UNITED STATES DISTRICT COURT
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,	:	
Defendants.	:	

MEMORANDUM OF LAW IN
OPPOSITION TO DEFENDANTS' MOTION TO DISMISS

MICHAEL J. GARCIA
United States Attorney for the
Southern District of New York
86 Chambers Street, 3rd Floor
New York, New York 10007
Telephone: (212) 637-2699; 637-2719
Facsimile: (212) 637-2686

NICOLE GUERON (NG-7682)
LAWRENCE H. FOGELMAN (LF-9700)
Assistant United States Attorneys

- Of Counsel -

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Plaintiff United States of America (the "Government") respectfully submits this memorandum of law in opposition to defendants' motion to dismiss the Complaint.

PRELIMINARY STATEMENT

Airmont is a village in Rockland County that, as found by a jury in this district in 1993, incorporated and adopted a zoning code in order to exclude Orthodox Jews. See LeBlanc-Sternberg v. Fletcher, 67 F.3d 412, 419-22 (2d Cir. 1995) ("Airmont I"). The Second Circuit upheld the jury's verdict against Airmont as amply supported by the record. Id. at 429-31.

The United States brings this suit because Airmont continues to use its zoning code to discriminate against Orthodox Jews, this time by prohibiting all boarding schools – and therefore all residential yeshivas – from locating in Airmont. Airmont's zoning code bans all residential student housing from all districts in Airmont. By contrast, many other forms of group residential housing are permitted, such as senior housing, nursing homes, hospitals, and overnight camps. The Government's complaint alleges that this rule violates the Religious Land Use and Institutionalized Persons Act ("RLUIPA") because it discriminates against Hasidic Jews, a subgroup of Orthodox Jewry, and imposes a substantial burden on the religious exercise of Hasidic Jews who seek to build yeshivas in Airmont so that they can pursue their religious practices and beliefs. The Complaint also alleges that the zoning code violates the Fair Housing Act ("FHA") because Airmont intentionally discriminates against Hasidic Jews by prohibiting religious boarding schools, a type of housing covered by the FHA, from operating anywhere in Airmont, a rule which prevents Hasidic Jews from engaging in their religious practice of educating their young men in a yeshiva. Specifically, the Government alleges that in 2002, the defendants applied the Airmont zoning code to deny the application of a congregation of Hasidic Jews for permission to build a yeshiva on their land in Airmont. Accordingly, the Government's complaint states claims under RLUIPA and the FHA.

Contrary to defendants' assertions, RLUIPA is a constitutional exercise of Congressional power (i) under the Commerce Clause, because the jurisdictional element written into RLUIPA ensures that the statute cannot extend beyond the Commerce Clause's reach; (ii) under Section 5 of the Fourteenth Amendment, because it codifies the Supreme Court's Free Exercise Clause "individualized assessments" doctrine; and (iii) under the Establishment Clause of the First Amendment, because it lifts burdens on religious exercise without entangling government with religion or the promotion of religion. For these reasons, the vast majority of courts to have addressed the constitutionality of RLUIPA, including this Court in Fortress Bible Church v. Feiner, 03 Civ. 4235, 2004 WL 1179307, *3 (S.D.N.Y. March 29, 2004) (Robinson, J.), has upheld the statute as constitutional.

FACTUAL BACKGROUND

A. The Village of Airmont and Its Zoning Code

The Village of Airmont is located within the Town of Ramapo in Rockland County, New York. See Airmont I, 67 F.3d at 417. During the 1980s, Ramapo's Orthodox Jewish and Hasidic communities grew substantially. Id. In response to the influx of Orthodox Jews, id. at 418, Airmont incorporated out of Ramapo in May 1991, and adopted a zoning code in 1993 (the "Zoning Code," attached to Declaration of Assistant U.S. Attorney Nicole Guéron, dated November 14, 2005 ("Guéron Decl.") as Exhibit A); see 67 F.3d at 419-20.

In December, 1991, the United States filed the Airmont I suit, "alleging that the Village had been incorporated for the purpose of excluding Orthodox Jews through zoning restrictions on their places of worship." Id., 67 F.3d at 419. After a jury trial on claims brought by private plaintiffs who also sued Airmont, a jury verdict against Airmont, and a subsequent appeal, the Court of Appeals held that "the jury's verdicts are consistent with fully supportable findings that . . . the Village adopted a zoning code that was intended to, and would be interpreted to, curtail home synagogues, thereby

deterring Orthodox Jews from purchasing homes in many Airmont neighborhoods . . . ." Id. at 429.

The Court of Appeals ruled that "it is a fair inference that the jury viewed [Airmont's] enactment of [the Zoning Code] . . . as an act that was designed to limit the number of home synagogues and that was thus about to make dwellings unavailable to Orthodox Jews because of their religion." Id. at 428. The Court noted that "there was abundant evidence" that the Airmont Civic Association ("ACA") had "persistently urged incorporation of the Village expressly in order to gain control of zoning in order to keep Orthodox and Hasidic Jews from moving to the Airmont area." Id. The Court of Appeals further concluded that "the evidence amply permitted the jury to find that ACA and the Village shared a general conspiratorial objective and that ACA was a co-conspirator in the Village's adoption of a zoning code that was intended to be applied to achieve ACA's announced discriminatory goal." Id. at 429.

B. The Zoning Code's Ban on Boarding Schools

In 1993, when Airmont enacted its Zoning Code, Hasidic Jews in Ramapo and other areas of Rockland County and New York State operated religious boarding schools. Complaint, filed June 10, 2005 ("Cpl") ¶ 16. When it was enacted, and today, Airmont's Zoning Code included a ban on schools with residential facilities ("boarding schools" and "yeshivas") from the entire village of Airmont. Cpl. ¶ 13; Guéron Decl. Ex. A.[1] The practical effect of this rule is to prohibit Orthodox Jewish or Hasidic yeshivas from operating anywhere in Airmont.

The Zoning Code does not permit schools of any kind as an "as of right" use anywhere in Airmont. Guéron Decl. Ex. A. The Zoning Code permits non-boarding schools in some districts, but only as "conditional uses" subject to the following restriction: "there shall be no residential uses upon

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1 The Complaint cites the Zoning Code, and thus the Court may consider the text of the Zoning Code in its entirety. See San Leandro Emergency Med. Group Profit Sharing Plan, v. Philip Morris Cos., Inc., 75 F.3d 801, 808-09 (2d Cir. 1996) (district court may consider full text of documents only partially quoted in complaint).

the lot other than a guard or caretaker's dwelling." Cpl. ¶ 15; Guéron Decl. Ex. A, §§ 210-14(B)(14), 210-15(B)(11), 210-16(B)(11), 210-17(B)(9), 210-18(B)(8)).

While banning yeshivas and all other schools with residential facilities, the Zoning Code permits many other types of group residential facilities, either "as of right" or conditionally. Cpl. ¶¶ 17-22. Specifically, in residential districts RR-50, R-40, R-35, R-25 and R-15, "community residence facilities" are permitted as of right, and the following uses are conditionally permitted: "Camps and day camps," "Family and group care facility (non-Padavan)," "Public and private hospitals and sanatoriums for general medical care," and "Nursing homes and convalescent facilities." See Guéron Decl. Ex. A §§ 210-14(A)-(B), 210-15(A)-(B), 210-16(A)-(B), 210-17(A)-(B), 210-18(A)-(B). By contrast, schools are conditionally permitted only if the schools have no residential component. Id. §§ 210-14(B)(14), 210-15(B)(11), 210-16(B)(11), 210-17(B)(9), 210-18(B)(8). Thus, the Zoning Code conditionally permits numerous types of group residential facilities in Airmont's residential districts. Boarding schools are the only group residential facility singled out and forbidden from these districts.

The non-residential districts of Airmont are equally off-limits to yeshivas and boarding schools. The Neighborhood Shopping District does not permit yeshivas and boarding schools as of right or as conditional uses. See id. § 210-20. The Village Center and Laboratory-Office Districts do not permit yeshivas and boarding schools as of right or as conditional uses, although hotels and motels are conditionally permitted, id. § 210-21(C)(6), and are permitted to have a capacity of over 100 rooms, id. § 210-98(C); Cpl. ¶ 18.

While disallowing boarding schools, Airmont is willing to accommodate the particular group housing needs of certain community members. Cpl. ¶ 19-21. Thus, in 1999, it created the Specialized Housing Residential District, a "floating zone" to be situated within districts zoned Village Center and Neighborhood Shopping, to provide "housing accommodations for older residents." See Guéron Decl.

Ex. A § 210-19(A). The Zoning Code states that the purpose of this floating zone is "to provide for various types of housing to accommodate senior citizens at various stages of their life [sic], starting with independent living retirement or leisure communities to assisted living and nursing facilities." Id. § 210-19(A). Accordingly, the Zoning Code permits as conditional uses "senior citizen housing developments," which may have a site density of 20 dwelling units per net acre, id. § 210-102(F), and "congregate care housing development," which may have a site density of up to 15 dwelling units per acre, id. § 210-105(E). As noted above, these senior homes are permitted in the very districts where yeshivas and boarding schools are forbidden. Cpl. ¶¶ 19-22. In 2003, Airmont constructed two large group residential facilities for seniors, including a six-building condominium complex and another complex with 140 units. Id. ¶¶ 20-21.

C. The Application of the Zoning Code to Congregation Mischnois Lavier Yakov

In 2001, Congregation Mischnois Lavier Yakov, a congregation of Hasidic Jews (the "Congregation") bought a 19-acre tract of land in Airmont's RR-50 residential district. Id. ¶¶ 23-27. In or about April 2002, the Congregation applied to the Airmont Planning Board for a conditional use permit and site plan approval to build a yeshiva on the plot. Id. ¶ 28. The Congregation's effort to build a yeshiva stems from a tenet of the Congregation's religious belief and practice, as alleged in the Complaint:

> It is the Congregation's religious practice and belief that 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.
>
> Because promoting religious education as a way of Hasidic life is central to the Congregation's religious belief and practice, students are encouraged to continue learning in the same intense, on-campus yeshiva environment even after they marry.

Id. ¶¶ 24-25.

The Congregation's proposed yeshiva included a dormitory building for up to 200 unmarried students, and 72 townhouses to accommodate married students and staff. Id. ¶ 28. The Congregation's application was denied by the Rockland County Department of Planning on or about May 30, 2002, because it was deemed inconsistent with Airmont's zoning ban on residential student housing. Id. ¶ 32. On or about June 24, 2002, defendant Airmont Planning Board denied the Congregation's application, solely because the Zoning Code – the same 1993 zoning code at issue in Airmont I – bans residential student housing. Id. ¶ 33.

D. The Government's Complaint[2]

In June 2005, the Government filed this suit alleging that Airmont's Zoning Code bans schools with residential facilities from the entire Village of Airmont in order to prevent Hasidic Jews from operating yeshivas in Airmont. Cpl. ¶¶ 13, 16. The Zoning Code thus prevents Hasidic Jews from fulfilling the tenets of their religious practice and belief by establishing yeshivas to educate their children. Id. ¶¶ 24-25. The Government further alleges that the Zoning Code has been applied in a manner that substantially burdens the Congregation's religious exercise, id. ¶ 36, and constitutes discrimination on the basis of religion in violation of RLUIPA and the Fair Housing Act, id. ¶¶ 42-45.

STATUTORY BACKGROUND

A. RLUIPA's Land Use Provisions

The Religious Land Use and Institutionalized Persons Act of 2000 ("RLUIPA") was signed into law on September 22, 2000. See Pub. L. No. 106-274, 114 Stat. 803. The statute addresses two areas in which Congress determined that state and local governmental actions impose substantial burdens on

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2 RLUIPA provides that the "United States may bring an action for injunctive or declaratory relief to enforce compliance with this chapter." 42 U.S.C. § 2000cc-2(f).

religious liberty: land use regulations and the treatment of institutionalized persons in the custody of states and localities. This case concerns RLUIPA Section 2, which governs land use.

