established standing with respect to one claim where the challenged ordinance kept the plaintiff from “offer[ing] topless dancing as entertainment at its business establishment”). Accordingly, the central question is whether the Challenged Laws apply to, and foreclose, the Congregation’s planned rabbinical college.

With regard to the Dormitory Law, Defendants argue that while the Challenged Laws permit dormitories as accessory uses to an educational use, (Defs.’ Mem. 12

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16. In response, (see Defs.’ Counter 56.1 ¶102), Defendants cite only the Congregation’s Certification of Incorporation, which does not mention the Subject Property but does indicate that the Congregation was incorporated “[t]o establish, maintain[,] and conduct a school . . . of the holy Torah and to maintain classes for the teachings of the customs, traditions[,] and mode of worship of the Jewish Orthodox faith,” (Gordon Aff. Ex. 18, at unnumbered 2.)

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(citing Local Law 5 of 2014 and Local Law 1 of 2007)), “[a]s a matter of law, the housing aspect of Plaintiffs’ hypothetical plan is not an accessory use, because it is so disproportionate to the educational use that it cannot be subordinate or incidental,” (*id.* at 11.) In support, Defendants cite two dated cases in which state courts held that certain land uses were not accessory uses because they were not “naturally and normally incidental to the main use of the premises.” (*Id.* at 12 (citing *Ames v. Palma*, 52 A.D.2d 1078, 384 N.Y.S.2d 587, 587 (App Div. 1976) and *Town Hall, Inc. v. Tax Comm’n*, 18 A.D.2d 629, 234 N.Y.S.2d 760, 761 (App. Div. 1962).) Defendants also cite the deposition of C. Babad as evidence that housing, rather than education, was the primary purpose of the proposed residences. (*Id.* at 13 (citing Savad Decl. Ex. 31 (C. Babad Dep. Tr.) 102 (“Because if we come in with 250 families—and lucky they only can have one child a year, but can you imagine if they . . . have two a year? Probably in the next ten years we’ll have several thousand of them over there.”))).)

The Village Code contains no language proclaiming that certain uses cannot be because of their size, but rather defines accessory as “[a] use which is customarily incidental and subordinate to the principal permitted use on the lot and located on the same lot therewith . . . .” Village Code § 130-4. Defendants’ cases likewise do not stand for the proposition that the mere size of a proposed use, either in absolute terms or in proportion to other uses, renders it non-accessory. Rather, as the court in *Ames* put it, “[a]n accessory use *that is too large for an applicant’s proven needs* ceases to be naturally and



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normally incidental to the main use of the premises,” 384 N.Y.S.2d at 587 (emphasis added); *see also Town Hall, Inc. v. Tax Comm’n of City of N.Y.*, 18 A.D.2d 629, 234 N.Y.S.2d 760, 761 (App. Div. 1962) (finding that a clubhouse was not an accessory use to an educational institution not because of its size, but because “the exhibits which detailed the record of events held in the club [made] it manifestly clear that such use was the dominant one and that the use for educational purposes was merely incidental”). As Plaintiffs point out, there is ample case law indicating that the size of a development is not dispositive to whether it is accessory. *See, e.g., Mamaroneck Beach & Yacht Club, Inc. v. Zoning Bd. of Appeals of Vill. of Mamaroneck*, 53 A.D.3d 494, 862 N.Y.S.2d 81, 85 (App. Div. 2008) (“The [zoning board of appeals], in engrafting area requirements upon provisions defining a permissive accessory use, based upon the square footage of other building structures on the property,” namely by ruling that a structure that constituted more than 50% of total building square footage on the property could not be an accessory use, “was irrational and unreasonable.”). Rather, what matters is the size of the accessory use relative to the *need* for that use. *See De Mott v. Notey*, 3 N.Y.2d 116, 143 N.E.2d 804, 806, 164 N.Y.S.2d 398 (App. Div. 1957) (finding that use of two out of three buildings as dwellings was permissible accessory use to hospital because “[i]t is . . . generally known . . . that hospitals customarily provide living accommodations for at least some of their personnel”).

The evidence in the record is sufficient to establish standing as to the Dormitory Law. Plaintiffs contend,

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repeatedly, that they intend, and need, to build family housing for students of the proposed rabbinical college, and that such housing will *only* be used by students, faculty, and their families. (See Pl.'s 56.1 ¶¶ 457, 459-62, 465-67, 471-73, 489-491 (discussing need for such housing); see also ¶ 486 ("The housing component of the rabbinical college is only for students (and teachers) who are committed to the full-time religious training program along with their families, as well as one or two caretakers of the subject property."); ¶ 497 (noting that, when the Congregation was formed, "the understanding was that the planned rabbinical college would be only for students (and teachers) committed to the full-time program, along with their families"); ¶¶ 493-495 (discussing need for family housing with housekeeping, cooking, and dining facilities); ¶¶ 603-614 (discussing how the Dormitory Law prohibits plaintiffs' desired housing).) While some of the families living in the proposed dormitories may be large, potentially requiring the construction of large facilities, that fact does not make their size disproportionate, as a matter of law, to their need. See *Assoc. of Zone A & B Homeowners Subsidiary, Inc. v. Zoning Bd. of App. of City of Long Beach*, 298 A.D.2d 583, 749 N.Y.S.2d 68 (App. Div. 2002) ("Educational institutions are generally permitted to engage in activities and locate on their property facilities for such social, recreational, athletic, and other accessory uses as are reasonably associated with their educational purpose." (internal quotation marks omitted)). While Defendants may maintain that this is not Plaintiffs' true motive, the question of whether Plaintiffs intend the housing to serve *only* the rabbinical college, or the Orthodox Hasidic community generally, is, at most,

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a question of material fact for the jury. But, viewing the facts in favor of the Plaintiffs, as non-movants on this issue, Defendants' argument falls short.

Additionally, the question of whether the housing at issue here is actually an accessory use is beside the point. The Dormitory Law, in concert with other Village laws, including the Challenged Laws, prevent Plaintiffs from building the family housing they seek as part of their rabbinical college. The Dormitory Law, specifically, prohibits any sort of housing as part of an educational institution that is not defined as a "dormitory" in that statute. *See* Village Code § 130-9. Because the Dormitory Law explicitly precludes housing for students with families, housing that comprises greater than 20% of building square footage on the property at issue, or the building of separate cooking or housekeeping facilities, it is an insurmountable barrier to Plaintiffs' rabbinical college as currently conceived, regardless of how "accessory use" is defined. (*See* Mem. of Law in Opp'n to Defs.' Mot. for Summ. J. ("Pls.' Opp'n") 5-6 (Dkt. No. 167).)<sup>17</sup> Thus, the merits of Plaintiffs' challenge to the Dormitory Law notwithstanding, Plaintiffs' have provided sufficient evidence to indicate that the Dormitory Law, on its face, forecloses Plaintiffs' proposed rabbinical college, or any educational institution that may seek include housing for families of students, and therefore Plaintiffs have standing to levy a facial challenge against it.

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17. In fact, Plaintiffs contend that the dormitories are not an "accessory" use at all, but rather a component of the primary use: the rabbinical college itself. (*See* Pls.' Mem. 6 n.7.)

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With regard to the Wetlands Law, Defendants argue that “[t]here is no evidence the wetlands local law applies to any or some of the wetlands on the Subject Property because Plaintiffs have provided no wetlands studies of this property that would identify wetlands covered by the local wetlands law.” (Defs.’ Mem. of Law in Opp’n to Pls.’ Partial Mot. for Summ. J. (“Defs.’ Opp’n”) 27 (Dkt. No. 170).) Plaintiffs do, however, produce at least some evidence of wetlands on the Property, (*see* Beall Decl. ¶¶ 281-84, 287, 289 (discussing wetlands on property in the context of state and federal regulations), Ex. H (indicating the existence of wetlands on the east side of the property, and a stream on the west side of the property); Ex. I (same); Ex. T (property map identifying wetlands); *see also* Aff. of Amanda E. Gordon (“Second Gordon Aff.”) Ex. A (Report of Charles J. Voorhis) at 63 (Dkt. No. 173) (indicating the existence of wetlands on the Subject Property)), which Defendants do not rebut.<sup>18</sup> Plaintiffs are therefore permitted to bring a facial challenge against the Wetlands Law, and there is therefore no basis to grant summary judgment to Defendants on standing grounds.

## 2. Ripeness

Defendants also contend that Plaintiffs’ challenge is unripe because Plaintiffs never submitted a formal application related to the proposed rabbinical college. (*See, e.g.*, Defs.’ Mem. 14 (“Plaintiffs’ claims are not ripe . . . because they never filed an application . . . .”); Defs.’

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18. The Court below addresses the question of whether the Wetlands Law changed the regulatory environment with respect to Subject Property.

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Opp'n 4 n.6 (“[T]he dormitory regulations and wetlands regulations are beyond this Court’s jurisdiction due to a lack of standing and ripeness.”); *id.* at 26 (“Plaintiffs lack standing on the wetlands regulation, as discovery has shown that their attack on them is unripe and a claim at this point is merely speculative. Therefore, the Court lacks jurisdiction over the wetlands provisions, even as to a facial challenge.”).) For the reasons stated in the Court’s 2013 Opinion and Order, which is unaffected by the evidence adduced after that Opinion and Order was issued, Plaintiffs’ facial challenges, by virtue of being facial challenges, are ripe and have been ripe from “the moment the [Challenged laws] [were] passed.” *Tartikov*, 915 F. Supp. 2d at 595 (quoting *Suitum v. Tahoe Reg’l Planning Agency*, 520 U.S. 725, 736 n.10, 117 S. Ct. 1659, 137 L. Ed. 2d 980 (1997)); *see also S. Lyme Prop. Owners Ass’n, Inc. v. Town of Old Lyme*, 539 F. Supp. 2d 524, 536 (D. Conn. 2008) (“[F]acial challenges are generally ripe the moment the challenged regulation or ordinance is passed.” (internal quotation marks omitted)); *Ecogen, LLC v. Town of Italy*, 438 F. Supp. 2d 149, 155 (W.D.N.Y. 2006) (“[F]acial challenges to legislative acts are ripe by their very nature.” (internal quotation marks omitted)).

In a similar vein, Defendants suggest that Plaintiffs’ RLUIPA substantial burden claim is unripe because Plaintiffs have not filed an application, meaning the Village has not yet “impose[d]” the Challenged Laws on them. (*See* Defs.’ Mem. 36-37.) Plaintiffs disagree, noting that the inclusion of “implement” in the statute suggests that “impose” has a different meaning and is analogous to “enact.” (*See* Pls.’ Mem. 10-11.) The Court agrees with

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Plaintiffs: a substantial burden can be imposed by the mere enactment of legislation. *See Elijah Group, Inc. v. City of Leon Valley*, 643 F.3d 419, 422 (5th Cir. 2011) (“When we focus on the text of the Clause, we read it as prohibiting the government from ‘imposing,’ i.e., enacting, a facially discriminatory ordinance or ‘implementing,’ i.e. enforcing a[n ordinance].”); *Roman Catholic Diocese*, 2012 U.S. Dist. LEXIS 56694, 2012 WL 1392365, at \*8 (upholding facial challenge to zoning law because the plaintiff had adequately alleged that the “conditions imposed by the [law] would significantly restrict the [plaintiff’s] use of their [p]roperty for religious burial purposes”). Accordingly, Plaintiffs’ facial challenges are ripe for adjudication.

### 3. Spoliation

#### a. Factual Background

Plaintiffs, in their Motion for Sanctions, request that the Court sanction Defendants for destroying a Facebook post (the “Facebook Post”) written by Louie and related text messages between Mayor Yagel and Louie, and for failing to produce “the non-destroyed portion of those texts,” which Plaintiffs allege contained relevant evidence. (Pls.’ Mem. of Law in Supp. of Pls.’ Mot. for Sanctions Due to Spoliation of Evidence (“Pls.’ Sanctions Mem.”) 2 (Dkt. No. 196).)

In May 2013, Louie posted a comment on her personal Facebook page noting her disapproval of an all-male gathering of Hasidic/Orthodox Jews, though without

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directly referencing their religion. (Defs.' Mem. of Law in Opp'n to Pls.' Mot. for Sanctions Due to Spoliation of Evidence ("Defs.' Sanctions Opp'n") 1-2 (Dkt. No. 200).)<sup>19</sup> Thereafter, following an angry text message exchange between Mayor Yagel and Louie, Louie deleted the Facebook post. (*Id.* at 2; *see also* Decl. of Brett Yagel ("Yagel Sanctions Decl.") ¶ 19 (Dkt. No. 202) (referencing "any text message").)<sup>20</sup> In March 2015, Mayor Yagel posted a comment on his personal Facebook page about a *Rockland County Times* newspaper article. (Pls.' Sanctions Mem. 2.) Mayor Yagel's comment stated, in relevant part:

FACT: Rita Louie, while still a Trustee, posted on Facebook, inappropriately, about an 'ALL MALE gathering' at the Provident Bank Ballpark. Especially given the lawsuit which the Village of Pomona is involved with and the NATION [sic] IMPLICATIONS it could have. i.e., federal law potentially being struck down as unconstitutional, just as it's [sic] predecessor (RFA) was. Total lapse in reason and judgment.

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19. Louie claims that, as a women's rights activist, she objected to an "all-male gathering being held at a municipal facility, where women were not permitted to attend," and that she did not think it the Facebook post was relevant to the this Action. (*See* Decl. of Rita J. Louie ("Louie Sanctions Decl.") ¶¶ 14-17 (Dkt. No. 201); *see also* Defs.' Sanctions Opp'n 2.)

20. Mayor Yagel avers that he did not believe the post "reflected a religious animus" or was relevant to the instant Action but that he was worried that the post would be mischaracterized as anti-Semitic by Plaintiffs. (Yagel Sanctions Decl. ¶¶ 16-17.)

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Here [sic] explanation (have the text still Rita), on medication and I've removed it. And if a vacancy should occur (post this village election), how could anyone in their right mind (i.e. New Mayor), consider this person as a viable candidate to fill an [sic] trustee unexpired (his), given their predisposition to making such blatant and inappropriate remarks.

(Decl. of Paul Savad in Supp. of Pls.' Mot. for Sanctions Due to Spoliation of Evidence ("Savad Suppl. Decl.") Ex. 1 (Comment) (Dkt. No. 197).)

After learning that Louie had made such remarks, Plaintiffs requested "all responsive social media posts and comments," including Louie's Facebook post and the text of the post the Mayor Yagel indicated that he retained. (*See* Savad Suppl. Decl. Ex. 2 (Mar. 19, 2015 email demanding production).) Defendants responded they were unable to produce the Facebook post because Mayor Yagel did not have a copy and produced a partial copy of text messages discussing the post. (*Id.* Ex. 3 (Mar. 25, 2015 letter from Andrea Donovan Napp to Donna Sobel, Esq. describing disclosures).) The text messages contained the following exchange:

[Mayor Yagel]: Is it your position to cause damage to the village? Someone just sen[t] me a screenshot of your Facebook post! If it is your intent to jeopardize target . . . then you are succeeding and may cause us to loose! [sic] You should consider . . . .



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[Louie]: A little over the top but I understand your anger. All taken down and I reviewed all my accounts to make sure there are no other unfortunate mistakes. But no, I don't think I should consider resigning.

[Mayor Yagel]: I am so angry now that my heads [sic] about to pop. Their lawyers will use everything. Remember the case in NJ where the federal judge ruled that comments made by a public official in a non official [sic] setting led him to decide potential prejudice even though there was no final ruling but based on prior witness testimony. We have too much riding on this case for you to jeopardize it. Everything is fair game in the lawsuit. Judge Karas is watching this case . . . publicly commenting on an all male [sic] gathering when it's related to a religious entity, is not good!

(Savad Suppl. Decl. Ex. 4.) Plaintiffs allege that a portion of the text message is missing after Mayor Yagel writes “[y]ou should consider,” (Pls.’ Sanctions Mem. 4), though Louie’s response at least suggests that Mayor Yagel encouraged Louie to consider resigning, (Savad Suppl. Decl. Ex. 4; *see also* Defs.’ Sanctions Opp’n 10 n.11), as Mayor Yagel himself avers, (Yagel Sanctions Decl. ¶ 20). Plaintiffs nonetheless allege that Defendants intentionally destroyed the Facebook post, and failed to retain a complete set of the texts. (Pls.’ Sanctions Mem. 5.)<sup>21</sup>

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21. Additionally, on the basis of these texts, and the fact that they were sent on Friday, May 10, Plaintiffs determined that the exchange occurred on Friday, May 10, 2013. (Pls.’ Sanctions Mem 4 n.2.)

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Plaintiffs further allege that Mayor Yagel lied about his preservation of this evidence when he certified, on July 3, 2013, only two months after the exchange at issue, and in response to Plaintiffs' interrogatories, that Defendants preserved "all potentially relevant" electronic screen images. (Pls.' Sanctions Mem. 5; Savad Suppl. Decl. Ex. 5 at 4 (interrogatory), 19 (verification).) In response, Yagel avers that he did not think the Facebook post was relevant to the instant action. (*See* Yagel Sanctions Decl. ¶ 26.)<sup>22</sup>

**b. Applicable Law**

"Spoliation is the destruction or significant alteration of evidence, or the failure to preserve property for another's use as evidence in pending or reasonably foreseeable litigation." *Byrnie v. Town of Cromwell, Bd. of Educ.*, 243 F.3d 93, 107 (2d Cir. 2001) (internal quotation marks omitted). While "[c]ourts cannot and do not expect that a party can meet a standard of perfection," *Pension Comm. of the Univ. of Montreal Pension Plan v. Bank of Am. Sec. LLC*, 685 F. Supp. 2d 456, 461 (S.D.N.Y. 2010), *abrogated on other grounds, Chin v. Port Auth.*, 685 F.3d 135 (2d Cir. 2012), sanctions serve to "(1) deter[] parties from destroying evidence; (2) plac[e] the risk of an erroneous evaluation of the content of the destroyed evidence on the party responsible for its destruction; and (3) restor[e] the party harmed by the loss of evidence

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22. The Court does not take a position on whether Yagel intentionally lied when making this certification. As discussed below, even if Yagel did not believe the evidence was relevant, his bad faith is evidenced by the fact that, as he explained in his Facebook post, he still sought ensure that Plaintiffs did not discover it.

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helpful to its case to where the party would have been in the absence of spoliation.” *Id.* at 469 (internal quotation marks omitted). A spoliation sanction is appropriate where “(1) . . . the party having control over the evidence had an obligation to preserve it at the time it was destroyed; (2) . . . the records were destroyed with a culpable state of mind; and (3) . . . the destroyed evidence was relevant to the party’s claim or defense such that a reasonable trier of fact could find that it would support that claim or defense.” *Residential Funding Corp. v. DeGeorge Fin. Corp.*, 306 F.3d 99, 108 (2d Cir. 2002) (internal quotation marks omitted). “[D]etermining the proper sanction to impose for spoliation is ‘confined to the sound discretion of the trial judge . . . and is assessed on a case-by-case basis.’” *Adorno v. Port Auth.*, 258 F.R.D. 217, 227 (S.D.N.Y. 2009) (quoting *Fujitsu Ltd. V. Fed. Exp. Corp.*, 247 F.3d 423, 436 (2d Cir. 2001)).

**c. Application**

As to the first element, the duty to preserve, an obligation to preserve evidence “usually arises when a party has notice that the evidence is relevant to litigation . . . but also on occasion in other circumstances, as for example when the party should have known that the evidence may be relevant to future litigation.” *Byrnie*, 243 F.3d at 107 (internal quotation marks omitted); *see also Kronisch v. United States*, 150 F.3d 112, 126 (2d Cir. 1998) (same). Indeed, “[w]hile a litigant is under no duty to keep or retain every document in its possession, once a party reasonably anticipates litigation, it must suspend its routine document retention/destruction policy and

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put in place a litigation hold to ensure the preservation of relevant documents.” *Adorno*, 258 F.R.D. at 227 (alterations and internal quotation marks omitted); *see also Green v. McClendon*, 262 F.R.D. 284, 289 (S.D.N.Y. 2009) (describing this time as “the point where relevant individuals anticipate becoming parties in imminent litigation”); *Zubulake v. UBS Warburg, LLC*, 220 F.R.D. 212, 217 (S.D.N.Y. 2003) (noting that the duty to preserve evidence “attache[s] at the time that litigation was reasonably anticipated”). “Relevant documents are those that a party should reasonably know are relevant in the action, reasonably calculated to lead to the discovery of admissible evidence, reasonably likely to be requested during discovery and/or are the subject of a pending discovery request.” *Adorno*, 258 F.R.D. at 217 (alterations and internal quotation marks omitted).

It is clear that Defendants were under an obligation to preserve the Facebook post and related text messages as of the date of the Facebook post: May 10, 2013. This action was filed in July 10, 2007, (*see* Dkt No.1), and there was a litigation hold in place as of August 29, 2007, nearly six years before the comment at issue was posted, (*see* Savad Suppl. Decl. Ex. 11 (Aug. 29, 2007 letter from Former Mayor Sanderson to village officials re: litigation hold)). The Facebook post is also subject to the litigation hold because it appears to reference a gathering of individuals with the same religious observance as the Plaintiffs in this Action, who allege that Louie, among others, discriminated against them. Indeed, Mayor Yagel’s strong reaction to the post is suggestive not only of the obligation to preserve the post and related text messages but also of their relevance.

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As to the second element, culpable state of mind, “at times [the Second Circuit has] required a party to have intentionally destroyed evidence; at other times [the Second Circuit has] required action in bad faith; and at other times [the Second Circuit] has allowed an adverse inference based on gross negligence” and, accordingly, “a case by case approach [is] appropriate.” *Byrnie*, 243 F.3d at 107-08; *see also id.* at 109 (noting that “intentional destruction of documents in the face of a duty to retain those documents is adequate” to show a “culpable state of mind”). In other words, “the culpable state of mind factor is satisfied by a showing that the evidence was destroyed knowingly, even without intent to breach a duty to preserve it, or negligently.” *Residential Funding*, 306 F.3d at 108 (emphasis, alterations, and internal quotation marks omitted).<sup>23</sup> Gross negligence, in this context, is “the

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23. The Court recognizes that a recent amendment to Federal Rule of Civil Procedure 37, subdivision (e) provides that

If electronically stored information that should have been preserved in the anticipation or conduct of litigation is lost because a party failed to take reasonable steps to preserve it, and it cannot be restored or replaced through additional discovery, the court:

- (1) upon finding prejudice to another party from loss of the information, may order measures no greater than necessary to cure the prejudice; or
- (2) only upon finding that the party acted with the intent to deprive another party of the information’s use in the litigation may:

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failure to exercise even that care which a careless person would use,” *Harkabi v. SanDisk Corp.*, 275 F.R.D. 414, 419 (S.D.N.Y. 2010) (internal quotation marks omitted), and “[o]nce the duty to preserve attaches, any destruction of documents is, at a minimum, negligent.” *Zubulake*, 220 F.R.D. at 220; *see also Orbit One Comm’ns, Inc. v. Numerex Corp.*, 271 F.R.D. 429, 438 (S.D.N.Y. 2010) (“In this circuit, a culpable state of mind for purposes of spoliation inference includes ordinary negligence.” (internal quotation marks omitted)); *see also Residential Funding*, 306 F.3d at 108 (“[The] sanction [of an adverse inference] should be available even for the negligent destruction of documents if that is necessary to further the remedial purpose of the inference.”).

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(A) presume that the lost information was unfavorable to the party;

(B) instruct the jury that it may or must presume the information was unfavorable to the party; or

(C) dismiss the action or enter a default judgment.

While the amendment, as Defendants admit, does not take effect until December 1, 2015, (Defs.’ Sanctions Opp’n 8 n.10), it would “abrogate *Residential Funding* insofar as it holds that sanctions may be appropriate in instances where evidence is negligently destroyed.” *Sekisui Am. Corp. v. Hart*, 945 F. Supp. 2d 494, 503 n.51 (S.D.N.Y. 2013) (discussing an earlier version of the proposed amendment). Therefore, to impose any remedy beyond one that merely “cure[s]” any “prejudice,” the Court would have to find an “intent to deprive.” Because the amendment is not yet effective, the Court need not follow the rule here, but the Court notes that, as explained below, it nonetheless finds that Defendants had the requisite intent to deprive Plaintiffs of the evidence at issue.

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Here, the culpable state of mind element is met. Mayor Yagel clearly stated his concern about the Court or Plaintiffs learning about Louie’s Facebook post in his comment, and in response Louie deleted the post. Indeed, rather than seek to preserve the post or any other relevant social media, Louie assured Mayor Yagel that she had “reviewed all [her] accounts to make sure there [were] no other unfortunate mistakes.” (Savad Suppl. Decl. Ex. 4.) While Defendants emphasize the fact that Mayor Yagel did not recognize the “significance” of Louie’s statement that she had deleted the post, (*see* Defs.’ Sanctions Opp’n 9), neither that detail nor the fact that Mayor Yagel “continued to castigate” Louie means that Mayor Yagel did not instigate the destruction of the evidence; his tirade may have been aimed at preventing Louie from posting similar comments in the future, (*id.* at 9). Assuming Mayor Yagel’s concern about the post truly was rooted in his “perception that Plaintiffs would . . . have[] twisted any incidental reference to Orthodox/Hasidic Jews into something far more nefarious,” that alone not only demonstrates that Mayor Yagel did not want Plaintiffs to obtain the Facebook post but also, as the text messages make clear, suggests that Mayor Yagel was concerned about the Court learning about the post as well. (*Id.* at 9-10; *see also* Reply Mem. of Law in Supp. of Pls.’ Mot. for Sanctions Due to Spoliation of Evidence (“Pls.’ Sanctions Reply”) 3 (Dkt. No. 205).) Thus, regardless of whether there was actually a “conspiracy” between Mayor Yagel and Louie to destroy the Facebook post, (*see* Defs.’ Sanctions Opp’n 10), this is the rare case where bad faith, and a clear intent to deprive Plaintiffs of the evidence at issue, is sufficiently clear from the face of the record.

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As to the third element, “[t]he burden of proving that evidence would have been relevant to a party’s claims or defense is proportional to the mens rea of the party who destroyed the evidence, and where the party destroyed the evidence due to ordinary negligence [as opposed to bad faith], the burden falls on the prejudiced party to produce some evidence suggesting that a document or documents relevant to substantiating his claim would have been included among the destroyed files.” *Williams v. N.Y.C. Transit Auth.*, No. 10-CV-882, 2011 U.S. Dist. LEXIS 120768, 2011 WL 5024280, at \*8 (E.D.N.Y. Oct. 19, 2011) (emphasis and internal quotation marks omitted). “To satisfy this burden, the innocent party may provide sufficient evidence that would tend to show that the lost documents would have been favorable to [its] case.” *Id.* (internal quotation marks omitted); *see also Adorno*, 258 F.R.D. at 228 (“Although the burden placed on the moving party to show that the lost evidence would have been favorable to it ought not be too onerous, . . . when the culpable party was negligent, there must be extrinsic evidence to demonstrate that the destroyed evidence was relevant and would have been unfavorable to the destroying party.” (citations and internal quotation marks omitted)).

Because the Court has found that Defendants’ destruction of evidence was in bad faith, there is a presumption that the evidence was relevant. *See Residential Funding* 306 F.3d at 109 (“Where a party destroys evidence in bad faith, that bad faith alone is sufficient circumstantial evidence from which a reasonable fact finder could conclude that the missing evidence was



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unfavorable to that party.”); *Chan v. Triple 8 Palace, Inc.*, No. 03-CV-6048, 2005 U.S. Dist. LEXIS 16520, 2005 WL 1925579, at \*8 (S.D.N.Y. Aug. 11, 2005) (same). However, even if the presumption of relevance did not apply, the Facebook post and text messages are plainly relevant to Plaintiffs’ discrimination claims because any subsequent discriminatory animus may indicate a pattern of discrimination, *cf. Arlington Heights*, 429 U.S. at 266 (noting propriety of considering “circumstantial” evidence and the relevance of a “pattern” of discrimination), or whether seeking a text amendment to (or variance from) the Challenged Laws would be futile, *see, e.g., Westchester Day Sch. v. Vill. of Mamaroneck (“WDS II”)*, 504 F.3d 338, 349, 352 (2d Cir. 2007) (“*WDS II*”).<sup>24</sup>

Facebook posts are regularly produced in litigation as evidence of a party’s thoughts and actions, *see, e.g., Reid v. Ingerman Smith LLP*, No. 12-CV-307, 2012 U.S. Dist. LEXIS 182439, 2012 WL 6720752, at \*1 (E.D.N.Y. Dec. 27, 2012) (ordering such posts produced), and, as Plaintiffs point out, (Pls.’ Sanctions Mem. 9), the post at issue here is responsive to Plaintiffs’ Document Request No. 53 which sought, among other things, all “documents concerning statements . . . concerning Jews, Hasidic Jews[,] and Orthodox Jews[] including, but not limited to, all blogs [and] on-line forums,” (Savad Suppl. Decl. Ex.

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24. Defendants assert that this argument “holds no sway in this case,” but they do not explain why. (Defs.’ Sanctions Opp’n 14.) As discussed below, and as explained by Plaintiffs in their Reply, (*see* Pls.’ Sanctions Reply 7-8), whether Plaintiffs’ efforts to obtain a text amendment would be futile is a material fact in this Action.

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13).<sup>25</sup> In fact, Defendants previously produced a Facebook post from the day after the offending post. (*See id.* Ex. 15 at unnumbered 1.)<sup>26</sup> Likewise, the texts are responsive to Plaintiff’s Document Request No. 45, which sought, among other things “documents including . . . correspondence [and] notes . . . concerning communications by or with the Village Board and/or its Members . . . concerning the Subject Property and/or the proposed Rabbinical College.” (*Id.* Ex. 13.) Moreover, as noted above, the relevance of the evidence is confirmed by Mayor Yagel’s response to the Facebook Post, particularly given he noted that it “may cause [Defendants] to loose [sic].” (*Id.* Ex. 4.) Accordingly, the Court finds that sanctions of some type are warranted for Defendants destruction of—and failure to produce—this evidence.<sup>27</sup>

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25. Defendants’ assertion that the Facebook post is not covered by Plaintiffs’ Document Request No. 53 is not credible. (*See* Defs.’ Sanctions Opp’n 14-15.) The fact that the individuals at issue in Louie’s post are Hasidic and/or Orthodox Jews does, by its very nature, render it a comment “concerning” Hasidic and/or Orthodox Jews.

26. Defendants’ assertion that the text messages are not covered by Plaintiffs’ Document Request No. 45 also is not credible. (*See* Defs.’ Spoliation Opp’n 15.) By virtue of referencing how Plaintiffs may use the post to show discriminatory animus in the passage of the Challenged Laws to prevent the construction of the proposed rabbinical college, they clearly relate to the proposed rabbinical college.

27. While Defendants suggest that Magistrate Judge George A. Yanthis limited production of post-2007 materials to those pertinent to the Village’s interest in passing the Challenged Laws, (*see* Defs.’ Sanctions Opp’n 15), the Court’s reading of Judge Yanthis’s Order is that it did not place limits on document requests that were previously

*Appendix C***d. Appropriate Sanction**

“[A] district court has broad discretion in crafting a proper sanction for spoliation,” which should “serve the prophylactic, punitive, and remedial rationales underlying the spoliation doctrine.” *West v. Goodyear Tire and Rubber Co.*, 167 F.3d 776, 779 (2d Cir. 1999). In so doing, “[a] court should impose the least harsh sanction that can provide an adequate remedy.” *Hawley v. Mphasis Corp.*, 302 F.R.D. 37, 46 (S.D.N.Y. 2014) (internal quotation marks omitted); *see also Regulatory Fundamentals Grp. v. Governance Risk Mgmt. Compliance*, No. 13-CV-2493, 2014 U.S. Dist. LEXIS 107616, 2014 WL 3844796, at \*15 (S.D.N.Y. Aug. 5, 2014) (noting that “a court should always impose the least harsh sanction that can provide an adequate remedy.”). In other words, it “should be designed to: (1) deter parties from engaging in spoliation; (2) place the risk of an erroneous judgment on the party who wrongfully created the risk; and (3) restore the prejudiced party to the same position he would have been in absent the wrongful destruction of evidence by the opposing party.” *West*, 167 F.3d at 776. “In determining whether to impose severe sanctions, such as the entry of a default judgment or an adverse inference instruction, the Court must assess whether the requesting party suffered prejudice as a result of the loss or withholding of evidence.” *F.D.I.C. v. Horn*, No. 12-CV-5958, 2015 U.S. Dist. LEXIS 44226, 2015 WL 1529824, at \*15 (E.D.N.Y. Mar. 31, 2015) (internal quotation marks omitted).

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in place, (*see generally* Decl. of Andrea Donovan Napp (“Napp Sanctions Decl.”) Ex. 2 (transcript) (Dkt. No. 204)).

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Plaintiffs contend that Defendants' behavior warrants "severe disciplinary measures." (Pls.' Sanctions Mem. 14 (quoting *Metro. Opera Ass'n Inc. v. Local 100, Hotel employees & Rest. Emps. Int'l Union*, 212 F.R.D. 178, 219 (S.D.N.Y. 2003)).) They argue that "[a]ny sanction short of a terminating sanction would 'fail to account for the prejudice or to sufficiently penalize [Defendants] or deter others,'" (*id.* at 14 (quoting *Regulatory Fundamental*, 2014 U.S. Dist. LEXIS 107616, 2014 WL 3844796, at \*16), and that striking Defendants' Answer and affirmative defenses, together with entering judgment for Plaintiffs, is "appropriate," (*id.*). Plaintiffs also maintain that even if this specific instance of Defendants' misconduct is insufficient to justify severe sanctions, considered together with Defendants' other acts of spoliation, severe sanctions are warranted. (*See id.* at 15.) Such misconduct allegedly includes failure to forensically image or preserve all electronically-stored information, failure to timely inform the individual Defendants of the litigation hold, and the deletion of comments from the minutes of a key meeting (and the failure to provide a copy of the minutes after those comments were restored). (Pls.' Sanctions Mem. 15-20.)<sup>28</sup>

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28. While the Court ultimately finds consideration of the alleged "pattern" of misconduct unnecessary in determining the appropriate sanction for the primary misconduct alleged in Plaintiffs' Motion, the other allegations Plaintiffs make are (a) not raised as independent grounds for sanctions, (b) suspect given, as Defendants point out, if Plaintiffs were concerned about Defendants' behavior, "they should have raised [the] concern in the spring of 2013 or, at the latest[,] in the summer of 2014," when they were first aware of these issues, (Defs.' Sanctions Opp'n 18), and (c) satisfactorily explained by Defendants, with the possible exception of Defendants' delay in

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While the Court recognizes that terminating sanctions may be appropriate “if there is a showing of willfulness, bad faith, or fault on the part of the sanctioned party,” *West*, 167 F.3d at 779, such sanctions are most appropriate in “extreme circumstances, usually after consideration of alternative, less drastic sanctions,” *id.* The Court finds, therefore, that while there is bad faith here, the circumstances of the case are not sufficiently “extreme” to justify a terminating sanction, particularly in light of the fact that, as Defendants suggest, this is the only instance of clear bad faith in what has been a case involving voluminous discovery. (*See* Defs.’ Sanctions Opp’n 24.) Less drastic sanctions are sufficient in this case, as discussed below. *See West*, 167 F.3d at 780 (finding terminating sanctions were inappropriate because the district judge could have instructed the jury to presume the conclusions the spoliated evidence would have been used to establish and precluded the guilty party from offering contrary evidence).

As an alternative to terminating sanctions, Plaintiffs argue that Defendants should “be precluded from offering any evidence that Local Law 1 of 2007 and Local Law 5 of 2007 were not passed with discriminatory animus” and that “the jury should be given an averse inference instruction” on this issue. (Pls.’ Sanctions Mem. 20.) Plaintiffs also ask that Defendants be precluded from offering evidence that a text amendment would be considered or that the Defendants’ interests were not pre-textual, and that the

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issuing the litigation hold (which Plaintiffs have not demonstrated was prejudicial), (*see id.* at 19-23).

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jury should be given an adverse inference instruction on this issue as well. (*See id.* at 21.) Plaintiffs maintain that any lesser sanction would be insufficient. (*See id.* at 22.)

An adverse inference is “an extreme sanction and should not be imposed lightly.” *Treppel v. Biovail Corp.*, 249 F.R.D. 111, 120 (S.D.N.Y. 2008); *Zubulake*, 220 F.R.D. at 219 (“In practice, an adverse inference instruction often ends litigation—it is too difficult a hurdle for the spoliator to overcome.”). And because Plaintiffs are “free to explore at trial the issue of records being [lost], without an adverse inference charge, certainly during cross-examination or for impeachment purposes,” *Horn*, 2015 U.S. Dist. LEXIS 44226, 2015 WL 1529824, at \*16, Defendants are likely to “feel the impact of this issue at trial in any event, even without an adverse inference,” *id.* Nonetheless, “[t]he sanction of an adverse inference may be appropriate in some cases involving the negligent destruction of evidence because each party should bear the risk of its own negligence.” *Residential Funding Corp.*, 306 F.3d at 108; *see also Linde v. Arab Bank, PLC*, 269 F.R.D. 186, 204 (E.D.N.Y. 2010) (precluding evidence); *Zubulake*, 229 F.R.D. at 436-37 (giving an adverse inference instruction for willful destruction of emails).

The Court finds such a limited sanction justified here. While, as noted above, there is sufficient evidence of bad faith to justify an adverse inference sanction, even if Defendants were only grossly negligent, such conduct is sufficient for the imposition of an adverse inference sanction. *See Reilly v. Natwest Markets Grp. Inc.*, 181 F.3d 253, 268-69 (2d Cir. 1999) (noting that adverse inference

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and issue preclusion are appropriate sanctions for gross negligence, even when there is no evidence of bad faith or willfulness); *Augstein v. Leslie*, No. 11-CV-7512, 2012 U.S. Dist. LEXIS 149517, 2012 WL 4928914, at \*5-6 (S.D.N.Y. Oct. 17, 2012) (imposing adverse inference sanction due to “at least negligent” destruction of hard drive); *Chan*, 2005 U.S. Dist. LEXIS 16520, 2005 WL 1925579, at \*7 (“A showing of gross negligence is plainly enough to justify sanctions at least as serious as an adverse inference.”); *Shaffer v. RWP Grp., Inc.*, 169 F.R.D. 19, 26 (E.D.N.Y. 1996) (providing adverse inference sanction where the defendants destroyed document without finding of willfulness or bad faith). Because Defendants concealed—and failed to disclose—the relevant Facebook post and potentially a portion of the accompanying text messages, the jury will be instructed that it may infer that the contents of the Facebook Post indicated discriminatory animus towards the Hasidic Jewish population. Defendants also will be precluded from offering evidence to rebut that *specific inference*, though they can still present evidence to indicate that the Challenged Laws were not adopted for discriminatory reasons.

These sanctions are sufficient, as they give Plaintiffs the most powerful inference the jury could draw from the spoliated evidence, without rebuttal, thereby serving the remedial, punitive, and deterrent purposes of sanctions. See *Kronisch*, 150 F.3d at 126 (providing adverse presumption instruction); *Daval Steel Prods. v M/V Fakredine*, 951 F.2d 1357, 1366 (2d Cir. 1991) (barring party from presenting evidence opposing claim at issue). Any greater sanction (with the exception of an award of

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fees, as discussed below)—for example, precluding any evidence on discriminatory animus of the Challenged Laws at all—would be functionally equivalent to a terminating sanction in this case, as discriminatory animus is one of the critical factual contentions at issue, and therefore would be “[in]congruent with the [Defendants’] degree of culpability.” See *Richard Green (Fine Paintings) v. McClendon*, 262 F.R.D. 284, 288 (S.D.N.Y. 2009); cf. *West*, 167 F.3d at 780 (suggesting sanctions but leaving their precise form “to the sound discretion” of the district judge on remand). Indeed, because the portions of the text messages have “permit[ted] [Plaintiffs] to determine the substance of the” deleted post, see *Miller v. Time-Warner Commc’ns. Inc.*, No. 07-CV-7286, 1999 U.S. Dist. LEXIS 14512, 1999 WL 749528, at \*2 (S.D.N.Y. Sept. 22, 1999) (noting that the moving party was not prejudiced because it could determine the substance of an erased writing), an adverse inference instruction is sufficient to address any prejudice.

Plaintiffs’ request for attorneys’ fees and costs is also warranted. Attorneys’ fees and costs “may be appropriate to punish the offending party for its actions or to deter the litigant’s conduct, sending the message that egregious conduct will not be tolerated.” *Doe v. Norwalk Community Coll.*, 248 F.R.D. 372, 381 (D. Conn. 2007) (brackets and internal quotation marks omitted). Because Defendants appear to have acted in bad faith, the Court awards Plaintiffs the attorneys’ fees incurred in connection with its Motion for Sanctions. See *Dorchester Fin. Holdings Corp. v. Banco BRJ S.A.*, 304 F.R.D. 178, 185 (S.D.N.Y. 2014) (“To fully correct the prejudice to [the defendant]



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from [the plaintiff's] spoliation, the [c]ourt also orders [the defendant] to pay [the plaintiff's] reasonable attorney's fees and costs in connection with this spoliation dispute."<sup>29</sup>

### 3. Plaintiffs' Rule 56.1 Statements

Local Rules 56.1(a) and (d) require that a moving party file "a separate, short[,] and concise statement . . . of the material facts to which the moving party contends there is no genuine issue to be tried," "followed by citation to evidence." The purpose of these rules is "to streamline the consideration of summary judgment motions by freeing district courts from the need to hunt through voluminous records without guidance from the parties." *Holtz v. Rockefeller & Co., Inc.*, 258 F.3d 62, 74 (2d Cir. 2001). Accordingly, a Rule 56.1 statement "is not itself a vehicle for making factual assertions that are otherwise unsupported in the record." *Id.* For that reason, "where the record does not support the assertions in a Local 56.1 statement, those assertions [are] disregarded and the record reviewed independently." *Id.*; *see also Baity v. Kralik*, 51 F. Supp. 3d 414, 419 (S.D.N.Y. 2014) (finding statements "lack[ing] citations to admissible evidence" to violate Local Rule 56.1 and Federal Rule of Civil Procedure 56); 51 F. Supp. 3d 414, *id.* at \*3 (disregarding facts "not supported by citations to admissible evidence in the record"). Similarly, the Court can also disregard legal conclusions or unsubstantiated opinions in a Local Rule 56.1 statement. *See Am Gen. Life Ins. Co.*

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29. Plaintiffs have until October 31, 2015 to submit evidence of the attorneys' fees they seek. Defendants will have two weeks from the date of Plaintiffs' submission to respond.

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*v. Diana Spira 2005 Irrevocable Life Ins. Trust*, No. 08-CV-6843, 2014 U.S. Dist. LEXIS 165367, 2014 WL 6694502, at \*1 (S.D.N.Y. Nov. 25, 2014) (“The Court grants [the [plaintiff’s] motion to strike as to argumentative statements in the [56.1 statement] and as to purported factual statements which are unsupported by any citation to the record.”); *Epstein v. Kemper Ins. Co.*, 210 F. Supp. 2d 308, 314 (S.D.N.Y. 2012) (“Statements in an affidavit or Rule 56.1 statement are inappropriate if they are not based on personal knowledge, contain inadmissible hearsay, are conclusory or argumentative, or do not cite to supporting evidence.”); *Simmons v. Woodycrest Ctr. For Human Dev., Inc.*, No. 10-CV-5193, 2011 U.S. Dist. LEXIS 24513, 2011 WL 855942, at \*1 n.1 (S.D.N.Y. Mar. 8, 2011) (disregarding portions of the defendants’ Rule 56.1 statement consisting of legal conclusions or “gross distortions of the summary judgment record”).

Defendants devote nearly half of their Opposition to the contention that Plaintiffs’ Rule 56.1 Statements should be stricken or disregarded. Among other things, Defendants contend that Plaintiffs’ 56.1 Statements are “nothing short of abusive” and consist of a “voluminous compendium of assertions, accompanied by opinion-laden declarations, that read[] more like a complaint, containing allegations, mischaracterizations, opinions[,] and legal conclusions.” (Defs.’ Opp’n 3.) Indeed, Defendants suggest that Plaintiffs filed their lengthy Rule 56.1 Statements intentionally, using their allegedly deep coffers to “outlast” the Village. (*See* Defs.’ Opp’n 4 (citing Savad Decl. Ex. 31(C. Babad Dep. Tr.) 107).) Defendants ask that the Court “us[e] its discretion to strike Plaintiffs’ Statement[s] of

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Facts in [their] entirety or, alternatively, consider[] only those paragraphs containing truly undisputed facts, as contemplated by the Local Rules and the well-developed body of case law.” (*Id.* at 5.) The Court will take up each of the flaws that Defendants identify in Plaintiffs’ Rule 56.1 Statements in turn.

First, Defendants are correct that Plaintiffs’ Rule 56.1 Statements are certainly not “short and concise.” As Defendants point out, Plaintiffs’ main Rule 56.1 Statement is 998 paragraphs long and is supported by 11 declarations and 370 exhibits. (*Id.* at 1.) Plaintiffs also submitted a Supplemental Rule 56.1 Statement at the end of their Counter Rule 56.1 Statement, sporting an additional 43 paragraphs (one of which contains 31 subparagraphs) and 88 additional exhibits. (*See* Pls.’ Counter 56.1; Decl. of Paul Savad in Opp’n to Defs.’ Mot. for Summ. J. (Dkt. No. 169).) Plaintiffs’ prolixity is therefore pronounced, and worsened by redundancy; many of the paragraphs in Plaintiff’s Rule 56.1 Statements are repetitive, some to the point that they are nearly identical to paragraphs that precede them. (*Compare, e.g.*, Pls.’ 56.1 ¶ 489 (“Housing is required for the rabbinical college use.”) *with id.* ¶ 492 (“Providing housing on campus is critical to the success of the proposed rabbinical college program.”); *id.* ¶ 50 (“A backlog of cases often forces Orthodox Jews involved in disputes to go to secular courts.”) *with id.* ¶ 631 (“The backlog in religious courts forces Orthodox and Hasidic Jews to go to secular courts.”)). Moreover, Plaintiffs’ Rule 56.1 Statements should likely have included *more* paragraphs, as Defendants are correct that some paragraphs contain multiple factual assertions, which appears to violate the

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spirit, if not the explicit text, of Local Rule 56.1. (*See, e.g.*, ¶ 140 (“The Village rushed Local Law 5 through the legislative process and failed to comply with many required formalities. The resolution passing Local Law 5 of 2004 did not contain a SEQRA resolution. There were no studies for Local Law 5 of 2004. The Village does not have any records to suggest that there was a New York General Municipal Law review of Local Law 5 of 2004.” (citations omitted)).) Defendants are also correct that some of the statements appear malformed such that they are difficult to understand, (*see, e.g., id.* ¶¶ 342 (“Rita Louie, Nick Sanderson”), 384 (“This was done despite the Village’s knowledge of RLUIPA, since at least 2004 and was proposed by the Village Board one month after Tartikov was first mentioned RLUIPA at January, 2007 meeting.”), whereas others appear to still contain drafting notes, (*see, e.g.*, ¶ 641 (containing, as explanatory parentheticals, “good quotes re: serving god,” “would take 50 years currently,” and “don’t live forever”)).

Of course, Plaintiffs are correct that the mere fact that a Local Rule 56.1 statement is lengthy does not render it in violation of the Rule, *see, e.g., Capitol Records, LLC v. Vimeo, LLC*, 972 F. Supp. 2d 500, 509 (S.D.N.Y. 2013) (denying motion to strike and finding that a “ninety-page, 403-paragraph 56.1 statement” was not “unduly lengthy in light of the numerous and complex issues raised . . . and the large body of evidence”), and they attempt to justify the length of their Rule 56.1 Statements on the basis of the volume of discovery and, in particular, “Defendants’ ‘kitchen sink’ approach” represented by their summary judgment Motion on all fourteen of Plaintiffs’ causes

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of action. (Reply Mem. of Law in Supp. of Pls.' Mot. for Summ. J. ("Pls.' Reply") 7 (Dkt. No. 190).) Even in light of those considerations, Plaintiffs' Rule 56.1 Statements are unnecessarily lengthy, due especially to the inclusion of redundant or incomprehensible facts, as discussed above. The Court will disregard all such repetitive or incomprehensible statements but notes that doing so does not alter the Court's evaluation of the pending Motions. *Cf. UPS Store, Inc. v. Hagan*, 99 F. Supp. 3d 426, 2015 U.S. Dist. LEXIS 36971, 2015 WL 1456654, at \*1-\*2 (S.D.N.Y. Mar. 24, 2015) (noting that Local Rule 56.1 is designed to "fashion a pragmatic solution aimed at advancing [the] litigation").

Second, Defendants contend that Plaintiffs' Rule 56.1 Statements are "composed primarily of assertions that are neither relevant nor material to Plaintiffs' summary judgment motion." (Defs. Opp'n 7.) Certainly, "[f]actual disputes which are irrelevant or unnecessary" to the claims at issue "will not be counted." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986). Defendants contend that because Plaintiffs' facial challenges, by definition, do not address the application of the Challenged Laws to Plaintiffs specifically, but rather look to the legality of the local laws themselves, "[h]undreds of . . . paragraphs [that] contain statements that relate specifically to Plaintiffs' religious practices or the hypothetical development they have broadly outlined" should be disregarded. (Defs.' Opp'n 8-9.) As discussed in the next section, the Court finds that a least some of these factual statements—particularly as they relate to Plaintiffs' plans for the rabbinical college

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and its relationship to Plaintiffs' religious beliefs—*are* relevant to Plaintiffs' facial claims. The Court therefore declines to make a blanket ruling on the relevance of Plaintiffs' Rule 56.1 Statements, although it will, as a matter of course, not consider irrelevant facts because they are, by nature, not pertinent to the case.

Third, Defendants contend that Plaintiffs' Rule 56.1 Statements are “replete with argument, mischaracterizations[,] [and/]or opinions to which Plaintiffs cannot reasonably have expected Defendants to agree.” (*Id.* at 9.) Defendants cite a list of facts Plaintiffs represented as undisputed, many of which, the Court agrees, are clearly in dispute. (*See, e.g.*, Pls.' 56.1 ¶¶ 580 (“The Village prohibits Plaintiffs' religious land use . . . by right or by special permit within its jurisdiction.”), 972 (“Existing Village regulations sufficiently protect the Village's interest in the water supply.”).) The Court will not consider these facts as undisputed, though it declines to outline specifically which paragraphs are implicated because Defendants have indicated their opposition to them in their Counter Rule 56.1 Statements, meaning they are, for purposes of the instant motion, disputed.

Fourth, Defendants contend that Plaintiffs' Rule 56.1 Statements contain improper legal conclusions. The Court agrees. (*See, e.g.*, Pls.' 56.1 ¶¶ 483 (“The Village is a ‘jurisdiction,’ and both the Village and the Board of Trustees are ‘governments’ under RLUIPA.”); 526 (“Shuls, libraries, courtrooms, and classrooms constitute religious exercise and religious land use.” (italics omitted))).) Even some of the headings to sections of Plaintiffs' Rule 56.1

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Statements contain impermissible argument or legal conclusion. (*See, e.g., id.* at 40 (“The Village’s Targeting of Orthodox/Hasidic Jews and Their Property.”).) As noted above, the Court will disregard such statements.

Fifth, Defendants contend that certain statements do not support the propositions for which they are asserted. The Court agrees that, in some circumstances, Plaintiffs’ claims are not supported by the evidence cited, (*see, e.g., id.* ¶ 501 (asserting that Defendants have “no facts to indicate that Plaintiffs’ religious beliefs concerning the need to live with their families are not sincere,” citing pages of an exhibit that do not exist); *id.* ¶ 793 (asserting that Defendants had “no studies or reports demonstrating a need for laws regulating educational institutions in order to protect its traffic interests” and incorrectly citing Savad Declaration Exhibit 312 rather than Exhibit 310 for this proposition, the latter of which only indicates that Defendant had no “*formal* studies or reports establishing a need for controlling traffic” at the time) (emphasis added)), or are not accompanied by citations to evidence at all, (*see, e.g., id.* ¶ 269 (containing no citation to the record to support assertions about the campaign for the Village Board of Trustees)). However, as noted above, and as with any other disputed statements of material fact, the Court will consider the sources for the claims made in dueling Rule 56.1 Statements when they are disputed, rather than rely on the Rule 56.1 Statements themselves, so there is no need to separately strike or disregard these statements.

Overall, Defendants claim that the infirmities in Plaintiff’s Rule 56.1 Statements have “prejudiced” them

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because they have had to “expend countless hours and considerable sums in order to fashion and appropriate response,” including “verify[ing] each and every one of the 998 ‘facts’ asserted.” (Defs’ Opp’n 11-12.) Defendants accordingly ask that the Court strike or disregard the entirety of Plaintiffs’ Rule 56.1 Statements or, at least, “only consider those assertions that are properly included pursuant to Local Rule 56.1(a).” (*Id.* at 12.)

The Court is sympathetic to Defendants’ concerns. Plaintiffs’ Rule 56.1 Statements are redundant and contrary to the letter and spirit of Local Rule 56.1. Further, Plaintiffs make little attempt to justify the length of their Rule 56.1 Statements or to respond to the other infirmities Defendants identified, except as already explained above. (Pls.’ Reply 6-9.) Rather, Plaintiffs argue that the remedy is “not . . . to strike the statement, but to simply disregard the faulty sections.” (Pls.’ Reply 18 (citing, *inter alia*, *Ross Univ. Sch. of Med., Ltd. v. Brooklyn-Queens Health Care, Inc.*, No. 09-CV-1410, 2012 U.S. Dist. LEXIS 174295, 2012 WL 6091570, at \*6 (E.D.N.Y. Dec. 7, 2012), *adopted in part by* 2013 U.S. Dist. LEXIS 45949, 2013 WL 1334271 (E.D.N.Y. Mar. 28, 2013).) The Court agrees that Defendants’ proposed sanction is too severe. Accordingly, the Court will, as outlined above, disregard the portions of Plaintiffs’ Rule 56.1 Statements that are not compliant with Local Rule 56.1. The Court also denies Defendants’ request for attorneys’ fees, which is only made in passing in a footnote, (*see* Defs.’ Opp’n. 5 n.10), because the Court finds that Plaintiffs’ transgressions are relatively minor.<sup>30</sup>

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30. There is also a unique issue with Plaintiffs’ Supplemental Rule 56.1 Statement, namely that it references a large number of statements posted anonymously on websites and blogs. (*See*



*Appendix C***4. Admissibility of Declarations****a. Legal Standard for Expert Opinions**

Defendants lodge several specific challenges to Plaintiffs' experts. They contend that "[a]ll but one of Plaintiffs' expert declarations should be stricken in their entirety, or the indicated portions disregarded, and the corresponding Statement of Fact paragraphs disregarded as well." (Defs.' Opp'n 12.)

An expert may offer testimony to assist the factfinder in "understand[ing] unfamiliar terms and concepts." *United States v. Bilzerian*, 926 F.2d 1285, 1294 (2d Cir. 1991).<sup>31</sup> Federal Rule of Evidence 702 provides that a

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Pls.' Counter 56.1 97-110 (Pls.' Suppl. Statement of Facts ("Pls.' Suppl. 56.1")) ¶ 4.) Because the speaker in each of those anonymous statements is unidentifiable, it is not clear if the statements at issue can be traced to anyone affiliated with the Village. The Court therefore finds them irrelevant and will disregard them.

Additionally, in their Reply, Plaintiffs argue that Defendants did not meet their "obligations" in opposing Plaintiffs' Rule 56.1 Statements, such that large portions of it should be deemed admitted. (Pls.' Reply 4.) Plaintiffs fault Defendants for "reciting verbatim the evidence already relied upon by Plaintiffs and/or recharacterizing or restating the cited evidence, including adding irrelevant facts or legal arguments." (*Id.*) While Defendants are under no obligation to cite *different* evidence in support of their counter-statements—indeed, they may simply maintain that the evidence cited by Plaintiffs does not support the proposition in the statement at issue—the Court, as discussed below, will discount any statements it deems irrelevant or that constitute legal argument.

31. For example, an expert may testify about the relevant statutory or regulatory framework. *See, e.g., Bilzerian*, 926 F.2d at

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witness qualified as an expert may only provide such testimony if

- (a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence to determine a fact in issue;
- (b) the testimony is based on sufficient facts or data;
- (c) ) the testimony is the product of reliable principles and methods; and
- (d) the expert has reliably applied the principles and methods to the facts of the case.

The proponent of expert testimony has the burden of establishing these elements by a preponderance of the evidence. *See United States v. Cruz*, 363 F.3d 187, 192 (2d Cir. 2004). The district court must “ensure[] that an expert’s testimony both rests on a reliable foundation and is relevant to the task at hand,” *Daubert v. Merrell Dow Pharms.*, 509 U.S. 579, 600, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993), by applying the elements of Rule 702, as well as the relevance standard in Rule 401, *see Amorgianos v. Amtrak*, 303 F.3d 256, 265 (2d Cir. 2002) (“In fulfilling this gatekeeping role, the trial court should look to the standards or Rule 401 in analyzing whether proffered

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1294-95 (assisting with federal securities regulation); *In re Fosamax Prods. Liab. Litig.*, 645 F. Supp. 2d 164, 190-91 (S.D.N.Y. 2009) (assisting with FDA regulations).

