IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

Congregation Rabbinical College of Tartikov Inc., Rabbi Mordechai Babad, Rabbi Wolf Brief, Rabbi David A. Menczer, and Kolel Belz of Monsey,

Plaintiffs-Appellants,

v.

Village of Pomona, NY; Board of Trustees of The Village of Pomona, NY, and The Village of Pomona Zoning Board of Appeals,

Defendants-Appellees.

Appeal from the United States District Court
For the Southern District of New York
Case No: 8:08-cv-02304-KMK
The Honorable Karen M. Kilkenney

BRIEF AND REQUIRED SHORT APPENDIX OF DEFENDANTS-APPELLEES, VILLAGE OF POMONA, NY, et al.

ORAL ARGUMENT REQUESTED

Michael E. Gumprecht, Esq.
Attorney for Defendants-Appellees, Village of Pomona, NY, et al.

19 Barbara Lane
Plainview, New York 11803
(937) 329-0281

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JURISDICTIONAL STATEMENT

The District Court had subject matter jurisdiction over the case, pursuant to 28 U.S.C. § 1331, 1343, 42 U.S.C. §§ 2000cc – 2000cc-5 and 42 U.S.C. § 1983, which confer original jurisdiction on federal district courts in suits to redress the deprivation of rights, privileges and immunities secured by the laws and Constitution of the United States, particularly the First and Fourteenth Amendments to the Constitution of the United States, and the Religious Land Use and Institutionalized Persons Act of 2000.

The judgment of the United States District Court for Defendants was entered on August 15, 2008. The Honorable Karen M. Kilkenney issued a decision for the final order of the Court pursuant to Defendants' motion for summary judgment. On August 29, 2008, Appellants filed a Notice of Appeal. The jurisdiction of this Court is invoked under 28 U.S.C. §1291.

STATEMENT OF THE ISSUES

1. Whether the Appellants have established a Prima Facie Case for a violation under the Religious Land Use and Institutionalized Persons Act of 2000.
2. Whether the Appellants' intended use of the proposed dormitories for housing purposes constitutes a religious exercise.
3. Whether the zoning code places a substantial burden on the exercise of religion when the Appellants merely face the inconvenience of modifying their plans.
4. Whether the zoning board decision furthers a compelling government interest in the least restrictive means when the zoning code exists to maintain the order and safety of the Village and the zoning board chose the only means available.
5. Whether permission for the Appellants to violate the zoning code will show religious preference and thereby violate the First Amendment's mandates for governmental neutrality between religion and nonreligion.

STATEMENT OF THE CASE

This proceeding arises out of the allegations by the Plaintiffs-Appellants Congregation Rabbinical College of Tartikov Inc., et al. that the Defendants-Appellees, the Village of Pomona, NY, et al., violated the Religious Land Use and Institutionalized Persons Act of 2000 by substantially burdening their free exercise of religion by preventing the construction of dormitory housing to be used by students of the college. The District Court granted Summary Judgment in favor of the Appellees, the Appellants now appeal.

I. Procedural History

Appellants filed a complaint alleging a violation of the Religious Land Use and Institutionalized Persons Act of 2000 ("RLUIPA") on January 2, 2008. The Appellees filed an Answer on March 11, 2008 and on June 15, 2008, subsequently filed a Motion for Summary Judgment for lack of subject matter jurisdiction and failure to state a claim upon which relief can be granted.

On August 15, 2008, the Southern District of New York granted the Appellees motion for summary judgment. Appellants gave notice of appeal on August 29, 2008. The judgment of the United States District Court for Appellees was entered on August 15, 2008. On August 29, 2008, Appellants filed a Notice of Appeal.

