Diane P. Sullivan
WEIL, GOTSHAL & MANGES LLP
17 Hulfish Street, Suite 201
Princeton, NJ 08542
(609) 986-1120

Kevin J. Arquit (admitted *pro hac vice*)
WEIL GOTSHAL & MANGES LLP
767 Fifth Avenue
New York, NY 10153
(212) 310-8000

Baher Azmy
CENTER FOR CONSTITUTIONAL RIGHTS
666 Broadway, 7th Floor
New York, NY 10012
(212) 614-6464

Valeria A. Gheorghiu
Law Office of Valeria A. Gheorghiu
113 Green Street, Suite 2
Kingston, NY 12401
(914) 772-7194

Jonathan Wallace (admitted *pro hac vice*)
P.O. Box 728
Amagansett, New York 11930
(917) 359-6234

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

RAMAPOUGH MOUNTAIN INDIANS, INC., and RAMAPOUGH LENAPE NATION

Plaintiffs,

-against-

THE TOWNSHIP OF MAHWAH, RAMAPO HUNT & POLO CLUB ASSOCIATION, INC., GERALDINE ENTRUP, THOMAS MULVEY,

Defendants.

Civ. No. 2:18-cv-09228

REPLY MEMORANDUM OF LAW IN FURTHER SUPPORT OF PLAINTIFFS' MOTION FOR LEAVE TO FILE FIRST AMENDED COMPLAINT

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases **Page(s)**

Statutes

Other Authorities

Plaintiffs Ramapough Mountain Indians, Inc. and the Ramapough Lenape Nation, (collectively, "Plaintiffs") respectfully submit this memorandum of law in further support of its motion pursuant to Federal Rule of Civil Procedure 15(a) for leave to file its First Amended Complaint ("Motion") and in reply to the memoranda in opposition to the Motion by Defendants the Township of Mahwah, including Geraldine Entrup and Thomas Mulvey (collectively, "Mahwah") and the Ramapo Hunt & Polo Club Association, Inc. ("HOA") (together with Mahwah, the "Defendants").

PRELIMINARY STATEMENT

Motions to Amend are freely granted, especially at this early stage in the case. Amendment must be allowed whenever there has not been undue delay, bad faith on the part of the plaintiff, or prejudice to the defendant as a result of the delay—Defendants argue none of these grounds. Rather, Defendants' oppositions read like a Motion to Dismiss. Indeed, in several sections of their briefs, Defendants explicitly request dismissal, suggesting their arguments have been cut and pasted from their previous briefing. *See, e.g.*, ECF No. 71 ("Mahwah Opp.") at 26 (requesting "Plaintiffs' claims in the Amended Complaint be dismissed for the failure to state a claim."). Thus, Defendants' sole argument against amendment is that it would be futile, but this argument both misstates the applicable law, and improperly relies on facts, declarations, and supporting material outside the record.

The Federal Rules do not contemplate substantive motion practice regarding the sufficiency of a party's claims on a motion to amend, especially where, as here, Defendant HOA has *previously demanded amendment*, and it appears the Court has already extended the time to amend as of right. But, even if the Court were to undertake the searching inquiry Defendants request, Plaintiffs' motion for leave to amend must be granted. The proposed First Amended Complaint ("FAC"), ECF No. 42-2, alleges facts to support cognizable substantive due process, free exercise, RLUIPA, and Section 1985(3) claims. Mahwah complains that the claims are not ripe, but this ignores its explicitly stated position, that more than two Ramapough may not stand on their own land, and pray in the open air, without first seeking a zoning variance. This outrageous and unsupported position, under which the Ramapough have been served with countless summonses amounting to millions of dollars in potential fines, is causing Plaintiffs concrete and irreparable harm, and must be addressed. Nor do *Younger* abstention and principles of preclusion bind this Court's ability to adjudicate the issues Plaintiffs have raised on amendment. Defendants' own reliance on facts beyond the record to support their opposition undercuts their contention that dismissal is currently appropriate as a matter of law and demonstrates the need to move into discovery. Thus, for all the reasons set forth in the Motion and below, the Court should grant Plaintiffs' Motion.

ARGUMENT

I. PLAINTIFFS COULD HAVE FILED THEIR AMENDED COMPLAINT AS A MATTER OF RIGHT

Plaintiffs sought leave to amend their Complaint out of an abundance of caution. On June 29, 2018, after receiving the original Complaint, the HOA demanded, at a minimum, that Plaintiffs amend the complaint under threat of sanctions. Ex. 1 (Letter from A. Chagaris to V. Gheorghiu and J. Wallace, dated June 29, 2018, and response letter from J. Wallace and V. Gheorghiu to A. Chagaris, dated July 17, 2018)[1]. On August 8, 2018, this Court granted Plaintiffs' August 6, 2018 request for an extension of time "to amend the Complaint *as of right* or to oppose Defendants' motions" to dismiss. ECF No. 32 (Pls.' First Motion for Extension of Time) (emphasis added); *see* ECF No. 38 (Order) at 2 ("In the Court's discretion, Plaintiffs' application, (ECF No. 32), is GRANTED."). However, in its order granting Plaintiffs' request, the Court stated that "Plaintiffs' oppositions are due on September 21, 2018, and Defendants' replies are due October 5, 2018." ECF No. 38 at 2. Given this language, it was somewhat unclear whether the Court had granted the entirety of Plaintiffs' requested relief (*i.e.*, an extension of time to amend the Complaint as of right *or* to oppose motions to dismiss) as the docket suggested or, instead, only granted Plaintiffs' request for an

[1] Unless otherwise noted, all exhibits are to the Declaration of Nigar A. Shaikh, filed contemporaneously herewith.

extension of time to submit oppositions to Defendants' motions to dismiss. While Plaintiffs were (and remain) of the opinion that the Court granted Plaintiffs an extension to amend their complaint *as of right*, Plaintiffs moved for leave to amend on August 8, 2018, as a precaution—as Plaintiffs did not want risk either noncompliance with this Court's deadlines or an untimely opposition filing.[2]

Because the relief requested by this motion has already been granted, this Court can easily moot Plaintiffs' current motion by clarifying that its August 8, 2018 order extended Plaintiffs' deadline to file an Amendment as of right and allowing Plaintiffs to file their FAC. Alternatively, for the reasons explained below, the Court should grant Plaintiffs' motion to amend.