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expert testimony is relevant . . . and whether the proffered testimony has a sufficiently reliable foundation to permit it to be considered.” (internal quotation marks omitted)).

“Rule 26 of the Federal Rules of Civil Procedure requires all expert witnesses to submit a written report that includes a complete statement of all opinions the witness will express[,] the basis and reasons for them[,] [and] the facts or data considered by the witness in forming them.” *Morritt v. Stryker Corp.*, No. 07-CV-2319, 2011 U.S. Dist. LEXIS 98218, 2011 WL 3876960, at \*5 (E.D.N.Y. Sept. 1, 2011) (internal quotation marks omitted). Further, Rule 37(c)(1) “provides that a party who fails to provide information required by Rule 26(a) is not permitted to use that information . . . to supply evidence on a motion . . . unless the failure was substantially justified or . . . harmless.” *Id.*; see also *Commercial Data Servers, Inc. v. IBM*, 262 F. Supp. 2d 50, 61 (S.D.N.Y. 2003) (“[A] party that without substantial justification fails to disclose information required by Rule 26(a) . . . is not, unless such failure is harmless, permitted to use as evidence . . . on a motion any witness or information not so disclosed.”). Such a prohibition does not extend to new facts and “evidentiary details.” See *Cedar Petrochem., Inc. v. Dongbu Hannong Chem. Co., Ltd.*, 769 F. Supp. 2d 269, 279 (S.D.N.Y. 2011). Accordingly, if a party fails to offer a satisfactory reason for failing to comply with Rule 26, that fact “weighs very strongly in favor of preclusion.” *Morritt*, 2011 U.S. Dist. LEXIS 98218, 2011 WL 3876960, at \*6; see also *Prendergast v. Hobart Corp.*, No. 04-CV-5134, 2010 U.S. Dist. LEXIS 82077, 2010 WL 3199699, at

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\*5 (E.D.N.Y. Aug. 12, 2010) (finding that the “[p]laintiff had ample time for expert discovery in this case and has provided no justification for her failure to disclose the opinions in [the expert’s] affidavit with his expert report or during his deposition,” and that “[t]he opinions set forth for the first time in [the expert’s] affidavit are therefore properly stricken on this ground alone.”).

“Because the purpose of summary judgment is to weed out cases in which there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law, it is appropriate for district courts to decide questions regarding the admissibility of evidence on summary judgment,” where the Court must exercise this “gatekeeper” role. *Raskin v. Wyatt Co.*, 125 F.3d 55, 66 (2d Cir. 1997) (citations, footnotes, and internal quotation marks omitted). “Districts courts have broad discretion in determining how to ascertain whether proffered expert testimony is admissible.” *Berk v. St. Vincent’s Hosp. and Medical Ctr.*, 380 F. Supp. 2d 334, 351 (S.D.N.Y. 2005). Nonetheless, excluding expert testimony is a “drastic remedy,” *RMED Int’l, Inc. v. Sloan’s Supermarkets, Inc.*, No. 94-CV-5587, 2002 U.S. Dist. LEXIS 23829, 2002 WL 31780188, at \*3 (S.D.N.Y. Dec. 11, 2002), and should be used sparingly, “even when there has not been strict compliance with Rule 26,” because exclusion “may at times tend to frustrate the Federal Rules’ overarching objective of doing substantial justice to litigants.” *Scientific Components Corp. v. Sirenza Microdevices, Inc.*, No. 03-CV-1851, 2008 U.S. Dist. LEXIS 92703, 2008 WL 4911440, at \*4 (E.D.N.Y. Nov. 13, 2008).

*Appendix C***b. Application to Experts**

Defendants first contend that the declarations prepared by Plaintiffs' Wetlands, Traffic, Planning, and Architecture Experts—Barbara Beall (“Beall”), William Fitzpatrick (“Fitzpatrick”), Alan Weinstein (“Weinstein”), and Susannah Drake (“Drake”)—should be stricken because they are irrelevant to a facial challenge. (*See* Defs.' Opp'n 14.)

Before proceeding to the specific challenges to each expert, two overall contentions are worth addressing. First, as described in the next section, the Court finds Defendants' contention that the experts' findings “would only be relevant [to] an as-applied challenge,” (*id.*), to be without merit. The effect of the Challenged Laws on Plaintiffs is not only relevant to their discrimination claims, but is also suggestive of the degree to which the Challenged Laws may affect other religious groups. The Court therefore denies Defendants' relevance challenge.<sup>32</sup> Second, Defendants contend that the declarations at issue contain opinions not disclosed in the expert reports, as required by Rule 26. (*See* Defs.' Opp'n 13-14.) In support of this claim, Defendants only identify paragraphs which they claim were not disclosed. Plaintiffs contest Defendants' claim, arguing that “[e]ach opinion stated by the expert witnesses was disclosed to the Defendants in either the initial or rebuttal reports,” citing supporting evidence and contending that some of the supposedly new opinions just

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32. The same applies to Defendants' relevance challenge to the declarations of the individual Plaintiffs and that of Plaintiffs' expert, Steven H. Resnicoff, an expert in Jewish religion and law.

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contain new facts or elaborations on previously disclosed opinions. (Pls.' Reply 12-13 (citing Reply Decl. of Paul Savad in Supp. of Pls.' Mot. for Summ. J. ("Savad Reply Decl.") Ex. 417 (documenting disclosures) (Dkt. No. 191).) The Court is satisfied that Plaintiffs disclosed the reports at issue and therefore denies Defendants' Rule-26-based challenge. (*See, e.g.*, Beall Decl. ¶¶ 16, 19 (discussing, in paragraph 19, Ulman's statement that there may be another lot in the Village that is larger than 10 acres, which is an elaboration on Beall's previously-disclosed opinion, embodied in paragraph 16, that "there are no other available vacant lots within the Village of Pomona that could support an educational institution besides the Subject [Property]").)

Regarding specific expert opinions, Defendants first challenge the Beall Declaration, Plaintiffs' wetlands expert, on a few grounds. First, Defendant contends that Beall discusses matters beyond her expertise, including "the Village's Master Plan, the utility of the SEQRA process, and the Village's laws related to Educational Institutions and Dormitories." (Defs.' Opp'n 15 (citations omitted).) While Defendants' discussion of this issue is rather flippant, the Court agrees that Beall does, at times, venture past her area of expertise in her declaration. (*See, e.g.*, Beall Decl. ¶ 231 (declaring that "automotive repair schools [and] driving schools . . . can be accredited by various accrediting bodies"). The Court will disregard those statements in considering the pending Motions for Summary Judgment, without prejudice to Defendants' renewing their Motion to Strike. *See Takeda Chem. Industr., Ltd. v. Mylan Labs., Inc.*, Nos. 03-CV-8253

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et al., 2006 U.S. Dist. LEXIS 278, 2006 WL 44053, at \*2 (S.D.N.Y. Jan. 9, 2006) (striking portions of expert's opinion that "fall far outside the realm" of his "area of . . . expertise").

Second, Defendants contend that Beall improperly offers "legal conclusions and policy analysis." (Defs.' Opp'n 16.). The Court is not convinced that Beall cannot engage in "policy analysis" related to wetlands use, nor does the mere use of legal jargon, or reference to laws that govern wetlands use, render an opinion a "legal conclusion." Therefore, the vast majority of Beall's opinions are admissible. However, the Court will exclude any statements that cross the line from policy analysis to pure legal conclusions, such as when Beall only interprets the applicable law itself. (*See, e.g.*, Beall Decl. ¶¶ 113-122 (stating, and explaining, legal conclusion that the Wetlands Law was not necessary for the Village to comply with federal or statute statutory requirements); ¶ 257 ("The Village has the authority to complete an EIS review under SEQRA for an educational institutional project.")) *See Jones v. Midland Funding, LLC*, 616 F. Supp. 2d 224, 227 (D. Conn. 2009) ("An expert should not be permitted to express an opinion that is merely an interpretation of federal statutes or regulations, as that is the sole province of the [c]ourt." (brackets and internal quotation marks omitted)). This holding is again without prejudice to Defendants' renewing their Motion To Strike.

Third, Defendants contend that the Beall Declaration "should be stricken or disregarded in substantial part because it is based on speculation and/or lacks any reliable

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methodology.” (Defs.’ Opp’n 16.) Defendants allege, more specifically, that Beall “makes sweeping statements with little or no support,” and “purports to apply methodologies that are unreliable at best,” e.g., identifying wetlands by looking at aerial photos and maps. (Defs.’ Opp’n 17.) While the Court will consider the evidence cited—which properly may, as Plaintiffs point out, be personal knowledge, (see Pls.’ Reply 11); see also *Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137, 150, 119 S. Ct. 1167, 143 L. Ed. 2d 238 (1999) (noting that expert testimony may be based on “personal knowledge or experience”)—to assess the probative value of Beall’s testimony, Defendants’ fleeting challenge to Beall’s conclusions and methodology, without evidence or support for that challenge beyond citation to a couple of paragraphs in the Beall Declaration, is unsubstantiated. See *Teva Pharmaceuticals USA, Inc. v. Sandoz, Inc.*, 749 F. Supp. 2d 130, 132 (S.D.N.Y. 2010) (denying motion for summary judgment in part because challenge to expert’s methods consisted of “nothing more than attorney argument,” and the “[d]efendants did not offer the opinion of a single expert discrediting or casting doubt on [the expert’s] methodology”). Further, given Beall has identified support for her conclusions throughout her report, the Court finds that her opinions are admissible, and that Defendants’ objections, at best, go to weight. See *Amorgianos*, 303 F.3d at 267 (“Where an expert otherwise reliably utilizes ... methods to reach a conclusion, lack of textual support may go to the weight, not the admissibility[,] of the expert’s testimony.”); *Cohalan v. Genie Indus., Inc.*, No. 10-CV-2415, 2013 U.S. Dist. LEXIS 28532, 2013 WL 829150, at \*5 (S.D.N.Y. Mar. 1, 2013) (“Disputes as to the strength of [an expert’s]



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credentials, faults in his use of different etiology as a methodology, or lack of textual authority for his opinion, go to the weight, not the admissibility of his testimony.” (quoting *McCulloch v. H.B. Fuller Co.*, 61 F.3d 1038, 1044 (2d Cir.1995)); *Quiles v. Bradford—White Corp.*, No. 10-CV-0747, 2012 U.S. Dist. LEXIS 54662, 2012 WL 1355262, at \*3 (N.D.N.Y. Apr. 18, 2012) (“[G]aps or inconsistencies’ in an expert’s reasoning, or arguments that an expert’s conclusions are wrong, ‘go to the weight of the evidence, not to its admissibility.’”) (quoting *Campbell v. Metro. Prop. and Cas. Ins. Co.*, 239 F.3d 179, 186 (2d Cir. 2001)); *CIT Group/Bus. Credit, Inc. v. Graco Fishing and Rental Tools, Inc.*, 815 F. Supp. 2d 673, 676 (S.D.N.Y. 2011) (“Questions about the . . . sufficiency of the evidence upon which the expert relied . . . are for cross-examination.”); see also *MBIA Ins. Corp. v. Patriarch Partners VIII, LLC*, No. 09-CV-3255, 2012 U.S. Dist. LEXIS 92435, 2012 WL 2568972, at \* 15 (S.D.N.Y. July 3, 2012) (“Indeed, most objections to expert testimony are related only to the weight of the evidence, not its admissibility.”). Accordingly, Defendants’ Motion to Strike the Beall Declaration is denied in its entirety without prejudice.

Defendants next challenge the Declaration of Fitzpatrick, Plaintiffs’ traffic expert. According to Defendants, Fitzpatrick’s opinions are “entirely unsupported” because Plaintiffs’ rabbinical college is hypothetical, and because Plaintiffs “have not provided any site plans, estimated traffic volumes, attendance or population estimates[,] or any other information that might in some way substantiate his analysis.” (Defs.’ Opp’n 17.) Defendants provide no support for the contention that

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Fitzpatrick is required to rely on previously provided reports on traffic volumes and population estimates, nor do they levy specific challenges to the particular conclusion that Fitzpatrick draws. *See Astra Aktiebolag v. Andrx Pharms., Inc.*, 222 F. Supp. 2d 423, 491 (S.D.N.Y. 2002) (denying motion to strike portions of expert's testimony and report because "[p]ursuant to Rule 703, an expert may rely on any facts or data 'of a type reasonably relied upon by experts in the particular field,' including facts, data, and opinions that are otherwise inadmissible. There is no requirement that an expert must run his own tests."). Moreover, Fitzpatrick's opinions appear to be, for the most part, supported. (*See, e.g.*, Decl. of William D. Fitzpatrick ¶¶ 35 (citing aerial view of intersection in support of its description), 49 (noting that "the basis in professional traffic engineering for estimating traffic generation for a site . . . is the proper application of the Institute of Transportation Engineering (ITS) published database"), 54 (describing ITS database methodology); 120-173 (describing University/College ITS database reference, and assessing traffic impact under a variety of conditions) (Dkt. No. 152).) The Court accordingly denies Defendants' Motion to Strike the Fitzpatrick Declaration, without prejudice.

Defendants also challenge the Declaration of Weinstein, Plaintiffs' planning expert, "because it contains conclusions of law, conclusory expert opinions not supported by appropriate evidence, expert opinions not previously disclosed . . . , and opinions not relevant to a facial challenge." (Defs.' Mem. 18) The Court agrees in part. While the Court finds that Weinstein's opinions were

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previously disclosed, even if they have changed slightly from their initial form, (*see* Defs.’ Opp’n Ex. D (noting, for example, that Weinstein’s initial expert report indicated that 38 New York jurisdictions have an accreditation requirement, and that Weinstein’s Declaration changed that number to five); *see also Newell Puerto Rico, Ltd. v. Rubbermaid Inc.*, 20 F.3d 15, 22 (1st Cir. 1994) (finding that “[i]t is not unusual for experts to make changes in their opinions and revise their analyses and reports frequently in preparation for, and sometimes even during, a trial”), and that, as discussed below, Weinstein’s opinions that are specific to the proposed rabbinical college are still relevant to Plaintiffs’ facial challenge, (*see, e.g.*, Decl. of Alan C. Weinstein ¶ 34 (Dkt. No. 143) (noting that dormitory space is especially important for the proposed rabbinical college because “of the length of the program of instruction”), the declaration does contain several unsupported opinions and improper legal conclusions. For example, with respect to the former, Weinstein’s discussion of the proposed rabbinical college’s “focused curriculum and mode of instruction” only cites unidentified “information . . . received from Michael Tauber.” (*Id.* ¶ 29). With respect to legal conclusions, Weinstein improperly determines that the Challenged Laws prohibit the construction of a rabbinical college, (*see, e.g., id.* ¶ 10 (concluding that the Accreditation Law “totally exclude[s]” “an unaccredited [r]abbinical [c]ollege”)) and defines an “accessory use” as “one that is subordinate and incidental to the primary use,” (*id.* ¶ 50). The Court will disregard such unsupported statements or legal conclusions. Once again, this ruling is without prejudice to Defendants’ renewing their Motion to Strike.

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Defendants also challenge the Declaration of Drake, Plaintiffs' Architecture expert, arguing that it "fails to meet the required evidentiary standards under *Daubert*." (Defs.' Mem. 19.) Defendants specifically contend that the Drake Declaration "gives no indication that [Drake] has ever had any experience . . . with a rabbinical college, a Torah Community, or, for that matter, any type of religious institution of higher education," and that she also "has no idea of the nature, size, shape, capacity[,] or intended location of any of the structure that Plaintiffs intend to build at the subject site," and if the proposed rabbinical college is at all comparable to the universities she uses as comparators. (*Id.* at 20-21.) The Court disagrees. While Defendants are correct that Drake has no information about the exact plans for the rabbinical college, it is entirely within the scope of her expertise to opine, based on her knowledge of the field and her investigation of the Subject Property, on ways in which the community impact of a rabbinical college may be minimized. Indeed, two of the paragraphs that Defendants specifically identify as flawed proceed in precisely this way; Drake opines that a rabbinical college *can* be built in a way that is sensitive to the surrounding community, (*see* Declaration of Susannah C. Drake ¶ 15 (Dkt. No. 154)), and provides examples of how that can be achieved, e.g., by using building materials that blend into the surrounding landscape, (*see id.* ¶ 21). Accordingly, the Court will not strike the Drake Declaration on this basis, without prejudice to Defendants' renewing their Motion to Strike.

*Appendix C***c. Tauber Declaration**

Relatedly, Defendants challenge the Declaration of M. Tauber, “Tartikov’s principal,” on several grounds, including relevance and the inclusion of opinion testimony, information beyond Tauber’s personal knowledge, and legal conclusions. (Defs.’ Mem. 22-23.) The same standards with regard to legal conclusions and opinions apply to his Declaration, and personal knowledge is required for admissibility. *See DiStiso v. Cook*, 691 F.3d 226, 230 (2d Cir. 2012) (“[W]here a party relies on affidavits . . . to establish facts, the statements ‘must be made on personal knowledge, set out facts that would be admissible in evidence, and show that the affiant . . . is competent to testify on the matters stated.’” (quoting Fed. R. Civ. P. 56(c)(4)) (citing Fed. R. Evid. 602)); *Sellers v. M.C. Floor Crafters, Inc.*, 842 F.2d 639, 643 (2d Cir. 1988) (“Rule 56 requires a motion for summary judgment to be supported with affidavits based on personal knowledge.”); *Baity*, 51 F. Supp. 3d at 419 (disregarding “statements not based on [the] [p]laintiff’s personal knowledge”); *Flaherty v. Filardi*, No. 03-CV-2167, 2007 U.S. Dist. LEXIS 4595, 2007 WL 163112, at \*5 (S.D.N.Y. Jan. 24, 2007) (“The test for admissibility is whether a reasonable trier of fact could believe the witness had personal knowledge.” (internal quotation marks omitted)).

While the relevance challenge is meritless for the reasons discussed below, Defendant is correct that there are inadmissible statements in the Tauber Declaration. It contains statements that are unsupported by personal knowledge, (*see, e.g.*, Tauber Decl. ¶ 7 (Dkt. No. 148)

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(“Every student who will attend the [r]abbinical college is compelled by his religious beliefs to pursue this study.”)), statements that are unhelpful lay opinion, (*see id.* ¶ 14 (“I know that there is a great shortage of qualified rabbinical judges who can resolve issues according to the true meaning of our religious laws.”), and statements that are improper legal conclusions, (*see id.* ¶ 41 (explaining that the process for “a zone/text amendment or variance . . . is a long and discretionary process”)). The Court will disregard such statements, but otherwise not strike the Declaration. This ruling is, once again, without prejudice to Defendants’ refileing their Motion to Strike.

### 5. Governing Standards for a Facial Challenge

As the Court previously noted, “[f]acial invalidation is, manifestly, strong medicine that has been employed by [courts] sparingly and only as a last resort,” wherein a plaintiff has a “heavy burden in advancing her claim.” *Nat’l Endowment for the Arts v. Finley*, 524 U.S. 569, 580, 118 S. Ct. 2168, 141 L. Ed. 2d 500 (1998) (internal quotation marks omitted); *see also Cranley v. Nat’l Life Ins. Co. of Vt.*, 318 F.3d 105, 110 (2d Cir. 2003) (“A plaintiff making a facial claim faces an uphill battle because it is difficult to demonstrate that the mere enactment of a piece of legislation violates the plaintiff’s constitutional rights.”). The oft-cited standard for facial challenges is derived from dicta in *United States v. Salerno*, 481 U.S. 739, 107 S. Ct. 2095, 95 L. Ed. 2d 697 (1987), wherein Chief Justice Rehnquist wrote that “the challenger must establish that no set of circumstances exists under which the [challenged law] would be valid.” *Id.* at 745. Defendants

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spill substantial ink pressing the *Salerno* formulation in their briefing, arguing that Plaintiffs need to show that the Challenged Laws are unconstitutional “in all applications.” (Defs.’ Mem. 7; *see also* Defs.’ Opp’n 1 (“It is well-established that the inquiry in a facial challenge, as opposed to an as-applied challenge, is whether the challenged provisions are *ever* capable of constitutional application.”); *id.* at 8 (“Rather, the crux of the inquiry in this straightforward facial challenge is whether the challenged laws can ever be capable of constitutional application.”)). It is for this reason that Defendants often contend that Plaintiffs’ “religious practices” and “the specifications of their still-hypothetical rabbinical college” are “immaterial and irrelevant,” (Defs.’ Opp’n 1; *see also id.* at 9 (contending that facts about “Plaintiffs’ religious practices or the hypothetical development they have broadly outlined” are “not relevant or material to the discussion, which should focus on the circumstances surrounding the consideration and passage of the Code Provisions.”)), arguing that facial challenges “do not take into account the facts and circumstances of particular plaintiffs,” (*id.* at 8). Defendants do recognize an exception for facial challenges made pursuant to the Free Exercise Clause, “when a facially neutral law targets a particular religious entity,” (*id.* (citing, inter alia, *Church of Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520, 544, 113 S. Ct. 2217, 124 L. Ed. 2d 472 (1993))), but they argue that such exception does not apply in this case, (*id.*; *see also id.* at 24 (“The *Lukami* exception to the entrenched facial challenge doctrine has no purchase [sic] in this case because none of the challenged laws burden Plaintiffs’ hypothetical plan *and* they do not burden other developers’ actions, religious or not.”)).

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As this Court previously explained, Defendants are correct that “[a] facial challenge is one that addresses not the application of an ordinance to a particular set of plaintiffs, but the legality of the ordinance itself.” *Tartikov*, 915 F. Supp. 2d at 611 (brackets, alterations, and internal quotation marks omitted). And, despite criticism among commentators and some courts, there is a substantial body of case law that indicates the *Salerno* standard remains controlling, at least insofar as the standard’s inverse is true: a law must have a “plainly legitimate sweep” to be constitutional. *See, e.g., Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 449, 128 S. Ct. 1184, 170 L. Ed. 2d 151 (2008) (applying this standard); *United States v. Decastro*, 682 F.3d 160, 168 (2d Cir. 2012) (noting that a party making a facial challenge must show that “no set of circumstances exists under which the statute would be valid, *i.e.*, that the law is unconstitutional in all of its applications, or at least that it lacks a plainly legitimate sweep” (internal quotation marks and brackets omitted)); *see also United States v. Booker*, 543 U.S. 220, 275, 125 S. Ct. 738, 160 L. Ed. 2d 621 (2005) (“[I]t is abundantly clear that the fact that a statute, or any provision of a statute, is unconstitutional in a portion of its applications does not render the statute or provision invalid . . .”).

However, there are exceptions to the *Salerno* standard. First, it plainly does not apply to First Amendment claims. *See United States v. Farhane*, 634 F.3d 127, 138-39 (2d Cir. 2011) (acknowledging that the *Salerno* standard is not be applicable to First Amendment claims); *Lerman*, 232 F.3d at 144 (“*Salerno*, however, does not apply to this case, in which the plaintiffs assert the violation of



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rights protected by the First Amendment.”); *see also Finley*, 524 U.S. at 580 (“To prevail [on a facial challenge], respondents must demonstrate a substantial risk that application of the provision will lead to the suppression of speech.”). Second, in its 2013 Opinion and Order, the Court found that the *Salerno* line of cases is distinguishable from the instant case because no case in the *Salerno* line “involved allegations of discriminatory animus grounded in race or religion.” *Tartikov*, 915 F. Supp. 2d at 613 n.18. Thus, the Court noted that the *Salerno* test would be met if the Challenged Laws violate Plaintiffs’ Equal Protection or Free Exercise rights because “a law that violates the Equal Protection Clause or the Free Exercise Clause will be invalid when applied under any conceivable circumstance, even if it can be justified by a conceivably benign motive.” *Id.*<sup>33</sup> This ruling is law of the

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33. The Court also found motive to be relevant to Plaintiffs’ facial challenges, which Defendants do not contest at this stage of the litigation. *See Tartikov*, 915 F. Supp. 2d at 611-14; *see also Santa Fe Independent Sch. Distr. v. Doe*, 530 U.S. 290, 317, 120 S. Ct. 2266, 147 L. Ed. 2d 295 (2000) (noting that it is proper for courts to examine the purpose of a law when facially challenged); *Meats, Inc. v. Weiss*, 294 F.3d 415, 425 (2d Cir. 2002) (same); *cf. Gray v. City of Valley Park, Mo.*, No. 07-CV-881, 2008 U.S. Dist. LEXIS 7238, 2008 WL 294294, at \*19 n.26 (E.D. Mo. Jan. 31, 2008) (noting that a facial challenge may be based on the theory that an ordinance was “passed with discriminatory intent”); *Nev. Fair Hous. Ctr., Inc. v. Clark County*, 565 F. Supp. 2d 1178, 1187 (D. Nev. 2008) (noting that while “legislative motive is irrelevant to a facial challenge . . . evidence of some intent to disadvantage a class of people makes the determination of the basis for the overt disparate treatment much easier”). *But see Estvanko v. City of Perry*, No. 09-CV-137, 2010 U.S. Dist. LEXIS 121599, 2010 WL 4812996, at \*3 (M.D. Ga. Nov. 17, 2010) (“When a facial challenge is made, the motive of the drafters of the ordinance is irrelevant.”)

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case, see *Brentwood Pain & Rehab. Servs., P.C. v. Allstate Ins. Co.*, 508 F. Supp. 2d 278, 288 (S.D.N.Y. 2007) (citing *In re PCH Assoc.*, 949 F.2d 585, 592 (2d Cir. 1991)); see also *United States v. Plugh*, 648 F.3d 118, 123 (2d Cir. 2011) (explaining that “[a]s a general matter . . . [a court should] adhere to its own decision at an earlier stage of the litigation” (internal quotation marks omitted)), and Defendants have failed to point to any “extraordinary circumstances” justifying its reconsideration, see *N. River Ins. Co. v. Phila. Reins. Corp.*, 63 F.3d 160, 165 (2d Cir. 1995) (noting that a court should be “loathe to revisit an earlier decision in the absence of extraordinary circumstances” (internal quotation marks omitted)); *Bellezza v. Holland*, No. 09-CV-8434, 2011 U.S. Dist. LEXIS 76030, 2011 WL 2848141, at \*3 (S.D.N.Y. July 12, 2011) (defining extraordinary circumstances as “cogent or compelling reasons not to [follow the earlier decision], such as an intervening change of controlling law, the availability of new evidence, or the need to correct a clear error to prevent manifest injustice” (internal quotation marks omitted)). Further, there is ample precedent supporting the Court’s ruling, including some cases suggesting that *Salerno* is no longer the governing standard for facial challenges at all. See *City of Chicago v. Morales*, 527 U.S. 41, 54 n.2, 119 S. Ct. 1849, 144 L. Ed. 2d 67 (1999) (plurality opinion) (“To the extent we have articulated a clear standard for facial challenges, it is not the *Salerno* formulation, which has never been the decisive factor in any decision of this Court, including *Salerno* itself . . . “); *Farrell v. Burke*, 449 F.3d 470, 496 n.12 (2d Cir. 2006) (“[I]t appears that the Supreme Court might decline to apply the ‘impermissibly vague in all applications’ standard for facial

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challenges wherever fundamental rights are at stake, not merely in those cases where First Amendment rights are at stake.”); accord *Doe v. City of Albuquerque*, 667 F.3d 1111, 1124 (10th Cir. 2012) (“The idea that the Supreme Court applies the ‘no set of circumstances’ test to every facial challenge is simply a fiction, readily dispelled by a plethora of Supreme Court authority.” (collecting cases)); *A Woman’s Choice-East Side Women’s Clinic v. Newman*, 305 F.3d 684, 687 (7th Cir. 2002) (finding that the *Salerno* test is a “suggestion” and that it “must give way” to more recent Supreme Court precedent (internal quotation marks omitted) (citing, inter alia, *Stenberg v. Carhart*, 530 U.S. 914, 120 S. Ct. 2597, 147 L. Ed. 2d 743 (2000))); cf. *United States v. Frandsen*, 212 F.3d 1231, 1235 n.3 (11th Cir. 2000) (explaining that the *Salerno* test “has been subject to a heated debate in the Supreme Court, where it has not been consistently followed”); *Inturri v. City of Hartford*, 365 F. Supp. 2d 240, 253 n.13 (D. Conn. 2005) (“Although in some limited situations a facial challenge to a statute that does not implicate the First Amendment may be brought, there is considerable disagreement as to what standard would be applied.”).<sup>34</sup> But see *S.D. Myers, Inc. v. City and Cty. of S.F.*, 253 F.3d 461 (9th Cir. 2001) (“While we have held that *Casey* overruled *Salerno* in the context of facial challenges to abortion statutes, we will not reject *Salerno* in other contexts until a majority of the Supreme

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34. As the Tenth Circuit explained, even after *Salerno*, the Supreme Court “has repeatedly considered facial challenges simply by applying the relevant constitutional test to the challenged statute without attempting to conjure up whether or not there is a hypothetical situation in which application of the statute might be valid.” *Doe*, 667 F.3d at 1124.

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Court clearly directs us to do so.” (citation and internal quotation marks omitted)); *United States v. Arzberger*, 592 F. Supp. 2d 590, 599 (S.D.N.Y. 2008) (noting that *Salerno*, despite criticism, remains “the basis for evaluating facial constitutional challenges in the Second Circuit”).

Third, in the context of the Free Exercise Clause, despite Defendants’ claim to the contrary, *Church of the Lukumi Babalu Aye, Inc. v. City Hialeah*, 508 U.S. 520, 113 S. Ct. 2217, 124 L. Ed. 2d 472 (1993), offers an alternate, directly applicable standard to apply, as it provides that “government, in pursuit of legitimate interests, cannot in a selective manner impose burdens on conduct motivated by religious belief.” *Id.* at 543. *See also Cent. Rabbinical Congress v. N.Y. City Dep’t of Health & Mental Hygiene*, 763 F.3d 183, 196 (2d Cir. 2014) (“But where some purposeful and exclusive regulation exists—where the object of the law is itself the regulation of religious conduct—the law is subject to heightened scrutiny, and not to rational basis review.”); *Commack Self-Serv. Kosher Meats, Inc. v. Hooker*, 680 F.3d 194, 202 (2d Cir. 2012) (applying this standard to a facial challenge under the Free Exercise Clause). Accordingly, *Salerno* is not the appropriate standard to apply here.

More generally, based on broader principles of constitutional analysis, Plaintiffs’ experience is also appropriately the backbone of their constitutional claims. In general, “[t]he proper focus of constitutional inquiry is the group for whom the law is a restriction.” *Planned Parenthood of SE Pa. v. Casey*, 505 U.S. 833, 894, 112 S. Ct. 2791, 120 L. Ed. 2d 674 (1992); *see also Al Falah Ctr.*

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*v. Twp. of Bridgewater*, No. 11-CV-2391, Slip Op. at 12-14 (D.N.J. Sept. 30, 2013) (denying summary judgment to the defendants on First and Fourteenth Amendment facial challenges based on the challenged law's impact on the plaintiff and the defendant's motivation for passing that law). Here, the effect of the Challenged Laws on Plaintiffs is relevant to determining whether the Challenged Laws were discriminatory under the Equal Protection Clause and/or targeted at religious practice under *Lukumi* (and the Free Exercise Clause), and may be suggestive of the effect they have on other religious groups. Moreover, given the Court "must be careful not to go beyond the statute's facial requirements and speculate about 'hypothetical' or 'imaginary' cases," *Wash. State Grange*, 552 U.S. at 449-50, Plaintiffs' experience is especially important as a source of evidence on the constitutionality of the Challenged Laws, *see Doe*, 667 F.3d at 1123-24, 1127-28 (analyzing, in the context of a facial challenge, the particular circumstances of the plaintiffs and noting that it is proper to "appl[y] the appropriate constitutional test to the restriction at issue," rather than "conjur[ing] up whether or not there is a hypothetical situation in which application of the statute might be valid"); *Cty. Concrete Corp v. Town of Roxbury*, 442 F.3d 159, 167 (3d Cir. 2006) (finding allegations that the defendant township "knew exactly how [the] appellants intended to use their land and passed [an] [o]rdinance specifically tailored to prevent that use" to constitute a ripe facial challenge to that ordinance); *Dibbs v. Hillsborough Cty.*, 67 F. Supp. 3d 1340, 1349-50 (M.D. Fla. 2014) ("A property owner makes a facial challenge by claiming that a municipality knew exactly how he intended to use his property and passed

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an ordinance specifically tailored to prevent that use.” (internal quotation marks omitted); *Cornell Cos., Inc., v. Borough of New Morgan*, 512 F. Supp. 2d 238, 258 (E.D. Pa. 2007) (“The basis of an EPC facial challenge is that the mere enactment of the ordinances violates the EPC because it treats the plaintiff’s property differently than other similarly situated landowners.”).

Of course, this does not mean that an extended discussion of Jewish Law, the nature of a Torah Community, or the Congregation’s history, among other things, necessarily are dispositive in this case. As discussed above, the unwieldiness of Plaintiffs’ Rule 56.1 Statement is partially due to the repetitive inclusion of facts of this sort, which may or may not even be relevant to an as-applied challenge. Nonetheless, Defendants err in their wholesale dismissal of facts specific to Plaintiffs’ experience, because it is that experience that may be the only way for the Court or a fact-finder to determine whether the Challenged Laws are facially constitutional.

## **6. Equal Protection (Claim 4)**

In their Fourth Claim, Plaintiffs allege that Defendants have violated the Equal Protection Clause of the Fourteenth Amendment. (*See* SAC ¶¶ 260-63.) The Equal Protection Clause “is essentially a direction that all persons similarly situated should be treated alike.” *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 439, 105 S. Ct. 3249, 87 L. Ed. 2d 313 (1985); *see also Harlen Assocs. v. Inc. Vill. of Mineola*, 273 F.3d 494, 499 (2d Cir. 2001) (same). “Plaintiffs challenging . . . facially neutral laws on

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equal protection grounds bear the burden of making out a prima facie case of discriminatory purpose.” *Pyke v. Cuomo*, 567 F.3d 74, 78 (2d Cir. 2009); *see also Tartikov*, 915 F. Supp. 2d 574, 614 (“To prove an equal protection violation, claimants must prove purposeful discrimination by a government actor, directed at a suspect class, such as a racial group, or a religion.” (citations and internal quotation marks omitted)). If Plaintiffs make such a showing, the government action at issue is “subject to strict judicial scrutiny,” such that the law may be upheld only if it “further[s] a compelling state interest and [is] narrowly tailored to accomplish [that] purpose.” *Pyke*, 567 F.3d at 77.

Plaintiffs may establish an equal protection violation by identifying (1) “a law that expressly classifies on the basis of race,” (2) “a facially neutral law or policy that has been applied in an unlawfully discriminatory manner,” or (3) “a facially neutral [law or] policy that has an adverse effect and that was motivated by discriminatory animus.” *Id.* As the Court previously held, Plaintiffs rely on the third method here. *See Tartikov*, 915 F. Supp. 2d at 615; *see also Jana-Rock Constr., Inc. v. N.Y.S. Dep’t of Econ. Dev.*, 438 F.3d 195, 204 (2d Cir. 2006) (noting that the Equal Protection Clause is violated, unless justified by strict scrutiny, when government action is “motivated by discriminatory animus and its application results in discriminatory effect” (citations omitted)).

**a. Discriminatory Purpose**

“Discriminatory purpose implies that the decisionmaker . . . selected or reaffirmed a particular

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course of action at least in part because of, not merely in spite of, its adverse effects upon an identifiable group.” *Hayden v. Cty. of Nassau*, 180 F.3d 42, 50 (2d Cir. 1999) (internal quotation marks omitted). Though the desire to discriminate need not be the sole motivating factor, see *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 265, 97 S. Ct. 555, 50 L. Ed. 2d 450 (1977) (“Rarely can it be said that a legislature or administrative body operating under a broad mandate made a decision motivated solely by a single concern, or even that a particular purpose was the ‘dominant’ or ‘primary’ one.”), a plaintiff will only “be permitted to take his case to trial if he proffers evidence that strongly indicates that discrimination was a significant reason for a public body’s actions and the defendant body, or its members, fails to counter that evidence with its own clear evidence that a majority acted with permissible motives,” *Cine SK8, Inc. v. Town of Henrietta*, 507 F.3d 778, 786 (2d Cir. 2007). “Determining whether invidious discriminatory purpose was a motivating factor demands a sensitive inquiry into such circumstantial and direct evidence of intent as may be available.” *Arlington Heights*, 429 U.S. at 266 (internal quotation marks omitted). In assessing discriminatory intent in the land use context, courts consider “the series of events leading up to a land use decision, the context in which the decision was made, whether the decision or decisionmaking process departed from established norms, statements made by the decisionmaking body and community members, reports issued by the decisionmaking body, whether a discriminatory impact was foreseeable, and whether less discriminatory avenues were available.” *Chabad*



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*Lubavitch of Litchfield Cty., Inc. v. Litchfield Historic Dist. Comm'n*, 768 F.3d 183, 199 (2d Cir. 2014); *see also id.* (“Discriminatory intent may be inferred from the totality of the circumstances,” including “historical background” and “contemporary statements made by the decision-making body,” or “by showing that animus against the protected group was a significant factor in the position taken by the municipal decision-makers themselves or by those to whom the decision-makers were knowingly responsive.”); *LeBlanc-Sternberg v. Fletcher*, 67 F.3d 412, 425 (2d Cir. 1995) (same); *United States v. Yonkers Bd. of Educ.*, 837 F.2d 1181, 1221 (2d Cir. 1987) (explaining that “[i]ntent to discriminate may be established in a number of ways,” and may be “inferred from the totality of the relevant facts,” including “historical background . . . particularly if it reveals a series of official actions taken for invidious purposes; [and] the specific sequence of events leading up to the challenged decision, such as zoning changes for a given site enacted upon . . . learning of [the plaintiff’s] plans for . . . construction” (alterations and internal quotation marks omitted) (quoting *Arlington Heights*, 429 U.S. at 267-68)). However, Plaintiffs cannot rely on mere conclusory allegations to establish this element of their Equal Protection claim. *See Tiraco v. N.Y.S. Bd. of Elections*, 963 F. Supp. 2d 184 (E.D.N.Y. Aug. 7, 2013) (“[The] [p]laintiff’s conclusory allegations likewise fail to state a viable Fourteenth Amendment equal protection claim.”); *33 Seminary LLC v. City of Binghamton*, 869 F. Supp. 2d 282, 310 (N.D.N.Y. 2012) (finding the plaintiff’s allegations insufficient because they were “wholly conclusory”).

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There is ample evidence in the record to make the question of discriminatory purpose a disputed fact. First, there is the timing of the Challenged Laws. With regard to the Accreditation Law, the relevant provisions of which were adopted in January 2001 and amended in September 2004, while the Parties dispute exactly what the nexus of the relevant local laws was, they agree that, in January 2000, the Village Planner circulated memos entitled “Proposed Primary School and Pre-School ([Yeshiva Spring Valley] Pomona) and the Village Zoning Regulations regarding Schools,” recommending that the Village adopt zoning laws for schools, which were otherwise “scant.” (Pls.’ 56.1 ¶¶ 123-24.) Mayor Marshall at the time stated, in the context of the Accreditation Law, that “[t]hey[,]” presumably the Orthodox Jews behind the Yeshiva, “[are] going to come in and we’re going to be caught with our pants down if we don’t move.” (Pls.’ 56.1 ¶ 126 (citing Savad Decl. Ex. 3 (Marshall Tr.) 96-98).) Additionally, in 2004, the year that the Accreditation Law was amended, Yeshiva Spring Valley had its tax-exempt status denied for the first time, the Congregation purchased the Subject Property, and the Village participated in a lawsuit filed to challenge Ramapo’s adoption of the ASHL. (Pls.’ 56.1 ¶¶ 4, 99, 138, 324, 360; Defs.’ 56.1 ¶¶ 138.) Moreover, while Ulman indicated that the Accreditation Law was passed to “strengthen the Village’s control over schools,” (Pls.’ 56.1 ¶ 144; Defs.’ Counter 56.1 ¶ 144), since 2001 there have been no schools or higher education institutions of any kind in the Village, (Pls.’ 56.1 ¶ 143). Also in 2004, the Village passed a resolution noting that the Board of Trustees “opposes in the strongest possible terms any public officials who abdicate their responsibility

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of office by placing the politics of special interest groups and individual developers ahead of the best interest of the people they are committed to serve.” (Savad Decl. Ex. 179 (Jan. 26, 2004 Board of Trustees meeting minutes), at 2-3) Ulman admitted that Orthodox Hasidic Jews are one such special interest group. (*See* Savad Decl. Ex. 15 (Ulman Decl.) 979.) Therefore, even if Defendants were not aware until November of 2004 that the Congregation had purchased the Subject Property and that it would be used for a rabbinical college, (*see* Pls.’ 56.1 ¶¶ 148-49), the evidence suggests that Defendants were at least aware of the growth of Orthodox/Hasidic community in Ramapo prior to that time, and that this community may have sought to expand in the Village through educational institutions, at the time of the passage of the relevant portions of the Accreditation Law in January 2001, as amended in September 2004.

With regard to the Dormitory Law, the relevant provisions of which were adopted in September 2004 and January 2007 at the aforementioned January 22, 2007 meeting, Mayor Marshall reported that there was “a hostility” among attendees “engendered from [an] article in *The Journal News* regarding the Tartikov project,” (Pls.’ 56.1 ¶ 161 (citing Savad Decl. Ex. 3 (Marshall Tr.) 176 (“There were several meetings during my time that were nasty, this was one of them”); Defs.’ Counter 56.1 ¶ 161; *see generally* Savad Decl. Ex. 78 (Jan. 22, 2007 Meeting Transcript).)<sup>35</sup> One meeting attendee noted that

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35. The Court recognizes that Defendants note the first portion of the Dormitory Law was passed before Defendants became aware of the Congregation’s purchase of the subject property in November

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he or she had heard that the Congregation's proposal was for "rabbinical students and their families," and sought a way prevent institutions from being "flooded with family members and children, *and all of that sort.*" (*Id.* at 69-70 (emphasis added).) Mayor Marshall indicated, in response, that the "[a]ccessory use" provision of the Dormitory Law "addresses that to some degree." (*Id.* at 71.) Another meeting attendee, who appears to live just outside the Village, stated, in reference to the Congregation's apparent plan, that "[e]veryone should understand that this is not going to happen, and we're not going to let it happen. Let's stop it now. [Multiple shouts of 'Stop it now!'] Their counsel is here to protect their interests. We're here, the people who live in this village, to protect our interests, okay." *Seco*(*Id.* at 21.) Yet another attendee specifically indicated that because the rabbinical college "would entirely change the character . . . [and] politics of the village . . . there has to be a solution through the zoning laws that prohibits such a large number of people being within one property, and one institution." (*Id.* at 10.)<sup>36</sup> Therefore, the evidence at the very least indicates

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2004. (Defs.' Mem. 27; *see also* Pls.' 56.1 ¶ 148-49; Defs.' 56.1 ¶ 116.) This fact, however, does not place Plaintiffs' equal protection claim outside of the zone of disputed facts.

36. As laid out below in the context of comments made outside of this particular meeting, contrary to Defendants' objections, statements by community members, even if not a part of the decisionmaking body, are relevant in assessing discriminatory purpose, *see Tsombanidis v. West Haven Fire Dept.*, 352 F.3d 565, 580 (2d Cir. 2003) (directing the district court to consider whether private citizens' "hostility motivated the [municipality] in initiating . . . its . . . efforts" on remand); *LeBlanc-Sternberg*, 67 F.3d at 425

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that the Dormitory Law was passed at a time at which there was great hostility towards the Orthodox Jews in the community or, at the very least, hostility to the construction of a large school of the type that Plaintiffs sought, namely one with on-campus family housing.

The Wetlands Law, the relevant provisions of which were adopted in April 2007, was first considered at the aforementioned January 22, 2007 meeting. (Pls.' 56.1 ¶ 173; Defs.' Counter 56.1 ¶ 173.) The Village did not conduct any studies prior to the adoption of the law to determine where the Village's wetlands were, what threats they faced, or how best to protect them, (Pls.' 56.1 ¶ 190; Defs.' Counter 56.1 ¶ 190), though Mayor Marshall was generally aware of the existence of Wetlands on the Subject Property at the time, (Pls.' 56.1 ¶ 180; Defs.' Counter 56.1 ¶ 180). Nonetheless, between the January meeting and the passage of the Wetlands Law, Trustees Sanderson, Louie, and Yagel indicated in campaign materials that voters needed to "stand up to the threat" that the Congregation posed, further stating "[y]ou need to vote for a team that is prepared to stand up to this

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("Discriminatory intent may [be demonstrated] . . . by showing that animus against the protected group was a significant factor in the position taken by . . . those to whom the decision-makers were knowingly responsive." (internal quotation marks omitted)), particularly to the extent that Village officials were aware of these comments, (*see* Pls.' 56.1 ¶¶ 220-223; *see also id.* ¶¶ 248, 251, 253-54, 256, 258 (indicating the Village officials took public comments into account.) Therefore, unlike the statements on websites and blogs discussed above, these statements are not offered for the truth, but rather to demonstrate that such statements were made to, or in the presence of, Defendants.

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threat of using the fundamentally unfair RLUIPA statute as a hammer against our village.” (Pls. 56.1 ¶ 275; Defs.’ Counter 56.1 ¶ 275.) Trustee Sanderson also specifically indicated in a campaign video that the rabbinical college “could completely change the village and the make-up of the village,” (Pls.’ 56.1 ¶ 279 (citing Savad Decl. 17 (Sanderson Tr.) 125-128); Defs.’ Counter 56.1 ¶ 279), and each candidate also more generally campaigned on a platform to “keep Pomona Pomona,” which Trustee Louie indicated meant to “keep Pomona the village that it is and not change it,” (Pls.’ 56.1 ¶ 294 (citing Savad Decl. Ex. 9 (Louie Tr.) 156). In fact, the campaign materials for all three candidates indicated that “the single most important issue facing the village is clearly the Tartikov development.” (Pls.’ 56.1 ¶ 274; Defs.’ Counter 56.1 ¶ 274.) Accordingly, as was the case with the Dormitory Law, the Wetlands Law was passed at a time when there was intense focus on the proposed rabbinical college but when no studies or analysis had been conducted of the needs, or nature, of wetlands in the Village. The juxtaposition of these facts supports Plaintiffs’ claim that Defendants adopted the Wetlands Law as a pre-textual means to unlawfully target Plaintiffs’ land use plans for the Subject Property.

Second, in addition to some of the suggestive comments described above, a number of arguably discriminatory comments made by Village officials and community members prior to the passage of the Challenged Laws suggest animus towards the Hasidic

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Jewish community.<sup>37</sup> See *Yeshiva Chofetz Chaim Radin, Inc. v. Vill. of New Hempstead by its Bd. of Tr.*, 98 F. Supp. 2d 347, 355 (S.D.N.Y. 2000) (holding that “discriminatory comments by the [m]ayor . . . present grounds for allowing a jury to judge the credibility, and motivation, of the [m]ayor . . . as well as the motivation that can be attributed to the [v]illage itself in passing the disputed provisions”). These statements are undisputed as described below:

- Village Planning Board Chairperson Melvin Cook, who admittedly was not employed by the Village until after the Challenged Laws were adopted, indicated that “[s]ome of us see the Rabbinical College as the beginnings of another restricted religious community similar to New Square,” (Pls.’ 56.1 ¶ 211 (citing, inter alia, Savad Decl. Ex. 1 (Cook Dep. Tr.) 102); Defs.’ Counter 56.1 ¶ 211), which Cook called a “tribal ghetto” of ultra-orthodox Jews, (Pls.’ 56.1 ¶ 111 (citing Savad Decl. Ex. 1, at 89-90)). Cook indicated that the increased number of Orthodox

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37. Of note, a number of the statements Plaintiffs cite do *not* indicate discriminatory animus, but rather indicate the degree of opposition to the rabbinical college, or indicate that the reason for the opposition was (and is) the rabbinical college’s size. (*Compare, e.g.*, Pls’ 56.1 ¶ 231 (noting that Lynn Yagel stated “there is no hope for Rockland County due to RLUIPA development” with Savad Decl. Ex. 11 (L Yagel Tr.) 127 (noting that the statement referred to “overdevelopment”).) While these statements are relevant to whether the rabbinical college was targeted, they do not themselves reveal a *discriminatory* purpose. Nonetheless, there is enough other evidence to suggest a discriminatory motive to send this case to a jury to determine if the Challenged Laws were motivated by discriminatory animus.

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Hasidic Jews hurt the community because of their adverse effect on the school systems and diversity in Ramapo. (Pls.' 56.1 ¶ 296 (citing Savad Decl. Ex. 1, at 79-80 ("I felt [the increase in Ultra Orthodox Jews] has hurt the community and it certainly affected the school systems in Ramapo.")); Defs.' Counter 56.1 ¶ 296.)<sup>38</sup>

- Village Clerk Leslie Sanderson indicated that if "rampant rumors" about "how many people" the rabbinical college would bring in "were true[,] it would usurp the Village, perhaps the Village Board and the amount of people that live there." (Pls.' 56.1 ¶ 214 (citing Savad Decl. Ex. 11 (Sanderson Dep. Tr.) 200); Defs.' Counter 56.1 ¶ 214.)
- A published letter to the editor of *The Journal News*, which Defendants admit was authored at

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38. The Court disagrees with Defendants' assertion that Cook's motives are irrelevant because he was not employed by the Village when the laws were passed. The Village's perception of the Hasidic community after the passage of the Challenged Laws is at least circumstantial evidence that is suggestive of the Villages' prior views. *Cf. Arlington Heights*, 429 U.S. at 266 (noting propriety of considering "circumstantial evidence" and the relevance of a "pattern" of discrimination).

Additionally, Plaintiffs contend that references to "diversity" are "code for keeping Hasidic and Orthodox Jews out of the Village because the people making these statements know that there are few Orthodox Jews and no Hasidic Jews in the Village." *See McWright v. Alexander*, 982 F.2d 222, 228 (7th Cir. 1992) (indicating that neutral terms of this sort can be facially discriminatory when put into context).



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least in part by Trustee Yagel, contended that “[t]o say that a virtual mini-city within the village—that will house thousands of homogenous individuals who can control village elections—is ‘natural’ in any way is simply not true.” (Pls.’ 56.1 ¶ 215; Defs.’ Counter 56.1 ¶ 215 (citing Savad Decl. Ex. 150 (published letter)).) Trustee Yagel was also quoted in a *New York Times* article as saying that it is “disgusting” that the Congregation was “trying to create this mini city in our village.” (Pls.’ 56.1 ¶ 246 (citing Savad Decl. Ex. 4 (B. Yagel Tr.) 245-46; *id.* Ex. 112); Defs.’ Counter 56.1 ¶ 246.)

- Village resident Robert Prol sent a letter to Mayor Sanderson and Trustees Yagel, Banks, and Louie less than a year before he was appointed to the Village planning board, stating, “[t]here is only one outcome acceptable to the community, and that is to maintain our fair zoning laws and the way of life we have all invested in.” (Pls.’ 56.1 ¶¶ 234-35 (citing, inter alia, Savad Decl. Ex. 2 (Prol Dep. Tr.) 123-24); Defs.’ Counter 56.1 ¶ 234.) Trustee Louie responded by admitting “[i]t’s a little unsettling what’s going on, but we are sure we can maintain our zoning laws in Pomona and keep our neighborhood rural and diverse.” (Pls.’ 56.1 ¶ 236 (citing Savad Decl. Ex. 9 (Louie Dep. Tr.) 221-26).) Robert Prol also referred to the Congregation as “trying to force their slum on everyone else,” though he later clarified that by “slum” he meant that the “density level . . . would [result in] lots of garbage and packages and everything else all over the place.” (Pls.’ 56.1

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¶ 244; Defs.’ Counter 56.1 ¶ 244 (citing Savad Decl. Ex. 2, at 86, 92).) A year after Robert Prol sent the aforementioned letter, Mayor Sanderson appointed him to the planning board. (Pls.’ 56.1 ¶ 235.)

- Trustee Sanderson, in an email to Trustee Yagel, provided draft language for an email blast that included the need to “defeat any developers who plan to take over our village and our area.” (*Id.* ¶ 281 (citing Savad Decl. Ex. 9 (Louie Dep. Tr.) 115-116)); Defs.’ Counter 56.1 ¶ 281.) Trustee Sanderson also publicly stated that the Village needed to “maintain[] its cultural and religious diversity,” (Pls.’ 56.1 ¶ 284 (citing Savad Decl. Ex. 310 (Request for Admission) Response No. 106)), and highlighted her concern about the Orthodox Hasidic “bloc vote” because of its impact on the Ramapo School District, (*see* Pls.’ 56.1 ¶ 295 (citing, *inter alia*, Savad Decl. Ex. 11 (Sanderson Dep. Tr.) 155-56); Defs.’ Counter 56.1 ¶ 295.)
- Trustee Louie emailed a Village resident indicating that a goal of hers was to “[m]aintain[] the demographic makeup of the village the way it is.” (Pls.’ 56.1 ¶ 307 (citing Savad Decl. Ex. 9 (Louie Dep. Tr.) 139-140); Defs.’ Counter 56.1 ¶ 307.)
- The aforementioned Facebook post and related text messages between Mayor Yagel and Louie, concerning a gathering of Hasidic Jews at Provident Bank Ballpark, (*see* Savad Suppl. Decl. Ex. 1), and the associated adverse inference sanction.

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It is worth noting that all of these statements were made *despite* evidence of an attempt to take care not to make incriminating statements, as Mayor Marshall indicated at the aforementioned January 22, 2007 meeting:

Ladies and gentleman, let me say something. We sitting at this table have limitations that are placed on us as to what we can say and what we can't say, because our attorney tells us what we can say and what we can't. I can't say what I feel, I can't. If I agree with you, if I don't agree with you, I don't have the luxury of being able to say that here. All I can say is that every member of this board works very, very hard to do what is best for this community. You have your issues. Don't assume because no one has gotten up and said, wow, I agree with you, oh boy; don't assume that because we didn't do that we don't agree. We may or may not, but please give us the benefit of the doubt.

(Pls.' 56.1 ¶ 416 (citing, inter alia, Savad Decl. Ex. 78, at 58); *see also*, Pls.' 56.1 ¶ 422 (noting that in advance of a meeting, "Trustee Yagel warned Mayor Sanderson and Trustee Louie that they [m]ust be very careful about what we say. Don't know who's in the audience. Savad might show up again.") (citing, inter alia, Savad Decl. Ex. 105 (email from Yagel)); *id.* ¶ 425 ("Trustee Yagel stated that the residents should make sure that when they speak in public that they don't speak in a discriminatory manner because that can be construed as 'the village is discriminating.'" (quoting Savad Decl. Ex. 239 (Affidavit

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of Laura M. Kramer) ¶ 10) (citing Savad Decl. Ex. 4, at 189-90); Defs.' 56.1 ¶ 425 (clarifying this statement).)

Third, the Village's behavior with respect to other proposed projects is suggestive. For example, Trustee Sanderson opposed an Orthodox middle school on property outside the town in May 2007, indicating that it did "not sound good" and encouraging others to attend public hearings. (Pls.' 56.1 ¶ 375 (citing Savad Decl. Ex. 11 (Sanderson Dep. Tr.) 224-26).) Additionally, as early as 1996, the Village Attorney, then Ruben Ortenberg, advised residents to contact the Town of Ramapo to object to the expansion of an Orthodox Hasidic school. (Pls.' 56.1 ¶ 376.) At the same time, the Village did not challenge a variety of secular development projects of equal size that may have "threatened" the Village in the same way. (*See, e.g.*, Pls.' 56.1 ¶¶ 381 (noting support for concept of Barr Laboratories office building); 399 (noting that Mayor Marshall encouraged the Village to accept the construction group homes and that residents "simply [did] not have the right to choose who [their] neighbors [would] be").) *Cf. LeBlanc-Sternberg*, 67 F.3d at 431 (finding relevant that the municipality "cited potential traffic and noise problems among their reasons for opposing home synagogues but tolerated existing traffic and noise caused by secular uses").<sup>39</sup>

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39. Plaintiffs also indicate that the Village challenged other Yeshivas, (Pls.' 56.1 ¶¶ 360, 363, 376; Pls.' Supplemental 56.1 ¶¶ 23-25), yet did not challenge a large agricultural operation because it did not want to "get involved" in other villages' affairs, (Pls.' 56.1 377-78.) In fact, in one instance, the Village did not object to an assisted living facility located just outside the Village yet encouraged

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Of course, not all of the facts demonstrate discriminatory motives. Many of the statements post-date the laws in question, and some reflect concern about over-development of property in the Village. (*See* Defs.’ Mem. of Law in Reply to Pls.’ Opp’n to Defs.’ Mot. for Summ. J. (“Defs.’ Reply”) 6 (Dkt. No. 193).) And the Village, in the past, has shown a willingness in other contexts to facilitate religious land use. (*See, e.g., id.* at 7-8 (noting that Local Law 2 of 2007 for the first time allowed single-family residents to be used as houses of worship, as requested by ultra-Orthodox, Hasidic communities).) Taken together, though, in the light most favorable to the non-movant Plaintiffs, and given the unique burden the Challenged Laws place on Plaintiffs, there is sufficient evidence for a reasonable jury to conclude that the Challenge Laws were passed with a discriminatory purpose.<sup>40</sup>

**b. Discriminatory Effect**

Plaintiffs also allege that the Challenged Laws had a discriminatory effect on them. In establishing discriminatory effect, Plaintiffs are not “obligated to show a better treated, similarly situated group of individuals.” *Pyke*, 258 F.3d at 110 (holding that a plaintiff who “alleges that a facially neutral statute or policy with an adverse

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residents to oppose a Yeshiva on the same property when proposed. (Pls. 56.1 ¶¶ 374-75, 401.)