Congress enacted RLUIPA's land-use provisions to enforce, by statutory right, constitutional prohibitions of religious discrimination. See Joint Statement of Sen. Hatch and Sen. Kennedy ("Joint Statement"), 146 Cong. Rec. S7774-776, 2000 WL 1079346 (daily ed. July 27, 2000) ("Each subsection [of RLUIPA's land use provisions] closely tracks the legal standards in one or more Supreme Court opinions"). Congress codified those constitutional prohibitions "for greater visibility and easier enforceability." Id. at S7775; see Storzer and Picarello, The Religious Land Use and Institutionalized Persons Act of 2000: A Constitutional Response to Unconstitutional Zoning Practices, 9 Geo. Mason L. Rev. 929, 946 (2001) (RLUIPA "lays out the appropriate free exercise standards and puts municipalities on notice that they apply").

Section 2(a)(1) of RLUIPA provides that no state or local 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 on that person, assembly or institution" is both "in furtherance of a compelling governmental interest" and "the least restrictive means" of furthering that interest. 42 U.S.C. § 2000cc(a)(1).

Section 2(a)(2) limits the applicability of this provision to cases 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 the 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 that permit the government to make, individualized assessments of the proposed uses for the property involved.

42 U.S.C. § 2000cc(a)(2). As the constitutional basis for these three applications, Congress relied for section 2(a)(2)(A) on its authority under the Spending Clause ("The Spending Clause provisions are modeled directly on similar provisions in other civil rights laws."); for section 2(a)(2)(B) on its authority under the Commerce Clause (noting that "Commerce Clause provisions require proof of a jurisdictional element which would ensure . . . that the burden on religious exercise in question affects interstate commerce"); and for section 2(a)(2)(C) on its authority under section 5 of the Fourteenth Amendment ("The land use sections . . . have a third constitutional base: they enforce the Free Exercise and Free Speech Clauses as interpreted by the Supreme Court."). Joint Statement, 146 Cong. Rec. at S7775.

Section 2(b) of RLUIPA protects religious assemblies and institutions with non-discrimination and non-exclusion provisions. This suit alleges violations of Section 2(b)(2), which prohibits governmental entities from "impos[ing] or implement[ing] 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). Congress enacted section 2(b) pursuant to its power under the Fourteenth Amendment, Section 5. Joint Statement, 146 Cong. Rec. at S7775-76.

B. Legislative History and Congressional Findings

Congress enacted Section 2 of RLUIPA after developing a record of widespread state and local discrimination against religious institutions by means of zoning regulations. In evaluating the need for RLUIPA, Congress heard testimony in nine separate hearings over three years that "addressed in great detail both the need for legislation and the scope of Congressional power to enact such legislation." Joint Statement, 146 Cong. Rec. at S7774; see Religious Liberty Protection Act of 1999 Report, H.R.

Rep. 106-219, 1999 WL 462644, *18-24 (1999) (summarizing testimony). The testimony – both statistical and anecdotal – strongly demonstrated a pattern of abuse in need of a remedy. See H.R. Rep. 106-219, *23.

During the Congressional hearings, witnesses presented "massive evidence" of a pattern of religious discrimination which frustrated a core aspect of religious exercise – the ability to assemble for worship. See 146 Cong. Rec. at S7774-75; H.R. Rep. No. 106-219, *20-24. Specifically, Congress found that land use regulations implemented through a system of individualized assessments placed "within the complete discretion of land use regulators whether [religious] individuals had the ability to assemble for worship." H.R. Rep. 106-219, *19. Congress also determined that "[r]egulators typically have virtually unlimited discretion in granting or denying permits for land use and in other aspects of implementing zoning laws," id., *20, and that "the standards in individualized land use decisions are often vague, discretionary, and subjective," id., *24. Such discretion, Congress found, results in "widespread" discriminatory applications of land use regulations to religious assemblies. Id., *18.

Congress also received testimony that religious assemblies receive less than equal treatment when compared to secular land uses. Specifically, Congress found that:

> [B]anquet halls, clubs, community centers, funeral parlors, fraternal organizations, health clubs, gyms, places of amusement, recreation centers, lodges, libraries, museums, municipal buildings, meeting halls, and theaters are often permitted as of right in zones where churches require a special use permit, or permitted on special use permit where churches are wholly excluded.

H.R. Rep. 106-219, *19-20. Again, Congress determined that these forms of discrimination are "widespread." See 146 Cong. Rec. at S7775; H.R. Rep. 106-219, *18-24.

Further, Congress determined that individualized land use assessments readily lend themselves to discrimination against religious assemblies, yet make it difficult to prove such discrimination in any particular case. See 146 Cong. Rec. at S7774-75; H.R. Rep. 106-219, *18-24. In reaching this

conclusion, Congress relied on statistical evidence from national surveys and studies of zoning codes, reported land use cases, and the experiences of particular religious communities, all of which demonstrated unconstitutional government conduct. See 146 Cong. Rec. at S7775; H.R. Rep. 106-219, *18-24; see also The Religious Land Use and Institutionalized Persons Act of 2000, Statement of Rep. Canady, 146 Cong. Rec. E1234, 1235, 2000 WL 976598 (daily ed. July 14, 2000). Congress also relied on evidence and testimony about examples of unconstitutional discrimination from across the country, and testimony from witnesses with broad expertise who stated that these examples were representative of other incidents. See 146 Cong. Rec. at S7775; H.R. Rep. 106-219, *18-24.

Congress further relied on studies that confirmed widespread discrimination against religious institutions in land-use matters. For example, the Congressional record includes a study which found that Jews, small Christian denominations, and nondenominational churches are vastly overrepresented in reported zoning cases concerning houses of worship. See H.R. Rep. 106-219, *20-21. This study revealed, for example, that 20 percent of the reported cases concerning the location of houses of worship involve Jews, even though Jews account for only 2 percent of the population in the United States. See id. *21. Two other studies confirmed widespread discrimination against religious institutions in land-use matters. One of those studies examined 29 Chicago-area jurisdictions and revealed that numerous secular land uses (including clubs, community centers, lodges, meeting halls, and fraternal organizations) were allowed by right or special use permit, but similar religious uses were denied equal treatment. See H.R. Rep. 106-219, *19. The other study showed that Presbyterian congregations nationwide reported significant conflict with land use authorities. See id. *21.

Several land-use experts confirmed the existence of widespread discrimination against religion in land-use matters. One attorney who specializes in land use litigation testified, for example, that "it is not uncommon for ordinances to establish standards for houses of worship differing from those

applicable to other places of assembly, such as where they are conditional uses or not permitted in any zone." H.R. Rep. 106-219, *19. Other witnesses discussed a "pattern of abuse that exists among land use authorities who deny many religious groups their right to free exercise, often using mere pretexts (such as traffic, safety, or behavioral concerns) to mask the actual goal of prohibiting constitutionally protected religious activity." Id. *20.

Finally, witnesses described to Congress specific cases of religious discrimination in land-use decisions occurring across the nation. See H.R. Rep. 106-219, *20-22. In one case, for example, the City of Los Angeles "refused to allow fifty elderly Jews to meet for prayer in a house in the large residential neighborhood of Hancock Park," even though the City permitted secular assemblies such as schools and recreational uses. See id. *22. In another case, a "bustling beach community with busy weekend night activity" in Long Island, New York, barred a synagogue from locating there because "it would bring traffic on Friday nights." Id. *23. Perhaps the most vivid example of religious discrimination in land-use concerned the City of Cheltenham Township, Pennsylvania, "which insisted that a synagogue construct the required number of parking spaces despite their being virtually unused" (because Orthodox Jews may not use motorized vehicles on their Sabbath). Id. *22-23. "When the synagogue finally agreed to construct the unneeded parking spaces, the city denied the permit anyway, citing the traffic problems that would ensue from cars for that much parking." Id. The synagogue's attorney testified that he had handled more than thirty other cases of similar religious discrimination. Id.

The congressional record is thus replete with concrete data demonstrating a widespread pattern of discrimination by local governments against religious applicants in a land use setting. Congress found substantial evidence of discrimination against religious uses on the face of numerous local land use codes. Many of the examples of religious discrimination documented in the House Report were

from reported decisions in which a court had upheld the claims of the religious litigants. See H.R. Rep. 106-219, *20 n.86, *22 n.97-98, *23 n.109.

ARGUMENT

THE COMPLAINT STATES CLAIMS UNDER RLUIPA AND THE FHA, AND THE LAND USE PROVISIONS OF RLUIPA ARE CONSTITUTIONAL

The Complaint states valid claims under RLUIPA and the FHA. Further, RLUIPA's land use provisions are a proper exercise of Congress's powers under the Commerce Clause and the Fourteenth Amendment, and do not violate the First Amendment Establishment Clause. Accordingly, the motion to dismiss should be denied.

POINT I

The Complaint Alleges a Violation of RLUIPA

1. The Complaint States a Claim that Religious Experience Is Substantially Burdened in Violation of Section 2(a)(1) of RLUIPA

The Complaint states a claim that Airmont's exclusion of yeshivas imposes a substantial burden on the exercise of religion in violation of Section 2(a)(1) of RLUIPA. Cpl. ¶¶ 36-40.

A. The Complaint Alleges that Yeshivas are Religious Exercise

RLUIPA defines religious exercise to include "any exercise of religion, whether or not compelled by, or central to, a system of religious beliefs." 42 U.S.C. § 2000cc-5(7)(A). Further, RLUIPA expressly states that "[t]he 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." Id. § 2000cc-5(7)(B).

The Complaint alleges that the Congregation's effort to use its property to build a yeshiva qualifies as a religious exercise under RLUIPA. Cpl. ¶ 23-30. Specifically, the Complaint alleges that it is the Congregation's religious practice and belief that when their boys are approximately 15 years

old, "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." Id. ¶ 24. The Complaint alleges that 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." Id. The Complaint further alleges that this education does not end with marriage, but that because "promoting religious education as a way of Hasidic life is central to the Congregation's religious belief and practice, students are encouraged to continue learning in the same intense, on-campus yeshiva environment even after they marry." Id. ¶ 25.

These allegations state that the Congregation's effort to use its land to construct and operate Hasidic yeshivas is a religious exercise as defined by RLUIPA – a point that the defendants do not appear to contest. See San Jose Christian College v. City of Morgan Hill, 360 F.3d 1024, 1034 (9th Cir. 2004) (college's intention to use property for religious college was "religious exercise" under RLUIPA).

B. The Complaint Alleges that Airmont's Zoning Code Substantially Burdens Religious Exercise

The Complaint alleges that the Zoning Code imposes a substantial burden on religious exercise by precluding yeshivas from being constructed or operated anywhere in Airmont. Cpl. ¶ 36.

RLUIPA does not define the term "substantial burden," and the courts applying RLUIPA have not settled upon a uniform definition for that term. In Midrash Sephardi, Inc. v. Town of Surfside, the Eleventh Circuit ruled that a "substantial burden" means more than an inconvenience on religious exercise, and is "akin to significant pressure . . . that tends to force adherents to forego religious precepts." 366 F.3d 1214, 1227 (11th Cir. 2004). The Ninth Circuit has defined "substantial burden" under RLUIPA as a "significantly great restriction or onus" on religious exercise. San Jose Christian College, 360 F.3d at 1034. The Seventh Circuit has adopted a higher threshold, ruling in Civil Liberties

for Urban Believers v. City of Chicago, that:

> in the context of RLUIPA's broad definition of religious exercise, a land-use regulation that imposes 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.

342 F.3d 752, 761 (7th Cir. 2003). The Seventh Circuit has since clarified, however, that the burden need not be "insuperable" to be deemed "substantial," and that unreasonable delay, uncertainty and expense can constitute a substantial burden. See Sts. Constantine & Helen Greek Orthodox Church v. City of New Berlin, 396 F.3d 895, 900-901 (7th Cir. 2005).

