UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,	:	
Plaintiff,	:	05 Civ. 5520 (SCR)
v.	:	
THE VILLAGE OF AIRMONT, THE VILLAGE OF AIRMONT BOARD OF TRUSTEES, and THE VILLAGE OF AIRMONT PLANNING BOARD,	:	MEMORANDUM DECISION AND ORDER
Defendants.	:	

STEPHEN C. ROBINSON, United States District Judge.

The United States of America (the "Government") brought two claims under the Religious Land Use and Institutionalized Persons Act of 2000 ("RLUIPA"), 42 U.S.C. § 2000cc et seq., and one claim under the Fair Housing Act ("FHA"), 42 U.S.C. § 3601 et seq., against the Village of Airmont, the Village of Airmont Board of Trustees, and the Village of Airmont Planning Board (collectively, the "Defendants"). The claims are based on a provision of Airmont's Zoning Code (the "Code") that prohibits boarding schools throughout Airmont. The Government argues that the Code, both facially and as applied, violates RLUIPA and the FHA. The Defendants now bring a motion to dismiss the Government's Complaint.

For the reasons set forth in this opinion, the Defendants' motion to dismiss is denied.

I

BACKGROUND

A. Airmont's Zoning Code

The Village of Airmont ("Airmont"), incorporated in 1991, is located in Rockland County, New York. Airmont adopted the Code, including the provision at issue, in 1993. Under the Code, schools are permitted only as conditional uses in certain zones. Anyone wishing to build a school must have their site plan approved by the Planning Board. No one, however, may build a school with a residential component. In the zones that permit schools, the Code provides that "[s]chools of general or religious instruction and buildings for religious instructions [sic] [are permitted as a conditional use] provided that there shall be no residential uses upon the lot other than a guard or caretaker's dwelling." *See, e.g.*, Airmont Code § 210-17(B)(9).

While the Code has a blanket prohibition on boarding schools, the Code also allows for variances, including use variances:

> On appeal from an order, requirement, decision or determination made by the Building Inspector, or on referral of an applicant to the Board by an approving agency . . . the Board of Appeals is authorized to vary or modify the strict letter of this chapter where its literal interpretation would cause practical difficulties or unnecessary hardships . . . in such a manner as to observe the spirit of this chapter, secure public safety and welfare and do substantial justice. Where required, variance applications shall be referred to the Rockland County Department of Planning.

Id. § 210-158(C).

For the Board of Appeals to grant a use variance, the applicant must show that the applicable zoning regulations caused "unnecessary hardship." *Id.* § 210-158(C)(2)(b). To establish "unnecessary hardship," the applicant must show that (1) "[t]he applicant cannot realize a reasonable return, provide that lack of return is substantial as demonstrated by competent

financial evidence"; (2) "[t]hat the alleged hardship relating to the property in question is unique, and does not apply to a substantial portion of the district or neighborhood"; (3) "[t]hat the alleged hardship has not been self-created." *Id.*

B. Congregation Mischknois Lavier Yakov, Inc.

The Government is challenging Airmont's prohibition on boarding schools both on its face and in its application to the Congregation Mischknois Lavier Yakov, Inc. ("Congregation") and its attempt to build a yeshiva in Airmont. According to the Government's Complaint,

> when Hasidic boys reach the age of approximately 15 years, they are sent to live and study at religious boarding schools (called "yeshivas" or "campus yeshivas") to pursue their religious studies for an indefinite period of time. Members of the Congregation believe that it is essential for these boys to live, study and pray in the same place in order to minimize outside influences and to intensify the religious learning experience.

Compl. ¶ 24. The Congregation's application was denied by the Rockland County Department of Planning and by the Airmont Planning Board because it was inconsistent with the Code's prohibition on boarding schools. After Airmont prohibited the Congregation from developing its property as it wished, the Congregation sought relief in this Court (the "Congregation case").

On or about January 3, 2005, the Congregation entered into a settlement agreement with the Board of Trustees for the Village of Airmont, the Planning Board for the Village of Airmont, the Building Inspector for the Village of Airmont, Salvatore Corallo, and the Rockland County Department of Planning (collectively, the "Congregation Defendants"). The Congregation's plan to construct the yeshiva is currently moving through Airmont's land use approval process.

The settlement, however, has an uncertain future. In the Congregation case, the Congregation Defendants have moved to vacate the Stipulation of Settlement under Rule 60(b)

of the Federal Rules of Civil Procedure. In a related case, the Hillside Avenue Preservation Association, Inc. ("Hillside"), a local community group, instituted an Article 78 proceeding in New York State court against the Congregation Defendants and the Zoning Board of Appeals for the Village of Airmont, challenging the settlement. The Congregation intervened, and it removed the case to federal court.

C. *LeBlanc-Sternberg v. Fletcher*

This case is not the first legal battle that Airmont has faced because of its Code. In December, 1991, the United States brought a suit against Airmont, claiming that the village "discriminated against Orthodox Jews on the basis of their religion through the adoption of zoning policies limiting the use of Orthodox rabbis' homes for prayer services." *LeBlanc-Sternberg v. Fletcher*, 67 F.3d 412, 416 (2d Cir. 1995). The United States Court of Appeals for the Second Circuit held that "there was evidence that the events leading to the incorporation of the town and the implementation of its zoning code 'amply support a finding that the impetus [to form the town and implement the Code] was not a legitimate nondiscriminatory reason but rather an animosity toward Orthodox Jews as a group.'" *LeBlanc-Sternberg v. Fletcher*, No. 96-6149, 1996 WL 699648, at *1 (2d Cir. Dec. 6, 1996) [hereinafter *LeBlanc Sternberg II*] (quoting *LeBlanc-Sternberg*, 67 F.3d at 431). The court further determined "that there was support for the jury's finding that the motivation behind the enactment of the zoning regulations was anti-Semitism, and its 'implicit finding that Airmont's zoning code *would be* interpreted to restrict the use of home synagogues.'"[1] *Id.* (quoting *LeBlanc-Sternberg*, 67 F.3d at 431) (emphasis in original).

[1] During oral argument, the Government noted that Ramapo, the town that Airmont had been a part of before it seceded, permitted boarding schools within the area that is now Airmont. Tr. at 22.