40. Because the evidence above is sufficient for Plaintiffs’ claim to survive summary judgment, the Court need not consider the claim that the Village is closely entwined with the Preserve Ramapo organization.

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effect was motivated by discriminatory animus [] is not obligated to show a better treated, similarly situated group of individuals of a different race in order to establish a claim of denial of equal protection.”). Indeed, the cases “recognize[] that a government that sets out to discriminate intentionally in its enforcement of some neutral law or policy will rarely if ever fail to achieve its purpose.” *Doe v. Vill. of Mamaroneck*, 462 F. Supp. 2d 520, 546 (S.D.N.Y. 2006).

Plaintiffs have established, at the very least, that whether the Challenged Laws prohibit the building of a rabbinical college is an issue of material fact. Defendants offer a defense of the Challenged Laws but devote no more than a few conclusory paragraphs to the “neutral purpose[s]” of each law. (*See, e.g.*, Defs.’ Mem. 45.) To the extent Defendants offer a substantive defense, it is addressed in the context of the relevant law below.

First, with respect to the Accreditation Law, educational institutions are, in general, permitted in the Village, provided those who intend to build the institution obtain a special permit. *See, e.g.*, Defs.’ Counter 56.1 ¶ 579 (citing Village Code § 130-10(F)). However, unaccredited educational institutions are not permitted under any circumstances, because an educational institution is defined by Village law as one that is “accredited by the New York State Education Department or similar recognized accrediting agency,” Village Code § 130-4. (*See also* Pls.’ 56.1 ¶¶ 580-81; Defs.’ Counter 56.1 ¶¶ 580-81.) Plaintiffs present expert testimony indicating that their proposed rabbinical college cannot be accredited

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by any New York State body, which Defendants do not rebut with any evidence of their own. (*See* Pls.’ 56.1 ¶¶ 583-84, 591; Defs.’ Counter 56.1 ¶¶ 583-84, 591.) In fact, Defendants do not dispute that “[t]o be accredited” at all, an educational institution has to first be in existence and fully operational, (Pls.’ 56.1 ¶ 590; Defs.’ Counter 56.1 ¶ 590), placing Plaintiffs, and likely any other group that sought to build an educational institution in the Village, in a catch-22: they cannot build a rabbinical college unless it is accredited, and they cannot have their rabbinical college accredited until it is built, (*see* Pls.’ 56.1 ¶ 588-9; Defs.’ Counter 56.1 ¶ 589-89; Savad Decl. Ex. 16 (Preston Green Dep. Tr.) 49, 89-90 (noting that the relevant accredited bodies require institutions to be operational)). Indeed, the rabbinical college could not even be accredited by the Association of Advanced Rabbinical and Talmudic Schools (“AARTS”), a body designed to accredit schools like the proposed rabbinical college, absent changes to its curriculum and the rabbinical college being operational. (*See* Savad Decl. Ex. 16 (Green Tr.) 89-90; Gordon Aff. Ex. 15 (Preston Green Witness Report) at 20-21.) To that end, the Accreditation Law at least arguably prevents Plaintiffs from building their proposed rabbinical college.

Second, with regard to the Dormitory Law, the Village Code explicitly provides that “single-family, two-family[,] and/or multifamily dwelling units . . . shall not be considered to be dormitories or part of dormitories.” Village Code § 130-4. (*See also* Pls.’ 56.1 ¶ 603.) Dormitories likewise cannot “contain separate cooking, dining or housekeeping facilities” and cannot “occupy more than 20% of the total square footage of all buildings

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on the lot.” Village Code §§ 130-4, 130-10(F)(12). (*See also* Pls.’ 56.1 ¶¶ 610, 695.) These prohibitions arguably render it impossible for Plaintiffs, who, by religious belief, have obligations to their families that can only be fulfilled by living with them, (*see* Pls.’ 56.1 ¶¶ 42 (noting that Jewish law imposes “conjugal duties upon a husband and wife”), 493 (noting that students must “live with their families in order to raise their family in a religious environment”); Defs.’ Counter 56.1 ¶¶ 42, 493), and who allegedly can best complete the course of study by remaining on school grounds, (*see, e.g.*, Pls.’ 56.1 ¶¶ 72 (noting that rabbinical college will be a “Torah Community” and will “involve[] intensive learning interaction, day and night, among the students, teachers[,] and lecturers,” 455-56 (noting that students must “exile [themselves] into a Torah Community”); Defs.’ Counter 56.1 ¶¶ 455-56), to complete their studies at the proposed rabbinical college. While it is for the jury to decide the authenticity of Plaintiffs’ beliefs—and the degree that such Torah Community with multi-family housing is necessary to achieve them, which is Defendants’ central dispute with these contentions—there is sufficient evidence to conclude that the Dormitory Law has a disparate impact on Plaintiffs.<sup>41</sup>

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41. Defendants allege, in response, that the “dormitory regulations expanded opportunities for dormitories and were enacted for the neutral purpose of conforming the village code with New York case law.” (Defs.’ Mem. 46.) First, the fact that dormitory use was permitted in such a way as to carve out Plaintiffs’ plan for dormitories at the proposed rabbinical college means it has a discriminatory effect; by design, some individuals benefitted, while Plaintiffs, because of their professed religious beliefs, did not. Second, Plaintiffs dispute that dormitories were not permitted in the Village under New York law prior to the passage of the law. (*See*



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Third, with regard to the Wetlands Law, two provisions, working in concert, have the apparent effect of barring construction of the rabbinical college in the Village. First, Village law provides that “[t]he minimum lot area for an educational institution” is 10 acres. Village Code § 130-10(F)(1)(a). (*See also* Pls.’ 56.1 ¶ 14; Defs.’ 56.1 ¶ 14.) Plaintiffs argue, with sufficient evidentiary support, that the Subject Property is the only such non-government-owned property in the Village, meaning it is the only location where which the proposed rabbinical college can be built. (Pls.’ 56.1 ¶ 616 (citing Beall Decl. ¶¶ 15-19).)<sup>42</sup> Second, the Wetlands Law itself defined wetlands as “all lands and waters of the Village of Pomona . . . which have a contiguous area of at least 2,000 square feet” which contain, or are enclosed by, certain submerged vegetation, or that otherwise contain “poorly drained soils.” Village Code § 126-2. “[W]ithin 100 feet of the boundary” of such lands, or of any water course or “water body,” defined as a “body of standing water which is not dry more than three months of the year . . . and which, when wet, is customarily more than 500 square feet in water surface area,” it is unlawful, unless with a permit issued by the Board of Trustees or the Planning Board, to, in relevant part, “[e]rect[] any building or structure of any kind,” including “roads [or] driveway,” without a permit. *Id.* § 126-3. The Wetlands Law also exempts properties

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Pls.’ 56.1 ¶ 132; Defs.’ Counter 56.1 ¶ 132 (citing Savad Decl. Ex. 13 (Ulman Dep. Tr.) 303-304.)

42. None of the evidence cited contradicts Plaintiffs’ statement, though, as noted above, this is arguably outside the scope of Plaintiffs’ Wetlands Experts’ field of knowledge.

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improved by single-family homes, rendering the Subject Property only one of a handful of the 1,156 parcels in the Village affected by the law. Village Code § 126-3(D). (*See also* Beall Decl. ¶¶ 151-53).<sup>43</sup>

Plaintiffs have proffered evidence of the existence of wetlands on the Subject Property, specifically wetlands covering the vast majority of the west side of the property abutting Route 306. (*See* Beall Decl. ¶ 280 & Ex. T (survey map of the Subject Property).) Based on a survey map, it appears that a driveway cuts between the wetlands on the Subject Property. (*See id.* Ex. T; *see also* Pls.' 56.1 ¶¶ 618-620 (discussing wetlands on the Subject Property and their impact); Beall Decl. ¶¶ 280-89 (discussing wetlands on property in the context of state and federal regulations), Ex. T (property map identifying wetlands) (Dkt. No. 153); Tauber Decl ¶ 28 (averring that the Wetlands Law renders the Subject Property inaccessible); Second Gordon Aff. Ex. A, at 61-63 (maps identifying wetlands on property).) Plaintiffs, however, offer evidence that “the current access road” would have “to be improved” in order to be usable for the proposed rabbinical college because there is “no other practicable access location for the Property,” but that cannot be completed because the current driveway falls within 100 feet of the wetlands. (Tauber Decl. ¶ 5.)

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43. Defendants contend that the exception only applies to pre-existing single-family homes. (*See* Defs.' Mem. 30.) However, the plain language of the Wetlands Law does not contain such a qualifier. *See* Village Code § 126-3(D) (“The aforesaid one-hundred-foot buffer in which regulated activities are not permitted to take place shall not apply to lots that *are* improved with single-family residences.” (emphasis added)).

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Plaintiffs have also proffered evidence, which Defendants do not rebut with any evidence of their own, that the Village was aware of the existence of wetlands on the Subject Property, (*see* Pls.' 56.1 ¶ 180 (noting that Mayor Marshall knew there were wetlands on the property; Defs.' 56.1 ¶ 180), such that it is plausible that Defendants targeted the rabbinical college with the Wetlands Law.

Two issues remain unresolved by the record, however. First, it is not clear from the record why Plaintiffs cannot build an entirely new entrance road off of Route 202, which is not abutted by wetlands.<sup>44</sup> Second, it is not clear to what extent the area between the wetlands is otherwise regulated by state and federal law. In her Declaration, Beall, Plaintiffs' wetlands expert, notes that "[t]he wetlands on the west side of the Property would, at a minimum, be regulated by the Corps of Engineers, as noted on the map by the comment 'ACOE wetlands.'" (Beall Decl. ¶ 283.)<sup>45</sup> Plaintiffs further suggest, in their Rule 56.1 Statement, that "99% of mapped aquatic resources" in the

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44. Plaintiffs indicate that "[a]ccess from the Property to Route 202 is impracticable because of the existence of steep slopes, wetlands, and wetland buffers," but the only evidence they cite is the M. Tauber Declaration. (Pls.' 56.1 ¶ 621.) M. Tauber, however, as discussed above, is an expert neither on environmental topography nor Village law, and as such this evidence is insufficient.

45. An Environmental and Planning Analysis by one of Plaintiffs' experts indicates that federal regulation of wetlands ends at the wetlands themselves, suggesting there is no buffer requirement under federal law. (Second Gordon Aff. Ex. A, at 8; *see also* Defs.' Mem. 30 (citing Savad. Decl. Ex. 313, at 461) (noting that there is no federal buffer requirement).)

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village are currently regulated by the Corps of Engineers and 80% are regulated by the N[Y]SDEC, (Pls.' 56.1 ¶ 870 (citing Beall Decl. ¶¶ 100-101)), and that "development near the wetlands on the [S]ubject Property would be regulated by the NYSDEC," (Pls.' 56.1 ¶ 906 (citing Beall Decl. ¶¶ 282-85)), which, according to an analysis prepared by one of Plaintiffs' experts, requires a permit for "activity within 100 feet of NYS designated wetlands," (Second Gordon Aff. Ex. A, at 8; *see also id.* at 27 (noting that the Wetlands Law is "critical and necessary and is in keeping with municipal functions in New York State as well as other national wetland protection interests," and that "it mirrors the NYSDEC provisions for a 100 foot jurisdiction area"); Exs. H (indicating the existence of a NYSDEC-regulated stream on the west side of the property). If the wetlands at issue are already regulated by state and federal law in the same way as that provided for in the Wetlands Law, then it is unclear what, if any, unique impact the Wetlands Law has on the proposed rabbinical college.<sup>46</sup> In this regard, it is noteworthy that Defendants claim that the Wetlands Law was intended to protect "wetlands in the Village that fell between the cracks and were not regulated by the state or the federal government." (Defs.' Mem. 30; *see also* Defs.' 56.1 ¶ 161 (citing, *inter alia* Gordon Aff. Ex. 12 (Ulman Dep. Tr.) 461.) The testimony cited, however, is unsupported by evidence and, more importantly, does not establish that the wetlands on the Subject Property were not already

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46. Based on exhibits to the aforementioned report, there are certainly state and federally regulated wetlands in the Village, though it is not clear whether they fall in the Subject Property or not. (Second Gordon Aff. Ex. A, at 61-63.)

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subject to federal or state regulation. Defendants also argue, in conclusory fashion, that “there is no evidence that the wetlands local law has any effect whatsoever on the [P]roperty” because no study had been done. (Defs.’ Mem. 46.) However, as stated above, the *only* evidence on this issue is advanced by Plaintiffs. Therefore, Defendants are not entitled to summary judgment as to the Wetlands Law on Plaintiffs’ Equal Protection claim.<sup>47</sup>

In response to the fact that the Challenged Laws appear to have a discriminatory effect on Plaintiffs’ proposed rabbinical college, Defendants assert that Plaintiffs could potentially build a rabbinical college “through a zone change [or] a text amendment,” *see* Village Code § 130-35 (power to amend), a “use variance,” *see* Village Code § 130-28(D) (variances), or a “special use permit,” *see* Village Code § 130-10, through which the Parties can work together “to bring to fruition something that is legal and beneficial to all involved,” (*see, e.g.*, Defs.’ Mem 3, 34-35, 41, 42.) First, as the Court previously noted, a zone change or text amendment is a “legislative process” that “Plaintiffs allege would be cumbersome and, given the hostility of Defendants, fraught with indefinite delay and

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47. In their Opposition, Defendants claim that because Plaintiffs have not challenged the Village’s R-40 zoning they could not have built the rabbinical college anyway. (Defs.’ Opp’n 29.) The special use permitting process, as described below, provides for educational institutions “subject to special permit approval.” *See* Village Code § 130-10(F). The problem is that the Challenged Laws impose conditions on qualifying as an acceptable educational institution and on development near wetlands more generally, which are conditions that Plaintiffs allege the proposed rabbinical college cannot meet.

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uncertainty.” *Tartikov*, 915 F. Supp. 2d at 633. (See also Savad Decl. Ex. 313 (Hearing Tr.) 94 (Ulman admitting that Plaintiffs “would need an amendment to one of [the Village’s] laws” to build the rabbinical college).) While Plaintiffs offer only minimal evidence to support their contention that process would be as cumbersome as they claim, (see Tauber Decl. ¶ 41), given the aforementioned evidence of discriminatory animus, and the fact that the decision to grant an amendment is a matter of Village discretion, (see Savad Decl. Ex. 313, at 19; see also Pls.’ 56.1 ¶¶ 657, 662; Defs.’ Counter 56.1 ¶¶ 657, 662), Plaintiffs have a viable claim that seeking a zoning change or text amendment would be a futile exercise, see *Grace Church of North Cty. v. City of San Diego*, 555 F. Supp. 2d 1126, 1138 (S.D. Cal. 2008) (granting summary judgment to plaintiff based on evidence that plaintiff had no “reasonable expectation that any application for an extension” to use its property would be granted), or at the very least would be fraught with delay, which may harm, or even completely undermine, Plaintiffs’ ability to construct the proposed rabbinical college. Second, with regard to applying for a variance, Ulman made clear that the Congregation would not have been granted a variance even had it applied, (see Pls. 56.1 ¶ 626; Defs.’ Counter 56.1 ¶ 626; see also Pls.’ Opp’n 17 (citing Savad Decl. Ex. 313, at 19 (“I agreed that it would be wasteful for them to apply for a variance.”))), suggesting that such an application would also be futile. Third, Plaintiffs are unable to obtain a special use permit for the rabbinical college, the mechanism by which houses of worship and educational institutions are approved in the Village, because, as discussed, the Challenged Laws impose conditions on special use permits by limiting what

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qualifies as an “educational institution,” *see* Village Code § 130-10(F); *see also Tartikov*, 915 F. Supp. 2d at 604 (“[I]t is undisputed that the Village’s zoning authorities would not have the discretion to issue a special use permit for an unaccredited institution or to issue certain variances under the Village’s Zoning code.”), and by restricting development on or near wetlands, *see* Village Code § 126-3. Accordingly, at a minimum, there is enough evidence to suggest that whether Plaintiffs can successfully obtain a change in the Challenged Laws, or variance from them, is a question of fact subject to a resolution by a fact-finder.<sup>48</sup>

**c. Strict Scrutiny**

If Plaintiffs are able to prove that the Challenged Laws were passed with a discriminatory purpose and have a discriminatory effect, strict scrutiny would apply. *See United States v. Bannister*, 786 F. Supp. 2d 617, 664 (E.D.N.Y. 2011) (“In cases involving alleged racial discrimination, once a discriminatory purpose and a discriminatory effect are shown, the law is subject to strict scrutiny.”) While the Challenged Laws may be justifiable under a rational basis test, they do not survive strict scrutiny.

A compelling state interest involves “some substantial threat to public safety, peace[,] or order,” *Sherbert v.*

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48. While the Parties do not explicitly address the issue, the same analysis applies to the prospect of the Congregation obtaining a permit to build an access road within the buffer area of the wetlands on the west side of the Subject Property, pursuant to Village Code § 126-3.

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*Verner*, 374 U.S. 398, 403, 83 S. Ct. 1790, 10 L. Ed. 2d 965 (1963), and includes only “interest of the highest order,” *WDS II*, 504 F.3d at 353, and the “gravest abuses,” *Sherbert*, 374 U.S. at 408. Given this high bar, courts have held that “[a]esthetics,” traffic, and “community character” are normally not compelling interests. See *Westchester Day Sch. v. Vill. Of Mamaroneck*, 417 F. Supp. 2d 477, 554 (S.D.N.Y. 2006) (“[T]he visual impact of the [p]roject does not implicate a compelling government interest.”), *aff’d*, 504 F.3d 338 (2007); *Clear Channel Outdoor, Inc. v. Town Bd. of Town of Windham*, 352 F. Supp. 2d 297, 304 (N.D.N.Y. 2005) (“[W]hile aesthetics and traffic safety are regularly found to be substantial enough government interests to support a content-neutral regulation, those interests are rarely compelling enough to support a content-based regulation.”); *XXL of Ohio, Inc. v. City of Broadview Heights*, 341 F. Supp. 2d 765, 789-90 (N.D. Ohio 2004) (holding that aesthetics and neighborhood preservation are not sufficiently compelling interests to withstand strict scrutiny analysis); *Cottonwood Christian Ctr. v. Cypress Redevelopment Agency*, 218 F. Supp. 2d 1203, 1227-28 (C.D. Cal. 2002) (noting that “aesthetic harm” is not “compelling”); *Knoeffler v. Town of Mamakating*, 87 F. Supp. 2d 322, 330 (S.D.N.Y. 2000) (“Even where the government has declared a policy of promoting aesthetics and traffic safety, . . . restrictions intended to accomplish those interests have failed to pass strict scrutiny and have been struck down.”).

Defendants contend that the Challenged Laws were passed “to retain [the Village’s] rural and residential character” and because of a “lack of enthusiasm for high-



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intensity development.” (Defs.’ Mem. 23.) With regard to the specific Challenged Laws: first, Defendants contend that the Dormitory Law was passed to “minimize[] the impact of a non-residential use in a single-family district,” including the effect on traffic and storm-water systems,” (*id.* at 25), and to comply with state law, (*id.* at 24-25).<sup>49</sup> Defendants also claim they have a “compelling interest in adding permission to have dormitories as accessory uses to educational uses and a compelling interest in further expanding opportunities for schools to have dormitories by shifting the calculus from a per-student analysis to one that is based on land use,” (*id.* at 26). Second, Defendants maintain that the Wetlands Law was passed to protect

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49. Specifically, Defendants contend that the Dormitory Law was passed “in response to requirements in case law.” (Defs.’ 56.1 ¶ 124.) The Village determined that the district court in *Congregation Mischknols Lavier Yakov, Inc. v. Bd. of Tr. of Vill. of Airmont*, No. 02-CV-5642 (S.D.N.Y. filed July 19, 2002) “indicated that dormitories could not be prohibited in relation to an educational use,” and that the New York Court of Appeals in *Cornell Univ. v. Bagnardi*, 68 N.Y.2d 583, 503 N.E.2d 509, 510 N.Y.S.2d 861 (App. Div. 1986), “discussed the special status afforded to educational institutions in land use cases and set forth the factors to be considered by local governments when reviewing applications for such uses.” (Defs.’ 56.1 ¶ 124.) Therefore, Defendants contend that the Village changed its “per-student” lot area requirement to ensure that “the entire educational institution requirement [would not be] declared unconstitutional.” (*Id.* ¶ 125.) Defendants further contend that they adopted the accreditation requirement in order to “create a distinction between an educational institution bearing the special status, required by the New York Court of Appeals, and a commercial-type educational use, such as an automotive school[,] which is not protected by the special status standard,” and the village “preferred to avoid commercial-type educational land use in Pomona.” (*Id.* ¶ 126.)

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wetlands that were not otherwise protected by state and federal law, (Defs.' Mem. 30), "to protect property and infrastructures that can be severely damaged by severe storms if not properly protected through appropriate oversight and control of wetlands," (*id.* at 29), i.e., "to make sure they were not destroyed, for the health, safety, and welfare of all the residents," (*id.* at 31 (internal quotation marks omitted)), and to "protect[] the waterways and prevent[] flooding," (*id.* at 32). Third, with regard to the Accreditation Law, Defendants allege that Local Law 1 of 2001 was passed so that educational institutions would require a special permit and so that their "density and impacts on adjoining properties would be regulated," (*id.* at 32-33), and that the definition of educational institution was expanded with Local Law 5 of 2004 to ensure it "allowed accreditation from a broader, generic entity," (*id.* at 33). Defendants further contend that the "intent behind the definition [of educational institution] and the accreditation requirement was to ensure that only those educational uses consistent with a residential and rural area would be permitted, and that inconsistent uses would not, *e.g.*, automotive or other trade schools." (*Id.* at 33.)

These explanations are insufficient to justify granting summary judgment to Defendants. In general, as discussed above, the stated aesthetic and community character rationales are generally not compelling state interests, and Defendants have not demonstrated that these interests are so overwhelming or gravely threatened by the institutions such as the proposed rabbinical college to render them compelling. Defendants cite only one case suggesting otherwise, *Murphy v. Zoning Comm'n*

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*of Town of New Milford*, 148 F. Supp. 2d 173 (D. Conn. 2001), which at best only cites contradictory precedent, *see id.* at 189-90. Further, specifically with regard to the Dormitory Law, while certain aspects of the law may be justified by a need to comply with other laws, Defendants offer no defense of the scope of the restrictions it contains (for example, its ban on separate cooking, dining, or housekeeping facilities). And, specifically with regard to the Wetlands Law, while there is some evidence to suggest a need for a wetlands law, (*see, e.g.*, *Aff. of Amanda Gordon Ex. A*, at 27 (noting that the Wetlands law is “critical and necessary and is in keeping with municipal functions in New York State as well as other national wetland protection interests”), Defendants offer no evidence beyond Ulman’s testimony, (*see* Defs.’ Mem. 30-31), as to the nature of the threat to wetlands and the extent to which the Village’s wetlands were not already protected by state and federal law.

Nonetheless, even if the Challenged Laws were justified by compelling interests, they would still fail to pass strict scrutiny because they are not narrowly tailored to serve those interests. *See Turner Broad. Sys. Inc. v. F.C.C.*, 512 U.S. 622, 664, 114 S. Ct. 2445, 129 L. Ed. 2d 497 (1994) (noting that a municipality must show “that the regulation will in fact alleviate [claimed] harms in a direct and material way”). When “[t]he proffered objectives are not pursued with respect to analogous non-religious conduct, and those interests could be achieved by narrower ordinances that burdened religious conduct to a far lesser degree[,] [then] [t]he absence of narrow tailoring suffices to establish the invalidity of the actions.” *Lukumi*,

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508 U.S. at 546; *Jana-Rock Constr., Inc. v. N.Y.S. Dep't of Econ. Dev.*, 438 F.3d 195, 210 (2d Cir. 2006) (“Strict scrutiny is applied in order to determine whether the harm stemming from a particular decision . . . is justified”).<sup>50</sup> There are a variety of reasons why the Challenged Laws arguably fail this test, as implied by the prior discussion of discriminatory effect. Nonetheless, the Court recounts a few below.

First, Defendants have admitted that a generalized restriction on the intensity and size of development would serve all of its allegedly compelling interests. (*See* Pls.’ 56.1 ¶ 709; Defs.’ Counter 56.1 ¶ 709.) While, as noted above, this is just the sort of generalized interest that does not justify a burden on religious exercise, *see Gonzales*, 546 U.S. at 438, it also demonstrates that there is no reason that Plaintiffs’ development implicates these interests more than any other development.

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50. Of note, Plaintiff repeatedly cites *Holt v. Hobbs*, 135 S. Ct. 853, 190 L. Ed. 2d 747 (2015) as governing Plaintiff’s facial challenge. (*See* Pls.’ Mem. 34 (citing *Holt*, 135 S. Ct. at 863 (noting that RLUIPA “requires the Government to demonstrate that the compelling interest test is satisfied through application of the challenged law to the person” (internal quotation marks omitted)).) While that case concerned facial *hair*, it did not concern a facial *challenge*, or even a constitutional challenge at all, and therefore does not provide the proper standard to apply to facial challenges rooted in constitutional rights, despite Plaintiffs’ insistence otherwise. *See Holt*, 135 S. Ct. at 853, 859 (“We hold that the Department’s policy, *as applied in this case*, violates the Religious Land Use and Institutionalized Persons Act of 2000 . . . .” (emphasis added)); *Snodgrass v. Robinson*, No. 14-CV-269, 2015 U.S. Dist. LEXIS 104864, 2015 WL 4743986, at \*9, \*11 (W.D. Va. Aug. 10, 2015) (applying *Holt* only to the Plaintiff’s as-applied challenge but not to his facial challenge).

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Second, as noted above in the context of the Wetlands Law, Defendants admit that they commissioned no studies or experts when examining the need for the Challenged Laws, suggesting the allegedly compelling interests may be an “afterthought effort to bolster a flimsily supported decision,” *Westchester Day School*, 417 F. Supp. 2d at 554, or “contrived for the sole purpose of rationalizing the” Village’s decisions, *Fortress Bible Church v. Feiner*, 734 F. Supp. 2d 409, 505 (S.D.N.Y. 2010), *aff’d by* 694 F.3d 208 (2d Cir. 2012). (*See also* Pls. Mem. 35 (discussing the lack of evidence generally), 38 (discussing the lack of evidence for traffic concerns), 45 (discussing the lack of evidence for noise concerns); Pls.’ 56.1 ¶¶ 742, 749, 821.)

Third, Village law already provides “several layers of regulation” to protect the interests at issue through operation of the special permit process for educational institutions. (Pl.’s Mem. 36.) First, the Village Code provides that the Board of Trustees may, “impose . . . restrictions and regulations” on educational institutions to “minimize traffic hazards, impairment of the use, enjoyment or value of property in the surrounding area, or generally protect the health, safety[,] and welfare of the neighborhood.” (*Id.* at 37 (internal quotation marks omitted).) *See also* Village Code § 130-10(F). Second, the Zoning Board of Appeals, in approving individual special use permit applications, may impose “reasonable conditions and restrictions as are directly related to and incidental to the proposed special use permit.” (Pls.’ Mem. 37 (internal quotation marks omitted).) *See also* Village Code § 130-28(E)(1). Third, the permitting Board may attach “additional conditions and safeguards . . . to ensure initial and continual conformance

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to all applicable standards and requirements” including “[t]he location and size of the special permit use, nature and intensity of the operations involved in it or conducted in connection with it,” and ensuring that the use does not “change . . . the character of the neighborhood.” (Pls.’ Mem. 37 (internal quotation marks omitted).) *See also* Village Code § 130-28(E)(6). Fourth, the Village Planning Board can “impose such reasonable conditions and restrictions as are directly related to and incidental to a proposed site plan,” and cannot approve a site plan unless it takes into account “public health, safety[,] and general welfare” with respect to traffic, parking, and other aspects of development, (Pls.’ Mem. 37 (internal quotation marks omitted).) *See also* Village Code § 119-3(B). Furthermore, as alluded to above, Article 24 of the New York State Environmental Conservation Law requires permitting from the New York State Department of Environmental Conservation for activity within 100 feet of designated wetlands and wetlands that are “part of [the] ‘waters of the United States’ are federally protected” by the River and Harbors Act of 1899 and the Clean Water Act, administered by the Army Corps of Engineers. (Second Gordon Aff. Ex. A, at 8; Pls.’ Mem. 50-51.) It is not clear from the record the extent to which the wetlands on the Subject Property are covered by these laws. Accordingly, it is unclear what compelling interests the Challenged Laws uniquely serve.

Fourth, specifically with regard to traffic, while it is not always foreclosed as a compelling interest, *see Westchester Day Sch. v. Vill. of Mamaroneck*, 386 F.3d 183, 191 (2d Cir. 2004) (“WDS I”) (“We know of no controlling authority,

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either in the Supreme Court or any circuit[,] holding that traffic problems are incapable of being deemed compelling.”), Defendants’ only evidence connecting the Challenged Laws to alleviating traffic concerns is that “all dwelling units, by their nature, generate traffic.” (Pls.’ Mem. 41 (citing Pls.’ 56.1 ¶ 791).) This explanation is insufficient, particularly given, among other reasons, there is evidence that the proposed rabbinical college would be largely self-contained, generating little to no traffic at all. (See Pls.’ 56.1 ¶¶ 805-06; Pls.’ Mem. 43.) See also *Congregation Etz Chaim v. City of L.A.*, Civ. No. 10-1587, 2011 U.S. Dist. LEXIS 158418, 2011 WL 12472550, at \*7 (C.D. Cal. July 11, 2011) (granting summary judgment to the plaintiff where the defendant city “present[ed] no evidence that any traffic or parking concerns actually existed, nor that such concerns could not be mitigated in such a way as to allow the Congregation’s use at the subject property” (internal quotation marks omitted).)

Fifth, there is no reason to believe, nor any evidence indicating, that accredited schools have a lesser impact on traffic, aesthetics, or any other interest Defendants claim, as compared to unaccredited schools. (See Decl. of William D. Fitzpatrick ¶ 65 (Dkt. No. 152) (“[T]raffic generation will be the same for an accredited facility and a non-accredited facility with an equal number of students.”.) Nor do Defendants offer any evidence that automobile schools are not capable of being accredited. (See Pls.’ 56.1 ¶ 759 (asserting that automobile schools can be accredited).) Regardless, given there are no accredited—or unaccredited—schools in the Village, it is difficult to understand why accreditation suddenly

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became a concern for the Village, unless considered in light of the growth of the Orthodox Hasidic community in the Pomona area and the proposed rabbinical college. (Pls.' 56.1 ¶ 723.) See *Cottonwood Christian Ctr. v. Cypress Redev. Agency*, 218 F. Supp. 2d 1203, 1225 (C.D. Cal. 2002) (“At first blush, the [defendant] [c]ity’s concern about blighting rings hollow. Why had the [defendant], so complacent before [the plaintiff] purchased the [subject] [p]roperty, suddenly burst into action? . . . [T]he activity suggests that the [defendant] was simply trying to keep [the plaintiff] out of the [c]ity, or at least from the use of its own land.”). The same issue applies to the Dormitory Law, as Defendants do not make clear why dormitories with kitchens or housekeeping facilities pose any greater threat to the environment or character of the Village than more traditional, student-only dormitories.

What all of these concerns make clear is that the justification for the discriminatory effect of the Challenged Laws is hardly beyond dispute. The laws are structured such that they arguably carve out Plaintiffs’ use with questionable reasons for doing so, and general claims that the Challenged Laws are “reasonable limitations so that the expansion in the use would be consistent with the rural and residential character of the community,” (Defs.’ Mem. 27), are insufficient. Accordingly, the Court finds that Plaintiffs’ Equal Protection Claim survives summary judgment.

### **5. Free Exercise (Claim 1)**

Plaintiffs also bring a claim under the Free Exercise Clause of the First Amendment. The First Amendment,



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which is applicable to the States by operation of the Fourteenth Amendment, “prohibits the enactment of any law prohibiting the free exercise of religion.” *Bronx House of Faith v. Cmty. Sch. Distr. No. 10*, 127 F.3d 207, 216 (2d Cir. 1997) (internal quotation marks omitted); *see also Hosanna-Tabor Evangelical Lutheran Church and Sch. v. E.E.O.C.*, 565 U.S. 171, 132 S. Ct. 694, 702, 181 L. Ed. 2d 650 (2012) (“The First Amendment provides, in part that ‘Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof.’”). “At a minimum, the protections of the Free Exercise Clause pertain if the law at issue discriminates against some or all religious beliefs or regulates or prohibits conduct because it is undertaken for religious reasons.” *Lukumi*, 508 U.S. at 532 (alteration omitted); *see also Commack*, 680 F.3d at 210 (same). It is not a violation of the Free Exercise Clause, however, to enforce a generally applicable rule, policy, or statute that incidentally burdens a religious practice, as long as the government can “demonstrate a rational basis for [the] enforcement” of the rule, policy, or statute, and the burden is only an incidental effect, rather than the object, of the law. *Fifth Ave. Presbyterian Church v. City of N.Y.*, 293 F.3d 570, 574 (2d Cir. 2002); *see also Emp’t. Div., Dep’t of Human Res. of Or. v. Smith*, 494 U.S. 872, 878-79, 110 S. Ct. 1595, 108 L. Ed. 2d 876 (1990) (explaining that enforcement of a neutral law of general applicability does not offend the Free Exercise Clause), *superseded by statute on other grounds*, 42 U.S.C. § 2000bb *et seq.*, as recognized by *Holt v. Hobbs*, 135 S. Ct. at 859.

Thus, to state a free exercise claim under the aforementioned *Lukumi* standard, a plaintiff must

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establish that “the object of [the challenged] law is to infringe upon or restrict practices because of their religious motivation,” or that the law’s “purpose . . . is the suppression of religion or religious conduct.” *Lukumi*, 508 U.S. at 533. Such a law is subject to strict scrutiny review, and it “will survive strict scrutiny only in rare cases.” *Id.* at 546; *see also Smith*, 494 U.S. at 890 (noting that a facially neutral, generally applicable law is only subject to rationality review); *Fifth Ave.*, 293 F.3d at 574 (noting rational basis review applies when a burden on religion is incidental to, rather than the object of, the law at issue).

“To determine the object of a law, [the Court] must begin with its text, for the minimum requirement of neutrality is that a law not discriminate on its face.” *Lukumi*, 508 U.S. at 533. But, even if neutral on its face, a law may still run afoul of the Free Exercise Clause if it “targets religious conduct for distinctive treatment.” *Id.* at 534 (“Facial neutrality is not determinative.”). As the Supreme Court has cautioned, the Free Exercise Clause “forbids subtle departures from neutrality,” *Gillette v. United States*, 401 U.S. 437, 452, 91 S. Ct. 828, 28 L. Ed. 2d 168 (1971), and “covert suppression of particular religious beliefs,” *Bowen*, 476 U.S. at 703; *see also Lukumi*, 508 U.S. at 534 (“Official action that targets religious conduct for distinctive treatment cannot be shielded by mere compliance with the requirement of facial neutrality. The Free Exercise Clause protects against governmental hostility which is masked, as well as overt.”). In this regard, courts may find “guidance” in Equal Protection jurisprudence, which, among other things, requires consideration of direct and circumstantial

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evidence regarding the goals of those who enacted the law in question. *Lukumi*, 508 U.S. at 540. Indeed, “[r]elevant evidence includes . . . the historical background of the decision under challenge, the specific series of events leading to the enactment or official policy in question, and the legislative or administrative history, including contemporaneous statements made by the decisionmaking body.” *Id.* Another measure of a law’s object is the temporal proximity between the perceived land use and the adoption of the regulation of that use. *See Vision Church v. Vill. of Long Grove*, 468 F.3d 975, 999 (7th Cir. 2006) (suggesting that the “temporal proximity between [the plaintiff’s] dispute with the [defendant] [v] illage over a special use permit and the enactment of the [o]rdinance” at issue was evidence of the purpose of the ordinance). Based on these factors, “if the object of a law is to infringe upon or restrict practice because of their religious motivation, the law is not neutral.” *Lukumi*, 508 U.S. at 533.

As the Court indicated in its 2013 Opinion and Order, “it is . . . debatable that the above-mentioned animosity to the rabbinical college stemmed from ‘legitimate concern[s] . . . for reasons quite apart from discrimination.’” *Tartikov*, 915 F. Supp. 2d at 621 (alterations in original) (quoting *Lukumi*, 508 U.S. at 535). The question here, then, is whether the record reveals a nefarious motive for the Challenged Laws. Before reaching that question, however, the Court notes that Defendants contend once again, in the context of Plaintiffs’ free exercise claim, that housing is not eligible for free exercise protection because it is not a religious use. (*See, e.g.*, Defs.’ Mem. 2.) However, at least in the context of RLUIPA, the Court has already

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found that “the building of rabbinical college,” of which student housing would be a part, “falls squarely within [the] definition of ‘religious exercise,’” and that “the multi-family dormitories that [Plaintiffs] seek to build are intended to facilitate religious exercise.” *Tartikov*, 915 F. Supp. 2d at 629. The same analysis is applicable here. Because the definition of religious exercise is quite broad, *see WDS I*, 386 F.3d at 186 (holding that religious exercise is “any exercise of religion, whether or not compelled by, or central to, a system of religious belief” and that “the use, building, or conversion of real property for the purpose of religious exercise shall be considered . . . religious exercise.”), accessory housing, and particularly accessory housing that is intended to be the center of religious learning and teaching, is arguably religious exercise, *see WDS II*, 504 F.3d at 348 (noting that the correct inquiry to determine whether an educational facility is covered as “religious exercise” by RLUIPA is whether it “would be used at least in part for religious education and practice”); *see also Fifth Ave*, 293 F.3d at 574-75 (finding provision of a location for homeless to sleep to be religious exercise); *Candlehouse, Inc. v. Town of Vestal*, No. 11-CV-93, 2013 U.S. Dist. LEXIS 63353, 2013 WL 1867114, at \*18 (N.D.N.Y. May 3, 2013) (noting that there was sufficient evidence to support a finding that the residential component of a religious ministry for substance abuse to be religious exercise); *Bikur Cholim*, 664 F. Supp. 2d at 276 (holding that operation “of a facility to enable observant individuals to visit the sick on the Sabbath and holidays as well as the other individual plaintiff’s [sic] obligations to observe the Sabbath while being able to visit their family members at [a nearby hospital] implicates their religious

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exercise”). Thus, there is sufficient evidence in the record to conclude that the housing at issue here is “inextricably integrated with, and necessary for [Plaintiffs’] ability to provide, religious education and practice, i.e., engage in ‘religious exercise.’” *Westchester Day Sch.*, 417 F. Supp. 2d at 545-46. Accordingly, the rabbinical college, *in its entirety*, is at least arguably deserving of free-exercise protections.

At the outset, as discussed in the next section in more detail, the Court notes that each of the Challenged Laws is facially neutral. As Defendants repeatedly point out, and as the Court previously found, the Challenged Laws, on their face, apply to all development projects and educational institutions. *Tartikov*, 915 F. Supp. 2d at 621; *see also id.* at 615 (“[T]he Challenged Laws are facially neutral with respect to religion (and race).”). Accordingly, absent any other evidence, only intermediate scrutiny would apply. (*See* Pls.’ Mem. 27.) *See also Turner Broad.*, 512 U.S. at 662 (noting that “the intermediate level of scrutiny [is] applicable to content-neutral restrictions that impose an incidental burden on speech”); *Mastrovincenzo v. City of N.Y.*, 435 F.3d 78, 98 (2d Cir. 2006) (“Regulations that . . . are . . . content-neutral . . . trigger intermediate, rather than strict, scrutiny.”); *Hobbs v. Cty. of Westchester*, 397 F.3d 133, 149 (2d Cir. 2005) (“[A] less stringent test—applying ‘intermediate scrutiny’—is applicable to regulations of expressive activity that are not based on content.”). However, as discussed above, Plaintiffs have offered sufficient evidence to raise a question of material fact as to whether the Challenged Laws were passed with a discriminatory purpose—to infringe on Plaintiffs’ free

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exercise of religious beliefs. This renders the Challenged Laws non-neutral and therefore subject to strict scrutiny. *See Lukumi*, 508 U.S. at 533 (“[I]f the object of a law is to infringe upon or restrict practices because of their religious motivation, the law is not neutral.”). And, for the reasons discussed in the previous section, a reasonable jury could find that the Challenged Laws do not pass strict scrutiny. Accordingly, summary judgment is denied as to Plaintiffs’ free exercise claim.

## 6. Free Speech (Claim 2)

In their second cause of action, Plaintiffs allege that the Challenged Laws violate Plaintiffs’ right to free speech under the First Amendment. Plaintiffs move for summary judgment “to the extent that [the] claim[] does not involve issues of discriminatory motivation,” (Pls.’ Mem. 4), and Defendants cross-move for summary judgment.

“When conducting First Amendment [free speech] analysis, courts examine challenged governmental regulations to discern whether they are content based or content neutral since ‘the scope of protection for speech generally depends on whether the restriction is imposed because of the content of the speech.’” *Bd. of Managers of Soho Int’l Arts Condo. v. City of N.Y.*, No. 01-CV-1226, 2004 U.S. Dist. LEXIS 17807, 2004 WL 1982520, at \*10 (S.D.N.Y. Sept. 8, 2004) (quoting *Universal City Studios, Inc. v. Corley*, 273 F.3d 429, 450 (2d Cir. 2001)). Indeed, this inquiry is “critical, because it informs the level of scrutiny the regulation should receive. Content-based restrictions are viewed as presumptively invalid and are subject to strict scrutiny.” *Tartikov*, 915 F. Supp. 2d at 623.

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Generally, if a law is content-based, “strict scrutiny applies and the municipality must show that the regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end.” *Sugarman v. Vill. of Chester*, 192 F. Supp. 2d 282, 291-92 (S.D.N.Y. 2002) (internal quotation marks omitted); *see also Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2226, 192 L. Ed. 2d 236 (2015) (“Content-based laws . . . are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests.”). By contrast, content-neutral restrictions are subject to intermediate scrutiny, whereby “the government may impose reasonable time, place[,] and manner restrictions on speech as long as they are content neutral, narrowly tailored to serve a significant government interest[,] and leave open ‘ample channels for communication.’” *Sugarman*, 192 F. Supp. 2d at 292 (quoting *Ward v. Rock Against Racism*, 491 U.S. 781, 791, 109 S. Ct. 2746, 105 L. Ed. 2d 661 (1989)); *see also Vincenty v. Bloomberg*, 476 F.3d 74, 84 (2d Cir. 2007) (“The appropriate standard by which to evaluate the constitutionality of a content-neutral regulation that imposes only an incidental burden on speech is the intermediate level of scrutiny.”); *Lusk v. Vill. of Cold Spring*, 475 F.3d 480, 495 n.16 (2007) (“Content-neutral criteria for political and other signage that are sufficiently objective and precise, and that permit residents to engage in some form of spontaneous speech, have been held to be constitutionally permissible.”). Of note, “[t]he First Amendment’s hostility to content-based regulation extends not only to restrictions on particular viewpoints, but also to prohibition of public discussion on an entire

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topic.” *Consol. Edison Co., Inc. v. Publ. Serv. Comm’n*, 447 U.S. 530, 537, 100 S. Ct. 2326, 65 L. Ed. 2d 319 (1980); *Hobbs*, 397 F.3d at 148 (same).

“The principal inquiry in determining content neutrality . . . is whether the government has adopted a regulation of speech because of disagreement with the message it conveys . . . . A regulation that serves purposes unrelated to the content of expression is deemed neutral, even if it has an incidental effect on some speakers or messages but not others.” *Ward*, 491 U.S. at 791; *Tunick v. Safir*, 209 F.3d 67, 91 (2d Cir. 2000) (same). “Government regulation of speech is content based if a law applies to particular speech because of the topic discussed or message expressed.” *Reed*, 135 S. Ct. at 2227. “As a general rule, laws that by their terms distinguish favored speech from disfavored speech on the basis of the ideas or views expressed are content based,” *Turner Broad.*, 512 U.S. at 643. In other words, “[a]n ordinance is content-based when the content of the speech determines whether the ordinance applies,” *Sugarman*, 192 F. Supp. 2d at 292. By contrast, “government regulation of expressive activity is content neutral so long as it is justified without reference to the content of the regulated speech.” *Time Warner*, 729 F.3d at 155 (emphasis and internal quotation marks omitted).

As noted above, each of the challenged laws is facially neutral as to content. *See Tartikov*, 915 F. Supp. 2d at 621. *See also id.* at 615 (“[T]he Challenged Laws are facially neutral with respect to religion (and race).”). However, because there is a question of material fact as to whether



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the laws were passed with a discriminatory purpose, it is unclear if intermediate or strict scrutiny applies. See *Lukumi*, 508 U.S. at 533 (“[I]f the object of a law is to infringe upon or restrict practices because of their religious motivation, the law is not neutral.”). The Court need not reach this issue with respect to Plaintiffs’ free speech claim, however, because it finds that Plaintiffs’ have not established that they have a viable free speech claim.

The Court previously held that Plaintiffs had barely “pled enough facts to establish that the rabbinical college would engage in and foster expressive conduct.” *Tartikov*, 915 F. Supp. 2d at 625; see also *Kleindienst v. Mandel*, 408 U.S. 753, 762, 92 S. Ct. 2576, 33 L. Ed. 2d 683 (1972) (discussing the “First Amendment right to ‘receive information and ideas’”). The Court also noted that while simply limiting potential locations of the proposed rabbinical college in the Village would likely not violate the Free Speech Clause of the First Amendment, see *Merrimack Congregation of Jehovah’s Witnesses v. Town of Merrimack*, No. 10-CV-581, 2011 U.S. Dist. LEXIS 36090, 2011 WL 1236133, at \*4 (D.N.H. Mar. 31, 2011) (“Courts have held that, absent other expressive conduct, limitations on the geographical location of a religious institution do not implicate the right to free expression under the First Amendment.”); *Grace Church of Roaring Fork Valley v. Bd. of Cty. Comm’n. of Pitkin Cty.*, 742 F. Supp. 2d 1156, 1167 (D. Colo. 2010) (noting that “denial of the [plaintiff’s] proposal to build a worship facility at a particular location did not improperly regulate the [plaintiff’s] dissemination of its religious message”); see also *Christian Coll. v. City of Morgan Hill*, 360 F.3d

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1024, 1037 (9th Cir. 2004) (finding town's refusal to rezone site designated for hospital to religious affiliated college did not violate the Free Speech Clause); *Town of Islip v. Caviglia*, 73 N.Y.2d 544, 540 N.E.2d 215, 222, 542 N.Y.S.2d 139 (App. Div. 1989) (finding zoning ordinance that limited the location of certain land uses did not violate the plaintiff's free speech rights), here the Challenged Laws arguably prevent Plaintiffs from building the rabbinical college anywhere in the Village, *see Tartikov*, 915 F. Supp. 2d at 626. The Court thus focuses not on whether the Challenged Laws prevent the construction of a rabbinical college, but rather on whether the act of constructing a rabbinical college is free speech at all.

Defendants, citing the same two cases they cited at the motion to dismiss stage, *see id.* at 624, contend that constructing a rabbinical college is not an act of free speech but instead only implicates the Free Exercise Clause, (*see* Defs.' Mem. 52 (“[T]he act of building a house of worship, let alone a religious school[,] does not implicate the Free Speech Clause; instead, courts analyze zoning regulations limiting such construction under the Free Exercise Clause, which addresses religiously motivated conduct.” (citing *Tenaflly Eruv Ass’n, Inc. v. Borough of Tenaflly*, 309 F.3d 144, 163 (3d Cir. 2002) (finding that “the act of erecting a wall separating the interior of a building from the secular world” does not constitute speech); *San Jose Christian College v. City of Morgan Hill*, 360 F.3d at 1032 (9th Cir. 2004) (finding religious college's desire to educate was not speech)). Plaintiffs, by contrast, encourage a broad view of the concept of speech, claiming, in principal, that the proposed rabbinical

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college is designed to “foster the expression of certain ideas among and between faculty members and students.” *Tartikov*, 915 F. Supp. 2d at 625; *see also Adhi Parasakthi Charitable, Med., Edu., and Cultural Soc’y v. Twp. of West Pikeland*, 721 F. Supp. 2d 361, 374 (E.D. Pa. 2010) (“The act of worshipping . . . inherently communicates something to others about that individual’s views on society, life, and other more philosophical subjects . . . . [T]he use of the land as a place of worship allows an individual’s conduct to communicate these thoughts with other members of the congregation.”); *id.* at 372 (“Expressive conduct will constitute protected speech if the conduct is imbued with elements of communication, given the factual context of the conduct.” (internal quotation marks omitted)).

The case law supports a broad view of what can be considered speech. *See, e.g., Kleindienst*, 408 U.S. at 762-63 (discussing “First Amendment right to receive information and ideas”); *Bd. of Tr. of SUNY v. Fox*, 492 U.S. 469, 473-74, 109 S. Ct. 3028, 106 L. Ed. 2d 388 (1989) (finding “Tupperware parties” to be speech); *Adhi Parasakthi*, 721 F. Supp. 2d at 372, 374 (noting that an “act of worship is communicative,” and that it must be “imbued with elements of communication”). Indeed, the word “speech” itself in the First Amendment “is not construed literally, or even limited to the use of words.” *Tenafty*, 309 F.3d at 158. Further, the Court previously distinguished the two cases Defendants cite—*San Jose Christian* and *Tenafty*. *Tartikov*, 915 F. Supp. 2d at 624-25. *San Jose* is distinguishable because, unlike the plaintiff in that case, Plaintiffs here alleged that the Village’s action was motivated by discrimination. *Id.* at 624. Plaintiffs,

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as discussed above, now have evidence supporting this allegation, and so the case remains distinguishable. *Tenaftly* is also distinguishable, as the court in that case found that construction of a religious boundary “did not communicate any idea or message; rather, it served only a ‘purely functional purpose.’” *Tartikov*, 915 F. Supp. 2d at 625 (quoting *Tenaftly*, 309 F.3d at 164). The construction of the boundary “allowed [Orthodox Jews] to engage in certain activities on the Sabbath” that were “otherwise forbidden,” e.g., pushing baby strollers. *Id.* at 624-25 (quoting *Tenaftly*, 309 F.3d at 152, 162). By contrast, the construction of the rabbinical college does not just enable Orthodox Jews to practice everyday activities in ways that are consistent with their religion, but rather directly enables religious education and worship. The question is, then, whether an action that facilitates speech can be an act of speech itself.

On the basis of Plaintiffs’ pleadings, the Court previously answered this question in the affirmative. Now that evidence has been gathered and provided to the Court, however, the Court is persuaded that the fact that building a rabbinical college might *enable* religious speech does not render its construction speech itself. *See Adhi Parasakthi*, 721 F. Supp. 2d at 373-74 (“[I]n the absence of evidence supporting a contrary conclusion, the building of a place of worship will not be considered expressive conduct protected by the Free Speech Clause.”); *cf. City Council of L.A. v. Taxpayers for Vincent*, 466 U.S. 789, 814, 104 S. Ct. 2118, 80 L. Ed. 2d 772 (1984) (“[T]he mere fact that government property can be used as a vehicle for communication does not mean that the Constitution

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requires such uses to be permitted.”). On this point, the Third Circuit has bluntly explained that if “every religious group that wanted to challenge a zoning regulation preventing them from constructing a house of worship could” claim a violation of free speech, it would be “so astonishing that [the Third Circuit is] unaware of any court—or even law review article—that has suggested it.” *Tenaflly*, 309 F.3d at 163; *see also id.* (“Otherwise, the act of constructing houses of worship would implicate the Free Speech Clause, whereas courts consistently analyze the constitutionality of zoning regulations limiting such construction under the Free Exercise Clause, not the Free Speech Clause.”).<sup>51</sup> While Plaintiffs have offered evidence as to the expressive conduct they hope to engage in after the rabbinical college is built, Plaintiffs have not offered “any evidence to attempt to show that the building itself will convey some attitude or belief,” *Adhi Parasakthi*, 721 F. Supp. 2d at 374, nor have they made any argument or showing that the building of a rabbinical college is an “indispensable instrument[] of effective public speech,” *Saia v. People of State of N.Y.*, 334 U.S. 558, 561, 68 S. Ct. 1148, 92 L. Ed. 1574 (1948). Therefore, the Court “cannot find any violation of the First Amendment’s Free

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51. The *Tenaflly* court made clear that “courts consistently analyze the constitutionality of zoning regulations limiting [the] construction of houses of worship under the Free Exercise Clause, not the Free Speech Clause.” *Tenaflly*, 309 F.3d at 163 (citing *City of Boerne v. Flores*, 521 U.S. 507, 534, 117 S. Ct. 2157, 138 L. Ed. 2d 624 (1997); *Messiah Baptist Church v. Cty. of Jefferson*, 859 F.2d 820, 823-26 (10th Cir. 1988); *Lakewood, Ohio Congregation of Jehovah’s Witnesses, Inc. v. City of Lakewood*, 699 F.2d 303, 307-08 (6th Cir. 1983); *Church of Jesus Christ of Latter—Day Saints v. Jefferson Cty.*, 741 F. Supp. 1522, 1527-34 (N.D. Ala. 1990)).

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Speech Clause.” *Adhi Parasakthi*, 721 F. Supp. 2d at 374. Accordingly, the Court grants Summary Judgment to Defendants on Plaintiffs’ free speech claim and denies Plaintiffs’ Motion for Summary Judgment as to this claim.<sup>52</sup>

**7. Free Association (Claim 3)**

In their third cause of action, Plaintiffs allege that the Challenged Laws violate Plaintiffs’ right to free exercise of religion under the First Amendment. As with Plaintiffs’ Free Speech claim, Plaintiffs’ once again move for summary judgment insofar as the claim does not involve discriminatory motivation, (Pls.’ Mem. 4), and Defendants cross-move for summary judgment.

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52. In *Adhi Parasakthi*, the court found that the plaintiffs’ desire to use land for worship and an annual religious festival was protected by the First Amendment. 721 F. Supp. 2d at 374. Here, however, Plaintiffs, offer no evidence that they intend to use the land for any other expressive activity that is foreclosed by the Challenged Laws. Rather, all of the claimed speech is contingent on construction of the rabbinical college.

Plaintiffs also suggest that, if the Court accepts Defendants’ argument that the laws can simply be amended, the Challenged Laws are a prior restraint on speech because they afford unbridled discretion to Defendants. (*See* Pls.’ Opp’n 20-22; Defs.’ Opp’n 35-36.) The Court need not address this argument because Plaintiffs’ have failed to establish a viable free speech claim. *See Adhi Parasakthi*, 721 F. Supp. 2d at 374 (rejecting claim that defendant town’s conduct was a “prior restraint” because the construction of a Hindu temple was not speech).

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In addition to Freedom of Speech, the First Amendment also protects the Freedom of Association. *See Baird v. State Bar of Ariz.*, 401 U.S. 1, 6, 91 S. Ct. 702, 27 L. Ed. 2d 639 (1971). The Supreme Court has “identified two types of ‘freedom of association’ that merit constitutional protection: (i) ‘choices to enter into and maintain certain intimate human relationships’ and (ii) association ‘for the purpose of engaging in those activities protected by the First Amendment.’” *URI Student Senate v. Town of Narragansett*, 631 F.3d 1, 12-13 (1st Cir. 2011) (quoting *Roberts v. U.S. Jaycees*, 468 U.S. 609, 617-18, 104 S. Ct. 3244, 82 L. Ed. 2d 462 (1984)); *see also Sanitation & Recycling Indus., Inc. v. City of N.Y.*, 107 F.3d 985, 995-96 (2d Cir. 1997) (same); *AK Tournament Play, Inc. v. Town of Wallkill*, No. 09-CV-10579, 2011 U.S. Dist. LEXIS 4873, 2011 WL 197216, at \*2 (S.D.N.Y. Jan. 19, 2011) (same).