II. Statement of Facts

The Congregation Rabbinical College of Tartikov, Inc., is a religious institution dedicated to the instruction of advanced rabbinical studies for previously ordained rabbis. *Complaint* ¶*15*. The purpose of the Rabbinical College is to educate rabbis in Orthodox Jewish religious law and the application of these laws, to serve on rabbinical courts and counsel members of the Orthodox Jewish community on the day-to-day questions that arise in applying Jewish Law to their daily lives. *Complaint* ¶*45*. Training provided by the college is required to become certified rabbinical judges for rabbinical court, sometimes requiring fifteen years to complete. *Complaint* ¶*46*. Students, all ordained rabbis, will typically begin these specialized religious studies between the ages of 20 and 30, and will be married, some with young children. *Complaint* ¶*46*. Appellant students will attend the religious college without any tuition costs and without any housing costs. *Complaint* ¶*46*. The individual Appellants are members of the Orthodox/Hassidic Jewish religion and are prospective students and teachers of the educational component, and residents of the housing component of the Rabbinical College. *Complaint* ¶*18*. At the conclusion of World War II, approximately 10,000 Orthodox/Hasidic Jews immigrated to the United States, bringing with them this shortage of rabbinical judges because most surviving Orthodox Jews were either too young or too old to be trained. *Complaint* ¶*22*. The religious tradition of the

rabbinical court and the training of rabbis as rabbinical judges are central to Orthodox Jewish religious beliefs and Appellants thereby contend that the Rabbinical College will uniquely provide the necessary curriculum and student size needed to train rabbis consistent with their specific religious beliefs and eliminate the shortage of rabbinical judges. *Complaint* ¶¶*27-28*.

On August 17, 2004, the Congregation purchased the Subject Property in the Village of Pomona. *Complaint* ¶*58*. The Subject Property is a single lot of approximately 100 acres, and is bordered by U.S. Route 202 on the north and New York State Route 306 on the west. *Complaint* ¶*83*. In addition to the religious educational buildings and resident housing on the subject property, the Congregation also planned to construct up to ten synagogues near the on campus housing units, one for each of the many different Jewish sects and traditions (including Ashkenazic, Sephardic, and other Hassidic and Orthodox sects). *Complaint* ¶*53*. The Rabbinical College also would include four rabbinical court courtrooms throughout the campus to be used for various purposes and multiple libraries containing the books necessary for student education. *Complaint* ¶¶*54-55*. After the initial purchase, an additional contiguous 30 acres were purchased by an affiliate of the Congregation to serve as a buffer between the Rabbinical College and the neighboring community. *Complaint* ¶*59*. Immediately after purchasing the Subject Property, the Congregation retained professionals to develop a site plan

with architectural drawings, and to perform thorough studies on the local impact of the proposed construction. *Complaint ¶100*. The professionals modified the site plan to ensure that it satisfied local required standards until the Rabbinical College could build according to the envisioned site plan with no negative effects. *Complaint ¶102*.

In late 2004, the Village amended its zoning code to permit dormitories as an accessory use to a school, expressly prohibiting any housing for students with families. *Complaint ¶74*. Further amendments in 2004 required dormitories to be on the same lot as the primary educational use, and prohibited more than one dormitory building on any lot. *Complaint ¶75*. On January 22, 2007, the Village again amended its code for educational institutions, adding a provision limiting the size of a dormitory building to twenty percent of the total square footage of all buildings on the lot. *Complaint ¶79*. As a result, the Appellants sought a Special Use Permit or variance for the creation of the Rabbinical College on the Subject Property in the Village of Pomona so they could begin construction of the campus. *Complaint ¶85*. On June 23, 2007, Appellants applied to the Defendants for a Special Use Permit to construct the Rabbinical College as an Educational Institution according to the Village Code. *Complaint ¶106*. The site plan submitted with that application showed facilities to accommodate up to two hundred rabbinical students and their families, including two buildings to house classrooms,

libraries, and worship space, as well as six dormitories to house rabbinical students and their families. *Complaint ¶106*. The Appellants argued that the Subject Property is the only available parcel of land that can accommodate the Rabbinical College with no alternative properties existing in Pomona or in surrounding communities that can legally or practicably accommodate the Appellants' use. *Complaint ¶¶68-69*. On August 7, 2007, the Board of Trustees held a public hearing regarding Appellants' application. *Complaint ¶107*. After the hearing, the Village Board of Trustees denied Appellants' application for a Special Use Permit on October 16, 2007, citing the number, size, and configuration of the proposed dormitories as not being in conformity with the Village Code. *Complaint ¶110*. Appellants appealed the Board decision to the Village of Pomona Zoning Board of Appeals on November 1, 2007, seeking a variance to construct the Rabbinical College with the desired dormitories. *Complaint ¶111*. The Board of Appeals held a public hearing on the appeal on December 4, 2007. *Complaint ¶112*. On December 28, 2007, the Board of Appeals affirmed the Trustees decision and denied the Appellants' request for variance. *Complaint ¶113*. As a result the Appellants contend that their proposed use has been denied in violation of RLUIPA and they subsequently filed suit in District Court.