In reaching its decision, the Second Circuit highlighted some of the evidence presented at trial, including the "plethora of [anti-Orthodox Jewish] statements in the record attributed to [individuals] who became Village officials." *LeBlanc-Sternberg*, 67 F.3d at 430. An Airmont mayor described Orthodox Jews as "'foreigners and interlopers,' who were 'ignorant and uneducated' and 'an insult to' the community." *Id.* A village trustee stated that "'the only reason we formed this village is to keep those Jews from Williamsburg out of here.'" *Id.* Another village trustee asserted that the "village did not 'have to pursue an Article 78 [proceeding] . . . , [because] there are other ways we can harass them.'" *Id.*

After the Second Circuit issued its 1995 decision, the district court imposed an injunction that provided, in part, that Airmont was prohibited from

> (a) engaging in any conduct having the purpose or effect of perpetuating or promoting religious discrimination or of denying or abridging the right of any person to equal opportunity on account of religion, including, but not limited to, interpreting the Home Professional Office provision of the Airmont Zoning Code, or any other provision of the Airmont Zoning Code, so as to hinder, prevent, or prohibit persons from assembling in residential dwellings for the purposes of group prayer; (b) discriminating against any person or group or persons on account of religion in connection with the planning, development, construction, acquisition, financing, operation or approval of any housing in the Village of Airmont; (c) interfering with any person in the exercise of his right to secure equal housing opportunity for himself or for others; and (d) taking any action which in any way denies or makes unavailable housing to persons on the basis of religion.

United States v. Village of Airmont, 925 F. Supp. 160, 161 (S.D.N.Y. 1996).

II

DISCUSSION

A. Standard of Review

In evaluating a motion to dismiss, a court "must view all allegations raised in the complaint in the light most favorable to the non-moving party . . . and 'must accept as true all factual allegations in the complaint.'" *Newman & Schwartz v. Asplundh Tree Expert Co., Inc.*, 102 F.3d 660, 662 (2d Cir. 1996) (quoting *Leatherman v. Tarrant County Narcotics Unit*, 507 U.S. 163 (1993)) (citation omitted). In doing so, a court is "not to weigh the evidence that might be presented at a trial but merely to determine whether the complaint itself is legally sufficient." *Goldman v. Belden*, 754 F.2d 1059, 1067 (2d Cir. 1985). The court's consideration is limited to the factual allegations in the plaintiff's complaint, documents attached to the complaint as exhibits or incorporated into the complaint by reference, matters of which judicial notice may be taken, and "documents either in plaintiffs' possession or of which plaintiffs had knowledge and relied on in bringing suit." *Brass v. Am. Film Techs., Inc.*, 987 F.2d 142, 150 (2d Cir. 1993) (citing *Cortec Indus., Inc. v. Sum Holding L.P.*, 949 F.2d 42, 47-48 (2d Cir. 1991)).

A court must deny a motion to dismiss "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Stewart v. Jackson & Nash*, 976 F.2d 86, 87 (2d Cir. 1992) (quoting *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957)). Because the complaint must allege facts that confer a cognizable right of action, "'[t]he issue is not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims.'" *York v. Ass'n of the Bar*, 286 F.3d 122, 125 (2d Cir. 2002) (citing *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974)).

B. Justiciability of the Government's As-Applied Claims

1. Mootness

In its Complaint, the Government claims that the Code violates RLUIPA and the Fair Housing Act (FHA) both facially and as applied to the Congregation. Because of the settlement in the Congregation case, the Congregation is proceeding with its plans to construct a yeshiva in Airmont.

Despite the settlement, however, the Government's as-applied claims are not moot because of settlement has an uncertain future. Both the Congregation Defendants and Hillside are challenging the settlement in two different cases. *Cf. British Int'l Ins. Co. Ltd. v. Seguros La Republica, S.A.*, 354 F.3d 120, 122-23 (2d Cir. 2003) (finding that a settlement did not moot an appeal because the settlement was tentative and contained a two-month window, where either party could back out). Here, there is "residual controversy" that is endangering the settlement.[2] *Id.* at 123. Thus, the Government's as applied claims are not moot.

2. Ripeness

In *Murphy v. New Milford Zoning Commission*, the Second Circuit established the appropriate ripeness inquiry for a land use RLUIPA claim. 402 F.3d 342, 351-52 (2d Cir. 2005). A court must ask "(1) whether the [plaintiff] experienced an immediate injury as a result of [the

[2] At some point in time, the Government's as applied claims may be mooted by the settlement between the Congregation and the Congregation Defendants. In the current settlement agreement, the Congregation Defendants agreed that they would not deny the Congregation's application on the ground that it included student housing. The Government asserted, during oral argument, that the remedy, if the Government wins, would be to amend the Code to remove the prohibition on boarding schools. Tr. at 21. Thus, the remedy the Government would seek for its as applied claims is the result that the Congregation Defendants have agreed to provide in the challenged settlement, which *might* make the Government's claims moot. *See EEOC v. Waffle House, Inc.*, 534 U.S. 279, 296 (2002) (noting that a private plaintiff's actions—for example, if he "failed to mitigate his damages, or had accepted a monetary settlement"—could impact the relief that the government could obtain); *British Int'l Ins. Co. Ltd.*, 354 F.3d at 123 ("A case is not moot . . . 'so long as the appellant retains some interest in the case, so that a decision in its favor will inure to its benefit.'" (quoting *New England Health Care Employees Union, Dist. 1199, SEIU AFL-CIO v. Mount Sinai Hosp.*, 65 F.3d 1024, 1029 (2d Cir. 1995))). The Court does not express any position on this issue.

town's] actions and (2) whether requiring the [the plaintiff] to pursue additional administrative remedies would further define [the plaintiff's] alleged injuries." *Id.* at 351. If there was no immediate injury and additional administrative remedies would further define the plaintiff's alleged injury, the court should examine whether the plaintiff has "obtained a final, definitive position from local authorities as to how their property may be used." *Id.* at 352 (citing *Williamson County Regional Planning Comm'n v. Hamilton Bank*, 473 U.S. 172 (1985)). If the plaintiff has not obtained such a final, definitive position, then the federal court does not have jurisdiction. *Id.*

Assuming, without deciding, that the Congregation did not experience an immediate injury and that additional administrative remedies would further define the Congregation's alleged injury, the Government's as-applied claim is ripe because the Congregation obtained a final, definitive position when the Planning Board denied its application.[3] The Code prohibits an applicant from applying for a variance without a "referral . . . to the Board by an approving agency." Airmont Code § 210-158(C). Thus, the Congregation went as far as it could through the Airmont's land use process when the Planning Board denied its application. It needed permission from the Planning Board to go further, *i.e.* to attempt to obtain a variance.[4] Further,

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[3] Even assuming that the Congregation did not obtain a final, definitive position, it may also meet the futility exception to the finality requirement. *See Murphy*, 402 F.3d at 349 ("A property owner . . . 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."). Not only has the Second Circuit observed that the motivation behind the enactment of the zoning regulations was anti-Semitism, *LeBlanc-Sternberg*, 67 F.3d at 431, but the Congregation would almost certainly be unable to establish the factors that it would be required to show to obtain a use variance. An applicant must show that (1) "[t]he applicant cannot realize a reasonable return, provide that lack of return is substantial as demonstrated by competent financial evidence"; (2) "[t]hat the alleged hardship relating to the property in question is unique, and does not apply to a substantial portion of the district or neighborhood"; and (3) "[t]hat the alleged hardship has not been self-created." Airmont Code § 210-158(C)(2)(b). The Congregation would have difficulty establishing these factors, particularly the second and third. *See, e.g.*, *Carbone v. Town of Bedford*, 534 N.Y.S.2d 211, 211 (N.Y. App. Div. 1988) (finding that a hardship was self-created when a property owner purchased the property with the knowledge that he needed a variance before he could build his house).

