22-2710-cv

United States Court of Appeals

for the

Second Circuit

CITIZENS UNITED TO PROTECT OUR NEIGHBORHOODS,
HILDA KOGUT, ROBERT ASSELBERGS, CAROLE GOODMAN,

Plaintiffs-Appellants,

– v. –

VILLAGE OF CHESTNUT RIDGE, NEW YORK,

Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF AND SPECIAL APPENDIX FOR PLAINTIFFS-APPELLANTS

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CORPORATE DISCLOSURE STATEMENT
PURSUANT TO RULE 26.1 OF THE
FEDERAL RULES OF APPELLATE PROCEDURE

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, Citizens United to Protect Our Neighborhoods, Plaintiff/Appellant in this action, states that it does not have a corporate parent, and there is no publicly held corporation that owns 10 percent or more of the entity's stock.

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PRELIMINARY STATEMENT

Plaintiffs-Appellants Citizens United to Protect Our Neighborhoods ("**CUPON**"), Hilda Kogut, Robert Asselbergs, and Carole Goodman (the "**Individual Appellants**") (collectively, the "**Appellants**") appeal the September 30, 2022, Opinion and Order (the "**Opinion**") of the District Court (Hon. Nelson S. Román) granting—*after more than two years*—Defendant-Appellee's Village of Chestnut Ridge, New York (the "**Village**" or "**Appellee**") motion to dismiss Appellants' Establishment Clause claim (the "**Motion**")[1] on the basis that Appellants lack standing to pursue their Establishment Clause claims.

The District Court's standing determination is wrong as a matter of law and should be reversed.

Appellants filed this lawsuit on April 18, 2019, seeking declaratory and injunctive relief declaring that the Village's new zoning law (the "**New Zoning Law**" or the "**Law**") violates the Establishment Clause by favoring one religion over all others and favoring religious activity over non-religious activity. The New Zoning Law resulted from the excessive entanglement between the Village government and the Orthodox Jewish Coalition ("**OJC**"), a religious organization that wrote the Law.

[1] The District Court also denied the Proposed Intervenors' Motion to Intervene and Dismiss as moot. (SPA1.)

Twelve hundred and sixty one days after Appellants filed the Complaint—the District Court (on September 30, 2022) dismissed Appellants' claims on the basis that Appellants lacked standing. The Individual Appellants are municipal taxpayers who allege that the Village worked exclusively with the OJC in a series of secret meetings for the purpose of overhauling the Village's existing zoning laws, radically altering the character of the Village for the benefit of one religion over others and for the benefit of religious activity over non-religious activity. Specifically, the New Zoning Law allows for an unlimited number of "houses of worship" in the Village and creates three new categories of "religious" use—all of which are presumptively permissible without the need for variance in over *ninety percent* of the Village. At the same time, the New Zoning Law specifically prohibits comparable secular uses—such as for "administrative offices, social halls . . . indoor recreation facilities, schools, and classrooms" but allows those uses for two of the three categories of houses of worship. And while the Village cosmetically changed the name of one of the categories from "Residential House of Worship" to "Residential Gathering Place" at the eleventh hour, it did not substantively change the New Zoning Law, and it is clear that the category was created for residential houses of worship.

To be crystal clear, Appellants are not—and have never been—antagonistic to religious use; there are many such uses in the Village. Prior to the New Zoning Law, the Village Planning Board ("**VPB**") was responsible for issuing variances on

a case-by-case basis that would allow any type of house of worship to be built or modified throughout the village. The New Zoning Law bypasses that entire process by making religious use *presumptively* permissible throughout the town without the need for a variance. This drastic change led the Village's own Planning Board to *oppose* the New Zoning Law for multiple reasons and to note that the Law was "designed to favor one religious institution over another."

Appellants alleged that the Village made expenditures in furtherance of the New Zoning Law, including hiring a private land use firm to work with the Village and the OJC on the Law. Those expenditures are sufficient to give the Individual Appellants municipal taxpayer standing to pursue their Establishment Clause claim and therefore also sufficient to confer associational standing on CUPON. The District Court erred in ignoring the import of these allegations, and in particular, in analyzing the taxpayer standing issue primarily under cases that examine *state* or *federal* taxpayer standing as opposed to Second Circuit law that governs standing for *municipal* taxpayers. The District Court should have analyzed the standing issue guided by the presumption that municipal taxpayers suffer concrete injury whenever a challenged activity involves a measurable appropriation or loss of revenue by virtue of a municipal taxpayer's close relationship with the municipality.

The District Court also erred by disregarding the relevant factual allegations demonstrating the direct exposure of Individual Appellants both to the religious

structures enabled by the New Zoning Law and to the Village's pervasive behavior and statements—all of which evidence the patently religious motivation for the New Zoning Law. The District Court further erred by ignoring Appellants' allegations that the New Zoning Law afforded benefits exclusively to the religious by allowing blanket variance approval for places of worship—including variances to allow higher density and ancillary uses—in residential communities. Non-religious property owners are denied those same benefits.

The urgency of this case stands in stark contrast to the District Court's delay in ruling on the motion to dismiss. Indeed, this Court can take judicial notice of the fact that the Village and the OJC recently entered into a court-ordered consent decree, pursuant to which the Village has agreed that if the New Zoning Law gets overturned as unconstitutional, the Village will still grandfather (as a prior conforming use) any structure where construction has begun or a substantial investment has been made—regardless of the stage of development. This case should be heard on the merits and it should be heard quickly. For the reasons set forth below, the District Court's decision should be reversed.

JURISDICTIONAL STATEMENT

The District Court exercised federal question jurisdiction under 28 U.S.C. §§ 1331 and 1343 because Appellants brought claims under the First Amendment to the United States Constitution. The District Court had authority to grant the requested

injunctive and declaratory relief under 28 U.S.C. § 1343 and entered final judgment on September 30, 2022. (SPA21.) Appellants timely filed their Notice of Appeal on October 14, 2022. (A428-29.) This Court has jurisdiction under 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

1. Whether the District Court failed to accept all well-pleaded allegations in the complaint as true and draw all reasonable inferences in the Appellants' favor in finding that the Individual Appellants lacked standing to assert a violation of the Establishment Clause under the principles of taxpayer standing, direct exposure standing, and denial of benefit standing.

2. Whether the District Court erred in finding that CUPON failed to demonstrate either associational standing or organizational standing to assert a violation of the Establishment Clause.

STATEMENT OF THE CASE

A. Background

1. Chestnut Ridge and the New Zoning Law

The Village of Chestnut Ridge was first incorporated in 1986. (A20-21, ¶¶17, 22.) The Village's original zoning laws were enacted at that time, but the Village has never had a comprehensive zoning plan in place. (A21 ¶¶24-26.) Since 1986, the Village has largely been a suburban, low-density, and single-family

neighborhood, wooded and quiet. (A21 ¶23.) Under the Village's original zoning laws, all places of worship belonged to one category of use, which required special permit approval and site planning approval of the VPB. (A22 ¶28.) Any owner of a single-family home or land zoned for such use could apply for and get permission to use that property for organized, regular religious purposes through the typical variance process. (*Id.*) At the time the Complaint was filed, Chestnut Ridge was home to numerous houses of worship spanning various religions and denominations, all of which (with a few recent notable exceptions) received the necessary permissions pursuant to the original zoning laws that allowed houses of worship as permitted uses in all residential zoning districts. (A22 ¶¶29-30.) Despite lacking a comprehensive plan, the Village Board embarked on the drafting and adoption of the New Zoning Law, which radically alters the character of the Village and presumptively zones the entire geographic area of the Village for religious use. (A17, A21-22, ¶¶2, 27.)

The OJC gave the Village a draft of the New Zoning Law in August 2017. (A25 ¶44.) Village invoices reveal that Appellee hired Nelson Pope & Voorhis, LLC ("**NPV**"), a land planning services firm, to review the OJC's draft. (*Id.*) NPV met privately with the OJC to discuss the Law on Appellee's behalf. (*Id.*) NPV worked directly with Brooker Engineering, PLLC ("**Brooker**"), a civil engineering firm hired by the OJC, to further revise the New Zoning Law. (A25-26, ¶¶45, 47,

50.) NPV and Brooker also met with and reported directly to the Village's Mayor, Rosario Presti, Jr. ("**Mayor Presti**"). (A26, ¶¶46, 48.) While the OJC and Appellee were crafting the New Zoning Law privately, a member of the VPB asked NPV whether members of the OJC were present at the drafting meetings for the New Zoning Law; NPV confirmed that they were. (A26 ¶49.)

Months later, at the Village Board meeting held on February 22, 2018, the New Zoning Law was revealed to the public for the first time in a document dated February 9, 2017.[2] (A27 ¶54.) The proposed New Zoning Law was called the "House of Worship" amendments. (A27 ¶55.) The proposed Law provided for the establishment of three categories of Houses of Worship: "residential places of worship," "neighborhood places of worship," and "community places of worship," with each category being granted automatic and blanket variances with respect to development coverage, doubling the percentage of the property that could be developed, far in excess of any other non-religious building or use in the same zoning districts.[3] (A27-28, ¶56.) The residential place of worship category created a

[2] Mayor Presti claimed the date was an error, and should have read February 9, 2018. (A27 ¶54.)

[3] A "residential gathering place" is the use of a dedicated portion of a one-family detached residence for gatherings of at least 15 people and up to 49 people more than 12 times per year. (A36 ¶94.) The New Zoning Law allows owners of residential gathering places to use off-site parking facilities on private property and parking on public streets within a more than quarter mile radius for up to 50 percent of its required parking. (A36 ¶95.) A "neighborhood place of worship" is the use of a structure for regular organized religious assembly with a total floor area up to

permitted use in single-family dwellings, and was later cosmetically amended to be called a "residential gathering place." (*Id.*) The draft also explicitly stated that the proposed Law's purpose was "to remove impediments to the free practice of religion, such as allowing for smaller-scale places of worship customary to Orthodox Congregations which are precluded from driving on Holy Days." (A28 ¶ 57.)

At the February Board Meeting, Mayor Presti confirmed that special permits would automatically be approved in favor of applicants under the New Zoning Law. (A28 ¶60.) But any secular purpose would not receive such special treatment. Mayor Presti also confirmed that other than the OJC, no other religious organization, and no other non-religious groups or individuals, were included in the meetings to draft the Law. (A29 ¶61.)

The VPB presented its assessment of the New Zoning Law on May 29, 2018:

> we feel the provisions of this Local Law have the potential to significantly disrupt the peaceful and quiet harmony associated with single family zoning districts and alter single family neighborhoods and impact the quality of life on the residents of the Village. ***A proliferation of houses of worship at the scale permitted by the Local Law will negatively impact homeowners by allowing for large structures to be***

10,000 square feet, even if the lot is a single-family dwelling. (A36-37, ¶96.) The "community place of worship" is the use of a structure designed for regular organized religious assembly with a total floor area of more than 10,000 square feet. (A37 ¶97.) The latter two categories receive automatic blanket variances that nonreligious uses do not receive under the Law. (*See* A80-81 ("All other accessory uses shall be prohibited, including but not limited to administrative offices, social halls, bath and shower facilities other than those dedicated for use by the residents of the principal residential use, gymnasiums, indoor recreation facilities, schools, and classrooms.").)

> ***built in single family zones.*** The associated parking issues, noise, and traffic can severely impact the neighboring single family dwellings, especially if more than one place of worship is sited on a single block.

(A29-30, ¶64) (emphasis added). The VPB also questioned, as Appellants did, "why only the input of one religious organization [the OJC] was considered in connection with the drafting," and similarly concluded that the New Zoning Law was "designed to favor one religious institution over another." (A30 ¶66.) Significantly, the VPB recommended that the neighborhood places of worship category be eliminated entirely from the Law, as it was simply "too intense of a use to be permitted on standard size residential lots." (A30 ¶68.) Appellee ignored all of these recommendations.