III. Standard of Review

A district court's grant of summary judgment is reviewable by the United States Court of Appeals, Second Circuit under a *de novo* standard. Ramos v. Town of Vernon, 353 F.3d 171, 174 (2d Cir. 2003). Summary judgment can be granted when the facts and discovery of the case show that there is no genuine issue of material fact and that the moving party is entitled to a judgment as a matter of law. Fed. R. Civ. P. 56. The party moving for summary judgment has the burden of establishing that there is no genuine issue of material fact. Celotex Corp. v. Catrett, 477 U.S. 317 (1986).

The appellate court reviewing a motion for summary judgment must "construe the facts in the light most favorable to the non-moving party and must resolve all ambiguities and draw all reasonable inferences against the movant." Dallas Aerospace, Inc. v. CIS Air Corp., 352 F.3d 775, 780 (2d Cir. 2003).

SUMMARY OF THE ARGUMENT

The Appellants fail to establish a prima facie case for a violation under RLUIPA because they fail to satisfy the necessary elements required under the federal statute. A violation under RLUIPA exists when a substantial burden has been placed on a religious exercise. If such a burden has been placed on a religious exercise it is permissible if the government has a compelling interest in furthering that burden in the least restrictive manner available. The Appellants' intended use of dorms does not constitute a religious exercise because RLUIPA requires that the dorms be used for a religious purpose yet they will be used for residential purposes. Even if this constitutes is a religious exercise, the Village Zoning Code does not place a substantial burden on the exercise of religion because the standard for a substantial burden established in past cases is far higher than what exists in this case as the college merely faces the inconvenience of modifying their plans. Furthermore, even if the government has placed a substantial burden on a religious exercise, it has a done so in the least restrictive manner available to further a compelling government interest because the Village Zoning Code exists as a compelling government interest to maintain the order and safety of the Village and the zoning board decision advanced this interest in the least restrictive means available since there were no alternative means available.

Any construction in violation of the zoning code will also violate the First Amendment because it will show preference for the Appellants as a result of their religious status. Since the First Amendment mandates governmental neutrality between religion and nonreligion, permission for the Appellants to violate the zoning code will show religious preference and thereby weaken the very same Constitutional protections the RLUIPA statute protects.

ARGUMENT

I. THE APPELLANTS FAIL TO ESTABLISH A PRIMA FACIE CASE FOR A VIOLATION UNDER RLUIPA

The Appellants fail to establish a prima facie case for a violation under the Religious Land Use and Institutionalized Persons Act, 42 U.S.C. §§ 2000cc – 2000cc-5 (2003) ("RLUIPA"). While the Appellants have asserted a violation under RLUIPA, "a plaintiff asserting a RLUIPA violation has the burden of presenting prima facie evidence to support the assertion." The Greater Bible Way Temple of Jackson v. City of Jackson, 733 N.W.2d 734, 742 (Mich. 2007) (citing 42 U.S.C. § 2000cc-5(7)(B)(2003)). The Appellants have not satisfied this burden because the intended use of dorms for housing purposes is not a religious exercise and furthermore, the zoning code does not place a substantial burden on the exercise of religion.

RLUIPA emboldens First Amendment protections of the free exercise of religion by protecting land use by religious persons or institutions for religious purposes. The use of land for religious purposes may not be burdened by zoning restrictions unless the government can demonstrate a compelling interest advanced in the least restrictive means, and institutions may use any land intended for religious exercise unless the government has a compelling interest otherwise. In this case the proposed building in question is not being constructed for a religious purpose or for the performance of any religious exercise.