[4] While the Defendants argue that the Congregation's application should have gone, as an original matter, to the Building Inspector and not the Planning Board, the fact remains that it went to the Planning Board. Once the Planning Board denied the Congregation's application, the Code clearly states that it could not seek a variance

the Code also allows applicants to turn to the state courts to appeal a decision of the Planning Board. Section 210-94 provides that "[a]ny person aggrieved by any decision of the Planning Board may apply to the Supreme Court of the State of New York for review" through an Article 78 proceeding. Thus, the Code itself contemplates that applicants can turn to the courts to appeal a decision by the Planning Board. Because the Code requires a party to be referred to the Board of Appeals for a variance and allows a party to turn to the courts when aggrieved by a Planning Board decision, the Congregation obtained a final, definitive position when the Planning Board denied its application to construct a yeshiva.

C. The Complaint States a Claim Under RLUIPA

The Government brings two claims under RLUIPA. The first claim is that the Defendants' prohibition of boarding schools, both facially and as applied to the Congregation, substantially burdens the religious exercise in Airmont, in violation of 42 U.S.C. § 2000cc(a)(1). The second claim is that the Defendants' prohibition of boarding schools, both facially and as applied to the Congregation, discriminates on the basis of religion, in violation of section 2000cc(b)(2).

When Congress enacted RLUIPA, it "endeavored to codify existing Free Exercise jurisprudence." *Murphy*, 402 F.3d at 350 (citing *Midrash Sephardi, Inc. v. Town of Surfside*, 366 F.3d 1214, 1239 (11th Cir. 2004)); *see also Civil Liberties for Urban Believers v. City of Chicago*, 342 F.3d 752, 760-61 (7th Cir. 2003). Congress did not intend, however, to "relieve religious institutions from applying for variances, special permits or exceptions, *where available*

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without a referral to the Board of Appeals from the Planning Board. The Defendants also argue that the Planning Board should have referred the Congregation's application back to the Building Inspector. The Planning Board denied the Congregation's application on June 23, 2002. The Congregation filed its Complaint in the Congregation case on July 19, 2002. The Planning Board had almost one month to send the application to the Building Inspector, but it did not.

without discrimination or unfair delay." 146 Cong. Rec. S7774-01, S7776 (daily ed. July 27, 2000) (Joint Statement of Sen. Orrin Hatch and Sen. Edward Kennedy) [hereinafter "Joint Statement"] (emphasis added). RLUIPA has not elevated the federal courts into appellate zoning boards. *See Murphy*, 402 F.3d at 348. Instead, RLUIPA protects against, *inter alia*, "subtle forms of discrimination when, as in the case of the grant or denial of zoning variances, a state delegates essentially standardless discretion to nonprofessionals operating without procedural safeguards." *Sts. Constantine and Helen Greek Orthodox Church, Inc. v. City of New Berlin*, 396 F.3d 895, 900 (7th Cir. 2005) (opinion of Posner, J.); *see also* Joint Statement at S7774 ("Zoning codes frequently exclude churches in places where they permit theaters, meeting halls, and other places where large groups of people assemble for secular purposes.").

1. Substantial Burden—Section 2000cc(a)(1)

RLUIPA, in part, provides that "[n]o government shall impose or implement a land use regulation in a manner that imposes a substantial burden on the religious exercise of a person, including a religious assembly or institution, unless the government demonstrates that imposition of the burden" is both "in furtherance of a compelling government interest" and "the least restrictive means of furthering that" interest.[5] 42 U.S.C. § 2000cc(a)(1) (2006). A plaintiff has

[5] RLUIPA's substantial burden provision applies only in three situations: (1) where "the substantial burden is imposed in a program or activity that receives Federal financial assistance"; (2) where "the substantial burden affects, or the removal of that substantial burden would affect, commerce"; or (3) where "the substantial burden is imposed in the implementation of a land use regulation of system of land use regulations, under which a government makes, or has in place formal or informal procedures or practices that permit the government to make, individualized assessments of the proposed uses for the property involved." 42 U.S.C. § 2000cc(a)(2) (2006).

The Government's Complaint asserts that Airmont's zoning ban on boarding schools and Defendants' denial of the Congregation's application "affects commerce within the meaning of RLUIPA." Compl. ¶ 38. The Government further asserts that the Defendants' denial of the Congregation's application "constitutes the imposition or implementation of land use regulations whereby the Defendants made, or had in place formal or informal procedures or practices of, individualized assessments regarding the Congregation's application within the meaning of RLUIPA." Compl. ¶ 39. The Defendants do not challenge Government's claims. This Court concludes, for the purposes of this motion, that RLUIPA's substantial burden provision applies because the Government has sufficiently pled that it has met both the second and third condition.

the initial burden of establishing that a government implemented a land use regulation that imposed a "substantial burden" on the "religious exercise" of a person. *Id.* If the land use regulation substantially burdens religious exercise, that regulation must be the least restrictive means of furthering a compelling government interest. *Id.*

The Second Circuit has not ruled on what constitutes a substantial burden under RLUIPA, and other courts across the country have not settled on a uniform definition. The Ninth Circuit defines a substantial burden as a "significantly great restriction or onus" on religious exercise. *San Jose Christian College v. City of Morgan Hill*, 360 F.3d 1024, 1034 (9th Cir. 2004). According to the Eleventh Circuit, a substantial burden is "akin to significant pressure which directly coerces the religious adherent to conform his or her behavior accordingly. Thus, a substantial burden can result from pressure that tends to force adherents to forego religious precepts or from pressure that mandates religious conduct." *Midrash Sephardi, Inc.*, 366 F.3d at 1227. The Seventh Circuit has a stricter approach, finding that "a substantial burden on religious exercise is one that necessarily bears direct, primary, and fundamental responsibility for rendering religious exercise—including the use of real property for the purpose thereof within the regulated jurisdiction generally—effectively impracticable."[6] *Civil Liberties for Urban Believers*, 342 F.3d at 761; *see also Guru Nanak Sikh Society of Yuba City v. County of Sutter*, 326 F. Supp. 2d 1140, 1153-54 (E.D. Cal. 2003), *aff'd*, 456 F.3d 978 (9th Cir. 2006) (describing the Seventh Circuit's test as "an extremely high threshold").