At the August 16, 2018, Village Board Meeting, Mayor Presti again confirmed that the OJC—and the OJC alone—actively and directly worked with Appellee in pushing to get the New Zoning Law enacted. (A33 ¶80.) Another Village Board member, Grant Valentine, informed the audience that the Village asked the OJC to attend private meetings because of the OJC's health, safety, and welfare. (A34 ¶81.) Appellants filed Freedom of Information Law ("**FOIL**") requests relating to these meetings, and the evidence demonstrates that the OJC (a single religious group) drafted the initial draft of the Law and gave it to the Appellee who then copied it into a Village memorandum. Appellee then took that

memorandum and with only minor, non-substantive revisions, drafted the version of the New Zoning Law that was later enacted. (A35-36, ¶¶91-92.)

Appellee approved a Resolution that adopted the New Zoning Law on February 21, 2019. (A38 ¶103.) The Resolution is merely another symbol of Appellee's entanglement with, and promotion of, religion, affirming that the purpose of the New Zoning Law was to accommodate a particular religious practice of a particular religions group—the OJC. (A38 ¶104.) In the process, Appellee went out of its way to attack several of its citizens, accusing them of "outright animus" and "discriminatory bias" for not adhering to the Village's favorable treatment of the OJC, despite these citizens' background of varied faiths and opinions. (A38 ¶106.)

B. The Parties

1. The Individual Appellants

In light of these events, on April 18, 2019, three long-time residents of the Village filed suit: Hilda Kogut, Robert Asselbergs, and Carole Goodman. Each of these individuals are municipal taxpayers and members of CUPON. (A18 ¶7.) Each objects to the use of Village tax dollars spent on the formulation, adoption, and implementation of the New Zoning Law, and each objects to the Village's preferential treatment of the OJC (and religious uses generally) over nonreligious uses, in violation of the Establishment Clause. (*Id.*) All three of the Individual Appellants attended Village Board meetings where the New Zoning Law was

discussed and where Appellee conceded that it met privately with the OJC, never sought the contributions of other religious groups, and used the Law drafted by the OJC to make fundamental and radical changes to the Village's zoning laws. (A25-29, ¶¶44-58, 61-63.) Individual Appellants personally contributed to help fund CUPON's retainer of a land use planner, who was hired out of necessity once Individual Appellants learned of the proposed New Zoning Law. (*See* A21 ¶26.)

Ms. Kogut has resided in the Village since 1995. (A18 ¶8.) On February 11, 2016, Kedishas Aharon D'hadas ("**Kedishas**"), a religious corporation, received a building permit for 3 Spring Hill Terrace, a property located near Ms. Kogut's residence. (A23-24, ¶36.) Kedishas claimed that a 3 car garage would be constructed on the property pursuant to the permit and a Certificate of Occupancy was issued. (*Id.*) Ms. Kogut appealed to the Zoning Board of Appeals ("**ZBA**") to revoke the Certificate due to Ms. Kogut's eyewitness testimony, photographic and video evidence that the elaborate "garage," which dwarfed the size of the single-family house on the property, was actually being used as a house of worship without the required special permit and in violation of the original zoning laws. (A24 ¶37.) Kedishas never disclosed its intent to construct a synagogue. (A24 ¶38.) On March 20, 2018, the ZBA revoked the Certificate, finding that the permit application falsely stated the purpose of the structure, misrepresentations that were repeated by Keshidas at the ZBA meeting. Nevertheless, just a day later, the Village Attorney

overruled the ZBA and approved the issuance of another Certificate for the illegal synagogue. (A24 ¶39.)

Mr. Asselbergs has been a Village resident since 1987. (A18-19, ¶9.) As a member of CUPON, Mr. Asselbergs has contributed time, energy and knowledge of real estate to the organization's goals of promoting fair land use reform.

Ms. Goodman has resided in the Chestnut Ridge area since 1965, well before the Village was incorporated. (A19 ¶10.) As a member of CUPON and a property owner in the Village, Ms. Goodman attended Village Board meetings to voice her opposition to the New Zoning Law. (A18 ¶5.) In response, Appellee directly targeted Ms. Goodman, and in the Resolution adopting the New Zoning Law, accused her of "outright animus" and "discriminatory bias" for daring to speak publicly about the potential impact of the drastic zoning amendments. (A38 ¶106.)

2. CUPON

Appellant CUPON is a civic membership organization founded by Village residents in 2018 that advocates for fair land use reform for the Village, in part, by encouraging the development of a comprehensive zoning plan, which would take into consideration the needs of all Village residents. (A18 ¶5.) When the Village first disclosed the draft of the New Zoning Law in February 2018, however, CUPON was forced to shift gears, and opposed the Law's passage. (*Id.*) CUPON urged that any zoning amendments be created consistent with the principles of the

Establishment Clause—that any amendments not favor one religious organization over another and not favor religious use over secular use, as required by the Constitution.

CUPON used its resources—through contributions by Individual Appellants and other members—to hire a land use planner to review the New Zoning Law, analyze any impacts on the health, safety, and public welfare of Village residents at stake, and to assist in formulating a response in opposition to the Law. (A21, A32, ¶¶26, 73.) The Village completely disregarded the land planner's findings, and unlike the OJC, CUPON was excluded entirely from participation in the drafting and consideration of the Law, and was kept in the dark regarding the secret one-on-one meetings between Appellee and the OJC. (A25 ¶¶43-44.) Moreover, CUPON, through one of its members, Ms. Kogut, uncovered this preferential treatment and religious promotion only after obtaining the Village's response to FOIL requests. (A25-27, A29, ¶¶44, 48, 53, 62.)

3. Procedural History

Appellants filed their Complaint on April 18, 2019, but, as noted, this important case languished before District Court for over 41 months. On May 22, 2019, the Village requested a pre-motion conference with Judge Román to address its desire to file a motion to dismiss the Complaint pursuant to Fed. R. Civ. P. 12(b)(1) and 12(b)(6), to which the Appellants responded on May 28, 2019. (A6

¶16.) Another pre-motion conference letter was submitted on June 18, 2019 by the OJC, Congregation Birchas Yitzchok, Congregation Dexter Park, Congregation Torah U'Tfilla, and Agudath Israel of American Inc. (collectively, the "**Proposed Intervenors**"), a group of parties seeking to intervene in this case and to support Appellee's motion to dismiss. Appellants responded to the Proposed Intervenors' letter on June 20, 2019. (A6 ¶18.) After three months passed without response from the District Court, Appellants re-filed their June 20, 2019, letter.

The parties' requests for pre-motion conferences went unanswered by the District Court *for more than ten months*. After that unexplained delay, Appellants, on May 4, 2020, filed another letter, this time asking the court to rule on the pre-motion conference requests, or otherwise to move the case forward, in part because the fundamental harm at issue—the Establishment Clause violation—continued unabated despite the unprecedented circumstances of the Coronavirus pandemic. (A7 ¶21.) On May 29, 2020, the District Court finally issued a memorandum endorsement waiving the pre-motion conference requirement and granting Appellee leave to file the motion to dismiss and the Proposed Intervenors leave to file the motion to intervene. (A7-8, ¶23.)

The Motion was fully briefed as of September 11, 2020. (A9-11 ¶¶32-49.) More than two additional years passed before the District Court on September 30, 2022—without oral argument or supplemental briefing—granted Appellee's Motion

on the basis that Appellants lacked Article III standing, and dismissed the Complaint. (Spa1, 21.)

SUMMARY OF THE ARGUMENT

The Individual Appellants have adequately alleged that they suffered an injury-in-fact (and therefore have standing) under each of three theories of standing routinely accepted by this Court in Establishment Clause cases: (1) taxpayer standing; (2) direct exposure; and (3) denial of benefit.

Unlike federal or state taxpayer standing—the standing principles that the District Court erroneously appears to have applied—municipal taxpayer standing is relatively broad for Establishment Clause claims. Under this Court's precedent, there is a presumption that the municipal taxpayer's relationship to the municipality is sufficiently "direct and immediate" that the taxpayer suffers an injury-in-fact to qualify for standing, so long as "the challenged activity involves a measurable appropriation or loss of revenue." *Altman v. Bedford Cent. Sch. Dist.*, 245 F.3d 49, 73 (2d Cir. 2001) (quoting *United States v. City of New York*, 972 F.2d 464, 470 (2d Cir. 1992)).

The Individual Appellants clearly have municipal taxpayer standing to raise their claims. The Individual Appellants alleged numerous specific, identified appropriations the Village made in furtherance of drafting and enacting the New Zoning Law, including payments to a private planning firm that submitted invoices

related to work done on the Law. Additionally, the Individual Appellants alleged that the New Zoning Law removed certain permitting and variance requirements for houses of worship. Individual Appellants have therefore identified *measurable* appropriations or loss of revenue associated with the New Zoning Law. That is all that is required under this Court's precedent, and the District Court erred in holding otherwise.

The Individual Appellants have also adequately alleged direct exposure standing. This Court has previously held that individual plaintiffs satisfy direct exposure standing when a plaintiff is personally confronted with a government-sponsored religious expression that directly touches the plaintiff's religious or non-religious sensibilities. The direct exposure standing inquiry, at its core, asks whether a plaintiff suffers "interaction with or exposure to the religious object of the challenged governmental action that gives rise to the injury." *Montesa v. Schwartz*, 836 F.3d 176, 197 (2d Cir. 2016). And the Individual Appellants have alleged facts suggesting that such structures have the potential to completely change the character of their neighborhoods, subjecting them to constant reminders that the Village has impermissibly sought to benefit adherents of a particular religion with the New Zoning Law. The physical embodiments of the New Zoning Law—and the Establishment Clause violations that underlie it—are in the Individual Appellants'

own backyards. Such direct exposure is an injury-in-fact under this Court's precedent, and Individual Appellants therefore have standing.

Finally, the Individual Appellants have alleged denial of benefit standing. The New Zoning Law grants certain blanket variances from typical zoning requirements for the construction of houses of worship. Religious adherents may take advantage of the Law to construct structures that would be illegal if constructed for any non-religious purpose. The Law also removes certain permitting requirements from the construction of houses of worship, while comparable structures built for non-religious purposes must still comply with those requirements. These are not benefits provided equally to all which only incidentally benefit religious individuals and organizations. These are benefits given ***exclusively*** to religious individuals and organizations ***because*** they seek to build a structure for religious purposes. Those same benefits are denied to all who wish to build a structure for non-religious use. Individual Appellants therefore have adequately alleged the denial of benefits and, therefore, that they have denial of benefit standing.

CUPON has standing both on behalf of its members (associational standing) and based on injuries to CUPON itself (organizational standing). The District Court's holding that CUPON did not have associational standing was premised exclusively on the incorrect holding that the Individual Appellants, who are CUPON members, did not have standing. This is a faulty premise; and, in any event, CUPON

satisfies the additional two requirements to establish associational standing, which the District Court did not consider: (1) this lawsuit is germane to CUPON's mission to advocate for fair land use reform in Chestnut Ridge, particularly given CUPON's expertise in the area of zoning and (2) CUPON's claims do not require individualized proof, nor does CUPON seek individualized relief. CUPON therefore has associational standing. CUPON also has organizational standing due to the perceptible impairment of its activities.

ARGUMENT

A. STANDARD OF REVIEW

The standard of review for an order granting a motion to dismiss for lack of standing is *de novo*. *See, e.g.*, *Bd. of Educ. v. N.Y. State Tchrs. Ret. Sys.*, 60 F.3d 106, 109 (2d Cir. 1995). In reviewing a party's standing to assert a particular claim, the Court "*must* 'accept as true all material allegations of the complaint, and *must* construe the complaint in favor of the complaining party.'" *Id.* (quoting *Warth v. Seldin*, 442 U.S. 490, 501 (1975)) (emphasis added).