II. Plaintiffs' Motion Should Be Granted Because The Proposed Amended Complaint Is Not Clearly Futile

A. Leave To Amend Is Freely Given

Plaintiffs' burden on a motion to amend under Fed. R. Civ. P. 15 is not high, and the decision to grant leave to amend rests in the Court's sound discretion. *See* Fed. R. Civ. P. 15(a)(2) ("The court should freely give leave [to amend] when justice so requires"); *Foman v. Davis*, 371 U.S. 178, 182 (1962) (explaining that

[2] Plaintiffs' decision to move to amend, rather than simply docket an Amended Complaint, was fueled in large part by a conversation with Defendants' counsel, who suggested that Defendants had interpreted the Court's August 8, 2018 Order to extend only Plaintiffs' deadline to submit motion-to-dismiss oppositions and informed Plaintiffs that they would move to strike any amended complaint not supported by a motion to amend.

Rule 15's mandate to freely give leave to amend "is to be heeded"). The Third Circuit has repeatedly construed Rule 15(a) to require district courts to liberally grant motions to amend, particularly where, as here, a good-faith motion is brought early in the proceedings and the amendment would not prejudice defendants. *See Long v. Wilson*, 393 F.3d 390, 400 (3d Cir. 2004) ("We have held that motions to amend pleadings should be liberally granted"); *Adams v. Gould Inc.*, 739 F.2d 858, 867-868 (3d Cir. 1984) ("[U]nder the liberal pleading philosophy of the federal rules as incorporated in Rule 15(a), an amendment should be allowed whenever there has not been undue delay, bad faith on the part of the plaintiff, or prejudice to the defendant as a result of the delay"); *Clinton v. Jersey City Police Dep't.*, 2017 WL 1024274, at *2 (D.N.J. Mar. 16, 2017) (Cecchi, J.) (noting that the Third Circuit "has shown a strong liberality in allowing amendments under Rule 15 in order to ensure that claims will be decided on the merits rather than on technicalities"). Accordingly, "[w]hen deciding whether to grant a motion in support of leave to amend pursuant to Rule 15(a)," there is a "general presumption . . . in favor of allowing a party to amend its pleadings." *Demmick v. Cellco P'ship*, 2008 WL 750547, at *1 (D.N.J. Mar. 19, 2008) (Cecchi, J.) (citing *Del Sontro v. Cendant Corp., Inc.*, 223 F.Supp.2d 563, 576 (D.N.J. 2002)).

To be sure, the Third Circuit's "policy favoring liberal amendment of pleadings" is not "unbounded." *Dole v. Arco Chem. Co.*, 921 F.2d 484, 487 (3d

Cir. 1990). District courts can deny leave to amend where (1) a plaintiff has unduly delayed seeking an amendment or has a dilatory or bad-faith motive, (2) amendment would unfairly prejudice the defendant, or (3) the amendment would be futile. *See Grayson v. Mayview State Hosp.*, 293 F.3d 103, 108 (3d Cir. 2002) (explaining that "if a plaintiff requests leave to amend a complaint vulnerable to dismissal before a responsive pleading is filed, such leave *must be granted* in the absence of undue delay, bad faith, dilatory motive, unfair prejudice, or futility of amendment"); *Clinton*, 2017 WL 1024274, at *5 (D.N.J. Mar. 16, 2017) (Cecchi, J.) ("Given the liberal standard for the amendment of pleadings, 'courts place a heavy burden on opponents who wish to declare a proposed amendment futile'") (internal citation omitted); *Gordon v. Dailey*, 2017 WL 1181577, at *2 (D.N.J. Mar. 30, 2017) (noting that "courts place a heavy burden on opponents of motions to amend").

In opposing Plaintiffs' motion to amend, Defendants do not claim that Plaintiffs unduly delayed seeking an amendment or have a dilatory motive. Nor do Defendants argue that allowing Plaintiffs' proposed amendment would prejudice them *in any way*, let alone result in *undue or unfair* prejudice. *See Cornell & Co. v. Occupational Safety & Health Review Comm'n*, 573 F.2d 820, 823 (3d Cir. 1978) ("It is well-settled that prejudice to the non-moving party is the touchstone for the denial of an amendment"); *Eisai Inc. v. Sanofi-Aventis U.S., LLC*, 2012 WL 32202,

at *8 (D.N.J. Jan. 5, 2012) (same). Instead, Defendants claim only that Plaintiffs' proposed amendment would be futile. *See* Mahwah Opp. at 3 ("As none of the allegations in the Proposed Amended Complaint are sufficient to withstand a motion to dismiss the claim asserted by Plaintiff, the District Court should deny Plaintiffs' Motion for leave to amend the Complaint in its entirety"); ECF No. 72 ("HOA Opp.") at 9 ("Plaintiffs' application for leave to file the PAC should be denied because doing so would be futile.").

A proposed amendment can only be considered futile "if the amendment will not cure the deficiency in the original complaint or if the amended complaint cannot withstand a renewed motion to dismiss." *Jablonski v. Pan Am, World Airways, Inc.*, 863 F.2d 289, 292 (3d Cir. 1988). While, in assessing futility, district courts apply the same standard of legal sufficiency as under Rule 12(b)(6) (*see City of Cambridge Ret. Sys. v. Altisource Asset Mgmt. Corp*, 908 F.3d 872, 878 (3d Cir. 2018)), oppositions to motions for leave to amend *are not* equivalent to motions to dismiss. *See Giordano v. Holder*, 2017 WL 1969466, at *3 (D.N.J. May 12, 2017) (Cecchi, J.) (explaining that "Rule 15 futility does not contemplate substantive motion practice on the merits of the claims"); *Harrison Beverage Co. v. Dribeck Imps., Inc.*, 133 F.R.D. 463, 468–49 (D.N.J. 1990) (acknowledging the court may deny leave to amend "if the proposed amendment 'is frivolous or advances a claim or defense that is legally insufficient on its face,'" but explaining

that a motion for leave to amend "does not require the parties to engage in the equivalent of substantive motion practice upon the proposed new claim or defense"). Accordingly, unless a proposed amendment is *clearly futile*, a motion for leave to amend should be granted. *See Gordon*, 2017 WL 1181577, at *2 ("If a proposed amendment is not clearly futile, then denial of a leave to amend is improper'" (quoting 6 Charles Alan Wright et al., Federal Practice and Procedure § 1487 (2d ed.1990))); *Aruanno v. New Jersey*, 2009 WL 114556, at *2 (D.N.J. Jan. 15, 2009) (although "[t]he futility analysis on a motion to amend is essentially the same as a Rule 12(b)(6) motion," given the "liberal standard for the amendment of pleadings," motions for leave to amend should only be denied where "the proposed amendment [is] frivolous or advance[s] a claim that is insufficient on its face").