The Second Circuit has not, however, been completely silent on this issue. In *Westchester Day School v. Village of Mamaroneck*, a case examining RLUIPA, the court noted that the rejection of a proposal could be a substantial burden, even when there was a possibility

[6] More recently, the Seventh Circuit clarified its previous definition, finding that a burden need not be "insuperable" to be substantial. *Sts. Constantine and Helen Greek Orthodox Church, Inc.*, 396 F.3d at 901 (finding that delay, uncertainty and expense could constitute a substantial burden).

that a modified proposal would be approved. 386 F.3d 183, 188 n.3 (2d. Cir. 2004). The court provided three examples: "where the board's stated willingness is disingenuous, or cure of the problems noted by the board would impose so great an economic burden as to make amendment unworkable, or where the change demanded would itself constitute a burden on religious exercise." *Id.*; *see also Westchester Day Sch. v. Village of Mamaroneck*, 417 F. Supp. 2d 477, 547 (S.D.N.Y. 2006) [hereinafter *Weschester Day Sch. II*] (noting that "[c]ourts in the Second Circuit have concluded that the regulations must have a 'chilling effect' on the exercise of religion to substantially burden religious exercise" and concluding that, for the purposes of RLUIPA, "a 'substantial burden exists when a governmental action seriously impedes religious exercise"). In another context, the Second Circuit has said that a substantial burden "is a government policy prohibiting religious adherents from engaging in conduct that is mandated by their faith."[7] *Bronx Household of Faith v. Cmty. Sch. Dist. No. 10*, 127 F.3d 207, 217 (2d Cir. 1997); *see also McEachin v. McGuinnis*, 357 F.3d 197, 202 (2d Cir. 2004) (noting that a substantial burden is "a situation where 'the state puts substantial pressure on an adherent to modify his behavior and to violate his beliefs.'" (quoting *Jolly v. Coughlin*, 76 F.3d 468, 477 (2d Cir. 1996))); *cf. Vestry of St. Bartholomew's Church v. City of New York*, 914 F.2d 348, 355 (2d Cir. 1990) ("The central question in identifying an unconstitutional burden is whether the claimant has been denied the ability to practice his religion or coerced in the nature of those practices.").

[7] The Second Circuit considered this in the context of interpreting the Religious Freedom Restoration Act of 1993 ("RFRA"). *Bronx Household of Faith v. Cmty. Sch. Dist. No. 10*, 127 F.3d 207, 217 (2d Cir. 1997). The Supreme Court declared RFRA unconstitutional in *City of Boerne v. Flores*. 521 U.S. 507 (1997). Many courts have concluded that to determine the definition of a substantial burden, one should look to RFRA. *See, e.g., Civil Liberties for Urban Believers*, 342 F.3d 752 at 760-61; *see also* Joint Statement at S7776 ("The Act does not include a definition of the term 'substantial burden' because it is not the intent of this Act to create a new standard for the definition of 'substantial burden' on religious exercise. Instead, that term as used in the Act should be interpreted by reference to Supreme Court jurisprudence. . . . The term 'substantial burden' as used in this Act is not intended to be given any broader interpretation than the Supreme Court's articulation of the concept of substantial burden or religious exercise.").

It is not necessary, at this juncture, for this Court to define precisely "substantial burden" because, as explained below, the Government has sufficiently pled facts that allow its claim to survive a motion to dismiss under any of these extant definitions.

a. The Government's Facial Challenge

The Defendants argue that the Government's facial challenge must be dismissed because the Code does not substantially burden religious exercise. Specifically, the Defendants assert that the Code does not substantially burden religious exercise because the Code allows those wishing to construct a boarding school to seek a variance.

That the Code has a variance provision does not invalidate the Government's claim that Airmont's prohibition on boarding schools, on its face, is a substantial burden on religious exercise. To obtain a variance, an applicant must show that "[t]hat the alleged hardship relating to the property in question is unique, and does not apply to a substantial portion of the district or neighborhood" and "[t]hat the alleged hardship has not been self-created." Airmont Code § 210-157(C)(2)(b). An applicant wishing to build and operate a boarding school could not establish these two factors for an activity that is banned throughout Airmont. *Cf. Sts. Constantine and Helen Greek Orthodox Church, Inc.*, 396 F.3d at 901 (finding that delay, uncertainty, and expense could constitute a substantial burden); *Civil Liberties for Urban Believers*, 342 F.3d at 761 (finding, after a facial challenge, that ordinances that permit churches as of right in certain zones and are special uses requiring approval from the Zoning Board of Appeals are not a substantial burden because "they do not render impracticable the use of real property in Chicago for religious exercise, much less discourage churches from locating or attempting to locate in Chicago"). Moreover, the Government alleges that the Code's ban on boarding schools was

included to prevent Hasidic Jews from operating any yeshivas in Airmont. *Cf. LeBlanc-Sternberg*, 67 F.3d at 431 (upholding a jury's finding that the motivation behind Airmont's zoning regulations was anti-Semitism). Accepting the facts in the Complaint as true, as this Court must, it certainly could be "effectively impracticable," *Civil Liberties for Urban Believers*, 342 F.3d at 761, for any yeshiva to obtain a variance from the Board of Appeals.[8] *See Westchester Day Sch.*, 386 F.3d at 188 n.3 (observing that a substantial burden could be found if an applicant has a chance to get approval in the future "where the board's stated willingness is disingenuous, or cure of the problems noted by the board would impose so great an economic burden as to make amendment unworkable, or where the change demanded would itself constitute a burden on religious exercise").

b. The Government's As-Applied Challenge

The Defendants argue that the Government's as applied claim also should be dismissed because the denial of the Congregation's site plan was not a substantial burden on the Congregation's religious exercise. They assert that the Congregation could build a school on the property or construct houses on the property and put the school elsewhere.[9] Alternatively, the Defendants argue, the Congregation could have obtained a variance, appealed the Planning Board's denial to the Zoning Board of Appeals, or filed an Article 78 proceeding.

The Government's as applied claim survives the Defendants' motion to dismiss. The Complaint asserts that a yeshiva, where students live and study religion, is a central component of Hasidic Jews' religious exercise. The Complaint further asserts that, as a result of the denial

[8] The Government has also sufficiently pled that the Code's ban on boarding schools is not the least restrictive means of advancing a compelling state interest. The Defendants have not offered any argument to the contrary, although they certainly will have an opportunity to advance such arguments in the future.

[9] This argument simply ignores Paragraph 24 of the Government's Complaint. The Government asserts that "[m]embers of the Congregation believe that it is essential for these boys to live, study and pray in the same place in order to minimize outside influences and to intensify the religious learning experience." Compl. ¶ 24.

of the Congregation's site plan, the Congregation was prevented from building a yeshiva on its property, substantially burdening its religious exercise.[10] Such allegations are sufficient at this stage of the proceedings. *See, e.g.*, *Westchester Day Sch. v. Village of Mamaroneck*, 379 F. Supp. 2d 550, 555-56 (S.D.N.Y. 2005) (finding that the complaint included enough factual allegations to survive a motion to dismiss where a school alleged that its current facilities were inadequate for its educational and religious mission and that the town's denial of the school's application to expand constituted a substantial burden); *cf. Sts. Constantine and Helen Greek Orthodox Church, Inc.*, 396 F.3d at 901 (finding a substantial burden where the church "could have searched around for other parcels of land . . . or it could have continued filing applications with the City, but in either case there would have been delay, uncertainty, and expense").