In evaluating a free association claim, “[t]he first question . . . is whether and to what extent [the] defendants’ actions burdened that right.” *Tabbaa v. Chertoff*, 509 F.3d 89, 100 (2d Cir. 2007). “To be cognizable, the interference with associational rights must be direct and substantial or significant,” rather than simply make it “more difficult” for Plaintiffs “to exercise their freedom of association.” *Fighting Finest, Inc. v. Bratton*, 95 F.3d 224, 228 (1996) (internal quotation marks omitted). Plaintiffs contend that they seek to “pass[] knowledge from teacher and mentor to student, student to student, and student to children . . . throughout all the facilities of the proposed rabbinical college.” (Pls. Opp’n 22 (citing *Tabbaa*, 509 F.3d at 101 (discussing protected right of expression “through association at” an Islamic conference).) The connection is

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more direct than with respect to Plaintiffs' free speech rights; Plaintiffs' arguably cannot associate at all in the context of their rabbinical studies, *see Tartikov*, 915 F. Supp. 2d at 627, because the venue of that association—the rabbinical college—is arguably foreclosed by the Challenged Laws. Indeed, even if Plaintiffs could “associate” elsewhere, the locational burden is sufficient to state a claim, *see LeBlanc-Sternberg*, 781 F. Supp. at 269 (finding that the plaintiffs had standing to bring a free association claim when they alleged that the defendant village incorporated “to prevent the Orthodox Jewish community from establishing a synagogue in the village,” causing other Orthodox Jews to “hesitate[] to move into the [] area.”).

“Having found a cognizable burden,” the second question is “the appropriate level of scrutiny to employ in evaluating [the] defendants' actions.” *Tabbaa*, 509 F.3d at 102. “[A]n infringement on associational rights is not unconstitutional so long as it serves compelling state interests, unrelated to the suppression of ideas, that cannot be achieved through means significantly restrictive of associational freedoms.” *Id.* (brackets and internal quotation marks omitted). As discussed above, taking the facts in the light that is most favorable to Plaintiffs, a reasonably jury could conclude that Defendants' stated interests are not compelling, and that the Challenged Laws are not narrowly tailored to serve those interests. On the other hand, as discussed in the next section, taking the facts in the light most favorable to Defendants, it is plausible that the Challenged Laws do not burden Plaintiffs' associational rights because they arguably



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may still build, and associate at, a rabbinical college in the Village, just not one of the exact design they desire. That is an issue for a jury, and not the Court, to sort out. Accordingly, summary judgment is denied to both Parties as to this claim.

**8. RLUIPA Claims****a. Substantial Burden (Claim 5)****i. Substance of Claim**

In their fifth claim, Plaintiffs assert that Defendants have violated RLUIPA by unlawfully imposing a substantial burden on their religion. The Parties have filed Cross-Motions for summary judgment on this claim.

The Substantial Burden provision of RLUIPA

prohibits a governmental entity from applying a land use regulation “in a manner that imposes a substantial burden on the religious exercise of a person . . . or institution, unless the government demonstrates that imposition of the burden . . . is in furtherance of a compelling governmental interest; and . . . [the burden imposed] is the least restrictive means of furthering that compelling governmental interest.”

*WDS I*, 386 F.3d at 189 (alterations in original) (quoting § 2000cc(a)(1)); *see also Fortress Bible*, 694 F.3d at 218-

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19. This provision “backstops the explicit prohibition of religious discrimination in the later section of [RLUIPA], much as the disparate-impact theory of employment discrimination backstops the prohibition of intentional discrimination.” *Sts. Constantine & Helen Greek Orthodox Church, Inc. v. City of New Berlin*, 396 F.3d 895, 900 (7th Cir. 2005). Thus, for example, “[i]f a land use decision . . . imposes a substantial burden on religious exercise . . . and the decision maker cannot justify it, the inference arises that hostility to religion, or more likely to a particular sect, influenced the decision.” *Id.*

“The statute defines ‘religious exercise’ to include ‘any exercise of religion, whether or not compelled by, or central to, a system of religious belief,’ and provides further that ‘[t]he use, building, or conversion of real property for the purpose of religious exercise shall be considered . . . religious exercise.’” *WDS I*, 386 F.3d at 186 (alterations in original) (quoting 42 U.S.C. § 2000cc-5(7)(A), (B)); *see also Sts. Constantine & Helen*, 396 F.3d at 900 (same). “Religious exercise” under RLUIPA is defined broadly “to the maximum extent permitted by the terms of this chapter and the Constitution.” *WDS II*, 504 F.3d at 347 (quoting 42 U.S.C. § 2000cc-3(g)); *see also Bikur Cholim*, 664 F. Supp. 2d at 275, 288 (same). On this basis, the Court previously found that “the building of a rabbinical college, with the alleged purpose of training rabbinical judges for religious courts,” together with the multi-family dormitories, “falls squarely within this definition of ‘religious exercise.’” *Tartikov*, 915 F. Supp. 2d at 629 ; *see also id.* (“[T]he multi-family dormitories that [Plaintiffs] seek to build are intended to facilitate

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religious exercise, thus bringing this accessory use within RLUIPA's protections."). Particularly in light of the Court's discussion of the religious aspect of the proposed multi-family housing above, the Court sees no reason to disturb this ruling. *Cf. Yonkers Racing Corp. v. City of Yonkers*, 858 F.2d 855, 869-70 (2d Cir. 1988) ("Seminary grounds . . . form an 'apron' of quietude . . . and contribute to the 'atmosphere of quiet reflection' essential to the 'academic, spiritual, psychological[,] and pastoral preparation of young men for the priesthood.>"). Accordingly, Plaintiffs' desire to build the proposed rabbinical college is a religious exercise.

While RLUIPA does not itself define the phrase "substantial burden," the Second Circuit has held that a land use regulation constitutes a "substantial burden" within the meaning of RLUIPA if it "directly *coerces* the religious institution to change its behavior." *WDS II*, 504 F.3d at 349 (emphasis in original). "The burden must have more than a minimal impact on religious exercise, and there must be a close nexus between the two." *Fortress Bible*, 694 F.3d at 219. Among the types of burdens the courts have found to be minimal, and hence not protected by RLUIPA, are facially neutral permit and variance requirements. Thus, courts have regularly found that zoning ordinances that merely require religious institutions to go through a routine permit or variance application process do not run afoul of RLUIPA. *See, e.g., id.* ("A denial of a religious institution's building application is likely not a substantial burden if it leaves open the possibility of modification and resubmission."); *Konikov v. Orange Cty.*, 410 F.3d 1317, 1323 (11th Cir. 2005) ("[R]equiring

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applications for variances, special permits, or other relief provisions [does] not offend RLUIPA’s goals.”); *San Jose*, 360 F.3d at 1035-36 (holding that a city’s requirement that the plaintiff refile a “complete “ permit application did not constitute a substantial burden); *Civil Liberties for Urban Believers v. City of Chicago*, 342 F.3d 752, 761-62 (7th Cir. 2003) (“*CLUB*”) (finding that “the scarcity of affordable land available for development in R zones, along with the costs, procedural requirements, and inherent political aspects of the Special Use, Map Amendment, and Planned Development approval processes” did not impose substantial burden on religious institutions); *Roman Catholic Bishop of Springfield v. City of Springfield*, 760 F. Supp. 2d 172, 187 (D. Mass. 2011) (finding that a routine application process did not violate RLUIPA), *vacated in part on other grounds*, 724 F.3d 78 (1st Cir. 2013); *Hale O Kaula Church v. Maui Planning Comm’n*, 229 F. Supp. 2d 1056, 1071 (D. Haw. 2002) (holding that laws requiring special use permits did not impose a substantial burden on religious institution). Indeed, to exempt religious institutions from the normal permit/variance process would result in favoring these institutions, something which neither RLUIPA nor the Free Exercise Clause more generally require (and which the Establishment Clause might prohibit). *See CLUB*, 342 F.3d at 762 (“Otherwise, compliance with RLUIPA would require municipal governments not merely to treat religious land uses on an equal footing with nonreligious land uses, but rather to favor them in the form of an outright exemption from land-use regulations . . . . [N]o such free pass for religious land uses masquerades among the legitimate protections RLUIPA affords to religious exercise.”);

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*WDS I*, 386 F.3d at 189 (“As a legislative accommodation of religion, RLUIPA occupies a treacherous narrow zone between the Free Exercise Clause, which seeks to assure that government does not interfere with the exercise of religion, and the Establishment Clause, which prohibits the government from becoming entwined with religion in a manner that would express preference for one religion over another, or religion over irreligion.”).

While RLUIPA does not exempt religious institutions from complying with facially neutral permit and variance applications procedures, it does not wholly exempt zoning laws from scrutiny. Rather, RLUIPA protects religious institutions from land use regulations that substantially affect their ability to use their property in the exercise of their religion. *See Fortress Bible*, 694 F.3d at 218 (“[T]o hold that PLUIPA is inapplicable to what amounts to zoning actions taken in the context of a statutorily mandated environmental quality review would allow towns to insulate zoning decisions from RLUIPA review . . . . [The court] decline[s] to endorse a process that would allow a town to evade RLUIPA by what essentially amounts to a re-characterization of its zoning decisions.”). For example, courts have held zoning ordinances, or zoning decisions, that significantly lessen the prospect of a religious institution’s being able to use the property to further its religious mission contravene RLUIPA. *See Guru Nanak Sikh Soc’y of Yuba City v. Cty. of Sutter*, 456 F.3d 978, 992 (9th Cir. 2006) (holding that the defendant county’s two denials of variance permits, under the circumstances, had “to a significantly great extent lessened the prospect of [the religious institution] being able to construct a temple

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in the future,” thus imposing a “substantial burden” on the religious institution’s “religious exercise”); *Roman Catholic Diocese of Rockville Centre v. Inc. Vill. of Old Westbury*, No. 09-CV-5195, 2012 U.S. Dist. LEXIS 56694, 2012 WL 1392365, at \*8 (E.D.N.Y. Apr. 23, 2012) (upholding plaintiff’s facial challenge to zoning law because plaintiff had adequately alleged that the “conditions imposed by the [law] would significantly restrict the [plaintiff’s] use of their Property for religious burial purposes”). Courts have also held that zoning schemes that impose conditions on the use of the property, such as limitations on the size of the facilities that can permissibly be used by the religious institution, can impose a substantial burden. See *Chabad Lubavitch*, 796 F. Supp. 2d at 343 (finding substantial burden allegations sufficient based on claims that municipality limited plaintiff’s expansion to an area 17,000 square feet smaller than plaintiff proposed, and describing that “if [the plaintiff] conformed its plans to the [municipality’s] specification, it would need to sacrifice a good portion of the spaces that it believes is necessary to the exercise of its religion”); *Cathedral Church of the Intercessor v. Inc. Vill. of Malverne*, No. 02-CV-2989, 2006 U.S. Dist. LEXIS 12842, 2006 WL 572855, at \*8 (E.D.N.Y. Mar. 6, 2006) (finding plaintiff adequately alleged substantial burden, where space limits imposed by the defendants “constrained” the ability of the church’s parishioners to “observe or participate” in religious services).

Courts have likewise found a substantial burden requirement where municipal zoning schemes impose significant “delay, uncertainty, and expense.” *Sts.*

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*Constantine & Helen*, 396 F.3d at 901; *see also WDS II*, 504 F.3d at 349 (noting that a complete denial of a religious institution's zoning application which results in substantial "delay, uncertainty, and expense" can be a substantial burden); *Grace Church*, 555 F. Supp. 2d at 1137-39 (finding that the plaintiff had established a substantial burden based on the uncertainty and expense resulting from the municipality's zoning regulations and from municipal officials' consistent hostility toward plaintiff in their review of plaintiff's land use applications). In one recent case, the Second Circuit even held that when a municipality's "willingness to consider [a] proposal is disingenuous, a conditional denial may rise to the level of a substantial burden," *Fortress Bible*, 694 F.3d at 219, and "when [a] town's actions are arbitrary, capricious, unlawful, or taken in bad faith, a substantial burden may be imposed because it appears that the [religious institution] may have been discriminated against on the basis of its status as a religious institution," *id.* In sum, "a complete denial" of a religious institution's intended or applied-for use of its property "is not necessary for the Court to find that the government regulation . . . impose[s] a substantial burden on religious exercise." *Cathedral Church*, 2006 U.S. Dist. LEXIS 12842, 2006 WL 572855, at \*8; *see also Sts. Constantine & Helen*, 396 F.3d at 899-900 (finding that to establish substantial burden, a religious group need not "show that there was no other parcel of land on which it could build its church"); *Westchester Day Sch. v. Vill. of Mamaroneck*, 379 F. Supp. 2d 550, 556-57 (S.D.N.Y. 2005) (same).

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The Court's analysis of the discriminatory effect prong of Plaintiffs' Equal Protection claim, and the Court's discussion of Plaintiffs' Free Exercise claim, *see WDS II*, 504 F.3d at 348-49 (noting that the test for a substantial burden is guided by Free Exercise jurisprudence), apply here. While unnecessary to establish a substantial burden, *see Tartikov*, 915 F. Supp. 2d at 632, Plaintiffs have offered sufficient evidence to at least suggest that the combined effect of the Challenged Laws is to completely bar the construction of a rabbinical college of the type desired by Plaintiffs, namely one with the desired curriculum that includes multi-family housing. (*See* Pls.' Mem. 16-17 (citing, *inter alia*, *WDS II*, 504 F.3d at 349 (noting a substantial burden exists when there is no "reasonable opportunity" for a modified application that would suffice).) *See also Roman Catholic Diocese*, 2012 U.S. Dist. LEXIS 56694, 2012 WL 1392365, at \*8 (E.D.N.Y. Apr. 23, 2012) (granting motion to amend complaint bringing facial challenge to zoning ordinance, based on the conclusion that plaintiff had adequately alleged the ordinance imposed a substantial burden by, among other things, reducing the portion of the property that could be used for religious purposes and requiring plaintiff to meet certain groundwater testing and landscaping requirements); *Cottonwood*, 218 F. Supp. 2d at 1226 ("Preventing a church from building a worship site fundamentally inhibits its ability to practice its religion."); *cf. Town of Mount Pleasant v. Legion of Christ*, 787 N.Y.S.2d 681, 3 Misc. 3d 1104[A], 2003 NY Slip Op 51725[U], 2003 WL 23515112, at \*5 (N.Y. Sup. Ct. 2003) (finding that defendant's "option of violating the law or abandoning an important part of its mission" was "untenable"). Likewise, Plaintiffs have offered sufficient



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evidence to suggest that the Challenged Laws were passed with a discriminatory motive. *See Fortress Bible*, 694 F.3d at 219; *WDS II*, 504 F.3d at 351-52. Accordingly, Plaintiffs have established an issue of material fact as to whether the Challenged Laws place a substantial burden on their religious exercise in violation of RLUIPA. *See Tartikov*, 915 F. Supp. 2d at 632 (noting that if “[t]he ordinances . . . in fact completely prevent Plaintiffs from building and running a rabbinical college at all in Pomona,” then “Plaintiffs have established a substantial burden”).

Further, as discussed above, Defendants have failed to demonstrate as a matter of law that their passage of the Challenged Laws was justified by compelling state interests and that the laws were the least restrictive means of furthering those interests. *See* 42 U.S.C. § 2000cc(a)(1). The fact that Defendants may, in general, allow other religious and educational uses in the Village is irrelevant. *See Hobbs*, 135 S. Ct. at 862 (finding “the availability of alternative means of practicing religion” irrelevant under RLUIPA). Indeed, it is the religious entity, and not the Village, that has the right to determine its religious exercise, and RLUIPA protection is “not limited to beliefs which are shared by all of the members of a religious sect.” *Id.* at 863 (internal quotation marks omitted). Accordingly, Defendants are not entitled to summary judgment on Plaintiffs’ substantial burden claim.

The question of whether Plaintiffs’ are entitled to summary judgment on their substantial burden claim is a closer one. Certainly, “religious institutions do not have a constitutional right to build wherever they like.” *Fortress*

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*Bible*, 694 F.3d at 221. Nonetheless, in the Court's view, the core of Plaintiffs' substantial burden claim has two parts: (a) is the proposed rabbinical college, *exactly as proposed* with libraries, mikvahs, student housing, etc., essential to their religious exercise, and (b) if not, can Plaintiffs build a rabbinical college that is sufficient to meet their needs within the confines of the Challenged Laws?

With regard to the necessity of building a rabbinical college exactly as proposed (to the extent Plaintiffs have even offered a proposal), as discussed above, there are three other rabbinical colleges in the general area: Kollel Belz, Mechon L'Horoya, and Kollel Beth Yechiel Mechil of Tartikov. (Pls.' 56.1 ¶¶ 563-571; Pls.' Counter 56.1 ¶ 57; *see also* Savad Decl. Ex. 34 (Resnicoff Dep. Tr.) 19-22 (noting that "Tartikov in Brooklyn and Mechon L'Hoyroa" train rabbinical judges" but students do not live on campus).) As outlined, however, there are several differences between the programs at these schools and that which is proposed by the Congregation. Kollel Belz and Mechon L' Horoya "only teach[] certain sections of the Shulchan Aruch," which two individual Plaintiffs contend means these schools cannot train full-time rabbis, while Kollel Beth Yechiel Mechil of Tartikov simply "has a different program." Kollel Belz and Kollel Beth Yechiel Mechil of Tartikov have no libraries or mikvahs on campus (and Kollel Beth Yechiel Mechil of Tartikov lacks a synagogue), and none of the three schools has on-campus housing, meaning none can provide the Torah Community envisioned by the Congregation. (Pls.' 56.1 ¶¶ 569-572; Defs.' 56.1 ¶¶ 62-64; Pls.' Counter 56.1 ¶¶ 55, 58; Decl. of Jacob Hershkowitz ¶¶ 42-50 (Dkt. No. 146); Decl. of Chaim Rosenberg ¶¶ 44-50 (Dkt. No. 149).)

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Plaintiffs contend that these differences not only mean that the proposed rabbinical college would offer a higher quality education and offer the only way to study the full Shulchan Aruch, but also that a rabbinical college *as proposed by Plaintiffs* is essential to the exercise of their religious beliefs. (See Pls.' 56.1 ¶¶ 449-473, 489, 655; Pls.' Counter 56.1 ¶ 49).

Defendants, of course, contest these claims. They allege that Plaintiffs have not articulated any religious belief that requires a Torah Community, never mind a rabbinical college that has mikvahs on campus. (Defs.' 56.1 ¶ 46; Pls.' Counter 56.1 ¶¶ 49, 516, 520.) They also repeatedly cite a portion of the deposition of M. Menczer in which he admits that it is possible to “study to become a rabbinical judge in a synagogue” without being immersed in a Torah Community, though M. Menczer also makes clear that to be a “Great Torah scholar,” a student has to “dedicate [himself] to a certain kind of study program, study day and night, [he has] to surround [himself] [with] Torah students, and [he has] to exclude [himself] from all worldly pleasures, all distractions,” and that this is a “requirement” under Jewish law, even though not necessary to ordination as a rabbi. (Savad Decl. Ex. 26 (M. Menczer Dep. Tr.) 88-90.) Given Plaintiffs do not allege a complete lack of ordained rabbis in the region, and other schools do produce rabbinical judges—even if they are not “Great Torah scholars” or full-time rabbinical judges—whether Plaintiffs require a rabbinical college exactly as proposed is at least a disputed issue of fact. Based on the credibility of witnesses at trial, a reasonable jury may find that a Torah Community, while ideal, is not

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essential to Plaintiffs' exercise of their religious beliefs, and that training a number of part-time rabbis would be sufficient to meet the Plaintiffs' need for rabbinical judges in the Pomona area, such that the Challenged Laws do not impose a substantial burden.<sup>53</sup>

In this context, it is worth noting that the precise contours of the rabbinical college the Congregation proposes is far from clear. The only curriculum document, as noted above, was prepared by a student apparently due to the existence of the instant Action, (*see* Defs.' 56.1 ¶¶ 26-28; Pls.' Counter 56.1 ¶¶ 26-28; Gordon Aff. Ex. 10, at 23; *see also* Gordon Aff. Ex. 21 (proposed curriculum)), and it provides no specific information about the anticipated curriculum—the Shulchan Aruch—beyond the names of a series of classes (e.g., “Kosher Diet,” “Prayer,” “Renting, Leasing & Borrowing”), (*see* Gordon Aff. Ex. 22). Additionally, there is no architectural plan for the rabbinical college contained in the record beyond a “preliminary concept plan,” (Defs.' 56.1 ¶¶ 19, 22; Pls.' Counter 56.1 ¶ 22), nor has any such plan been formally submitted to the Village for approval, (*see* Savad Decl. Ex. 27, at 120). Unsurprisingly, therefore, no teachers have been hired, and the dean admits having done “nothing” so far to begin the hiring process. (*See* Defs.' 56.1 ¶¶ 14,

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53. Plaintiffs allege that M. Babad is “one of the few [rabbinical] judges fully trained in all four books of the Shulchan Aruch. (Pls.' 56.1 ¶ 553.) While, on the one hand, this suggests that there may be a lack of adequately fully trained rabbinical judges, it also suggests that the training that most rabbinical judges receive is in less than the full Shulchan Aruch, implying that training in the full Shulchan Aruch is unnecessary.

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34-35, 66.) Accordingly, it is difficult for the Court to determine, before sending the case to a jury, that the Congregation's vision for a rabbinical college, while perhaps a vision they hope to pursue, is essential to the exercise of specific religious beliefs, such that an inability to build that college campus is a substantial burden.

Of course, even if Plaintiffs cannot prove that their proposed rabbinical college is essential to their religious exercise, if *no* rabbinical college of any kind is compatible with the Challenged Laws, then the Challenged Laws may unlawfully impose a substantial burden. With regard to the Dormitory Law, it is clear, as outlined, that three other rabbinical colleges in the area train students without on-campus housing. Therefore, the Dormitory Law arguably is not a substantial burden on the operation of *a* rabbinical college. With regard to the Accreditation Law, as discussed above, it is undisputed that the proposed rabbinical college as currently proposed cannot be accredited by the State of New York or AARTS because, among other reasons, it is not a degree-granting institution and is not yet operational. (*See* Pls.' 56.1 ¶¶ 580-81, 583-84, 591; Defs.' Counter 56.1 ¶¶ 580-81, 590.) Nonetheless, Plaintiffs' expert makes clear that, at least in general "a higher education institution that trains Rabbinical Judges can be accredited." (Gordon Aff. Ex. 15 (Preston Green Expert report), at 18.) Indeed, the expert makes clear that, with modifications to the proposed rabbinical college curriculum and admission requirements, the proposed rabbinical college could at least be accredited by AARTS (though the college would still need to be operational first). (*See* Pls.' 56.1 ¶ 594, 596, 598-99, 601-02; Savad Decl. Ex.

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16 (Green Dep. Tr.) at 89-90; Gordon Aff. Ex. 15 (Preston Green Witness Report) 20-21.) In fact, Plaintiffs' expert's suggestion is along these lines:

[I]f the educational institution meets all other criteria for accreditation, Pomona can grant Tartikov a conditional use variance that would permit the school to become operational on the condition that the school obtain accreditation in a reasonable time from the Board of Regents or similar accrediting body. Failure to obtain accreditation could result in the variance[] being annulled and set aside.

(Gordon Aff. Ex. 15, at 20.) Accordingly, the Court cannot conclude, as a matter of law, that the Accreditation Law prevents the construction of a rabbinical college in the Village.

With regard to the Wetlands Law, as discussed above, Plaintiffs have offered evidence of the existence of wetlands covering the west side of the Subject Property along Route 306 and that the access road that runs through the west side would have to be improved for the proposed rabbinical college to be usable. (*See* Beall Decl. ¶ 280 & Ex. T (survey map of the Subject Property); Tauber Decl. ¶¶ 5, 28; *see also* Pls.' 56.1 ¶ 180 (indicating that Mayor Marshall was generally aware of the existence of wetlands on the Subject Property); Defs.' Counter 56.1 ¶ 180 (same).) However, as noted above, there are holes in Plaintiffs' claim that the Wetlands Law imposes a substantial burden, namely (a) a lack of evidence that

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Plaintiffs cannot build an access road through the other side of the property, from Route 202, and (b) the possibility that the Wetlands Law is duplicative of state and federal regulations. If the Wetlands Law does not prevent the construction of an access road, or otherwise does not create an additional burden beyond that created by state and federal law, then it does not impose a substantial burden on Plaintiffs' religious exercise.

Accordingly, because a series of disputed material facts remain as to (a) the exact form the rabbinical college must take in order to be sufficient for Plaintiffs' exercise of religion, and (b) to what extent the Challenged Laws alone make it difficult (or impossible) to build a rabbinical college in the Village, summary judgment is denied to Plaintiffs on their substantial burden claim.

**ii. Constitutional Challenge**

Defendants also challenge the constitutionality of RLUIPA's substantial burden provision. (Defs.' Mem. 54-59.) While the courts, as the United States points out, normally avoid addressing constitutional questions when possible, *see Allstate Ins. Co. v. Serio*, 261 F.3d 143, 149-50 (2d Cir. 2001) ("It is axiomatic that the federal courts should, where possible, avoid reaching constitutional questions."); *see also Slack v. McDaniel*, 529 U.S. 473, 485, 120 S. Ct. 1595, 146 L. Ed. 2d 542 (2000) (articulating this rule), because the Court has found that Plaintiffs' substantial burden claim survives summary judgment the Court must address the merits of Defendants' constitutional challenge. Plaintiffs, as well as Intervenor United States, oppose Defendants' claim.

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Defendants contend that the substantial burden provision is unconstitutional on its face because it “distort[s] the relationship between the local and state governments and the federal government in violation of settled federalism principles,” relying on the “Tenth Amendment’s limitations on Article I power,” and further argue that the provision is “beyond the power of Congress, a violation of the separation of powers, and the Establishment Clause.” (Defs.’ Mem. 55 (citing *Congregation Kol Ami v. Abington Twp.*, 309 F.3d 120, 135-36 (3d Cir. 2002) (“[L]and use law is one of the bastions of local control, largely free of federal intervention.”); *id.* at 57). In support of their contention, Defendants cite, among other cases, *Gorieb v. Fox*, 274 U.S 603, 47 S. Ct. 675, 71 L. Ed. 1228 (1927), for the proposition that “[s]tate legislatures and city councils, who deal with the situation from a practical standpoint, are better qualified than the courts to determine the necessity, character, and degree of regulation which . . . new and perplexing conditions require; and their conclusion should not be disturbed by the courts,” *id.* at 608. Second, Defendants contend that the “RLUIPA formula . . . does not regulate land use principles per se, but rather never uses a constitutional standard of review to reduce the effect of state and local land use law across the board,” further asserting that “Congress never considered actual land use issues, such as the importance or value of residential neighborhoods, setbacks, parking and traffic concerns, density, property values, or aesthetics,” when debating RLUIPA’s merits. (Defs.’ Mem. 56 (emphasis omitted).) Third, Defendants note that the Supreme Court has explicitly reserved judgment on the constitutionality of RLUIPA’s land use



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provisions, *Cutter v. Wilkinson*, 544 U.S. 709, 125 S. Ct. 2113, 161 L. Ed. 2d 1020 (2005), *id.* 716 n.3 (“Section 2 of RLUIPA is not at issue here. We therefore express no view on the validity of that part of the Act.”), and limited the scope of RLUIPA in *Sossamon v. Tex.*, 563 U.S. 277, 131 S. Ct. 1651, 179 L. Ed. 2d 700 (2011), *see id.* at 1656-57.<sup>54</sup> Fourth and finally, in support of their Establishment Clause challenge, Defendants contend that RLUIPA unconstitutionally “grant[s] religious developers a privilege and financial advantages that no other developer can obtain.” (Defs.’ Mem. 58 (citing, *inter alia*, *Tex. Monthly, Inc. v. Bullock*, 489 U.S. 1, 14, 109 S. Ct. 890, 103 L. Ed. 2d 1 (1989); *Bronx Household of Faith v. Bd. of Educ.*, 750 F.3d 184, 207-09 (2d Cir. 2014)).

In response, Plaintiffs rely, in principal, on the Second Circuit’s decision in *WDS II*. (*See* Pls. Opp’n 57.) In that case, the Second Circuit held, among other things, that RLUIPA does not violate the Tenth Amendment because it “leaves it to each state to enact and enforce land use

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54. Defendants also contend that RLUIPA was passed illegally, noting that “[i]t was not passed unanimously,” and that it was enacted “negligently or intentionally without reference to the most relevant Supreme Court doctrine in derogation of federalism.” (Defs.’ Mem. 58.) However, there is certainly no requirement that Congress must pass legislation unanimously, *see Skaggs v. Carle*, 110 F.3d 831, 841, 324 U.S. App. D.C. 87 (D.C. Cir. 1997) (“[T]he framers positively concluded that a simple ‘majority vote’ was sufficient for the passage of legislation in Congress.”), nor is there any authority suggesting that Congress must reference any particular “Supreme Court doctrine” in the legislative process or that failing to do so is a violation of federalism, *cf. WDS II*, 504 F.3d at 354-55 (finding that RLUIPA does not violate the 10th Amendment).

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regulations as it deems appropriate so long as the state does not substantially burden religious exercise in the absence of a compelling interest achieved by the least restrictive means,” *WDS II*, 504 F.3d at 354-55, and that “RLUIPA’s land use provisions do not violate the [E]stablishment [C]lause,” *id.* at 355. Defendants do not address this holding, which the Court is required to follow. *See Fernandez v. Johnson*, No. 12-CV-2774, 2013 U.S. Dist. LEXIS 31998, 2013 WL 796542, at \*3 (S.D.N.Y. Mar. 5, 2013) (“This [c]ourt must follow binding Second Circuit precedent unless a subsequent decision of the Supreme Court so undermines it that it will almost inevitably be overruled by the Second Circuit.” (brackets and internal quotation marks omitted)); *see also Fortress Bible*, 734 F. Supp. 2d at 509 (finding that RLUIPA does not violate the Establishment Clause because “the Second Circuit has held that RLUIPA’s land use provisions . . . do not violate the Establishment Clause”). Moreover, as the United States points out in its brief, the precedents that Defendants cite do not support their claims. For example, in *Gorieb*, the Supreme Court only noted that local land use decisions “should not be disturbed by the courts, unless clearly arbitrary and unreasonable,” 274 U.S. at 608, not that Congress could not legislate in this field, (*see* Br. of the United States of Am. in Intervention in Defense of the Religious Land Use and Institutionalized Persons Act of 2000 (“USA Br.”) 17 (Dkt. No. 183).) Likewise, in *Congregation Kol Ami*, the court rejected the defendants’ challenge to RLUIPA. (*See* USA Br. 18 (citing 309 F.3d 120).) *See also Congregation Kol Ami v. Abington Twp.*, No. 01-CV-1919, 2004 U.S. Dist. LEXIS 16397, 2004 WL 1837037, at \*9-15 (E.D. Pa. Aug. 17, 2004).

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Additionally, Plaintiffs properly characterize Defendants' theory of unconstitutionality as relying only on the proposition that "local governments engage in land use regulation" and that "Congress is powerless to regulate in that sphere," which Plaintiffs correctly point out would "render innumerable federal statutes" that affect local land use unconstitutional, including the Americans with Disabilities Act, Fair Housing Act, and Clean Water Act. (Pls.' Opp'n 57-58.) *See also United States v. Maui Cty.*, 298 F. Supp. 2d 1010, 1015 (D. Haw. 2003) ("Although RLUIPA does 'intrude' to some extent on local land use decisions, there is nothing about it that violates principles of federalism . . . *if* the federal statute is otherwise grounded in the Constitution. RLUIPA is not federal zoning of [local] land; it is federal enforcement of federal rights."). Plaintiffs further argue that RLUIPA's substantial burden provision has a jurisdictional limitation, providing that it can only be applied when the government action affects interstate commerce, is imposed in a program that receives federal funding, or in a circumstance where individualized assessments of the property are involved. (Pls.' Opp'n 58 (citing 42 U.S.C. § 2000cc(a)(2)).) The substantial burden provision is thus grounded as a proper exercise of Congress's power under the Spending Clause, Commerce Clause, and § 5 of the Fourteenth Amendment, *see WDS II*, 504 F.3d at 354 ("[T]he Supreme Court has made plain [that] the satisfaction of [] a jurisdictional element . . . is sufficient to validate the exercise of congressional power because an interstate commerce nexus must be demonstrated in each case for the statute in question to operate."); *see also Fortress Bible*, 734 F. Supp. 2d at 509 ("By limiting

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RLUIPA's scope to cases that present one of these jurisdictional nexuses, Congress alternatively grounded RLUIPA, depending on the facts of a particular case, in the Spending Clause, the Commerce Clause, and § 5 of the Fourteenth Amendment.”).<sup>55</sup>

Defendants do not respond to either of these contentions, nor do they claim that any of the jurisdictional elements of RLUIPA's substantial burden provision is not met here; they only indicate that they “stand by their facial challenge” in their reply. (Defs.' Reply 19.) Accordingly, the Court finds that the governing case law supports the conclusion that RLUIPA, because of its jurisdictional provision and as has already been determined by the Second Circuit, constitutes a proper constitutional exercise of Congress' power and does not run afoul of any constitutional provisions. *See Sossamon*, 131 S. Ct. at 1664 (“Though the Court reserves the general question whether RLUIPA is a valid exercise of Congress' power under the Spending Clause, there is apparently no disagreement among the Federal Courts of Appeals.”); *see also Sossamon v. Lone Star State of Tex.*,

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55. It is also worth noting that Plaintiffs at least make an argument, however tenuous, as to why the proposed rabbinical college would affect interstate commerce, which Defendants do not rebut, (*see* Pls.' Mem. 9 (“Plaintiffs' use and development of the Subject Property unquestionably meets this criteria.” (citing *Chabad Lubavitch*, 768 F.3d at 183, 192 (construction of religious facility meets jurisdictional element); *WDS II*, 504 F.3d at 354 (“[C]ommercial building construction is activity affecting interstate commerce.”)), such that the application of RLUIPA's substantial burden provision in these circumstances is constitutional under the Commerce Clause, *see WDS II*, 504 F.3d at 354-55.

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560 F.3d 316, 328, n.34 (5th Cir. 2009) (“Every circuit to consider whether RLUIPA is Spending Clause legislation has concluded that it is constitutional under at least that power.”).

Apart from their facial challenge, Defendants also contend that, as applied, the substantial burden provision is unconstitutional because, more than asking the court to “become [a] super land-use board[] of appeals,” (Defs.’ Mem. 59 (quoting *Samerica Corp. v. City of Phila.*, 142 F.3d 582, 598 (3d Cir. 1998)), “the Court is being asked to step into the shoes of the *original* land-use board, to abandon the local laws regarding housing, and to *sua sponte* grant permission for their hypothetical plan.” According to Defendants, “it is difficult to overstate the steepness of the slippery slope.” (*Id.*) In their Reply, Defendants further allege that, as applied in this case, RLUIPA’s substantial burden provision would violate the Due Process clause, (Defs.’ Reply 20 (citing *League of Residential Neighborhood Advocates v. City of L.A.*, 498 F.3d at 1052, 1053)), though the explanation and authority for this claim is missing from Defendants’ submissions.

In response, Plaintiffs insist that they do not seek the Court’s approval of their plan without proceeding through the applicable approval process, but rather seek only “the right to apply.” (Pls.’ Opp’n 59.) While this does not appear to be exactly true, given, in their Second Amended Complaint, Plaintiffs sought a declaratory judgment directing the Village to “grant [Plaintiffs’] site plan final approval for a [r]abbincal [c]ollege and directing the Building Inspector to issue a building permit for up to

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250 residential units,” (SAC 68), this ground for relief is unripe because there is no pending application before the Village. It is in this vein that the United States argues, convincingly, that ripeness provides sufficient protection of Defendants’ federalism interests because it “affords local officials an opportunity to adjudicate an application before the dispute may be brought to federal court,” as embodied in the Court’s finding that Plaintiffs’ as-applied challenges were unripe in its 2013 Opinion and Order. (USA Br. 22 (citing *Murphy v. New Milford Zoning Comm’n*, 402 F.3d 342, 348 (2d Cir. 2005).) Indeed, simply striking down the Challenged Laws (as opposed to directing acceptance of Plaintiffs’ proposed rabbinical college) would not force the Village to make particular land use decisions or “short circuit its land use decision-making process,” but rather would require the Village to craft new land use laws that are consistent with the requirements of federal law (and, of course, the Constitution). (*Id.* at 23.)

At its core, the Court finds that Defendants’ fleeting as-applied challenge, which does not appear to be meaningfully different from its facial challenge, is wanting of legal authority. *See Lima v. Hatsuhana of USA, Inc.*, No. 13-CV-3389, 2014 U.S. Dist. LEXIS 6070, 2014 WL 177412 (S.D.N.Y. Jan. 16, 2014) (“Issues mentioned in a perfunctory manner, unaccompanied by some effort at developed argumentation, are deemed waived.” (alteration omitted)). The Court agrees with the United States that, as limited by the Court’s 2013 Opinion and Order, a finding in favor of Plaintiffs does not “require the imposition of a housing development on Pomona in contravention of the zoning on the property without the applicant having to file

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an application or pursue ordinary land use procedures.” (Defs.’ Reply 20.) Indeed, as noted “religious institutions do not have a constitutional right to build wherever they like,” *Fortress Bible*, 694 F.3d at 221, and invalidation of the Challenged Laws is not tantamount to a finding that Plaintiffs should “prevail in their quest to build a rabbinical college on the Subject Property,” *Tartikov*, 915 F. Supp. 2d at 623; *see also id.* at 638 (“This ruling is not tantamount to saying that Plaintiffs will be able to build a rabbinical college, let alone one that is the size or structure [of] their liking.”). Accordingly, Defendants’ as applied challenge is denied.

**b. Discrimination and Exclusion****i. Equal Terms (Claim 6)**

In their sixth claim, Plaintiffs assert that Defendants have violated RLUIPA by unlawfully imposing a land use regulation that treats the proposed rabbinical college on less than equal terms with nonreligious institutions. Unlike Plaintiffs’ other RLUIPA claims, only Defendants have moved for summary judgment on this claim. (*See* Pls.’ Mem. 4.) The Equal Terms provision of RLUIPA provides that “[n]o government shall impose or implement 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.” 42 U.S.C. § 2000cc(b)(1). This “statutory command ‘requires equal treatment of secular and religious assemblies and allows courts to determine whether a particular system of classifications adopted by a city *subtly or covertly departs from requirements of*

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*neutrality and general applicability.” Primera Iglesia Bautista Hispana of Boca Raton, Inc. v. Broward Cty.*, 450 F.3d 1295, 1307 (11th Cir. 2006) (brackets omitted) (emphasis in original) (quoting *Midrash Sephardi, Inc. v. Town of Surfside*, 366 F.3d 1214, 1232 (11th Cir. 2004)). As with the Substantial Burden component of RLUIPA, the meaning of the Equal Terms section is far from clear, see *Guru Nanak*, 326 F. Supp. 2d at 1154 (asserting that this section “is even less clear” than the “substantial burden” section), but the courts have determined that the “substantial burden and nondiscrimination provisions are operatively independent of one another,” *CLUB*, 342 F.3d at 762. Moreover, some courts have concluded that the nondiscrimination provisions of RLUIPA, which include the Equal Terms provision, “codify existing Equal Protection Clause and Free Exercise Clause jurisprudence.” *Petra Presbyterian Church v. Vill. of Northbrook*, No. 03-CV-1936, 2003 U.S. Dist. LEXIS 15105, 2003 WL 22048089, at \*11 (N.D. Ill. Aug. 29, 2003); accord *Guru Nanak*, 326 F. Supp. 2d at 1155; *Freedom Baptist Church of Del. Cnty. v. Twp. of Middletown*, 204 F. Supp. 2d 857, 869 (E.D. Pa. 2002).

As the Court explained in its 2013 Opinion and Order, there are four fundamental elements of an Equal Terms claim: (1) the plaintiff must be a religious institution; (2) subject to a land use regulation; that (3) treats the religious institution on less than equal terms; with (4) a nonreligious institution. See *Primera*, 450 F.3d at 1307-08; *Tartikov*, 915 F. Supp. 2d at 634; see also *Chabad Lubavitch*, 768 F.3d at 197 (noting that a plaintiff must produce prima facie evidence of “unequal treatment”).



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As far as how to prove an “equal terms” claim, however, “[d]ivision exists” among the Federal Circuits as to “whether the . . . provision invariably requires evidence of a ‘similarly situated’ secular comparator . . . and, where such evidence is necessary, on what ground the comparison much be made.” *Chabad Lubavitch*, 768 F.3d at 196; see also *Lighthouse Inst. for Evangelism, Inc., v. City of Long Branch*, 510 F.3d 253, 266 (3rd Cir. 2007) (“[A] regulation will violate the Equal Terms provision only if it treats religious assemblies or institutions less well than secular assemblies or institutions that are similarly situated as to the regulatory purpose.” (emphasis omitted)); *River of Life Kingdom Ministries v. Vill. of Hazel Crest*, 611 F.3d 367, 371 (7th Cir. 2010) (summarizing various approaches and advocating a focus on zoning criteria rather than regulatory purpose). The Second Circuit has thus far “declined to define ‘the precise outlines of what it takes to be a valid comparator under RLUIPA’s equal-terms provision.’” *Chabad Lubavitch*, 768 F.3d at 197 (citing *Third Church of Christ, Scientist v. City of N.Y.*, 626 F.3d 667, 669 (2d Cir. 2010)).

With that division in mind, the consensus among courts is that there are three distinct kinds of Equal Terms violations: (i) a statute that facially differentiates between religious and secular assemblies or institutions; (ii) a facially neutral statute that is nevertheless “gerrymandered” to place a burden solely on religious, as opposed to secular, assemblies or institutions; and (iii) a truly neutral statute that is selectively enforced against religious, as opposed to secular, assemblies or institutions. See *Primera*, 450 F.3d at 1308; accord *Vision Church*,

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468 F.3d at 1003 (following same analysis); *Church of Scientology of Ga., Inc. v. City of Sandy Springs*, 843 F. Supp. 2d 1328, 1361 (N.D. Ga. 2012) (same); *Covenant Christian Ministries, Inc. v. City of Marietta*, No. 06-CV-1994, 2008 U.S. Dist. LEXIS 54304, 2008 WL 8866408, at \*13 (N.D. Ga. Mar. 31, 2008) (same); *Family Life Church v. City of Elgin*, 561 F. Supp. 2d 978, 989 (N.D. Ill. 2008) (same).

While, as discussed above, the Challenged Laws are facially neutral, the Court previously found that Plaintiffs had only stated a “gerrymander” claim, and Plaintiffs have not provided any evidence—or advanced any claim—to support a different theory here. *Tartikov*, 915 F. Supp. 2d at 636. While Defendants contend that Plaintiffs’ failure to offer evidence of “a secular comparator that is similarly situated as to the regulatory purpose of the regulation in question,” sinks Plaintiffs’ Equal Terms claim, (Defs.’ Mem. 49 (quoting *Lighthouse*, 510 F.3d at 264), as the Court previously found, a gerrymander claim does not require the pleading of comparators. *See Lukumi*, 508 U.S. at 535 (defining “religious gerrymander” as “an impermissible attempt to target [a group] and their religious practices” (internal quotation marks omitted)); *Tartikov*, 915 F. Supp. 2d at 636 (discussing allegations of intent that support a gerrymander claim). Therefore, as discussed above in the context of Plaintiffs’ Equal Protection and Free Exercise Claims, which are codified in RLUIPA’s Equal Terms provision, *id.* at 633, the evidence, taken in a light most favorably to Plaintiffs, provides sufficient support to the contention that Defendants engaged in a religious gerrymander, as it suggests that Defendants

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used the Challenged Laws to uniquely restrict the ability of Plaintiffs to build their rabbinical college in the Village. Accordingly, summary judgment is denied.

**ii. Nondiscrimination (Claim 7)**

The Court denies summary judgment to Defendants' on Plaintiffs' Nondiscrimination claim "for the same reasons" as its Equal Terms claim because "the elements of a Nondiscrimination claim differ little, if at all, from an Equal Terms claim." *Tartikov*, 915 F. Supp. 2d at 636.

**iii. Exclusions and Limits (Claims 8-9)**

The exclusions and limits provision of RLUIPA provides that "[n]o government shall impose or implement a land use regulation that . . . (A) totally excludes religious assemblies from a jurisdiction; or (B) unreasonably limits religious assemblies, institutions, or structures within a jurisdiction." 42 U.S.C. § 2000cc(b)(3). The purpose of this provision "is not to examine the restrictions placed on individual landowners, but to prevent municipalities from broadly limiting where religious entities can locate." *Adhi Parasakthi*, 721 F. Supp. 2d at 387; accord *Rocky Mountain Christian Church v. Bd. of Cty. Comm'rs*, 613 F.3d 1229, 1238 (10th Cir. 2010) (noting that district court's jury instruction properly required plaintiff to establish that the county's "regulation, as applied or implemented, has the effect of depriving both [plaintiff] and other religious institutions or assemblies of reasonable opportunities to practice their religion, including the use and construction of structures, within [the defendant] [c]ounty" (internal quotation marks omitted)).

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As noted above, it is at least arguable that the effect of the Challenged Laws is to completely exclude the rabbinical college from the Village and that pursuing a text amendment or the like is futile. *See Rocky Mountain*, 613 F.3d at 1238 (upholding jury’s verdict for RLUIPA plaintiff based, in part, on evidence that county official stated that it would allow only a 100—seat synagogue because “there will never be another mega church . . . in Boulder County,” and on testimony that another congregation ran out of money going through the defendant county’s special use application process (alteration in original) (internal quotation marks omitted)); *see also Tartikov*, 915 F. Supp. 2d at 637-38 (denying motion to dismiss as to this claim). However, as discussed in the context of Plaintiffs’ substantial burden claim, Plaintiffs have failed to offer sufficient evidence to establish as a matter of law that the rabbinical college, as theoretically proposed, is essential to Plaintiffs’ religious exercise or that the effect of the Challenged laws is to completely exclude the construction of any rabbinical college in the Village. Accordingly, summary judgment is denied as to this claim.

**10. Remaining Claims/Defenses****a. Fair Housing Act (Claims 11 and 12)**

The FHA “prohibits governmental agencies from implementing or enforcing housing policies in a discriminatory manner.” *Tsombanidis v. West Haven Fire Dep’t*, 352 F.3d 565, 573 (2d Cir. 2003). Under the FHA, “it shall be unlawful [t]o . . . make unavailable . . . a dwelling to any person because of race [or] color.”

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42 U.S.C. § 3604(a); *see also Orange Lake Assocs., Inc. v. Kirkpatrick*, 21 F.3d 1214, 1227 (2d Cir. 1994) (same). Because, as discussed above, Plaintiffs have sufficiently raised an issue of material fact as to whether “the Village adopted the Challenged Laws with a discriminatory purpose,” namely to prevent the construction of the rabbinical college and its associated housing, *Tartikov*, 915 F. Supp. 2d at 610, their FHA claims also survive summary judgment, *see Ryan v. Ramsey*, 936 F. Supp. 417, 427 (S.D. Tx. 1996) (denying summary judgment on FHA claim because there were “outstanding issues of material fact” as to discriminatory intent, namely whether “a jury could have reasonably inferred that race was a significant factor in the defendants’ decision”). It also bears noting that in light of the Supreme Court’s recent decision in *Tex. Dep’t of Housing and Cmty. Affairs v. Inclusive Cmty. Project*, 135 S. Ct. 2507, 192 L. Ed. 2d 514 (2015), Plaintiffs’ Fair Housing Act claim would also survive on a theory of disparate impact, *see id.* at 2525 (“The Court holds that disparate-impact claims are cognizable under the Fair Housing Act . . . . “); *see also LeBlanc-Sternberg*, 67 F.3d at 425 (“An FHA violation may be established on a theory of disparate impact or one of disparate treatment.”), because Plaintiffs have raised an issue of material fact as to whether the facially neutral Challenged Laws have a “significantly adverse or disproportionate impact on persons of a particular type,” namely by preventing a subsection of the Orthodox Hasidic community from building a rabbinical college, *Tsombanidis*, 352 F.3d at 574.

*Appendix C***b. *Berenson* (New York Common Law) (Claim 14)**

Plaintiffs allege that Defendants violated the *Berenson* doctrine by “not consider[ing] the present regional housing needs of the region in which the Village is located, and that such regional housing needs are not otherwise adequately provided for,” namely those “in need of adult student housing or those who can only afford low or moderate income housing in the Village and in the region in which the Village is located.” (SAC ¶¶ 292-94.) Accordingly, Plaintiffs contend that Defendants “either acted for an exclusionary purpose, or the Zoning Code . . . brought about an exclusionary effect.” (*Id.* ¶ 295.) They call on the Court to direct Defendants “to provide a comprehensive zoning plan to meet the regional needs and the requirements of the Jewish community seeking religious education, and to provide for multi-family housing that can provide affordable housing to Plaintiffs and others who seek religious educational opportunities within the Village.” (*Id.* ¶ 297.)

*Berenson* provides that “[i]n determining the validity of an ordinance excluding multifamily housing as a permitted use, [the court] must consider the general purposes which the concept of zoning seeks to serve. The primary goal of a zoning ordinance must be to provide for the development of a balanced, cohesive community which will make efficient use of the town’s available land.” *Berenson v. Town of New Castle*, 38 N.Y.2d 102, 341 N.E.2d 236, 241, 378 N.Y.S.2d 672 (N.Y. 1975). Under *Berenson*, a board passing a zoning ordinance must (1)

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have “provided a properly balanced and well[-]ordered plan for the community,” and (2) “in enacting a zoning ordinance, [given] consideration . . . to regional needs and requirements,” including “not only the general welfare of the residents of the zoning township, but . . . also . . . the effect of the ordinance on the neighboring communities.” *Id.* at 242; see also *Cont’l Bldg. Co. v. Town of N. Salem*, 211 A.D.2d 88, 625 N.Y.S.2d 700, 703 (App. Div. 1995) (same). Accordingly, “a zoning ordinance enacted for a statutorily permitted purpose will be invalidated only if it is demonstrated that it actually was enacted for an improper purpose *or* if it was enacted without giving proper regard to local and regional housing needs and has an exclusionary effect.” *Robert E. Kurzius, Inc. v. Inc. Vill. of Upper Brookville*, 51 N.Y.2d 338, 414 N.E.2d 680, 683, 434 N.Y.S.2d 180 (App. Div. 1980) (internal quotation marks omitted) (emphasis added); *Cont’l Bldg. Co.*, 625 N.Y.S.2d at 703 (same).

Defendants are correct that “discovery has uncovered no facts showing there are regional needs for fair housing.” (Defs.’ Mem. 54.) Indeed, the only evidence that Plaintiffs identify, in a single paragraph supporting their *Berenson* claim, is a fact that they claim Defendants admit: a need for affordable, multifamily housing in the Village’s Master Plan. (Pls. Opp’n 57 (citing Pls.’ 56.1 ¶ 26).) However, Defendants explicitly dispute this “fact,” (Defs.’ Counter 56.1 ¶ 26), and Plaintiffs overstate the evidence: Ulman only indicated in her deposition that “multi-family housing [w]as something to be looked at for future use within the Village,” (Savad Decl. Ex. 12, at 180-81), that the Master Plan itself only notes a need for “housing to accommodate

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an *aging population and small families*” (Savad Decl. Ex. 151 (Village of Pomona Master Plan Update) 21 (emphasis added)), and that it would be “inappropriate” to “increase[] development density” in order to create “affordable housing,” (*id.* at 22). In fact, Defendants argue in their Reply that there is adequate multi-family housing nearby in Ramapo and in the region, (Defs.’ Reply 19 (citing Pls.’ 56.1 ¶ 138)), though, granted, the only evidence offered for that assertion is the existence of the ASHL.<sup>56</sup> Nonetheless, the Court concludes that there is insufficient evidence in the record to suggest that the Village failed to give consideration to regional housing needs when passing the Challenged Laws or that there is a general need for multi-family housing in the region.

As discussed above, however, the *Berenson* test is disjunctive. *Cf. N. Shore Unitarian Universalist Soc., Inc. v. Inc. Vill. of Upper Brookville*, 110 A.D.2d 123, 493 N.Y.S.2d 564, 567 (App. Div. 1985) (“In sum, [the] plaintiff has failed to show that the ordinance in question was enacted with an exclusionary purpose, *or* that it ignored local or regional housing needs.” (emphasis added)). Therefore, even though Plaintiffs have failed to demonstrate that the Challenged Laws were “enacted without giving proper regard to local and regional housing needs and has an exclusionary effect,” there is, as discussed extensively in this Opinion and Order, sufficient evidence for a reasonable jury to conclude that the Village enacted the Challenged Laws for an improper

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56. Defendants reliance on this law is ironic, given they challenged the ASHL upon its adoption. (*See* Pl.’s 56.1 ¶ 138.)



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exclusionary purpose, namely to discriminate against the Hasidic Jewish community. Therefore, the Court denies Defendants' Motion as to Plaintiffs' *Berenson* claim.

**c. Remaining State Claim**

The only remaining claim is claim 10 (Article 1 §§ 3, 8, 9 and 11 of the New York State Constitution), which concerns freedom of worship, assembly, and equal protection. (SAC ¶¶ 274-75.)<sup>57</sup> The Parties cross-move for summary judgment on this claim. Defendants contend that these claims should be resolved according to the same (or similar) standards as the corresponding federal claims. (*See* Defs.' Mem. at 18-19 n.14 (seeking summary judgment on § 3 claim), 44 n.28 (seeking summary judgment on § 11 and New York Civil Rights Law claims (citing, inter alia, *Hayut v. State Univ. of N.Y.*, 352 F.3d 733, 754-55 (2d Cir. 2003) (applying Equal Protection clause analysis to Article 1, § 11 claim)), 53 n.30 (seeking summary judgment on § 8 and § 9 claims (citing *Tartikov*, 915 F. Supp. 3d at 623 ("The corollary provisions for the First Amendment's Free Speech and Free Association Clauses in the New York Constitution are interpreted consistently with the Federal Constitution."))).) Plaintiffs appear to agree, and first pair their analysis of their § 3 claim with their RLUIPA substantial burden claim, noting that, "like RLUIPA, this provision[] applies to 'incidental

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57. The Court previously dismissed Plaintiffs' New York Civil Rights Law § 40—c claim (claim 11) as unripe, and, despite discussing that claim in the motion papers, (*see* Defs.' Mem. 44 n.28; Pls.' Opp'n 26), neither Party has offered any reason for the Court to re-examine that ruling here. *See Tartikov*, 915 F. Supp. 2d at 607.

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burdens’ on religious exercise.” (Pls.’ Mem. 10 (citing *Tartikov*, 915 F. Supp. 2d at 619 n.20).) They do so for good reason, as “in analyzing a state free exercise claim, ‘when the State imposes an incidental burden on the right to free exercise of religion,’ the courts are to consider the ‘interest advanced by the legislation that imposes the burden,’ and then ‘the respective interests must be balanced to determine whether the incidental burdening is justified.’” *Tartikov*, 915 F. Supp. 2d at 618 n.20 (quoting *Catholic Charities of Diocese of Albany v. Serio*, 7 N.Y.3d 510, 859 N.E.2d 459, 466, 825 N.Y.S.2d 653 (N.Y. 2006)). Accordingly, for the same reason that the Court denied summary judgment on Plaintiffs’ RLUIPA substantial burden claim—namely failure to establish a burden on the exercise of religion as a matter of law—the Court also denies summary judgment on Plaintiffs’ § 3 claim.

Plaintiffs also pair their analysis of their § 8 claim with their Free Speech claim, noting that the New York Constitution “provides additional protection for expression and expressive activity.” (Pls.’ Mem. 27.) As noted in the Court’s 2013 Opinion and Order, and as Defendants point out, “the corollary provisions for the First Amendment’s Free Speech and Free Association Clauses in the New York Constitution,” namely §§ 8 and 9, “are interpreted consistently with the Federal Constitution,” *Tartikov*, 915 F. Supp. 3d at 623, and accordingly the Court resolves those claims in the same way. Therefore, for the same reasons as those discussed above, the Court grants summary judgment to Defendants as to Plaintiffs’ § 8 claim because Plaintiffs have failed to show that the construction of a rabbinical college constitutes an exercise

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of free speech, but denies summary judgment to both Parties as to Plaintiffs' § 9 claim (free association).<sup>58</sup> Additionally, because the "equal protection provisions of the New York Constitution are interpreted consistently with the corollary provisions of the Federal Constitution," *Tartikov*, 915 F. Supp. 2d at 615 n.19 (citing *People v. Kern*, 75 N.Y.2d 638, 554 N.E.2d 1235, 1240-41, 555 N.Y.S.2d 647 (App. Div. 1990), for the reasons stated above, the Court denies summary judgment to Defendants as to Plaintiffs' § 11 claim.

**d. Affirmative Defenses**

Plaintiffs also move for "summary judgment dismissing Defendants' affirmative defenses." (Pls.' Mem. 57.) Defendants concede that their third, fourth, seventh, eighth, ninth, tenth, eleventh, twelfth, thirteenth, fifteenth, seventeenth, eighteenth, nineteenth, twenty-third, twenty-fourth, and twenty-fifth affirmative defenses can be dismissed. (*See* Defs.' Opp'n 41-46.) Likewise, Defendants' first (failure to state a claim), second (standing), fifth (lack of case or controversy), sixteenth (constitutionality of RLUIPA), twenty-sixth (failure to assert facial challenge), and twenty-seventh (residential or housing use is not an exercise of religion or religion use) defenses have already been addressed, and explicitly or implicitly rejected, in

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58. While Plaintiffs cite *O'Neill v. Oakgrove Constr., Inc.*, 71 N.Y.2d 521, 523 N.E.2d 277, 528 N.Y.S.2d 1 (N.Y. 1988), for the proposition that § 8 is "more expansive" than the First Amendment, *id.* at 531 (Kaye, J., concurring), the portion of the opinion cited is the concurrence, and there is no authority in that opinion for determining that the building of a rabbinical college is speech.