To meet their "heavy burden . . . to declare [the] proposed amendment futile," *Aruanno*, 2009 WL 114556, at *2, Defendants must "be able to demonstrate that it appears beyond doubt that the party can prove no set of facts in support of the claim which would entitle the party to relief." *Gordon*, 2017 WL 1181577, at *2 n.3 (internal quotation marks and alterations omitted). As explained below, Defendants have not met that burden here.

B. Defendants Improperly Rely On Facts Outside The Record

In determining whether a defendant has met its burden to demonstrate the futility of a proposed amendment, courts "must consider only those facts alleged in

the proposed amended complaint, accepting the allegations as true and drawing all logical inferences in favor of the plaintiff." *Harris v. Steadman*, 160 F. Supp. 3d 814, 817 (E.D. Pa. 2016); *see Reckitt Benckiser Inc. v. Tris Pharma, Inc*., 2011 WL 4915853, at *3 (D.N.J. Oct. 17, 2011). Disregarding this requirement, Defendants present scads of extraneous purported facts, declarations, and supporting material in their opposition briefs. *See, e.g.*, ECF No. 72-1 (Decl. of Arthur Chagaris, Esq.) (attaching as exhibits documents that are not matters of public record, including letters); ECF No. 71-1 (Certification of Counsel in Supp. of Defendants' Opp. to Pls.' Motion for Leave) (same). Among other unsupported and inaccurate statements, Mahwah asserts as fact that: the property at issue regularly floods, is open for large events and public assemblies and Plaintiffs "consistently invite the public at large," HOA Opp. at 1; that public assemblies and religious and other activities are not permitted under the Zoning Ordinance, *id.* at 5; that RMI developed the property with "unlawful structures," *id*.; and that Plaintiffs tampered with or vandalized HOA property, *id.* at 2.

None of these supposed "facts"—which are more properly classified as fiction—should be considered by this Court on motion to amend. *See Katiroll Co. Inc. v. Kati Roll & Platters Inc*., 2011 WL 13151970, at *1 (D.N.J. Feb. 10, 2011) (refusing to consider defendants' factual arguments on a motion to amend because they went "beyond the scope of the Court's analysis as the alleged futility of

Plaintiff's Motion to Amend is considered under the Rule 12(b)(6) motion to dismiss standard, where the facts alleged by Plaintiff must be accepted as true"). If anything, Defendants' continued reliance on their competing version of the facts illustrates precisely why discovery is needed in this case, as it is the only way to test the allegations in Plaintiffs' FAC and to separate the fact therein from the fiction in Defendants' self-serving retelling. In short, discovery on the plausible allegations contained in the FAC would prove up a "set of facts in support of [a] claim" entitling Plaintiffs to relief. *Gordon*, 2017 WL 1181577, at *2 n.3.

Plaintiffs bring the following causes of action in the FAC: i) Mahwah denies Plaintiffs' rights to assemble and freely practice their religion in violation of the First and Fourteenth Amendments, *see* FAC ¶¶ 83-92; (ii) Mahwah deprives Plaintiffs of the right to freedom of association, in violation of the First and Fourteenth Amendments, *see id.* ¶¶ 93-100; (iii) Mahwah denies Plaintiffs' right to the use and enjoyment of their land based on religious animus, in a manner that shocks the conscience, in violation of the Fourteenth Amendment, *see id.* ¶¶ 101-106; (iv) the HOA has conspired with one or more other Defendants to deprive Plaintiffs equal protection of the law and equal protection and immunities under the law, and to prevent and hinder the constituted authorities from providing and securing Plaintiffs equal protection of the law, in violation of Plaintiffs' civil rights under 42 U.S.C. § 1985, *see id.* ¶¶ 107-112; (v) Mahwah's coercive actions and

selective enforcement of ordinances substantially burden Plaintiffs' religious practice in violation of RLUIPA, *see id.* ¶¶ 113-119; (vi) Mahwah's coercive actions and selective enforcement of ordinances treat Plaintiffs on less than equal terms with a nonreligious assembly or institution in violation of RLUIPA, *see id.* ¶¶ 120-126; and (vii) Mahwah's attempts to forcibly remove Plaintiffs and demands to tear down and remove Plaintiffs' stone altar and prayer circle constitute the imposition of a land use regulation to totally exclude religious assemblies from a jurisdiction and/or unreasonably limit religious assemblies, institutions, or structures in violation of RLUIPA, *see id.* ¶¶ 127-133. And, Plaintiffs adequately allege facts supporting the elements of each cause of action. *See id.* ¶¶ 83-133. Accordingly, Plaintiffs' motion for leave to amend should be granted. *See Foman v. Davis*, 371 U.S. 178, 182 (1962) ("If the underlying facts or circumstances relied upon by a plaintiff may be a proper subject of relief, he ought to be afforded an opportunity to test his claim on the merits.").

III. PLAINTIFFS' CLAIMS ARE RIPE UNDER ARTICLE III BECAUSE PLAINTIFFS HAVE ALREADY SUFFERED CONCRETE HARMS

Defendants also argue that leave to amend should be denied since Plaintiffs' claims are not ripe under Article III. More specifically, Defendants argue that Plaintiffs cannot sue over the merits of an adverse zoning decision before the local land use board renders a "definitive final decision." Mahwah Opp. at 9. However, this finality rule "is not mechanically applied." *Congregation Anshei Roosevelt v.*

Planning and Zoning Bd. of Borough of Roosevelt, 2008 WL 4003483, at *11 (D.N.J. Aug. 21, 2008) (quoting *Murphy v. New Milford Zoning Comm'n*, 402 F.3d 342, 348 (2d Cir. 2005)), *aff'd*, 338 F. App'x 214 (3d Cir. 2009).