The Second Circuit has not yet defined "substantial burden" under RLUIPA, although in another context it ruled that "a substantial burden exists where the state 'put[s] substantial pressure on an adherent to modify his behavior and to violate his beliefs.'" Jolly v. Coughlin, 76 F.3d 468, 477 (2d Cir. 1996) (citation omitted). The only Southern District of New York court to consider the definition of "substantial burden" under RLUIPA ruled that zoning regulations must have a "chilling effect" on religious exercise, rather than imposing a mere inconvenience, to constitute a substantial burden. See Westchester Day School v. Village of Mamaroneck, 280 F. Supp. 2d 230, 240 (S.D.N.Y. 2003) (zoning ordinances substantially burdened religious school by burdening quality of religious education it sought to provide).[3] The Westchester Day School Court also ruled, after remand, that an allegation that the school was denied the opportunity to construct and renovate its facilities in ways that are "necessary for WDS to fulfill its religious mission," states a RLUIPA claim of substantial burden on religious exercise. See Westchester Day School, 379 F. Supp. 2d 550, 556 (S.D.N.Y. 2005); see also Congregation Kol

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3 The district court's decision in Westchester Day School was vacated and remanded by the Second Circuit on the grounds that the school's construction application was not completely and finally denied; the district court's ruling on the meaning of substantial burden and RLUIPA's constitutionality was not expressly reversed, however. See 386 F.3d 183, 188-90 (2d Cir. 2004).

Ami v. Abington Township, No.Civ.A. 01-1919, 2004 WL 1837037, *8-9 (E.D. Pa. Aug. 17, 2004) (denial of variance preventing development and operation of place of worship is "substantial burden").

Under any of these definitions, the Complaint states a claim that Airmont's blanket ban on boarding schools substantially burdens religious exercise. The Complaint alleges that members of the Hasidic community hold the sincere belief that a proper religious education requires that their boys attend campus yeshivas to live and study in an insular, intense environment. Cpl. ¶¶ 24-25. Because the Zoning Code expressly prohibits all boarding schools – regardless of the school's size, design or location within the Airmont – it is impossible for Hasidic Jews in Airmont to engage in the religious educational experience that their faith mandates. Cpl. ¶ 36.

This is not a case where Hasidic Jews could build their school in another part of the town. Contrast Midrash Sephardi, 366 F.3d at 1228 (no substantial burden where synagogues were permitted in some, but not all of town's districts); Konikov v. Orange County, 302 F. Supp. 2d 1328, 1343 (M.D. Fl. 2004) (same). Rather, Airmont's zoning code leaves Hasidic Jews with only two options: build a religious school without student housing, which violates their religious beliefs about a proper religious education, as alleged in the Complaint; or forego building in Airmont.[4]

RLUIPA's legislative history indicates that such a forced choice is exactly what RLUIPA sought to target and prevent. Congress relied on studies of zoning codes that left "no place where a church [can] locate without the grant of a special use permit," H.R. Rep. 106-219, *19, and noted that "[m]any

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4 Airmont's contention that the Congregation could use its property for single family housing and "build their school elsewhere" (Def. Br. at 8) flatly ignores the Complaint's allegations that the Congregation's faith requires that its young men live and study in a single location to create a monastic religious experience. Cpl. ¶¶ 24-25. Airmont's suggestion is, effectively, that Hasidic Jews can live in Airmont so long as they do not practice their religion in accordance with their faith; but that if Hasidic Jews want to live as their faith demands, Airmont says that they must live elsewhere.

zoning schemes around the country make it illegal to start a church anywhere in the community without discretionary permission from a land use authority." Id., *24. Congress passed RLUIPA in response. Thus, Airmont cannot escape the effect of RLUIPA by arguing that the Congregation "could have chosen to apply for a variance" or appealed its permit denial. (Def. Br. at 8).[5] That merely proposes a solution that Congress has already deemed unacceptable.

Accordingly, the Complaint states a claim that Airmont imposes a "substantial burden" on religious exercise.

C. The Complaint Alleges that Airmont Articulates no Compelling Interest or Least Restrictive Means for the Zoning Code's Ban on Yeshivas

Because the Zoning Code imposes a substantial burden on religious exercise, Airmont must show that the Zoning Code's ban on boarding schools is the "least restrictive means" of furthering a "compelling governmental interest." 42 U.S.C. § 2000cc(a)(1)(A); Cpl. ¶ 37. Airmont makes no such showing.

To the contrary, the Complaint alleges that "Airmont has not identified any compelling governmental interest for denying the Congregation's application or for the Zoning Code's ban on all schools with residential student housing – regardless of the proposed school's size, location within Airmont, or the capacity or type of on-campus housing." Cpl. ¶ 34. In alleging that Airmont conditionally permits any number of group residential facilities, including overnight camps, family and group care facilities, hospitals and sanatoriums, nursing homes and convalescent facilities, senior

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5 The Zoning Code permits use variances at the sole discretion of the Airmont Board of Appeals, after a showing that the variance will not "after the essential character of the neighborhood" and that the alleged hardship necessitating the variance "has not been self created." Guéron Decl. Ex. A § 210-158(C)(2)(b). But it was to avoid burdening religious exercise by the unfair application of just these kinds of discretionary rules that Congress passed RLUIPA. H.R. Rep. 106-219, *24.

housing, and hotels, the Complaint clearly states a claim that Airmont does not deem most group residential housing to be contrary to its compelling interests. Id. ¶ 37. The Complaint also alleges that even if limiting yeshivas did further a compelling governmental interest, Airmont's total prohibition is not the least restrictive means of furthering that interest. Id.

In Westchester Day School, the only case in the Southern District of New York to consider the issue, the Court defined "compelling interests" as those interests implicated by immediate threats to public health, safety or welfare. See Westchester Day School, 280 F. Supp. 2d at 242-43 (village's concerns over traffic and parking were not compelling reason to deny plaintiff's application to expand religious day school). That approach is consistent with New York State jurisprudence. See Matter of Westchester Reform Temple v. Brown, 22 N.Y.2d 488, 494-496, 293 N.Y.S.2d 297 (N.Y. 1968) (religious structures cannot be excluded from residential zones unless construction would have direct and immediate adverse impact on health, safety, welfare). Where, as here, Airmont has not identified any interest, compelling or otherwise, for the Zoning Code's ban on all boarding schools, the Complaint states a valid claim.

2. The Complaint States a Claim that Airmont Discriminates in Violation of Section 2(b)(2) of RLUIPA

The Complaint also states a valid claim that Airmont discriminates against Hasidic Jews through its Zoning Code, in violation of Section 2(b)(2) of RLUIPA. 42 U.S.C. § 2000cc(b)(2). The Complaint alleges that, at the time Airmont enacted its Zoning Code, Hasidic boarding schools operated in Ramapo and other areas of Rockland County, and that Airmont prohibited boarding schools in order to prevent Hasidic boarding schools from operating in Airmont. Cpl. ¶ 16. Thus, the Complaint alleges that Airmont enacted the ban on boarding schools aware that it would exclude yeshivas from operating in Airmont, and precisely for that purpose. Id.

Further, the Complaint alleges that the Zoning Code singles out and prohibits boarding schools, while permitting other group residential uses as of right or conditionally. As detailed in the facts section above, the Zoning Code bans boarding schools – including all yeshivas – from the entire town of Airmont. Yeshivas are banned from residential districts that permit "community residence facilities" as of right. Id. ¶¶ 13-22; Guéron Decl. Ex. A §§ 210-14(A)-(B), 210-15(A)-(B), 210-16(A)-(B), 210-17(A)-(B), 210-18(A)-(B). Yeshivas are banned from residential districts that conditionally permit overnight camps; family and group care facilities; public and private hospitals and sanatoriums for general medical care; and nursing homes and convalescent facilities. See id. Yeshivas are banned from non-residential districts that conditionally permit hotels of more than 100 rooms. Cpl. ¶ 18; Guéron Decl. Ex. A § 210-21(C)(6). And whereas Airmont permits – and has recently allowed to be built – large housing complexes for senior citizens, it makes no such accommodations for yeshivas. Cpl. ¶¶ 19-21; Guéron Decl. Ex. A § 210-19(A).

Airmont argues that the Complaint fails to state a claim of discrimination because the Zoning Code is facially neutral toward religion and does not favor secular uses over religious ones. (Def. Br. at 5). The implication of this argument is that the Complaint must fail because it does not allege disparate treatment of yeshivas as compared to secular boarding schools. This argument is wrong for two reasons.

First, as a legal matter, evidence of a defendant's disparate treatment of two similarly situated persons is not necessary to establish discriminatory intent. As the Court of Appeals has explained, evidence of disparate treatment, while "a common and especially effective method of establishing" discriminatory intent, "is only one way to discharge that burden." Abdu-Brisson v. Delta Air Lines, 239 F.3d 456, 467-68 (2d Cir. 2001). Accordingly, "such evidence is not always necessary." Holtz v. Rockefeller & Co., Inc., 258 F.3d 62, 77 (2d Cir. 2001). Rather, "whether invidious discriminatory

purpose was a motivating factor demands a sensitive inquiry into such circumstantial and direct evidence of intent as may be available." Village of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 266 (1977). And where direct evidence is not presented, "discriminatory intent may be inferred from the totality of the circumstances." Airmont I, 67 F.3d at 425; cf. Olmstead v. Zimring, 527 U.S. 581, 598 (1999) (recognizing "comprehensive view" of discrimination may look beyond allegations of unequal treatment of similarly situated individuals); Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 535 (1993) ("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 Government hostility which is masked as well as overt.").[6]

The Complaint alleges that the Zoning Code's ban on boarding schools was written because of invidious discrimination, as an effort to keep out Hasidic Jews. Cpl. ¶ 16. This case alleges that Airmont is again, via the same Zoning Code, discriminating against the same religious constituency as it was found to have mistreated in Airmont I. See 67 F.3d at 431. This states a claim of discrimination.

Further, since this case concerns alleged discrimination by the Village of Airmont, it is particularly appropriate to remember the Court's admonition in Airmont I and look to the totality of the circumstances here. In Airmont I, the Court of Appeals upheld a discrimination verdict against Airmont, quoting statements from the record such as "i [sic] *will not* have a hasidic community in my backyard" (emphasis in original) and "the reason of forming this village is to keep people like you out

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6 Defendants' case citations do not prove otherwise. (Def. Br. at 5). They wrongly assert that Hale O Kaula Church insists that "only laws that facially discriminate" violate RLUIPA; in fact, Hale O'Kaula holds that discrimination can come in the form of facial discrimination or discriminatory application. See Hale O Kaula Church v. Maui Planning Comm'n, 229 F. Supp. 2d 1056, 1071 (D. Haw. 2002). Similarly, Lighthouse Institute (a case designated "non precedential" by the Third Circuit Court of Appeals) recognizes facially discriminatory laws and evidence that facially neutral laws are "interpreted" unfairly. See Lighthouse Inst. for Evangelism, Inc. v. City of Long Branch, 100 Fed. Appx. 70, 77 (3d Cir. 2004).

of this neighborhood." Airmont I, 67 F.3d at 431. In light of these statements, the Court of Appeals ruled that "there was ample support for the jury's implicit finding that Airmont's zoning code would be interpreted to restrict the use of home synagogues, that the motivation behind the enactment was discriminatory animus toward Orthodox and Hasidic Jews, and that Airmont pursued this goal joint with the [Airmont Civic Association]." Id. This history should not be ignored here.

Second, Airmont's claim that the Zoning Code is facially neutral towards religion and does not favor secular land-users over religious ones is incorrect. Airmont permits many, varied types of group residential housing, but prohibits yeshivas and other boarding schools. In so doing, Airmont prefers secular group residential uses – camps, senior housing, nursing homes, hospitals – over yeshivas. Airmont should not be able to insulate this preference against yeshivas by ensuring that the Zoning Code treats all boarding schools alike. Rather, the Court should look more broadly, and find that the Complaint alleges religious discrimination when many forms of secular group residential housing are permitted, but a central form of religious group residential housing is barred.