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this Opinion and Order and the Court's 2013 Opinion and Order. (*See* Defs.' Answer (Dkt. No. 55); *see also* Defs.' Opp'n 41 n.26 (noting that Defendants' affirmative defenses were stated in the Answer filed as Docket Number 55).) Accordingly, the only affirmative defenses that remain in dispute are Defendants' sixth (failure to exhaust), fourteenth (unclean hands), and twentieth, twenty-first, and twenty-second (immunity).

Regarding exhaustion, Plaintiffs argue that "[e]xhaustion is not required where the questions presented include facial challenges to legislation, or for claims brought under 42 U.S.C. § 1983." (Pls.' Mem. 60 (citing *Oestereich v. Selective Serv. Sys. Local Bd.*, 393 U.S. 233, 234, 89 S. Ct. 414, 21 L. Ed. 2d 402 (1966); *Kraebel v. N.Y. City Dep't of Hous. Pres. and Dev.*, 959 F.2d 395, 404 (2d Cir. 1992)). Defendants, in response, contend that *Oestereich* is inapplicable here, that, in general, "a party must exhaust his administrative remedies before seeking judicial review," (Defs.' Opp'n 43 (citing *Gonzalez v. Perrill*, 919 F.2d 1, 2 (2d Cir. 1990))), and that exhaustion is distinct from ripeness, (*id.* (citing *Williamson Cty. Reg'l Planning Comm'n v. Hamilton Bank*, 473 U.S. 172, 193, 105 S. Ct. 3108, 87 L. Ed. 2d 126 (1985), *superseded by statute on other grounds*, 47 U.S.C. § 332(c)(7)(B)(v), as stated in *Sprint Spectrum L.P. v. City of Carmel*, 361 F.3d 998, 1004 (7th Cir. 2004))). Specifically, Defendants rely heavily on the Second Circuit's decision in *Murphy v. New Milford Zoning Comm'n*, 402 F.3d 342 (2d Cir. 2005), in which the court required the plaintiffs to apply to a local zoning board of appeals prior to proceeding with their lawsuit because "the resolution of the constitutional and

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statutory claims . . . hinge[d] on factual circumstances not yet fully developed,” *id.* at 351

The Court concludes that exhaustion is not required for Plaintiffs’ remaining claims, as the overwhelming weight of authority indicates that exhaustion is not required for facial challenges. *See Lamar*, 356 F.3d at 374 (explaining that “[the plaintiff] need not have first sought and been denied *any* permit prior to filing a facial challenge”); *MacDonald v. Safir*, 206 F.3d 183, 189 (2d Cir. 2000) (“[T]here is no need for a party actually to apply or to request a permit in order to bring a facial challenge to an ordinance (or parts of it) . . .”). Indeed, as Plaintiffs argue, it is not even clear what administrative review procedures Plaintiffs should have sought before bringing their challenge, or what “adverse decision” there was to review at all. (*See* Pls.’ Reply. at 30.) Accordingly, “because defendants have the burden of raising an affirmative defense in their answer and establishing it . . . on a motion for summary judgment,” *Reach Music Pub., Inc. v. Warner/Chappell Music, Inc.*, No. 09-CV-5580, 2009 U.S. Dist. LEXIS 101943, 2009 WL 3496115, at \*2 (S.D.N.Y. Oct. 23, 2009) (brackets and internal quotation marks omitted), and Defendants have not met their burden here, summary judgment is granted to Plaintiffs as to this affirmative defense.

Regarding unclean hands, Plaintiffs contend that the defense only applies “where the misconduct alleged as the basis for the defense ‘has immediate and necessary relation to the equity that [the plaintiff] seeks in respect of the matter in litigation.’” (Pls.’ Mem. 58-59 (quoting

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*Keystone Driller Co. v. Gen. Excavator Co.*, 290 U.S. 240, 245, 54 S. Ct. 146, 78 L. Ed. 293, 1934 Dec. Comm’r Pat. 639 (1933)). Plaintiffs also argue that “[t]here is no evidence that Plaintiffs engaged in an unconscionable act” or that any such act “had an immediate and necessary relation to the Plaintiffs’ sought relief.” (Pls.’ Mem. 59.) Defendants respond that the application of the doctrine is subject to the discretion of the district court, and that there is evidence in the record supporting the claim that the rabbinical college “is a deceptive front for a scheme to develop high density housing,” namely that there are no definite construction plans and the curriculum for the school was developed only by one putative student. (Defs.’ Opp’n 42 (citing *Aris-Isotoner Gloves, Inc. v. Berkshire Fashions, Inc.*, 792 F. Supp. 969, 970 (S.D.N.Y. 1992)). As noted above, there are certainly disputed facts as to the degree to which the rabbinical college has been seriously planned. (See, e.g., Defs.’ 56.1 ¶¶ 25-36; Pls.’ Counter 56.1 ¶¶ 25-36.) However, Defendants have offered no evidence to suggest that Plaintiffs have no interest in building a rabbinical college. The central question in this case is not Plaintiffs’ sincerity, but rather whether Plaintiffs’ right to build their rabbinical college has been violated. Accordingly, the Court grants summary judgment to Plaintiffs on Defendants’ unclean hands affirmative defense.

Regarding immunity from damages, Plaintiffs contend that because they do not seek monetary damages, Defendants’ affirmative defenses based on claims of immunity from damages fail. (Pls.’ Mem. 60.) In response, Defendants argue that the defenses—absolute immunity

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and qualified immunity—do not bar only damages claims. (Defs.’ Mem. 60.) This is only half-correct. While absolute immunity bars claims for damages and injunctive relief, *see Montero v. Travis*, 171 F.3d 757, 761 (2d Cir. 1999) (“Absolute immunity bars not only [the plaintiff’s] § 1983 claim for damages but also his claim for injunctive relief.”), but not prospective declaratory relief, *See B.d.S. v. Southold Union Free Sch. Distr.*, Nos. 08-CV-1319, 08-CV-1364, 2009 U.S. Dist. LEXIS 55981, 2009 WL 1875942, at \*20 (E.D.N.Y. June 24, 2009) (“[T]he doctrine of absolute immunity does not extend to claims for declaratory relief based upon continuing violations of federal law.”), qualified immunity only bars damages claims, *see Sudler v. City of N.Y.*, 689 F.3d 159, 177 (2d Cir. 2012) (“[Q]ualified immunity does not bar actions for declaratory or injunctive relief.” (alteration and internal quotation marks omitted)).

Keeping this framework in mind, Defendants’ immunity-based affirmative defenses fail for two reasons. First, Plaintiffs are suing the individual Defendants in their official capacities, and therefore they are not entitled to any immunity that the Village does not also possess, meaning they cannot claim qualified or absolute immunity. *See Schubert v. City of Rye*, 775 F. Supp. 2d 689, 699 (S.D.N.Y. 2011) (“[A] public official named as a defendant in his or her official capacity in a § 1983 action is not entitled to personal immunity defenses, but only the immunities available to the government entity, and it is well settled that a municipal entity has no claim to such immunity from § 1983 liability.” (citation omitted)); *see also Johnson ex rel. Johnson v. Bd. of Educ. of Albion Centr. Sch. Dist.*, No. 02-CV-115E, 2003 U.S. Dist. LEXIS 25087,

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2003 WL 23350123, at \*2 (W.D.N.Y. Oct. 16, 2003) (“[The defendant] may not claim the defense of qualified immunity because he was sued in his official capacity.”); *cf. Ying Jing Gan v. City of N.Y.*, 996 F.2d 522, 529 (2d Cir. 1993) (“To the extent that a state official is sued for damages in his official capacity, such a suit is deemed to be a suit against the state, and the official is entitled to invoke the Eleventh Amendment immunity belonging to the state.”). Second, because, as explained above, qualified immunity only applies to damages claims, that defense is inapplicable here. Accordingly, the Court grants summary judgment to Plaintiffs on the immunity affirmative defenses.<sup>59</sup>

## III. Conclusion

The Court grants summary judgment to Defendants as to Plaintiffs’ Free Speech and corresponding Article 1, § 8 New York Constitution claims, and the Court grants summary judgment to Plaintiffs on Defendants’ affirmative defenses noted herein. The Court denies summary judgment to all Parties as to all other claims, grants Plaintiffs’ Motion for Sanctions, and grants Defendants’ Motion to Strike in part. The Clerk of the Court is respectfully directed to terminate the pending motions. (Dkt. Nos. 137, 140, 195.)

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59. Defendants argue that, if the Court strikes any of the affirmative defenses, particularly Defendants’ standing, lack of case or controversy, and failure to assert a facial challenge defenses, “there is a body of case law holding that . . . [they] will be treated as waived.” (Defs.’ Mem. 44.) Because the Court does not strike any of Defendants’ affirmative defenses, but instead grants summary judgment on them, there is no waiver concern here.



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SO ORDERED.

Dated: September 29, 2015  
White Plains, New York

/s/ Kenneth M. Karas  
KENNETH M. KARAS  
UNITED STATES DISTRICT  
JUDGE

**APPENDIX D — OPINION AND ORDER OF THE  
UNITED STATES DISTRICT COURT FOR THE  
SOUTHERN DISTRICT OF NEW YORK,  
FILED JANUARY 7, 2013**

UNITED STATES DISTRICT COURT FOR THE  
SOUTHERN DISTRICT OF NEW YORK

Case No. 07-CV-6304 (KMK)

CONGREGATION RABBINICAL COLLEGE OF  
TARTIKOV, INC., RABBI MORDECHAI BABAD,  
RABBI WOLF BRIEF, RABBI HERMEN KAHANA,  
RABBI MEIR MARGULIS, RABBI GERGELY  
NEUMAN, RABBI MEILECH MENCZER,  
RABBI JACOB HERSHKOWITZ, RABBI CHAIM  
ROSENBERG, RABBI DAVID A. MENCZER, RABBI  
ARYEH ROYDE, AND KOLEL BELZ OF MONSEY,

*Plaintiffs,*

v.

VILLAGE OF POMONA, BOARD OF TRUSTEES  
OF THE VILLAGE OF POMONA, NICHOLAS  
SANDERSON, AS MAYOR, IAN BANKS, AS  
TRUSTEE AND IN HIS OFFICIAL CAPACITY,  
ALMA SANDERS ROMAN, AS TRUSTEE AND  
IN HER OFFICIAL CAPACITY, RITA LOUIE, AS  
TRUSTEE AND IN HER OFFICIAL CAPACITY,  
AND BRETT YAGEL, AS TRUSTEE AND IN HIS  
OFFICIAL CAPACITY,

*Defendants.*

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January 4, 2013, Decided

**OPINION AND ORDER**

KENNETH M. KARAS, District Judge:

“This case presents the familiar conflict between the legal principle of non-discrimination and the political principle of not-in-my-backyard.” *New Directions Treatment Servs. v. City of Reading*, 490 F.3d 293, 295 (3d Cir. 2007). Plaintiffs challenge certain zoning and environmental ordinances enacted by Defendant Village of Pomona, asserting that the ordinances are unlawful under the First and Fourteenth Amendments of the United States Constitution, the Religious Land Use and Institutionalized Persons Act of 2000 (“RLUIPA”), 42 U.S.C. § 2000cc *et seq.*, the Fair Housing Act (“FHA”), 42 U.S.C. § 3601 *et seq.*, the New York Civil Rights Law § 40-c(1), (2), Article I, Sections 3, 8, 9, and 11 of the New York State Constitution, and New York common law. Specifically, Plaintiffs challenge the enactment and enforcement of the Village of Pomona, New York Code Sections 130-4 (defining educational institutions and dormitories), 130-10(F)(12) (limiting the size of dormitories pursuant to an educational use), and 126 (establishing wetlands protections) (together, the “challenged ordinances”).<sup>1</sup> Defendants move to dismiss Plaintiffs’ Second Amended

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1. The challenged ordinances can be found in the Declaration accompanying Plaintiffs’ Memorandum of Law in Opposition to Defendants’ Motion To Dismiss. They can also be found online at <http://www.ecode360.com/12718511> and <http://www.ecode360.com/12718574>.

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Complaint under Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6). For the reasons discussed below, Defendants' Motion is granted in part and denied in part.

**I. Background**

The Court assumes the following facts, largely drawn from Plaintiffs' Second Amended Complaint, as true for purposes of the instant Motion. Plaintiffs have brought this action to challenge the aforementioned zoning ordinances adopted by Defendant Village of Pomona (the "Village"); Plaintiffs claim that the ordinances unlawfully prohibit Plaintiff Congregation Rabbinical College of Tartikov (the "Congregation") from owning, holding, building, and operating a rabbinical college on a 100-acre tract (the "Subject Property") located in the Village and owned by the Congregation. (Second Am. Compl. ("SAC") ¶ 1 (Dkt. No. 28).)

**A. The Parties**

Plaintiffs are corporations and individuals affiliated with the Orthodox Jewish community, including various sects of the Hasidic community, all of whom allege an interest in the construction of a rabbinical college on the Subject Property. (*Id.* ¶¶ 24-27.) The Congregation, the owner of the Subject Property, is a religious corporation that was formed in 2004 with the aim of constructing a rabbinical college and related facilities on the Subject Property. (*Id.* ¶ 10.) Plaintiff Kolel Belz of Monsey ("Kolel Belz") is a religious corporation that serves more than 200 families and purports to "represent[] the interests of itself

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and the broader Orthodox community in actively seeking trained” rabbinical judges (“*dayanim*”) to “conduct the activities of rabbinical courts.” (*Id.* ¶¶ 34-35.) Plaintiffs Rabbi Mordechai Babad (“M. Babad”), Rabbi Wolf Brief, Rabbi Hermen Kahana, Rabbi Meir Margulis, Rabbi Gergely Neuman, Rabbi Meilech Menczer (“M. Menczer”), Rabbi Jacob Hershkowitz, Rabbi Chaim Rosenberg, Rabbi David A. Menczer (“D. Menczer”), and Rabbi Aryeh Royde (collectively, the “Individual Plaintiffs”) are trained Rabbis who seek to live and to teach and/or to study at the Congregation’s proposed rabbinical college. (*Id.* ¶¶ 11-20.) Defendants consist of the Village, its Mayor, Nicholas Sanderson, and the members of its Board of Trustees, Ian Banks, Alma Sanders Roman, Rita Louie, and Brett Yagel. (*Id.* ¶¶ 22-23.)

**B. The Religious Significance of a Rabbinical College**

According to Orthodox Jewish belief, Orthodox Jews are not permitted to resolve conflicts in the secular court system. (*Id.* ¶ 54.) Rather, the Orthodox Jewish religion requires that Orthodox Jews resolve conflicts in rabbinical courts before rabbinical judges applying Jewish law. (*Id.*) The Orthodox Jewish community therefore is obligated by religious belief to create rabbinical courts in every locale where Orthodox Jews live. (*Id.* ¶¶ 54-55.) Currently, however, because there are very few trained rabbinical judges in the United States, “there are only a very few [r]abbinical [c]ourts . . . serving Orthodox Jews in the entire United States,” and those courts are “extremely overburdened.” (*Id.* ¶ 49.)

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Plaintiffs allege that by building the rabbinical college, the Congregation seeks to ameliorate the “severe” shortage of trained rabbinical judges in the Orthodox Jewish community. (*Id.* ¶¶ 25, 33.) While several other rabbinical colleges exist in the United States, “[t]he existing [institutions] are insufficient to meet the need of students” who wish to become rabbinical judges and to train the number of “[r]abbinical [j]udges needed to serve the Orthodox Jewish community.” (*Id.* ¶ 82.) Moreover, not all of the rabbinical colleges in the United States offer the “full course of study or religious environment” that the Congregation’s planned rabbinical college will offer. (*Id.*) Although Plaintiffs acknowledge that one rabbinical college already offers the same type of program that the Congregation’s rabbinical college plans to offer—Kollel Beth Yechiel Mechil of Tartikov, located in Brooklyn, New York—that “facility is extremely overcrowded and . . . [i]ts doors have been shut for several years to new rabbis because of . . . dire space limitations.” (*Id.* ¶ 48.)

### **C. The Congregation’s Planned Rabbinical College**

The Congregation’s planned rabbinical college will be “devoted solely to religious training of [rabbinical judges] who will be tested and certified by rabbinical authorities . . . after many years of intense religious study.” (*Id.* ¶ 53.) Rabbinical students, all of whom must be ordained Rabbis, “will normally begin these specialized religious studies between the ages of 20 and 30.” (*Id.* ¶ 59.) Training to become a certified rabbinical judge may take “up to (or beyond) fifteen years.” (*Id.*) During that time, rabbinical

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students will study the religious laws of the Orthodox Jewish tradition, as well as “the wise and just application of the religious laws,” and they will learn how “to counsel members of the Orthodox Jewish community on the day-to-day questions that arise in applying Jewish Law to every aspect of their daily lives.” (*Id.* ¶ 58.)

The academic format of the planned rabbinical college “is based upon strenuous religious study and prayer during the hours of 5:00 a.m. to 10:30 p.m., with meal breaks.” (*Id.* ¶ 60.) Plaintiffs believe that “it is essential for these students to live, study and pray in the same place in order to minimize outside influences and to intensify the religious learning experience.” (*Id.* ¶ 65.) In accord with Plaintiffs’ belief that “[r]esidential housing is essential to the training provided by” a rabbinical college, the Congregation’s rabbinical college will include housing for the rabbinical students. (*Id.* ¶ 64.) Such housing must accommodate families, as many students “will be married, some with young children.” (*Id.* ¶¶ 59, 66.)

Additionally, because “Orthodox Jews must pray three times per day, in morning, afternoon and evening services,” (*id.* ¶ 63), Plaintiffs allege that it is essential to their religious beliefs that the rabbinical college and the residential housing be close in proximity to synagogues (“*shuls*”), (*id.*). Accordingly, the planned rabbinical college will include up to ten *shuls* to accommodate Orthodox Jews of all sects and traditions, including Ashkenazic, Sephardic, and other Hasidic and Orthodox sects. (*Id.* ¶ 68.)

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The Congregation's rabbinical college will also include four rabbinical courtrooms on campus, "which will be used to litigate and settle disputes, and as teaching facilities for students to become certified [r]abbinical [j]udges." (*Id.* ¶ 69.) The campus will further house "multiple libraries, which will contain the books necessary for the educational program." (*Id.* ¶ 70.)

While the Orthodox Jewish religion prescribes a rigorous program for the certification of rabbinical judges, Plaintiffs allege that no formal accreditation process exists for the program that will be offered by the rabbinical college. (*Id.* ¶¶ 105-06.)

**D. The Subject Property**

The Subject Property consists of a 100-acre tract of land located within the Village and also within the larger Town of Ramapo. (*Id.* ¶¶ 1, 73, 75.) The Congregation purchased the Subject Property in August 2004 with the intention of building thereon its rabbinical college and related facilities. (*Id.* ¶¶ 10, 73.) Around the same time, an "additional contiguous 30 acres was [sic] purchased by an affiliate of the Congregation to serve as a buffer between the [r]abbinical [c]ollege and the neighboring community." (*Id.* ¶ 74.) Plaintiffs allege that "[t]he Subject Property is uniquely suited to meet the needs of the Congregation" in building the rabbinical college. (*Id.* ¶ 76.)

According to Plaintiffs, "the Subject Property is the only available parcel of land" that is both appropriately sized and situated in close proximity to the "religious



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infrastructure and population,” as required for a rabbinical college. (*Id.* ¶ 83.) Plaintiffs further allege that the Subject Property also is an appropriate location for the planned rabbinical college because of its proximity to both the Village and the other villages located within the Town of Ramapo, which are also home to a large Orthodox Jewish community. (*Id.* ¶ 77.) Importantly, these villages are equipped with “the infrastructures necessary to maintain the practices prescribed by [the Orthodox Jewish] beliefs, including synagogues, yeshivas, elementary and high schools for boys and girls, ritual baths, and kosher food stores and restaurants.” (*Id.*) Moreover, it is the Orthodox Jewish community in these villages, as well as other villages within the greater area of Rockland County, that the Congregation’s rabbinical college is intended to serve. (*Id.* ¶ 80.) Plaintiffs allege that “[n]o alternative properties exist in [the Village] or in surrounding communities which can legally or practicably accommodate the” planned rabbinical college. (*Id.* ¶ 84.)

**E. The Village’s Land Use Ordinances**

Plaintiffs claim that the Village’s land use ordinances prohibit the Congregation from building its rabbinical college on the Subject Property. (*Id.* ¶¶ 92-95.) First, Plaintiffs allege that the Village’s zoning laws generally prohibit the Congregation from building the rabbinical college itself. The entire Village, including the Subject Property, is designated as an “R-40 District,” which “requires a minimum of 40,000 square feet per lot (approximately one acre) for the development of one-family homes,” (*id.* ¶ 88). *See also* Vill. of Pomona, N.Y.

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Code § 130-5. The Village’s Zoning Code permits a limited number of uses on land within the Village’s boundaries— e.g., one-family residences, houses of worship, libraries and museums, public parks and playgrounds. *See* Vill. of Pomona, N.Y. Code § 130-9(A). According to Plaintiffs, a rabbinical college could not qualify under any of the uses permitted by the Village. While the Village does grant, upon approval by either the Village Board of Trustees or the Village Board of Zoning Appeals, certain special use permits, Plaintiffs allege that a rabbinical college could not qualify as a special use under the other provisions of the Village’s zoning Code. (SAC ¶ 91.) Specifically, although Sections 130-4 and 130-10 of the Village Zoning Code empower the Board of Trustees to issue a special use permit for “educational institutions,” Plaintiffs allege that Section 130-4’s restricted definition of “educational institution” as “[a]ny private or religious . . . school conducting a full-time curriculum of instruction a minimum of five days per week for seven months per year *and accredited by the New York State Education Department or similar recognized accrediting agency,*” Vill. of Pomona, N.Y. Code § 130-4 (emphasis added), prevents the rabbinical college from being permitted as a special use. (SAC ¶ 93.) Plaintiffs allege that no formal accreditation process exists for the rabbinical college, (*id.* ¶¶ 105-06), and thus claim that the rabbinical college cannot qualify under the Village’s land use ordinances as either a permitted use or a special use under Sections 130-9 and 130-10, (*id.* ¶ 95.)

Plaintiffs further allege that the Village’s land use ordinances prohibit the Congregation from building

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residential facilities requisite to its rabbinical college. Although the Subject Property consists of a 100-acre tract of land, it is considered a single “lot” under the Village’s zoning law. (*Id.* ¶ 89.)<sup>2</sup> Pursuant to Section 130-9 of the Village’s Zoning Code, unless the Subject Property is subdivided, the entire 100-acre tract may house only a single one-family residence; multiple dwellings are explicitly prohibited. *See* Vill. of Pomona, N.Y. Code § 130-9(A)(1). Allegedly, it is “impracticable” for the Congregation to comply with this restriction given the alleged need to house students, teachers, and their families on the rabbinical college campus. (SAC ¶ 92.) While the land use ordinances permit dormitories as an “accessory use to an” educational institution “on the same lot as the educational use,” Vill. of Pomona, N.Y. Code § 130-10(F)(12), Plaintiffs allege that a rabbinical college cannot meet the Village’s definition of an educational institution. Moreover, Section 130-4 of the Village Code defines “dormitory” as exempting rooms that “contain separate cooking, dining or housekeeping facilities,” *id.*, § 130-4, which Plaintiffs allege are required to house families adequately. (SAC ¶ 107.) Additionally, Plaintiffs allege that the land use ordinances unreasonably prohibit the construction of more than one dormitory building per lot and limit the size of a dormitory to twenty percent of the “total square footage of all buildings on the lot,” *see* Vill. of Pomona, N.Y. Code § 130-10(F)(12). (SAC ¶¶ 108-09.) According to Plaintiffs, “applying generally accepted architectural standards and guidelines for school building

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2. Currently, the Subject Property contains “12-13 structures, including bungalows and other buildings used as an Orthodox Jewish summer camp.” (SAC ¶ 89.)

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square footage per student and dormitory square footage per student, such a restriction results in permitted school dormitories which could house a maximum of only approximately three (3%) of any student body.” (*Id.* ¶ 163.) Therefore, the “twenty percent restriction effectively eliminates all dormitories.” (*Id.*)

Based on these provisions of the Village’s Zoning Code, Plaintiffs argue that “there is no question that the College’s proposed use is forbidden within the Village.” (*Id.* ¶ 111.)

**F. The Village’s Environmental Regulations**

In April 2007, the Village adopted a wetlands protection ordinance, which requires a 100-foot buffer around wetlands of 2,000 square feet or more. *See* Vill. of Pomona, N.Y. Code § 126-3(A). Plaintiffs contend that the Village enacted this law “specifically to prevent the Hasidic Jewish community from locating and obtaining housing within the Village.” (SAC ¶ 174.) Plaintiffs further allege that “the . . . wetlands law . . . exempts nearly every lot in the entire Village, except for the [Subject Property] (and perhaps a very few other uses, if any).” (*Id.* ¶ 169.) Accordingly, Plaintiffs challenge the law as “intended to restrict development of the [Subject Property], which contains 37 acres of wetlands.” (*Id.* ¶ 171.)

**G. Discriminatory Purpose**

Plaintiffs allege that the Village adopted the challenged ordinances with the deliberate purpose

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of precluding construction of the rabbinical college. (*Id.* ¶¶ 156-159.) Specifically, Plaintiffs contend that the timing of the enactment of some of these zoning laws suggests discriminatory animus. For example, the Village’s definition of “educational institution” was amended one month after the Congregation’s August 2004 purchase of the Subject Property to require that a qualifying institution be “accredited by the New York State Department of Education or a similar recognized accrediting agency,” Vill. of Pomona, N.Y. Code § 130-4. (SAC ¶ 156.) Just a few months thereafter, in late 2004, the Village further amended its Zoning Code to exclude from its definition of “dormitory” any single-family, two-family and multifamily dwelling units, *see* Vill. of Pomona, N.Y. Code § 130-4, and to limit the number of dormitories per lot. (SAC ¶¶ 157-58.) In January 2007, the Village again amended its Zoning Code to limit the size of dormitory buildings—relative to the total square footage of all buildings on the lot—to be used as accessories to educational institutions. (*Id.* ¶ 162.)

Plaintiffs further allege that the “Dormitory’ legislation [passed in 2007] was . . . designed and enacted specifically to prevent the Hasidic Jewish community from residing and obtaining housing within the Village,” as evidenced in part by “[c]ommunity opposition . . . through public comment at the hearing on the dormitory legislation.” (*Id.* ¶¶ 164-65.) Plaintiffs highlight the following comments, made by the Village’s then-Mayor, Herbert Marshall, in response to the community’s opposition as further evidence of the discriminatory motive behind the dormitory legislation:

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Ladies and gentleman, let me say something. We sitting at this table have limitations that are placed on us as to what we can say, and what we can't say, because our attorney tells us what we can say and what we can't say. I can't say what I feel — I can't — if I agree with you, I don't agree with you, I don't have that luxury of being able to say that here. All that I can say is that every member of this board works very, very hard to do what is best for this community. You have your issues. Don't assume because no one has gotten up and said, wow, I agree with you, oh boy; don't assume that because we didn't do that we don't agree.

*(Id.* ¶ 166.)

Plaintiffs further allege that Mayor Sanderson and Trustees Yagel and Louie were elected to office based on campaign promises to “fight this plan” and “stand up to this threat,” ostensibly referring to the Congregation’s plan to build the rabbinical college. (*Id.* ¶ 178.) Plaintiffs also cite an article published in a local newspaper, the Journal-News, which stated that Mayor Sanderson defeated former Mayor Marshall “in a contest defined by land-use concerns sparked by plans for a rabbinical college.” (*Id.* ¶ 198.) Plaintiffs also allege that Trustees Yagel and Louie “expressly warned a civic association to be careful not to allow discriminatory statements to slip out.” (*Id.* ¶ 183.) Mayor Sanderson allegedly stated publicly in 2007 that “[t]he single most important issue facing the village at this time is the as yet un-proposed, but leaked,

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[r]abbinical [c]ollege development,” and that the Village should “maintain[] its cultural and religious diversity.” (*Id.* ¶ 180 (fourth alteration in original).) It is further alleged that, prior to his election, Mayor Sanderson “appeared in a campaign video [in which] he said that the [r]abbinical [c]ollege could not only ‘change the village,’ but could change ‘the makeup of the village,’” suggesting, in Plaintiffs’ view, his intention of “controlling the influx of Hasidic Jews into the Village.” (*Id.* ¶ 179.) Once Mayor Sanderson was elected, he allegedly stated “if they use RLUIPA to get us, we will fight,” further noting that “it would cost \$1,000,000 to fight a RLUIPA challenge, and . . . the funds could be raised over ‘3-5 years’ before a lawsuit would be filed.” (*Id.* ¶ 181, 184.)

In addition to these and other specific allegations concerning animus toward the rabbinical college, Plaintiffs also generally allege that there has been “[c]ommunity [h]ostility to Hasidic Jews” in the Village, which “played a significant role in the discriminatory actions undertaken by the Defendants and led directly to targeting of various Jewish uses of the Subject Property.” (*Id.* ¶ 186.) In support of this allegation, Plaintiffs cite various slurs and other offensive statements about Hasidic Jews made by members of the Village’s community. (*Id.* ¶¶ 188-95.) The various statements include an alleged statement by Doris Ulman, the Village’s Attorney, at a seminar on RLUIPA that “residents should not ‘cave into them and sell our houses,’ referring,” in Plaintiffs’ view, “to the Hasidic population.” (*Id.* ¶ 192.)

*Appendix D***H. The Congregation Contacts the Village Regarding the Project**

The Congregation does not allege that it submitted a formal application for the planned rabbinical college to the Village. Rather, the Village first became aware of the Congregation's plan for the rabbinical college when a "hypothetical sketch plat . . . was apparently leaked to the 'Preserve Ramapo' group," a "local private organization that has" expressed concerns about "population growth in Ramapo's Hasidic communities." (*Id.* ¶¶ 175-76.) Plaintiffs allege that the Village amended its zoning laws in a discriminatory manner in 2004 and later in 2007 based on its knowledge from this leak of the Congregation's plan to build the rabbinical college.

The Congregation reached out to the Village Board of Trustees and other Village representatives in March and April 2007 to discuss the project and whether it could "be accommodated by the Village." (*Id.* ¶¶ 208-09.) After apparently receiving no response from the Village, counsel for the Congregation telephoned Ulman on May 9, 2007 to discuss the project. (*Id.* ¶ 210.) Counsel subsequently followed up on May 10, 2007 with two letters requesting a "[p]ublic [m]eeting, for an informal design and technical review of a proposed project," (*id.*), as is encouraged under the Village's Zoning Code. *See* Vill. of Pomona, N.Y. Code § 130-28(E)(3) ("Applicants are encouraged to submit a preliminary, informal application and to discuss it with the appropriate permitting Board prior to formal submission of a complete and detailed special permit application."). Ulman responded by letter on May 14, 2007, stating



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I do not understand why you would request any meeting to discuss the design of a project that is illegal until you have applied for the required zone change. At no time did your letters or discussions with me suggest that a public meeting was requested to discuss the project. In my opinion, any meeting, public or private, would be premature.

(Defs.' Ex. R; SAC ¶ 211.) On June 22, 2007, the Congregation contacted Mayor Sanderson, the Village Board of Trustees, and Ulman by letter, again suggesting a meeting to discuss the Congregation's proposed project. (SAC ¶ 212.) The letter requested "that the Village of Pomona Board of Trustees exercise its authority under federal law to grant an exemption to a religious institution to allow for the construction of" the rabbinical college. (Defs.' Ex. S at 1; SAC ¶ 213.) On July 3, 2007, Mayor Sanderson responded to the Congregation by letter, stating that the Village "cannot grant your request to have the Board of Trustees exempt [the project] from the provisions of the Pomona Zoning Law " and that "the only remedy available for the [r]abbinical [c]ollege were [sic] legislative ones [sic]." (SAC ¶¶ 214-15.)

## **II. Discussion**

### **A. Standard of Review**

#### **1. Rule 12(b)(1)**

"[A] federal court has subject-matter jurisdiction over a cause of action only when it 'has authority to adjudicate

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the cause' pressed in the complaint." *Singer v. Xipto, Inc.*, 852 F. Supp. 2d 416, 422 (S.D.N.Y. 2012) (quoting *Sinochem Int'l Co. v. Malay Int'l Shipping Corp.*, 549 U.S. 422, 425, 127 S. Ct. 1184, 167 L. Ed. 2d 15 (2007)). "Determining the existence of subject matter jurisdiction is a threshold inquiry, and a claim is properly dismissed for lack of subject matter jurisdiction under Rule 12(b)(1) when the district court lacks the statutory or constitutional power to adjudicate it." *Morrison v. Nat'l Austl. Bank Ltd.*, 547 F.3d 167, 170 (2d Cir. 2008) (internal quotation marks omitted). "A plaintiff asserting jurisdiction has the burden of proving by a preponderance of evidence that it exists." *Id.* (internal quotation marks omitted). "[T]he court must take all facts alleged in the complaint as true and draw all reasonable inferences in favor of plaintiff, but jurisdiction must be shown affirmatively, and that showing is not made by drawing from the pleadings inferences favorable to the party asserting it." *Id.* (alteration in original) (citations and internal quotation marks omitted).

**2. Rule 12(b)(6)**

"On a Rule 12(b)(6) motion to dismiss a complaint, the court must accept a plaintiff's factual allegations as true and draw all reasonable inferences in [the plaintiff's] favor." *Gonzalez v. Caballero*, 572 F. Supp. 2d 463, 466 (S.D.N.Y. 2008); *see also Ruotolo v. City of New York*, 514 F.3d 184, 188 (2d Cir. 2008) ("We review *de novo* a district court's dismissal of a complaint pursuant to Rule 12(b)(6), accepting all factual allegations in the complaint and drawing all reasonable inferences in the plaintiff's favor." (internal quotation marks omitted)). "In adjudicating a Rule 12(b)(6) motion, a district court must confine its

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consideration to facts stated on the face of the complaint, in documents appended to the complaint or incorporated in the complaint by reference, and to matters of which judicial notice may be taken.” *Leonard F. v. Isr. Disc. Bank of N.Y.*, 199 F.3d 99, 107 (2d Cir. 1999) (internal quotation marks omitted).

The Supreme Court has held that “[w]hile a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations, a plaintiff’s obligation to provide the ‘grounds’ of his [or her] ‘entitle[ment] to relief’ requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555, 127 S. Ct. 1955, 167 L. Ed.2d 929 (2007) (third alteration in original) (citations omitted). Instead, the Court has emphasized that “[f]actual allegations must be enough to raise a right to relief above the speculative level,” *id.*, and that “once a claim has been stated adequately, it may be supported by showing any set of facts consistent with the allegations in the complaint,” *id.* at 563. Plaintiffs must allege “only enough facts to state a claim to relief that is plausible on its face.” *Id.* at 570. But if a plaintiff has “not nudged [his or her] claims across the line from conceivable to plausible, the[] complaint must be dismissed.” *Id.*; *see also Ashcroft v. Iqbal*, 556 U.S. 662, 679, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009) (“Determining whether a complaint states a plausible claim for relief will . . . be a context-specific task that requires the reviewing court to draw on its judicial experience and common sense. But where the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged—but

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it has not ‘show[n]’—’that the pleader is entitled to relief.’” (alteration in original) (citation omitted) (quoting Fed. R. Civ. P. 8(a)(2)).

“A court presented with a motion to dismiss under both Fed. R. Civ. P. 12(b)(1) and 12(b)(6) must decide the jurisdictional question first because a disposition of a Rule 12(b)(6) motion is a decision on the merits, and therefore, an exercise of jurisdiction.” *Homefront Org., Inc. v. Motz*, 570 F. Supp. 2d 398, 404 (E.D.N.Y. 2008) (internal quotation marks omitted); *see also Rhulen Agency, Inc. v. Ala. Ins. Guar. Ass’n*, 896 F.2d 674, 678 (2d Cir. 1990).

**B. Justiciability**

Defendants move to dismiss on the grounds that Plaintiffs lack standing to bring this case and that Plaintiffs’ claims are not ripe.

**1. Standing**

The Court begins, as it must, with the question of Plaintiffs’ standing. *See Pettus v. Morgenthau*, 554 F.3d 293, 298 (2d Cir. 2009) (“[S]tanding . . . is intended to be a threshold issue at least tentatively decided at the outset of the litigation.”); *Licensing by Paolo, Inc. v. Sinatra (In re Gucci)*, 126 F.3d 380, 387-88 (2d Cir. 1997) (“Whether a claimant has standing is ‘the threshold question in every federal case, determining the power of the court to entertain the suit.’” (quoting *Warth v. Seldin*, 422 U.S. 490, 498, 95 S. Ct. 2197, 45 L. Ed. 2d 343 (1975))). “[T]o satisfy Article III’s standing requirements, a plaintiff

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must show (1) it has suffered an ‘injury in fact’ that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.” *Pac. Capital Bank, N.A. v. Connecticut*, 542 F.3d 341, 350 (2d Cir. 2008) (alteration in original) (quoting *Friends of the Earth, Inc. v. Laidlaw Env'tl. Servs., Inc.*, 528 U.S. 167, 180-81, 120 S. Ct. 693, 145 L. Ed. 2d 610 (2000)); see also *W.R. Huff Asset Mgmt. Co. v. Deloitte & Touche LLP*, 549 F.3d 100, 106-07 (2d Cir. 2008) (same); *Policemen’s Annuity & Benefit Fund of Chi. v. Bank of Am., NA*, No. 12-CV-2865, 907 F. Supp. 2d 536, 2012 U.S. Dist. LEXIS 173871, 2012 WL 6062544, at \*5 (S.D.N.Y. Dec. 7, 2012) (same).<sup>3</sup> It is the burden of the party invoking federal

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3. In addition to these constitutional requirements, courts also apply “prudential principles” to determine whether a plaintiff has standing. *Gladstone, Realtors v. Village of Bellwood*, 441 U.S. 91, 99-100, 99 S. Ct. 1601, 60 L. Ed. 2d 66 (1979). These prudential limits on standing allow courts “to avoid deciding questions of broad social import where no individual rights would be vindicated and to limit access to the federal courts to those litigants best suited to assert a particular claim.” *Id.* at 99-100. Not all claims are subject to prudential limits, however, as Congress is permitted to “expand standing to the full extent permitted by [Article] III.” *Id.* at 100. In fact, plaintiffs pursuing claims under the FHA are not subject to prudential limits on standing. See *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 372, 102 S. Ct. 1114, 71 L. Ed. 2d 214 (1982) (holding that Congress intended standing under the FHA to extend to the full limits of Article III). As the Court finds that Plaintiffs’ standing can be determined based solely on the constitutional analysis, the Court does not engage in a separate

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jurisdiction to establish standing. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561, 112 S. Ct. 2130, 119 L. Ed. 2d 351 (1992). However, “at the pleading stage, standing allegations need not be crafted with precise detail.” *Baur v. Veneman*, 352 F.3d 625, 631 (2d Cir. 2003) (citing *Lujan*, 504 U.S. at 561); *see also Nat’l Council of La Raza v. Mukasey*, 283 Fed. App’x 848, 850 (2d Cir. 2008) (same); *Heghmann v. Sebelius*, No. 09-CV-5880, 2010 U.S. Dist. LEXIS 71965, 2010 WL 2643301, at \*2 (S.D.N.Y. May 13, 2010) (same).

Generally, “the ‘injury-in-fact’ requirement means that a plaintiff must have personally suffered an injury.” *Huff*, 549 F.3d at 107; *see also Lujan*, 504 U.S. at 560 n.1 (“By particularized, we mean that the injury must affect the plaintiff in a personal and individual way.”); *Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc.*, 454 U.S. 464, 472, 102 S. Ct. 752, 70 L. Ed. 2d 700 (1982) (“[Article] III requires the party who invokes the court’s authority to show that he [or she] personally has suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant.” (internal quotation marks omitted)). A plaintiff must allege a personal stake in the outcome of the case and a “distinct and palpable” injury. *See Ross v. Bank of Am.*,

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standing analysis for Plaintiffs’ FHA claims. Rather, the Court uses the same analysis to determine Plaintiffs’ standing with respect to all of its claims. *See ACORN v. County of Nassau*, No. 05-CV-2301, 2006 U.S. Dist. LEXIS 50217, 2006 WL 2053732, at \*7 n.1 (E.D.N.Y. July 21, 2006) (employing the same analysis to determine the plaintiffs’ standing under the Equal Protection Clause and the FHA).

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*N.A.*, 524 F.3d 217, 222 (2d Cir. 2008) (internal quotation marks omitted); *see also Duke Power Co. v. Carolina Envtl. Study Grp., Inc.*, 438 U.S. 59, 72, 98 S. Ct. 2620, 57 L. Ed. 2d 595 (1978); *City of New Rochelle v. Town of Mamaroneck*, 111 F. Supp. 2d 353, 358 (S.D.N.Y. 2000).

As for causation, a plaintiff “satisf[ies] the causation requirement if the complaint ‘aver[s] the existence of [an] intermediate link between the . . . [challenged] regulations and the injury.’” *Pac. Capital Bank*, 542 F.3d at 350 (second and third alterations in original) (quoting *Heldman v. Sobol*, 962 F.2d 148, 156 (2d Cir. 1992)); *see also In re Currency Conversion Fee Antitrust Litig.*, Nos. M 21-95, 05-CV-7116, 2009 U.S. Dist. LEXIS 6747, 2009 WL 151168, at \*2 (S.D.N.Y. Jan. 21, 2009) (same). Causation is lacking if the claimed injury is “th[e] result [of] the independent action of some third party not before the court” rather than the challenged conduct. *Lujan*, 504 U.S. at 560 (alterations in original) (internal quotation marks omitted); *see also M.J. Entm’t Enters., Inc. v. City of Mount Vernon*, 234 F. Supp. 2d 306, 311-13 (S.D.N.Y. 2002) (holding that plaintiff lacked standing to bring a facial challenge to a zoning ordinance that did not apply to plaintiff’s property). But a plaintiff need not claim that a defendant’s challenged actions were the very last step in a chain of events leading to an injury adequately to allege causation. *See Bennett v. Spear*, 520 U.S. 154, 168-69, 117 S. Ct. 1154, 137 L. Ed. 2d 281 (1997) (noting that the “‘fairly traceable’” requirement does not demand that “the defendant’s actions [be] the very last step in the chain of causation”); *Ctr. for Reproductive Law & Policy v. Bush*, 304 F.3d 183, 192 (2d Cir. 2002) (same).

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Finally, the redressability requirement demands that there is a “non-speculative likelihood that the injury can be remedied by the requested relief.” *Coalition of Watershed Towns v. EPA*, 552 F.3d 216, 218 (2d Cir. 2008) (per curiam) (quoting *Huff*, 549 F.3d at 106-07); see also *M.J. Entm’t*, 234 F. Supp. 2d at 311 (determining that redressability requirement was not met because “a ruling by this Court invalidating the ‘special permit use’ provisions of the Zoning Code would not redress plaintiff’s injury,” as plaintiff’s proposed use was barred by another ordinance). To meet this standard, the plaintiff must allege facts that show it is “likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.” *Watershed Towns*, 552 F.3d at 218 (quoting *Lujan*, 504 U.S. at 561); see also *Allen v. Wright*, 468 U.S. 737, 758, 104 S. Ct. 3315, 82 L. Ed. 2d 556 (1984) (holding that there was no standing where it was “entirely speculative” whether withdrawal of the challenged tax exemption would lead “any particular school . . . to change [the] policies” that had caused the plaintiffs’ injuries); *Lamar Adver. of Penn, LLC v. Town of Orchard Park*, 356 F.3d 365, 374 (2d Cir. 2004) (finding injury redressable, because, “[w]ere [plaintiff] to succeed on the merits of its claims, it likely would be able to erect at least some of the signs it has asserted an intent to build”).

**a. The Congregation**

The Congregation has shown that it has standing to challenge the ordinances at issue because, accepting as true the allegations in the Second Amended Complaint, the Congregation has alleged a particularized injury that



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would be redressed if the Court granted the requested relief. The Congregation alleges, inter alia, the following in support of its standing: (1) the Congregation owns the Subject Property; (2) it purchased the Subject Property with the intention of building a rabbinical college thereon; (3) it already has begun to develop plans to build the rabbinical college; (4) the Subject Property is subject to Sections 130-4, 130-9, and 130-10 of the Village Zoning Code, as well as Section 126 (the Village's wetlands ordinance), which on their face prohibit unaccredited educational institutions and some of the Congregation's planned accessory uses; and (5) those provisions were enacted unlawfully to prevent the Congregation from building its rabbinical college. (Pls.' Mem. 23.) Under these circumstances, the Congregation has sufficiently alleged an "injury in fact" that gives it a personal stake in the outcome of the litigation, as the Congregation's intended use of the Subject Property is allegedly prohibited by the challenged ordinances. *See Lamar*, 356 F.3d at 373-75 (finding that standing requirements were satisfied, where an ordinance prevented plaintiff from building certain signs); *Chabad Lubavitch v. Borough of Litchfield*, 796 F. Supp. 2d 333, 338 (D. Conn. 2011) (holding that religious corporation which owned property had standing to challenge zoning ordinance); *M.J. Entm't*, 234 F. Supp. 2d at 310 (determining that plaintiff had established standing with respect to one claim, where the challenged ordinance kept the plaintiff from "offer[ing] topless dancing as entertainment at its business establishment").

The Congregation also has met the other elements of Article III standing. The Congregation's alleged injury is

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fairly traceable to Defendants, because the Congregation allegedly cannot build the rabbinical college or its accessory uses as a result of the challenged ordinances. *See Pac. Capital Bank*, 542 F.3d at 350 (noting that an allegation of an “intermediate link between” an injury and a challenged regulation is sufficient to demonstrate traceability (internal quotation marks omitted)); *M.J. Entm’t*, 234 F. Supp. 2d at 310 (holding that the plaintiff’s “injury is traceable to the challenged action of [Defendant because Plaintiff] cannot [engage in its desired use] at its current location or relocate to another location . . . because of the municipality’s Zoning Code”).

Further, the alleged injury is redressable through the requested relief, because invalidation of the challenged ordinances allegedly could allow the Congregation to build the rabbinical college and its accessory uses. Taking the allegations in the Second Amended Complaint as true, “the Subject Property is the only available parcel of land” that is both appropriately sized and appropriately situated in close proximity to the “religious infrastructure and population,” as required for a rabbinical college. (SAC ¶ 83.) Based on these allegations, there is a “non-speculative likelihood” that if the challenged ordinances were invalidated, the Congregation could build the rabbinical college on the property. *See Watershed Towns*, 552 F.3d at 218 (internal quotation marks omitted). As the Second Amended Complaint does not clarify whether a complete plan for the rabbinical college, including financing commitments, yet exists, the Court is aware that there is a chance that even if the requested relief is granted, the Congregation might not build the rabbinical

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college on the Subject Property. But “these types of uncertainties always exist in housing development cases,” and they “should not be used as a means to defeat standing.” *ACORN*, 2006 U.S. Dist. LEXIS 50217, 2006 WL 2053732, at \*10; *see also Village of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 261-62, 97 S. Ct. 555, 50 L. Ed. 2d 450 (1977) (“[A]ll housing developments are subject to some extent to . . . uncertainties . . . [A] court is not required to engage in undue speculation as a predicate for finding that the plaintiff has the requisite personal stake in the controversy.”); *Huntington Branch, NAACP v. Town of Huntington*, 689 F.2d 391, 394 (2d Cir. 1982) (“[T]he requirement that the relief requested be likely to redress the injuries alleged by a plaintiff is not a demand for complete certainty.”).<sup>4</sup>

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4. Defendants argue that the Congregation cannot meet the injury-in-fact requirement, because it has not submitted an application to the Village. (Defs.’ Mem. 26.) However, there is authority that land use plaintiffs who have identified, and spent resources to develop, a specific project that is barred by local laws may, without more, still have standing to challenge those laws. *See LeBlanc-Sternberg v. Fletcher*, 67 F.3d 412, 424-25 (2d Cir. 1995) (holding that plaintiff had standing to bring FHA claim challenging an ordinance, even before the government entity had applied the ordinance against plaintiff); *ACORN*, 2006 U.S. Dist. LEXIS 50217, 2006 WL 2053732, at \*9 (noting that plaintiff alleged “that it took substantial steps, and expended resources in preparing a plan, but did not formally submit it to defendants because it did not comply with the allegedly discriminatory RFP”). In any event, as discussed at length below, this failure renders Plaintiffs’ as-applied challenges unripe. But, in the context of a facial challenge, a party “need not have first sought and been denied [a] permit prior to filing” suit to suffer an injury-in-fact.

*Appendix D***b. The Individual Plaintiffs**

The Individual Plaintiffs are trained Rabbis who seek to live and to teach and/or to study at the Congregation's planned rabbinical college. (SAC ¶¶ 11-20.) Defendants contend that the Individual Plaintiffs cannot meet the injury-in-fact requirement because they are "yet-to-be admitted or enrolled students," a yet-to-be hired Dean, and yet-to-be-hired lecturers who have "no basis to claim injury now," before the school has been "approved or constructed—let alone opened its doors." (Defs.' Mem. 30.) Defendants' argument is unavailing.

The Individual Plaintiffs assert that they have been prevented from studying, teaching, worshipping, and living at the rabbinical college by the challenged ordinances, which they allege discriminate against them based on their religion. (Pls.' Mem. 23-24; SAC ¶¶ 156-159.) Contrary to Defendants' argument that the Individual Plaintiffs are "yet-to-be admitted" or "yet-to-be hired," the Individual Plaintiffs have submitted affidavits that, taken as true, demonstrate that each has been either offered a position at the rabbinical college or offered enrollment as a student at the rabbinical college once it opens.<sup>5</sup> (M. Babad Aff. ¶¶ 1, 12; Brief Aff. ¶¶ 5-6; Kahana

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*Lamar*, 356 F.3d at 374. Thus, Congregation has standing to pursue its facial challenges to the zoning ordinances.

5. It is proper for the Court to consider these affidavits in deciding the instant Motion. *See J.S. ex rel. N.S. v. Atica Cent. Schs.*, 386 F.3d 107, 110 (2d Cir. 2004) (explaining that in resolving a 12(b)(1) motion to dismiss, the court "may consider affidavits and

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Aff. ¶¶ 5-6.) The Individual Plaintiffs, therefore, have a personal and concrete stake in seeing the rabbinical college built. *See Ross*, 524 F.3d at 222 (holding that a plaintiff must allege a personal stake in the outcome of the case and a “distinct and palpable” injury (internal quotation marks omitted)); *see also Arlington Heights*, 429 U.S. at 264 (holding that an individual who sought to live in planned housing community had standing to challenge discriminatory zoning laws preventing development of that housing community); *ACORN*, 2006 U.S. Dist. LEXIS 50217, 2006 WL 2053732, at \*11 (allowing individual plaintiffs who sought to live in affordable housing project in defendant city to challenge zoning ordinances preventing construction of the affordable housing project). The fact that the rabbinical college is not yet built or has not yet opened does not prevent the Individual Plaintiffs from asserting an injury now, as Defendants contend. (Defs.’ Mem. 30.) Indeed, the Individual Plaintiffs’ alleged injury-in-fact stems from the very fact that the rabbinical college cannot yet be built or opened.

Further, the Individual Plaintiffs’ alleged injury is both fairly traceable to Defendants and redressable by the Court. First, the Individual Plaintiffs’ inability to live and teach at the rabbinical college is caused by the challenged ordinances, which allegedly prevent the construction and operation of the rabbinical college and some of its accessory uses on the Subject Property. Second, taking the allegations in the Second Amended Complaint as

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other materials beyond the pleadings to resolve the jurisdictional issue, but [it] may not rely on conclusory or hearsay statements contained in the affidavits”).

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true, there is at least a non-speculative likelihood that if the challenged ordinances were invalidated, the Congregation's planned rabbinical college could be built, and the Individual Plaintiffs could study, work, and live on the Subject Property. *Cf. Arlington Heights*, 429 U.S. at 264 (finding that the individual plaintiff's injury—inability to obtain affordable housing in defendant village—was redressable by the requested relief, because it was likely that the housing development would materialize absent the challenged discriminatory ordinance); *ACORN*, 2006 U.S. Dist. LEXIS 50217, 2006 WL 2053732, at \*11 (same).

**c. Kolel Belz**

Plaintiff Kolel Belz is a religious corporation that serves more than 200 families of congregants and purports to “represent[] the interests of itself and the broader Orthodox community in actively seeking trained” rabbinical judges to “conduct the activities of rabbinical courts.” (SAC ¶¶ 34-35.) In support of its standing argument, Kolel Belz argues that it “will benefit from this litigation because it will have access to the services of rabbinical judges trained at the [r]abbinical [c]ollege.” (Pls.’ Mem. 24-25.) Defendants argue that Kolel Belz lacks standing to raise any of its claims on its own behalf or on behalf of the local Orthodox community. (Defs.’ Mem. 26-29.) For the following reasons, the Court agrees that Kolel Belz lacks standing to pursue this action.

Kolel Belz, “as an organization, is fully able to bring suit on its own behalf ‘for injuries it has sustained,’” *Int’l Action Ctr. v. City of New York*, 522 F. Supp. 2d 679, 693

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(S.D.N.Y. 2007) (quoting *Mid-Hudson Catskill Rural Migrant Ministry, Inc. v. Fine Host Corp.*, 418 F.3d 168, 174 (2d Cir. 2005)), “so long as those injuries—or threats of injury—are ‘both “real and immediate,” [and] not “conjectural or hypothetical,”” *id.* (alteration in original) (quoting *Bordell v. Gen. Electric Co.*, 922 F.2d 1057, 1060 (2d Cir. 1991)). Kolel Belz, however, fails to allege that it has personally suffered any injury based on the Village’s zoning ordinances. Instead, it alleges that the challenged ordinances will deprive the local Orthodox community of trained rabbinical judges. Even assuming that this alleged injury is cognizable as an injury-in-fact, Kolel Belz does not allege that *it* suffers any personal injury separate and apart from the interests of the local Orthodox community. *See Huff*, 549 F.3d at 109 (holding that an investment advisor lacked standing to sue based on injuries suffered by its clients); *Int’l Action Ctr.*, 522 F. Supp. 2d at 693 (finding that plaintiff organization failed to allege an injury to itself that was not merely speculative). Accordingly, the Court finds that Kolel Belz lacks standing to pursue this action on its own behalf.

As Kolel Belz has not alleged that it is a membership organization, it cannot assert (and, indeed, it has not asserted) associational standing.<sup>6</sup> Therefore, “[t]o the

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6. “Under New York and federal law, an organization may sue as a representative of its members only if the members have standing to sue in their own right.” *Int’l Action Ctr.*, 522 F. Supp. 2d at 694 (quoting *Mid-Hudson*, 418 F.3d at 173); *see also Alliance for Open Soc’y Int’l, Inc. v. U.S. Agency for Int’l Dev.*, 570 F. Supp. 2d 533, 539 (S.D.N.Y. 2008). Here, however, Kolel Belz has neither alleged, nor provided the Court with any basis

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extent that [Kolel Belz] seeks to sue on behalf of” the local Orthodox community, “it may pursue its claim only on a theory of third-party standing.” *Mid-Hudson*, 418 F.3d at 174; *see also Huff*, 549 F.3d at 109. A plaintiff may assert “third-party standing where [it] can demonstrate (1) a close relationship to the injured party and (2) a barrier to the injured party’s ability to assert its own interests.” *Huff*, 549 F.3d at 109; *see also Miller v. Albright*, 523 U.S. 420, 447, 118 S. Ct. 1428, 140 L. Ed. 2d 575 (1998) (O’Connor, J., concurring in the judgment) (explaining that a plaintiff asserting third-party standing must have “a close relation to the third party,” and “some hindrance to the third party’s ability to protect his or her own interests [must exist]” (internal quotation marks omitted)); *Mid-Hudson*, 418 F.3d at 174 (“[A] plaintiff seeking third-party standing in federal court must . . . demonstrat[e] a close relation to the injured third party and a hindrance to that party’s ability to protect its own interests.”). “In this vein, courts historically have permitted [t]rustees [to] bring suits to benefit their trusts; guardians ad litem [to] bring suits to benefit their wards; receivers [to] bring suit to benefit their receiverships; assignees in bankruptcy [to] bring suit to benefit bankrupt estates; [and] executors

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to infer, that it is a membership organization. While some of the Individual Plaintiffs allegedly engage in rabbinical studies at Kolel Belz (SAC ¶ 38), there is no specific allegation that these specific Individual Plaintiffs, or any others, are members of Kolel Belz. Therefore, the Court finds that Kolel Belz would have no basis to assert associational standing. *See Int’l Action Ctr.*, 522 F. Supp. 2d at 694 (holding that an organization was not entitled to sue as a representative of its members, where the organization was not a membership organization).