A. Plaintiffs Were Not Required To Seek Permits In The First Instance Due To Prior Nonconforming Use At 95 Halifax

The rule of finality does not apply since Plaintiffs' contested use of the land is protected as preexisting nonconforming use. *See* FAC ¶¶ 26-29. Preexisting nonconforming use is a "valuable property right" and thus does not require a permit or variance. *S & S Auto Sales, Inc. v. Zoning Bd. of Adjustment for Borough of Stratford*, 373 N.J. Super. 603, 614 (App. Div. 2004). Temporary non-uses do not abandon this right, nor do ownership or tenancy terminate a nonconforming use where an owner demonstrates an expressed intent to continue the use. *Id.*

Prior non-conforming religious and cultural use regularly occurred at 95 Halifax since Developer Charles Elmes first permitted the Ramapough to hold ceremonies and pow-wows in the 1980s before the property was re-zoned as a C-200 Conservation zone. FAC ¶¶ 58-59. Defendants have not provided any cases demonstrating why, as a matter of law, the rule of finality should preclude fact finding as to whether and when prior nonconforming use occurred at 95 Halifax.

B. Defendant Mahwah's Enforcement Activities Concretely Harm Plaintiffs And Render A Final Zoning Board Decision Unnecessary

Furthermore, in the Third Circuit, a land use claim is ripe under Article III, even without a final zoning board appeal decision if "the interim decision of the zoning authorities has been formalized and its effects felt in a concrete way." *See Peachlum v. City of York*, 333 F.3d 429, 437 (3d Cir. 2003) (vacating district court dismissal of First Amendment land use case for failure to appeal initial zoning decision); *Congregation of Kollel v .Township of Howell*, 2017 WL 637689, at *12 (D.N.J. Feb. 16, 2017) ("Therefore, First Amendment challenges require relaxation of the ripeness inquiry, for 'unconstitutional statutes or ordinances tend to chill protected expression among those who forbear speaking because of the law's very existence'" (citing *Peachlum*, 333 F.3d at 435)). The Third Circuit also cautions that "ripeness is not to be confused with exhaustion [of remedies]" because "although courts prefer administrative finality . . . the issue is whether a provisional administrative action has been formalized and its effects felt in a concrete way." *Peachlum*, 333 F.3d at 436-37 (citations omitted).

In *Peachlum*, the Court noted that years of enforcement actions by the city resulted in judgments, fines, and costs against the plaintiff, meaning there was "no question that any infringement of [Peachlum's] First Amendment speech rights has already occurred." 333 F.3d at 437; *see also Konikov v. Orange County*, 410 F.3d

1317, 1322 (11th Cir. 2005) (reversing district court and holding that plaintiff's injury was "actual, concrete" because "the imposition of the fine indicates that the Code Enforcement Board had made a final decision to apply the Code").

Mahwah has conducted itself similarly to the City of York by bringing several actions against Plaintiffs to collect fines and compel removal of religious artifacts from 95 Halifax. *See* FAC ¶¶ 11-12, 14, 58-59, 61, 65. And just like the city in *Peachlum*, Mahwah has already chilled Plaintiffs' First Amendment religious exercise through the township's continued issuance of summons for religious displays and artifacts on the land, such as the Ramapough's stone altar and prayer circle, and for Mahwah's Administrative Officer of the Department of Land Use and Property Maintenance Michael Kelly and Zoning Board member Geraldine Entrup's absurd, discriminatory position that more than two individuals of the tribe congregating on the land for open-air prayer violates Mahwah's zoning ordinance. FAC ¶¶ 58-59, 61, 65. Mahwah's aggressive actions seeking to compel enforcement of the initial zoning decision are sufficiently final and demonstrate that Plaintiff's harms are concrete.

C. Defendant Mahwah's Rescission Of An Existing Permit Demonstrates Futility Of Zoning Board Appeal

The rule of finality also does not apply if an appeal to a zoning board of appeals or a variance application would be futile. *Congregation Anshei Roosevelt*, 2008 WL 4003483, at *11. Here, Plaintiffs allege in the FAC that in 2017, around

the time when Plaintiffs submitted their initial permit application for religious use on the property, Michael Kelly unilaterally revoked a 2012 permit for a longhouse for religious and cultural purposes on the land at 95 Halifax even after Defendant Thomas Mulvey determined in 2013 that Plaintiffs' use of the land did not violate any zoning ordinance. FAC ¶¶ 56-57. Mahwah did not provide hearings of any sort before this capricious rescission. *See Blanche Rd. Corp. v. Bensalem Township*, 57 F.3d 253, 267-68 (3d Cir. 1995), *abrogated on other grounds by United Artists Theatre Circuit, Inc. v. Township of Warrington*, 316 F.3d 392, 400 (3d Cir. 2003) (reversing district court dismissal of land use claim because plaintiffs' claim arose from township officers "deliberately and improperly" interfering with the permit process, and thus is "not dependent on a final decision from the county").

Furthermore, despite a then-authoritative 2017 judicial decision stating that tents were not structures violating the zoning ordinances, *see* Ex. 2 (audio transcription of court decision in *New Jersey v. Ramapough Mountain Indians*, No. 0233-SC-08491, dated November 17, 2017), at 18, Mahwah nevertheless continued issuing summons for tents in 2018. FAC ¶ 61. Even though the municipal court decision was ultimately appealed, this total disregard for the court's authority, along with Mahwah's capricious revocation of an existing permit for a now-challenged use without due process, demonstrates the futility of Plaintiffs' seeking administrative remedies in this case.