POINT II

RLUIPA is Constitutional

1. RLUIPA Section 2(a)(1), as Applied Through Section 2(a)(2)(B), Is a Valid Exercise of Congress's Authority Under the Commerce Clause

Section 2(a)(1) of RLUIPA, as applied through Section 2(a)(2)(B), is a constitutional exercise of Congressional authority under the Commerce Clause. RLUIPA, like all other statutes, is entitled to a presumption of constitutionality, see INS v. Chadha, 462 U.S. 919, 944 (1983), and Airmont has failed to discharge its heavy burden of proving that RLUIPA is unconstitutional, see Lujan v. G&G Fire Sprinklers, Inc., 532 U.S. 189, 198 (2001).

A. Section 2(a)(1) Is Constitutional Because it Contains a Valid Jurisdictional Element

In enacting section 2(a)(1), Congress invoked its power under the Commerce Clause, which permits Congress "[t]o regulate Commerce . . . among the several States." U.S. Const., Art. I, § 8, cl. 3. Thus, Section 2(a)(2)(B) provides that Section 2(a)(1) applies whenever a land use regulation imposes a substantial burden upon the religious exercise of a person or institution, and when that burden "affects, or removal of that substantial burden would affect, commerce . . . among the several states . . .." 42 U.S.C. 2000cc(a)(2)(B). This clause – often called a jurisdictional element – restricts RLUIPA so that it can apply only when the Commerce Clause will permit it.

The jurisdictional element prevents RLUIPA from exceeding the Commerce Clause's bounds; it makes RLUIPA "tautologically constitutional" by defining the statute to reach only so far as the constitution permits. See H.R. Rep. 106-219, *16. Thus, there can be only two possible outcomes when a court considers whether RLUIPA applies and weighs the jurisdictional element of section 2(a)(2)(B). First, a court could find that the alleged burden on religion does not affect interstate commerce. In that case, RLUIPA would not apply as a *statutory* matter, so no constitutional breach could arise. Second, a court could find that the alleged burden on religion does affect interstate commerce. In that case, RLUIPA applies and clears the constitutional hurdle.

In United States v. Lopez, a case cited by defendants (Def. Br. 18), the Supreme Court invalidated the Gun Free School Zones Act on the grounds that it was a criminal statute unrelated to commerce, and thus not a valid exercise of Commerce Clause powers. 514 U.S. 549, 560-61 (1995). However, the Lopez Court stressed that Congress may constitutionally exercise its Commerce Clause power by employing a "jurisdictional element" to target only those individual acts that themselves affect commerce. See id. at 561-62. Accord United States v. Morrison, 529 U.S. 598, 612 (2000) ("a jurisdictional element may establish that the enactment is in pursuance of Congress' regulation of

interstate commerce"). Because a jurisdictional element restricts the applicability of a statute to those activities which a court, based on a case-by-case analysis, determines affect interstate commerce, it ensures the constitutionality of any statute that includes one. See Lopez, 514 U.S. at 561. In other words, the jurisdictional element limits a statute to the arena in which Congress has constitutional authority.[7]

The Second Circuit has consistently upheld statutes passed under the Commerce Clause that contain jurisdictional elements. See, e.g., United States v. Griffith, 284 F.3d 338, 346-47 (2d Cir. 2002) (rejecting challenge under Commerce Clause to constitutionality of criminal statute where jurisdictional element ensured sufficient nexus to interstate commerce); United States v. Santiago, 238 F.3d 213, 216 (2d Cir. 2001) (by including a jurisdictional element in criminal statute prohibiting possession of firearm by convicted felon, "Congress effectively limited the statute's reach to a discrete set of firearm possessions that have an explicit connection with or effect on interstate commerce") (internal quotation marks and alterations omitted); United States v. Trzaska, 111 F.3d 1019, 1029 (2d Cir. 1997) (same).[8]

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7 Consistent with these principles, Congress routinely employs jurisdictional elements to target specific activities, within a larger class, that affect interstate commerce. See, e.g., 18 U.S.C. 844(i) (federal arson statute, applicable to damage of property "used in interstate . . . commerce or in any activity affecting interstate . . . commerce"); 18 U.S.C. 922(g) (federal felony firearms possession law, applicable to firearms transported, possessed or received "in interstate . . . commerce or . . . affecting commerce"); 18 U.S.C. 1951(a) (Hobbs Act, prohibiting robbery or extortion that "obstructs, delays or affects commerce"); 18 U.S.C. 2119 (federal carjacking statute, applicable when car has been transported in interstate commerce).

8 Other courts of appeals have similarly upheld statutes passed under the Commerce Clause that contain jurisdictional elements. See United States v. Grassie, 237 F.3d 1199, 1211 (10th Cir. 2001) ("[B]y making interstate commerce an element of the [Church Arson Prevention Act] . . . to be decided on a case-by-case basis, constitutional problems are avoided"); United States v. Baker, 197 F.3d 211, 218 (6th Cir. 1999) ("[T]he jurisdictional element applicable to 18 U.S.C. 922(g)(8) insulates the statute from a Commerce Clause challenge"); United States v. Harrington, 108 F.3d 1460, 1464-68 (D.C. Cir. 1997) (holding that jurisdictional element employed in Hobbs Act ensured statute's facial constitutionality); United States v. Bishop, 66 F.3d 569, 588 (3d Cir. 1995) ("[T]he jurisdictional element in [federal carjacking statute] independently refutes

Moreover, RLUIPA satisfies the concern expressed by the Court of Appeals in United States v. Holston, 343 F.3d 83, 88 (2d Cir. 2003), that there must be a close nexus between the jurisdictional element and the regulated conduct. The provision at issue in Holston, 18 U.S.C. § 2251(a), imposed criminal liability on individuals who manufactured child pornography when one of the materials from which the pornography was created had traveled in interstate commerce. Id. at 86. Although it upheld the statute, the Court found that the interstate commerce components underpinning the jurisdictional element (for example, shipment of a video camera across state lines) were too attenuated from the regulated criminal conduct (the production of child pornography) to limit the statute's reach. See id. at 89. By contrast, under RLUIPA section 2(a)(2)(B), it is the state or local government's imposition of a substantial burden on religious exercise – the very object of the statute itself – that must affect interstate commerce. Thus, RLUIPA requires a close nexus between the jurisdictional element and the regulated conduct.

On the basis of RLUIPA's jurisdictional element, every court to consider the issue, save one, has held that RLUIPA section 2(a)(1), as applied through section2(a)(2)(B), is a valid exercise of Commerce Clause powers. See Kol Ami, 2004 WL 1837037, *11-12 (jurisdictional element "sufficient to satisfy the Commerce Clause"); Castle Hills First Baptist Church v. City of Castle Hills, No. 01 CA 1149, 2004 WL 546792, *19 (W.D. Tex. Mar. 17, 2004) (jurisdictional element and nexus to economic endeavors satisfy commerce clause); Hale O Kaula, 229 F. Supp. 2d at 1072-73 ("Lopez itself recognized that if a statute includes a jurisdictional element, the statute avoids such a jurisdictional challenge [under the Commerce Clause]. RLUIPA contains such an element."); United States v. Maui, 298 F. Supp. 2d 1010, 1015 (D. Haw. 2003) (same); Life Teen, Inc. v. Yavapai County, No. Civ. 01-

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appellants' arguments that the statute is constitutionally infirm").

1490, 2003 U.S. Dist. LEXIS 24363, *36-38 (D. Ariz. Mar. 26, 2003) (same); Freedom Baptist Church v. Township of Middletown, 204 F. Supp. 2d 857, 866-68 (E.D. Pa. 2002) (same). But see Elsinore Christian Center v. City of Lake Elsinore, 291 F. Supp. 2d 1083, 1102-03 (C.D. Cal. 2003). Moreover, several courts have held that RLUIPA's institutionalized persons provisions, which contain an identical jurisdictional element, are constitutional under the Commerce Clause. See Mayweathers v. Terhune, 2001 WL 804140, *8 (E.D. Cal. July 2, 2001) (jurisdictional element ensures that "by definition, § 3 of RLUIPA does not exceed the boundaries of the Commerce Clause."), aff'd on other grounds, 314 F.3d 1062 (9th Cir. 2002); Johnson v. Martin, 223 F. Supp. 2d 820, 828 (W.D. Mich. 2002) ("RLUIPA is saved by its jurisdictional requirement which establishes the requisite nexus to interstate commerce to satisfy the Commerce Clause.").

Finally, RLUIPA includes a limiting provision even beyond the jurisdictional element:

> 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 . . . among the several States . . . 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 . . . among the several States . . . .

42 U.S.C. 2000cc-2(g). This so-called savings clause provides that RLUIPA shall not apply if a state or municipality demonstrates that the aggregate effects do not substantially affect commerce. See Johnson, 223 F. Supp. 2d at 829 n.8 ("[e]ven if RLUIPA is viewed as regulating intrastate activity . . . it only applies if the Wickard [v. Filburn, 317 U.S. 111 (1942)] test is satisfied. That is, the intrastate activity must have an aggregate effect on interstate activity"); Freedom Baptist Church, 204 F. Supp. 2d at 867 n.14 (citing savings clause regarding aggregation of intrastate effects). This savings clause provides a secondary layer of constitutional protection to RLUIPA defendants.

B. Section 2(a)(1) is Valid Because it Concerns "Economic Activity"

Relying on Elsinore and a law review article, the Village contends that RLUIPA does not satisfy the Commerce Clause because it does not regulate "economic activity" but only local land-use decisions, and that even if local land-use decisions are economic activity, they do not affect interstate commerce substantially. (Def. Br. at 19). This argument is flawed for several reasons.

First, and most importantly, this argument ignores the dispositive factor: that RLUIPA has a jurisdictional element requiring a case-by-case determination that the activity in question affects interstate commerce. Thus, if a court were to find in a given case that the burden on religious exercise does not affect interstate commerce, Section 2(a)(1), as applied through Section 2(a)(2)(B), simply would not apply.

Moreover, the Village is wrong when it makes the conclusory statement that the jurisdictional element would require a court to "pil[e] inference upon inference" to establish a link to interstate commerce. (Def. Br. at 20). Unlike in Morrison, where the Supreme Court held that the link between gender-related violence and a substantial effect on interstate commerce was too attenuated, or in Lopez, where possession of a firearm in a school zone only tenuously related to interstate commerce, the link between interstate commerce and the activities of a religious institution is direct.[9] Religious institutions are participants in interstate commerce, and the construction of buildings in particular requires the use of goods, services, and labor that travel in interstate commerce. See Camps Newfoundland/Owatonna v. Town of Harrison, 520 U.S. 564, 573 (1997) (holding that non-profit religious camp engaged in commerce because non-profits are major participants in interstate commerce for goods and services, use interstate communications and transportation, and raise and distribute revenues interstate); see also

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9 As noted above, the most relevant point about Lopez and Morrison is that both explain that a jurisdictional element is sufficient, alone, to comply with the Commerce Clause.

Grassie, 237 F.3d at 1209-10 ("[T]he Commerce Clause applies to charitable and non-profit entities . . . Religion and, in particular[,] religious buildings actively used as the site and dynamic for a full range of activities, easily falls within the holding of Camps.").

Thus, courts have determined that the operation and construction of a religious school is an "economic endeavor within the meaning of the Commerce Clause." Westchester Day School, 280 F. Supp. 2d at 238, vacated on other grounds, 386 F.3d 183 (2d Cir. 2004); see Castle Hills, 2004 WL 546792, *19 (same); Kol Ami, 2004 WL 1837037, *12 (RLUIPA land use laws "have a very close nexus, rather than an attenuated connection, with these commercial activities."); cf. U.S. v. Laton, 352 F.3d 286, 298 (6th Cir. 2003) (for Commerce Clause purposes, churches "primarily serve a religious function, but churches can also have secondary and important economic purposes"); U.S. v. Odom, 252 F.3d 1289, 1294 (11th Cir. 2001) ("Churches are not commonly considered a business enterprise; nonetheless, churches can and do engage in commerce.").