A. THE INTENDED USE OF DORMS FOR HOUSING PURPOSES IS NOT A RELIGIOUS EXERCISE

The intended use of dorms for housing purposes is not a religious exercise. RLUIPA defines religious exercise as "any exercise of religion, whether or not compelled by, or central to, a system of religious belief." 42 U.S.C § 2000cc-5(7)(A). RLUIPA elaborates on this definition by connecting the intended purpose of proposed property with religious exercise only so far as the property in question is actually used for religious purposes. Thus, "the use, building, or conversion of real property for the purpose of religious exercise shall be considered to be religious exercise of the person or entity that uses or intends to use the property for that purpose." 42 U.S.C § 2000cc-5(7)(B). In this case the Appellants wish to construct new dorms for general living and housing purposes for students and, if applicable, their families. While the residents and their families are religious, this does not make their primary place of residence a place of religious exercise or "for that [religious] purpose," especially religious instruction occurs in separate buildings on campus. Id.

Furthermore, general household activities are not a religious exercise, just as a building "to be used exclusively for sporting activities . . . would not constitute religious exercise." Westchester Day Sch. v. Village of Mamaroneck, 504 F.3d 338, 347 (2d Cir. 2007). In *Westchester Day* the Court held that proposed classrooms used for instruction at a religious school constituted a religious

exercise. Conversely, the proposed dorms in this case are for housing purposes and therefore are not a religious exercise nor would they exist "for that purpose" as required under the language of RLUIPA. In addition, a building – as an object – is not an activity. Even if one assumes that a building becomes an activity through its intended use, the proposed dorms will be used exclusively for general household activity, which also fails to satisfy the standard under RLUIPA.

Appellants may argue that the 6th Circuit has already held that "RLUIPA's definition of religious exercise covers most any activity that is tied to a religious group's mission." Living Water Church of God v. Charter Township of Meridian, 258 Fed. Appx. 729, 734 (6th Cir. 2007). Under *Living Water* the proposed dorms cannot be "tied to [the] religious group's mission" because the language of RLUIPA requires that the college "intends to use the property for that [religious] purpose" and it doesn't. The development of new dormitory housing is merely an act of building construction, not a religious exercise. In addition, the proposed dorms are buildings that are not activity tied to the religious mission of the school. Even if the proposed housing would benefit members of a religious group in their individual lives, the primary residential use of dormitories for individual daily living and family purposes are not religious and cannot be tied to any religious mission, so the college again fails "to use the property for that [religious] purpose"

as required by RLUIPA. For these reasons the proposed dorms do not fall under the established standard for religious exercise.

B. THE ZONING CODE DOES NOT PLACE A SUBSTANTIAL BURDEN ON THE EXERCISE OF RELIGION

The Village of Pomona's zoning code does not place a substantial burden on the exercise of religion. According to RLUIPA, "No 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." 42 U.S.C. § 2000cc(a)(1)(2003). Even if this Court finds that the proposed dormitories do constitute a religious exercise, the language of RLUIPA is not intended to operate as "an outright exemption from land-use regulations." Civil Liberties for Urban Believers v. City of Chicago, 342 F.3d 762 (7th Cir. 2006). The Eleventh Circuit has already found that any alleged burden on a religious exercise "must place more than an inconvenience on religious exercise; a 'substantial burden' is akin to significant pressure which directly coerces the religious adherent to conform his or her behavior accordingly." Midrash Sephardi, Inc. v. Town of Surfside, 366 F.3d 1214, 1227 (11th Cir. 2004), cited by Westchester Day, 504 F.3d at 349. In *Midrash* the Court did not find that a substantial burden existed when significant pressure was placed on elderly followers of Judaism to walk great distances to the synagogue. In this case that high threshold cannot be passed by the mere fact that the Appellants had to seek a variance, which is even less of an

inconvenience than what the Plaintiffs in *Midrash* endured. Recent rulings by Courts continue to be influenced by the description of 'inconvenience' in *Midrash*, demonstrated by the "*Midrash* decision's finding that the necessity of seeking a discretionary permit does not substantially burden the free exercise of religion but is instead a 'run of the mill' zoning consideration." Covenant Christian Ministries, Inc. v. City of Marietta, 2008 U.S. Dist. LEXIS 54304 (N.D. Ga. Mar. 31, 2008). The Village Zoning Code and board ruling are led by local discretionary authority and would be considered 'run of the mill' by the description found in *Covenant*.