IV. PLAINTIFFS' FACTUAL ALLEGATIONS SUPPORT A FOURTEENTH AMENDMENT SUBSTANTIVE DUE PROCESS CLAIM

A. Plaintiffs Adequately Allege That Defendant Mahwah's Conduct "Shocks The Conscience"

In further support of their opposition, Defendants also argue that Plaintiffs failed to allege facts to support a claim for a violation of their Fourteenth Amendment due process rights. Mahwah Opp. at 17. Defendants mischaracterize the scope of Plaintiffs' substantive due process allegations, claiming they are "based entirely upon the alleged imposition of 'coercive' fines, and alleged 'threats and intimidation tactics to cause Ramapough members to cease use of their land.'" *Id.* at 17-18. Defendants ignore key allegations – that Plaintiffs were deprived of their protected property interest when the Township unilaterally revoked Plaintiffs' 2012 zoning permit[3] without pre-deprivation notice, hearing, or opportunity to be heard in September 2017, shortly after Mahwah discovered the permit existed; and that Mahwah's Township Engineer stated, under oath, that C-200 zoning prohibits more than two (2) people praying in open air on 95 Halifax Road. FAC ¶¶ 55-57, 59. Plaintiffs' claim is further predicated on the cumulative egregious, arbitrary,

[3] Incredibly, Mahwah takes the position that this "was not a zoning permit but merely a permit permitting the construction of a longhouse," Mahwah Opp. at 2, n.1, despite the title on *their own exhibit* clearly designating the 2012 permit a "Township of Mahwah Zoning Permit." ECF No. 71-2 (Exhibit B to Mahwah Opp.). Defendant Mahwah's exhibit further clarifies: "This is NOT a Construction Permit." *Id*.

and capricious conduct of Mahwah identified in paragraphs 46 through 69 of the FAC, which allege Mahwah's interference with and chilling of constitutionally protected religious assembly, freedom of religion, and prayer on 95 Halifax Road. *Id.* ¶¶ 46-69.

To prevail on a substantive due process claim in the municipal land use context, Plaintiffs must establish that (i) they have a property interest protected by due process; and (ii) that the government's deprivation of that property interest "shocks the conscience." *Cherry Hill Towers, L.L.C. v. Township of Cherry Hill*, 407 F.Supp.2d 648, 654 (D.N.J. 2006). The "shocks the conscience" standard "is not precise" and it "varies depending on the factual context." *Eichenlaub v. Township of Indiana*, 385 F.3d 274, 285 (3d Cir. 2004). To "shock the conscience," the alleged conduct "must involve more than just disagreement about conventional zoning or planning rules and rise to the level of self-dealing, an unconstitutional taking, or interference with otherwise constitutionally protected activity on the property." *Dotzel v. Ashbridge*, 306 F. App'x 798, 801 (3d Cir. 2009) (internal quotation marks omitted). The "shocks the conscience" analysis is properly applied to zoning controversies involving "allegations of hostility to constitutionally-protected activity on the premises." *Eichenlaub*, 385 F.3d at 285. The Third Circuit has noted that allegations that local officials sought to "hamper development" due to bias against a certain ethnic group would constitute

conscience-shocking behavior. *Id*. at 286; *see also Chainey v. Street*, 523 F.3d 200, 220 (3d Cir. 2008) (suggesting that allegations of "bias against an ethnic group" shocks the conscience).

Notwithstanding that this is not a motion to dismiss, Plaintiffs have adequately alleged facts to support a substantive due process claim. Defendants do not contest that Plaintiffs have established a protected property interest on 95 Halifax Road. Further, Plaintiffs have alleged conduct implicating bias by Defendants against a religious group, and interference with constitutionally protected activity on their property, two grounds the Third Circuit has explicitly found independently constitute "conscience-shocking" behavior. The allegations Plaintiffs identify in paragraphs 46 through 69 of the FAC involve more than mere disagreements about zoning laws and improper motives – they rise to the level of interference with a constitutionally protected property interest in a manner wholly unrelated to a rational governmental goal. *See Dotzel*, 306 F. App'x at 801. Accordingly, Plaintiffs have sufficiently alleged that Mahwah's conduct "shocks the conscience."

B. Plaintiffs' Substantive Due Process Claim Is Ripe For Review And Is Not Subject To The Finality Rule

Defendants' invocation of the finality requirement of the ripeness doctrine, arguing that they resorted to daily summonses "only after Plaintiffs refused to avail themselves of the procedure for obtaining permits for their non-conforming uses on

the Property," Mahwah Opp. at 19-20, falls flat where, as here, Plaintiffs bring a course-of-conduct substantive due process claim, which is not subject to the finality rule. *Cty. Concrete Corp. v. Township of Roxbury*, 442 F.3d 159, 167 (3d Cir. 2006) (declining to apply the finality rule to a substantive due process claim where the alleged course of conduct was unrelated to the merits of the zoning permit application); *see also Blanche Rd. Corp.*, 57 F.3d at 268 (noting that a course-of-conduct claim is a "substantively different type of claim than that presented in the ripeness cases, and internal review of the individual permit decisions is thus unnecessary to render such a claim ripe"), *abrogated on other grounds by United Artists Theatre Circuit, Inc. v. Township of Warrington,* 316 F.3d 392, 400 (3d Cir. 2003).

As set forth in paragraphs 46 to 69 of the FAC, Plaintiffs have adequately alleged that Mahwah engaged in a campaign of harassment with the purpose of stopping the Ramapough from using their land for religious purposes – conduct entirely unrelated to the merits of the zoning process. Plaintiffs' substantive due process claim based on Mahwah's course of conduct is thus ripe for review.

V. YOUNGER ABSTENTION DOES NOT BAR THIS COURT'S JURISDICTION

Defendants also argue that Plaintiffs' motion for leave to amend should be denied because the *Younger* abstention doctrine prevents this Court from reviewing Plaintiffs' claims. Despite the importance of land use to state interests, "the mere

fact that the factual background of a case arose out of a land use dispute is not enough to say that the federal proceeding would interfere with state proceedings." *Addiction Specialists, Inc. v. Township of Hampton*, 411 F.3d 399, 409 (3d Cir. 2005). Indeed, this is consistent with the Third Circuit's admonition that *Younger* abstention should rarely be invoked. *Id.* at 408. In *Addiction Specialists*, the Third Circuit found that the district court abused its discretion by abstaining based on *Younger*, and held that federal judicial inquiry into the "willful and malicious application of the state and local land use policies" did not need to touch on the zoning policies themselves, or the validity of state and municipal codes. *Id.* at 410-411. There, the Third Circuit found that plaintiff's alleged violations of constitutional and statutory rights did not implicate state interests and therefore *Younger* abstention should not have applied. *Id.*

Here, Plaintiffs' FAC does not challenge the validity of the C-200 zoning ordinance. Rather, much like the plaintiff in *Addiction Specialists*, Plaintiffs seek judicial review of Mahwah's myriad capricious actions that evince religious

animus against the Ramapough religion.[4] Thus, *Younger* abstention does not apply and this Court has jurisdiction to review Plaintiffs' FAC[5].