Congress "normally is not required to make formal findings as to the substantial burdens that an activity has on interstate commerce." Lopez, 514 U.S. at 562-63. Even were this Court to disregard that directive, however, RLUIPA's legislative history amply supports Congress's determination that religious institutions suffer from discriminatory application of local zoning codes, and that this has a

> significant impact on interstate commerce. As the Court of Appeals noted, Religious organizations, as a division of the charitable and non-profit sector, . . . impact the national economy in orders of magnitude. Recently, in testimony before the House Judiciary Committee, Mark B. Stern, testifying on behalf of the American Jewish Congress, filled multiple pages of the record with statistics showing the enormous impact that religion has on commerce in this country, with houses of worship filling a central economic and animating role.

Grassie, 237 F.3d at 1209 n.7 (citing the Religious Liberty Protection Act of 1998: Hearings on H.R. 4019 Before the Subcomm. on the Constitution of the House Comm. on the Judiciary, 105th Cong. 57-62); see also 146 Cong. Rec. at S7775; H.R. Rep. No. 106-219, *28 (identifying construction projects

as specific economic transactions in commerce that discriminatory land use regulations may burden, and noting that aggregate effects are substantial); Johnson, 223 F. Supp. 2d at 828-29 (finding that free exercise of religion affects interstate commerce "in a multitude of ways"). Further, Congress heard testimony that $44-66 billion in religious charitable donations are made annually; that religious congregations have operating expenses of $41 billion; and that, in New York alone, religious institutions control $13.5 billion of property. See Religious Liberty Protection Act of 1998: Hearing on H.R. 4019 Before the Subcomm. on the Constitution of the House Comm. on the Judiciary, 105th Cong. 54065 (1998)). Rep. Canady, co-sponsor of the bill, explained that RLUIPA "does not treat religious exercise itself as commerce, but it recognizes that the exercise of religion sometimes requires commercial transactions, as in the construction, purchase, or rental of buildings." H.R. Rep. No. 106-219, *22.

Finally, it is incorrect to deem zoning a purely local issue. Numerous courts have noted that "the mere fact that zoning is traditionally a local matter does not answer Congress's undoubtedly broad authority . . . . to regulate economic activity even when it is primarily intrastate in nature." Freedom Baptist Church, 204 F. Supp. 2d at 867; see also Life Teen, 2003 U.S. Dist. LEXIS 24363, *48-49 ("Land use regulation is left to the States and local governments under RLUIPA; they are simply prohibited from imposing substantial burdens on religious exercise in the process."). And as the Court noted in Freedom Baptist Church, "nor is [RLUIPA] the first time Congress has entered the zoning area." 204 F. Supp. 2d at 867 (citing the Telecommunications Act of 1996). This argument is buttressed by the findings of other courts that have upheld analogous statutes. See, e.g., Groome Resources, Ltd. v. Parish of Jefferson, 234 F.3d 192, 205-206 (5th Cir. 2000) (Fair Housing Amendments Act, which regulates local zoning laws to combat discrimination, is constitutional).

Thus, for all the above reasons, this court should hold that RLUIPA section 2(a)(1), as applied

through section 2(a)(2)(B), is a valid exercise of Congress's Commerce Clause power.

2. RLUIPA Section 2(a)(1), as Applied by Section 2(a)(2)(C), is a Constitutional Exercise of Congress's Authority Under Section 5 of the Fourteenth Amendment

RLUIPA section 2(a)(1), as applied through section 2(a)(2)(C), codifies the Supreme Court's Free Exercise Clause "individualized assessments" doctrine. Thus, it is within Congress's power under section 5 of the Fourteenth Amendment. See City of Boerne v. Flores, 521 U.S. 507, 519 (1997) ("Congress can enact legislation under § 5 enforcing the constitutional right to the free exercise of religion.").

Because RLUIPA codifies the Free Exercise Clause doctrine and does not expand upon existing constitutional guarantees, this Court need not examine whether RLUIPA is a congruent and proportional response to the widespread discrimination against religion in land use matters that Congress sought to address by enacting RLUIPA. See Flores, 521 U.S. at 520 (recognizing that Congress may go beyond the Supreme Court's precise articulation of constitutional protections and prohibit conduct that is not unconstitutional if there is a "congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end.") Even if the Court were to find that RLUIPA exceeded the requirements of the Free Exercise Clause, however, the record compiled by Congress demonstrating widespread discrimination against religion in land use matters is more than sufficient to support Congress's authority to enact this provision of RLUIPA.

A. RLUIPA Section 2(a)(1), as Applied by Section 2(a)(2)(C), Codifies the Supreme Court's Individualized Assessments Doctrine

(i) The Individual Assessments Doctrine of the Free Exercise Clause

In Employment Division v. Smith, 494 U.S. 872 , 879-84 (1990), the Supreme Court held that the Free Exercise Clause does not relieve a person of the obligation to comply with a neutral, generally

applicable law. The Court thus held that strict scrutiny was not required for claims by religious objectors against across-the-board laws that were not targeted at religion, such as criminal drug laws. Id. at 884. The Smith Court insisted, however, that laws that are not generally applicable, but which instead have "eligibility criteria [that] invite 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 under the Free Exercise Clause. Id. Smith explained that the Free Exercise Clause requires strict scrutiny of laws aimed at religion, and that government action is aimed at religion "where the State has in place a system of individualized exemptions," but "refuse[s] to extend that system to cases of 'religious hardship.'" Id.

Three years after Smith, the Supreme Court applied the individualized assessments doctrine in Lukumi, 508 U.S. 520. There, the Court struck down municipal animal-cruelty ordinances that required the government to evaluate the justification for animal killings on the basis of whether such killings were "unnecessar[y]." 508 U.S. at 537. The Court held that this was a system of individualized assessments because it required "an evaluation of the particular justification for the killing," id., applied strict scrutiny, and struck down the ordinance because the City of Hialeah had devalued religious reasons for killing animals by "judging them to be of lesser import than nonreligious reasons." Id.

(ii) RLUIPA Codifies the Individual Assessments Doctrine

In enacting RLUIPA, Congress found that land-use decisions, like employment compensation laws, typically involve individualized assessments. See Joint Statement, 146 Cong. Rec. at S7775 (hearing record demonstrates "a widespread practice of individualized decisions to grant or refuse permission to use property for religious purposes"); H.R. Rep. No. 106-219, *20 (finding that regulators "typically have virtually unlimited discretion in granting or denying permits for land use and in other aspects of implementing zoning laws"). Thus, Congress enacted RLUIPA section 2(a)(1), as applied

through section 2(a)(2)(C), to enforce the Supreme Court's interpretation of the Free Exercise Clause in a context in which land use decisions are made according to individualized assessments. Joint Statement, 146 Cong. Rec. at S7775; H.R. Rep. 106-219, *17.[10] Since RLUIPA section 2(a)(1), as applied through section 2(a)(2)(C), codifies the Supreme Court's individualized assessments doctrine, and extends no further than that doctrine applies, it is a permissible exercise of Congress's power under section 5 of the Fourteenth Amendment. Thus, Airmont is wrong to claim that RLUIPA "alters the fabric of Free Exercise rights." (Def. Br. at 9).

Indeed, the vast majority of the district courts to have addressed this issue have held that RLUIPA section 2(a)(1), as applied through section 2(a)(2)(C), is a valid exercise of Congress's section 5 powers. See Kol Ami, 2004 WL 1837037, *10 (holding RLUIPA constitutional and stating "RLUIPA, in almost all of its applications, will only reinforce the level of scrutiny applicable to systems of individualized exemptions."); Castle Hills, 2004 WL 546792 (upholding RLUIPA as constitutional: "RLUIPA prohibits unconstitutional state conduct as previously defined in the land use context by the Supreme Court."); Primera Iglesia Bautista Hispana of Boca Raton, Inc. v. Broward County, No. 01-6530, 2003 U.S. Dist. Lexis 26148, *20-22 (S.D. Fla. Nov. 7, 2003) (Rep. and Rec.) (finding RLUIPA constitutional and agreeing with decision holding that RLUIPA "merely codified the individualized assessments jurisprudence in Free Exercise cases from Sherbert . . .through [Lukumi]") (citation

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10 See Guru Nanak Sikh Society of Yuba City v. County of Sutter, 326 F. Supp. 2d 1140, 1160 n. 10 (E.D. Cal. 2003) (it is "beyond cavil that zoning decisions such as the one at issue in this case are properly described as 'individual assessments'"), app. pending, No. 03-17343 (9th Cir.); Freedom Baptist Church, 204 F. Supp. 2d at 868 (zoning ordinances "must by their nature impose individual assessment regimes," i.e., land use regulations through zoning codes "necessarily involve case-by-case evaluations of the propriety of proposed activity against extant land use regulations"); Al-Salam Mosque Foundation v. City of Palos Heights, 2001 WL 204772, *2 (N.D. Ill. Mar. 1, 2001) ("Land use regulation often involves individualized governmental assessment of the reasons for the relevant conduct," requiring strict scrutiny) (internal quotation marks omitted).

omitted), adopted by 2004 U.S. Lexis 25466 (S.D. Fla. Jan. 5, 2004); Westchester Day School, 280 F. Supp. 2d at 234-37 (upholding RLUIPA as constitutional and consistent with Smith), vacated on other grounds, 386 F.3d 183 (2d Cir. 2004); Maui, 298 F. Supp. 2d at 1016-17 ("If, as the Court finds here, RLUIPA codified existing precedent regarding when to apply the strict scrutiny test (i.e., if a generally applicable and neutral law also contains exceptions based upon 'individualized assessments' which can be used in a pretextual manner . . .) then it is Constitutional"); Guru Nanak, 326 F. Supp. 2d at 1156-1161 (in "limiting its applicability outside of the Spending and Commerce Clauses to those cases where governments make 'individual assessments,' [RLUIPA] draws the very line that Smith itself drew when it distinguished neutral laws of general applicability from those 'where the State has in place a system of individual exemptions,' but nevertheless 'refuse[s] to extend that system to cases of 'religious hardship.'") (citation omitted), app. pending, No. 03-17343; Murphy v. Zoning Comm'n of Town of New Milford, 289 F. Supp. 2d 87 (D. Conn. 2003) (finding RLUIPA a constitutional enactment of Congress), vacated on other grounds by 402 F.3d 342 (2d Cir. 2005); Cottonwood Christian Center v. Cypress Redevelopment Agency, 218 F. Supp. 2d 1203, 1221 n.7 (C.D. Cal. 2002) (finding that RLUIPA appeared to be within Congress's constitutional authority, although not explicitly deciding whether RLUIPA was constitutional); Life Teen, 2003 U.S. Dist. LEXIS 24363, *38-43 ("RLUIPA codifies existing Free Exercise jurisprudence under Sherbert and Lukumi by applying strict scrutiny in cases where" where the government makes "'individualized assessments of the proposed uses for the property involved'") (citation omitted); Christ Universal Mission Church v. City of Chicago, 2002 U.S. Dist. Lexis 22917, * 24 (N.D. Ill. Sept. 11, 2002) (disagreeing with argument that RLUIPA is unconstitutional); Freedom Baptist Church, 204 F. Supp. 2d at 869 (RLUIPA Section 2(a)(2)(C) "faithfully codifies the 'individual assessments' jurisprudence in the Sherbert through Lukumi line of cases."); but see Elsinore, 291 F. Supp. 2d at 1104 (finding RLUIPA unconstitutional), app. pending.

No. 04-55320 (9th Cir.).

Airmont relies on one case for the holding that RLUIPA is unconstitutional: Elsinore, 291 F. Supp. 2d at 1104 (and the previous decision in the case, Elsinore Christian Center v. City of Lake Elsinore, 270 F. Supp. 2d 1163 (C.D. Cal. 2003)). This Court rejected the earlier decision in Fortress Bible Church v. Feiner, 03 Civ. 4235, 2004 WL 1179307, *3 (S.D.N.Y. March 29, 2004) (Robinson, J.) (the "Elsinore holding contradicts a significant weight of the case law on this subject, including two recent cases from District Courts within this Circuit, and this Court finds the contradicting case law more persuasive.") (citing Westchester Day School, 280 F. Supp. 2d 230, Murphy, 289 F. Supp. 2d 87; Hale O Kaula, 229 F. Supp. 2d at 1072; Johnson, 223 F. Supp. 2d at 828; Cottonwood Christian Center, 218 F. Supp. 2d at 1221; Freedom Baptist Church, 204 F. Supp. 2d at 868).