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[to] bring suit to benefit testator estates.” *Huff*, 549 F.3d at 109 (alterations in original) (quoting *Sprint Commc’ns Co. v. APCC Servs., Inc.*, 554 U.S. 269, 287-88, 128 S. Ct. 2531, 171 L. Ed. 2d 424 (2008)). Here, however, Kolel Belz has failed to allege what type of relationship it has to the members of the local Orthodox community. The Second Amended Complaint alleges merely that Kolel Belz is a religious corporation and that some of the Individual Plaintiffs engage in rabbinical studies there. (SAC ¶¶ 21, 38.) These allegations do not provide the Court with a basis to conclude that Kolel Belz has a sufficiently close relationship to the members of the local Orthodox community to warrant recognition of third-party standing.

Nor has Kolel Belz provided the Court with any allegations from which the Court could conclude that members of the community cannot vindicate their own interests. To do so, Kolel Belz would need to establish that “some barrier or practical obstacle (*e.g.*, third party is unidentifiable, lacks sufficient interest, or will suffer some sanction) prevents or deters the third party from asserting his or her own interest.” *Benjamin v. Aroostook Med. Ctr., Inc.*, 57 F.3d 101, 106 (1st Cir. 1995). Kolel Belz offers nothing by way of an allegation, let alone proof, of any such barriers preventing third parties from challenging the Defendants’ conduct. Indeed, the participation of the Individual Plaintiffs—some of whom are connected to Kolel Belz (SAC ¶ 38)—suggests otherwise. *See Hodak v. City of St. Peters*, 535 F.3d 899, 905 (8th Cir. 2008) (noting that circuit courts agree that “if a third party actually asserts his [or her] own rights, no hindrance exists and third-party standing is improper”).

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For these reasons, the Court finds that Plaintiff Kolel Belz lacks standing to bring this suit. Accordingly, its claims are dismissed without prejudice.

**2. Ripeness****a. Facial Challenges**

Plaintiffs have raised facial challenges to the legality of certain portions of the Village’s Zoning Code under the Equal Protection Clauses of both the Federal Constitution and the New York Constitution, as well as the Free Speech, Free Exercise, and Free Association Clauses of the First Amendment of the Federal Constitution and corollary protections in the New York Constitution, and under RLUIPA. Defendants summarily assert that Plaintiffs “facial challenge[s] fail[] to meet the jurisdictional requirement[] of ripeness,” (Defs.’ Mem. 13), arguing that Plaintiffs should be required to participate “in the normal land use process,” (*id.*). Contrary to Defendants’ assertion, however, “‘facial’ challenges to regulation[s] are generally ripe the moment the challenged regulation or ordinance is passed.” *Suitum v. Tahoe Reg’l Planning Agency*, 520 U.S. 725, 736 n.10, 117 S. Ct. 1659, 137 L. Ed. 2d 980 (1997); *see also Cnty. Concrete Corp. v. Township of Roxbury*, 442 F.3d 159, 164 (3d Cir. 2006) (noting that the finality requirement “does not apply . . . to *facial* attacks on a zoning ordinance, i.e., a claim that the mere enactment of a regulation either constitutes a taking without just compensation, or a substantive violation of due process or equal protection.” (emphasis in original)); *Lamar*, 356 F.3d at 374 (holding that a party “need not have first

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sought and been denied *any* permit prior to filing a facial challenge” (emphasis in original); *MacDonald v. Saftir*, 206 F.3d 183, 189 (2d Cir. 2000) (“[T]here is no need for a party actually to apply or to request a permit in order to bring a facial challenge to an ordinance (or parts of it) . . . .”); *Charette v. Town of Oyster Bay*, 159 F.3d 749, 757 (2d Cir. 1998) (“[Making] no effort to apply for a permit . . . does not, of course, deprive [plaintiff] of standing to assert that the [zoning ordinance] is facially invalid . . . .”); *S. Lyme Prop. Owners Ass’n, Inc. v. Town of Old Lyme*, 539 F. Supp. 2d 524, 536 (D. Conn. 2008) (“[F]acial challenges are generally ripe the moment the challenged regulation or ordinance is passed.” (internal quotation marks omitted)); *Ecogen, LLC v. Town of Italy*, 438 F. Supp. 2d 149, 155 (W.D.N.Y. 2006) (“[F]acial challenges to legislative acts are ripe by their very nature.” (internal quotation marks omitted)); *City of New Rochelle*, 111 F. Supp. 2d at 360 (holding that facial challenge to land use law was ripe as it presented “pure questions of law”).<sup>7</sup> Accordingly, Plaintiffs’ facial challenges to the Village’s zoning ordinances are ripe for review.

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7. Given the general rule that facial challenges become ripe at the inception of the regulation or ordinance, *see Suitum*, 520 U.S. at 736 n.10, there is no reason to believe that facial challenges under RLUIPA would be treated differently. *See Opulent Life Church v. City of Holly Springs*, 697 F.3d 279, 287-88 (5th Cir. 2012) (noting that plaintiff’s “facial challenges” under RLUIPA were “easily ripe”); *Sisters of St. Francis Health Servs., Inc. v. Morgan County*, 397 F. Supp. 2d 1032, 1048-49 (S.D. Ind. 2005) (holding that ripeness requirements for as-applied challenge under RLUIPA did not apply in the context of a facial challenge under RLUIPA and deeming the case ripe for review).

*Appendix D***b. As-Applied Challenges**

Defendants further contend that Plaintiffs' as-applied challenges to the Village's zoning laws are not ripe for adjudication, because the Congregation failed "formally [to] present[] [its] actual plans for the proposed [r]abbinical [c]ollege to the Village," or to "ma[k]e any application for a special use permit, use variance, zoning amendment or zone change as required by the Village zoning laws." (Defs.' Mem. 12.) The Court agrees that Plaintiffs' as-applied challenges under the Free Speech, Free Exercise, and Free Association Clauses of the First Amendment, the Equal Protection Clause of the Fourteenth Amendment, the FHA, and RLUIPA, as well as Plaintiffs' as-applied claims under New York state law, are unripe, and thus, the Court lacks subject matter jurisdiction over these claims.

"Ripeness is a doctrine rooted in both Article III's case or controversy requirement and prudential limitations on the exercise of judicial authority." *Murphy v. New Milford Zoning Comm'n*, 402 F.3d 342, 347 (2d Cir. 2005). The ripeness doctrine's "basic rationale is to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements." *Abbott Labs. v. Gardner*, 387 U.S. 136, 148, 87 S. Ct. 1507, 18 L. Ed. 2d 681 (1967), *overruled on other grounds by Califano v. Sanders*, 430 U.S. 99, 105, 97 S. Ct. 980, 51 L. Ed. 2d 192 (1977); *see also Nat'l Park Hospitality Ass'n v. Dep't of Interior*, 538 U.S. 803, 807-08, 123 S. Ct. 2026, 155 L. Ed. 2d 1017 (2003) ("Ripeness is a justiciability doctrine designed to prevent the courts, through avoidance of premature adjudication, from

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entangling themselves in abstract disagreements over administrative policies, and also to protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties.” (internal quotation marks omitted)); *Authors Guild, Inc. v. HathiTrust*, No. 11-CV-6351, 902 F. Supp. 2d 445, 2012 U.S. Dist. LEXIS 146169, 2012 WL 4808939, at \*7 (S.D.N.Y. Oct. 10, 2012) (“Article III of the Constitution limits the jurisdiction of the federal courts to cases or controversies of sufficient immediacy and reality and not hypothetical or abstract disputes.” (internal quotation marks omitted)). At its core, ripeness is “peculiarly a question of timing,” meaning that a case can become ripe for adjudication even if initially premature. *Reg'l Rail Reorganization Act Cases*, 419 U.S. 102, 140, 95 S. Ct. 335, 42 L. Ed. 2d 320 (1974). Thus, for example, an action is not ripe if it involves contingent future events that may or may not occur. *See Thomas v. Union Carbide Agr. Prods. Co.*, 473 U.S. 568, 580-81, 105 S. Ct. 3325, 87 L. Ed. 2d 409 (1985).

“Determining whether a case is ripe generally requires [courts] to ‘evaluate both the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration.’” *Murphy*, 402 F.3d at 347 (quoting *Abbott Labs.*, 387 U.S. at 149); *see also Simmonds v. INS*, 326 F.3d 351, 359 (2d Cir. 2003) (same); *New York v. U.S. Army Corps of Eng'rs*, Nos. 11-CV-2599, 11-CV-3857, 11-CV-3780, 896 F. Supp. 2d 180, 2012 U.S. Dist. LEXIS 136712, 2012 WL 4336701, at \* 13 (E.D.N.Y. Sept. 24, 2012) (same). “The ‘fitness of the issues for judicial decision’ prong . . . requires a weighing of the sensitivity

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of the issues presented and whether there exists a need for further factual development.” *Murphy*, 402 F.3d at 347 (quoting *Abbott Labs.*, 387 U.S. at 149); *see also E. End Eruv Ass’n, Inc. v. Village of Westhampton Beach*, 828 F. Supp. 2d 526, 536 (E.D.N.Y. 2011) (same). The “‘hardship to the parties’ prong . . . injects prudential considerations into the mix requiring [courts] to gauge the risk and severity of injury to a party that will result if the exercise of jurisdiction is declined.” *Murphy*, 402 F.3d at 347 (quoting *Abbott Labs.*, 387 U.S. at 149); *see also E. End Eruv Ass’n*, 828 F. Supp. 2d at 536 (same).

**i. The Final Decision Requirement**

“Building on the foregoing, the Supreme Court has developed specific ripeness requirements applicable to land use disputes.” *Murphy*, 402 F.3d at 347. In *Williamson County Regional Planning Commission v. Hamilton Bank*, 473 U.S. 172, 105 S. Ct. 3108, 87 L. Ed. 2d 126 (1985), the Supreme Court formulated a two-pronged approach to evaluate the ripeness of a Fifth Amendment Takings Clause claim. The first prong requires the land developer to obtain a final, definitive position as to the application of the relevant zoning laws to the property from the municipal entity responsible for those laws. *Id.* at 186. Under this prong, the plaintiff cannot seek federal court review of a zoning ordinance or provision until it has submitted at least one meaningful application for a variance. *Id.* at 190. Under the second prong, the property owner must seek compensation for an alleged taking before initiating a federal lawsuit. *Id.* at 194. This second prong derives from the “Fifth Amendment’s proviso that

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only takings without ‘just compensation’ infringe that Amendment.” *Suitum*, 520 U.S. at 734; *see also* *Murphy*, 402 F.3d at 348-5 (discussing *Williamson*’s two-prong ripeness analysis in Takings Clause cases).

Although this ripeness paradigm was originally developed by the Supreme Court in the context of a regulatory takings challenge, *see Williamson*, 473 U.S. at 186, the Second Circuit has applied prong one of the *Williamson* analysis to land use disputes involving more than just takings claims. *See Murphy*, 402 F.3d at 349-50. Indeed, the Second Circuit has applied this test to as-applied challenges to land use laws under RLUIPA, the First Amendment, the Equal Protection Clause, and the Due Process Clause. *See id.* at 348-51 (applying final decision test for ripeness to as-applied RLUIPA claims and as-applied First Amendment free exercise claims); *Dougherty v. Town of N. Hempstead Bd. of Zoning Appeals*, 282 F.3d 83, 88-89 (2d Cir. 2002) (noting that *Williamson*’s finality test had been extended to Equal Protection claims and Due Process claims); *Southview Assocs., Ltd. v. Bongartz*, 980 F.2d 84, 96-97 (2d Cir. 1992) (noting that plaintiff’s substantive due process claim was subject “to only the final decision prong of the *Williamson* ripeness test”); *accord Guatay Christian Fellowship v. County of San Diego*, 670 F.3d 957, 979 (9th Cir. 2011) (“All of the circuits to address this issue have applied the final decision requirement to RLUIPA claims, as well as to related First Amendment—based § 1983 claims . . . .”); *Miles Christi Religious Order v. Township of Northville*, 629 F.3d 533, 537 (6th Cir. 2010) (noting that the Sixth Circuit has applied the finality requirement to

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Equal Protection and First Amendment challenges to land use requirements); *Taylor Inv., Ltd. v. Upper Darby Township*, 983 F.2d 1285, 1291-92 (3d Cir. 1993) (applying *Williamson* final decision rule to substantive Due Process, procedural Due Process, and Equal Protection as-applied challenges to zoning determination); *Unity Ventures v. County of Lake*, 841 F.2d 770, 774-76 (7th Cir. 1988) (applying final decision rule to Equal Protection and Due Process claims); *Roman Catholic Diocese of Rockville Ctr. v. Inc. Village of Old Westbury*, No. 09-CV-5195, 2012 U.S. Dist. LEXIS 56694, 2012 WL 1392365, at \*6 (E.D.N.Y. Apr. 23, 2012) (noting that in the Second Circuit the final decision rule applies to First Amendment and RLUIPA challenges to land use laws).<sup>8</sup>

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8. Plaintiffs claim that the Second Circuit has “squarely decided the question of whether a pre-enforcement challenge to a facially neutral zoning ordinance under the First Amendment and the Fair Housing Act is ripe.” (Pls.’ Mem. 13.) For this proposition, Plaintiffs cite the Second Circuit’s decision in *LeBlanc-Sternberg v. Fletcher*, 67 F.3d 412 (2d Cir. 1995). However, in the portion of *LeBlanc-Sternberg* quoted by Plaintiffs, the Second Circuit merely held that the plaintiffs in that case had *standing* to challenge facially neutral zoning ordinances under the FHA and the First Amendment. *See id.* at 424-26. The court did not address, because it was not asked to address, the analytically distinct question of whether the plaintiffs’ claims were ripe under *Williamson*. *See Bronx Household of Faith v. Bd. of Educ. of New York*, 492 F.3d 89, 111 (2d Cir. 2007) (noting that while ripeness “overlaps in some respects with standing,” the “central concerns of ripeness doctrine are somewhat distinct from standing”). In fact, for example, after *LeBlanc-Sternberg*, the Second Circuit held that “in certain circumstances a First Amendment claim emanating from a land use dispute may be subject to the *Williamson County* prong-one ripeness test.” *Murphy*, 402 F.3d at 350; *see also id.* (“[W]e do



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The final decision requirement also applies to land use disputes arising under New York law. *See Church of St. Paul & St. Andrew v. Barwick*, 67 N.Y.2d 510, 496 N.E.2d 183, 189-90, 505 N.Y.S.2d 24 (N.Y. 1986) (finding that as-applied claims under the First Amendment of the New York State and Federal Constitutions unripe based on plaintiff's failure to obtain a final decision, where the plaintiff had yet to seek administrative approval of its "rebuilding program"); *Waterways Dev. Corp. v. Lavalle*, 28 A.D.3d 539, 813 N.Y.S.2d 485, 486 (App. Div. 2006) (holding that under New York law, a claim is not ripe if a governmental body has yet to render a "final determination as to the validity" of a proposed project); *cf.*

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not believe it necessary to distinguish the RLUIPA claim from the First Amendment Free Exercise claim when it comes to our ripeness inquiry."); *accord Grossi v. City of New York*, No. 08-CV-1083, 2009 U.S. Dist. LEXIS 110694, 2009 WL 4456307, at \*5 (E.D.N.Y. Nov. 30, 2009) ("It is well settled that the final decision requirement is applicable to . . . First Amendment claims."); *Shenkel United Church of Christ v. North Coventry Township*, No. 09-CV-1823, 2009 U.S. Dist. LEXIS 106314, 2009 WL 3806769, at \*3 (E.D. Pa. Nov. 13, 2009) ("[I]n as-applied First Amendment and RLUIPA claims arising from land use disputes, *Williamson's* prong-one ripeness standard governs."); *Kittay v. Giuliani*, 112 F. Supp. 2d 342, 349 n.5 (S.D.N.Y. 2000) (applying *Williamson* to First Amendment claim). Indeed, the Second Circuit has found *Williamson* to be inapplicable to a First Amendment claim only in limited specific circumstances—such as where there already was an adequate factual record and where the plaintiff had experienced an "immediate injury." *Murphy*, 402 F.3d at 350 n.5. As noted below, however, Plaintiffs do not fit within this exception, as they have not submitted a single, formal proposal to the Village providing the details regarding the rabbinical college they will build—which omission renders the factual record incomplete.

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*Koultukis v. N.Y.C. Dep't of Bldgs.*, Index No. 103643/01, 2001 N.Y. Misc. LEXIS 896, 2001 WL 1722885, at \*1 (N.Y. Sup. Ct. Oct. 4, 2001) (“[A] controversy cannot be ripe for judicial review if the claimed harm may be prevented or significantly ameliorated by further administrative action.” (citation omitted)).

“A final decision exists when a development plan has been submitted, considered and rejected by the governmental entity with the power to implement zoning regulations.” *S&R Dev. Estates, LLC v. Bass*, 588 F. Supp. 2d 452, 461 (S.D.N.Y. 2008); *see also Ecogen*, 438 F. Supp. 2d at 155 (holding that the final decision rule generally requires “that the plaintiff . . . have submitted at least one application for, and been denied, permission for the proposed structure or use of the subject property.”); *Goldfine v. Kelly*, 80 F. Supp. 2d 153, 159 (S.D.N.Y. 2000) (“In order to have a final decision, a ‘development plan must be submitted, considered, and rejected by the governmental entity.” (quoting *Unity Ventures*, 841 F.2d at 774)); *Barwick*, 496 N.E.2d at 189-90 (holding that decision was not final “until plaintiff has sought and the Commission has granted or denied a certificate of appropriateness or other approval . . .” (citation omitted)); *Waterways*, 813 N.Y.S.2d at 486 (holding that case was not ripe, because “[t]he plaintiff ha[d] not applied for a building permit for the residential units involving the variance at issue” and “[t]herefore, there [had] been no final determination as to the validity thereof”). Furthermore, generally, even if a plan has been submitted and rejected, a claim is not ripe until the “property owner submit[s] at least one meaningful application for a variance.” *Murphy*,

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402 F.3d at 348; *see also id.* at 353 (“[F]ailure to pursue a variance prevents a federal challenge to a local land use decision from becoming ripe.” (citing *Williamson*, 473 U.S. at 190)); *Bikur Cholim, Inc. v. Village of Suffern*, 664 F. Supp. 2d 267, 275 (S.D.N.Y. 2009) (“In general, . . . failure to seek a variance prevents a zoning decision from becoming ripe.”); *S&R Dev. Estates*, 588 F. Supp. 2d at 461-64 (dismissing claims on ripeness grounds, where the plaintiff had not applied for a variance); *Goldfine*, 80 F. Supp. 2d at 159 (same); *Korcz v. Elhage*, 1 A.D.3d 903, 767 N.Y.S.2d 737, 738-39 (App. Div. 2003) (same); *Dick’s Quarry, Inc. v. Town of Warwick*, 293 A.D.2d 445, 739 N.Y.S.2d 464, 464-65 (App. Div. 2002) (same). In the end, “[a] case is ripe when the court ‘can look to a final, definitive position from a local authority to assess precisely how [a property owner] can use [his or her] property.’” *Bikur Cholim*, 664 F. Supp. 2d at 275 (quoting *Murphy*, 402 F.3d at 347).

The Second Circuit has held that the final decision rule: (1) “aids in the development of a full record”; (2) ensures that a court “will . . . know precisely how a regulation will be applied to a particular parcel”; (3) recognizes the possibility that, by granting a variance, the administrative body “might provide the relief the property owner seeks without requiring judicial entanglement in constitutional disputes”; and (4) “evinces the judiciary’s appreciation that land use disputes are uniquely matters of local concern more aptly suited for local resolution.” *Murphy*, 402 F.3d at 348; *accord Spence v. Zimmerman*, 873 F.2d 256, 262 (11th Cir. 1989) (“We stress that federal courts do not sit as zoning boards of review and should be most circumspect

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in determining that constitutional rights are violated in quarrels over zoning decisions.”); *Hoehne v. County of San Benito*, 870 F.2d 529, 532 (9th Cir. 1989) (noting that in *Williamson* and other decisions, the Supreme Court “has erected imposing barriers . . . to guard against the federal courts becoming the Grand Mufti of local zoning boards.”); *Barwick*, 496 N.E.2d at 189 (“[T]he controversy cannot be ripe if the claimed harm may be prevented or significantly ameliorated by further administrative action or by steps available to the complaining party.”); *Koultukis*, 2001 N.Y. Misc. LEXIS 896, 2001 WL 1722885, at \*1 (“The purpose of this doctrine is to avoid litigation which may become academic and [to] prevent the premature review or adjudication of administrative actions.” (citation omitted)).

In this case, there has been no final decision, as the Congregation has yet to submit a single formal application to the Village Board of Trustees for approval of the rabbinical college. This failure by Plaintiffs to file (or their decision not to file) any formal application for use of the Subject Property leaves Plaintiffs outside the boundaries of the final decision rule. *See Guatay Christian Fellowship*, 670 F.3d at 980 (holding that “the Church’s failure to complete even *one* full Use Permit application leaves us unable to discern whether there is a true case or controversy, and any resulting injury” (emphasis in original)); *Loesel v. City of Frankenmuth*, No. 08-CV-11131, 2009 U.S. Dist. LEXIS 25956, 2009 WL 817402, at \*13 (E.D. Mich. Mar. 27, 2009) (finding plaintiff failed to satisfy final decision rule, even if “the evidence showed that each individual city official opposed the building of a Wal-Mart,” because the plaintiff “never even completed

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an initial application”); *Wal-Mart Stores, Inc. v. City of Turlock*, 483 F. Supp. 2d 987, 998-99 (E.D. Cal. 2006) (noting that for an as-applied challenge to land use regulations to be ripe, a “final decision by the government agency that inflicts a concrete harm on the landowner is required,” but that before “a decision is final the landowner must have submitted one formal development plan and sought a variance from any regulations barring development in the proposed plan [both of which] have been denied”). Although Plaintiffs were allegedly rebuffed by the Village attorney and by Mayor Sanderson in their *informal* efforts to present their plan to the Village officials, such “[i]nformal efforts to gain approval for land development are insufficient, by themselves, to constitute final government action.” *Goldfine*, 80 F. Supp. 2d at 160; *see also Unity Ventures*, 841 F.2d at 775 (dismissing claim on ripeness grounds, because the plaintiffs had not made a “formal application” that was rejected); *Grossi*, 2009 U.S. Dist. LEXIS 110694, 2009 WL 4456307, at \*5 (noting that plaintiffs had not satisfied the final decision requirement, because they had “failed to complete the paperwork and file the application with the appropriate offices”); *Celentano v. City of West Haven*, 815 F. Supp. 561, 569 (D. Conn. 1993) (“An unsuccessful effort to negotiate an informal resolution of a zoning dispute with a local agency . . . does not, by itself, constitute final government action.”); *Waterways*, 813 N.Y.S.2d at 486 (dismissing claim on ripeness grounds, where “[t]he only challenged actions [were] conversations with, and letters from, various Town of Brookhaven officials,” which the court concluded did not “have any final effect on the validity of the variance at issue and/or the issuance of a building permit allowing the construction of the units”).

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Plaintiffs suggest that, by adopting the challenged ordinances, Defendants have made a final decision to bar Plaintiffs from building the rabbinical college on the Subject Property. (Pls.' Mem. 13-14.) Yet, Plaintiffs do not allege that Defendants have rejected any particular development plan that Plaintiffs have formally submitted to Defendants. Rather, Plaintiffs broadly charge that Defendants have been hostile to the *idea* of a rabbinical college ever since some information about the putative college leaked. Indeed, Plaintiffs assert that "Defendants' conduct . . . has been made in a total vacuum of any information about the plans for the [r]abbinical [c]ollege and without seeing any of the studies performed . . . ." (SAC ¶ 185.) But, that void is the direct result of Plaintiffs' decision not to make a formal application to the Village (complete with the necessary details about the use of the Subject Property). Instead of identifying a final decision by Defendants to reject a particular land development plan, Plaintiffs have cited only the zoning ordinances that they believe would bar them from building a rabbinical college—which ordinances they seek to invalidate, based on how they *might be* applied to the would-be college. Thus, it is Plaintiffs who are attempting "to address important and potentially complex constitutional and regulatory issues in a vacuum." *Kittay*, 112 F. Supp. 2d at 349; *see also S. Pac. Transp. Co. v. City of Los Angeles*, 922 F.2d 498, 504 (9th Cir. 1990) ("Since no meaningful application has been made, there has been no final determination regarding allowable development of these properties and the district court properly concluded appellants' as-applied claim is not ripe for federal adjudication.").

*Appendix D***ii. The Futility Exception**

The Second Circuit has recognized a futility exception to the final decision requirement, cautioning that “the finality requirement [should not be] mechanically applied.” *Murphy*, 402 F.3d at 349. While “[t]he Second Circuit has not yet determined what the precise contours of the futility exception are,” *Homefront*, 570 F. Supp. 2d at 407 (internal quotation marks omitted); *see also Osborne v. Fernandez*, No. 06-CV-4127, 2009 U.S. Dist. LEXIS 27409, 2009 WL 884697, at \*5 (S.D.N.Y. Mar. 31, 2009) (noting that the contours of the futility exception have “not yet [been] definitively delineated by the Second Circuit”), the consensus among courts appears to be that to invoke the futility exception, a plaintiff must demonstrate: (1) “that plaintiff has filed ‘at least one meaningful application,’” and (2) “the inevitability of refusal of the[] application, taking into consideration factors such as ‘the defendants’ hostility, delay and obstruction,’” *Osborne*, 2009 U.S. Dist. LEXIS 27409, 2009 WL 884697, at \*5 (quoting *Dix v. City of New York*, No. 01-CV-6186, 2002 U.S. Dist. LEXIS 18262, 2002 WL 31175251, at \*6-7 (S.D.N.Y. Sept. 30, 2002)); *see also S&R Dev. Estates*, 588 F. Supp. 2d at 463-64.<sup>9</sup>

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9. Courts have described the futility exception as being “narrow.” *See Gilbert v. City of Cambridge*, 932 F.2d 51, 60-61 (1st Cir. 1991) (noting that courts have recognized a “narrow” “futility exception” to the final decision requirement); *Roman Catholic Bishop of Springfield v. City of Springfield*, 760 F. Supp. 2d 172, 182-83 (D. Mass. 2011) (same); *Goldfine*, 80 F. Supp. 2d at 159 (same).

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Plaintiffs contend that the futility exception is met here, because the Village officials “lack discretion to grant any administrative relief and have ‘dug in their heels’ against the Congregation.” (Pls.’ Mem. 16.) In particular, Plaintiffs claim that there is no way for them to obtain a land use permit to build a rabbinical college, because the re-written zoning laws bar any administrative relief, including zoning variances, special use permits, and administrative appeals. As such, Plaintiffs claim that the only way they can develop the Subject Property to construct a rabbinical college is through a legislative fix—for example, a text amendment to change the zoning laws.<sup>10</sup> And, even if they were required to do this under

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10. The process to obtain a text amendment in the Village appears to be the following: (1) The applicant files a petition for amendment describing the proposed changes with the Village Clerk—the Board of Trustees has discretion to decide whether to consider formally the proposed amendment; (2) if the proposed amendment is to be considered, the Board of Trustees must refer it to the appropriate Village entities and/or individuals for a review and report; (3) the Village Planning Board shall confer with the applicant and assist the applicant in revising its petition and resubmitting it to the Board of Trustees (and to the board, agency, or official to which it was referred by the Board of Trustees); (4) within 45 days of the referral or the re-submission, the Village Planning Board and the board, agency, or official to which the proposed amendment was referred shall report to the Board of Trustees regarding the advisability of the proposed amendment—failure to report within 45 days shall be construed as approval of the amendment; (5) the Village Attorney shall report to the Board of Trustees regarding the form of the amendment; and (6) the Board of Trustees shall give notice of a public hearing and hold such public hearing upon receipt of the reports and any revised amendment. *See* Vill. of Pomona, N.Y. Code §§ 130-35-130-41.



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*Williamson* (which Plaintiffs claim they are not), Plaintiffs allege that Defendants' discriminatory animus towards Plaintiffs is so entrenched that it would be hopeless to change the zoning laws.

As an initial matter, Plaintiffs' position conflates the finality requirement with the exhaustion requirement. As the Supreme Court explained in *Williamson*:

The question whether administrative remedies must be exhausted is conceptually distinct, however, from the question whether an administrative action must be final before it is judicially reviewable. While the policies

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The process to obtain a special use permit appears to entail the following: (1) An applicant must submit a formal application describing, inter alia, the proposed use—the application will be considered by the Board of Trustees or the Zoning Board (depending on the proposed use); (2) the relevant board refers the application to the appropriate Village board, agency, or official for a review and report, due within 30 days of the referral; (3) within 62 days after the receipt of the completed application, a public hearing must be held after appropriate notice has been given; and (4) within 62 days of the public hearing, the Board of Trustees or the Zoning Board must decide the application. *See* Vill. of Pomona, N.Y. Code § 130-28(E).

Defendants argue that the process of seeking a text amendment is akin to an administrative remedy that Plaintiffs could have, but have not, pursued. The Court need not resolve the question of whether seeking a text amendment is legislative as opposed to an administrative act, because, in either case, Plaintiffs' failure to submit one meaningful application thwarts their attempt to invoke the futility exception to the final decision rule.

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underlying the two concepts often overlap, the finality requirement is concerned with whether the initial decisionmaker has arrived at a definitive position on the issue that inflicts an actual, concrete injury; the exhaustion requirement generally refers to administrative and judicial procedures by which an injured party may seek review of an adverse decision and obtain a remedy if the decision is found to be unlawful or otherwise inappropriate.

473 U.S. at 192-93 (citations omitted). The final decision rule, as noted above, requires a land use plaintiff to establish that it obtained “a final, definitive position as to how it could use the property from the entity charged with implementing the zoning regulations.” *Murphy*, 402 F.3d at 348. This “jurisdictional prerequisite conditions federal review on a property owner submitting at least one meaningful application for a variance.” *Id.*; see also *City of Turlock*, 483 F. Supp. 2d at 999 (“Before a decision is final the landowner must have submitted one formal development plan and sought a variance from any regulations barring development in the proposed plan[, both of which] have been denied.”). A landowner plaintiff may avoid dismissal on ripeness grounds, however, by establishing the futility of pursuing administrative remedies, such as variances, re-applications, or appeals to zoning boards. See *Murphy*, 402 F.3d at 349 (“A property owner, for example, will be excused from obtaining a final decision if pursuing an appeal to a zoning board of appeals or seeking a variance would be futile.”); *S. Pac.*, 922 F.2d at 504 (“While it is true that something called

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a ‘futility exception’ exists, this exception serves only to protect property owners from being required to submit multiple applications when the manner in which the first application was rejected makes it clear that no project will be approved.”). What the futility exception does not discharge, however, is “an owner’s obligation to file one meaningful development proposal.” *S. Pac.*, 922 F.2d at 504. Indeed, courts have explicitly and consistently held, a “[property owner] cannot rely upon the futility exception” until he or she makes “at least one ‘meaningful application.’” *Kinzli v. City of Santa Cruz*, 818 F.2d 1449, 1455 (9th Cir. 1987); *see also Guatay Christian Fellowship*, 670 F.3d at 982 (holding that property owner could not invoke the futility exception, because it had not submitted a meaningful permit application); *DLX, Inc. v. Kentucky*, 381 F.3d 511, 525 (6th Cir. 2004) (“[While] a plaintiff need not seek a variance from a regulation where it would be an idle and futile act[,] the exception only applies where a landowner has submitted at least one meaningful application for a variance.” (internal quotation marks omitted)); *Gilbert*, 932 F.2d at 61 (“[T]he filing of one meaningful application will ordinarily be a necessary, although not alone sufficient, precondition for invoking the futility exception.”); *Herrington v. County of Sonoma*, 857 F.2d 567, 569 (9th Cir. 1988) (per curiam) (“A property owner cannot rely on the futility exception until he or she makes at least one meaningful application.”); *Unity Ventures*, 841 F.2d at 775-76 (holding that at least one formal application must be filed before a court can determine whether futility is met); *S&R Dev. Estates*, 588 F. Supp. 2d at 463-64 (same); *Osborne*, 2009 U.S. Dist. LEXIS 27409, 2009 WL 884697, at \*5 (same);

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*City of Turlock*, 483 F. Supp. 2d at 999 (same); *Westhab, Inc. v. City of New Rochelle*, No. 03-CV-8377, 2004 U.S. Dist. LEXIS 9926, 2004 WL 1171400, at \*11 (S.D.N.Y. May 3, 2004) (same); *Kittay*, 112 F. Supp. 2d at 349-50 (same). Put another way, there is no such thing as a futility exception to the requirement that a landowner make at least one formal application before bringing the type of as-applied challenges brought by Plaintiffs here.

Requiring one meaningful application ensures that local zoning authorities have at least one opportunity to consider how local regulations apply to a proposed use before the regulations are subject to judicial review. See *Church v. City of Medina*, No. 11-CV-0275, 2012 U.S. Dist. LEXIS 87687, 2012 WL 2395195, at \*5 (D. Minn. June 25, 2012) (“A decision on the merits of any of the courts would require the decisionmaker to know how the City would have responded to the Church’s withdrawn permit application.”). Relatedly, the meaningful application requirement enables a court to consider the applicability of the challenged regulations to a formal plan, the precise details of which might well dictate the outcome of the litigation. As one court has explained in terms that apply to this case:

Although [plaintiffs] opposed the rezoning of the subject properties between 1983 and 1985, they gave no indication at that time of how they might intend to develop the property if permitted to do so. They filed no meaningful applications for development of the property, for variances, or for any other form of relief

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before filing this federal complaint. To address this claim in this posture, federal courts would be required to guess what possible proposals [plaintiffs] might have filed with the City, and how the City might have responded to these imaginary applications.

*S. Pac.*, 922 F.2d at 504 (footnote omitted).

Here, in the absence of a formal application, the particulars of the Congregation's planned use remain abstract. For example, the Amended Complaint does not allege the size of the dormitories that Plaintiffs propose to build, and Plaintiffs have provided inconsistent representations on this point. (SAC ¶ 212 (alleging that Plaintiffs' counsel "stated [in a letter to the Village's Counsel] that [Plaintiffs would] seek a development for only 250 students"); Tr. of Oral Argument ("Tr.") 63-64 (stating that the dormitories would house 250 students in the "first phase," but that "there conceivably could be one-thousand units").) Thus, the Court cannot know whether Plaintiffs may pursue development plans that could comport with some, even if not all, of the Village's Zoning Code. See *Executive 100, Inc. v. Martin County*, 922 F.2d 1536, 1551 (11th Cir. 1991) (holding a claim unripe, where the plaintiffs had not sought variances or attempted to pursue "less ambitious development plans"). Moreover, the Village has not had the opportunity to review any plans, to hold a public hearing, or to decide whether any part of the Congregation's plan complies with the Village's Zoning Code (including ordinances other than those attacked facially by Plaintiffs). Under such circumstances, the Court cannot "know precisely how [the ordinances] will

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be applied to [this] particular parcel.” *Murphy*, 402 F.3d at 348; *see also City of Medina*, 2012 U.S. Dist. LEXIS 87687, 2012 WL 2395195, at \*5 (“The City’s decision [on a withdrawn permit application] would . . . allow the Court to know how the zoning ordinance would be applied to the Church’s property, so that it could apply the appropriate statutory or constitutional analysis to the City’s treatment of the Church.”). In other words, the question of how the Village’s zoning ordinances would be applied is purely speculative, because the rabbinical college, while a genuine and real aspiration of Plaintiffs, is, at this point, still merely an undefined plan.

Plaintiffs contend that, notwithstanding their failure to submit a single application, rejection of their application is certain, because no Village official or entity has discretion to approve Plaintiffs’ proposed use of the Subject Property as a rabbinical college under the Village’s Zoning Code. (Pls.’ Mem. 17.) The Second Circuit has indeed noted that a plaintiff may be excused from pursuing all available administrative remedies if “a zoning agency lacks discretion to grant variances.” *Murphy*, 402 F.3d at 349. Here, for example, it is undisputed that the Village’s zoning authorities would not have the discretion to issue a special use permit for an unaccredited institution or to issue certain variances under the Village’s Zoning Code. (Defs.’ Mem. 10.)<sup>11</sup> In other words, Plaintiffs argue

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11. The Parties agree that the rabbinical college would not qualify for a special use permit if, as Plaintiffs allege, there exists no formal accreditation process for the rabbinical college, because the Village’s Zoning Code allows special use permits to issue only to an *accredited* “educational institution,” *see* Vill. of Pomona, N.Y. Code § 130-4. (SAC ¶¶ 93, 95, 105-06.) Defendants

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that the futility exception should apply here, because they have no option of persuading the Village to change its Zoning Code or of seeking a variance or special use exception of any kind. But, again, for Plaintiffs to invoke the futility exception on the claim that they could not seek a special use permit or a variance of any kind, because they are not entitled to either under the Village's Zoning Code, they nonetheless had to have submitted at least one formal application for development of the Subject Property before bringing their as-applied claims.

To be sure, courts have regularly found that the futility exception applies in instances where landowners could not, by law, obtain a variance under local zoning

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have also accepted Plaintiffs' representation that the rabbinical college could not meet the Village's criteria for granting a use variance, because Plaintiffs cannot show at least three of the six mandatory requirements for granting a variance, in particular (a) that "the property in question cannot yield a reasonable return if used only for a purpose allowed in that district[,] (b) [t]hat the plight of the owner is due to unique circumstances affecting the property which is the subject of the application and not to general conditions in the neighborhood[,] and "(e) [t]hat the unnecessary hardship claimed as a ground for the variance has not been created by the owner." (Pls.' Mem. 18 n.30 (quoting Vill. of Pomona, N.Y. Code § 130-28(D)(1)).) *See United States v. Airmont*, No. 05-CV-5520, 2008 U.S. Dist. LEXIS 123979, \*14 n.3 (S.D.N.Y. Nov. 12, 2008) (noting that a property owner's failure to apply for a variance after its formal application was rejected was excused as futile where the property owner "would almost certainly be unable to establish the factors that it would be required to show to obtain a use variance"); *cf. Bikur Cholim*, 664 F. Supp. 2d at 286 (noting that it would have been futile for plaintiffs to appeal the denial of their variance application, where the property plainly did not meet the criteria required for a variance).

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ordinances, but only where the landowner had submitted a formal application. For example, in *Hoehne*, the landowners purchased a sixty-acre parcel of land and then subsequently submitted a subdivision application to the county planning commission, proposing to divide the property into four lots with an average of fifteen acres per lot. 870 F.2d at 530. At the time of the formal proposal, the property was zoned to permit single-family residences with a five-acre minimum. *Id.* The planning commission voted to deny the request, which recommendation was adopted by the board of supervisors. *Id.* at 531. “Subsequent to the Board’s decision, the County amended its General Plan land-use designation” to change the designation of the subject parcel to “Agricultural Rangeland,” thereby imposing a forty-acre minimum lot size and legally barring the plaintiffs’ proposed subdivision plan. *Id.* Plaintiffs brought an action challenging the county’s actions. The Ninth Circuit held that it “would have been futile for the [land owners] to seek a zoning variance *to accommodate their application* because the supervisors, by legislative act, changed the zoning designation from a minimum lot size of five acres to one of forty acres,” and because a “variance [was] not available for exceptions to the requirements of the General Plan.” *Id.* at 534-35 (emphasis added).<sup>12</sup>

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12. Other courts have reached similar conclusions—i.e., that a land owner may claim futility if he or she has submitted a formal application to municipal officials, and if the applicable zoning laws bar any variances or other administrative remedies. *See, e.g., Herrington*, 857 F.2d at 570 (holding that plaintiffs who had submitted a “32-unit subdivision proposal” were not required to seek a variance where the municipal board had rezoned the property to bar the proposal, and where the zoning ordinance did not permit any variances); *Roman Catholic Diocese*, 2012



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However, just five years later, the Ninth Circuit confronted a challenge to a municipality's general plan and water moratorium. *See Kawaoka v. City of Arroyo Grande*, 17 F.3d 1227 (9th Cir. 1994). The district court dismissed the action, concluding that plaintiffs' failure to submit a formal development plan doomed the as-applied challenges as unripe. *See id.* at 1232. On appeal, plaintiffs cited *Hoehne* "for the proposition that they [were] not required to seek a legislative amendment to undo that which ha[d] just been done by the legislature." *Id.* at 1233. In rejecting this claim, the Ninth Circuit concluded that *Hoehne* was "unhelpful" to the plaintiffs, because "even in *Hoehne*, the [plaintiffs] had applied to the City to develop their property and been rejected," whereas "in the present case, the Kawaokas have filed no such application." *Id.* (citing *S. Pac.*, 922 F.2d at 503). And so it is here. While Plaintiffs may well be right that they could not have sought a variance or special use permit, that alone does not make their as-applied challenges ripe, because they did not submit a formal application to develop the Subject Property.

Furthermore, in the absence of even one meaningful application, the Court cannot conclude that the Village's

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U.S. Dist. LEXIS 56694, 2012 WL 1392365, at \*1, \*6 (holding that plaintiff had satisfied ripeness requirements when, after plaintiffs filed a formal development plan, municipality adopted a law barring the proposed use and prohibited plaintiffs from appealing to the municipality's zoning board of appeals); *City of Turlock*, 483 F. Supp. 2d at 999-1001 (finding landowner's claim was ripe, where landowner had filed an application and revised application to open a "discount superstore," and where the local zoning law barred such stores and did not allow for variances).

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rejection of Plaintiffs' application is virtually certain, as required to demonstrate futility. *See Murphy*, 402 F.3d at 349 (noting that the futility exception might apply if the zoning agency has "made clear that all such applications will be denied"); *Gilbert*, 932 F.2d at 61 ("To come within the exception, a sort of inevitability is required: the prospect of refusal must be certain (or nearly so)."); *Osborne*, 2009 U.S. Dist. LEXIS 27409, 2009 WL 884697, at \*5 (explaining that a plaintiff must show, inter alia, "the inevitability of refusal of their application" to demonstrate futility); *Tri-State Video Corp. v. Town of Stephentown*, No. 97-CV-0965, 1998 U.S. Dist. LEXIS 1899, 1998 WL 72331, at \*4 (N.D.N.Y. Feb. 13, 1998) (deciding not to apply the futility exception despite open hostility of the town and its officials toward the plan, because the Zoning Board of Appeals "ha[d] yet to issue any ruling on . . . [the p]laintiffs' proposed use of the property"). Plaintiffs contend that the futility exception should apply here, because the Village has exhibited such hostility toward the notion of a rabbinical college that it would almost certainly reject any application by Plaintiffs. In support of this claim, Plaintiffs highlight their allegations that the ordinances were enacted specifically to prevent the construction of a rabbinical college and that Village officials and members of the community have expressed discriminatory animus toward Plaintiffs' plans.

Plaintiffs' claims about the letters written by the Village attorney and Mayor Sanderson and the comments allegedly made by other Village officials, if true, are indeed troubling. But these individuals are not the only Village officials who would consider a formal application, if it were ever made. The fate of any formal proposal therefore

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remains an unanswered question. This conclusion finds support in the case law. For example, in *Homefront*, the court refused to excuse the plaintiff's failure to submit a single formal application based on the futility exception despite statements by the Mayor of the defendant Village that the "proposed project was 'not happening in our town'" and that the defendants "would not permit plaintiffs to build anything on the [subject] property." 570 F. Supp. 2d at 401, 402. In rejecting the plaintiffs' claim of futility, the court emphasized that "[the Mayor] could change his mind regarding the proposal or, regardless of [his] negative views, the Planning Board or the [Board of Zoning Appeals] could approve the proposal." *Id.* at 409. Other courts faced with only the public statements of some municipal officials and a failure by the landowner plaintiff to submit a formal application have similarly declined to apply the futility exception. See *Roman Catholic Bishop*, 760 F. Supp. 2d at 183 ("[T]he City's decision to pass the Ordinance in no way predetermines the outcome of an application for an exemption. . . . It would be perfectly consistent for the City to enact this Ordinance in an effort to stave off the possibility of demolition and later provide an exemption for Plaintiff to remove features of the Church's facade."); *Loesel*, 2009 U.S. Dist. LEXIS 25956, 2009 WL 817402, at \*13 ("[T]he City Council and Planning Commission consist of several members and absent any definitive action taken by them as a group, evidence of the strength of a single person's point of view . . . does not adequately show that Defendant would have rejected Wal-Mart's proposal or request for a variance.")<sup>13</sup>

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13. Plaintiffs' allegations about the cool reaction to their *informal* overtures to Village officials about the rabbinical college

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Thus, the Court declines to speculate about the likelihood that the Village Board of Trustees would reject the Congregation's plans (whatever they may be). Instead, the Village Board of Trustees "should be given an opportunity to reach a final decision as to how it will apply the [Village's zoning laws] to the property at issue." *Congregation Anshei Roosevelt v. Planning & Zoning Bd. of Roosevelt*, No. 07-CV-4109, 2008 U.S. Dist. LEXIS 63994, 2008 WL 4003483, at \*13 (D.N.J. Aug. 21, 2008); *see also id.* (dismissing claims on ripeness grounds, because plaintiffs had yet to apply for a variance, which would not have been futile), *aff'd*, 338 Fed. App'x 214 (3d Cir. 2009). Accordingly, Plaintiffs' claims under New York Civil Rights Law § 40-c, as well as Plaintiffs' as-applied challenges to the Village's zoning regulations under the First Amendment, the Fourteenth Amendment, the New York Constitution, and RLUIPA are not ripe for adjudication, and these claims are dismissed without prejudice.

**iii. Ripeness of FHA Claims**

Defendants do not appear specifically to challenge the ripeness of Plaintiffs' claims under the FHA.<sup>14</sup>

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do not alter the analysis. *See Loesel*, 2009 U.S. Dist. LEXIS 25956, 2009 WL 817402, at \*13 ("To determine that Defendant would have rejected an application that was never completed, based on the result of only a preliminary meeting, would be entirely speculative. Thus, Plaintiffs' claims do not meet the finality requirement, and they may not advance their challenge to the ordinance as applied to their property.").

14. Three theories of discrimination are available to a plaintiff alleging a violation of the FHA or Title II of the Americans with

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Nevertheless, as ripeness is a jurisdictional matter, the Court separately addresses the question of whether Plaintiffs' as-applied FHA claims are ripe for adjudication. The Second Circuit has not explicitly decided whether the final decision requirement applies to FHA claims. As noted above, Plaintiffs understandably point to *LeBlanc-Sternberg*, in which the Second Circuit allowed the plaintiffs to recover under the FHA for a municipality's discriminatory enactment of a zoning code. In that case, the Second Circuit observed that the FHA explicitly grants standing to "anyone who believes he [or she] 'will be injured by a discriminatory housing practice *that is about to occur.*'" 67 F.3d at 425 (quoting 42 U.S.C. § 3602(i) (emphasis in original)). The *LeBlanc-Sternberg* court further noted that "where it has been established that a zoning ordinance will likely be applied in a discriminatory manner, it is unnecessary that the municipality actually so apply it before the ordinance may properly be challenged." *Id.*<sup>15</sup> It is this statement on which Plaintiffs rely in asserting that their FHA claims are ripe.

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Disability Act ("ADA"): (1) intentional discrimination; (2) disparate impact; and (3) refusal to make a reasonable accommodation. *See Tsombanidis v. W. Haven Fire Dep't*, 352 F.3d 565, 573 (2d Cir. 2003); *Lapid Ventures, LLC v. Township of Piscataway*, No. 10-CV-6219, 2011 U.S. Dist. LEXIS 63973, 2011 WL 2429314, at \*5 (D.N.J. June 13, 2011). Plaintiffs appear to be relying on the first two theories.

15. In support of this proposition, the *LeBlanc-Sternberg* panel cited the Eighth Circuit's decision in *Park View Heights Corp. v. City of Black Jack*, 467 F.2d 1208 (8th Cir. 1972). In *Park View Heights*, the plaintiffs included two non-profit groups that sought to build a multi-family housing development and

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eight individuals suing as a class. The developers submitted an application to build the apartments to the Department of Housing and Urban Development (“HUD”), after securing a mortgage and completing all architectural, legal, and organizational planning. *Id.* at 1210-11. As a result of this planning, HUD issued a “feasibility letter,” which was “tantamount to a contractual obligation” to support the project. *Id.* at 1211 (internal quotation marks omitted). In response to the feasibility letter, area residents organized an effort to incorporate the area that included the proposed housing development (and to call it, of all things, “the City of Black Jack”). Subsequently, the city council adopted a zoning ordinance that “effectively prevent[ed] the construction of new multi-family dwelling units within” the newly incorporated city. *Id.* Plaintiffs brought an action challenging the zoning ordinance as, inter alia, an unlawful taking, and as violating the Thirteenth and Fourteenth Amendments, as well as the FHA. *Id.* The district court dismissed, concluding that the claims were not ripe, because no building permit had been denied, and no variance had been sought. *Id.* at 1212. In reversing, the Eighth Circuit held that the case was ripe, because it “kn[e]w the conduct intended by the plaintiffs, as well as the actions which [had] been taken by the defendants.” *Id.* at 1215.

To the extent Plaintiffs might suggest that *Park View Heights* stands for the proposition that a land use plaintiff can show that its FHA claims are ripe even without formalizing the land use development plan, they would be overreaching. First, *Park View Heights* was decided well before *Williamson County*, which has been interpreted to apply to a wide variety of land use claims, including the FHA. Indeed, the Eighth Circuit, notwithstanding its own holding in *Park View Heights*, has held that a plaintiff bringing a reasonable accommodation claim under the FHA must permit the municipality an opportunity to consider a formal application. See *Oxford House-C v. City of St. Louis*, 77 F.3d 249, 253 (8th Cir. 1996) (“Congress . . . did not intend the federal courts

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However, notwithstanding Plaintiffs' view of *LeBlanc-Sternberg*, the lower courts within the Second Circuit have, since that decision, regularly held that the ripeness analysis derived from *Williamson* applies to as-applied FHA claims. See *Jenkins v. Eaton*, No. 08-CV-0713, 2009 U.S. Dist. LEXIS 26308, 2009 WL 811592, at \*3 (E.D.N.Y. Mar. 27, 2009) (noting that the ripeness doctrine under *Williamson* "extends both to equal protection and due process challenges, as well as to related claims under the FHA" (citation omitted)); *S&R Dev. Estates*, 588 F. Supp. 2d at 461 ("Courts in this Circuit have also applied the [*Williamson*] ripeness doctrine to FHA claims."); *Town & Country Adult Living, Inc. v. Village/Town of Mount Kisco*, No. 02-CV-0444, 2003 U.S. Dist. LEXIS 8519, 2003 WL 21219794, at \*2 (S.D.N.Y. May 21, 2003) (recognizing applicability of final decision requirement to FHA claims and concluding that it had been satisfied); *Tsombanidis v. City of West Haven*, 129 F. Supp. 2d 136, 160-61 (D. Conn. 2001) (holding that FHA reasonable accommodation

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to act as zoning boards by deciding fact-intensive accommodation issues in the first instance."). Second, this case is distinguishable from *Park View Heights*, because, in that case, the development plans were concrete, finalized, and publicly known, whereas here they are far from developed or publicly known. Indeed, the Eighth Circuit itself has declined to apply *Park View Heights* when the development at issue is filled with uncertainties. See *Paraquad, Inc. v. St. Louis Hous. Auth.*, 259 F.3d 956, 960 (8th Cir. 2001) ("In *Park View*, we considered an attack on a zoning ordinance that prohibited the construction of multiracial housing. We noted the architectural and engineering plans for the building were complete, and the City could do nothing further to exclude the plaintiffs from the community. In our case, however, there are many unresolved uncertainties." (citation omitted)).

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claim was not ripe, because the city had not been given an opportunity to consider plaintiff's land use request); *Sunrise Dev., Inc. v. Town of Huntington*, 62 F. Supp. 2d 762, 770-71 (E.D.N.Y. 1999) (applying *Williamson* to FHA claim, but holding that plaintiff had received final denial of special use permit). *But see Advocacy & Res. Ctr. v. Town of Chazy*, 62 F. Supp. 2d 686, 688-89 (N.D.N.Y. 1999) (determining that FHA claim was ripe despite the plaintiffs' failure to apply for a variance). And, since *LeBlanc-Sternberg*, the Second Circuit has held that a plaintiff must provide a government entity an opportunity to accommodate the plaintiff's intended use, so that the government entity can "know what a plaintiff seeks prior to incurring liability" for violating the FHA. *Tsombanidis v. W. Haven Fire Dep't*, 352 F.3d 565, 579 (2d Cir. 2003).

Illustrative of these decisions is *Woodfield Equities, L.L.C. v. Inc. Village of Patchogue*, 357 F. Supp. 2d 622 (E.D.N.Y. 2005). In that case, the plaintiffs challenged a village's condemnation of their property on the grounds that the condemnation violated the FHA, the ADA, and the Rehabilitation Act. *Id.* at 630. In rejecting the plaintiffs' application for a preliminary injunction, the court found that the FHA, ADA, and Rehabilitation Act claims were not ripe, because the plaintiffs had not made any proper application to the village for the right to operate the property as they wished (to run a residential recovery center). *Id.* at 631-32. Although the *Woodfield Equities* court acknowledged the broad standing afforded under statutes like the FHA and ADA, and, in fact, cited *LeBlanc-Sternberg*, it nonetheless concluded that the claims were not ripe, because the condemnation was not



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a final decision. *Id.* at 632 (“Ideally, the submission of at least one purposeful application that is subsequently denied, meets the finality requirement. . . . Plaintiffs never submitted an application to the Village for a use variance or special permit.”).<sup>16</sup>

The consensus view among the lower courts within the Second Circuit—that as-applied challenges under the FHA are not ripe unless the plaintiff has submitted at least one formal application for relief—is shared by courts outside our circuit. *See, e.g., Lapid-Laurel, L.L.C. v. Zoning Bd. of Adjustment of Scotch Plains*, 284 F.3d 442, 451 n.5 (3d Cir. 2002) (noting that requiring local land use entities to have an opportunity to comply with an FHA reasonable accommodation request before an FHA claim can be considered ripe is consistent with holdings from other circuits); *Oxford House-A v. City of University City*, 87 F.3d 1022, 1024-25 (8th Cir. 1996) (“The Oxford Houses must give the City a chance to accommodate them through the City’s established procedures for adjusting the zoning code.”); *United States v. Village of Palatine*, 37 F.3d 1230, 1233 (7th Cir. 1994) (citing *Williamson* in holding that plaintiffs’ FHA reasonable accommodation claims were not ripe, because plaintiffs had not sought a reasonable accommodation of the village); *Marriott Senior*

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16. The Second Circuit affirmed the denial of the preliminary injunction. *See* 156 Fed. App’x. 389 (2d Cir. 2005). In affirming, the Second Circuit noted that the plaintiff had filed an action in state court challenging the village’s condemnation and that the state court had issued a stay, freezing the condemnation. *Id.* at 391. Thus, the Second Circuit did not need to reach the question of the ripeness of the action.

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*Living Servs., Inc. v. Springfield Township*, 78 F. Supp. 2d 376, 385-86 (E.D. Pa. 1999) (noting that “it is undisputed that Marriott never submitted a Preliminary Plan and Final Plan pursuant to the Township’s . . . Ordinance[,]” and accordingly finding plaintiff’s FHA claim unripe); *Oxford House, Inc. v. City of Virginia Beach*, 825 F. Supp. 1251, 1261-62 (E.D. Va. 1993) (“[T]he zoning process is not remedial in nature because, unless and until plaintiffs are denied a conditional use permit or the required conditions are established, the City has not fully applied its zoning scheme to them and, consequently, plaintiffs’ claims of discrimination . . . are not ripe for adjudication . . .”).

Plaintiffs correctly note that a landowner asserting an as-applied FHA claim need not always “first pursue remedies under local zoning laws.” (Pls.’ Mem. 21.) Indeed, the Second Circuit has held that, by its terms, the FHA does not require a plaintiff to exhaust all local remedies before bringing an action in federal court. *See Huntington*, 689 F.2d at 393 n.3 (2d Cir. 1982); *see also Tsombanidis*, 352 F.3d at 579 (“It may be that once the governmental entity denies [a reasonable] accommodation, neither the FHA nor the ADA require a plaintiff to exhaust the state or local administrative procedures.” (emphasis in original)). This is the view of other courts as well. *See, e.g., Groome Res. Ltd. v. Parish of Jefferson*, 234 F.3d 192, 199-200 (5th Cir. 2000) (holding that FHA reasonable accommodation claim was ripe when the accommodation was denied, and that plaintiff did not need to pursue remedies in subsequent proceedings); *Bryant Woods Inn, Inc. v. Howard County*, 124 F.3d 597, 602 (4th Cir. 2000) (same). But none of these courts has permitted

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an as-applied challenge to a zoning ordinance, asserted under the FHA, to proceed until the plaintiff has made at least one formal application detailing the proposed use of the property at issue, thus allowing the government entity to make a decision regarding the plaintiff's request. *See Lapid-Laurel*, 284 F.3d at 451 n.5 (suggesting agreement with decisions in other circuits that as-applied challenges under the FHA "must first be presented to local land use boards" before being ripe (citing *Village of Palatine*, 37 F.3d 1230)); *Bryant Woods*, 124 F.3d at 602 (noting that the county "must be afforded an opportunity to make a final decision," even if plaintiff is not required to pursue "post-decisional procedures," as would be required in a takings case (citing *Williamson*, 473 U.S. at 195)); *Marriott Senior Living Servs.*, 78 F. Supp. 2d at 385-86 ("While strict compliance with every local ordinance or regulation is not required, before the denial of a reasonable accommodation claim may be deemed final, the applicant must show that under the circumstances it has afforded the appropriate local authority a reasonable opportunity to consider the project in some final form . . ."). In other words, even if a plaintiff may satisfy the final decision rule without exhausting his or her administrative remedies, there is no authority for the proposition that a plaintiff can satisfy the final decision rule without making at least one formal application to the relevant governmental entity. *See Marriott Senior Living Servs.*, 78 F. Supp. 2d at 385 ("Marriott clearly did not progress beyond preliminary discussions with Township officials and submission of the Sketch Plan under the Township's informal procedure."). Thus, Plaintiffs' as-applied challenges under the FHA are not yet ripe and are dismissed without prejudice.