Also consistent with the findings of *Midrash*, the Sixth Circuit has duly noted that the Appellant's threshold to demonstrate "a 'substantial burden' is a difficult threshold to cross." Living Water Church of God, 258 Fed. Appx. 729, 736. The threshold to demonstrate a 'substantial burden' is far more difficult than establishing the presence of mere inconvenience, in fact, so 'difficult' that "Courts confronting free exercise challenges to zoning restrictions rarely find the substantial burden test satisfied even when the resulting effect is to completely prohibit a religious congregation from building a church on its own land." Westchester Day, 504 F.3d at 349 (referencing Christian Gospel Church, Inc. v. City and County of S.F., 896 F.2d 1221, 1224 (9th Cir. 1990); Messiah Baptist Church v. County of Jefferson, 859 F.2d 820, 824-25 (10th Cir. 1988); Grosz v. City of Miami Beach, 721 F.2d 729, 739-40 (11th Cir. 1983); Lakewood, Ohio

Congregation of Jehovah's Witnesses, Inc. v. City of Lakewood, 699 F.2d 303, 304 (6th Cir. 1983). *Westchester Day* plainly explains how rarely a substantial burden exists – even if the zoning code blocks a congregation from building on its own land – and yet the Appellants improperly assert that the prevention of dormitory construction will stop them from constructing the entire school and therefore act as a 'substantial burden' to their free exercise of religion. The Appellants in this case do not face such a predicament like the Plaintiffs in *Westchester Day,* they merely face the inconvenience of modifying their plans. The plans submitted to the Pomona Village Zoning Board of Appeals for a variance were rejected, but the plans submitted by the Appellants – while the most convenient for them – are not the only possible solution. Appellants may seek to build or use existing housing in other locations or modify their plans for schooling to incorporate other unexamined housing alternatives. This is less convenient than the current solution they prefer (like the inconvenience described in *Midrash*) yet the Appellants have the ability to seek alternative reasonable opportunities nonetheless. As a result, not only is the standard for a substantial burden incredibly high, any existing burden is a self-imposed by the Appellants due to their own requirements and they only face the inconvenience of modifying their plans, not a burden by the Village of Pomona.

The rejection of the Appellants' plans is inconvenient and does not satisfy the 'substantial burden' test, but it also does not force them to change their

religious behaviors, it is simply because the proposal failed to meet the requirements of sections 130-10(F) and 130-28(E)(6) of the Pomona Village Zoning Code. "Rejection of a submitted plan, while leaving open the possibility of approval of a resubmission with modifications designed to address the cited problems, is less likely to constitute a 'substantial burden' than definitive rejection of the same plan . . . if there is a reasonable opportunity for the institution to submit a modified application, the denial does not place substantial pressure on it to change its behavior and thus does not constitute a substantial burden on the free exercise of religion." Westchester Day Sch. v. Village of Mamaroneck, 386 F.3d 183 at 188 (2d Cir. 2004). Furthermore, "Supreme Court precedents teach that a substantial burden on religious exercise exists when an individual is required to 'choose between following the precepts of her religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of her religion . . . on the other hand.'" Westchester Day, 504 F.3d at 348 (quoting Sherbert v. Verner, 374 U.S. 398,404 (1963)). Unlike the school in *Westchester*, the Appellants may need to modify their building plans, their academic plans or possibly their family plans, but they will not have to "change [their] behavior" nor will they be forced to "abandon one of the precepts of [their religion]" as a result of modified housing arrangements resulting from the denial by the Pomona Village Zoning Board of Appeals. Westchester Day, 386 F.3d 183 at 188. The inconvenience of changing

plans will not force the Appellants to completely abandon their plans nor will they be forced to abandon the precepts of their religion. The Seventh Circuit has held that the inconvenience created by local land use regulations does not constitute a substantial burden if the regulations are "neutral and traceable to municipal land planning goals" and as long as there is no evidence actions were taken "because [the Plaintiff] is a religious institution." Vision Church v. Vill. of Long Grove, 468 F.3d 975, 998-99 (7th Cir. 2006). The zoning regulations in *Vision Church* were the result of legitimate land planning goals for the Village of Long Grove. Like the Village in *Vision Church*, the decision of the Pomona Village Zoning Board of Appeals was based on "municipal planning goals" and the Appellants have not alleged or provided any evidence that the Pomona Village Zoning Board of Appeals ruled against them because the Appellants represent a religious institution.