B. THE DISTRICT COURT ERRED IN HOLDING THAT THE INDIVIDUAL APPELLANTS LACKED TAXPAYER STANDING

Individual Appellants have taxpayer standing because all are municipal taxpayers and residents of the Village and allege the Village used specific municipal tax dollars solely for the purpose of adopting the New Zoning Law, which was

enacted to benefit one religious group over all others and to support religious activity over non-religious activity.[4]

The District Court, with practically no analysis, held that the Individual Appellants lacked taxpayer standing. The court appears to have relied primarily on a case that addresses *state* taxpayer standing (*Novesky v. Goord*, 120 F. App'x 384 (2d Cir. 2005))—as opposed to *municipal* taxpayer standing, which is at issue here. This Court has consistently recognized that *municipal* taxpayer standing "stands on different footing" than *state* or *federal* taxpayer standing, due to the different relationship that exists between a municipality and its taxpayers. *See City of New York*, 972 F.2d at 466-68, 471. Indeed, courts should "*presume* a municipal taxpayer's relationship to the municipality is 'direct and immediate' such that the taxpayer suffers concrete injury whenever the challenged activity involves a measurable appropriation or loss of revenue." *Altman*, 245 F.3d at 73 (emphasis added) (quoting *City of New York,* 972 F.2d at 466, 470) (citing *Massachusetts v. Mellon*, 262 U.S. 447 (1923) ("*Frothingham*") (establishing the presumption for municipal taxpayer standing)); *see also N.Y. State Tchrs. Ret. Sys.*, 60 F.3d at 110-11 (municipal taxpayer standing requires only an ability to identify a "measurable

[4] Appellants also alleged that that the New Zoning Law creates a continuing loss of revenue by allowing religious organizations and individuals to forego the permit and approval process that is required of all other property owners in Chestnut Village. (A18-19, A25-27, ¶¶7-10, 42, 44-48, 50-52.)

appropriation or loss of revenue" attributable to the challenged activities). And, unlike the standing requirements for a federal or state taxpayer, a municipal taxpayer's "standing does not depend on the plaintiff's ability to show a 'likelihood that resulting savings will inure to the benefit of the taxpayer.'" *Altman*, 245 F.3d at 73 (quoting *City of New York*, 972 F.2d at 466, 470).

This Court's municipal taxpayer cases date back thirty years to *United States v. City of New York*, 972 F.2d 464. There, this Court considered whether municipal taxpayers had standing to challenge the legality of municipal expenditures related to sludge removal. *Id.* at 466-68. Relying on the especially "close relationship" of a taxpayer to a municipality, which "is 'direct and immediate,'" the Court held that the municipal taxpayer "suffers concrete injury whenever the 'challenged activity involves a *measureable* appropriation or loss of revenue.'"[5] *Id.* at 470-71 (emphasis added) (quoting *D.C. Common Cause v. District of Columbia*, 858 F.2d 1, 5 (D.C. Cir. 1988)); *id.* at 471 (citing other courts of appeal that have "uniformly concluded that municipal taxpayers have standing to challenge allegedly unlawful municipal expenditures"); *see also N.Y. State Tchrs. Ret. Sys.*, 60 F.3d at 110 (holding that

[5] For taxpayer standing cases based on prior misappropriation of funds, "the remedy by injunction to prevent their misuse is not inappropriate. . . . The reasons which support the extension of the equitable remedy to a single taxpayer in such cases are based upon the peculiar relation of the corporate taxpayer to the corporation, which is not without some resemblance to that subsisting between stockholder and private corporation." *N.Y. State Tchrs. Ret. Sys.*, 60 F.3d at 110 (alteration in original).

while there are "substantial obstacles to taxpayers who challenge federal or state actions, a taxpayer who challenges *municipal actions* stands on a different footing" (emphasis added)).

Indeed, the Individual Appellants have plausibly alleged that they are Village residents who are municipal taxpayers (A18-19, ¶¶6-10); they have plausibly alleged that the New Zoning Law violates the Establishment Clause by favoring one religion over all others and preferring religious activity to non-religious activities, (A25, A27-A28, ¶¶42, 52-56; *see generally* A25-29 ¶¶42-63); and they have plausibly alleged specific expenditures (discovered through FOIL requests) for specific purposes that the Village made to help draft and implement the New Zoning Law, (A25-26, ¶¶44-50). These expenditures include the hiring of a private land use company NPV that assisted in discussing, reviewing, drafting, and ultimately enacting the New Zoning Law. (*Id.*) NPV worked closely with the OJC to craft the New Zoning Law and explicitly described billing entries—obtained by Appellants through FOIL requests—as "OJC Draft Zoning," "OJC Zoning," and "OJC Law and Follow[ing] up with R. Presti." (A25-26, A29, ¶¶44-50, 62.) These appropriations are "measurable appropriation[s] . . . of revenue" that evidence the Village hired NPV to implement the New Zoning Law, which was designed and applied to serve the interests of one religious group—the OJC. (A25-26, A29, ¶¶44-50, 62.) Under this Court's precedent in *City of New York*, 972 F.2d at 470-71, these expenditures

are sufficient—in and of themselves—to establish taxpayer standing for the Individual Appellants, and the District Court erred in concluding otherwise.

Instead of applying the municipal taxpayer standing cases to the facts alleged in the Complaint, the District Court, with scant analysis, concluded that Individual Appellants did not "allege[] any amount of measurable appropriation." (SPA14.)[6] Though it is not clear, the error appears to lie in the District Court's reliance on *Novesky*, 120 F. App'x at 385-86, which held that the plaintiff did not have *state* taxpayer standing because he had failed to allege a "*measurable* appropriation or disbursement of [state] funds occasioned *solely* by the activities complained of," and instead had challenged "discrete elements of two rehabilitation programs funded out of [the state's] general budget," elements that were "administered by government employees whose salaries are funded by tax dollars." *Id.* at 385-86 (cleaned up).

Indeed, while *Novesky* is a state—as opposed to municipal—taxpayer case, the Individual Appellants' allegations here are far more robust and specific than the plaintiff in *Novesky*. Unlike in *Novesky*, Appellants here allege—through *specific billing entries and dates*—that specific *municipal* tax expenditures were expended

[6] The District Court also failed to consider the "loss of revenue" aspect of taxpayer standing. Individual Appellants alleged that the Law allows houses of worship to receive *automatic* approval for special permits. It is a reasonable and obvious inference that the fees associated with applying for variances will therefore no longer be paid by religious property owners but would have to be paid by everybody else. (A28-30, A36-37, ¶¶60, 67, 94-97.)

on a specific private planning firm for the specific purpose of drafting and enacting the New Zoning Law. (A25-26, A29, ¶¶44-50, 62.) This measurable appropriation is certainly sufficient for *municipal* taxpayer standing.

Moreover, the specific *amount* of an appropriation is irrelevant in municipal taxpayer standing analysis. *See DeStefano v. Miller*, 67 F. Supp. 2d 274, 282 (S.D.N.Y. 1999) (finding taxpayer standing where "the State spends a *measurable amount* of taxpayer dollars, (albeit an infinitesimal one per capita), on a program that supports religious activity" (emphasis added)), *vacated on other grounds sub nom. DeStefano v. Emergency Hous. Grp., Inc.*, 247 F.3d 397 (2d Cir. 2001). An appropriation is measurable when it represents a specific, identifiable expenditure rather than some unproven fraction of the general budget or unknown portion of a government employee's salary. *See Altman*, 245 F.3d at 57-60. *Compare Novesky*, 120 F. App'x at 385-86 (finding no measurable appropriation for state taxpayer standing where allegations related to programs that were funded out of a general budget and performed by salaried state employees), *with DeStefano*, 67 F. Supp. 2d at 282 (finding a measurable appropriation where government space occupied by religiously-affiliated AA meeting cost state taxpayers $50 over the course of a year).

In *Altman*, the municipal taxpayers challenged several school activities, primarily art and classroom lessons that involved religious figures. 245 F.3d at 57-60. But the mere "funding [of] the general budget for general school district

expenses," *id.* at 74, was insufficient to establish measurable appropriation. The Court noted, however, that allegations of specific expenditures on "crayons, clay, or construction paper," purchased "solely for the activities that plaintiffs challenged," *would have* been sufficient to establish measurable appropriations. *Id.*

Indeed, the District Court did cite to one municipal taxpayer case that warranted finding standing. The District Court's citation to *Lown v. Salvation Army, Inc.*, 393 F. Supp. 2d 223 (S.D.N.Y 2005), is particularly puzzling. In *Lown*, a municipal taxpayer case, the district court held that the plaintiffs *had taxpayer standing* where they alleged that ten percent of government contracts to City Social Services were devoted to the Salvation Army, which was 95% funded by government sources. 393 F. Supp. 2d at 238-39. And since the Salvation Army was going to perform new religiously-oriented social services, the court made the reasonable inference that the religious tasks would involve government funds from the government contracts. That was sufficient to establish a "measurable appropriation." *Id.* at 238-39. Here, the Individual Appellants have likewise alleged specific expenditures that were used solely for the purpose of drafting and enacting the New Zoning Law. (A25-26, A29, ¶¶44-50, 62.)

While the Complaint did not include the specific amount of each expenditure on NPV, Appellants clearly alleged that multiple expenditures were made based on the invoices they received through FOIL requests. And, the relevant issue that the

District Court should have considered is whether Appellants alleged *measurable* appropriations—not necessarily the actual measured amount of those appropriations. *Altman*, 245 F.3d at 74. At a minimum, the District Court should have made the obvious inferences that the Village paid the alleged invoices and that the invoices were for more than zero pennies—or *three pence*. Indeed, the District Court was required to review the Complaint in the light most favorable to the Appellants and to draw reasonable inferences in their favor. The District Court erred in failing to do so.

C. THE INDIVIDUAL APPELLANTS ALSO PROPERLY ALLEGED DIRECT EXPOSURE STANDING

Individual Appellants also have standing because they alleged "direct exposure to the challenged activity." *Altman*, 245 F.3d at 72. The District Court erred by overlooking the relevant factual allegations demonstrating the direct exposure of Individual Appellants both to the religious structures enabled by the New Zoning Law and to the Village's statements evidencing the patently religious motivation behind the New Zoning Law.

The line of direct exposure standing cases arises from the Supreme Court's holding in *School District of Abington Township v. Schempp*, 374 U.S. 203 (1963), that plaintiffs may demonstrate standing by alleging they are "directly affected by the laws and practices against which their complaints are directed." *Id.* at 224 n.9.

This Court has since described two ***nonexclusive*** circumstances in which a plaintiff will have direct exposure standing:

> when (1) a plaintiff is personally constrained or otherwise subject to control under a governmental policy, regulation, or statute grounded in a 'religious' tenet or principle . . . or (2) a plaintiff is personally confronted with a government-sponsored religious expression that directly touches the plaintiff's religious or non-religious sensibilities. In both situations, it is a plaintiff's ***interaction with or exposure to the religious object of the challenged governmental action that gives rise to the injury***.

Montesa, 836 F.3d at 197 (emphasis added). With respect to the former, generally, the prohibition or mandate in a religious law "is grounded in or at least significantly influenced by a 'religious' tenet or principle," and affects a plaintiff's "economic well-being." *Id.* at 196. With respect to the latter category, a plaintiff's injury is generally not economic, but occurs "when a plaintiff comes into contact with, or is exposed to, a government-promoted expression of religion." *Id.* at 197.

The District Court's rejection of direct exposure standing was premised on an inapt comparison of this case to the facts in *Montesa*, where the student-plaintiffs alleged that their education was negatively affected by the purported diversion of public education funding toward religious schools. (SPA15-17); *id.* at 194. But the reason that the plaintiffs in *Montesa* were found not to satisfy direct exposure standing was their failure to allege how the State's Individuals with Disabilities Education Act (a non-religious, secular law) settlement payments either (1) contributed to the establishment of a religion or (2) constituted a religious

expression, statement, or symbol with which the plaintiffs came into direct contact. *Id.* at 198. Instead, the *Montesa* plaintiffs alleged only that public funds were diverted for an unconstitutional purpose—in other words, they alleged only an *indirect* exposure. *Id.* at 199.