(iii) The Individualized Assessments Doctrine Applies to Land Use Laws

Airmont's arguments, relying heavily on the reasoning of Elsinore, are incorrect. First, Airmont incorrectly claims that the "strict scrutiny test never applied to challenges outside the employment compensation field," and that the "individualized assessment" doctrine does not apply to land use decisions. (Def. Br. at 11, citing Smith, Elsinore). This Court has specifically addressed the issue and rejected the claim that RLUIPA cannot apply to land use challenges. See Fortress Bible Church, 2004 WL 1179307, *3 (Robinson, J.). Indeed, in Lukumi, the Supreme Court applied Free Exercise Clause strict scrutiny to a land use provision. 508 U.S. at 545. One of the local ordinances the Supreme Court struck down in Lukumi prohibited the slaughter of animals outside of areas zoned for slaughterhouses. See id. The Supreme Court held that this ordinance discriminated against religion in violation of the Free Exercise Clause because it contained an exemption for commercial operations that slaughter small numbers of hogs and cattle, and because the City could not prove that its refusal to allow comparable religious exceptions was justified by a compelling interest. See id.

Thus, as demonstrated in Lukumi and as approved in general terms by Smith, 494 U.S. at 994, the individualized assessments doctrine applies outside the unemployment compensation context, including to zoning decisions. See Freedom Baptist Church, 204 F. Supp. 2d at 868 ("the Supreme Court [in Lukumi] confirmed that the presence of "individualized assessments" remains of constitutional significance in Free Exercise cases even outside the unemployment compensation arena"); Rader v. Johnston, 924 F. Supp. 1540, 1552 n.23 (D. Neb. 1996) ("[T]he Supreme Court's latest free exercise decision, Lukumi Babalu Aye, removes much of the doubt about the role of individualized exemptions outside the unemployment compensation context").

Moreover, there is no apparent logic to the proposition that a land-use decision by its nature cannot impose a substantial burden on religious exercise, and courts have explicitly held otherwise.[11] The cases relied on by Airmont (that the court in Elsinore also relied on, 291 F. Supp. 2d at 1090), do not hold that land use laws could never impose a substantial burden on the free exercise of religion.[12]

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11 Contrary to Airmont's suggestion that the Free Exercise Clause individual assessments doctrine does not encompass land use decisions (Def. Br. at 9 ("Prior to RLUIPA, no court had equated land use with religious exercise")), courts had held otherwise prior to the enactment of RLUIPA. See Keeler v. Mayor & City Council of Cumberland, 940 F. Supp. 879, 886 (D. Md. 1996) (historic preservation ordinance, which called for assessment of the "best interest of a majority of persons in the community," was a system of individualized assessments); Alpine Christian Church v. County Comm'rs of Pitkin Cty., 870 F. Supp. 991, 994-95 (D. Colo. 1994) (denial of special use permit, pursuant to discretionary standard of "appropriate[ness]," created substantial burden on religion); First Covenant Church of Seattle v. City of Seattle, 840 P.2d 174, 215 (Wash. 1992) (city landmark ordinances not generally applicable because they "invite individualized assessments of the subject property and the owner's use of such property, and contain mechanisms for individualized exemptions"); Korean Buddhist Dae Won Sa Temple of Haw. v. Sullivan, 87 Haw. 217, 953 P.2d 1315, 1345 n.31 (1998) (zoning code created individualized exemptions and thus was subject to strict scrutiny).

12 See Def. Br. at 10 (citing Christian Gospel Church, Inc. v. City and County of San Francisco, 896 F.2d 1221, 1224 (9th Cir. 1990); Messiah Baptist Church v. Count of Jefferson, 859 F.2d 820, 825-826 (10th Cir. 1988); Lakewood, Ohio Congregation of Jehovah's Witnesses, Inc. v. City of Lakewood, 699 F.2d 303, 307 (6th Cir. 1983); Grosz v. City of Miami Beach, 721 F.2d 729, 739 (11th Cir. 1983)).

Rather, these courts merely hold that the plaintiffs in those cases had not articulated a substantial burden based on the specific facts they presented.

Congress's findings explicitly contradict Airmont's argument that zoning laws do not involve individualized inquiries. (Def. Br. at 11). Congress found that land-use laws allow local officials wide discretion to decide whether religious institutions may use land for religious purposes, and can lead to discrimination against religious entities because discretion invites consideration of a religious applicant's reasons for seeking approval for proposed land uses. Cf. Smith, 494 U.S. at 884 ("distinctive feature" of unemployment compensation programs, which qualify as individualized assessments programs subject to strict scrutiny, is that "criteria invite consideration of the particular circumstances behind an applicant's unemployment").

Airmont also contends, quoting Elsinore, that land-use laws cannot constitute a system of individualized exemptions because, "[i]n determining whether to issue a zoning permit, municipal authorities do not decide whether to exempt a proposed user from an applicable law, but rather whether the general law applies to the facts before it." 270 F. Supp. 2d at 1178 (emphasis in original); see Def. Br. at 12. This holding misses the point of the individualized assessment doctrine, and attempts to distinguish Smith, Lukumi and Sherbert on mere wordplay. As explained above, the "individualized assessment" concept applies to cases where the government has in place a system of "individualized governmental assessment of the reasons for the relevant conduct." Smith, 494 U.S. at 884. For example, the Employment Security Commission in Sherbert denied Sherbert benefits because she would not work on Saturdays, even though the commission would grant benefits on a showing of "good cause." See 374 U.S. at 399-401. Whether the commission "applied" the good cause requirement in weighing Sherbert's religious reasons, or failed to provide her an "exemption" from the general requirement that the unemployed accept work, the result is the same: where a system of individualized

assessments of reasons for refusing work was in place, she could not be denied benefits due to her religious reasons for refusing work absent a compelling governmental interest. Airmont's apparent effort to draw a distinction between the application of a law and an exemption from a law is meritless.

B. RLUIPA Section 2(a)(1), as Applied Through Section 2(a)(2)(C), is Within Congress's Power Under Under Section 5 of the Fourteenth Amendment Even if it Were Deemed to Exceed What the Constitution Requires

As demonstrated above, Airmont has failed to identify any way in which RLUIPA Section 2(a)(1), as applied through Section 2(a)(2)(C), exceeds what the Constitution requires. Thus, this Court need not address whether, if RLUIPA expanded existing constitutional requirements, it would satisfy the Flores "congruence and proportionality" test. If the Court chooses to consider the issue, however, it should hold that RLUIPA section 2(a)(1) is a permissible exercise of Congress's section 5 power. Before passing RLUIPA, Congress compiled an extensive record of widespread discrimination against religion in land use matters nationwide, and RLUIPA Section 2(a)(1), as applied through Section 2(a)(2)(C), is a congruent, proportional response to that discrimination.

In Flores, the Supreme Court recognized that Congress may go beyond the Court's precise articulation of constitutional protections and prohibit conduct that is not unconstitutional, if there is a "congruence and proportionality between the injury to be prevented and the means adopted to that end." Flores, 521 U.S. at 520; see Varner v. Illinois State Univ., 226 F.3d 927, 932-36 (7th Cir. 2000) (upholding Equal Pay Act's burden-shifting procedures although effect would be "to prohibit at least some conduct that is constitutional," because "the Act is targeted at the same kind of discrimination forbidden by the Constitution").

As demonstrated above, the predominant effect of RLUIPA Section 2(a)(1), as applied by Section 2(a)(2)(C), is to codify existing constitutional guarantees regarding the free exercise of religion.

Thus, even if a court were to hold that those sections do prohibit more conduct than the Constitution bars in some respect, they would still satisfy Flores's "congruence and proportionality" test because they predominantly forbid conduct that the Constitution already bars, and because Congress compiled a substantial record to show that religious uses face frequent discrimination nationwide in land-use decisions. See generally Varner, 226 F.3d at 935 (noting that the importance of congressional findings is "greatly diminished" where the statute in question "prohibits very little constitutional conduct").

(i) Congress Compiled a Substantial Record of Discrimination Against Religious Institutions Regarding Land Use Decisions

In nine hearings over the course of three years, Congress compiled "massive evidence" of widespread discrimination against religious institutions by state and local officials regarding land-use decisions. See Joint Statement, 146 Cong. Rec. S7774-75; H.R. Rep. No. 106-219, *21-24. Congress also found that while systems of individualized land use assessments readily lend themselves to discrimination against religious assemblies, it is difficult to prove discrimination in any particular case. See 146 Cong. Rec. at S7775; H.R. Rep. No. 106-219, *18-24.

As discussed in detail supra, pages 7-11, the Congressional record of anti-religious discrimination includes nationwide studies of land-use decisions, expert testimony, and anecdotal evidence illustrating the kinds of flagrant discrimination religious organizations frequently suffer in the land-use context. See H.R. Rep. No. 106-219, *18-24. This evidence is more than sufficient to justify RLUIPA's land use provisions, to the extent any of them exceed what the Constitution protects.

(ii) Airmont's Arguments Fail To Undermine This Substantial Evidence

Ignoring the evidence detailed above, supra at pages 7-11, Airmont argues that the congressional record is "devoid" of any concrete data demonstrating a "widespread, persisting pattern of discrimination by local governments against religious applicants in a land use setting." (Def. Br. at 14).

As an initial matter, Airmont's willingness to second-guess Congress's findings of fact ignores the deference to which such findings are entitled. "When Congress makes findings on essentially factual issues," those findings are "entitled to a great deal of deference, inasmuch as Congress is an institution better equipped to amass and evaluate the vast amounts of data bearing on such an issue." Walters v. Nat'l Ass'n of Radiation Survivors, 473 U.S. 305, 331 n.12 (1985) (citing cases); see also Flores, 521 U.S. at 531-533 (emphasizing that as a general matter "it is for Congress to determine the method by which it will reach a decision"); Turner Broadcasting System v. FCC, 520 U.S. 180, 195 (1996) (court's obligation is to "assure that, in formulating its judgments, Congress has drawn reasonable inferences based on substantial evidence").

Further, the cited evidence is, in any event, more than "concrete" enough to justify congressional action to protect religious liberty in the land-use area. For example, the empirical studies and zoning codes discussed by Congress are surely "concrete data," and, Congress found substantial evidence of discrimination against religious uses on the face of numerous local land use regulations and zoning codes. See H.R. Rep. No. 106-219, *18-19. Likewise, many of the anecdotes about religious discrimination in the House Report were from court decisions upholding the claims of the churches in question. See H.R. Rep. 106-219, *20 n.86 (listing cases), *22 n.97-98 (same), *23 n.109 (same).

Moreover, contrary to defendants' suggestion, the Supreme Court in Flores did not hold that "zoning regulations and historic preservation laws are not 'examples of legislation enacted or enforced due to animus or hostility to the burdened religious practices or that they indicate some widespread pattern of religious discrimination in this country.'" (Def. Br. at 14, quoting Flores, 521 U.S. at 531). Flores involved a facial challenge to the constitutionality of the Religious Freedom Restoration Act ("RFRA"). The Flores Court held that the record Congress compiled in support of enacting RFRA, which prevented the substantial burdening of a person's exercise of religion in all federal, state and local

laws (including laws of general applicability), did not show a pattern of widespread discrimination against religion with regard to every conceivable kind of government action. See 521 U.S. at 531. Flores did not address the issue of discrimination in land use decisions in particular, and obviously did not address the massive legislative record that supports RLUIPA.[13] As noted above, Congress developed that record after the Supreme Court clarified the Section 5 "congruence and proportionality" test in Flores, and after holding hearings that were limited to the contexts of land use and prisoner rights. In short, under Flores, RLUIPA's land-use provisions are a congruent and proportional response to the record of discrimination Congress compiled in enacting that statute.