The Appellants have failed to establish how their current predicament exceeds mere inconvenience and passes beyond the threshold of a 'substantial burden' as required under the law. As cited in multiple cases, this threshold has been repeatedly described in a manner that simply is not satisfied by the Appellant's current inconvenience. "For a land use regulation to impose a 'substantial burden,' it must be 'oppressive' to a 'significantly great' extent. That is, a 'substantial burden' on 'religious exercise' must impose a significantly great restriction or onus upon such exercise." San Jose Christian College v. City of

Morgan Hill, 360 F.3d 1024 at 1034 (9th Cir. Cal. 2004) (quoting Merriam-Webster's Collegiate Dictionary 1170 (10th ed. 2002)). The restrictions imposed by the Village of Pomona's zoning code and Pomona Village Zoning Board of Appeals are reasonable, permitted under law, non-discriminatory, they do not force the abandonment of the Appellant's religion and most importantly, they do not place a substantial burden on the Appellant's exercise of religion as required under RLUIPA.

C. THE ZONING BOARD DECISION FURTHERS A COMPELLING GOVERNMENT INTEREST IN THE LEAST RESTRICTIVE MEANS

The zoning board decision furthers a compelling government interest in the least restrictive means. The Appellants are not engaging in religious exercise and as a result, no substantial burden is placed on any religious exercises. However, if both of these elements are demonstrated by the Appellants, any substantial burden on religious exercise placed by the government furthers a compelling government interest and has been furthered in the least restrictive manner possible.

In 2005, the U.S Supreme Court unanimously ruled on a RLUIPA issue and stated that they "do not read RLUIPA to elevate accommodation of religious observances over an institution's need maintain order and safety. Our decisions indicate that an accommodation must be measured so that it does not override other significant interests." Cutter v. Wilkinson, 544 U.S. 709, 722 (2005). The "order and safety" in *Cutter* involved regulations set forth by a prison in Ohio and the

"other significant interests" included examples of compelling governmental interests, referenced by the Court as important to the very "lawmakers supporting RLUIPA [who] were mindful of the urgency of discipline, order, safety, and security in penal institutions." Id. at 722. Like the prison in *Cutter,* the Village zoning board is a government entity and like the prison's interests in *Cutter* the Village has a compelling governmental interest to "maintain order and safety" for the citizens of the Village of Pomona through the Village Zoning Code. Zoning codes "maintain order" by providing effective city planning development for a city's stream of traffic and commerce and maintain "safety" for its citizens through the strategic location plotting for police and medical facilities. Even the Appellants recognize the zoning code's inherent purpose to maintain "order and safety" because they retained professionals to develop a site plan with architectural drawings and performed studies on the local impact of the proposed construction. *Complaint ¶100*. The exact language of the Village Zoning Code conveys the desire to maintain order and safety in its chapter of "Purposes and Intent," describing how the code exists to "provide for the orderly and desirable development of the Village of Pomona" (*Village of Pomona Zoning Code §130-2*) and thereafter lists multiple regulations directly related to order and safety. An example of 'order' is the code's stated purpose to "prevent the overcrowding of land." *Zoning Code §130-2-B*. An example of 'safety' is the code's stated purpose

to "prevent the contamination of streams." *Zoning Code §130-2-C*. The Supreme Court has stated that it "[does] not read RLUIPA to elevate accommodation of religious observances over an institution's need maintain order and safety." Id. at 722. Since the Village's code exists to maintain 'order' and 'safety' any religious observance sought by the Appellants through the construction of dormitory housing cannot be elevated over the Village's need to maintain order and safety.