But those are not the circumstances in this case, primarily because the New Zoning Law is *itself* a religious law, the purpose of which is non-secular. (*See* A28, 40, ¶¶60, 116, 119-20.) The entire history of the drafting of the Law, from a singular religious organization handing the initial draft to the Village government via a private, one-on-one meeting to the exclusion of any other member of the Village, through the final Village Resolution adopting the Law, has been imbued with the promotion of the religious beliefs and religious practices of a certain religion, and religion generally, over non-religion. (A25-29, ¶¶42-63.) Where the students in *Montesa* felt only an indirect, nebulous impact of the underfunding of public schools, 836 F.3d at 199, the Individual Appellants here were directly exposed to the religious symbolism established by the New Zoning Law, which has already begun to change the character of the Village and in the Individual Appellants' own backyards through the construction of massive religious gathering places on single-family properties, automatically, and without limit. (A24 ¶37.)

Rather than trying to analogize this case to *Montesa*, the District Court should have considered the more appropriate analog of this Court's earlier decision in

Sullivan v. Syracuse Housing Authority, 962 F.2d 1101 (2d Cir. 1992). The plaintiff in *Sullivan* resided at Benderson Heights, a small community of apartments with a single community center, owned and operated by the Syracuse Housing Authority ("**SHA**"). *Id.* at 1103. As a tenant, plaintiff had the right to use the center, but the SHA had contracted with a faith-based entity to occupy a portion of the center and operate religious programs from there. *Id.* at 1103-04. The plaintiff alleged that the SHA had established a religious policy, depriving plaintiff of his right to use and enjoy the community center when plaintiff was exposed to the religious promotion. *Id.* at 1105. In other words, a religion had been "established in a place ***functionally analogous*** to Sullivan's own home," and plaintiff found this "alleged establishment of religion offensive." *Id.* at 1108 (emphasis added). The Court found these allegations sufficient to establish standing because plaintiff was not merely roaming the country in search of a governmental wrongdoing—rather, the wrongdoing was occurring within his community, in his own proverbial "backyard." *Id.* at 1109.

The Individual Appellants have alleged that they attended Village Board meetings only to be met with direct and clear statements of promotion and endorsement of a particular religious group (the OJC) and a particular religion, to the exclusion of other secular or non-secular individuals and organizations in the creation of the New Zoning Law. (A18, A26-28, A33, ¶¶5, 51-60, 80.) The Complaint alleges that the construction of these massive religious gathering places

had already begun in Appellant Kogut's neighborhood. (A24 ¶37.) And the Individual Appellants have alleged that they more broadly have and will continue to come into contact with these religious buildings—a symbol of the Village's consistent endorsement of this religious expression—as long as the New Zoning Law remains in effect. (*See generally* A32 ¶¶73-74.) This is precisely the sort of direct harm that conferred standing in *Sullivan*. Every time an Individual Appellant walks past one of the houses of worship enabled by the New Zoning Law, they will be reminded that the Village passed the New Zoning Law with religious motivations to advantage both religion generally and one specific religious group.

The District Court also erred in holding that the Individual Appellants could not show standing based on the "expression" line of cases because those cases "involved physical placement of religious expressions in public areas." (SPA17.) But the District Court misapplied the precedent. In *Jewish People for the Betterment of Westhampton Beach v. Village of Westhampton Beach*, 778 F.3d 390 (2d Cir. 2015), this Court found that plaintiffs had standing where the physical expression of religion—creation of an "eruv," or physical geographic demarcation within which adherents subscribing to a certain interpretation of Jewish law believe that they may perform certain activities otherwise prohibited on the Jewish Sabbath—was not at a courthouse or in a classroom or at a public meeting house, but on a utility pole. *Id.* at 393. Rather, it was enough that the physical demarcation of the eruv symbolized,

clarified, and fostered a specific religion's practices and beliefs ***within that entire geographic area***—it was enough that the physical eruv wire brought religious expression otherwise confined to private spaces into a public area by virtue of what it symbolized. *Id.* at 393-94.

The same applies to *Cooper v. United States Postal Service*, 577 F.3d 479 (2d Cir. 2009), where a plaintiff came into contact with religious displays, such as prayer cards, at the postal facility closest to his home, which was operated by a church as a contract postal unit. *Id.* at 484, 486-88. The District Court distinguished *Cooper* on the basis that the "expression" was in a "public area." (SPA17.) But the Second Circuit's holding did not turn on whether the expression was in public or in private, but whether the plaintiff had a direct and personal stake in the "spiritual injury" that was inflicted. *Cooper*, 577 F.3d at 490-91. The plaintiff came into direct contact with the displays made part of his experience in using the privately-operated postal facility. *Id.*

The Individual Appellants set forth a litany of allegations demonstrating their direct and personal contact with the Appellant's Establishment Clause violation, including that a special permit would automatically be approved under the Law; that the VPB found that a "proliferation of houses of worship at the scale permitted by the Local Law will negatively impact homeowners by allowing for large structures to be built in single family zones;" that as a result of the Law, massive structures

with significant automatic variances would be established to the exclusion of non-religious adherents. (A28-30, A32-35, A38, ¶¶57, 60, 64, 66-67, 74, 80-81, 91, 104.) The District Court did not address any of these allegations in its standing determination. On that basis alone, the dismissal should be reversed.

Further, in *Montesa*, this Court also made clear that religious mandate and religious expression cases were non-exhaustive examples, and they were not the only circumstances under which a plaintiff may satisfy direct exposure standing. 836 F.3d at 197 (noting that "a plaintiff will have direct exposure standing in *at least*" the two identified sets of circumstances (emphasis added)). Yet, despite this directive, the District Court erroneously treated these two categories as the *exclusive* circumstances under which a plaintiff could show direct exposure standing. In doing so, the District Court ignored that a plaintiff's direct exposure to the favorable treatment of religion as a whole or a single religious group, too, may satisfy the injury requirement. That is because the Establishment Clause precludes "government from conveying or attempting to convey a message that religion or a particular religion's belief is favored or preferred." *County of Allegheny v. ACLU*, 492 U.S. 573, 593 (1989); *see also Littlefield v. Forney Indep. Sch. Dist.*, 268 F.3d 275, 282, 294 n.31 (5th Cir. 2001) (finding that plaintiffs had standing to challenge opt-out procedures to a school district's mandatory uniform policy that favored certain established religions at the expense of others in the district).

The District Court's narrow view of the direct exposure theory of harm—that plaintiffs may only demonstrate direct exposure standing if they are economically harmed by a religious law or if they come into contact with religious expression in a public place—is flawed.[7] Federal appellate courts around the country have recognized that the stigmatic harm that flows from the enactment of a law, or adoption of an official policy, that deems a non-adherent or irreligious individual plaintiff "as an outsider in his or her own community" is injury sufficient to confer standing. *See, e.g.*, *Moss v. Spartanburg Cnty. Sch. Dist. Seven*, 683 F.3d 599 (4th Cir. 2012) (finding that a Jewish father who received a letter describing a public

[7] The Ninth Circuit also succinctly summarized standing in direct exposure precedent:

> Standing was adequate for jurisdiction in Establishment Clause cases in the Supreme Court in the following contexts: prayer at a football game, a crèche in a county courthouse or public park, the Ten Commandments displayed on the grounds of a state capitol or at a courthouse, a cross display at a national park, school prayer, a moment of silence at school, Bible reading at public school, and a religious invocation at a graduation. No one was made to pray, or to pray in someone else's church, or to support someone else's church, or limited in how they prayed on their own, or made to worship, or prohibited from worshiping, in any of these cases. The Court treated standing (and therefore the concreteness element of standing) as sufficient in all of these cases, even though nothing was affected but the religious or irreligious sentiments of the plaintiffs.

Catholic League for Religious & Civ. Rts. v. County of San Francisco, 624 F.3d 1043, 1049-50 (9th Cir. 2009) (collecting cases). The Ninth Circuit's explanation underscores the broad nature of direct exposure standing in Establishment Clause cases.

school policy of awarding academic credit for private, Christian religious instruction had standing); *Catholic League for Religious & Civ. Rts. v. County of San Francisco*, 624 F.3d 1043 (9th Cir. 2009) (finding that Catholic plaintiffs had standing where City adopted a resolution urging a Cardinal to withdraw his instruction to not place children for adoption in homosexual households). In other words, "[w]hen the power, prestige and financial support of government is placed behind a particular religious belief, the indirect coercive pressure" placed upon religious or nonreligious minorities "to conform to the prevailing officially approved religion is plain." *Schempp*, 374 U.S. at 221.

The Individual Appellants alleged facts sufficient to show a spiritual, psychological injury due to Appellant's Establishment Clause violation, including: Appellee's statement that the New Zoning Law's purpose was to allow for "smaller-scale places of worship customary to Orthodox Congregations which are precluded from driving on Holy Days;" the VPB's questioning why only the OJC was considered in drafting the New Zoning Law; the VPB's own statement that the Law was "designed to favor one religious institution over another; Appellee's confirmation that its private meetings and cooperation took place with the OJC to the exclusion of all other groups; Appellee's statement that it had asked the OJC to attend secret drafting meetings because of ***their health, safety, and welfare***, because they walk to their place of worship; and Appellee's Resolution adopting the New

Zoning Law, which confirmed that the Law was submitted on behalf of the OJC to address the OJC's needs. (A28-30, A32-35, A38, ¶¶57, 60, 64, 66-67, 74, 80-81, 91, 104.) More egregiously, like the San Francisco Board in *Catholic League*, here, Appellee targeted Appellant Goodman by name in its Resolution adopting the New Zoning Law. (A38 ¶106.) Because Ms. Goodman spoke out against the adoption of the Law, the Village directed its ire and contempt toward her, accusing Ms. Goodman of "outright animus." (*Id.*)

Whenever government "allies itself with one particular form of religion, the inevitable result is that it incurs the hatred, disrespect, and even contempt of those who held contrary beliefs." *Schempp*, 374 U.S. at 221-22. The Village's admitted exclusion of other groups and individuals, both religious and non-religious, from the drafting of the New Zoning Law, sent a message to the non-adherent Individual Appellants that "they are *outsiders*, not full members of the political community." *Moss*, 683 F.3d at 607. All of these facts, and more, were overlooked entirely by the District Court's Opinion. This Court should respectfully reverse.

D. THE INDIVIDUAL APPELLANTS ALLEGED DENIAL OF BENEFIT STANDING

This Court addresses "denial of benefit" or "incurring of cost" standing alongside its taxpayer standing analysis with respect to the merits of an Establishment Clause claim. "The clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another . . . . It

is equally well established, however, that not every [practice] that confers an 'indirect,' 'remote,' or 'incidental' benefit upon religious institutions is, for that reason alone, constitutionally invalid." *Montesa*, 836 F.3d at 202 (alteration in original) (citations omitted). Here, the benefits of the New Zoning Law implemented by the Village are confined to religious organizations and specifically promote the practice of those religious beliefs, thereby conferring standing on the Individual Appellants.

In *Texas Monthly, Inc. v. Bullock*, 489 U.S. 1 (1989), the Supreme Court noted that "when the government directs a subsidy exclusively to religious organizations" that "burdens non-beneficiaries markedly . . ., it 'provide[s] unjustifiable awards of assistance to religious organizations' and cannot but 'conve[y] a message of endorsement' to slighted members of the community." 489 U.S. at 14-15 (alterations in original) (quoting *Bishop of Church of Jesus Christ of Latter-day Saints v. Amos*, 483 U.S. 327, 348 (1987) (O'Connor, J., concurring in judgment)). In such a case, "[i]t is difficult to view . . . [that] exemption as anything but state sponsorship of religious belief." *Id.*

Here, the Village is allowing religious groups to waive the administrative costs of seeking a special permit, while non-religious groups incur the cost of abiding by a special permit procedure. (A27-28, ¶¶55-57, 60.) Pursuant to the New Zoning Law, a special permit will be automatically approved for any applications that seek

to establish a house of worship; however, secular proposals will remain subject to the special permit approval process. (A28 ¶60.) These benefits are not merely flowing to religious individuals as part of a broader, neutral zoning scheme; they are available to certain property owners *because* the property owner intends to engage in religious worship (and religious worship of a particular type) on the property.