Airmont's reliance upon Rector, Wardens, and Members of the Vestry of St. Bartholomew's Church v. City of New York, 914 F.3d 348 (2d Cir. 1990) (Def. Br. at 14) is also misplaced. Rector, Wardens rejected a Free Exercise Clause challenge to the application of the City's Landmarks Preservation Law to prevent a church from tearing down an existing building to construct a 47-story office tower. The Court of Appeals did not address the Supreme Court's individualized assessments doctrine in that case, however, and it correctly observed that zoning "is hardly a process in which the exercise of discretion is constrained by scientific principles or unaffected by selfish or political interests." Id. at 355. Thus, the Second Circuit supports the principal theoretical justification for

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13 The evidence of widespread religious discrimination in land use matters is not undercut by the single study Airmont cites in its brief. (Def. Br. at 13, citing Federalism and the Public Good, 78 Ind. L.J. 311 (2003), which in turn cites Are Congregations Constrained by the Government? Empirical Results from the National Congregations Study, 42 Journal of Church and State 335 (2000)). The National Congregations Study showed that religious organizations were denied permits to engage in religious activity 1 percent of the time, but the study considered all permit requests, including permits for activities such as running bingo games and holding parades or marches. See Are Congregations Constrained, 42 Journal of Church and State at 340. Thus, the study results do not contradict Congress's findings regarding the extent of religious discrimination in construction and land use decisions. Moreover, the study itself concluded that a 1 percent rate of denial would result in the denial of hundreds of permit applications by religious groups annually nationwide, a significant number by any account. See id. at 343.

application of the Supreme Court's individualized assessments doctrine to land use – that land-use systems nationwide are governed by vague standards that allow local officials broad discretion.. Thus, if anything, Rector, Wardens supports the conclusion that the Free Exercise Clause's individualized assessments doctrine should apply to RLUIPA's land use provisions.[14]

Finally, Airmont argues that RLUIPA section 2(a)(1), as applied through section 2(a)(2)(C), is not a "congruent" or "proportional" response to the widespread discrimination that Congress found exists against religious institutions because it "gives religion carte blanche in land-use matters." (Def. Br. at 15). This statement is incorrect. The statute forbids discrimination and prohibits state or local government from imposing a land use regulation only when it "imposes a substantial burden on the religious exercise of a person" and only if it does not further a "compelling government interest" and constitutes the "least restrictive means" of furthering that interest. See 42 U.S.C. § 2000cc(a)(1). Thus, the legislative history explicitly recognizes that RLUIPA "does not exempt religious uses from land use regulation; rather, it requires regulators to more fully justify substantial burdens on religious exercise." Joint Statement, 146 Cong. Rec. at S7775. Congress further explained that RLUIPA "does not provide religious institutions with immunity from land use regulation, nor does it relieve religious institutions from applying for variances, special permits, or exceptions, hardship approval, or other relief provisions in land use regulations, where available without discrimination or unfair delay." Id. at S7776 (emphasis added); see also id. at S7774 (finding that RLUIPA's compelling interest test "is a standard that responds to facts and context.").

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14 Rector, Wardens also rejected the church's Free Exercise Clause claim because the church could not demonstrate a substantial burden on religion, since it wanted to develop its property for commercial uses, not religious uses. See 914 F.2d at 357. This holding provides an additional ground for distinguishing Rector, Wardens from land use cases with which Congress was concerned in enacting RLUIPA.

In sum, RLUIPA is a proper exercise of Congress's section 5 powers because it applies to individualized assessments and is a congruent, proportional response to documented discrimination.

3. RLUIPA Section 2(a)(1) Does Not Violate the Establishment Clause of the First Amendment

RLUIPA section 2(a)(1) satisfies the Establishment Clause: it has the permissible secular purpose and effect of lifting a significant, government-imposed burden on the exercise of religion, and it does not require any excessive entanglement between government and religion. See Corp. of Presiding Bishop v. Amos, 483 U.S. 327, 335 (1987) (applying three-part test from Lemon v. Kurtzman, 403 U.S. 602 (1971), to evaluate constitutionality of accommodation statute).

The Supreme Court recently ruled unanimously that Section 3 of RLUIPA, which protects institutionalized persons, does not violate the Establishment Clause. See Cutter v. Wilkinson, __ U.S. __, 125 S. Ct. 2113 (2005). Although Cutter does not govern Section 2 land use cases, it is highly instructive because the provision at issue in Cutter is nearly identical to Section 2(a)(1), as both prohibit substantial burdens on religious exercise absent a showing that the burden is the "least restrictive means" of furthering a "compelling governmental interest." Compare Section 2(a)(1) (42 U.S.C. § 2000cc(a)(1)) with Section 3 (42 U.S.C. § 2000cc-1(a)). In Cutter, the Supreme Court stated: "Our decisions recognize that 'there is room for play in the joints' between the Clauses, and there is some space for legislative action neither compelled by the Free Exercise Clause nor prohibited by the Establishment Clause." 125 S. Ct. at 2121. The Court ruled that Section 3 of RLUIPA "fits within the corridor between the Religion Clauses: On its face, the Act qualifies as a permissible legislative accommodation of religion that is not barred by the Establishment Clause." Id. The Cutter Court noted that Section 3 "is compatible with the Establishment Clause because it alleviates exceptional government-created burdens on private religious exercise." Id. It further held that RLUIPA "does not

differentiate among bona fide faiths." Id. at 2123.

The sole court of appeals to decide an Establishment Clause challenge to RLUIPA in the land use context upheld RLUIPA. See Midrash Sephardi, 366 F.3d at 1240-42. Applying Lemon, the Midrash Sephardi Court found that the land use provisions of RLUIPA (1) serve the secular purpose of alleviating governmental interference with religious exercise; (2) have the permissible effect of mandating equal treatment for religious institutions by "forbidding states from imposing impermissible burdens on religious worship" and (3) avoid entanglement because it does not require government to supervise or oversee religion, but only to avoid discriminating against religious institutions. See 366 F.3d at 1240-41. Many district courts have concurred and upheld Section 2 of RLUIPA against Establishment Clause challenges. See, e.g., Westchester Day School, 280 F. Supp. 2d at 238; Kol Ami, 2004 WL 1837037, *13-14; Castle Hills, 2004 WL 546792, *18; Maui, 298 F. Supp. 2d at 1014-15; Murphy, 289 F. Supp. 2d at 122-24, vacated on other grounds, 402 F.3d 342 (2d Cir. 2005); Life Teen, 2003 U.S. Dist. LEXIS 24363, *49-54. This Court should do the same.

A. RLUIPA Section 2(a)(1) Has a Permissible Secular Purpose

The Supreme Court "'has long recognized that the government may (and sometimes must) accommodate religious practices and that it may do so without violating the Establishment Clause.'" Corp. of Presiding Bishop of Church of Jesus Christ of Latter Day Saints v. Amos, 483 U.S. 327, 334 (1987) (citation omitted). To hold otherwise, the Court has noted, would require the government to be "oblivious to impositions that legitimate exercises of state power may place on religious belief and practice." Bd. of Educ. of Kiryas Joel Village Sch. Dist. v. Grumet, 512 U.S. 687, 705 (1994).[15]

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15 The Supreme Court has applied this principle to a wide variety of contexts, including to uphold Title VII's exemption of religious organizations from its general prohibition against discrimination in employment on the basis of religion, see Amos, 483 U.S. at 335-339; a state property tax exemption for religious organizations, see Walz v. Tax Comm'n, 397 U.S. 664, 672-

Accordingly, the Supreme Court in Amos held that it is a permissible legislative purpose to alleviate a special, government-created burden on religious belief and practice. See Amos, 483 U.S. at 335. Accord Texas Monthly, Inc. v. Bullock, 489 U.S. 1, 15 (1989) (plurality opinion); Hsu, 85 F.3d at 865.

RLUIPA's land-use provisions remove a government-created burden on the free exercise of religion by freeing religious institutions from governmental restrictions that otherwise would prevent them from engaging in religious activity – the religious use of land for worship, teaching, and good works – without sufficient justification. See 146 Cong. Rec. E1235 (remarks of Rep. Canady) (RLUIPA was "designed to protect the free exercise of religion from unnecessary government interference"); see also Murphy, 289 F. Supp. 2d at 123-124 (RLUIPA's purpose of removing government barriers on religious institutions in land-use matters is valid secular purpose); Life Teen, 2003 U.S. Dist. LEXIS 24363, *52-53 (RLUIPA has permissible secular purpose of protecting free exercise of religion from "unwarranted and substantial infringement"); Kol Ami, 2004 WL 1837037, *13 (RLUIPA has legitimate secular purpose); Maui, 298 F. Supp. 2d at 1014-15 (same).

Airmont suggests (Def. Br. at 17) that section 2(a)(1) has an invalid, religious purpose because it provides "unique protection" to religion. This argument ignores controlling Supreme Court and Second Circuit precedent. In Amos, the Supreme Court held that a law that lifts a significant government-imposed burden on religion can serve a valid secular purpose even if it "singles out religious entities for a benefit." 483 U.S. at 338. The Court explained, "[w]here . . . government acts with the proper purpose of lifting a regulation that burdens the exercise of religion, we see no reason

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680 (1970); and a state program releasing public school children during the school day to receive religious instruction at religious centers. See Zorach v. Clauson, 343 U.S. 306, 315 (1952). See also Hsu v. Roslyn Union Free School Dist., 85 F.3d 839 (2d Cir. 1996) (public school's recognition of student religious club is constitutional as permissive accommodation of religion under Amos).

to require that the exemption comes packaged with benefits to secular entities." Id.; see Hsu, 85 F.3d at 863 ("'alleviat[ing] significant governmental interference with the ability' of [student religious] Club to engage in after-school prayers" has valid, secular purpose "[e]ven when the School's recognition [of the Club] is viewed in terms of an exemption from an overall nondiscrimination policy").

B. RLUIPA Section 2(a)(1) Has Permissible Secular Effects

The Supreme Court held in Amos that an otherwise permissible religious accommodation does not have the "primary effect" of advancing religion if it leaves individuals or institutions "better able to advance their [religious] purposes." 483 U.S. at 336. As the Amos Court explains, "[a] law is not unconstitutional simply because it allows churches to advance religion, which is their very purpose." Id. at 337. Accord Hsu, 85 F.3d at 866 (noting that as Amos explains, "the flow of a 'benefit' only to a religious group does not mean that the government's actions are advancing religion" where the government is attempting to lift a significant, government-imposed burden on religion). To the contrary, Amos held, a law that lifts a significant, government-imposed burden on the free exercise of religion has the primary effect of advancing religion only if it is the government itself advancing religion through its own activities and influence. Amos, 483 U.S. at 337.

RLUIPA section 2(a)(1) has no such unconstitutional effects. That provision does not involve the government itself advancing religion, any more than did the accommodations upheld in Amos, Walz, and Zorach, et al. Rather, all it does is allow religious groups themselves to advance religion, as they could have done if the land-use laws at issue had never been enacted. See Murphy, 289 F. Supp. 2d at 124 ("Because RLUIPA's effect is the alleviation of unnecessary interference with religious exercise and government-imposed hardships, rather than the promotion of religion, RLUIPA does not impermissibly 'advance' religion."); Kol Ami, 2004 WL 1837037, *14 (same); Life Teen, 2003 U.S. Dist. LEXIS 24363, *52-53 (same); Maui, 298 F. Supp. 2d at 1014-15 (same). Cf. Hsu, 85 F.3d at 866

(public school's allowing student religious club to appoint leaders of its own faith does not involve the school itself in advancing religion).[16]

The Village argues that section 2(a)(1) improperly grants religious organizations the "benefit . . . of strict scrutiny." (Def. Br. at 17). As explained supra § 3A, however, religious organizations already enjoy the "benefit" of the compelling interest test under the Free Exercise Clause where the government has in place a system of individualized assessments but denies religious exemptions. Since section 2(a)(1) merely codifies that existing constitutional right in the land-use context, this "benefit" does not have the unconstitutional effect of advancing religion under the Establishment Clause. Moreover, as noted above, the Supreme Court and this Court have repeatedly emphasized that "[w]here . . . government acts with the proper purpose of lifting a regulation that burdens the exercise of religion, we see no reason to require that the exemption comes packaged with benefits to secular entities." Amos, 483 U.S. at 338. Accord Hsu, 85 F.3d at 863.