2. Discrimination—Section 2000cc(b)(2)

Section 2000cc(b)(2) [hereinafter "section (b)(2)" or "nondiscrimination provision"] 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) (2000). Few courts, however, have had the opportunity to consider this section. As one district court recently noted, "[t]here is a dearth of case law interpreting the nondiscrimination provision of the RLUIPA." *The Lighthouse Inst. for Evangelism, Inc. v. City of Long Branch*, 406 F. Supp.2d 507, 516 (D.N.J. 2005), *rev'd in part*, 510 F.3d 253 (3d Cir. 2007). Similarly, another district court has observed that the meaning of

[10] Moreover, assuming the truthfulness of the allegation that the Code's provision was enacted to prevent Hasidic Jews from operating yeshivas in Airmont are true, it is unlikely that the Congregation would be able to build its yeshiva *anywhere* in Airmont.

the section "is even less clear than the meaning of the 'substantial burden' provision."[11] *Guru Nanak Sikh Society of Yuba City v. County of Sutter*, 326 F. Supp. 2d 1140, 1154 (E.D. Cal. 2003), *aff'd*, 456 F.3d 978 (9th Cir. 2006).

The Defendants argue that only laws that facially discriminate against religion or against a particular religious group will violate section 2000cc(b)(2). Thus, the Defendants assert, the Code does not violate the nondiscrimination provision because the Code is facially neutral towards religion generally and towards particular religious groups.

A party may bring a facial or as-applied challenge under the nondiscrimination provision. Of the three cases that the Defendants cite as support for their position, *Hale O Kaula Church v. Maui Planning Comm'n*, 229 F. Supp. 2d 1056 (D. Haw. 2002); *Lighthouse Inst. for Evangelism Inc. v. City of Long Branch*, 100 Fed. App'x 70 (3d Cir. 2004); *Civil Liberties for Urban Believers*, 342 F.3d at 752, none even suggests that only facial challenges can be brought under the nondiscrimination provision. Simply because two of those cases addressed facial challenges does not mean that this Court may only entertain facial challenges.

The Defendants also argue that the structure of RLUIPA supports their argument. They assert that a party may bring a facial challenge under section (b)(2) and an as applied challenge

[11] Courts disagree over whether section 2000cc(b) is dependent on section 2000cc(a). In other words, some courts require that a plaintiff establish that there is a substantial burden on religious exercise before considering any claims brought under section 2000cc(b). *See Vineyard Christian Fellowship of Evanston, Inc. v. City of Evanston*, 250 F. Supp. 2d 961, 992-93 (N.D. Ill. 2003) (finding that section 2000cc(b) should be read as a subset of section 2000cc(a)); *The Lighthouse Inst. for Evangelism, Inc.*, 406 F. Supp. 2d at 519 ("[P]laintiffs' failure to demonstrate a substantial burden under [2000cc(a)] is fatal to his claims under [section 2000cc(a)]."), *rev'd in part*, 510 F.3d 253 (3d Cir. 2007). Other courts, however, hold that the two sections operate independently of one another. *See Civil Liberties for Urban Believers*, 342 F.3d at 762 (noting that "the substantial burden and nondiscrimination provisions are operatively independent of one another"); *Midrash Sephardi, Inc.*, 366 F.3d at 1228, 1232-35 (finding that a zoning ordinance did not place a substantial burden on two synagogues, but that the town did violate (b)(1) by permitting private clubs and other secular assemblies in the business district but prohibited religious assemblies); *Konikov v. Orange County*, 410 F.3d 1317, 1323-24, 1329 (11th Cir. 2005) (finding that the town's zoning ordinance did not impose a substantial burden on plaintiff's religious exercise but that it did, as applied, violate 2000cc(b)(1)); *Hollywood Community Synagogue, Inc. v. City of Hollywood*, 430 F. Supp. 2d 1296, 1320 (S.D. Fla. 2006) (finding that "[2000cc(b)] is operatively independent of the jurisdictional prerequisites of [2000cc(a)]. . . . Plaintiffs need not allege a substantial burden to state claims under RLUIPA §§ (b)(1) and (b)(2)"). It is not necessary for this Court to determine which position is more persuasive because the Government has pled sufficient facts for this Court to allow its substantial burden claim to go forward.

under sections (b)(1)[12] or (b)(3).[13] According to the Defendants, any other reading would render one or more of these sections meaningless. A more natural reading of these sections, however, is the one suggested by the Government. The Government argues, and this Court agrees, that section (b)(1) and (b)(2) both prohibit discrimination, but they differ with respect to the factual scenarios to which each applies. Section (b)(1), known as the equal terms provision, forbids government action that treats a religious entity less favorably than a nonreligious entity.[14] Section (b)(2) prohibits discrimination against any religious group or against religious sects or denominations. Not only is this reading supported by the plain language of the statute, but it is also supported by RLUIPA's legislative history: "[s]ections [](b)(1) and (2) prohibit various forms of discrimination *against or among* religious land uses. These sections enforce the Free Exercise Clause rule against laws that burden religion and are not neutral and generally applicable."[15] Joint Statement at S7776 (emphasis added). Because neither the case law nor the structure of RLUIPA itself supports the Defendants' assertion, this Court concludes that the Government may bring a facial challenge, an as applied challenge, or both under the nondiscrimination provision.

The Government's facial challenge under section (b)(2) survives the Defendants' motion to dismiss because the Government has stated a claim that Airmont is discriminating against an

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[12] Section 2000cc(b)(1) provides: "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." 42 U.S.C. 2000cc(b)(1).

[13] Section 2000cc(b)(3) provides: "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." 42 U.S.C. 2000cc(b)(3).

[14] According to the Eleventh Circuit, for example, "[section (b)(1)] codifies the *Smith-Lukumi* line of precedent. By requiring equal treatment of secular and religious assemblies, RLUIPA 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." *Midrash Sephardi, Inc.*, 366 F.3d at 1231-32 (concluding that the ordinance violated the equal terms provision of RLUIPA because it permitted private clubs in the business district, but excluded churches and synagogues).