In line with the Supreme Court's analysis of denial of benefits or incurring of cost for Establishment Clause standing cases, Individual Appellants here have alleged that by virtue of this non-neutral law, religious organizations—specifically the OJC—are provided preferential treatment in order to establish places of worship, while secular property owners incur costs, and thus have standing. (A27-28, ¶55-57, 60.) Moreover, because the OJC is now presumptively allowed to build houses of worship within communities where they previously would have needed to get variances (and no such presumption exists for constructing buildings for comparable secular uses), the "subsidy is targeting [a symbol] that promulgates the teachings [and practice] of religious faith," in direct contravention to the Establishment Clause. (A27-28, ¶¶55-57, 60.) These circumstances give rise to denial of benefit standing.

Instead of addressing Appellants allegations and reading them liberally as required at a motion to dismiss, the District Court summarily held that Appellants lacked "denial of benefit" standing, stating that Appellants "have failed to allege in the Complaint that they have been denied any benefits." (SPA17.) Without

addressing any binding precedent, the District Court merely stated that there is "no standing where plaintiffs 'fail[ed] to identify what benefit they have been excluded from,'" citing a district court case from Florida addressing general standing under *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992). (SPA12 (citing *Gagliardi v. City of Boca Raton*, 197 F. Supp. 3d 1359, 1365 (S.D. Fla. 2016)).) The Supreme Court and this Court have made clear that as the "theories [of Establishment Clause standing] evolved out of the unique context . . . [of] Establishment Clause claims and have come into existence because Establishment Clause injuries, by their nature, can be 'particularly elusive.'" *Montesa*, 836 F.3d at 195-96 (quoting *Saladin v. Milledgeville*, 812 F.2d 687, 691 (11th Cir. 1987)); *see also Valley Forge Christian Coll. v. Ams. United for Separation of Church & State*, 454 U.S. 464, 486 & n.22 (1982); *Schempp*, 374 U.S. at 224 n.9. Therefore, *Gagliardi v. City of Boca Raton*, 197 F. Supp. 3d 1359 (S.D. Fla. 2016), is not only inapposite in this case, but it also fails to address the substance of Appellants' claims.

The New Zoning Law is a benefit directly promoting the practice of the OJC's religious beliefs as it establishes houses of worship—"large structures to be built in single family zones"—with associated parking, signage, and congregation of religious observants. (A29-30, ¶64.) Furthermore, "*places of worship*"—structures intended to promulgate the religious faith—are afforded preferential treatment, which by their very nature assists religious organizations, and thus falls directly

within the "message of endorsement" warned of in *Bullock*. 489 U.S. at 15 (quoting *Amos*, 483 U.S. at 348 (O'Connor, J., concurring in judgment)). Meanwhile, Individual Appellants can access these same benefits only by capitulating to the religious preferences of the Village and engaging in religious worship on their properties. Indeed, the New Zoning Law exempting the OJC from the permitting process "provide[s] unjustifiable awards of assistance to religious organizations," which is "difficult to view . . . as anything but state sponsorship of religious beliefs." *Id*. (quoting *Amos*, 483 U.S. at 348 (O'Connor, J., concurring in judgment)). Therefore, Individual Appellants have established denial of benefit standing.

E. CUPON HAS ASSOCIATIONAL STANDING TO ASSERT AN ESTABLISHMENT CLAUSE CLAIM ON BEHALF OF ITS INDIVIDUAL MEMBERS

CUPON has established associational standing to sue on behalf of its members. An organization has associational (or representational) standing when it satisfies the three prongs of the *Hunt* test:

> (a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit.

Faculty, Alumni, & Students Opposed to Racial Preferences v. N.Y. Univ., 11 F.4th 68, 75 (2d Cir. 2021) (quoting *Hunt v. Wash. State Apple Advert. Comm'n*, 432 U.S. 333, 343 (1977)). The District Court incorrectly held that CUPON failed to meet the first requirement because its members did not establish standing to sue in their

own right. As discussed herein, however, the Individual Appellants *do* have standing to sue in their own right. CUPON also easily satisfies the second and third prongs of *Hunt*, which the District Court did not consider.

A court's inquiry as to germaneness at the pleadings stage is a "limited one." *Bldg. & Constr. Trades Council of Buffalo, N.Y. & Vicinity v. Downtown Dev., Inc.*, 448 F.3d 138, 149 (2d Cir. 2006). The germaneness requirement is satisfied if "an association's lawsuit, if successful, [would] reasonably tend to further the general interests that individual members sought to vindicate in joining the association and . . . the lawsuit bears a reasonable connection to the association's knowledge and experience." *Id.* (citing *Humane Soc'y of the U.S. v. Hodel*, 840 F.2d 45, 56 (D.C. Cir. 1988)). The organization's allegations regarding its mission and purpose are sufficient. *See, e.g.*, *id.* (holding that the germaneness requirement was satisfied based on the plaintiff's allegations in the complaint); *N.Y. State Nat'l Org. for Women v. Terry*, 886 F.2d 1339, 1349 (2d Cir. 1989) (same).

Although the District Court did not reach this issue, CUPON easily satisfies the germaneness requirement. As CUPON alleged in its Complaint, it is a "civic membership organization that advocates for, among other things, sensible and fair land use reform for all citizens of Chestnut Ridge." (A18 ¶5.) CUPON has advocated—both before and after the New Zoning Law was adopted—that the Village adopt a comprehensive zoning plan, rather than pursue a piecemeal approach

to zoning that intentionally favors one religious group over another. (*See* A18, 21, ¶¶5, 26.) Given that the Village's zoning laws fall squarely within CUPON's area of advocacy, this lawsuit "further[s] the general interests that individual members sought to vindicate in joining" CUPON. *Downtown Dev., Inc.*, 448 F.3d at 149. CUPON further alleged that it hired a professional planner to advocate for a comprehensive zoning plan in the Village. (*See* A21 ¶26.) This underscores CUPON's "knowledge and expertise" in the area of zoning. *Downtown Dev., Inc.*, 448 F.3d at 149. A lawsuit challenging the Village's inadequate (and unconstitutional) zoning laws is therefore germane to CUPON's purpose.

CUPON also satisfies the final *Hunt* requirement that individual members' participation in the lawsuit is not necessary. *N.Y. Univ*, 11 F.4th at 75 (quoting *Hunt*, 432 U.S. at 343). This prong of *Hunt* is satisfied "where the organization seeks a purely legal ruling without requesting that the federal court award individualized relief to its members," *Bano v. Union Carbide Corp.*, 361 F.3d 696, 714 (2d Cir. 2004), *i.e.*, when the plaintiff organization seeks only injunctive or declaratory relief and individualized proof is not required to prove the organization's claims. *All. for Open Soc'y Int'l, Inc. v. U.S. Agency for Int'l Dev.*, 651 F.3d 218, 229 (2d Cir. 2011); *N.Y. State Psychiatric Ass'n v. UnitedHealth Grp.*, 798 F.3d 125, 130 (2d Cir. 2015); *see also Nat'l Ass'n of Pharm. Mfrs., Inc. v. Ayerst Lab'ys*, 850 F.2d 904, 914 (2d Cir. 1988). The Supreme Court has implicitly acknowledged that Establishment

Clause challenges generally satisfy the third *Hunt* requirement, at least when plaintiffs seek a purely legal ruling, as in this case. *See Harris v. McRae*, 448 U.S. 297, 319-21 (1980) (reaching the merits of an Establishment Clause claim while simultaneously rejecting a Free Exercise Clause claim for lack of associational standing because Free Exercise Clause challenges "ordinarily require[] individual participation").

This lawsuit does not require the participation of CUPON's individual members. CUPON's sole claim rests on the Establishment Clause, which requires no individualized proof. *See McRae*, 448 U.S. at 319-21. Additionally, CUPON seeks only general injunctive and declaratory relief, not damages or some other individualized remedy. (*See* A21 ¶26.) CUPON therefore satisfies the third prong of *Hunt* and has associational standing.[8]

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[8] While not necessary for the Court to decide, CUPON also has *organizational* standing to bring this suit. To establish organizational standing, the organization must show "(i) an imminent 'injury in fact' to itself as an organization (rather than to its members) that is 'distinct and palpable';" (ii) traceability, and; (iii) redressability. *Centro De La Comunidad Hispana De Locust Valley v. Town of Oyster Bay*, 868 F.3d 104, 109 (2d Cir. 2017) (citing *Nnebe v. Daus*, 644 F.3d 147, 156 (2d Cir. 2011)). In other words, the organization is treated as any other person when assessing organizational standing.

The sole relevant question here is whether CUPON (as an organization) has suffered an injury in fact, and the Complaint makes clear that this requirement is satisfied. Appellants alleged that the Village's Establishment Clause violations made it more difficult for CUPON to engage in its advocacy for a comprehensive zoning plan. (*See* A16-18, 21, 27, 32, ¶¶1-5, 26, 52, 73.) The Village and the OJC discussed, negotiated, and drafted the New Zoning Law "in secret and intentionally

CONCLUSION

For all the foregoing reasons, Appellants respectfully request that this Court reverse the District Court's dismissal and remand for further proceedings.

Dated: December 13, 2022

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excluded other churches, mosques, planners, and village residents." (A27 ¶52.) CUPON had to devote its time and resources (including hiring a professional planner) to oppose the New Zoning Law. (*See* A16-18, 27, ¶¶1-5, 52.) The Village's actions made it *impossible* for CUPON to carry out its core activities.

Under Second Circuit precedent, "an organization can satisfy the injury prong if it shows that the challenged action did not merely harm its 'abstract social interests' but 'perceptibly impaired' its activities." *Conn. Parents Union v. Russell-Tucker*, 8 F.4th 167, 173 (2d Cir. 2021) (quoting *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 379 (1982)). If "an organization is not directly regulated by a challenged law or regulation," only an "involuntary material burden on its established core activities" is a perceptible impairment. *Id.* An organization suffers an injury in fact when a government action makes the organization's advocacy more difficult or costly. *Centro*, 868 F.3d at 110-11 (holding that an injury-in-fact exists where "a 'policy has impeded, and will continue to impede, the organization's ability to carry out [its] responsibilit[ies]" and where it "divert[ed] money from its other current activities to advance its established organizational interests" by challenging an ordinance that would make those activities more costly) (cleaned up) (quoting *N.Y. C.L. Union v. N.Y. City Transit Auth.*, 684 F.3d 286, 295 (2d Cir. 2011))). CUPON satisfies these requirements based on both its initial exclusion from the secret negotiations and its ongoing diversion of resources from advocating for a comprehensive zoning plan.

Hilda Kogut; Robert Asselbergs; and Carole Goodman.

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1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) and LR 32.1 in that it contains 10,275 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

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Special Appendix

SPECIAL APPENDIX
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SPA-1

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

CITIZENS UNITED TO PROTECT OUR NEIGHBORHOODS; HILDA KOGUT; ROBERT ASSELBERGS; and CAROLE GOODMAN,

Plaintiffs,

-against-

VILLAGE OF CHESTNUT RIDGE, NEW YORK,

Defendant.