C. RLUIPA Section 2(a)(1) Does Not Create Any Excessive Entanglement Between Government and Religion

As it is currently formulated, the "excessive entanglement" prong focuses largely on whether the government program would require "pervasive monitoring by public authorities" to ensure that there is no indoctrination of religion by government actors. See Agostini v. Felton, 521 U.S. 203, 233-234 (1997). RLUIPA section 2(a)(1) easily satisfies this standard, since it requires no monitoring of religious activities by public authorities. See Murphy, 289 F. Supp. 2d at 124 (RLUIPA minimizes Government involvement with religious exercise); Kol Ami, 2004 WL 1837037, *14 (RLUIPA does

16 Removing government burdens on religious liberty in the land-use context does not involve direct government funding of religious activity, cf. Bowen v. Kendrick, 487 U.S. 589 (1988); government endorsement of religious views, cf. County of Allegheny v. ACLU Greater Pittsburgh Chapter, 492 U.S. 573 (1989); or any other form of active government participation in religious advocacy or conduct.

not require oversight of religion, only that zoning boards assess whether they are using least restrictive means to advance compelling interest); Life Teen, 2003 U.S. Dist. LEXIS 24363, *48-49 (same).

Airmont argues that section 2(a)(1) creates "friction and entanglement between local land use structures and religious groups." (Def. Br. at 17). The Village fails to explain what kind of "entanglement" it has in mind, however, and the Supreme Court has never held that unspecified "friction" between government and religion violates Lemon's entanglement prong. Moreover, any friction between government and religion in this context would be caused by the pattern of discrimination against religion in land use matters that Congress found exists across the nation, not by RLUIPA. For all the above reasons, therefore, the Court should hold that RLUIPA section 2(a)(1) is consistent with the Establishment Clause.

4. RLUIPA Section 2(b)(2) Prohibiting Religious Discrimination Is Constitutional

Section 2(b)(2) of RLUIPA, which bans religious discrimination, is constitutional. Section 2(b)(2) 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). It is beyond dispute, nor do defendants contest, that this provision's anti-discrimination principle codifies the Free Exercise Clause, Establishment Clause and Equal Protection Clause of the Constitution. See Freedom Baptist Church, 204 F. Supp. 2d at 869 (section 2(b)(2) is constitutional because it codifies "existing Free Exercise, Establishment Clause and Equal Protection rights."); Primera Iglesia, 2003 U.S. Dist. Lexis 26148, *20-21 (same).

Prohibiting religious discrimination is a central tenet of the Free Exercise Clause. See Lukumi, 508 U.S. at 532 ("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. . . . Indeed, it was 'historical instances of religious persecution and intolerance that gave concern to those who drafted the Free Exercise Clause.'") (citations omitted); see id. at 543 ("The principle that government, in pursuit of legitimate interests, cannot in a selective manner impose burdens only on conduct motivated by religious belief is essential to the protection of the rights guaranteed by the Free Exercise Clause.").

Similarly, it is well settled that the Establishment Clause requires that the "principle or primary effect [of governmental action] must be one that neither advances nor inhibits religion." Lemon, 403 U.S. at 612 (emphasis added). The Equal Protection Clause likewise bars laws that discriminate against religion. See, e.g., Hsu By and Through Hsu v. Roslyn Union Free School Dist. No. 3, 85 F.3d 839, 868 (2d Cir. 1996) ("What the Equal Protection Clause forbids is state action that implements or sanctions invidious discrimination"). Accordingly, section 2(b)(2) does no more than implement the Constitutional provisions prohibiting religious discrimination, and thus is within Congress's power under section 5 of the Fourteenth Amendment.

POINT III

The Complaint States a Claim under the Fair Housing Act

The Government has also stated a claim under the Fair Housing Act. Section 804(a) of the FHA makes it unlawful "[t]o refuse to sell or rent . . . or otherwise make unavailable or deny, a dwelling to any person because of . . . religion." 42 U.S.C. § 3604(a). As an initial matter, it is settled that the FHA may be invoked to challenge discriminatory zoning restrictions. See Airmont I, 67 F.3d at 424 (finding that the Fair Housing Act reaches "a wide variety of discriminatory housing practices, including discriminatory zoning restrictions"). Moreover, boarding schools clearly constitute a "dwelling" under the Fair Housing Act. See 42 U.S.C. § 3602 (b) (defining "dwelling" to mean "any building . . . designed or intended for occupancy as [] a residence by one or more families"); 42 U.S.C. § 3602(c)

(defining "family" so as to include a single individual); Anonymous v. Goddard Riverside Cmty. Ctr., Inc., 96 Civ. 9198 (SAS), 1997 WL 475165, *3 n.4 (S.D.N.Y. Jul. 18, 1997) (noting that courts have held FHA to apply to various types of housing, including residential schools); United States v. Mass. Indus. Fin. Agency, 910 F. Supp. 21, 25 n. 2 (D. Mass. 1996) (residential school for adolescents constitutes dwelling under FHA).

Defendants make the unsupportable argument that simply because members of the Congregation may live in Airmont in "homes," there can be no Fair Housing Act violation based on Airmont's complete ban on boarding schools because "[a]ll that has been denied is a single type of housing." (Def. Br. at 4). Defendants' logic suggests that if one type of housing is available for a protected class, a town can freely discriminate against a protected class in a different type of housing. This is an absurd result, and would allow, for example, a town to refuse to sell houses to Hasidic Jews so long as the town allowed the sale of apartments. As a boarding school is clearly a covered "dwelling" under the FHA, Airmont's discriminatory ban on boarding schools in an effort to exclude Hasidic Jews renders Airmont liable under the FHA regardless of whether other types of housing may be available. See 42 U.S.C. § 3604(a).

The Complaint's allegations are sufficient to state a claim that Airmont intentionally discriminated against Hasidic Jews by prohibiting religious boarding schools from operating anywhere in Airmont, and adopted a Zoning Code that prevents Hasidic Jews from engaging in the religious educational experience that is mandated by their faith by excluding boarding schools. See Airmont I, 67 F.3d at 425 (Fair Housing Act claim may proceed on "disparate treatment" claim). Airmont's argument that the FHA claim should be dismissed because Airmont adopted a Zoning Code that is neutral on its face is baseless, for discriminatory intent under the FHA can be demonstrated by a totality of the circumstances. Cf. Lukumi, 508 U.S. at 535 ("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 Government hostility which is masked as well as overt."). Indeed, Airmont itself was previously found to have violated the Fair Housing Act based on an arguably facially neutral provision of its Zoning Code that Airmont adopted to discriminate against Hasidic Jews. See Airmont I, 67 F.3d at 420, 428, 425 ("If the motive is discriminatory, it is of no moment that the complained-of conduct would be permissible if taken for nondiscriminatory reasons.").

A plaintiff can establish a prima facie case under the Fair Housing Act 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 . . . responsive.'" Airmont I, 67 F.3d at 425 (citation omitted).[17] While Airmont essentially argues that the Court's inquiry into whether Airmont discriminated against Hasidic Jews is limited to the four corners of Airmont's Zoning Code, this is not the law under the FHA. As the Second Circuit explained, discriminatory intent:

> may be inferred from the totality of the circumstances, including the fact, if it is true, that the law bears more heavily on one [group] than another, as well as the historical background of the decision . . . ; the specific sequence of events leading up to the challenged decision . . .; contemporary statements by members of the decision making body . . .; and substantive departures . . . particularly if the factors usually considered important by the decision maker strongly favor a decision contrary to the one reached.

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17 Although the Government has alleged facts that, if taken as true, demonstrate a prima facie case of discrimination, it has no burden to do so at this stage of the proceedings. "The Supreme Court has held that, in complaints alleging prohibited discrimination, plaintiffs must merely comply with Rule 8 of the Federal Rules of Civil Procedure, giving defendants 'fair notice of what [their] claims are and the grounds upon which they rest,' and need not plead facts sufficient to make out a prima facie case of discrimination . . . Under this standard, to survive a Rule 12(b)(6) motion to dismiss, a complaint need only provide a short and plain statement of the claim and the grounds on which it rests." See Town & Country Adult Living, Inc. v. Village/Town of Mount Kisco, No. 02 Civ. 444 (LTS), 2003 WL 21219794 (S.D.N.Y. May 21, 2003) (denying motion to dismiss FHA and Americans with Disabilities Act claims) (citing Swierkiewicz v. Sorema N.A., 534 U.S. 506 (2002)). The Government has more than satisfied this low threshold here.

Id. at 425 (citations and internal quotations omitted).

Here, the Complaint alleges that Airmont acted with discriminatory intent in preventing Hasidic Jews from operating Yeshivas. Cpl. ¶16 ("Airmont included the Zoning Code prohibition on boarding schools in order to prevent Hasidic boarding schools from operating in Airmont."). The Complaint further alleges that by prohibiting Hasidic Jews from residing in their place of study, Airmont is preventing Hasidic Jews from engaging in the religious experience that their faith demands. Id. ¶ 36. The Complaint alleges that, at the same time it prevents Hasidic Jews from operating yeshivas, Airmont's Zoning Code permits many other types of group residential facilities. Cpl. ¶¶ 17-22. This states a claim of a violation of the FHA.

Airmont's argument that there is no FHA violation because the "Code permits the construction of churches and the use of residential places of worship in several zones throughout the Village" is baseless. (Def. Br. at 21). The Government's FHA claim is not premised on an exclusion of churches and synagogues from Airmont, but rather on the complete ban in Airmont on religious boarding schools. Further, Airmont grossly mischaracterizes the complaint as alleging that "the Congregation's inability to build everything they want on this one parcel discriminates against them on the basis of religion." (Def. Br. at 21). In fact, the complaint alleges that there is nowhere in Airmont that the Congregation could build a yeshiva under Airmont's Zoning Code. Cpl. ¶ 15.[18]

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18 The two cases Airmont cites in its effort to dismiss the FHA claim are inapposite. First, in Fair Housing in Huntington Committee v. Town of Huntington, No. 02-CV-2728 (DRH) (ARL), 2005 WL 675838 (E.D.N.Y. Mar. 23, 2005), the court granted judgment on the pleadings because the plaintiffs had not alleged that the defendant town had taken any action to "erect obstacles to proposed housing" of a protected group; rather the, plaintiffs had alleged only that the town failed to affirmatively provide housing in a particular location. Id., *8. Here, in sharp contrast, Airmont's Zoning Code affirmatively obstructs the ability of Hasidic Jews to fulfill the requirements of their religion by prohibiting religious boarding schools in violation of the Fair Housing Act. Airmont's reliance on Suffolk Interreligious Coalition on Housing, Inc. v. Town of Brookhaven, 176 A.D.2d 936, 575 N.Y.S.2d 548 (2d Dep't 1991), is also misplaced. In Suffolk,

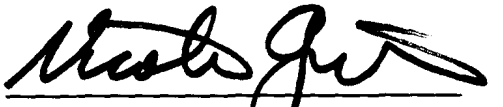
CONCLUSION

For the reasons stated above, the Court should deny Airmont's motion to dismiss the complaint and grant such other relief as it deems proper.

Dated: New York, New York
November 14, 2005

Respectfully submitted,

MICHAEL J. GARCIA
United States Attorney
Attorney for the United States

By: 

NICOLE GUERON (NG-7682)
LAWRENCE H. FOGELMAN (LF-9700)
Assistant United States Attorneys
86 Chambers Street, 3rd Floor
New York, New York 10007
Telephone: (212) 637-2699; 637-2719

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the court found that the town's denial of a particular rezoning request did not violate the Fair Housing Act because "vacant land already zoned for multifamily use is available." Id. at 938. In contrast, Airmont's Zoning Code does not allow religious boarding schools anywhere in the Village. See Cpl. ¶ 15.