[15] As a result, the Government notes, it may be logical to treat Sections (b)(1) and (b)(2) alike for the purposes of legal analysis, so long as their different predicate factual scenarios are recognized.

assembly or institution on the basis of religion or religious denomination. The Complaint alleges that at the time that Airmont enacted the Code, Hasidic boarding schools operated in Ramapo and other areas of Rockland County. Compl. ¶ 16. The Complaint further alleges that Airmont prohibited boarding schools to prevent Hasidic boarding schools from operating in Airmont.[16] Compl. ¶ 16. This claim is substantiated by the jury verdict (and the record) upheld in *LeBlanc-Sternberg*, 67 F.3d at 431.[17] This aspect of Airmont's history is strengthened by the language of the Code itself. The Code permits "[s]chools of general or religious instruction and buildings for religious instructions [sic] provided that there shall be no residential uses upon the lot other than a guard or caretaker's dwelling." *See, e.g.*, Airmont Code § 210-17(B)(9). The language suggests that the Code's drafters were seeking to prohibit religious schools, and perhaps yeshivas in particular, when they wrote this provision. Given the allegations in the Government's Complaint, it is possible that the Government will be able to establish that Airmont's prohibition on boarding schools, like the City of Hialeah's laws restricting animal sacrifice in *Church of the Lukumi Babalu Aye, Inc.*, has an impermissible object and "the secular ends asserted in defense of the laws were pursued only with respect to conduct motivated by religious beliefs."[18] 508 U.S. at 524 (finding that "if the object of a law is to infringe upon or restrict practices because of their religious motivation, the law is not neutral and it is invalid unless it is justified by a

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[16] The Supreme Court has emphasized that "[t]hose in office must be resolute in resisting importunate demands and must ensure that the sole reasons for imposing the burdens of law and regulation are secular. Legislators may not devise mechanisms, overt or disguised, designed to persecute or oppress a religion or its practices." *Church of the Lukumi Babalu Aye, Inc.*, 508 U.S. at 547.

[17] This Court also notes that the fact that the Code prohibits boarding schools yet permits other high density residential uses, such as summer camps and senior housing, further supports the Government's allegations. *Cf. Civil Liberties for Urban Believers*, 342 F.3d at 762 (observing that a change in the zoning code that requires clubs, meeting halls, recreation buildings, and community centers to obtain approval in the same zones and in the same manner that churches were previously required to do "simply place[d] churches on an equal footing with nonreligious assembly uses, thereby correcting any potential violation of the nondiscrimination provision").

[18] Contrary to the Defendants' assertions, the Government's allegations here are far more troublesome that the allegations at issue in *Hale O Kaula Church v. Maui Planning Comm'n*, 229 F. Supp. 2d 1056, 1070 (D. Haw.2002). In that case, the court found that a statute that classifies "land into agricultural, rural, urban, and conservation districts does not discriminate against church buildings or uses" and, therefore, does not violate section (b)(2) because all non-agricultural uses, including churches, are required to obtain a permit in an agricultural zone.

compelling interest and is narrowly tailored"); *LeBlanc-Sternberg*, 67 F.3d at 425-26 (noting that "in determining whether a law is based on religious animus," the Free Exercise Clause allows a court to consider the intent of the municipal decision-makers) (citing *Church of the Lukumi Babalu Aye, Inc.*, 508 U.S. at 540-42). Thus, the Government may proceed with its claim that one religious denomination—Hasidic Judaism—is singled out for discriminatory treatment by the Code, which bans all boarding schools, and thus all yeshivas.[19]

D. The Constitutionality of RLUIPA

The Defendants challenge the constitutionality of RLUIPA on a variety of grounds. Specifically, they argue that RLUIPA violates the Establishment Clause and exceeds Congress's power under the Commerce Clause and section 5 of the Fourteenth Amendment.

As a preliminary matter, there is one hoary principle of constitutional adjudication that must guide this Court in its analysis of the Defendants' arguments regarding the constitutionality of RLUIPA. James Bradley Thayer, The Origin and Scope of the American Doctrine of Constitutional Law, 7 HARV. L. REV. 129 (1893). "As Justice Frankfurter has noted, courts must give 'due regard to the fact that [they are] not exercising a primary judgment but [are] sitting in judgment upon those who also have taken the oath to observe the Constitution and who have the responsibility for carrying on government." *Midrash Sephardi, Inc.*, 366 F.3d at 1238 (quoting *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 164 (1951) (Frankfurter, J.,

[19] It is unclear which level of scrutiny, if any, this Court should employ to analyze the Government's section (b)(2) claims. The statute itself is silent, meaning that governments could be strictly liable for any discrimination. The two courts to address this issue, the Eleventh Circuit and the Third Circuit, however, disagree over the level of scrutiny. *Compare Midrash Sephardi, Inc.*, 366 F.3d at 1232 ("[A] violation of [(b)(1)], consistent with the analysis employed in *Lukumi*, must undergo strict scrutiny."), *with The Lighthouse Inst. for Evangelism, Inc.*, 510 F.3d 253, 268-70 (3d Cir. 2007), *aff'g in part* 406 F. Supp. 2d at 517 ("[P]arties seeking to prove a violation of section (b) must identify similarly situated nonsecular assemblies which are treated more favorably than secular institutions, and then identify no rational basis for the distinction related to the municipality's goal."). It is not necessary, however, to determine which position is more persuasive at this stage of the proceedings.

concurring)). A district court aptly observed that the "customary deference accorded the judgments of Congress is certainly appropriate when, as here, Congress specifically considered the question of the Act's constitutionality." *Guru Nanak Sikh Society of Yuba City*, 326 F. Supp. 2d at 1158. That court concluded by asserting that "it is safe to say that the unanimous Congress which enacted RLUIPA . . . considered the constitutionality of the statute carefully and thoroughly." *Id.*

1. Establishment Clause—Section 2000cc(a)

The Defendants argue that RLUIPA violates the Establishment Clause. This Court disagrees and joins the vast majority of courts that have considered this issue in holding that RLUIPA does not violate the Establishment Clause. *See, e.g.*, *Midrash Sephardi, Inc.*, 366 F.3d at 1240-42 ("Because RLUIPA accommodates religion by remedying and preventing discriminatory zoning in accordance with principles established by the First and Fourteenth Amendments, RLUIPA does not violate the Establishment Clause."); *United States v. Maui County*, 298 F. Supp.2d 1010, 1014-15 (D. Haw. 2003); *Westchester Day Sch. v. Village of Mamaroneck*, 280 F. Supp. 2d 230, 238 (S.D.N.Y. 2003), *rev'd on other grounds by*, 386 F.3d 183 (2d Cir. 2004); *cf. Cutter v. Wilkinson*, 125 S. Ct. 2113 (2005) (finding that the portion of RLUIPA that concerns religious exercise of institutionalized people does not violate the Establishment Clause).

The Defendants argue that RLUIPA violates the Establishment Clause because it does not satisfy the *Lemon* test. In *Lemon v. Kurtzman*, 403 U.S. 602 (1971), the Supreme Court set forth a three-prong test that courts must use to determine whether the Establishment Clause has been violated. Accordingly, to satisfy the Establishment Clause's strictures (1) the statute must have a

secular legislative purpose; (2) the statute's primary effect must be one that neither advances nor inhibits religion; and (3) the statute must not foster excessive government entanglement with religion. *Id.* at 612-13.