No. 7:19 CIV 3461 (NSR)

OPINION & ORDER

NELSON S. ROMÁN, United States District Judge:

Plaintiffs Citizens United to Protect Our Neighborhoods, Hilda Kogut, Robert Asselbergs, and Carole Goodman (collectively, "Plaintiffs") allege Defendant the Village of Chestnut Ridge, New York ("Defendant" or "the Village") violated the Establishment Clause of the First Amendment in its enactment of a new zoning law relating to houses of worship, Local Law #1 of 2019, by favoring only one religious group, the Orthodox Jewish Coalition. Before the Court are Defendant's motion to dismiss the Complaint pursuant to Federal Rule of Civil Procedure 12(b)(1) and (b)(6) and Proposed Defendants-Intervenors Congregation Birchas Yitzchok, Congregation Dexter Park, Congregation Torah U'tfilla, the Orthodox Jewish Coalition of Chestnut Ridge, and Agudath Israel of America Inc. (collectively, "Proposed Intervenors")'s motion to intervene in the action.

For the following reasons, Defendant's motion to dismiss is GRANTED and Proposed Intervenors' motion to intervene is DENIED as moot.

FACTUAL BACKGROUND

The following facts are derived from the Complaint and the documents referenced therein

and are assumed as true for purposes of this motion. *See Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

Plaintiff Citizens United to Protect Our Neighborhoods ("CUPON")—a civic membership organization that advocates for fair land use reform for citizens of the Chestnut Ridge—along with Plaintiffs Hilda Kogut, Robert Asselbergs, and Carole Goodman—residents of the Village of Chestnut Ridge—bring this action against Defendant, the Village of Chestnut Ridge, New York. ("Compl.," ECF No. 1 ¶¶ 5–10.) Plaintiffs seek declaratory and injunctive relief for Defendant's alleged unconstitutional actions in enacting zoning laws that favor only the Orthodox Jewish Coalition ("OJC"), a religious organization, in violation of the Establishment Clause of the First Amendment of the Constitution. (*Id.* ¶ 1.)

I. The Village of Chestnut Ridge

The Village of Chestnut Ridge is a municipal corporation located within the Town of Ramapo in Rockland County, New York. (*Id.* ¶¶ 10, 17.) The Village is "largely a high-quality, low-density, single-family neighborhood of quiet wooded and suburban character." (*Id.* ¶ 23.) Since the Village's incorporation in 1986, it has been zoned primarily for single-family residences. (*Id.*) The Village has a mayor, Rosario Presti, and a Board of Trustees. (*Id.* ¶ 18.) Plaintiffs allege Mayor Presti and the Board of Trustees were responsible for enacting and enforcing local laws, ordinances, and policies, managing the affairs of the village, protecting the public health, safety, and welfare of residents, providing public services, and carrying out duties consistent with the New York and United States Constitutions. (*Id.* ¶ 19.)

Contrary to the encouragement of New York State Village Law Section 7-722 to adopt a comprehensive plan for the Village, and against a recommendation from CUPON's professional planner to do the same, the Village did not develop a comprehensive plan. (*Id.* ¶¶ 25–26.)

Accordingly, the Village did not have a comprehensive plan in place to follow or consider in enacting the new zoning law at issue. (*See id.* ¶¶ 24–27.)

II. Background Of The Village's Zoning Laws

Plaintiffs challenge Defendant's adoption of Local Law #1 of 2019 (the "New Zoning Law"). (*See id.* ¶ 103.) Prior to the new zoning amendments, the Village had laws that treated all places of worship in one category (the "Old Zoning Laws"). Under the old laws, all places of worship must have a special permit for religious use and site planning approval from the Village Planning Board and, absent a variance, houses of worship must be built and maintained on lots that were at least five acres. (*Id.* ¶¶ 28–29.) Anyone seeking to use a single-family home or other structures for organized religious purposes must apply for and receive permission through a variance process. (*Id.* ¶ 28.)

Under the Old Zoning Laws, the Village had multiple houses of worships of varying faiths and all formal houses of worships received the necessary permissions and variances. (*See id.* ¶ 29.) For instance, Plaintiffs allege that at least one congregation had received permission to establish a house of worship without the need to change the laws. In October 2015, the Village approved special permits and variances for the Congregation Ohr Mordechai for it to raze an entire building and build a new neighborhood place of worship "without any overhaul of the Village's then-existing Zoning Laws." (*Id.* ¶¶ 31–35.) Plaintiffs also allege that except for one lawsuit—which they claim was collusive—there were no other claims or challenges filed to the Zoning Board of Appeals regarding houses of worship. (*See id.* ¶¶ 36–41.)

III. Drafting And Proposal Of The New Zoning Law

Plaintiffs allege starting in 2017, the mayor and village planners exchanged emails, texts, phone calls, and held meetings with the Orthodox Jewish Coalition ("OJC"). (*Id.* ¶ 43.) In August

2017, OJC allegedly provided a draft of the proposed law to the Village. (*Id.* ¶ 44.) In August and September 2017, Nelson Pope & Voorhis ("NPV"), a firm hired by the Village for planning purposes, billed the Village for work related to review of the proposed zoning law from OJC. (*Id.* ¶¶ 44–48.) On March 1, 2018, a Planning Board Workshop Meeting was held among NPV, Assistant Village Attorney Paul Baum, Village Planning Board Member Anthony Luciano, and members of OJC. (*Id.* ¶ 49.) Plaintiffs allege that the drafting, negotiating, and drafting of sections of the New Zoning Law was "done in secret" between the Village and OJC and with intention to "exclude[] other churches, mosques, patterns, and village residents." (*See id.* ¶¶ 52–53.)

A. February 22, 2018 Village Board Meeting

On February 22, 2018, the proposed zoning law was first publicly disclosed at a Village Board meeting, after providing less than two days' notice to Village residents. (*Id.* ¶¶ 54, 58.) The proposed zoning law was referred to as the "House of Worship amendments" which created new categories of religious uses and houses of worship under the definition of permitted uses as then contained in the Village's zoning laws. (*Id.* ¶ 55.) The proposed zoning law established three categories of Houses of Worship: (1) "residential places of worship," which was later changed to be called "residential gathering place"; (2) "neighborhood places of worship"; and (3) "community places of worship." (*Id.* ¶ 56.)

The "residential gathering place" category permitted the use of a single-family dwelling for religious uses. (*Id.*) Mayor Presti confirmed that a special permit would automatically be approved for an application that complies with Village law. (*Id.* ¶ 60.) Plaintiffs allege the proposed law allowed OJC to acquire single-family dwellings and open them to religious activities subject to additional parking requirements, serving as a blanket variance in development coverage and doubling the percentage of the property units that can be developed for religious uses. (*See*

id. at 56.) Plaintiffs allege the initial draft of the proposed zoning law was intended "to remove impediments to the free practice of religion, such as allowing for smaller-scale places of worship customary to Orthodox Congregations which are precluded from driving on Holy Days." (*Id.* ¶ 57.) Plaintiffs allege "[a]ny secular proposal of similar size and impact would not receive the special treatment accorded to OJC by the Village." (*Id.* ¶ 60.) Plaintiffs further allege no other religious organizations or members of the community were involved in the drafting of the proposed law and "no efforts [were] made to include other views of Village residents." (*Id.* ¶ 61.)

B. May 29, 2018 Village Planning Board Recommendation

On May 29, 2018, the Village Planning Board issued a memorandum presenting its review of the proposed zoning law. (*Id.* ¶ 64.) The memorandum stated that "[a] proliferation of houses of worship at the scale permitted by the Local Law will negatively impact homeowners by allowing for large structures to be built in single family zones." (*Id.*) The Village Planning Board recommended the Village to adopt a comprehensive plan prior to considering the proposed zoning law. (*Id.* ¶ 65.) Plaintiffs also allege the Village Planning Board was concerned with the residential places of worship category, questioned why only OJC was considered in the drafting of the proposed law, and stated that the law was "designed to favor one religious institution over another." (*Id.* ¶¶ 66–67.) The Village Planning Board recommended elimination of the category "neighborhood places of worship" because it was "too intense of a use to be permitted on standard size residential lots." (*Id.* ¶ 68.) Plaintiffs allege that the Village Planning Board's various recommendations were ignored by the Village and no revisions were made in accordance with its comments. (*Id.* ¶ 69.)

C. Public Meetings On Proposed Zoning Law

After the initial disclosure, the Village Board held several meetings regarding the proposed

zoning law. (*Id.* ¶ 63.) The first public hearing was on June 28, 2018. (*Id.* ¶ 70.) At the meeting, Jonathan Lockland, a Village planner, explained the first draft of the proposed law and the three proposed categories of houses of worship. (*Id.* ¶ 71.) Also at the meeting was Alan Sorenson, a professional planner, who opined that the proposed law had potential to fundamentally change the nature of the community because it would allow places of worship in over 90 percent of the Village. (*Id.* ¶ 73.) The Planning Board confirmed that there was no limit as to how many residential places and neighborhood places of worship there could be on one block. (*Id.* ¶ 74.) There were also individuals who spoke at the public hearing in defense of the proposed law. An attorney for OJC stated that OJC was prepared to assist the Village in the defense of the law if the Village is sued after adopting the proposed law. (*Id.* ¶ 72.) Mayor Presti also defended why OJC was involved in the drafting and planning process. (*Id.* ¶ 75.)

A second public hearing was held on July 24, 2018. (*Id.* ¶ 76.) A trustee of the Village confirmed at this meeting that the Village had not been enforcing its zoning laws and that people have been able to use their houses for worship without any zoning oversight. (*Id.* ¶ 78.) Mayor Presti described the process of getting applications through the Village Board as a substantial burden. (*Id.* ¶ 79.)

Plaintiffs allege that at a Village Board meeting on August 16, 2018, Mayor Presti was asked why only one organization was asked to draft and discuss the proposed zoning law. (*Id.* ¶ 80.) The Mayor responded that OJC was the group that asked the Village to consider amending zoning laws in advocacy for their community and religious uses. (*Id.*)

A final public hearing was held on January 15, 2019. (*Id.* ¶ 85.) At this meeting, Mayor Presti represented that the planner put this first draft proposal together back in November 2017. (*Id.* ¶ 86.)

IV. The New Zoning Law

The Village Board approved a resolution to adopt the New Zoning Law on February 21, 2019, adding religious house of worship amendments to the Village Zoning Laws. (*Id.* ¶ 103.) The resolution stated that "on or about November 1, 2017, the Village Board received a written petition requesting specific text amendments to the Chestnut Ridge Zoning Code from Brooker Engineering, PLLC, in letter form, submitted on behalf of the Orthodox Jewish Coalition of Chestnut Ridge . . . ." (*Id.* ¶ 104.) Plaintiffs allege this information was incorrect because invoices showed OJC and the Village had been discussing the zoning law since August 2017. (*Id.* ¶ 105.) Plaintiffs allege the New Zoning Law contained "substantially the same text as the initial draft provided by the OJC in November 2017 despite three public hearings, several comments from the Planning Board and from independent planners hired by Plaintiffs, as well as from the citizens of the Village recommending numerous changes to the OJC Zoning Law." (*Id.* ¶ 92.)

The New Zoning Law established three categories of religious uses: residential gathering place, neighborhood places of worship, and community places of worship. (*Id.* ¶ 93.) A "residential gathering place" is defined as a use of a dedicated portion of a one-family detached residence for large gatherings of between 15 to 49 people more than 12 times a year. (*Id.* ¶ 94.) The law permits owners of residential gathering place to use off-site parking facilities on private property. (*Id.* ¶ 95.) The New Zoning Law defines a "neighborhood place of worship" as use of a structure for regularly organized religious assembly with up to 10,000 square feet of total floor area and allows for this usage in a structure with or without a residential component. (*Id.* ¶ 96.) Finally, a "community place of worship" is defined as use of a structure designed for regular organized religious assembly with more than 10,000 square feet of total floor area. (*Id.* ¶ 97.)

The New Zoning Law was submitted to the New York Department of State on February

25, 2019. (*Id.* ¶ 107.) On March 21, 2019, an Article 78 proceeding was filed against the Village relating to the process of tis passage of the New Zoning Law in violation of the State Environmental Quality Review Act.