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However, as is true with Plaintiffs' constitutional challenges to the zoning ordinances, the ripeness of Plaintiffs' facial FHA challenges presents a different question. To the extent that Plaintiffs allege under the FHA that the Village adopted the challenged ordinances with a discriminatory purpose, those claims may proceed. *See Jackson v. Okaloosa County*, 21 F.3d 1531, 1541 n.16 (11th Cir. 1994) (finding that FHA claims were ripe, where plaintiffs alleged that "the adoption of the Policy itself violated the Fair Housing Act because the Policy was adopted with discriminatory purpose and/or with disparate impact"); *Caron Found. of Fla, Inc. v. City of Delray Beach*, 879 F. Supp. 2d 1353, No. 12-CV-80215, 2012 U.S. Dist. LEXIS 92256, 2012 WL 2249263, at \*6-8 (S.D. Fla. May 4, 2012) (holding that plaintiff's as-applied, reasonable accommodation claim was not ripe, but that plaintiff's facial challenge, based on a claim of disparate treatment, was ripe); *Lapid Ventures*, 2011 U.S. Dist. LEXIS 63973, 2011 WL 2429314, at \*6 (noting that plaintiffs' reasonable accommodation claim was not ripe, but that plaintiffs' disparate treatment and disparate impact claims were ripe, because plaintiffs alleged that the zoning ordinances at issue were adopted for "a discriminatory purpose").

Thus, Plaintiffs' facial challenges under the FHA to the Village's zoning ordinances are ripe for review.<sup>17</sup>

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17. Moreover, because Defendants have not challenged Plaintiffs' FHA claims as failing to state a claim under Rule 12(b) (6), those claims may proceed.

*Appendix D***C. Plaintiffs' Facial Challenges**

Plaintiffs contend that the challenged ordinances facially violate the Equal Protection Clauses of both the Federal Constitution and the New York Constitution, the Free Exercise, Free Speech, and Free Association Clauses of the First Amendment and corollary protections in the New York Constitution, the FHA, and RLUIPA. Defendants argue that Plaintiffs' allegations fail to state a valid facial challenge to the Village's zoning ordinances. (Defs.' Mem. 18-24.) A facial challenge is one that "address[es] not the application of [an ordinance] to a particular set of plaintiffs . . ., but the [legality] of the [ordinance]" itself. *Washington v. Glucksberg*, 521 U.S. 702, 739-40, 117 S. Ct. 2258, 117 S. Ct. 2302, 138 L. Ed. 2d 772 (1997) (Stevens, J., concurring); *see also Brooklyn Legal Servs. Corp. v. Legal Servs. Corp.*, 462 F.3d 219, 228 (2d Cir. 2006) ("Facial and as-applied challenges differ in *the extent to which* the invalidity of a statute need be demonstrated (facial, in all applications; as-applied, in a personal application)." (emphasis in original)), *overruled on other grounds*, *Bond v. United States*, 131 S. Ct. 2355, 180 L. Ed. 2d 269 (2011).

"A plaintiff making a facial claim faces an 'uphill battle' because 'it is difficult to demonstrate that the mere enactment of a piece of legislation' violates the plaintiff's constitutional rights." *Cranley v. Nat'l Life Ins. Co. of Vt.*, 318 F.3d 105, 110 (2d Cir. 2003) (quoting *Suitum*, 520 U.S. at 736 n.10). Indeed, facial challenges are "generally disfavored," because facial invalidation is "strong medicine" that "has been employed by the

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[Supreme] Court sparingly and only as a last resort.” *Nat’l Endowment for the Arts v. Finley*, 524 U.S. 569, 580, 118 S. Ct. 2168, 141 L. Ed. 2d 500 (1998) (internal quotation marks omitted). The Supreme Court has explained that “[f]acial challenges are disfavored for several reasons.” *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 450, 128 S. Ct. 1184, 170 L. Ed. 2d 151 (2008). First, “[c]laims of facial invalidity often rest on speculation. As a consequence, they raise the risk of ‘premature interpretation of statutes on the basis of factually barebones records.’” *Id.* (quoting *Sabri v. United States*, 541 U.S. 600, 609, 124 S. Ct. 1941, 158 L. Ed. 2d 891 (2004)). Second, “[f]acial challenges also run contrary to the fundamental principle of judicial restraint that courts should neither anticipate a question of constitutional law in advance of the necessity of deciding it nor formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied.” *Id.* (internal quotation marks omitted). Finally, courts must be mindful that “a ruling of unconstitutionality frustrates the intent of the elected representatives of the people.” *Id.* at 451 (quoting *Ayotte v. Planned Parenthood of N. New Eng.*, 546 U.S. 320, 329, 126 S. Ct. 961, 163 L. Ed. 2d 812 (2006)) (brackets omitted). With these considerations in mind, the Court now turns to Plaintiffs’ facial attacks.

### **1. Relevance of Discriminatory Motive to Plaintiffs’ Facial Challenges**

As a threshold matter, the Court considers Plaintiffs’ argument that the motive behind the enactment of the challenged ordinances is relevant to their facial

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challenges. Plaintiffs contend that in addition to examining the text of the challenged ordinances, the Court must also consider whether the ordinances were “enacted with a discriminatory *purpose*” to determine their facial validity. (Pls.’ Mem. 10 (emphasis in original).) In particular, Plaintiffs argue that the motivation behind the ordinances is relevant to their facial claims under the Equal Protection Clause, the Free Exercise Clause, and the Free Speech Clause. Defendants argue that the “subjective motivation” of those who enacted the challenged ordinances is irrelevant to the Court’s determination of the challenged ordinances’ facial validity. (Defs.’ Mem. 19 (internal quotation marks omitted).)

Normally, courts treat “the actual intent or motive of the government decisionmakers [as] irrelevant to their inquiry.” Alan E. Brownstein, *Illicit Legislative Motive in the Municipal Land Use Regulation Process*, 57 U. Cin. L. Rev. 1, 1 (1988); see also *Arlington Heights*, 429 U.S. at 268 n.18 (noting that questioning legislative motivation represents “substantial [judicial] intrusion into the workings of other branches of government”); *United States v. O’Brien*, 391 U.S. 367, 383, 88 S. Ct. 1673, 20 L. Ed. 2d 672 (1968) (“It is a familiar principle of constitutional law that this Court will not strike down an otherwise constitutional statute on the basis of an alleged illicit legislative motive.”); *McCray v. United States*, 195 U.S. 27, 56, 24 S. Ct. 769, 49 L. Ed. 78, T.D. 795 (1904) (“The decisions of this court from the beginning lend no support whatever to the assumption that the judiciary may restrain the exercise of lawful power on the assumption that a wrongful purpose or motive has caused the power

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to be exerted.”); *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87, 130, 3 L. Ed. 162 (1810) (“It may well be doubted how far the validity of a law depends upon the motives of its framers . . . .”); *Field Day, LLC v. County of Suffolk*, 463 F.3d 167, 174 (2d Cir. 2006) (noting that a court evaluating “[a] ‘facial challenge’ to a statute considers only the text of the statute itself, not its application to the particular circumstances of an individual”); *Grossbaum v. Indianapolis-Marion Cnty. Bldg. Auth.*, 100 F.3d 1287, 1292-93 (7th Cir. 1996) (explaining that legislative motive is relevant to only certain constitutional claims); *Panama City Med. Diagnostic Ltd. v. Williams*, 13 F.3d 1541, 1547 (11th Cir. 1994) (“The district court erred . . . in searching for the actual motivation of the legislation . . . [because] the proper inquiry is concerned with the *existence* of a conceivable rational basis, not whether that basis was actually considered by the legislative body.” (emphasis in original)).

The difficulty of ascertaining legislative motivation is often cited as a reason why such inquiries normally are to be avoided. See *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 558, 113 S. Ct. 2217, 124 L. Ed. 2d 472 (1993) (Scalia, J., concurring in part and concurring in the judgment) (“[I]t is virtually impossible to determine the singular ‘motive’ of a collective legislative body . . . .”); *Michael M. v. Superior Court of Sonoma Cnty.*, 450 U.S. 464, 470, 101 S. Ct. 1200, 67 L. Ed. 2d 437 (1981) (noting that “individual legislators may have voted for the statute for a variety of reasons”); *O’Brien*, 391 U.S. at 383 (“What motivates one legislator to make a speech about a statute is not necessarily what motivates scores of others to enact



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it, and the stakes are sufficiently high for us to eschew guesswork.”). *See generally* John Hart Ely, *Legislative and Administrative Motivation in Constitutional Law*, 79 Yale L.J. 1205, 1212-23 (1970) (discussing arguments against consideration of motive, including difficulty of ascertaining motive). Relatedly, courts question the utility of inquiring into legislative motive. In *O'Brien*, the Supreme Court emphasized the futility of evaluating legislative motive, noting that it makes little sense to void a law that could “be reenacted in its exact form if the same or another legislator made a ‘wiser’ speech about it.” 391 U.S. at 384; *see also* *Grossbaum*, 100 F.3d at 1293 (“Just as we would never uphold a law with unconstitutional effect because its enactors were benignly motivated, an illicit intent behind an otherwise valid government action indicates nothing more than a failed attempt to violate the Constitution.”).

Nevertheless, the Supreme Court recognized in *O'Brien* that there is “a very limited and well-defined class of cases where the very nature of the constitutional question requires an inquiry into legislative purpose.” *O'Brien*, 391 U.S. at 383 n.30. For example, courts inquire into the motives of government decisionmakers in deciding both claims of discrimination against a suspect class in violation of the Equal Protection Clause, *see, e.g., Miller v. Johnson*, 515 U.S. 900, 916, 115 S. Ct. 2475, 132 L. Ed. 2d 762 (1995) (noting that to succeed on an Equal Protection challenge to a redistricting plan, the burden is on the plaintiff to prove that “race was the predominant factor motivating the legislature’s decision to place a significant number of voters within or without a particular district”); *Hunter v. Underwood*, 471 U.S. 222, 233, 105 S. Ct. 1916,

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85 L. Ed. 2d 222 (1985) (invalidating on its face a law disenfranchising felons, because “its original enactment was motivated by a desire to discriminate against blacks on account of race and the section continues to this day to have that effect”); *United States v. Yonkers Bd. of Educ.*, 837 F.2d 1181, 1216-17 (2d Cir. 1987) (explaining that Equal Protection claim alleging racial discrimination require a reviewing court to consider whether government action was motivated by race), and claims of discrimination against religion or religious conduct in violation of the Free Exercise Clause, *see, e.g., Iqbal*, 556 U.S. at 676 (“Where the claim is invidious discrimination in contravention of the First . . . Amendment[], . . . the plaintiff must plead and prove that the defendant acted with discriminatory purpose.”); *Lukumi*, 508 U.S. at 533 (explaining that to substantiate a free exercise claim, the plaintiff must show that “the object or purpose of a law is the suppression of religion or religious conduct”); *id.* at 540 (considering events preceding enactment of an ordinance to determine whether it was motivated by religious animus).<sup>18</sup>

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18. Defendants contend that the above-mentioned principles, while applicable in the context of as-applied challenges, do not apply in the context of facial challenges. Specifically, Defendants argue that examining the actual motive behind the ordinances’ enactment is at odds with the standard by which facial challenges are judged, namely whether the plaintiff has “establish[ed] that no set of circumstances exists under which the [statute] would be valid.” *Diaz v. Paterson*, 547 F.3d 88, 101 (2d Cir. 2008) (second alteration in original) (quoting *Cranley*, 318 F.3d at 110); *see also Bach v. Pataki*, 408 F.3d 75, 89 (2d Cir. 2005) (citing *United States v. Salerno*, 481 U.S. 739, 745, 107 S. Ct. 2095, 95 L. Ed. 2d 697 (1987)). There is a debate among the Justices of the Supreme Court as to the validity of the no-set-of-circumstances standard, which was originally announced by the Supreme Court in *Salerno*, 481 U.S.

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at 745. See *Wash. State Grange*, 552 U.S. at 449 (acknowledging that “some Members of the Court have criticized the *Salerno* formulation”); *City of Chicago v. Morales*, 527 U.S. 41, 55 n.22, 119 S. Ct. 1849, 144 L. Ed. 2d 67 (1999) (Opinion of Stevens, J.) (“To the extent we have consistently articulated a clear standard for facial challenges, it is not the *Salerno* formulation, which has never been the decisive factor in any decision of this Court, including *Salerno* itself . . . .”); *id.* at 77-83 (Scalia, J., dissenting) (arguing in favor of the *Salerno* standard). Nevertheless, in the Second Circuit, the *Salerno* standard remains the basis for evaluating most facial constitutional challenges. See *Ruston v. Town Bd. for Skaneateles*, 610 F.3d 55, 58 n.2 (2d Cir. 2010) (applying *Salerno* to facial challenge to zoning law); *Diaz*, 547 F.3d at 101 (applying *Salerno* standard to facial Due Process challenge). The *Salerno* standard is inapplicable, however, to certain claims, including certain Free Speech and Free Exercise claims. See *Virginia v. Hicks*, 539 U.S. 113, 118, 123 S. Ct. 2191, 156 L. Ed. 2d 148 (2003) (“The First Amendment doctrine of overbreadth is an exception to our normal rule regarding the standards for facial challenges.”).

Under the *Salerno* standard, Defendants argue, regardless of the actual bases for the ordinances’ enactment, the ordinances may be upheld if they are justified by some conceivable constitutional basis. (Defs.’ Mem. 19.) There is some support in the Second Circuit for the broad outlines of Defendants’ argument. In *Giusto v. INS*, 9 F.3d 8 (2d Cir. 1993) (per curiam), the Second Circuit rejected a facial Equal Protection challenge to a congressional amendment to the Immigration and Nationality Act, which distinguished on its face “between aliens who have served at least five years in prison and those who have served shorter terms.” *Id.* at 9. The Second Circuit held that the legislative enactment would “not be set aside as the denial of equal protection of the laws if any state of facts reasonably *may be conceived* to justify it.” *Id.* at 10 (emphasis added) (internal quotation marks omitted). Similarly, in *Ecogen*, the court explained that a “defendants’ subjective motivation in enacting [an ordinance] is irrelevant” to a facial Equal Protection claim, because the “*existence* of a conceivably rational basis” is

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all that is required to survive a facial challenge. 438 F. Supp. 2d at 157-58 (emphasis in original); accord *S. Lyme Prop. Owners Ass'n*, 539 F. Supp. 2d at 540-41 (rejecting argument that plaintiffs could establish facial Equal Protection claim by showing improper motive).

Nonetheless, these cases are distinguishable from the instant case, because none involved allegations of discriminatory animus grounded in race or religion. See *Giusto*, 9 F.3d at 9-10 (reviewing governmental classification based on number of years in prison); *S. Lyme Prop. Owners Ass'n*, 539 F. Supp. 2d at 541 (reviewing Equal Protection class of one claim); *Ecogen*, 438 F. Supp. 2d at 157-58 (reviewing a claim based on defendant's aesthetic hostility toward the plaintiffs' project). Where the alleged motivation behind the enactment of a law is discriminatory animus based on race or religion, courts may look beyond the law's facially neutral text and conceivably rational basis to determine whether the law is on its face invalid. See *Lukumi*, 508 U.S. at 534 (“[An] action that targets religious conduct for distinctive treatment cannot be shielded by mere compliance with the requirement of facial neutrality.”); *Hunter*, 471 U.S. at 231-32 (invalidating law on its face notwithstanding the law's conceivably legitimate basis, because it was enacted with the purpose of discriminating based on race and had that effect). This is not inconsistent with the general standard of *Salerno*, which demands that “no set of circumstances exists under which the Act would be valid,” because a law that violates the Equal Protection Clause or the Free Exercise Clause will be invalid when applied under any conceivable circumstance, even if it can be justified by a conceivably benign motive. See *Hunter*, 471 U.S. at 231-33 (invalidating law on its face on Equal Protection grounds based on its discriminatory purpose and effect, and noting that even if the same law could be validly enacted under the Tenth Amendment, “the enactment of [the law] violated the Fourteenth Amendment, and the Tenth Amendment cannot save legislation prohibited by the subsequently enacted Fourteenth Amendment”).

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Motive also can be relevant to Free Speech claims. For example, where government restricts speech based on its content, a reviewing court may consider the government's motive to determine whether the government has impermissibly restricted speech merely because public officials disapprove the speakers' views. See *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 812, 105 S. Ct. 3439, 87 L. Ed. 2d 567 (1985) (noting that government may not restrict speech "to suppress a particular point of view"); *S.C. Educ. Ass'n v. Campbell*, 883 F.2d 1251, 1259 n.8 (4th Cir. 1989) (explaining that legislative motive "may be relevant when the challenged legislation has on its face some content-based, *direct* inhibiting effect on freedom of speech or some other expressive activity or enterprise" (emphasis in original)). Nevertheless, while motive is a factor that may be considered, a court may not find a First Amendment violation solely on the basis that a government decisionmaker acted with an improper motive. See *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 47-48, 106 S. Ct. 925, 89 L. Ed. 2d 29 (1986) (explaining that *O'Brien* had rejected the view that improper motive of stifling expression, without more, invalidates a law or government action); *O'Brien*, 391 U.S. at 383 (declining to strike down a law on First Amendment grounds solely on the basis of illicit motive); *M.J.M. Exhibitors, Inc. v. Stern (In re G. & A. Books, Inc.)*, 770 F.2d 288, 297 (2d Cir. 1985) ("[S]ubjective motivation . . . to suppress [speech] does not [by itself] render [the challenged action] unconstitutional, provided [it] is justified by substantial government interests independent of such motive.").

*Appendix D***2. Equal Protection Claims**

The Equal Protection Clause “is essentially a direction that all persons similarly situated should be treated alike.” *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 439, 105 S. Ct. 3249, 87 L. Ed. 2d 313 (1985); *see also Harlen Assocs. v. Inc. Village of Mineola*, 273 F.3d 494, 499 (2d Cir. 2001) (same).<sup>19</sup> “To prove an equal protection violation, claimants must prove purposeful discrimination” by a government actor, *Giano v. Senkowski*, 54 F.3d 1050, 1057 (2d Cir. 1995) (citing *McCleskey v. Kemp*, 481 U.S. 279, 292, 107 S. Ct. 1756, 95 L. Ed. 2d 262 (1987)), directed at a suspect class, *id.* (citing *Kadrmas v. Dickinson Pub. Sch.*, 487 U.S. 450, 457-58, 108 S. Ct. 2481, 101 L. Ed. 2d 399 (1988)), such as a racial group, *Pyke v. Cuomo*, 567 F.3d 74, 77 (2d Cir. 2009) (per curiam), or a religion, *see Pedersen v. Office of Personnel Mgmt.*, No. 10-CV-1750, 881 F. Supp. 2d 294, 2012 U.S. Dist. LEXIS 106713, 2012 WL 3113883, at \*12 (D. Conn. July 31, 2012) (“[C]ourts apply the most searching constitutional scrutiny to those laws that burden a fundamental right or target a suspect

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19. Because the equal protection provisions of the New York Constitution are interpreted consistently with the corollary provisions in the Federal Constitution, *see People v. Kern*, 75 N.Y.2d 638, 554 N.E.2d 1235, 1240-41, 555 N.Y.S.2d 647 (N.Y. 1990) (holding that the guarantee of Equal Protection under the New York Constitution is co-extensive with that of the Federal Constitution); *People v. McCray*, 57 N.Y.2d 542, 443 N.E.2d 915, 918, 457 N.Y.S.2d 441 (N.Y. 1982) (“[O]ur State constitutional equal protection clause is no more broad in coverage than its Federal prototype.” (citation omitted)), the Court addresses both challenges here.

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class, such as those based on race, national origin, sex or religion.” (alteration in original) (internal quotation marks omitted)). If the claimants can show purposeful discrimination directed at a suspect class, the government action is “subject to strict judicial scrutiny,” and may be upheld only if the government action “further[s] a compelling state interest and [is] narrowly tailored to accomplish the purpose.” *Pyke*, 567 F.3d at 77.

The Second Circuit has identified “three common methods” of “establish[ing] a violation of equal protection by intentional discrimination”: (1) identifying “a law that expressly classifies on the basis of race,” (2) identifying “a facially neutral law or policy that has been applied in an unlawfully discriminatory manner,” or (3) identifying “a facially neutral [law or] policy that has an adverse effect and that was motivated by discriminatory animus.” *Id.* (internal quotation marks omitted). Here, Plaintiffs cannot rely on the first method of proving discrimination, because the challenged ordinances are facially neutral with respect to religion (and race). Nor can Plaintiffs rely on the second method, because Plaintiffs’ as-applied challenges to the ordinances are not yet ripe for reasons already explained. Thus, to establish a claim for discrimination in violation of the Equal Protection Clause, Plaintiffs rely on the third method by claiming that the challenged ordinances, although facially neutral, “ha[ve] an adverse effect and . . . [were] motivated by discriminatory animus.” *Id.* (internal quotation marks omitted); *see also Washington v. Davis*, 426 U.S. 229, 240-41, 96 S. Ct. 2040, 48 L. Ed. 2d 597 (1976) (explaining that a facially neutral law or policy violates the Equal Protection Clause if it has both a discriminatory purpose and discriminatory effect).

*Appendix D***a. Discriminatory Purpose**

Plaintiffs claim that the challenged ordinances were enacted with a discriminatory purpose. “Discriminatory purpose ‘implies that the decisionmaker . . . selected or reaffirmed a particular course of action at least in part “because of,” not merely “in spite of,” its adverse effects upon an identifiable group.’” *Hayden v. County of Nassau*, 180 F.3d 42, 50 (2d Cir. 1999) (alteration in original) (emphasis omitted) (quoting *Personnel Adm’r v. Feeney*, 442 U.S. 256, 279, 99 S. Ct. 2282, 60 L. Ed. 2d 870 (1979)). “Discriminatory intent or purpose typically refers to those instances when a government actor seeks to disadvantage or negatively impact a group of persons.” *Id.* “Determining whether invidious discriminatory purpose was a motivating factor demands a sensitive inquiry into such circumstantial and direct evidence of intent as may be available.” *Arlington Heights*, 429 U.S. at 266 (quoting *Washington*, 426 U.S. at 242).

Here, Plaintiffs’ allegations are sufficient to allege discriminatory purpose. First, Plaintiffs pled that the timing of the enactment of one of the challenged ordinances demonstrates Defendants’ discriminatory animus. Indeed, Plaintiffs allege that one of the three challenged ordinances, Section 130-4 (defining educational institutions and dormitories), was enacted within months of the Congregation’s purchase of the Subject Property, (SAC ¶¶ 156-57). *See Brady v. Town of Colchester*, 863 F.2d 205, 216 (2d Cir. 1988) (noting that plaintiffs had established triable Equal Protection case based on government conduct that post-dated plaintiffs entering into a lease to use certain property); *Yonkers*, 837 F.2d at



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1221 (noting that discriminatory intent may be inferred from, among other facts, “the specific sequence of events leading up to the challenged decision” (brackets omitted) (quoting *Arlington Heights*, 429 U.S. at 267)).

Second, Plaintiffs’ allegations of racially charged public comments preceding the enactment of Sections 130-10 (limiting the size of dormitories pursuant to an educational use) and 126 (establishing wetland protections) suggests the existence of discriminatory motivation. For example, in response to racially charged public comments, the Village’s then-Mayor allegedly alluded to the discriminatory purpose behind the enactment of these ordinances by stating that:

We sitting at this table have limitations that are placed on us as to what we can say, and what we can’t say, because our attorney tells us what we can say and what we can’t say. I can’t say what I feel—I can’t—if I agree with you, I don’t agree with you, I don’t have that luxury of being able to say that here. All that I can say is that every member of this board works very, very hard to do what is best for this community. You have your issues. Don’t assume because no one has gotten up and said, wow, I agree with you, oh boy; don’t assume that because we didn’t do that[,] that we don’t agree.

(SAC ¶ 166.) And before the challenged ordinances were enacted, officials in the Village made numerous statements that raise an inference of discriminatory animus:

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- Defendants Yagel and Louie “expressly warned a civic association to be careful not to allow discriminatory statements to slip out,” (*id.* ¶ 183);
- Defendant Sanderson stated publicly that “[t]he single most important issue facing the village at this time is the as yet un-proposed, but leaked, [r]abbinical [c]ollege development,” that the Village should “maintain[] its cultural and religious diversity” and that “the [r]abbinical [c]ollege could not only ‘change the village,’ but could change ‘the makeup of the village,’” (*id.* ¶¶ 179-80 (fourth alteration in original)); and
- Defendants Yagel, Louie, and Sanderson were elected to Village Office based on campaign promises to “fight this plan” and “stand up to this threat,” ostensibly referring to the Congregation’s plan to build the rabbinical college, (*id.* ¶ 177 (internal quotation marks omitted)).

At this stage in the litigation, these allegations are sufficient to establish Plaintiffs’ claim that the challenged ordinances were enacted with the purpose of discriminating against members of Orthodox and Hasidic Jewish communities. *See LeBlanc-Sternberg*, 67 F.3d at 425 (noting that a “plaintiff can establish a *prima facie* case by showing that animus against the protected group was a significant factor in the position taken by the municipal decision-makers themselves or by those to whom the decision-makers were knowingly responsive” (internal quotation marks omitted)); *Yonkers*,

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837 F.2d at 1221 (noting that discriminatory intent may be established by “contemporary statements by members of the decisionmaking body” (quoting *Arlington Heights*, 429 U.S. at 267) (internal quotation marks omitted)).

**b. Discriminatory Effect**

In addition to plausibly alleging discriminatory intent, Plaintiffs must allege that the challenged ordinances have had an adverse effect to make out their Equal Protection claim. *See Brown v. City of Oneonta*, 221 F.3d 329, 337 (2d Cir. 2000) (noting that a plaintiff could “allege that a facially neutral statute or policy has an adverse effect and that it was motivated by discriminatory animus”). However, in seeking to satisfy this burden, Plaintiffs are not “obligated to show a better treated, similarly situated group of individuals.” *Pyke v. Cuomo*, 258 F.3d 107, 110 (2d Cir. 2001); *see also id.* (holding that a plaintiff who “alleges that a facially neutral statute or policy with an adverse effect was motivated by discriminatory animus[] is not obligated to show a better treated, similarly situated group of individuals of a different race in order to establish a claim of denial of equal protection”); *Doe v. Village of Mamaroneck*, 462 F. Supp. 2d 520, 546 (S.D.N.Y. 2006) (“The *Pyke* analysis implicitly recognizes that a government that sets out to discriminate intentionally in its enforcement of some neutral law or policy will rarely if ever fail to achieve its purpose.”).

Here, Plaintiffs’ core claim is that the challenged ordinances have had the foreseeable and adverse effect of prohibiting Plaintiffs from building a rabbinical college

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in the Village. (SAC ¶ 111.) For example, Plaintiffs allege that over the years, the Village has adopted a series of legal impediments to prevent “Jewish individuals and institutions from developing the [S]ubject [P]roperty and other nearby properties, while permitting other development within the Village, including a large Hindu temple.” (*Id.* ¶ 120.) According to Plaintiffs, as their plans for the Subject Property evolved, the Village’s zoning ordinances also evolved to box out the possibility of a rabbinical college being built. For example, Plaintiffs allege that the Village adopted the dormitory ordinance (Section 130-4) precisely to “prevent Jewish rabbinical scholars, who generally are married with children, from obtaining housing in Pomona.” (*Id.* ¶ 159; *id.* ¶ 164 (“[T]his ‘Dormitory’ legislation was also designed and enacted specifically to prevent the Hasidic Jewish community from residing and obtaining housing within the Village.”).) According to Plaintiffs, this type of zoning restriction has resulted in a “disparate impact” on them by limiting their opportunity “to obtain housing.” (*Id.* ¶ 246.) While this ordinance might conceivably be applied to other dormitories, Plaintiffs’ claim is that no other educational institutions would require a significant number of dormitories to accommodate families, thus proving, in Plaintiffs’ view, Defendants’ discriminatory effect.

Similarly, Plaintiffs allege that the zoning ordinance that requires educational institutions be “accredited by the New York State Education Department or similar recognized accrediting agency” has the intended effect of barring only a rabbinical college, because there is no

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“recognized accrediting agency” for such an institution. (*Id.* ¶ 225.) At the same time, this provision likely would not affect other educational institutions, which presumably are capable of receiving state accreditation. The result of this ordinance, according to Plaintiffs, is thus to bar only their efforts to build a rabbinical college. The same is true of the wetlands protection ordinance (Section 126), because, according to Plaintiffs, the exemptions in this provision have the effect of singling out the Plaintiffs’ property and preventing Plaintiffs from building the structures needed to support a rabbinical college. (*Id.* ¶¶ 169-171.)

While Defendants may dispute the assertion that Plaintiffs (or those in their subject class) have been adversely affected by the challenged zoning ordinances, and may otherwise argue that these restrictions serve compelling interests or are otherwise lawful, this is not the time to test those defenses. *Bikur Cholim*, 664 F. Supp. 2d at 276-77 (noting that whether zoning regulations were neutral was fact question not properly resolved at motion to dismiss stage). Instead, taking Plaintiffs’ allegations as true for purposes of deciding this motion, the Court concludes that Plaintiffs have substantiated their facial Equal Protection claim.

### **3. Free Exercise Claims**

Plaintiffs argue that they have stated a claim for violation of their right to Free Exercise of religion, because they have alleged that the challenged ordinances were enacted with the purpose of discriminating against Plaintiffs’ religious exercise. The First Amendment to

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the Federal Constitution, applicable to the states through the Fourteenth Amendment, “prohibits the enactment of any law ‘prohibiting the free exercise’ of religion.” *Bronx Household of Faith v. Cmty. Sch. Dist. No. 10*, 127 F.3d 207, 215 (2d Cir. 1997).<sup>20</sup> “At a minimum, the protections

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20. The free exercise provision of the New York Constitution, though not identical to the Free Exercise Clause of the Federal Constitution, likewise guarantees the right to free exercise of religion: “The free exercise and enjoyment of religious profession and worship, without discrimination or preference, shall forever be allowed in this state to all humankind . . .” N.Y. Const. Art. I, § 3. The New York Court of Appeals has not decided whether the New York constitutional free exercise protection is to be interpreted coextensively with the Federal Free Exercise Clause. *See New Creation Fellowship of Buffalo v. Town of Cheektowaga*, No. 99-CV-0460, 2004 U.S. Dist. LEXIS 25431, 2004 WL 1498190, at \*79 (W.D.N.Y. July 2, 2004) (“[T]he issue of identity between federal and New York State constitutional protection [is] an open one.”).

However, the New York Court of Appeals has not adopted the rule of the United States Supreme Court (in *Employment Division v. Smith*), that “the right of free exercise does not relieve an individual of the obligation to comply with a valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes).” 494 U.S. 872, 879, 110 S. Ct. 1595, 108 L. Ed. 2d 876 (1990) (internal quotation marks omitted). Instead, the New York Court of Appeals has held, in analyzing a state free exercise claim, that “when the State imposes an incidental burden on the right to free exercise of religion,” the courts are to consider the “interest advanced by the legislation that imposes the burden,” and then “the respective interests must be balanced to determine whether the incidental burdening is justified.” *Catholic Charities of the Diocese of Albany v. Serio*, 7 N.Y.3d 510, 859 N.E.2d 459, 466,

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of the Free Exercise Clause pertain if the law at issue discriminates against some or all religious beliefs or regulates or prohibits conduct because it is undertaken for religious reasons.” *Lukumi*, 508 U.S. at 532. Indeed, as the Supreme Court has observed, it was “historical instances of religious persecution and intolerance that gave concern to those who drafted the Free Exercise Clause.” *Bowen v. Roy*, 476 U.S. 693, 703, 106 S. Ct. 2147, 90 L. Ed. 2d 735 (1986) (Opinion of Burger, C.J.); *see also McGowan v. Maryland*, 366 U.S. 420, 464, 81 S. Ct. 1101, 6 L. Ed. 2d 393 (1961) (Opinion of Frankfurter, J.) (“In assuring the free exercise of religion, the Framers of the First Amendment were sensitive to the then recent history of those persecutions and impositions of civil disability with which sectarian majorities in virtually all of the Colonies had visited deviation in the matter of conscience.”); *Douglas v. City of Jeannette*, 319 U.S. 157, 179, 63 S. Ct. 877, 87 L. Ed. 1324 (1943) (Jackson, J., concurring in result) (“The First Amendment grew out of an experience which taught that society cannot trust the conscience of a majority to keep its religious zeal within the limits that a free society can tolerate.”).

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825 N.Y.S.2d 653 (N.Y. 2006) (internal quotation marks omitted). The difference in the state and federal tests is immaterial here, because the Court finds that Plaintiffs have stated a free exercise clause claim under the First Amendment. *See Fortress Bible Church v. Feiner*, 694 F.3d 208, 221 n.9 (2d Cir. 2012) (finding that municipality’s interference with a church’s land project violated Federal and state Free Exercise Clauses, but noting difference in tests in Federal and New York courts).

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It is not a violation of the Free Exercise Clause, however, to enforce a generally applicable rule, policy, or statute that incidentally burdens a religious practice, as long as the government can “demonstrate a rational basis for [the] enforcement” of the rule, policy, or statute, and the burden is only an incidental effect, rather than the object, of the law. *Fifth Ave. Presbyterian Church v. City of New York*, 293 F.3d 570, 574 (2d Cir. 2002); *see also Smith*, 494 U.S. at 878-79 (explaining that enforcement of a neutral law of general applicability does not offend the Free Exercise Clause). Thus, to state a free exercise claim, a plaintiff generally must establish that “the object of [the challenged] law is to infringe upon or restrict practices because of their religious motivation,” or that the law’s “purpose . . . is the suppression of religion or religious conduct.” *Lukumi*, 508 U.S. at 533. Such a law is subject to strict scrutiny review, and it “will survive strict scrutiny only in rare cases.” *Id.* at 546.

“To determine the object of a law, [the Court] must begin with its text, for the minimum requirement of neutrality is that a law not discriminate on its face.” *Id.* at 533. But, even if neutral on its face, a law may still run afoul of the Free Exercise Clause if it “targets religious conduct for distinctive treatment.” *Id.* at 534; *see also id.* (“Facial neutrality is not determinative”). As the Supreme Court has cautioned, the Free Exercise Clause “forbids subtle departures from neutrality,” *Gillette v. United States*, 401 U.S. 437, 452, 91 S. Ct. 828, 28 L. Ed. 2d 168 (1971), and “covert suppression of particular religious beliefs,” *Bowen*, 476 U.S. at 703 (Opinion of Burger, C.J.). *See also Lukumi*, 508 U.S. at 534 (“Official action that



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targets religious conduct for distinctive treatment cannot be shielded by mere compliance with the requirement of facial neutrality. The Free Exercise Clause protects against governmental hostility which is masked, as well as overt.”). In this regard, the courts may find “guidance” in Equal Protection jurisprudence, which, among other things, requires consideration of direct and circumstantial evidence regarding the objects of those who enacted the law in question. *Lukumi*, 508 U.S. at 540; *see also* Note, *Coded Codes: Discriminatory Intent, Modern Political Modernization, and Local Immigration Ordinances*, 85 N.Y.U. L. Rev. 2099, 2102 (2010) (discussing the use of “[q]uality of life” zoning ordinances that can serve as “‘coded codes’—facially neutral ordinances enacted to address immigration concerns and target specific communities”).

Here, Plaintiffs have plausibly alleged that the challenged ordinances were enacted to “infringe upon or restrict practices because of their religious motivation.” *Lukumi*, 508 U.S. at 533. For example, as noted above, Plaintiffs claim that the enactment of Section 130-4 (defining educational institutions and dormitories) occurred within months of the Congregation’s purchase of the Subject Property, (SAC ¶¶ 156-57), suggesting that the object of the ordinance was the prohibition of a rabbinical college. Until rumors of the rabbinical college surfaced, Plaintiffs contend, the Village exhibited no interest in imposing the accreditation requirement, which is a state requirement, after all. Thus, argue Plaintiffs, Defendants’ claims about the interests supposedly protected by Section 130-4 not only are irrational (or at least not compelling),

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but in fact are evidence of the pretextual means used by Defendants to single out Plaintiffs from using their property based on the exercise of their religion. *See Cottonwood Christian Ctr. v. Cypress Redevelopment Agency*, 218 F. Supp. 2d 1203, 1225 (C.D. Cal. 2002) (“At first blush, the City’s concern about blighting rings hollow. Why had the City, so complacent before Cottonwood purchased the Cottonwood Property, suddenly burst into action? . . . [T]he activity suggests that the City was simply trying to keep Cottonwood out of the City, or at least from the use of its own land.”).

Moreover, Plaintiffs allege that public comments preceding the enactment of the other two challenged ordinances, Sections 130-10 (limiting the size of dormitories pursuant to an educational use) and 126 (establishing rules for protections of wetlands), strongly suggest animosity toward the Orthodox and Hasidic Jewish sects of the Jewish religion. (SAC ¶ 166.) As discussed above, the then-Mayor’s response to these public comments tacitly recognized that discriminatory motives could be discerned in connection with enactment of the challenged ordinances. (*Id.*) Similarly, as noted above, Plaintiffs allege that members of the Village’s Board of Trustees, Defendants Yagel and Louie, “expressly warned a civic association to be careful not to allow discriminatory statements to slip out,” (*id.* ¶ 183), and the Village’s mayor, Defendant Sanderson, stated publicly before the enactment of these ordinances that “[t]he single most important issue facing the village at this time is the as yet un-proposed, but leaked, [r]abbinical [c]ollege development,” that the Village should “maintain[] its cultural and religious diversity,” and that “the [r]abbinical [c]ollege could not only ‘change

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the village,’ but could change ‘the makeup of the village,’” (*id.* ¶¶ 179-80 (fourth alteration in original)).

While it is of course debatable that the above-mentioned animosity to the rabbinical college stemmed from “legitimate concern[s] . . . for reasons quite apart from discrimination,” *Lukumi*, 508 U.S. at 535, at this early stage in the litigation, Plaintiffs’ allegations are sufficient to suggest an improper purpose of discrimination against Plaintiffs’ religious exercise, *cf. id.* at 540 (“Relevant evidence [of improper purpose] includes, among other things, the historical background of the decision under challenge, the specific series of events leading to the enactment or official policy in question, and the legislative or administrative history, including contemporaneous statements made by members of the decisionmaking body.”).

Plaintiffs’ claim is fortified when the separate zoning ordinances are viewed together, rather than in isolation, as the Supreme Court has said is appropriate in this context. *See id.* at 539-40 (noting that four ordinances at issue could “be treated as a group for neutrality purposes”). Thus, even if any of these ordinances might survive constitutional scrutiny, based solely on its apparent neutrality, their cumulative effect on Plaintiffs is relevant to the analysis. Indeed, each ordinance, while facially neutral, has the effect of limiting Plaintiffs’ use of the Subject Property. For example, as noted, Plaintiffs claim that Defendants barred the construction of non-accredited educational institutions and barred dormitories with separate cooking facilities, precisely because they expect that a rabbinical

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college cannot be accredited, and because many who would study at a rabbinical college (and many more than might study at other colleges) would be adults with families in need of kitchen facilities. (SAC ¶¶ 104-106, 107-09, 111, 156-59, and 162-64.) And, Plaintiffs allege that the wetlands ordinance, while facially innocuous, can plausibly be viewed as specifically targeting Plaintiffs, given that the exceptions provided in that ordinance effectively will bar Plaintiffs from using the Subject Property to build a rabbinical college, without affecting many, if any, other property owners in Pomona. (*Id.* ¶¶ 169, 172, 173, and 174.)

To be sure, these ordinances on their face do not distinguish between religious and secular facilities (let alone between Orthodox/Hasidic and non-Orthodox/Hasidic facilities)—for example, both religious and secular educational institutions require state accreditation and are barred from having dormitories with separate kitchens. But, according to Plaintiffs, these other institutions are merely theoretical and consequently could not have been the real or even possible object of the ordinances. Thus, the only effect of these ordinances, and the only effect allegedly intended by Defendants, was to prevent Plaintiffs from building a rabbinical college. In particular, Plaintiffs claim that the Village adopted these ordinances to regulate characteristics unique to an Orthodox/Hasidic rabbinical college, in effect imposing a “religious gerrymander.” *Lukumi*, 508 U.S. at 535 (“[T]he ordinances when considered together disclose an object remote from these legitimate concerns. The design of these laws accomplishes instead a ‘religious gerrymander,’ an impermissible attempt to target petitioners and their

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religious practices.” (citation omitted) (quoting *Walz v. Tax Comm’n of New York City*, 397 U.S. 664, 696, 90 S. Ct. 1409, 25 L. Ed. 2d 697 (1970) (Harlan, J., concurring)). According to Plaintiffs, the alleged statements by some of the Defendants demonstrate that they knew the Village could not adopt a zoning ordinance expressly prohibiting the construction of a rabbinical college. So, Plaintiffs claim, as an alternative, Defendants have tried subtly to achieve the same result through the cumulative impact of these facially neutral ordinances, which Defendants adopted only after Plaintiffs purchased the Subject Property. Cf. *Primera Iglesia Bautista Hispana of Boca Raton, Inc. v. Broward County*, 450 F.3d 1295, 1310 (11th Cir. 2006) (noting that “all of the zoning ordinances at issue were enacted before [plaintiff] purchased the Property, further undermining any suggestion that the zoning code ‘target[ed] [plaintiff’s] lesser known religious sect’” (second alteration in original) (internal quotation marks omitted)).

The Court recognizes fully that Defendants dispute many of Plaintiffs’ factual assertions regarding the rationale for adopting these ordinances, and that they may tender evidence explaining the compelling (or rational) health, safety, and other public interest reasons for them. But these are fact-driven questions that will have to be addressed at another time. See *Roman Catholic Diocese of Rockville Ctr.*, 2012 U.S. Dist. LEXIS 56694, 2012 WL 1392365, at \*7 (noting that “an analysis of whether the government has shown a compelling government interest or the use of least restrictive means is more appropriately addressed in connection with summary judgment”). And,

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even if Plaintiffs ultimately prevail in striking down these ordinances on their face, this outcome would not necessarily entitle Plaintiffs to build their rabbinical college. Indeed, the Free Exercise Clause by itself does not give religious institutions the constitutional right to build whatever structures they might like, wherever they might wish. *See Fortress Bible*, 694 F.3d at 221 (collecting authority for proposition that “religious institutions do not have a constitutional right to build wherever they like”). Put simply: The Court is not here concluding that the ordinances do, in fact, violate the Free Exercise Clause, let alone that Plaintiffs should prevail in their quest to build a rabbinical college on the Subject Property. Instead, the Court concludes merely that Plaintiffs have adequately stated a plausible claim that the challenged ordinances facially violate their free exercise rights.

#### 4. Free Speech and Free Association Claims

Plaintiffs also claim that the challenged ordinances facially violate the Free Speech and Free Association Clauses of the First Amendment.<sup>21</sup> For example, Plaintiffs

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21. The corollary provisions to the First Amendment’s Free Speech and Free Association Clauses in the New York Constitution are interpreted consistently with the Federal Constitution. *See Colandrea v. Town of Orangetown*, 490 F. Supp. 2d 342, 351-52 (S.D.N.Y. 2007) (explaining that “[w]hile the New York Constitution generally affords greater protection than the federal constitution with regard to speech,” the federal and New York constitutional provisions protecting free speech and free association from retaliation are governed by the same principles, and dismissing state Free Speech claims on the same basis as federal claims

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argue that the challenged ordinances prevent Plaintiffs from engaging in “expressive activity” and “expressive and intimate association” by prohibiting the construction and operation of a rabbinical college on the Subject Property.<sup>22</sup> (Pls.’ Mem. 38-39.) Defendants counter that Plaintiffs’ planned rabbinical college, even if barred by the challenged ordinances, does not involve speech, (Defs.’ Mem. 33-34), and that nothing in the ordinances prevents Plaintiffs from associating or worshipping together, let alone associating with or raising their families, (*id.* at 34).

There are many layers to Plaintiffs’ Free Speech claim, very few of which were addressed by the Parties in the two pages they collectively included in their memoranda of law. For example, the Parties have devoted little to the critical questions of: (1) what “expressive conduct” Plaintiffs are engaging in, or might engage in, through the construction of a rabbinical college; (2) how the challenged ordinances

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(alteration in original)). Therefore, the Court addresses both Plaintiffs’ state and federal challenges here.

22. With respect to their Free Speech claim, Plaintiffs assert that Defendants’ actions have excluded Plaintiffs’ protected expressive activity “completely from the Village’s jurisdiction,” that Defendants have treated religious expressive activity on less than equal terms with nonreligious expressive activity, that Defendants have regulated expression “on the basis of the character of the speaker,” and that Defendants’ regulation of speech has not been “content[]neutral.” (SAC ¶ 253.)

With respect to their Free Association claim, Plaintiffs allege that Defendants have intruded “upon the Plaintiffs’ right to marriage, childbirth, the raising and education of children,” and that Defendants have intruded “upon the Plaintiffs’ right to associate for purposes of protected expressive activity.” (*Id.* ¶ 257.)

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regulate such expressive conduct; and (3) what standard of review should be applied to these regulations.

The First Amendment provides that “Congress shall make no law . . . abridging the freedom of speech.” U.S. Const. amend. I. Constitutionally protected speech includes, among other things, certain symbolic speech and expressive conduct. See *Rumsfeld v. Forum for Academic & Institutional Rights, Inc.*, 547 U.S. 47, 66-69, 126 S. Ct. 1297, 164 L. Ed. 2d 156 (2006); *Texas v. Johnson*, 491 U.S. 397, 407, 109 S. Ct. 2533, 105 L. Ed. 2d 342 (1989); *Spence v. Washington*, 418 U.S. 405, 409-10, 94 S. Ct. 2727, 41 L. Ed. 2d 842 (1974). “[T]he scope of protection for speech generally depends on whether the restriction is imposed because of the content of the speech.” *Universal City Studios, Inc. v. Corley*, 273 F.3d 429, 450 (2d Cir. 2001). Thus, a restriction on speech should be viewed as content based if the claimed reason for the restriction is itself content based. See *Boos v. Barry*, 485 U.S. 312, 320-21, 108 S. Ct. 1157, 99 L. Ed. 2d 333 (1988) (holding that regulations “that focus on the direct impact of speech on its audience” are viewed as content-based restrictions); *Renton*, 475 U.S. at 48 (holding that regulation justified by the secondary effects of adult theatres have on the surrounding community was content neutral). In other words, “[g]overnment regulation of expressive activity is content neutral so long as it is ‘justified without reference to the content of the regulated speech.’” *Ward v. Rock Against Racism*, 491 U.S. 781, 791, 109 S. Ct. 2746, 105 L. Ed. 2d 661 (1989) (emphasis in original) (quoting *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 293, 104 S. Ct. 3065, 82 L. Ed. 2d 221 (1984)). Content-neutral regulations may limit the time, place, or manner of



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protected expression, even in a public forum. *See Costello v. City of Burlington*, 632 F.3d 41, 45 (2d Cir. 2011).

The question of whether a regulation is content based is critical, because it informs the level of scrutiny the regulation should receive. Content-based restrictions are viewed as presumptively invalid and are subject to strict scrutiny. *See United States v. Playboy Entm't Grp., Inc.*, 529 U.S. 803, 813, 120 S. Ct. 1878, 146 L. Ed. 2d 865 (2000); *R.A.V. v. City of St. Paul*, 505 U.S. 377, 382, 112 S. Ct. 2538, 120 L. Ed. 2d 305 (1992); *accord Mastrovincenzo v. City of New York*, 435 F.3d 78, 98 (2d Cir. 2006). Under the strict scrutiny test, a content-based regulation may be upheld only if it serves a “compelling” government interest, “is *necessary* to serve the asserted [compelling] interest,” *R.A.V.*, 505 U.S. at 395 (alteration and emphasis in original) (internal quotation marks omitted), is precisely tailored to serve that interest, and is the least restrictive means available for that purpose. *See Ashcroft v. Am. Civil Liberties Union*, 542 U.S. 656, 666, 124 S. Ct. 2783, 159 L. Ed. 2d 690 (2004); *Boos*, 485 U.S. at 321.<sup>23</sup> Content-neutral restrictions, on the other hand, invite intermediate scrutiny. *Mastrovincenzo*, 435 F.3d at 98. Under this less stringent test, a content-neutral regulation will be upheld if it is narrowly tailored to serve a significant government interest and allows

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23. Strict scrutiny of content-based restrictions derives from the concern “that if the government were able ‘to impose content-based burdens on speech,’ it could ‘effectively drive certain ideas or viewpoints from the marketplace.’” *Hobbs v. County of Westchester*, 397 F.3d 133, 148 (2d Cir. 2005) (quoting *Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd.*, 502 U.S. 105, 116, 112 S. Ct. 501, 116 L. Ed. 2d 476 (1991)).

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for alternative channels for communication. *See Ward*, 491 U.S. at 791; *Clark*, 468 U.S. at 293; *Deegan v. City of Ithaca*, 444 F.3d 135, 142 (2d Cir. 2006). To be narrowly tailored, a content-neutral regulation need not be the least restrictive or least intrusive means of achieving the asserted government interest. *See Ward*, 491 U.S. at 798 n.6 (noting that the least-restrictive-means test is “wholly out of place” in reviewing a content-neutral regulation).

With these principles in mind, the Court turns to the question of whether Plaintiffs have substantiated their claim that the challenged ordinances facially violate their freedom of speech. The only issue addressed (and disputed) by the Parties is the extent to which Plaintiffs have sufficiently alleged that the challenged ordinances regulate protected speech. Defendants argue that the only possible effect of the ordinances is to limit Plaintiffs’ construction of a rabbinical college, which Defendants assert is conduct that is not expressive. (Defs.’ Mem. 34.). In support of this position, Defendants cite two cases: *San Jose Christian College v. City of Morgan Hill*, 360 F.3d 1024 (9th Cir. 2004) and *Tenaftly Eruv Ass’n v. Borough of Tenaftly*, 309 F.3d 144 (3d Cir. 2002). Both cases are distinguishable and therefore not dispositive.

In *San Jose Christian*, the Ninth Circuit held that the zoning ordinance at issue in that case did “not at all prohibit the establishment of religiously-affiliated educational institutions.” 360 F.3d at 1032. In fact, the ordinance at issue permitted such institutions to exist, subject to certain requirements. As such, the Ninth Circuit concluded that the zoning restriction was a content-neutral, “time, place and manner restriction,”

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which “long [has] been held to be permissible.” *Id.* at 1033 (internal quotation marks omitted). Critical to the Ninth Circuit’s ruling was that the record “reflect[ed] *no* indication that the City’s action was motivated by the City’s disdain of [the] College’s religious orientation, or by the message to be communicated to the students/parishioners at the Property.” *Id.* at 1032 (emphasis in original). Taking Plaintiffs’ allegations (described in detail above) as true, the same cannot be said here.

In *Tenaftly*, plaintiffs were Orthodox Jewish residents who, consistent with religious convention, wanted to use *eruv*s to mark the outer boundaries of the home, which use would allow them to engage in certain activities on the Sabbath (e.g., pushing baby strollers). 309 F.3d at 152. An *eruv* can be constructed by attaching *lechis* (thin black strips made out of the same type of hard plastic used for the coverings of utility lines) vertically along utility poles. *Id.* The plaintiffs challenged a town ordinance that barred the placement of any sign or the like on, among other objects, poles and trees. In rejecting the plaintiffs’ Free Speech claim, the Third Circuit held that the *eruv* “simply demarcates the space within which certain activities otherwise forbidden on the Sabbath are allowed.” *Id.* at 162. As such, the court concluded that the mere placement of an *eruv* did not communicate any idea or message; rather, it served only a “purely functional purpose.” *Id.* at 164. Accordingly, the ordinance survived scrutiny under the Free Speech Clause.<sup>24</sup>

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24. However, the Third Circuit held that the plaintiffs had established that the selective enforcement of the ordinance violated the Free Exercise Clause. 309 F.3d at 165-78.

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In the end, the Court finds that Plaintiffs have plausibly (if barely) pled enough facts to establish that the rabbinical college would engage in and foster expressive conduct. In particular, Plaintiffs have alleged that they wish to construct and operate a rabbinical college to foster the expression of certain ideas among and between faculty members and students. As such, the communicative conduct will be more than just congregants' worshipping. *See Kleindienst v. Mandel*, 408 U.S. 753, 762-63, 92 S. Ct. 2576, 33 L. Ed. 2d 683 (1972) (discussing the distinct "First Amendment right to 'receive information and ideas'"). Moreover, Plaintiffs allege that the expressive conduct will, of necessity, involve Orthodox teachings and principles. Thus, to the extent Plaintiffs have alleged—as the Court finds they have—that Defendants were motivated by a discriminatory animus against Plaintiffs because of Plaintiffs' affiliation with the Orthodox/Hasidic community, Plaintiffs also have alleged that the ordinances restrict protected expressive conduct because of its message. *See Chabad Lubavitch*, 796 F. Supp. 2d at 345 (denying motion to dismiss Free Speech challenge to zoning ordinance regulating size of houses of worship, because plaintiff had alleged that defendants "acted with the *intent* to interfere with [plaintiff's] religious speech and expressive association" (emphasis in original)); *Vineyard Christian Fellowship of Evanston, Inc. v. City of Evanston*, 250 F. Supp. 2d 961, 981 (N.D. Ill. 2003) (holding that plaintiff religious organization had adequately pled Free Speech claim in challenge to zoning ordinance, where "the dispositive factor triggering the zoning ordinance in question was ultimately the content of the congregation's speech in its property"); *cf. Grace United Methodist Church v. City of Cheyenne*, 451 F.3d

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643, 657 (10th Cir. 2006) (affirming dismissal of Free Speech and Free Association claims, where “no evidence was presented indicating that the ordinance was passed for the purpose of curtailing or controlling the content of expression”); *San Jose Christian*, 360 F.3d at 1032 (noting that the record “reflects *no* indication that the City’s action was motivated by the City’s disdain of College’s religious orientation” (emphasis in original)).

The Court recognizes that there is authority suggesting that zoning ordinances that restrict the locations of religious institutions do not necessarily regulate expressive conduct. *See Merrimack Congregation of Jehovah’s Witnesses v. Town of Merrimack*, No. 10-CV-581, 2011 U.S. Dist. LEXIS 36090, 2011 WL 1236133, at \*4 (D.N.H. Mar. 31, 2011) (“Courts have held that, absent other expressive conduct, limitations on the geographical location of a religious institution do not implicate the right to free expression under the First Amendment.”); *Grace Church of Roaring Fork Valley v. Bd. of Cnty. Comm’rs of Pitkin Cnty.*, 742 F. Supp. 2d 1156, 1167 (D. Colo. 2010) (noting that “denial of the Church’s proposal to build a worship facility at a particular location did not improperly regulate the Church’s dissemination of its religious message”). Here, however, the challenged ordinances do not just limit the possible locations for Plaintiffs’ rabbinical college; rather, taking Plaintiffs’ allegations as true, these ordinances ban such an institution from being built anywhere in Pomona.