Despite the Defendants' arguments, this Court concludes that RLUIPA comports with the *Lemon* test. First, RLUIPA's purpose is to "to alleviate significant government interference with the exercise of religion," *Midrash Sephardi, Inc.*, 366 F.3d at 1241, which is a permissible legislative purpose under the *Lemon* test. *See Corp. of Presiding Bishop v. Amos*, 483 U.S. 327, 335, 338 (1987). Second, RLUIPA, by removing unnecessary interference with religion, does not advance or inhibit religion. *See id.* at 336-37 (noting that a "law is not unconstitutional simply because it allows churches to advance religion"). The Defendants' argument that RLUIPA gives special preferences to religious groups simply is not persuasive. RLUIPA seeks to put religious groups on an equal footing with secular groups by prohibiting substantial, unjustifiable burdens on religious exercise—burdens that secular grounds do not share. *See Midrash Sephardi, Inc.*, 366 F.3d at 1241 ("RLUIPA, by mandating *equal* as opposed to *special* treatment for religious institutions, does not advance religion by making it easier for religious organizations themselves to advance religion.") (emphasis in original). Finally, RLUIPA does not create excessive government entanglement with religion as it does not require any monitoring—let alone "pervasive monitoring"—to ensure that there is no indoctrination of religion by government actors. *See Agostini v. Felton*, 521 U.S. 203, 233-34 (1997).

2. Commerce Clause—Section 2000cc(a)

The Defendants also contend that RLUIPA exceeds Congress's powers under the Commerce Clause. Again, this Court concludes—and, in doing so, joins the majority of other courts that have considered this issue—that "RLUIPA is a permissible exercise of Congress's

broad power to act under the Commerce Clause." *Westchester Day Sch.*, 280 F. Supp.2d at 238; *see also Maui County*, 298 F. Supp. 2d at 1015; *Hale O Kaula Church*, 229 F. Supp.2d at 1072; *Freedom Baptist Church v. Township of Middletown*, 204 F. Supp. 2d 857, 866-68 (E.D. Pa. 2002).

RLUIPA does not violate the Commerce Clause because it contains a jurisdictional element that incorporates and parallels existing Supreme Court Commerce Clause jurisprudence. For example, section 2000cc(a)(2)(B) provides that the substantial burden provision applies whenever the substantial burden "affects, or [the] removal of that substantial burden would affect, commerce." 42 U.S.C. § 2000cc(a)(2)(B). Further, RLUIPA also provides that it does not apply if the government demonstrates that the aggregate effects of the burden do not substantially affect commerce. *Id.* § 2000cc-2(g). These jurisdictional limits prevent RLUIPA from exceeding the bounds of the Commerce Clause because a court, on a case-by-case basis, determines the impact on interstate commerce. *See United States v. Lopez*, 514 U.S. 549, 560-61 (1995) (noting that Congress may act, pursuant to the Commerce Clause, by including a "jurisdictional element" that targets only those acts that actually affect commerce); *United States v. Griffith*, 284 F.3d 338, 346-47 (2d Cir. 2002) (rejecting a challenge under the Commerce Clause where the statute contained such a jurisdictional element); *see also* Joint Statement at S7774 ("[RLUIPA] applies only to the extent that Congress has power to regulate under the Commerce Clause, the Spending Clause, or Section 5 of the Fourteenth Amendment.").

3. Section 5 of the Fourteenth Amendment

Finally, the Defendants submit that RLUIPA exceeds Congress's power under section 5 of the Fourteenth Amendment. This Court holds that RLUIPA does not exceed Congress's power under section 5. *See, e.g., Sts. Constantine and Helen Greek Orthodox Church, Inc.*, 396

F.3d at 897-98; *Midrash Sephardi, Inc.*, 366 F.3d at 1239-40; *Maui County*, 298 F. Supp. 2d at 1016-17; *Guru Nanak Sikh Society of Yuba City*, 326 F. Supp. 2d at 1157-61; *Westchester Day School*, 280 F. Supp. 2d at 234-37.

In *City of Boerne v. Flores*, the Supreme Court observed that under section 5, Congress "has been given the power 'to enforce,' not the power to determine what constitutes a constitutional violation." 521 U.S. 507, 519 (1997). Thus, RLUIPA cannot create new rights; it can only enforce existing rights. *See Westchester Day Sch.*, 280 F. Supp. 2d at 235 ("Legislation which alters the meaning of the Free Exercise Clause cannot be said to be enforcing the Clause.").

To determine whether a statute is an appropriate exercise of Congress's power under section 5, a court must first determine whether Congress has the authority to enact legislation enforcing the rights at issue. *See City of Boerne*, 521 U.S. at 519. Next, a court must determine whether the statute "'enforces' a constitutional right without substantially altering that right." *Midrash Sephardi, Inc.*, 366 F.3d at 1237. If Congress merely codifies a right already defined by the Supreme Court, then the inquiry ends. If the measure goes beyond the Court's precise articulation of constitutional protections, however, then there is no "congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end." *City of Boerne*, 521 U.S. at 519-20.

As an initial matter, the Supreme Court has clearly held that Congress has the power to enact legislation to protect religious exercise under the First Amendment. *Id.* at 519. Thus, this Court must examine whether RLUIPA merely enforces the Free Exercise and Establishment Clauses or whether it makes a substantive change in the existing law. After carefully considering

the parties' arguments, as well as decisions of other courts, this Court concludes that RLUIPA codified existing Supreme Court precedent.

RULIPA's substantial burden provision, as applied through section (a)(2)(C), codifies the Supreme Court's Free Exercise Clause "individualized assessments" doctrine. *See* 42 U.S.C. § 2000cc(a)(2)(C) ("[The substantial burden provision] applies in any case in which . . . 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 that permit the government to make, individualized assessments of the proposed uses for the property involved."). In *Employment Division v. Smith*, the Supreme Court held that laws that are not generally applicable because they have "an eligibility criteria [that] invite[s] consideration of the particular circumstances" and lend themselves "to individualized governmental assessment of the reasons for the relevant conduct," must be reviewed with strict scrutiny.[20] 494 U.S. 872, 884 (1990). The substantial burden provision, as applied through section (a)(2)(C), codifies this precedent. *See, e.g.*, *Sts. Constantine and Helen Greek Orthodox Church, Inc.*, 396 F.3d at 897-98 (noting that the substantial burden provision is "an uncontroversial use of section 5."); *see also* Joint Statement at S7775-76 (citing the individualized assessments doctrine of *Smith* and *Church of the Lukumi Babalu Aye, Inc.* as the precedent Congress sought to codify and observing that "[t]he hearing record demonstrates a widespread practice of individualized decisions to grant or refuse permission to use property for religious purposes. These individualized assessments readily lend themselves to discrimination, and they also make it difficult to prove discrimination in any individual case.").