PROCEDURAL BACKGROUND

Plaintiffs CUPON, Hilda Kogut, Robert Asselbergs, and Carole Goodman commenced the instant action against Defendant the Village of Chestnut Ridge, New York, on April 18, 2019. (ECF No. 1.) On September 11, 2020, Defendant moved to dismiss Plaintiffs' Complaint pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6). (ECF Nos. 32–34.) Plaintiffs opposed the motion. (ECF No. 46.)

On September 11, 2020, a motion to intervene was filed by Proposed Intervenors Agudath Israel of America Inc., Congregation Birchas Yitzchok, Congregation Dexter Park, Congregation Torah U'tfilla, and Orthodox Jewish Coalition of Chestnut Ridge. (ECF Nos. 36–42.) Proposed Intervenors Congregation Birchas Yitzchok, Congregation Dexter Park, and Congregation Torah U'tfilla are religious corporations that own properties in the Village of Chestnut Ridge. (ECF No. 38 at 4.) Proposed Intervenor OJC is an unincorporated association of seven Orthodox Jewish congregations located in the Village of Chestnut Ridge. (*Id.*) And Proposed Intervenor Agudath Israel of America Inc. is a nonprofit organization that serves a broad array of Orthodox Jews and advocates for their interests. (*Id.*) Together, the Proposed Intervenors seek to appear in the instant action as Defendants because they allege if the New Zoning Law were to be invalidated, they would be constrained in their free exercise of religion. (*Id.* at 5.) The Proposed Intervenors also filed a document entitled "Memorandum of Proposed Intervenors In Support Of Partial Joinder In Motion To Dismiss Defendant Village of Chestnut Ridge, New York," (ECF No. 44.)[1] Plaintiffs

[1] Proposed Intervenors proposed "Partial Joinder" in Defendant's Motion to Dismiss was filed without leave from the Court. Proposed Intervenors were granted leave only to brief on a motion to intervene. (*See* ECF No. 23.)

opposed the motion to intervene and filed an opposition to Proposed Intervenors' "partial joinder" in Defendant's motion to dismiss. (ECF Nos. 47 & 49.)

LEGAL STANDARD

I. Federal Rule of Civil Procedure 12(b)(1)

"[F]ederal courts are courts of limited jurisdiction and lack the power to disregard such limits as have been imposed by the Constitution or Congress." *Durant, Nichols, Houston, Hodgson, & Cortese-Costa, P.C. v. Dupont*, 565 F.3d 56, 62 (2d Cir. 2009) (internal quotation omitted). "A case is properly dismissed for lack of subject matter jurisdiction under Rule 12(b)(1) when the district court lacks the statutory or constitutional power to adjudicate it." *Nike, Inc. v. Already, LLC*, 663 F.3d 89, 94 (2d Cir. 2011) (internal quotation omitted). The party invoking the Court's jurisdiction bears the burden of establishing jurisdiction exists. *Conyers v. Rossides*, 558 F.3d 137, 143 (2d Cir. 2009) (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992)) (internal quotation omitted).

When, as here, the case is at the pleading stage, in deciding a motion to dismiss under Rule 12(b)(1), the Court "must accept as true all material facts alleged in the complaint and draw all reasonable inferences in the plaintiff's favor." *Id.* But "argumentative inferences favorable to the party asserting jurisdiction should not be drawn." *Buday v. N.Y. Yankees P'ship*, 486 F. App'x 894, 895 (2d Cir. 2012) (summary order) (quoting *Atl. Mut. Ins. Co. v. Balfour Maclaine Int'l Ltd.*, 968 F.2d 196, 198 (2d Cir. 1992)).

II. Federal Rule of Civil Procedure 12(b)(6)

Under Federal Rule of Civil Procedure 12(b)(6), dismissal is proper unless the complaint "contain[s] sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Iqbal*, 556 U.S. at 678 (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)).

When there are well-pled factual allegations in the complaint, "a court should assume their veracity and then determine whether they plausibly give rise to an entitlement to relief." *Id.* at 679. While the Court must take all material factual allegations as true and draw reasonable inferences in the non-moving party's favor, the Court is "not bound to accept as true a legal conclusion couched as a factual allegation," or to credit "mere conclusory statements" or "[t]hreadbare recitals of the elements of a cause of action." *Id.* at 662, 678 (quoting *Twombly*, 550 U.S. at 555). The critical inquiry is whether the plaintiff has pled sufficient facts to nudge the claims "across the line from conceivable to plausible." *Twombly*, 550 U.S. at 570.

III. Federal Rule of Civil Procedure 24

"Rule 24 of the Federal Rules of Civil Procedure contemplates two distinct species of intervention: intervention of right under Rule 24(a), and permissive intervention under Rule 24(b)." *Giuffre v. Dershowitz*, No. 19 CIV. 3377 (LAP), 2021 WL 5233551, at *3 (S.D.N.Y. Nov. 10, 2021) (citations omitted). To intervene as of right under Rule 24(a), a proposed intervenor must meet each of the following four conditions: (1) the motion is timely; (2) the applicant asserts an interest relating to the property or transaction that is the subject of the action; (3) the applicant is so situated that without intervention, disposition of the action may, as a practical matter, impair or impede the applicant's ability to protect its interest; and (4) the applicant's interest is not adequately represented by other parties. *MasterCard Int'l Inc. v. Visa Int'l Serv. Ass'n, Inc.*, 471 F.3d 377, 389 (2d Cir. 2006). Alternatively, a court may permit intervention if the motion is timely and the proposed intervenor "has a claim or defense that shares with the main action a common question of law or fact." Fed. R. Civ. P. 24(b)(1)(B). Courts evaluating as-of-right or permissive motions consider the same factors. *See 335-7 LLC v. City of New York*, 524 F. Supp. 3d 316, 326 (S.D.N.Y. 2021). However, the principal consideration for permissive intervention is whether

intervention will cause undue delay or prejudice to the original parties. *Id.*

DISCUSSION

Plaintiffs claim Defendant violated the Establishment Clause of the First Amendment. (*See* Compl.) Defendant seeks to dismiss the Complaint on the basis that (1) Plaintiffs lack standing; (2) Plaintiffs have failed to sufficiently allege an Establishment Clause claim; and (3) two pending state court actions require abstention. (*See* "Def. Mot.," ECF No. 34.) As discussed below, the Court finds that Plaintiffs lack standing and, accordingly, the Court does not need to reach other issues raise.

I. Standing

The Court first must address Defendant's challenge to subject matter jurisdiction. "Standing is a federal jurisdictional question 'determining the power of the court to entertain the suit.'" *Carver v. City of New York*, 621 F.3d 221, 225 (2d Cir. 2010) (quoting *Warth v. Seldin*, 422 U.S. 490, 498 (1975)). "'[A] plaintiff must demonstrate standing for each claim and form of relief sought.'" *Id.* (quoting *Baur v. Veneman*, 352 F.3d 625, 642 n.15 (2d Cir. 2003)). There are three Article III standing requirements: (1) the plaintiff must have "suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision." *John v. Whole Foods Market Grp., Inc.*, 858 F.3d 732, 736 (2d Cir. 2017) (quoting *Spokeo, Inc. v. Robins*, 578 U.S. 330, 338 (2016)).

"Litigants asserting an Establishment Clause claim against a State or municipal defendant must, like all civil litigants, demonstrate standing." *Montesa v. Schwartz*, 836 F.3d 176, 195 (2d Cir. 2016). The Second Circuit has recognized that "because Establishment Clause injuries, by their nature, can be 'particularly elusive,'" there are three specific theories of standing entitling a

litigant to bring an Establishment Clause claim: (1) taxpayer, (2) direct harm, and (3) denial of benefits. *Id.* at 195–96 (quoting *Saladin v. City Milledgeville*, 812 F.2d 687, 691 (11th Cir. 1987)).

A. Injury In Fact

Defendant argues Plaintiffs lack standing because no injury in fact has been alleged. (Def. Mot. at 8–14.) An injury in fact "'consists of an invasion of a legally protected interest that is concrete and particularized and actual or imminent, not conjectural or hypothetical.'" *John*, 858 F.3d at 736 (quoting *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547–48 (2016)). "Each element of standing 'must be supported . . . with the manner and degree of evidence required at the successive stages of the litigation,' and at the pleading stage, 'general factual allegation of injury resulting from the defendant's conduct may suffice.'" *Id.* (quoting *Lujan*, 504 U.S. at 561).

After careful consideration of the Complaint, the Court finds that Plaintiffs have not pled a concrete and particularized constitutional injury. Plaintiffs claim their First Amendment rights have been violated because Defendant enacted the New Zoning Law that allegedly only benefit a single religious organization. (Compl. ¶ 1.) Plaintiffs claim the new zoning amendments "target religious uses with special favorable treatment over secular uses." (*Id.*) However, Plaintiffs have not identified any injury, nonetheless a particularized and concrete one. The law is clear that generalized grievance is insufficient to establish standing. *See Lujan*, 504 U.S. at 575 ("a suit rested upon an impermissible 'generalized grievance,' and was inconsistent with 'the framework of Article III' because 'the impact on [plaintiff] is plainly undifferentiated and 'common to all members of the public.'" (quoting *United States v. Richardson*, 418 U.S. 166, 171 (1974)). Plaintiffs have not alleged that they sought and were denied any benefits. *See Gagliardi v. City of Boca Raton*, 197 F. Supp. 3d 1359, 1365 (S.D. Fla. 2016) (finding no standing where plaintiffs "fail[ed] to identify what benefit they have been excluded from"). Plaintiffs merely allege that

Defendant's actions "serve the purposes of OJC [and] have the effect of favoring the OJC" without identifying a single instance of how they were disfavored under this new law. (Compl. ¶ 1.) Plaintiffs argue they satisfy the requirements for Article III standing because they "were excluded from the process, disenfranchised by their municipal government, and face constant reminders that the fundamental nature of their neighborhoods has changed in order to promote the endorse religion." ("Pls. Opp.," ECF No. 46, at 6–7.) But Plaintiffs do not allege how they were excluded from the process. To the contrary, Plaintiffs allege Defendant held multiple public meetings to discuss the proposed zoning law and that attendees were able to raise concerns and challenge the mayor on the drafting of the proposal. (*See* Compl. ¶¶ 70–79, 85–86.) Without identifying a single instance in which Plaintiffs were denied benefits, their allegations of injuries are merely "conjectural or hypothetical" and are insufficient to establish injury in fact. *Lujan*, 504 U.S. at 560.

B. Standing in Establishment Clause Cases

But, unlike most litigated injuries, the harm from violation of the Establishment Clause "is often inherently generalized." *Montesa*, 836 F.3d at 196 (citing *Valley Forge Christian Coll. v. Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 475 (1982)). As a result, three theories of standing in Establishment Cases were "developed in response to the concerns that gave rise to [the courts'] prudential standing jurisprudence, and they have evolved to allow only particular types of Establishment Clause injuries to be adjudicated." *Id.* Plaintiffs argue that Plaintiffs Hilda Kogut, Robert Asselbergs, and Carole Goodman (collectively "Individual Plaintiffs") satisfy individual standing in Establishment Clause cases because they have taxpayer standing, direct exposure standing, and denial of benefit standing. (Pls. Opp. at 7–10.)

1. Taxpayer Standing

First, Individual Plaintiffs claim they have taxpayer standing. Ordinarily taxpayers do not have standing to challenge expenditures of government funds. *See Com. Of Massachusetts v. Mellon*, 262 U.S. 447 (1923). In *Flast v. Cohen*, 392 U.S. 83 (1968), the Supreme Court recognized an exception to that rule and permitted a taxpayer to bring an Establishment Clause action when there is "'a logical link between [his status as a taxpayer] and the type of legislative enactment attacked' as well as 'a nexus between that status and the precise nature of the constitutional infringement alleged.'" *DeStefano v. Emergency Housing Grp., Inc.*, 247 F.3d 497, 405 (quoting *Flast*, 392 U.S. at 102); *see also Bowen v. Kendrick*, 487 U.S. 589, 620 (1988).