The Village's compelling governmental interest in maintaining order and safety through the Village Zoning Code has been furthered in the least restrictive means possible. The Supreme Court has held that a city establishing a compelling interest to burden a religious exercise must do so by the least restrictive means necessary to properly satisfy that interest. Church of Lukumi Babalu Aye v. City of Hialeah, 508 U.S. 520, 532 (1993). Few cases describe how the standard of "least restrictive means" is met respect to RLUIPA, but in a case on Free Speech the Supreme Court stated that the standard has *not* been met "if a less restrictive means is available for the government to achieve its goals." United States v. Playboy Entertainment Group, 529 U.S. 803, 815 (2000). This is the inverse of the burden explanation from *Midrash*, where the Appellants suffer a burden of mere inconvenience to modify their plans. Conversely, per the language of *Playboy*, the burden placed on the Appellee to satisfy the "least restrictive means" standard is met when there are no alternative means available that are less restrictive. The

Zoning Appeal Board decision contains fourteen detailed reasons why the Village has no alternative but to reject the variance, citing multiple violations of the zoning code as well as substantial changes to the rural nature of the community, an economic burden on the Village's available resources and "adverse aesthetic, environmental and ecological impacts on the property and on the surrounding Village." *Appeal Board Decision* ¶*13*. Unlike the alternative options the Appellants have available to pursue, the Village has demonstrated that there are no other alternative means at its disposal (thereby satisfying *Playboy*) and has demonstrated this with fourteen distinct reasons. Therefore, the Village applied the least restrictive means possible to furthering its compelling governmental interest**.**

It is highly important to note how the U.S. Supreme Court has proclaimed that many of its "subsequent decisions have consistently held that the right of free exercise does not relieve an individual of the obligation to comply with a 'valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes).'" Employment Division v. Smith 494 U.S. 872, 879 (1990) (quoting United States v. Lee, 455 U.S. 252, 263 (1982)). Consistent with the "valid and neutral law of general applicability" standard of *Lee* quoted in *Smith*, the Court later similarly held that "a law that is neutral and of general applicability need not be justified by a compelling governmental interest even if the law has the incidental effect of

burdening a particular religious practice." Church of Lukumi, 508 U.S. 520 at 532. *Lukumi* extended this "neutral" and "general applicability" standard of *Lee* to the issue of religious exercise by determining whether a city ordinance unfairly burdened religious practices. Like *Lukumi*, this case also involves the potential burden of a city law. The Village Zoning Code is "neutral" and has "general applicability" because the zoning code is inherently neutral as it has equal binding authority with general application over all the citizens of the Village, regardless of whether they are affected by it or not. Adopting the standards of the Supreme Court, the Village Zoning Code is "neutral" and of "general applicability" and therefore it "need not be justified by a compelling governmental interest even if the law has the incidental effect of burdening a particular religious practice." Id. at 532.

II. ANY CONSTRUCTION VIOLATING THE ZONING CODE WILL ALSO VIOLATE THE FIRST AMENDMENT

Any construction violating the zoning code will also violate the First Amendment. The First Amendment requires that "Congress shall make no law respecting an establishment of religion…" U.S. Const. amend. I, cl. 1. Furthermore, "the First Amendment mandates governmental neutrality between religion and religion, and between religion and nonreligion.'" McCreary County v. ACLU of Kentucky, 545 U.S. 844 (2005) (quoting Epperson v. Arkansas, 393 U.S. 97 (1968)). *McCreary* explains how the Constitution is violated in the presence of

preferential treatment. In this case, if the ruling from the Pomona Village Zoning Board of Appeals is ignored, "governmental neutrality" will be lost and the First Amendment will be violated because the Appellants will receive preferential treatment as a result of their religious status. "When the government acts with the ostensible and predominant purpose of advancing religion, it violates that central Establishment Clause value of official religious neutrality, there being no neutrality when the government's ostensible object is to take sides." McCreary, 545 U.S. 844 at 859. In *McCreary* the Court affirmed government neutrality as necessary to avoid violating the First Amendment. The District Court ruling below remained neutral in light of the clear language of the Constitution.