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[20] That *Smith* concerned unemployment benefits does not mean that the rule established in *Smith* does not apply in other contexts. *See Church of the Lukumi*, 508 U.S. at 524 (finding that an ordinance prohibiting animal sacrifice was not neutral or generally applicable, including one ordinance that was directed at land use).

Similarly, sections 2000cc(b)(1) and (b)(2) are a constitutional exercise of Congress's section 5 powers. These provisions codify the Free Exercise Clause, Establishment Clause, and Equal Protection Clause jurisprudence.[21] They are, therefore, constitutional. *See Midrash Sephardi, Inc.*, 366 F.3d at 1239-40; *see also* Joint Statement at S7775-76 ("Sections [](b)(1) and (2) . . . enforce the Free Exercise Clause rule against laws that burden religion and are not neutral and generally applicable.").

To the extent, however, that RLUIPA does not line-up precisely with the Supreme Court's jurisprudence, this Court finds that Congress identified a history and pattern of improper land use provisions that, in effect, limited religious exercise and, further, that RLUIPA is a congruent and proportional response to potential limitations on the free exercise of religion. *See Bd. of Trustees of Univ. of Alabama v. Garrett*, 531 U.S. 356, 365 (2001) ("Congress is not limited to mere legislative repetition of this Court's constitutional jurisprudence. 'Rather, Congress' power to enforce the Amendment includes the authority both to remedy and to deter violation of rights guaranteed thereunder by prohibiting a somewhat broader swath of conduct, including that which is not itself forbidden by the Amendment's text.'" (quoting *Kimel v. Florida Bd. of Regents*, 528 U.S. 62, 81 (2000))). Before enacting RLUIPA, Congress inquired extensively into the land use practices, and their impact on religious exercise, of municipalities throughout the country. *See, e.g.*, *Maui County*, 298 F. Supp. 2d at 1016-17. In their Joint Statement, Senators Hatch and Kennedy noted:

> The hearing record compiled massive evidence that this right [to use a space for religious exercise] is frequently violated. Churches in general, and new, small, or unfamiliar churches in particular, are frequently discriminated against on the face of zoning codes and also in the highly individualized and discretionary processes of land use regulation. Zoning codes frequently exclude churches in places where they permit theaters, meeting halls, and other places

[21] Defendants do not contest this argument.

> where large groups of people assemble for secular purposes. Or the codes permit churches only with individualized permission from the zoning board, and zoning boards use that authority in discriminatory ways. Sometimes, zoning board members or neighborhood residents explicitly offer race or religion as the reason to exclude a proposed church, especially in cases of black churches and Jewish shuls and synagogues. More often, discrimination lurks behind such vague and universally applicable reasons as traffic, aesthetics, or "not consistent with the city's land use plan." Churches have been excluded from residential zones because they generate too much traffic, and from commercial zones because they don't generate enough traffic. Churches have been denied the right to meet in rented storefronts, in abandoned schools, in converted funeral homes, theaters, and skating rinks-in all sorts of buildings that were permitted when they generated traffic for secular purposes. The hearing record contains much evidence that these forms of discrimination are very widespread.

Joint Statement at S7774-75. Further, the rights and remedies in RLUIPA, including the requirement that a plaintiff establish a substantial burden and allow the government to show that, in any event, the ordinance at issue is the least restrictive means of advancing a compelling state interest, are a congruent and proportional response to unjustified religious discrimination via land use laws. *See, e.g.*, *Westchester Day Sch.*, 280 F. Supp. 2d at 234-37.

E. The Complaint States a Claim Under FHA?

The Government claims that the Code's prohibition of boarding schools, both on its face and as applied, violates section 3604(a) of the FHA by discriminating on the basis of religion. Section 3604(a) makes it unlawful "[t]o 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."

The Defendants argue that the Government's claim under the FHA must be dismissed. They assert that the FHA does not grant everyone "exactly the type of housing they prefer."

Defs.'s Mem. at 20. Further, they argue that, on its face, the ordinance treats everyone who wishes to build a boarding school alike. The Government responds by arguing that the FHA can be used to challenge discriminatory zoning regulations. Further, the Government asserts that the Complaint's allegations are sufficient to state a claim that the Defendants intentionally discriminated against Hasidic Jews by prohibiting boarding schools from operating anywhere in Airmont. Finally, according to the Government, this Court may look beyond the four corners of the Code to find that intentional discrimination.

The Government's FHA claims survive the Defendants' motion to dismiss. Indeed, a jury has found, and the Second Circuit has affirmed, that a portion of Airmont's Code,[22] on its face, violated the FHA. *See LeBlanc-Sternberg II*, 1996 WL 699648, at *4 ("[T]his court previously held that the Village had violated the FHA by passing a zoning code based on religious animus, and found it 'predictable from the evidence in this record' that the Village would violate the Constitution by enforcing the code in the future in a discriminatory manner." (citing *LeBlanc-Sternberg*, 67 F.3d at 434)); *see also LeBlanc-Sternberg*, 67 F.3d at 425 (noting that, for a claim under the FHA, "where it has been established that a zoning ordinance will

[22] The Code provision at issue in the first Airmont case required that a home professional office

> shall be incidental and secondary to the use of the residence for dwelling purpose, shall not change the character thereof and shall not have any evidence of such accessory use other than a permitted announcement sign. It is the intent of this Local Law that the home professional office shall not generate activities that come into a residential area so as to detract from the residential character of the area. Said activity shall not occupy more than one-half (1/2) of the ground floor area of the residence or its equivalent elsewhere in the residence if so used. In said activity, no more than two (2) persons, including members of the family residing on the premises, shall be employed. Permissible "home professional office" uses include, but are not limited to, the following: clergymen, lawyers, physicians, dentists, architects, engineers or accountants, if said use meets the other requirements of this Local Law. Any aggrieved person shall apply to the Zoning Board of Appeals for an interpretation as to whether or not a proposed activity or use constitutes a permissible home professional office. It is the intent of this Local Law that the home professional office shall only be an accessory use and that the residential character of the neighborhood involved shall be maintained at all times.

LeBlanc-Sternberg, 67 F.3d at 420.

likely be applied in a discriminatory manner, it is unnecessary that the municipality actually so apply it before the ordinance may properly be challenged" and that "an FHA violation may be established on a theory of disparate impact or one of disparate treatment"). Rarely does a district court receive such clear guidance on a virtually identical set of facts with some of the same participants. Given that a provision simply regulating—not prohibiting—the use of home professional offices was a violation of the FHA, the Government's Complaint states a claim that Airmont's prohibition on boarding schools also violates the FHA.

Conclusion

For the foregoing reasons, the Defendants' motion to dismiss is denied. The Clerk of the Court is directed to close docket entries 3 and 7.

It is so ordered.

Dated: November 12, 2008
White Plains, New York

Stephen C. Robinson
United States District Judge