VI. PRINCIPLES OF PRECLUSION DO NOT BIND THIS COURT'S ABILITY TO ADJUDICATE THE ISSUES RAISED IN THE FAC

A. Preclusion Does Not Bar Claims Premised On New Factual Developments, Nor Issues That Were Not Fully Litigated

Mahwah additionally argues that leave to amend should be denied because "Plaintiffs' RLUIPA and Free Exercise claims with respect to the use of the property have been raised in several court actions, and adjudicated," which Mahwah argues implicates principles of preclusion, including New Jersey's Entire Controversy Doctrine. Mahwah Opp. at 33. Even if Mahwah's preclusion argument was meritorious (and it is not), it would only warrant denial of leave to

---

[4] *See* FAC ¶¶ 56-57 (unilateral revocation of permit without a hearing); *id.* ¶¶ 58-59 (enforcement position that more than two Ramapough praying together is a zoning violation); *id.* ¶¶ 65-66 (issuing daily summons even for mere use, without witnessing religious use); *id.* ¶¶ 68 (exempting HOA members from equal zoning enforcement); ¶¶ 78-79 (threatening extra-judicial forcible removal and destruction of religious artifacts); ¶¶ 73, 81 (conspiring with HOA to apply frivolous criminal charges).

[5] *See also New Horizon Inv. Corp. v. Mayor & Mun. Council of Belleville*, 2005 WL 2237776, at *5-6 (D.N.J. Sept. 14, 2005) (applying *Addiction Specialists* and denying motion to dismiss on Younger abstention because that the complaint did not involve a facial validity challenge to the zoning ordinance); *Options Found., Inc. v. City of Denham Springs, Louisiana*, 2007 WL 9706608, at *3 (M.D. La. Oct. 12, 2007) (declining to abstain based on *Younger* because the case "does not require that the court rule on the zoning issues but, instead, addresses only the defendant's alleged violation of federal laws").

amend if Mahwah satisfied the high bar for demonstrating futility.[6] Mahwah fails to do so here.

Whether a state court decision should have a preclusive effect in a subsequent federal action depends on the law of the state that adjudicated the original action. *Forcellati v. PHH Mortg. Corp.*, 2018 WL 6178867, at *4 (D.N.J. Nov. 26, 2018) (Cecchi, J.). Principles of preclusion here can be separated into distinct concepts: (1) claim preclusion (also known as *res judicata*); (2) New Jersey's closely-related Entire Controversy Doctrine; and (3) issue preclusion (also known as collateral estoppel).

For claim preclusion to apply, Mahwah must prove: "(1) the judgment in the prior action must be valid, final, and on the merits; (2) the parties in the later action must be identical to or in privity with those in the prior action; and (3) the claim in the later action must grow out of the same transaction or occurrence as the claim in the earlier one." *Halabi v. Fed. Nat'l Mortg. Ass'n*, 2018 WL 706483, at *4 (D.N.J.

[6] Mahwah's argument is largely recycled from its previous motion to dismiss the original Complaint pursuant to Fed. R. Civ. P. 12(b)(6). *See* ECF No. 29-3, at 22-27. As an initial matter, preclusion is an affirmative defense that may only serve as the basis for a Rule 12(b)(6) motion where the bar is "apparent on the face of the complaint." *Rycoline Prods. Inc. v. C & W Unlimited*, 109 F.3d 883, 886 (3d Cir. 1997). If a defendant must attempt to introduce extrinsic evidence to support its argument—as here—the motion should be treated as a motion for summary judgment under Rule 56. *Id.* And in that case, Plaintiffs would thereby be entitled to notice and discovery first. *See* FED. R. CIV. P. 12(d) ("All parties must be given a reasonable opportunity to present all the material that is pertinent to the motion.").

Feb. 5, 2018) (quoting *Watkins v. Resorts Int'l Hotel & Casino, Inc.*, 124 N.J. 398, 412 (1991). "Determining whether the cause of action is the same requires evaluation of, among other things, whether (a) the acts complained of and relief sought are the same; (b) the theory of recovery is the same; (c) the witnesses and documents necessary at trial are the same; and (d) the material facts are the same." *Jaye v. Shipp*, 2018 WL 1535215, at *7 (D.N.J. Mar. 29, 2018) (citing *Culver v. Ins. Co. of N. Am.*, 115 N.J. 451, 461-62 (1989)).[7]

New Jersey's Entire Controversy Doctrine—set forth in New Jersey Rule of Court 4:30A—similarly "requires that a person assert in one action all related claims against a particular adversary or be precluded from bringing a second action based on the omitted claims against that party." *Tadros v. City of Union City*, 2011 WL 1321980, at *6 (D.N.J. Mar. 31, 2011) (quoting *Melikian v. Corradetti*, 791 F.2d 274, 279 (3d Cir. 1986)).[8]

[7] Even where "some of the contextual background facts . . . overlap" with a prior action, claim preclusion is not appropriate where the claim relies on "an entirely different set of facts." *Daewoo Elecs. Am., Inc. v. Opta Corp.*, 875 F.3d 1241, 1249 (9th Cir. 2017) (applying New Jersey state law preclusion principles).

[8] Unlike traditional claim preclusion, "the primary purpose of the entire controversy doctrine is not to enforce an adjudication that has already taken place"; rather, "'New Jersey's main justification for the doctrine [is] its interest in preserving its judicial resources.'" *Daewoo*, 875 F.3d, at 1252 (holding that the entire controversy doctrine does not apply outside of New Jersey state courts) (quoting *Paramount Aviation Corp. v. Agusta*, 178 F.3d 132, 142 (3d Cir. 1999);

Issue preclusion, unlike claim preclusion and the Entire Controversy Doctrine, "prevents parties or their privies only from re-litigating an issue already litigated in a valid, final judgment on the merits." *Simoni v. Luciani*, 872 F. Supp. 2d 382, 388-89 (D.N.J. 2012) (citing *Peloro v. United States*, 488 F.3d 163, 174 (3d Cir. 2007)). For issue preclusion to apply, Mahwah must prove: "(1) the issue sought to be precluded [is] the same as that involved in the prior action; (2) that issue [was] actually litigated; (3) it [was] determined by a final and valid judgment; and (4) the determination [was] essential to the prior judgment." *Simoni,* 872 F. Supp. 2d at 389.