Individual Plaintiffs are residents and municipal taxpayers of the Village. (Compl. ¶¶ 8–11.) Individual Plaintiffs argue that they have taxpayer standing because the Village incurred expenses in hiring a planning firm to review the proposed zoning law drafted by OJC. (Pls. Opp. at 8–9.) The Second Circuit has stated that "a municipal taxpayer's relationship to the municipality is 'direct and immediate' such that the taxpayer suffers concrete injury whenever the challenged activity involves a measurable appropriation or loss of revenue." *United States v. City of New York*, 972 F.2d 464, 466 (2d Cir. 1992). But "municipal taxpayer standing requires [the] ability to identify a 'measurable appropriation or loss of revenue' attributable to the challenged activities." *Altman v. Bedford Cent. Sch. Dist.*, 245 F.3d 49, 73 (2d Cir. 2001) (quoting *Board of Educ. v. New York State Teachers Retirement System*, 60 F.3d 106, 110–11 (2d Cir. 1995)). Here, Plaintiffs merely allege that the Village was billed by its planner, NPV, in its reviewed of the proposed zoning law. (*See* Compl. ¶¶ 44–50.) Although Plaintiffs reference specific billing entries and dates, Plaintiffs have not alleged any amount of measurable appropriation. *See Novesky v. Goord*, 120 F. App'x 384, 385–86 (2d Cir. 2005) (finding no "measurable appropriation" where plaintiff

challenges elements of rehabilitation programs funded by DOC's general budget and administered by government employees); *cf. Lown v. Salvation Army, Inc.*, 393 F. Supp. 2d 223, 238–39 (alleging ten percent of the face value of Social Services for Children's government contracts were diverted to defendant for religious purposes). These allegations do not constitute the type of "direct injury" to confer standing. *See Novesky*, 120 F. App'x at 386. It is the Plaintiffs' burden to establish the existence of federal jurisdiction. *See Lujan*, 504 U.S. at 560. Without identifying a measurable amount of the alleged appropriations, Plaintiffs have failed to meet such burden. *See Novesky*, 120 F. App'x at 385–86. Accordingly, the Court finds that Individual Plaintiffs do not have taxpayer standing to bring forth this action.

2. Direct Exposure Standing

Next, Individual Plaintiffs claim they have direct exposure standing. (Pls. Opp. at 9–10.) Standing in an Establishment Clause may also "rest on the plaintiff's direct exposure to the challenged activity." *Altman*, 245 F.3d at 72. To establish direct exposure standing, Plaintiffs must allege they are "directly affected by the laws and practices against which their complaints are directed." *Montesa*, 836 F.3d at 196 (citing *School of Dist. Of Abington Tp., Pa. v. Schempp*, 374 U.S. 203, 224 n.9 (1963)). The Second Circuit precedent "reveals that direct exposure cases tend to occur in two different contexts: 1) the plaintiff is exposed to and affected by a law that on its face establishes religion ('religion law' cases) or 2) the plaintiff is exposed to and affected by a religious expression or message sponsored or promoted by the government, ('expression' cases)." *Id.* In the "religious law" cases, the prohibition or mandate is grounded in or significantly influenced by a religious tenant or principle and directly and immediately injures a plaintiff's economic well-being. *Id.* at 197 (collecting cases). In the "expression" cases, the injury is not economical and "often occurs when a plaintiff comes into contact with, or is exposed to, a

government-promoted expression of religion." *Id.* The Second Circuit has stated that, because the injury in "expression" cases can be elusive, "the connection between the plaintiff and the challenged action—i.e. the 'exposure'—must be direct and immediate in order to satisfy the requirement that the plaintiff have a 'direct and personal stake in the controversy.'" *Id.* (citing *Sullivan v. Syracuse Housing Authority*, 962 F.2d 1101 (2d Cir. 1992)).

Individual Plaintiffs claim they have direct exposure standing because the New Zoning Law was rushed into law and gives preferential treatment to OJC and religious uses over secular uses, such that "the construction of an untold number of houses of worship" will serve as "constant reminders of the law and its endorsement of religion." (Pls. Opp. at 10.) This is an insufficient basis under either line of cases for finding direct exposure standing. First, Plaintiffs have not alleged any economic injuries from the New Zoning Law to establish standing under the "religion law" cases. *See Montesa*, 836 F.3d at 196. Second, Plaintiffs have not alleged they "c[ame] into contact with, or [were] exposed to, a government-promoted expression of religion." *See id.* at 197. Plaintiffs claim the Village improperly enacted a zoning amendment that permitted expanded religious use of certain places. However, nowhere in the Complaint is any allegation that they were directly exposed to any expression of religion. As Individual Plaintiffs concede, the number of houses of worship to be constructed under the New Zoning Law are "untold" and they only worry they "will be faced with constant reminders" of religious endorsements. (Pls. Opp. at 10.) These alleged hypothetical exposures as a result of the New Zoning Law do not amount to direct exposures to religious expressions. *See Montesa*, 836 F.3d at 189–99 (finding no standing where deprivations of educational services to student-plaintiffs were indirect effects that were "too far removed, too attenuated, from the alleged unconstitutional component of the act of funneling public monies"). The Court is not otherwise persuaded by the "expression" cases cited by

Plaintiffs. Indeed, all those cases are distinguishable because they involved physical placement of religious expressions in public areas. *See Jewish People for the Betterment of Westhampton Beach v. Village of Westhampton Beach*, 778 F.3d 390 (2d Cir. 2015) (construction of an eruv); *Cooper v. U.S. Postal Serv.*, 577 F.3d 479 (2d Cir. 2009) (displays of religious materials such as prayer request information, prayer cards, prayer request deposit boxes, and advertisements and donation boxes for missions). Accordingly, Individual Plaintiffs do not have direct exposure standing.

3. Denial of Benefits

Finally, Individual Plaintiffs claim they have denial of benefit standing. Litigants could have standing to bring an Establishment Clause claim if they allege a denial of benefits. *See Montesa*, 836 F.3d at 295. For example, the Supreme Court has stated that "plaintiffs may demonstrate standing on the ground that they have incurred a cost or been denied a benefit on account of their religion." *Arizona Christian Sch. Tuition Org. v. Winn*, 563 U.S. 125, 130 (2011). As explained *supra* in Section I.A., Plaintiffs have failed to allege in the Complaint that they have been denied any benefits. Accordingly, Individual Plaintiffs do not have denial of benefits standing to bring an Establishment Clause claim.

C. CUPON's Standing

Defendant argues that Plaintiff CUPON lacks associational or organization standing to file this action. (Mot. at 5.)

1. Associational Standing

CUPON claims it as associational standing. (Pls. Opp. at 7.) An organization has associational standing if it can show that (1) its members would have standing to sue in their own right; (2) the interests it seeks to protect relate to the organization's purpose; and (3) neither the asserted claim nor the requested relief require the participation of individual members of the

lawsuit. *Hunt v. Wash. State Apple Advert. Comm'n*, 432 U.S. 333, 343 (1977). CUPON is a "civic membership organization that advocates for, among other things, sensible and fair land use reform for all citizens of Chestnut Ridge." (Compl. ¶ 5.) CUPON claims it has satisfied all three prongs of associational standing. This Court disagrees. CUPON has not satisfied the first prong of associational standing—that CUPON's members would have standing to sue in their own right. Plaintiffs claim that the first prong is satisfied because all Individual Plaintiffs are members of CUPON. (Pls. Opp. at 13.) But, as analyzed above, Individual Plaintiffs have failed to establish individual standing to bring forth this action, *supra* Section I. Indeed, it is Plaintiffs' burden of proving by preponderance of evidence that subject matter jurisdiction exists. *See Morrison v. Nat'l Austl. Bank Ltd.*, 547 F.3d 167, 170 (2d Cir. 2008). CUPON has also not made other allegations to show that other members of its organization would have standing to bring forth this action. Accordingly, CUPON does not have associational standing.

2. Organizational Standing

CUPON claims it has organizational standing. (Pls. Opp. at 11–12.) To have organizational standing, an organization must establish that there is (1) an imminent injury "to itself as an organization (rather than to its members) that is 'distinct and palpable'"; (2) the injury is fairly traceable to the defendant's actions; and (3) the court can redress the injury. *Centro de la Comunidad Hispana de Locust Valley v. Town of Oyster Bay*, 868 F.3d 104, 109 (2d Cir. 2017). For organizational standing, an organization is "just another person—albeit a legal person—seeking to vindicate a right." *N.Y. Civil Liberties Union v. N.Y. City Transit Auth.*, 684 F.3d 286, 294 (2d Cir. 2012). The Court finds that the Complaint contains no allegations of any injuries to CUPON as an organization. The Complaint only contains allegations that "CUPON opposed the OJC Zoning Law . . . [and] advocated that the Village conduct a comprehensive plan process and

then amend its zoning laws in conformance with such a comprehensive plan . . . ." (Compl. ¶ 5.) CUPON does not allege it has suffered any injuries to its organization's activities or that it was forced to divert resources from current activities because of the enactment of the New Zoning Law. *See, e.g.*, *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 379 (1982) ("concrete and demonstrable injury to [an] organization's activities—with the consequent drain on the organization's resources—constitutes far more than simply a setback to the organization's abstract social interests"); *Centro de la Comunidad Hispana de Locust Valley*, 868 F.3d at 111 ("where an organization diverts its resources away from its current activities, it has suffered an injury that has been repeatedly held to be independently sufficient to confer organizational standing"). Accordingly, CUPON lacks organizational standing.

Having found that all Plaintiffs lack standing to bring the instant action, this Court finds that it lacks subject matter jurisdiction. Accordingly, this case must be DISMISSED, and the Court DENIES Proposed Intervenors' motion to intervene as moot.

CONCLUSION

For the foregoing reasons, the Court GRANTS Defendant's motion to dismiss (ECF No 32) and DENIES Proposed Intervenors' Motion to Intervene as moot (ECF No. 36). Plaintiffs' Complaint is DISMISSED without prejudice for lack of subject matter jurisdiction. The Second Circuit has made clear that "where a case is dismissed for lack of Article III standing, as here, that disposition cannot be entered with prejudice, and instead must be dismissed *without prejudice*." *Katz v. Donna Karan Co., L.L.C.*, 872 F.3d 114, 121 (2d Cir. 2017) (emphasis in original). Accordingly, the Clerk of Court is respectfully directed to (1) enter judgment in favor of Defendant Village of Chestnut Ridge, New York, without prejudice; and (2) terminate the motions at ECF Nos. 32 & 36.

Dated: September 30, 2022
White Plains, New York

SO ORDERED:

NELSON S. ROMÁN
United States District Judge

SPA-21

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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CITIZENS UNITED TO PROTECT OUR NEIGHBORHOODS; HILDA KOGUT; ROBERT ASSELBERGS; and CAROLE GOODMAN,

Plaintiffs,

-against-

19 **CIVIL** 3461 (NSR)

JUDGMENT

VILLAGE OF CHESTNUT RIDGE, NEW YORK,

Defendant.

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It is hereby **ORDERED, ADJUDGED AND DECREED:** That for the reasons stated in the Court's Opinion & Order dated September 30, 2022, Defendant's motion to dismiss is GRANTED and Proposed Intervenors' Motion to Intervene is DENIED as moot. Plaintiffs' Complaint is DISMISSED without prejudice for lack of subject matter jurisdiction. The Second Circuit has made clear that "where a case is dismissed for lack of Article III standing, as here, that disposition cannot be entered with prejudice, and instead must be dismissed without prejudice." Katz v. Donna Karan Co., L.L.C., 872 F.3d 114, 121 (2d Cir. 2017) (emphasis in original). Judgment is entered in favor of Defendant Village of Chestnut Ridge, New York, without prejudice.

Dated: New York, New York

September 30, 2022

RUBY J. KRAJICK

Clerk of Court

BY: K. Mango

Deputy Clerk