The Court also recognizes that there is authority suggesting that even if such zoning regulations could be

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viewed as regulating speech, they are content-neutral time, place, and manner restrictions that are subject to intermediate scrutiny. *See Cornerstone Bible Church v. City of Hastings*, 948 F.2d 464, 468-69 (8th Cir. 1991) (considering zoning restrictions on location of church as a time, place, and manner regulation). It may be that after the record is filled with evidence, or the lack of it becomes glaring, Plaintiffs will not be able to substantiate their pleadings. Indeed, the Court, in merely denying Defendants' Motion as to this claim, is not holding that the challenged ordinances here do violate the Free Speech Clause of the First Amendment, let alone suggesting what level of scrutiny should be applied in evaluating Plaintiffs' Free Speech challenge to these ordinances. Those are topics for another day (and after more briefing). For now, it suffices to say that Plaintiffs have adequately stated a Free Speech claim for the reasons discussed above. Therefore, Defendants' Motion to Dismiss this claim is denied.<sup>25</sup>

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25. In their opposition to Defendants' Motion, Plaintiffs also contend that they have raised a "facial overbreadth challenge" to the challenged ordinances. (Pls.' Mem. 11.) "Under the First Amendment doctrine of overbreadth, a statute is invalid when it brings within its scope—and thus threatens to chill—conduct protected by the First Amendment." *United States v. Sattar*, 314 F. Supp. 2d 279, 304 (S.D.N.Y. 2004), *aff'd*, 590 F.3d 93 (2d Cir. 2009); *see also Virginia v. Hicks*, 539 U.S. 113, 119, 123 S. Ct. 2191, 156 L. Ed. 2d 148 (2003) ("We have provided this expansive remedy out of concern that the threat of enforcement of an overbroad law may deter or 'chill' constitutionally protected speech—especially when the overbroad statute imposes criminal sanctions."). The Supreme Court has cautioned that the overbreadth doctrine is "strong medicine," *Broadrick v. Oklahoma*, 413 U.S. 601, 613, 93

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The First Amendment also protects the Freedom of Association. *See Baird v. State Bar of Ariz.*, 401 U.S. 1, 6, 91 S. Ct. 702, 27 L. Ed. 2d 639 (1971). The Supreme Court has “identified two types of ‘freedom of association’ that merit constitutional protection: (i) ‘choices to enter into and maintain certain intimate human relationships’ and (ii)

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S. Ct. 2908, 37 L. Ed. 2d 830 (1973), to be used “sparingly and only as a last resort” *id.*, and only when the overbreadth is not only real, but “substantial . . . judged in relation to the statute’s plainly legitimate sweep,” *id.* at 615. Stated differently, an overbreadth claim requires “a law’s application to protected [activity] be ‘substantial,’ not only in an absolute sense, but also relative to the scope of the law’s plainly legitimate applications.” *Hicks*, 539 U.S. at 119-20; *see also United States v. Rahman*, 189 F.3d 88, 115 (2d Cir. 1999) (“Particularly when conduct and not speech is involved, to void the statute the overbreadth must be ‘real [and] substantial . . . judged in relation to the statute’s plainly legitimate sweep.’” (alterations in original) (quoting *Broadrick*, 413 U.S. at 613)).

Plaintiffs did not include any overbreadth claim in their Second Amended Complaint. Nor did they include any allegations that would support such a claim. For example, Plaintiffs have not made any specific allegations about the application of the challenged ordinances to protected activity that is beyond the scope of the regulation of the Subject Property. Indeed, rather than “chilling” Plaintiffs’ expressive conduct, the challenged ordinances allegedly prohibit such activity directly, by barring Plaintiffs from constructing a rabbinical college at all. Therefore, Defendants’ Motion is granted, without prejudice to Plaintiffs to amend, as to any overbreadth claim Plaintiffs might be deemed to have included in their Second Amended Complaint. *See Calvary Christian Ctr. v. City of Fredericksburg*, 832 F. Supp. 2d 635, 645 (E.D. Va. 2011) (dismissing overbreadth challenge to zoning ordinance, where plaintiff “failed to explain how the overbreadth doctrine applies in this case”).

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association ‘for the purpose of engaging in those activities protected by the First Amendment.’” *URI Student Senate v. Town of Narragansett*, 631 F.3d 1, 12-13 (1st Cir. 2011) (quoting *Roberts v. U.S. Jaycees*, 468 U.S. 609, 617-18, 104 S. Ct. 3244, 82 L. Ed. 2d 462 (1984)); *see also Sanitation & Recycling Indus., Inc. v. City of New York*, 107 F.3d 985, 995-96 (2d Cir. 1997) (same); *AK Tournament Play, Inc. v. Town of Wallkill*, No. 09-CV-10579, 2011 U.S. Dist. LEXIS 4873, 2011 WL 197216, at \*2 (S.D.N.Y. Jan. 19, 2011) (same). Here, the Court already has found that Plaintiffs have alleged that the challenged ordinances were adopted out of discriminatory animus, and that these ordinances also implicate Plaintiffs’ Free Speech rights. Given this conclusion—the ultimate resolution of which, again, will have to await further development and subsequent motion practice—the Court finds that Plaintiffs have adequately stated a Freedom of Association claim, because Plaintiffs have alleged that the ordinances bar Plaintiffs from associating in their rabbinical studies—conduct that is otherwise constitutionally protected. *See Chabad Lubavitch*, 796 F. Supp. 2d at 345 (denying motion to dismiss Free Speech and Freedom of Association claims, because plaintiffs had adequately alleged defendants’ intent to interfere with plaintiffs’ “religious speech and expressive association”); *Vineyard Christian*, 250 F. Supp. 2d at 984 (same). However, Defendants’ Motion is denied only as it relates to the second type of freedom identified above—engaging in those activities protected by the First Amendment. Plaintiffs’ bare-bones, conclusory allegations about the deprivation of their rights to familial association are inadequate to state a Freedom of Association claim. Simply put, there is nothing about Defendants’ alleged



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actions, or even their alleged motives, that establishes that they seek or have sought to disrupt Plaintiffs' familial association rights. To the extent Plaintiffs might believe (even though they did not argue this point) that the dormitory provision could limit the ability of students with families to live on the rabbinical college campus, such a result would not separate students or faculty from their families, but merely require those students or faculty to make a choice about how best to manage their desire to study or teach at the rabbinical college while meeting their family obligations. Plaintiffs have not cited any authority suggesting that this would-be conundrum is tantamount to a violation of the Freedom of Association. Therefore, Defendants' Motion to Dismiss this component of the Freedom of Association claim is granted.

**5. RLUIPA Claims**

Plaintiffs further raise a facial challenge to Sections 130-4 (defining educational institutions and dormitories), 130-10 (limiting the size of dormitories pursuant to an educational use), and 126 (establishing wetlands protections) of the Village's Code under RLUIPA. "RLUIPA is the latest of long-running congressional efforts to accord religious exercise heightened protection from government-imposed burdens, consistent with [Supreme Court] precedents." *Cutter v. Wilkinson*, 544 U.S. 709, 714, 125 S. Ct. 2113, 161 L. Ed. 2d 1020 (2005); *see also Lighthouse Inst. for Evangelism, Inc. v. City of Long Branch*, 510 F.3d 253, 261 (3d Cir. 2007) (same). "The path to the enactment of RLUIPA is well documented." *Lighthouse*, 510 F.3d at 261. In 1993, Congress enacted the Religious Freedom Restoration Act ("RFRA") in

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response to the Supreme Court's decision in *Smith*, 494 U.S. 872, 110 S. Ct. 1595, 108 L. Ed. 2d 876 (1990), which (as noted earlier) held that the Free Exercise Clause of the Constitution does not invalidate neutral and generally applicable laws, even if they incidentally burden the exercise of religion. See *Lighthouse*, 510 F.3d at 261 (noting that "Congress initially enacted [RFRA] in 1993 to counter the Supreme Court's decision in [*Smith*]"); see also *Note, Religious Land Use in the Federal Courts Under RLUIPA*, 120 Harv. L. Rev. 2178, 2180 (2007) [hereinafter "*Religious Land Use*"] (noting that RFRA "purported to overrule *Smith*"). "RFRA provided that any legislation imposing a substantial burden on religion would be invalid unless it was the least restrictive means of furthering a compelling state interest." *Lighthouse*, 510 F.3d at 261.

"But in 1997, in *City of Boerne v. Flores*[, 521 U.S. 507, 117 S. Ct. 2157, 138 L. Ed. 2d 624 (1997)], the Supreme Court invalidated RFRA as applied to state and local governments, holding that RFRA exceeded Congress's power under Section 5 of the Fourteenth Amendment to enforce the Free Exercise Clause against the states." *Religious Land Use* at 2180; see also *Lighthouse*, 510 F.3d at 261 ("[T]he Supreme Court in [*City of Boerne*] struck down RFRA as it applied to the States because it exceeded Congress's remedial power under Section 5 of the Fourteenth Amendment."). RLUIPA was Congress's reaction to *City of Boerne*. See *Opulent Life Church*, 697 F.3d at 289. "More limited in reach than RFRA, RLUIPA addresses only land use regulations, and the religious rights of institutional persons." *Lighthouse*, 510 F.3d at 261 (citation omitted).

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RLUIPA provides certain protections for land use for religious exercise. *See* 42 U.S.C. § 2000cc. In particular, RLUIPA contains separate provisions (1) to protect religious persons, including religious assemblies or institutions, from land use regulations that substantially burden their free exercise of religion, *see id.* § 2000cc(a), and (2) to protect religious persons, including religious assemblies or institutions, from land use regulations that discriminate against them or exclude them on the basis of religion or religious denomination, *see* § 2000cc(b). Plaintiffs facially attack the challenged ordinances under both of these provisions. (Pls.’ Mem. 12.) Defendants argue that Plaintiffs’ facial challenges under RLUIPA should be dismissed as meritless. (Defs.’ Mem. 22.)

**a. Substantial Burden**

The Substantial Burden provision of RLUIPA

prohibits a governmental entity from applying a land use regulation “in a manner that imposes a substantial burden on the religious exercise of a person . . . or institution, unless the government demonstrates that imposition of the burden . . . is in furtherance of a compelling governmental interest; and . . . [the burden imposed] is the least restrictive means of furthering that compelling governmental interest.”

*Westchester Day Sch. v. Village of Mamaroneck* (“*Westchester I*”), 386 F.3d 183, 189 (2d Cir. 2004)

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(alterations in original) (quoting § 2000cc(a)(1)); *see also Fortress Bible*, 694 F.3d at 218-19. This provision “backstops the explicit prohibition of religious discrimination in the later section of [RLUIPA], much as the disparate-impact theory of employment discrimination backstops the prohibition of intentional discrimination.” *Sts. Constantine & Helen Greek Orthodox Church, Inc. v. City of New Berlin*, 396 F.3d 895, 900 (7th Cir. 2005). Thus, for example, if a “land use decision . . . imposes a substantial burden on religious exercise . . . and the decision maker cannot justify it, the inference arises that hostility to religion, or more likely to a particular sect, influenced the decision.” *Id.*

Plaintiffs posit that the challenged ordinances, because they have the intended effect of barring a rabbinical college, substantially burden their ability to engage in “religious study and prayer throughout the day and night, [and to live] in a communal facility that allows them to be fully immersed in their religious studies with their families, praying and learning groups, lecturers and fellow students—all contributing to the necessary religious environment.” (Pls.’ Mem. 29; SAC ¶¶ 60, 63, 68.) Defendants contend, in the first instance, that building a rabbinical college is not religious exercise under RLUIPA. (Defs.’ Mem. 36.) The Court is unpersuaded by Defendants’ claim, and concludes that Plaintiffs have sufficiently alleged that the rabbinical college and its accessory uses constitute “religious exercise” within the meaning of RLUIPA.

“The statute defines ‘religious exercise’ to include ‘any

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exercise of religion, whether or not compelled by, or central to, a system of religious belief,' and provides further that '[t]he use, building, or conversion of real property for the purpose of religious exercise shall be considered . . . religious exercise.'" *Westchester I*, 386 F.3d at 186 (alterations in original) (quoting 42 U.S.C. § 2000cc-5(7) (A), (B)); *see also Sts. Constantine & Helen*, 396 F.3d at 900 (same). "Religious exercise" under RLUIPA is to be defined broadly and "to the maximum extent permitted by the terms of this chapter and the Constitution." *Westchester Day Sch. v. Village of Mamaroneck* ("*Westchester II*"), 504 F.3d 338, 347 (2d Cir. 2007) (quoting 42 U.S.C. § 2000cc-3(g)); *see also Bikur Cholim*, 664 F. Supp. 2d at 275, 288 (same). It is clear that the building of a rabbinical college, with the alleged purpose of training rabbinical judges for religious courts, falls squarely within this definition of "religious exercise." Additionally, while the Second Circuit has expressed doubt over whether "secular . . . accessory facilities" to a religious school are protected as "religious exercise" under RLUIPA, *see Westchester I*, 386 F.3d at 189 (questioning, in particular, whether enlargement of a gymnasium at a religious school would constitute religious exercise), Plaintiffs have sufficiently alleged that the multi-family dormitories that they seek to build are intended to facilitate religious exercise, thus bringing this accessory use within RLUIPA's protections. *See Westchester II*, 504 F.3d at 348 (noting that the correct inquiry to determine whether an educational facility is covered as "religious exercise" by RLUIPA is whether it "would be used at least in part for religious education and practice"); *see also Bikur Cholim*, 664 F. Supp. 2d at 276 (holding that operation "of facility to enable observant individuals to

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visit the sick on the Sabbath and holidays as well as the other individual plaintiff's [sic] obligations to observe the Sabbath while being able to visit their family members at [a nearby hospital] implicate their religious exercise"); *Mintz v. Roman Catholic Bishop of Springfield*, 424 F. Supp. 2d 309, 319 (D. Mass. 2006) (holding that a church's proposed development of a "parish center" that would "house an office for religious education[,] and . . . serve as a meeting place for the parish council . . . [and as] the locus of small gatherings related to church services" constituted "religious exercise" under RLUIPA).

As a second line of attack on this cause of action, Defendants argue that the ordinances do not, on their face, impose a substantial burden on Plaintiffs' exercise of religion. According to Defendants, a substantial burden requires "something more than an incidental effect on religious exercise." (Defs.' Mem. 37 (internal quotation marks omitted).) Thus, say Defendants, the mere denial of a religious institution's application to build a religious facility is not a substantial burden, where a second application could be filed. (*Id.* at 38.) And, where such an application is denied based on regulations that are facially neutral (and which serve valid public interests), there is no substantial burden on the exercise of religion, because the location of a religious facility is "not itself religiously significant." (*Id.*) Applying these precepts to this case, Defendants assert that Plaintiffs have not been burdened by Defendants' actions, including the adoption of the facially neutral zoning ordinances. At most, these ordinances might limit Plaintiffs' ability to build a rabbinical college on the Subject Property, but that is

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not the type of burden that is cognizable under RLUIPA. Moreover, argue Defendants, because Plaintiffs have not even filed an application (let alone a second application) to build their rabbinical college, it is too early for Plaintiffs' to claim they have been burdened by anything Defendants have done. (*Id.*)

RLUIPA does not itself define the phrase “substantial burden.” See *Roman Catholic Bishop*, 760 F. Supp. 2d at 186. However, the Second Circuit has held that a land use regulation constitutes a “substantial burden” within the meaning of RLUIPA if it “directly coerces the religious institution to change its behavior.” *Westchester II*, 504 F.3d at 349 (emphasis in original); see also *Fortress Bible*, 694 F.3d at 218-19. “The burden must have more than a minimal impact on religious exercise, and there must be a close nexus between the two.” *Fortress Bible*, 694 F.3d at 219.<sup>26</sup> Among the types of burdens the courts have found to be minimal, and hence not protected by RLUIPA, are facially neutral permit and variance requirements. Thus, courts have regularly found that zoning ordinances that merely require religious institutions to go through a

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26. Other circuit courts have adopted a similar definition. See *Midrash Sephardi, Inc. v. Town of Surfside*, 366 F.3d 1214, 1227 (11th Cir. 2004) (“[A] ‘substantial burden’ is akin to significant pressure which directly coerces the religious adherent to conform his or her behavior accordingly.”); *San Jose Christian*, 360 F.3d at 1034 (noting that a substantial burden is one that “impose[s] a significantly great restriction or onus upon [religious] exercise”); *Civil Liberties for Urban Believers v. City of Chicago* (“*CLUB*”), 342 F.3d 752, 761 (7th Cir. 2003) (holding that substantial burden is one that renders religious exercise “effectively impracticable”).

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routine permit or variance application process do not run afoul of RLUIPA. *See, e.g., id.* (“A denial of a religious institution’s building application is likely not a substantial burden if it leaves open the possibility of modification and resubmission.”); *Konikov v. Orange County*, 410 F.3d 1317, 1323 (11th Cir. 2005) (“[R]equiring applications for variances, special permits, or other relief provisions [does] not offend RLUIPA’s goals.”); *San Jose Christian*, 360 F.3d at 1035-36 (holding that a city’s requirement that plaintiff refile a “complete” permit application did not constitute a substantial burden); *CLUB*, 342 F.3d at 761-62 (finding that “the scarcity of affordable land available for development in R zones, along with the costs, procedural requirements, and inherent political aspects of the Special Use, Map Amendment, and Planned Development approval processes” did not impose substantial burden on religious institutions); *Roman Catholic Bishop*, 760 F. Supp. 2d at 187 (finding that a routine application process did not violate RLUIPA); *Hale O Kaula Church v. Maui Planning Comm’n*, 229 F. Supp. 2d 1056, 1071 (D. Haw. 2002) (holding that laws requiring special use permits did not impose a substantial burden on religious institution). Indeed, to exempt religious institutions from the normal permit/variance process would result in favoring these institutions, something which RLUIPA (or the Free Exercise Clause) does not require (and which the Establishment Clause might prohibit). *See CLUB*, 342 F.3d at 762 (“Otherwise, compliance with RLUIPA would require municipal governments not merely to treat religious land uses on an equal footing with nonreligious land uses, but rather to favor them in the form of an outright exemption from land-use regulations. . . .



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[N]o such free pass for religious land uses masquerades among the legitimate protections RLUIPA affords to religious exercise.”); *see also Westchester I*, 386 F.3d at 189 (“As a legislative accommodation of religion, RLUIPA occupies a treacherous narrow zone between the Free Exercise Clause, which seeks to assure that government does not interfere with the exercise of religion, and the Establishment Clause, which prohibits the government from becoming entwined with religion in a manner that would express preference for one religion over another, or religion over irreligion.”).

While RLUIPA does not exempt religious institutions from complying with facially neutral permit and variance applications procedures, it does protect such institutions from land use regulations that substantially affect their ability to use their property in the exercise of their religion. For example, courts have held that zoning ordinances, or zoning decisions, that significantly lessen the prospect of a religious institution’s being able to use the property to further its religious mission contravenes RLUIPA. *See Guru Nanak Sikh Soc’y of Yuba City v. Cnty. of Sutter*, 456 F.3d 978, 992 (9th Cir. 2006) (holding that the defendant county’s two denials of variance permits, under the circumstances, had “to a significantly great extent lessened the prospect of [the religious institution] being able to construct a temple in the future,” thus imposing a “substantial burden” on the religious institution); *Roman Catholic Diocese*, 2012 U.S. Dist. LEXIS 56694, 2012 WL 1392365, at \*8 (upholding plaintiff’s facial challenge to zoning law, because plaintiff had adequately alleged that the “conditions imposed by the [law] would significantly restrict the [plaintiff’s] use of their Property for religious

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burial purposes”); *Grace Church of N. Cnty. v. City of San Diego*, 555 F. Supp. 2d 1126, 1138 (S.D. Cal. 2008) (holding that “based on the undisputed facts in this case, . . . Defendants [have] implemented a land use regulation in a manner that imposed a ‘significantly great restriction or onus’ on Plaintiff’s religious exercise”).

Such burdens can come in many forms. For example, courts have held that zoning schemes which impose conditions on the use of the property, such as limitations on the size of the facilities to be used by the religious institution, can impose a substantial burden. *See Roman Catholic Diocese*, 2012 U.S. Dist. LEXIS 56694, 2012 WL 1392365, at \*8 (holding that defendant’s zoning conditions, including its set-back requirement, imposed a substantial burden, because they, inter alia, limited the amount of the land available for religious burial purposes); *Chabad Lubavitch*, 796 F. Supp. 2d at 343 (finding substantial burden allegations sufficient based on claims that municipality limited plaintiff’s expansion to an area 17,000 square feet smaller than plaintiff proposed, and describing that “if [plaintiff] conformed its plans to the [municipality’s] specification, it would need to sacrifice a good portion of the spaces that it believes is necessary to the exercise of its religion”); *Cathedral Church of the Intercessor v. Inc. Village of Malverne*, No. 02-CV-2989, 2006 U.S. Dist. LEXIS 12842, 2006 WL 572855, at \*8 (E.D.N.Y. Mar. 6, 2006) (finding plaintiff adequately alleged substantial burden, where space limits imposed by defendants “constrained” the ability of the church’s parishioners to “observe or participate” in religious services). Courts also have found religious institutions have satisfied the substantial burden requirement by

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alleging or proving that a municipality's zoning scheme imposes significant "delay, uncertainty, and expense." *Sts. Constantine & Helen*, 396 F.3d at 901; *see also Westchester II*, 504 F.3d at 349 (noting that a complete denial of a religious institution's zoning application which results in substantial "delay, uncertainty, and expense" can be a substantial burden); *Grace Church*, 555 F. Supp. 2d at 1137-39 (finding plaintiff had established substantial burden from uncertainty and expense resulting from municipality's zoning regulations and from municipal officials' consistent hostility toward plaintiff in their review of plaintiff's land use applications). In other words, contrary to Defendants' suggestion, "a complete denial" of a religious institution's intended or applied-for use of its property "is not necessary for the Court to find that the government regulation . . . impose[s] a substantial burden on religious exercise." *Cathedral Church*, 2006 U.S. Dist. LEXIS 12842, 2006WL 572855, at \*8; *see also Sts. Constantine & Helen*, 396 F.3d at 899-900 (finding that to establish substantial burden, a religious group need not "show that there was no other parcel of land on which it could build its church"); *Westchester Day Sch. v. Village of Mamaroneck*, 379 F. Supp. 2d 550, 556-57 (S.D.N.Y. 2005) (same). Thus, for example, the Second Circuit has held recently that when a municipality's "willingness to consider [a] proposal is disingenuous, a conditional denial may rise to the level of a substantial burden." *Fortress Bible*, 694 F.3d at 219. "Moreover, when the town's actions are arbitrary, capricious, unlawful, or taken in bad faith, a substantial burden may be imposed because it appears that the [religious institution] may have been discriminated against on the basis of its status as a religious institution." *Id.*

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Taking Plaintiffs' allegations as true, the Court finds that Plaintiffs have plausibly made a case that Defendants' actions impose a substantial burden on Plaintiffs' religious exercise. First, while the challenged ordinances may be facially neutral, in the sense that they do not expressly single out the Subject Property or otherwise expressly ban the construction of a rabbinical college, for reasons described above in connection with Plaintiffs' Free Exercise Clause claim, Plaintiffs have alleged that the combined effect (even a subtle one) of the challenged ordinances is to bar the construction of a rabbinical college, and *only* to do that. Indeed, based on the timing of the ordinances' adoption and amendment, as well as the statements made by some of the Defendants regarding the rabbinical college, Plaintiffs have plausibly alleged that this was the purpose of these ordinances. The ordinances allegedly do not just restrict where a rabbinical college can be built, or the size and number of the structures that can make up the college, but in fact completely prevent Plaintiffs from building and running a rabbinical college at all in Pomona. If these allegations are true, then Plaintiffs have established a substantial burden. *See Cottonwood*, 218 F. Supp. 2d at 1226 ("Preventing a church from building a worship site fundamentally inhibits its ability to practice its religion.").

Second, while it is true that Plaintiffs have not yet filed a variance or special use application to build a rabbinical college on the Subject Property, Plaintiffs have alleged (again, as described above) that the challenged ordinances do not allow for any special use certificates or variances. (SAC ¶¶ 91, 221-22.) Thus, under the zoning scheme as it currently exists, Plaintiffs' only option is to seek a text

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amendment to the Zoning Code—a legislative process that Plaintiffs allege would be cumbersome and, given the hostility of Defendants, fraught with indefinite delay and uncertainty. Indeed, according to Plaintiffs, Defendants have erected a number of barriers to the construction of the rabbinical college precisely to delay the process long enough to deter Plaintiffs from completing the college. (SAC ¶¶ 206-20.) Thus, Plaintiffs have established that Defendants’ alleged actions impose a substantial burden on Plaintiffs’ religious exercise. Accordingly, the Motion to Dismiss this claim is denied. *See Roman Catholic Diocese*, 2012 U.S. Dist. LEXIS 56694, 2012 WL 1392365, at \*8 (granting motion to amend facial challenge to zoning ordinance, based on the conclusion that plaintiff had adequately alleged the ordinance imposed a substantial burden by, among other things, reducing the portion of the property that could be used for religious purposes and requiring plaintiff to meet certain groundwater testing and landscaping requirements); *Grace Church*, 555 F. Supp. 2d at 1138 (granting summary judgment to plaintiff on a Substantial Burden claim, based on evidence that plaintiff had no “reasonable expectation that any application for an extension” to use its property would be granted); *Cathedral Church*, 2006 U.S. Dist. LEXIS 12842, 2006 WL 572855, at \*8 (denying motion to dismiss, where plaintiff had adequately alleged a substantial burden based on claims that the space limitations imposed by municipality would limit the number of congregants who could participate in religious services).<sup>27</sup>

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27. It again bears repeating that the Court is not finding that Defendants have violated the Substantial Burden component of RLUIPA, merely that Plaintiffs have adequately pled this

*Appendix D***b. Discrimination and Exclusion**

Plaintiffs also raise a facial challenge to the Village’s zoning ordinances under each of the three subsections of the Discrimination and Exclusion provision of RLUIPA.

**i. Equal Terms**

The Equal Terms provision of RLUIPA provides that “[n]o government shall impose or implement 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.” 42 U.S.C. § 2000cc(b)(1). This “statutory command ‘requires equal treatment of secular and religious assemblies and allows courts to determine whether a particular system of classifications adopted by a city *subtly or covertly departs from requirements of neutrality and general applicability.*’” *Primera*, 450 F.3d at 1307 (brackets omitted) (emphasis in original) (quoting *Midrash*, 366 F.3d at 1232). As with the Substantial Burden component of RLUIPA, the meaning of the Equal Terms section is far from clear, *see Guru Nanak Sikh Soc’y of Yuba City v. County of Sutter*, 326 F. Supp. 2d 1140, 1154 (E.D. Cal. 2003) (asserting that this section “is even less clear” than the “substantial burden” section), but the courts have determined that the “substantial burden and nondiscrimination provisions are operatively independent

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claim. Of course, it remains to be seen if Plaintiffs will be able to substantiate this cause of action. *See Chabad Lubavitch of Litchfield Cnty., Inc. v. Borough of Litchfield*, 853 F. Supp. 2d 214 (D. Conn. 2012) (granting summary judgment to defendants after having denied their motion to dismiss free exercise and RLUIPA claims).

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of one another,” *CLUB*, 342 F.3d at 762. Moreover, some courts have concluded that the Nondiscrimination provisions of RLUIPA, which include the Equal Terms provision, “codify existing Equal Protection Clause and Free Exercise Clause jurisprudence.” *Petra Presbyterian Church v. Village of Northbrook*, No. 03-CV-1936, 2003 U.S. Dist. LEXIS 15105, 2003 WL 22048089, at \*11 (N.D. Ill. Aug. 29, 2003); *accord Guru Nanak*, 326 F. Supp. 2d at 1155 (same); *Freedom Baptist Church of Del. Cnty. v. Township of Middletown*, 204 F. Supp. 2d 857, 869 (E.D. Pa. 2002) (same).<sup>28</sup>

There are four elements of an Equal Terms violation: (1) the plaintiff must be a religious institution; (2) subject to a land use regulation; that (3) treats the religious institution on less than equal terms; with (4) a nonreligious institution. *See Primera*, 450 F.3d at 1307-08.<sup>29</sup> The

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28. The one exception is the precise application of the “similarly situated” requirement found in Equal Protection jurisprudence. *See Third Church of Christ, Scientist, of N.Y.C. v. City of New York*, 617 F. Supp. 2d 201, 209 (S.D.N.Y. 2008) (noting that the “key point of diversion among the [c]ourts is the metric of comparison they employ to determine whether particular religious and non-religious institutions or assemblies are properly measured against one another under the statute,” and, further describing that, “while [the equal terms provision] has the “feel” of an equal protection law, it lacks the “similarly situated” requirement usually found in equal protection analysis” (quoting *Midrash*, 366 F.3d at 1229)), *aff’d*, 626 F.3d 667 (2d Cir. 2010).

29. A plaintiff bringing an Equal Terms claim need not establish that the challenged land use regulation imposed a substantial burden. *See Centro Familiar Cristiano Buenas*

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consensus among courts is that there are three distinct kinds of Equal Terms violations: (i) a statute that facially differentiates between religious and secular assemblies or institutions; (ii) a facially neutral statute that is nevertheless “gerrymandered” to place a burden solely on religious, as opposed to secular, assemblies or institutions; or (iii) a truly neutral statute that is selectively enforced against religious, as opposed to secular, assemblies or institutions. *See Primera*, 450 F.3d at 1308; *accord Vision Church v. Village of Long Grove*, 468 F.3d 975, 1003 (7th Cir. 2006) (following same analysis); *Church of Scientology of Ga., Inc. v. City of Sandy Springs*, 843 F. Supp. 2d 1328, 1361 (N.D. Ga. 2012) (same); *Covenant Christian Ministries, Inc. v. City of Marietta*, No. 06-CV-1994, 2008 U.S. Dist. LEXIS 54304, 2008 WL 8866408, at \*13 (N.D. Ga. Mar. 31, 2008) (same); *Family Life Church v. City of Elgin*, 561 F. Supp. 2d 978, 989 (N.D. Ill. 2008) (same).

The Second Circuit has not yet identified the precise standard to analyze whether a plaintiff has adequately alleged an Equal Terms violation. *See Third Church of Christ*, 626 F.3d at 670 (noting different approaches in other circuits but declining to adopt or reject any of them); *Roman Catholic Diocese*, 2012 U.S. Dist. LEXIS 56694, 2012 WL 1392365, at \*10 (noting that the Second Circuit has “yet to decide the precise outlines of what it takes to be a valid comparator under RLUIPA’s equal-

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*Nuevas v. City of Yuma*, 651 F.3d 1163, 1172 (9th Cir. 2011) (noting that a RLUIPA plaintiff asserting an Equal Terms claim has no obligation to establish a substantial burden); *Lighthouse*, 510 F.3d at 262 (explaining that the Equal Terms provision contains no language suggesting a plaintiff must establish substantial burden).



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terms provision” (internal quotation marks omitted)). The other circuit courts to have considered the analysis to be used under this provision—the Third, Fifth, Seventh, Ninth, and Eleventh Circuits—have adopted different approaches. *See Third Church of Christ*, 626 F.3d at 669-70 (reviewing the approaches from the Eleventh, Third, and Seventh Circuits). As the Fifth Circuit very recently described:

The approaches of [the] . . . circuits to facial Equal Terms Clause challenges fall roughly into two camps. In one camp is the Eleventh Circuit, which treats all land use regulations that facially differentiate between religious and nonreligious institutions as violations of the Clause, but will nonetheless uphold such a regulation if it survives strict scrutiny review. The other camp includes the Third, Seventh, and Ninth Circuits. Those circuits hold that a violation of the Equal Terms Clause occurs only if a religious institution is treated less well than a similarly situated nonreligious comparator. The Third Circuit requires the comparator to be similarly situated *as to the regulatory purpose*. The Seventh and Ninth Circuits require a comparator that is similarly situated with respect to accepted zoning criteria.

*Opulent Life*, 697 F.3d at 291-92 (footnote, citations, and internal quotation marks omitted) (emphasis in original); *see also id.* (adopting a variation of the comparator analysis used by the Third and Seventh Circuits); *Centro Familiar*

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*Cristiano*, 651 F.3d at 1172-73 (adopting Third Circuit’s “similarly situated” requirement and, where necessary, Seventh Circuit’s test that comparator be similarly situated with respect to accepted zoning criteria); *River of Life Kingdom Ministries v. Village of Hazel Crest*, 611 F.3d 367, 371 (7th Cir. 2010) (en banc) (modifying the Third Circuit’s test to focus on the regulatory criteria used to enact the law, rather than municipality’s purpose in enacting the law); *Lighthouse*, 510 F.3d at 272-73 (holding that the proper inquiry focuses on the “impact of the allowed and forbidden [uses] . . . in light of the purpose of the regulation”); *Konikov*, 410 F.3d at 1327-28 (explaining that a secular comparator in an as-applied challenge should be selected by looking at “the evidence considered by” the municipality applying the zoning code to determine the criteria used in making its decision regarding a religious institution, and then comparing it to a secular institution or assembly under those same criteria). *See generally* Note, *RLUIPA’s Equal-Terms Provision’s Troubling Definition of Equal*, 60 U. Kan. L. Rev. 193 (2011) (noting the circuit split and criticizing the Eleventh Circuit’s approach); Comment, *Freedom From Religion: RLUIPA, Religious Freedom, and Representative Democracy on Trial*, 158 U. Pa. L. Rev. 571 (2010) (canvassing split among circuit courts and endorsing the Eleventh Circuit’s analysis); Note, *Restoring RLUIPA’s Equal Terms Provision*, 58 Duke L.J. 1071 (2009) (acknowledging the circuit split and criticizing the use of any similarly situated analysis in applying the Equal Terms provision). Despite the differing approaches, however, each of the circuit courts that has considered such claims agrees that to show an Equal Terms violation, a religious institution must be

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treated differently from a nonreligious comparator. *See Third Church*, 626 F.3d at 669 (“Determining whether a municipality has treated a religious entity ‘on less than equal terms’ requires a comparison between the religious entity and a secular one.”).<sup>30</sup>

The Court here need not weigh in on the thorny question of what a RLUIPA plaintiff must specifically plead by way of secular comparators to make out a prima facie Equal Terms claim. As noted, there are three categories of Equal Terms violations—facially non-neutral regulations, facially neutral regulations which “gerrymander” burdens on religious institutions, and facially neutral

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30. It bears noting that the Fifth Circuit does not buy the Second Circuit’s professed agnosticism. In *Elijah Group, Inc. v. City of Leon Valley*, the Fifth Circuit commented that while the Second Circuit, in *Third Church*, “attempted to avoid choosing among the other . . . circuits’ tests, it concluded that the hotel was a valid comparator to the church because ‘the Church’s and the hotels’ catering activities [are] *similarly situated with regard to their legality* under [the City’s] law.” 643 F.3d 419, 423 (5th Cir. 2011) (alterations and emphasis in original) (quoting *Third Church of Christ*, 626 F.3d at 670). By making such a comparison, the Fifth Circuit concluded that the Second Circuit, “[e]ven if unintentionally,” “created a fourth test— somewhat combining the Third and Seventh Circuits’ tests—which identifies a comparator that is similarly situated for ‘all functional intents and purposes’ of the regulation.” *Id.*

This Court is not as adept at reading between the lines as others, but defers to our Circuit when it states that is not adopting (or rejecting) any other court’s standard or test. And, in any event, the difference in the approaches of the various circuits is not dispositive here, as discussed below.

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regulations which are differentially applied. The first and third categories likely require Plaintiffs to plead some facts regarding some particular secular comparators. *See Elijah Grp., Inc.*, 643 F.3d at 422-23 (explaining that in analyzing whether a land use regulation facially differentiates, any nonreligious institution or assembly can be a comparator; in analyzing a discriminatory application claim, a plaintiff must identify a “similarly situated” nonreligious comparator; and in analyzing a “gerrymander” claim, a plaintiff need establish only that the facially neutral regulation separates uses of land in a way that “burdens almost only religious uses,”—such that treatment of the religious plaintiff is assessed relative to nonreligious (or other religious institutions’) land use); *Church of Scientology*, 843 F. Supp. 2d at 1361-62 (holding that to successfully claim that zoning ordinances were selectively enforced in violation of Equal Terms provision, religious institution would need to show “that the two projects were similarly situated” with “some specificity”). But, in any event, Plaintiffs have not established that the challenged ordinances here are facially non-neutral. As noted above, each provision standing alone makes no distinction between religious and secular assemblies or institutions, let alone makes a distinction between Orthodox/Hasidic and non-Orthodox/Hasidic assemblies or institutions. Nor have Plaintiffs made out a claim that the challenged ordinances have been differentially applied to them, as the Court already has concluded that Plaintiffs’ as-applied challenges are not yet ripe.

But for the reasons provided in not dismissing Plaintiffs’ Equal Protection and Free Exercise claims, the

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Court concludes that Plaintiffs have pled facts sufficient to make out a “gerrymander” claim, which itself can also support an Equal Terms claim. *See Primera*, 450 F.3d at 1309 (holding that a religious “gerrymander” would support an Equal Terms violation); *Church of Scientology*, 843 F. Supp. 2d at 1361 (“A religious gerrymander that departs from basic principles of neutrality may support a RLUIPA violation.”). As discussed above, Plaintiffs have alleged sufficient facts regarding the timing and impact of, and the motives behind, the challenged ordinances to suggest that they were adopted solely to bar Plaintiffs from constructing a rabbinical college on the Subject Property. *Cf. Primera*, 450 F.3d at 1310 (holding that plaintiff failed to identify evidence that the challenged zoning ordinances operated to “gerrymander” plaintiff’s use of its property, citing, inter alia, that the challenged zoning provisions were adopted before plaintiff purchased the property at issue); *Church of Scientology*, 843 F. Supp. 2d at 1361 (same). Again, crucial to the Court’s conclusion is the compelled assumption as to the truth of Plaintiffs’ allegations; the Court is not reaching the conclusion that the challenged ordinances do, in fact, violate RLUIPA on their face, or that, even if they do contravene the Equal Terms provision, they would not survive strict scrutiny (or any other standard of review). Therefore, the Court denies Defendants’ Motion to Dismiss as to Plaintiffs’ Equal Terms claim.

**ii. Nondiscrimination**

Plaintiffs assert a facial challenge to the Village’s ordinances under RLUIPA’s Nondiscrimination provision,

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which provides that “[n]o government shall impose or implement a land use regulation that discriminates against any assembly or institution on the basis of religion or religious denomination.” 42 U.S.C. § 2000cc(b)(2).

Very few courts have considered claims based on the Nondiscrimination provision of RLUIPA. However, based on the language of the two provisions and the caselaw applying them, the elements of a Nondiscrimination claim differ little, if at all, from an Equal Terms claim. *See Church of Scientology*, 843 F. Supp. 2d at 1360-61 (noting that both the Equal Terms and Nondiscrimination provisions of RLUIPA cover the same three types of violations); *Covenant Christian Ministries*, 2008 U.S. Dist. LEXIS 54304, 2008 WL 8866408, at \*15-16 (treating Equal Terms and Nondiscrimination as identical claims); *New Life Ministries v. Charter Township of Mt. Morris*, No. 05-CV-74339, 2006 U.S. Dist. LEXIS 63848, 2006 WL 2583254, at \*3-5 (E.D. Mich. 2006) (same). Thus, the Court concludes that Plaintiffs’ Nondiscrimination claim survives Defendants’ Motion for the same reasons Plaintiffs’ Equal Protection, Free Exercise, and Equal Terms claims survive. Accordingly, Defendants’ Motion to Dismiss with respect to this claim is denied.

**iii. Exclusions and Limits**

Finally, Plaintiffs allege that the Village’s zoning ordinances on their face violate RLUIPA’s Exclusions and Limits provision by totally excluding a rabbinical college from the Village. This provision provides that “[n]o government shall impose or implement a land

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use regulation that . . . (A) totally excludes religious assemblies from a jurisdiction; or (B) unreasonably limits religious assemblies, institutions, or structures within a jurisdiction.” 42 U.S.C. § 2000cc(b)(3). The purpose of this provision “is not to examine the restrictions placed on individual landowners, but to prevent municipalities from broadly limiting where religious entities can locate.” *Adhi Parasakthi Charitable, Med., Educ., & Cultural Soc’y of N. Am. v Township of West Pikeland*, 721 F. Supp. 2d 361, 387 (E.D. Pa. 2010); accord *Rocky Mountain Christian Church v. Bd. of Cnty. Comm’rs*, 613 F.3d 1229, 1238 (10th Cir. 2010) (noting that district court’s jury instruction properly required plaintiff to establish that the county’s “regulation, as applied or implemented, has the effect of depriving both [plaintiff] and other religious institutions or assemblies of reasonable opportunities to practice their religion, including the use and construction of structures, within Boulder County” (internal quotation marks omitted)).

The Court concludes that Plaintiffs have stated a claim based on their facial challenge under the Exclusions and Limits Provision. As noted, Plaintiffs have pled that the challenged ordinances prevent them, as a matter of law, from building the rabbinical college (indeed, any rabbinical college) on the Subject Property or anywhere in Pomona. The Court recognizes Defendants’ point that Plaintiffs could seek to change the ordinances, via a text amendment, but this does not change the analysis. Plaintiffs have alleged facts plausibly establishing that any efforts to change the law will be time consuming and likely unsuccessful. And in any event, Plaintiffs have alleged that as now written, the challenged ordinances

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prevent Plaintiffs (or any Orthodox/Hasidic group) from building a viable rabbinical college in Pomona, and that this was the intended objective of Defendants. This is sufficient to make out a plausible Exclusions and Limits claim. *See Rocky Mountain*, 613 F.3d at 1238 (upholding jury’s verdict for RLUIPA plaintiff based, in part, on evidence that county official stated that it would allow only a 100-seat synagogue because “there will never be another mega church . . . in Boulder County,” and on testimony that another congregation ran out of money going through the County’s special use application process (alteration in original) (internal quotation marks omitted)). Accordingly, Defendants’ Motion to Dismiss this claim is denied.

\* \* \*

At oral argument, counsel for Defendants expressed concern that Plaintiffs were intending to build “Wake Forest University in Pomona.” (Tr. 5).<sup>31</sup> For a residential community such as Pomona, the idea of a large college being built might be of profound and genuine concern for local residents and public officials, and it may be why Defendants and village residents want to block the construction of Plaintiffs’ college. However, in this lawsuit Plaintiffs allege that Defendants are blocking their college not because of its physical size or the number of students and faculty that may reside, study, and work there, but because it is an Orthodox/Hasidic rabbinical

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31. Wake Forest University has just under 5,000 undergraduate students and a campus size of approximately 340 acres. *See* Wake Forest University, <http://en.wikipedia-org/wiki/Wake-Forest-University>.



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college that would employ, educate, and house members of the Orthodox/Hasidic community. At this stage, these allegations are untested, but in the Court's view, they are sufficient to merit testing. This ruling is not tantamount to saying that Plaintiffs will be able to build a rabbinical college, let alone one that is of a size or structure to their liking. Rather, this ruling only means that the case can proceed to the next phase.

**III. Conclusion**

For the reasons discussed above, Defendants' Motion is granted in part and denied in part. Plaintiff Kolel Belz is dismissed as a Plaintiff in this action without prejudice. The remaining Plaintiffs' as-applied challenges under the Free Speech, Free Exercise, and Free Association Clauses of the First Amendment, the Equal Protection Clause of the Fourteenth Amendment, and RLUIPA, as well as their as-applied claims under the New York Constitution and New York state law, are dismissed without prejudice as unripe. The Motion To Dismiss is denied as to the remaining claims. The Clerk of Court is respectfully directed to terminate the pending motion. (Dkt. No. 36.)

SO ORDERED.

Dated: January 4, 2013  
White Plains, New York

/s/ Kenneth M. Karas  
KENNETH M. KARAS  
UNITED STATES DISTRICT JUDGE

**APPENDIX E — DENIAL OF REHEARING OF  
THE UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT, FILED  
FEBRUARY 6, 2020**

**UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT**

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 6th day of February, two thousand twenty.

CONGREGATION RABBINICAL COLLEGE OF  
TARTIKOV, INC, RABBI MORDECHAI BABAD,  
RABBI WOLF BRIEF, RABBI HERMAN KAHANA,  
MEIR MARGULIS, RABBI MEILECH MENCZER,  
RABBI JACOB HERSHKOWITZ, RABBI CHAIM  
ROSENBERG, RABBI DAVID A. MENCZER,

*Plaintiffs-Appellees-Cross-Appellants,*

RABBI GERGELY NEUMAN, RABBI KOLEL  
BELZ, OF MONSEY, RABBI ARYEH ROYDE,  
RABBI AKIVA POLLACK,

*Plaintiffs,*

v.

VILLAGE OF POMONA, NY, BOARD OF  
TRUSTEES OF THE VILLAGE OF POMONA, NY,  
NICHOLAS L. SANDERSON, AS MAYOR, IAN

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BANKS, AS TRUSTEE AND IN HIS OFFICIAL  
CAPACITY, ALMA SANDERS-ROMAN, AS  
TRUSTEE AND IN HER OFFICIAL CAPACITY,  
RITA LOUIE, AS TRUSTEE AND IN HER  
OFFICIAL CAPACITY, BRETT YAGEL, AS  
TRUSTEE AND IN HIS OFFICIAL CAPACITY,

*Defendants-Appellants-Cross-Appellees.*

**ORDER**

Docket Nos: 18-869 (L)  
18-1062 (XAP)

Appellees-Cross-Appellants, Mordechai Babad, Wolf Brief, Congregation Rabbinical College of Tartikov, Inc, Jacob Hershkowitz, Herman Kahana, Meir Margulis, David A. Menczer, Meilech Menczer and Chaim Rosenberg, filed a petition for panel rehearing, or, in the alternative, for rehearing *en banc*. The panel that determined the appeal has considered the request for panel rehearing, and the active members of the Court have considered the request for rehearing *en banc*.

IT IS HEREBY ORDERED that the petition is denied.

FOR THE COURT:

s/  
Catherine O'Hagan Wolfe, Clerk

**APPENDIX F — RELEVANT CONSTITUTIONAL  
AND STATUTORY PROVISIONS**

**U.S. CONST. amend. I**

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

**U.S. CONST. amend. XIV, § 1.**

Section 1.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

**42 U.S.C. § 2000cc**

(a) Substantial burdens

(1) General rule

No government shall impose or implement a land use regulation in a manner that imposes a substantial burden on the religious exercise

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of a person, including a religious assembly or institution, unless the government demonstrates that imposition of the burden on that person, assembly, or institution—

(A) is in furtherance of a compelling governmental interest; and

(B) is the least restrictive means of furthering that compelling governmental interest.

(2) Scope of application

This subsection applies in any case in which—

(A) the substantial burden is imposed in a program or activity that receives Federal financial assistance, even if the burden results from a rule of general applicability;

(B) the substantial burden affects, or removal of that substantial burden would affect, commerce with foreign nations, among the several States, or with Indian tribes, even if the burden results from a rule of general applicability; or

(C) the substantial burden is imposed in the implementation of a land use regulation or system of land use regulations, under which a government makes, or has in place formal or informal procedures or practices

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that permit the government to make, individualized assessments of the proposed uses for the property involved.

(b) Discrimination and exclusion

(1) Equal terms

No government shall impose or implement 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.

(2) Nondiscrimination

No government shall impose or implement a land use regulation that discriminates against any assembly or institution on the basis of religion or religious denomination.

(3) Exclusions and limits

No government shall impose or implement a land use regulation that—

(A) totally excludes religious assemblies from a jurisdiction; or

(B) unreasonably limits religious assemblies, institutions, or structures within a jurisdiction.

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**42 U.S.C. § 2000cc-2**

(a) Cause of action

A person may assert a violation of this chapter as a claim or defense in a judicial proceeding and obtain appropriate relief against a government. Standing to assert a claim or defense under this section shall be governed by the general rules of standing under article III of the Constitution.

(b) Burden of persuasion

If a plaintiff produces prima facie evidence to support a claim alleging a violation of the Free Exercise Clause or a violation of section 2000cc of this title, the government shall bear the burden of persuasion on any element of the claim, except that the plaintiff shall bear the burden of persuasion on whether the law (including a regulation) or government practice that is challenged by the claim substantially burdens the plaintiff's exercise of religion.

(c) Full faith and credit

Adjudication of a claim of a violation of section 2000cc of this title in a non-Federal forum shall not be entitled to full faith and credit in a Federal court unless the claimant had a full and fair adjudication of that claim in the non-Federal forum.

(d) Omitted

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(e) Prisoners

Nothing in this chapter shall be construed to amend or repeal the Prison Litigation Reform Act of 1995 (including provisions of law amended by that Act).

(f) Authority of United States to enforce this chapter

The United States may bring an action for injunctive or declaratory relief to enforce compliance with this chapter. Nothing in this subsection shall be construed to deny, impair, or otherwise affect any right or authority of the Attorney General, the United States, or any agency, officer, or employee of the United States, acting under any law other than this subsection, to institute or intervene in any proceeding.

(g) Limitation

If the only jurisdictional basis for applying a provision of this chapter is a claim that a substantial burden by a government on religious exercise affects, or that removal of that substantial burden would affect, commerce with foreign nations, among the several States, or with Indian tribes, the provision shall not apply if the government demonstrates that all substantial burdens on, or the removal of all substantial burdens from, similar religious exercise throughout the Nation would not lead in the aggregate to a substantial effect on commerce with foreign nations, among the several States, or with Indian tribes.



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**42 U.S.C. § 2000cc-3**

(a) Religious belief unaffected

Nothing in this chapter shall be construed to authorize any government to burden any religious belief.

(b) Religious exercise not regulated

Nothing in this chapter shall create any basis for restricting or burdening religious exercise or for claims against a religious organization including any religiously affiliated school or university, not acting under color of law.

(c) Claims to funding unaffected

Nothing in this chapter shall create or preclude a right of any religious organization to receive funding or other assistance from a government, or of any person to receive government funding for a religious activity, but this chapter may require a government to incur expenses in its own operations to avoid imposing a substantial burden on religious exercise.

(d) Other authority to impose conditions on funding unaffected

Nothing in this chapter shall—

- (1) authorize a government to regulate or affect, directly or indirectly, the activities or policies of a person other than a government as a condition of receiving funding or other assistance; or

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(2) restrict any authority that may exist under other law to so regulate or affect, except as provided in this chapter.

(e) Governmental discretion in alleviating burdens on religious exercise

A government may avoid the preemptive force of any provision of this chapter by changing the policy or practice that results in a substantial burden on religious exercise, by retaining the policy or practice and exempting the substantially burdened religious exercise, by providing exemptions from the policy or practice for applications that substantially burden religious exercise, or by any other means that eliminates the substantial burden.

(f) Effect on other law

With respect to a claim brought under this chapter, proof that a substantial burden on a person's religious exercise affects, or removal of that burden would affect, commerce with foreign nations, among the several States, or with Indian tribes, shall not establish any inference or presumption that Congress intends that any religious exercise is, or is not, subject to any law other than this chapter.

(g) Broad construction

This chapter shall be construed in favor of a broad protection of religious exercise, to the maximum extent permitted by the terms of this chapter and the Constitution.

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(h) No preemption or repeal

Nothing in this chapter shall be construed to preempt State law, or repeal Federal law, that is equally as protective of religious exercise as, or more protective of religious exercise than, this chapter.

(i) Severability

If any provision of this chapter or of an amendment made by this chapter, or any application of such provision to any person or circumstance, is held to be unconstitutional, the remainder of this chapter, the amendments made by this chapter, and the application of the provision to any other person or circumstance shall not be affected.

**42 U.S.C. § 2000cc-4**

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

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**42 U.S.C. § 2000cc-5**

In this chapter:

(1) Claimant

The term “claimant” means a person raising a claim or defense under this chapter.

(2) Demonstrates

The term “demonstrates” means meets the burdens of going forward with the evidence and of persuasion.

(3) Free Exercise Clause

The term “Free Exercise Clause” means that portion of the first amendment to the Constitution that proscribes laws prohibiting the free exercise of religion.

(4) Government

The term “government”—

(A) means—

- (i) a State, county, municipality, or other governmental entity created under the authority of a State;

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(ii) any branch, department, agency, instrumentality, or official of an entity listed in clause (i); and

(iii) any other person acting under color of State law; and

(B) for the purposes of sections 2000cc–2(b) and 2000cc–3 of this title, includes the United States, a branch, department, agency, instrumentality, or official of the United States, and any other person acting under color of Federal law.

(5) Land use regulation

The term “land use regulation” means a zoning or landmarking law, or the application of such a law, that limits or restricts a claimant’s use or development of land (including a structure affixed to land), if the claimant has an ownership, leasehold, easement, servitude, or other property interest in the regulated land or a contract or option to acquire such an interest.

(6) Program or activity

The term “program or activity” means all of the operations of any entity as described in paragraph (1) or (2) of section 2000d–4a of this title.

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(7) Religious exercise

(A) In general

The term “religious exercise” includes any exercise of religion, whether or not compelled by, or central to, a system of religious belief.

(B) Rule

The use, building, or conversion of real property for the purpose of religious exercise shall be considered to be religious exercise of the person or entity that uses or intends to use the property for that purpose.

**42 U.S.C. § 3604(a)**

As made applicable by section 3603 of this title and except as exempted by sections 3603(b) and 3607 of this title, it shall be unlawful—

(a) To refuse to sell or rent after the making of a bona fide offer, or to refuse to negotiate for the sale or rental of, or otherwise make unavailable or deny, a dwelling to any person because of race, color, religion, sex, familial status, or national origin.

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**42 U.S.C. § 3617**

It shall be unlawful to coerce, intimidate, threaten, or interfere with any person in the exercise or enjoyment of, or on account of his having exercised or enjoyed, or on account of his having aided or encouraged any other person in the exercise or enjoyment of, any right granted or protected by section 3603, 3604, 3605, or 3606 of this title.

**N.Y. CONST. art. I, §§ 3, 8, 9, 11**

....

§ 3. The free exercise and enjoyment of religious profession and worship, without discrimination or preference, shall forever be allowed in this state to all humankind; and no person shall be rendered incompetent to be a witness on account of his or her opinions on matters of religious belief; but the liberty of conscience hereby secured shall not be so construed as to excuse acts of licentiousness, or justify practices inconsistent with the peace or safety of this state. (Amended by vote of the people November 6, 2001.)

....

§ 8. Every citizen may freely speak, write and publish his or her sentiments on all subjects, being responsible for the abuse of that right; and no law shall be passed to restrain or abridge the liberty of speech or of the press. In all criminal prosecutions or indictments for libels, the truth may be given in evidence to the jury; and if it shall appear

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to the jury that the matter charged as libelous is true, and was published with good motives and for justifiable ends, the party shall be acquitted; and the jury shall have the right to determine the law and the fact. (Amended by vote of the people November 6, 2001.)

§ 9. 1. No law shall be passed abridging the rights of the people peaceably to assemble and to petition the government, or any department thereof; nor shall any divorce be granted otherwise than by due judicial proceedings; except as hereinafter provided, no lottery or the sale of lottery tickets, pool-selling, bookmaking, or any other kind of gambling, except lotteries operated by the state and the sale of lottery tickets in connection therewith as may be authorized and prescribed by the legislature, the net proceeds of which shall be applied exclusively to or in aid or support of education in this state as the legislature may prescribe, except pari-mutuel betting on horse races as may be prescribed by the legislature and from which the state shall derive a reasonable revenue for the support of government, and except casino gambling at no more than seven facilities as authorized and prescribed by the legislature shall hereafter be authorized or allowed within this state; and the legislature shall pass appropriate laws to prevent offenses against any of the provisions of this section. (Amendment approved by vote of the people November 5, 2013.)

2. Notwithstanding the foregoing provisions of this section, any city, town or village within the state may by an approving vote of the majority of the qualified electors in such municipality voting on a proposition therefor



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submitted at a general or special election authorize, subject to state legislative supervision and control, the conduct of one or both of the following categories of games of chance commonly known as: (a) bingo or lotto, in which prizes are awarded on the basis of designated numbers or symbols on a card conforming to numbers or symbols selected at random; (b) games in which prizes are awarded on the basis of a winning number or numbers, color or colors, or symbol or symbols determined by chance from among those previously selected or played, whether determined as the result of the spinning of a wheel, a drawing or otherwise by chance. If authorized, such games shall be subject to the following restrictions, among others which may be prescribed by the legislature: (1) only bona fide religious, charitable or non-profit organizations of veterans, volunteer firefighter and similar non-profit organizations shall be permitted to conduct such games; (2) the entire net proceeds of any game shall be exclusively devoted to the lawful purposes of such organizations; (3) no person except a bona fide member of any such organization shall participate in the management or operation of such game; and (4) no person shall receive any remuneration for participating in the management or operation of any such game. Unless otherwise provided by law, no single prize shall exceed two hundred fifty dollars, nor shall any series of prizes on one occasion aggregate more than one thousand dollars. The legislature shall pass appropriate laws to effectuate the purposes of this subdivision, ensure that such games are rigidly regulated to prevent commercialized gambling, prevent participation by criminal and other undesirable elements and the diversion of funds from the purposes

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authorized hereunder and establish a method by which a municipality which has authorized such games may rescind or revoke such authorization. Unless permitted by the legislature, no municipality shall have the power to pass local laws or ordinances relating to such games. Nothing in this section shall prevent the legislature from passing laws more restrictive than any of the provisions of this section. (Amendment approved by vote of the people November 7, 1939; further amended by vote of the people November 5, 1957; November 8, 1966; November 4, 1975; November 6, 1984; November 6, 2001.)

....

§ 11. No person shall be denied the equal protection of the laws of this state or any subdivision thereof. No person shall, because of race, color, creed or religion, be subjected to any discrimination in his or her civil rights by any other person or by any firm, corporation, or institution, or by the state or any agency or subdivision of the state. (New. Adopted by Constitutional Convention of 1938 and approved by vote of the people November 8, 1938; amended by vote of the people November 6, 2001.)