"[D]evelopment of new material facts can mean that a new case and an otherwise similar previous case do not present the same claim" and that *res judicata* is therefore inapplicable. *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292, 2305 (2016) (citing Restatement (Second) of Judgments § 24 cmt. f (1980)). "Factual developments may show that constitutional harm, which seemed too remote or speculative to afford relief at the time of an earlier suit, was in fact indisputable . . . . [and] such changed circumstances will give rise to a new constitutional claim." *Hellerstedt,* 136 S. Ct. at 2305-06 (ruling that constitutional claims based on post-enforcement consequences of a state abortion law were not

---

and citing *Fioriglio v. City of Atlantic City*, 963 F. Supp. 415, 420 n.1 (D.N.J. 1997)).

barred by a judgment in an earlier case challenging the same law, given that the later case "rest[ed] in significant part upon later, concrete factual developments").[9] And where "important human values . . . are at stake, *even a slight change of circumstances* may afford a sufficient basis for concluding that a second action may be brought." *Id.* at 2336 (emphasis added). Similarly, "[t]he New Jersey entire controversy [doctrine] does not require plaintiffs to assert claims that are premature or speculative." *Yerkes v. Weiss*, 2018 WL 1558146, at *14 (D.N.J. Mar. 29, 2018) (denying dismissal where Plaintiff was unaware of a key fact at the time the first complaint was filed); *cf. Mateen v. Am. President Lines*, 2013 WL 3964808, at *6 (D.N.J. July 31, 2013) (Cecchi, J.) (dismissing claims where plaintiff unsuccessfully challenged discriminatory actions that occurred through December 2011 in a state court proceeding, and then attempted to challenge the same actions—from November 2011, *before* the original action was filed—in a second action).[10] Courts have likewise found that an issue was not "actually

[9] *Accord Morgan v. Covington Township*, 648 F.3d 172, 177-78 (3d Cir. 2011) (reversing dismissal where second action brought claims based on conduct that occurred after filing of first action, holding that "*res judicata* does not bar claims that are predicated on events that postdate the filing of the initial complaint," even if the claims "relate to . . . [the] earlier-filed lawsuit").

[10] *In re Estate of Gabrellian*, 372 N.J. Super. 432, 444 (App. Div. 2004), cited by Mahwah, noted that the Entire Controversy Doctrine "does not bar claims that were unknown during the time of the original action."

litigated" for purposes of issue preclusion when "it was not decided in prior litigation, arose out of *separate transactions and facts*, or was not necessary to the judgment." *Prospect Funding Holdings, LLC v. Breen*, 2018 WL 734665, at *6 (D.N.J. Feb. 5, 2018) (emphasis added) (citing 18 Charles Alan Wright et al., Federal Practice and Procedure § 4419 (3d ed. 2016)), *aff'd* 2018 WL 6601131 (3d Cir. Dec. 14, 2018). The development of new material facts in this case render the *res judicata*, New Jersey's Entire Controversy Doctrine, and issue preclusion inapplicable.

B. The FAC Is Based On Recent Factual Developments Giving Rise To New Constitutional And RLUIPA Claims

In support of Mahwah's *res judicata* argument, Mahwah references three state-court actions involving the Ramapough, all of which predate key factual allegations in the FAC. *See* Mahwah Opp. at 33. First, Bergen County Superior Court Case No. BER-L-3189-17, filed by Mahwah on May 8, 2017, in which Mahwah sought an injunction against the Ramapough's use of the land at 95 Halifax for certain purposes allegedly in violation of local zoning ordinances, which is currently set for trial in a consolidated action. *See id*. Second, Mahwah Municipal Court Case No. 0233-SC-08491, which proceeded to a bench trial in October and November 2017, followed by a trial *de novo* in Bergen County Superior Court, Case No. BMA 001-18-02, both ending in conviction of certain municipal summonses issued between January 10, 2017 and September 22, 2017

based on the unauthorized presence of a large tent on 95 Halifax.[11] *Id*. at 32. Third, Bergen County Superior Court Case No. BER-L-7345-17, filed by the Ramapough on October 27, 2017 and voluntarily dismissed in April 2018, in which the Ramapough challenged only the September 2017 rescission of its 2012 zoning permit for construction of a longhouse. *See id*. at 31.

The FAC asserts claims based on conduct that occurred *after* filing of the referenced state- and municipal-court proceedings (including the Ramapough's responsive pleadings in those actions), and which therefore could not have been raised in those earlier proceedings. For example, in a January 2018 letter, Mahwah ordered the Ramapough to stop using their land for religious purposes. *See* FAC ¶ 48. This action came less than two months after Mahwah's Township Engineer stated under oath that more than two people engaging in open-air prayer on 95 Halifax would violate the Township's municipal code, despite the absence of any such provision in the zoning code. *Id.* ¶ 59. Thereafter, the Township began imposing coercive summonses against Plaintiffs for religious use of their land, including for open-air prayer, beginning in April 2018 and continuing to date. *Id.*

[11] In its brief, Mahwah claims that the *de novo* trial in Bergen County Superior Court produced "an Order upholding the municipal court conviction for the summonses issued by the Township." Mahwah Opp. at 32. This is inaccurate. As discussed above, Judge Bachmann's decision narrowed the convictions to those concerning a single large tent and significantly reduced the fines.

¶¶ 11-13. Similarly, many of the key facts demonstrating that Mahwah's actions were driven by religious animus and motivated by a conspiracy with the HOA—such as comments by Town Council Members and HOA members at February and March 2018 Town Council Meetings, *see id.* ¶¶ 13, 79, 80,—occurred after the three actions referenced by Mahwah were filed and had been litigated.[12] Consequently, while the referenced state-court actions shared some background context with the FAC, they did not hinge on the same material facts. Because changed circumstances give rise to new claims, preclusion principles do not bar the FAC. *See Hellerstedt*, 136 S. Ct. at 2305.