Not only is it improper to violate the First Amendment, it would be hypocritical to do so under the banner of RLUIPA, whose intended purpose is to strengthen the First Amendment by protecting the free exercise of religion. By violating the First Amendment, any permission to build granted to the Appellants will violate the integrity of the very same Constitutional amendment containing the "free exercise of religion" that RLUIPA seeks to preserve and strengthen by its existence. The Pomona Village Zoning Board of Appeals correctly applied the zoning law to the facts and their special power to do so has been widely protected by the Courts. The Third Circuit summarized this best when it described how "the federal courts have given states and local communities broad latitude to determine

their zoning plans. Indeed, land use law is one of the bastions of local control, largely free of federal intervention." Congregation Kol Ami v. Abington Township, 309 F.3d 120, 139 (3d Cir. 2002). In *Kol Ami* the sovereignty of a local zoning board was respected even though they prevented a zoning variance for a religious congregation. The Village of Pomona is also entitled to this type of local control free from federal intervention. Intervention on behalf of the religious party in *Kol Ami* would have shown a religious preference just as intervention on behalf of the Appellants would also show religious preference. This Court does not need to intervene; the District Court correctly applied existing zoning law while preserving the current powers of the Pomona Village Zoning Board of Appeals, all without violating the First Amendment.

The Village also respected the First Amendment by rendering a lawful decision that stands the test of Constitutionality in this Court. The Supreme Court established a three-prong test for religion in Lemon v. Kurtzman, 403 U.S. 602 (1971). Under the test in *Lemon* the Village would have violated the law if they had "advanced religion through its own activities and influence." Corp. of Presiding Bishop of Church of Jesus Christ of Latter-day Saints v. Amos, 483 U.S. 327, 337 (1987). The Village did *not* violate the law because its actions are consistent with Supreme Court precedent when the *Lemon* test is applied to these facts. Like the Village, the Appellants – as well as this honorable Court – must

respect the First Amendment by following the clear language of the Constitution as well as clear case precedent in this area of the law. Upholding the Pomona Zoning Code will prevent the Appellants from constructing the desired dormitories and thereby preferential treatment under the law due to the Appellant's religious beliefs will be avoided and the First Amendment will not be violated. The Village has properly applied the zoning code in a Constitutional manner and if the District Court ruling is affirmed, the Village will have exercised their powers in a manner "largely free of federal intervention." Congregation Kol Ami, 309 F.3d 120 at 309.

CONCLUSION

Therefore, because the Appellants have failed to established a Prima Facie Case for a violation under the Religious Land Use and Institutionalized Persons Act of 2000 and any permission to construct a building in violation of the Village Zoning Code will also violate the First Amendment, the Appellees respectfully request that this Court affirm the District Court's grant of summary judgment.

Respectfully submitted,

Michael E. Gumprecht

Dated: November 11, 2008

Michael E. Gumprecht
19 Barbara Lane
Plainview, New York 11803
(937) 329-0281

IN THE UNITED STATES COURT OF APPEALS

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CONGREGATION RABBINICAL COLLEGE OF TARTIKOV INC., RABBI MORDECHAI BABAD, RABBI WOLF BRIEF, RABBI DAVID A. MENCZER, and KOLEL BELZ OF MONSEY,

Plaintiffs-Appellants,

v.

VILLAGE OF POMONA, NY; BOARD OF TRUSTEES OF THE VILLAGE OF POMONA, NY, and THE VILLAGE OF POMONA ZONING BOARD OF APPEALS,

Defendants-Appellees.

CERTIFICATE OF SERVICE

The undersigned, counsel of record for Village of Pomona, NY, et al., hereby certifies that on November 11, 2008, he caused one copy of the attached Brief of Defendants-Appellees Village of Pomona, NY, et al. to be served by electronic mail to each of the attorneys of record hereafter named at the electronic addresses stated below:

Aimee R. Lucas, Esq.
Rudy Remigio, Esq.
Lucas & Remigio, P.C.
Email: arlucas@liberty.edu
Email: rremigio@liberty.edu

Dated: November 11, 2008

Michael E. Gumprecht
Counsel of Record for Defendants-Appellees
Village of Pomona, NY, et al.