C. No State Court Action Resolved The RLUIPA Or Free Exercise Claims Raised In The Amended Complaint

Moreover, none of the state-court actions included a fully-litigated decision on RLUIPA or free-exercise principles. First, Mahwah filed its civil complaint and application for temporary restraining order against the Ramapough in Bergen County Superior Court Case No. BER-L-3189-17 on May 8, 2017, seeking an order directing the Ramapough to remove all structures in violation of Mahwah's zoning ordinance and cease prohibited uses of 95 Halifax. *See* Ex. 3 (Verified

[12] While the FAC references the September 2017 rescission of Plaintiffs' 2012 zoning permit, *see* ECF No. ¶ 10, that fact is only included for context and completeness. The FAC challenges ongoing coercive and harassing conduct that began in April 2018; it does not seek to overturn the permit rescission.

Complaint in *Township of Mahwah v. Ramapough Mountain Indians, Inc.*, No. BER-L-3189-17, dated May 8, 2017). The Ramapough raised RLUIPA as an affirmative defense in their Answer, but—as Mahwah concedes in its brief—that case remains ongoing. *See* Mahwah Opp. at 33.[13] The case is currently set for trial in March 2019.

Second, Mahwah Municipal Court Case No. 0233-SC-08491 and the subsequent trial *de novo* in Bergen County Superior Court Case No. BMA 001-18-02—which involved a set of summonses issued from late 2016 through September 2017, before the rescission of the Ramapough's 2012 zoning permit—similarly lack preclusive effect. While the Ramapough attempted to invoke constitutional principles in its defense, the Municipal Court Judge expressly ruled that challenges to Mahwah's zoning ordinances as "arbitrary, capricious, [and] discriminatory" raised "Constitutional issues . . . best left to the appellate courts, and rarely to be decided by a trial court." Ex. 2 at 24:13-20. On trial *de novo*, the Superior Court

[13] On June 15, 2017, the Superior Court issued an order dissolving temporary restraints that had been in place, concluding that Mahwah had not demonstrated that it faced immediate and irreparable harm. *See* Ex. 4 (Order Dissolving Temporary Restraints and Dismissing Order to Show Cause in *Township of Mahwah v. Ramapough Mountain Indians, Inc.*, No. BER-L-3189-17, dated June 15, 2017). In *dicta*, the court opined that the Ramapough had not shown "at this juncture" that it was entitled to relief under RLUIPA because there was not yet evidence of exhaustion of administrative remedies. *Id.* at 7. The Court declined to reach the merits of any First Amendment issues at all. Neither point was essential to the court's ruling. *See id.*

entered a judgment of conviction against the Ramapough on certain of the summonses based solely on the presence of a "large tent" on 95 Halifax from October 2016 through October 2017. *See* Ex. 5 (Judgment After Trial *de novo* in *State of New Jersey v. Ramapough Mountain Indians, Inc.*, No. BMA-001-18-02, dated January 10, 2018 at 9-10. The Court expressly stated that it need not reach the question of whether prohibiting "a longhouse or sweat lodge, for example" on 95 Halifax would be a prohibition on religious exercise, because the tent provided grounds for the summonses without addressing religious practice. *Id*.[14]

Finally, Bergen County Superior Court Case No. BER-L-7345-17, filed by the Ramapough in October 2017, challenged only the September 2017 rescission of the Ramapough's 2012 zoning permit, based on an absence of statutory authority, due process, and equitable estoppel. *See* Ex. 6 (Complaint for

[14] The Superior Court also opined that it was not "the proper forum" for a RLUIPA claim, because RLUIPA requires exhaustion of administrative remedies, and "the record before this court does not contain . . . information" showing such exhaustion. *See* Ex. 5 at 9-10. However, exhaustion of administrative remedies is not required for RLUIPA claims where the administrative process would be futile. *See Garden State Islamic Ctr. v. City of Vineland*, 2018 WL 6523444, at *4-5 (D.N.J. Dec. 12, 2018) (Rodriguez, J.); *Bikur Cholim, Inc. v. Vill. of Suffern*, 664 F. Supp. 2d 267, 274 (S.D.N.Y. 2009). In the underlying Municipal Court action, the Ramapough were denied the opportunity to develop a full record on RLUIPA and futility as to administrative remedies because the Municipal Court judge incorrectly believed that "RLUIPA is . . . an avenue of remedy that is available to the [Ramapough] in the U.S. District Court, but not in a state court." *See* Ex. 2 at 28:21-24. Neither proceeding provided the full and fair opportunity to litigate the issue that is required for issue preclusion.

Declaratory Judgment and in Lieu of Prerogative Writs in *Ramapough Mountain Indians, Inc. v. Michael Kelly and Township of Mahwah*, No. BER-L-007345-17, dated October 27, 2017). That limited action was not (and could not have been) premised upon the discriminatory behavior that is the main focus of the FAC and began in April 2018, six months *after* it was filed, and so it did not raise the RLUIPA or free exercise issues at the core of the FAC. Thus, the voluntary dismissal with prejudice of that action in April 2018 has no preclusive effect on this action.

VII. AMENDMENT TO INCLUDE PLAINTIFFS' CIVIL CONSPIRACY CLAIM UNDER 42 U.S.C. § 1985(3) IS NOT FUTILE

A. Plaintiffs' Proposed Amended Complaint States A Claim For Conspiracy Under 42 U.S.C. § 1985(3)

Defendants also urge the Court to deny Plaintiffs' request for leave to amend because Plaintiffs' FAC fails to state a claim for conspiracy under 42 U.S.C. § 1985(3). Specifically, Defendants argue that Plaintiffs' § 1985(3) claim fails because: (i) religion is not a protected class for the purpose of the civil conspiracy statute; (ii) Plaintiffs fail to allege facts establishing the existence of a conspiracy; and (iii) "the PAC contains no colorable allegation that Mahwah's zoning

ordinance or any other laws have been applied 'unequally.'" *See* HOA Opp. at 15-23; Mahwah Opp. at 26-31.[15] Each of Defendants' contentions is without merit.

First, Mahwah's argument that religious animus does not "satisfy the requirement of what constitutes a protected class under § 1985(3)," *see* Mahwah Opp. at 26, is refuted by clearly established law. Section 1985(3) extends to private conspiracies predicated on racial or "otherwise class-based, invidiously discriminatory animus." *Griffin v. Breckenridge*, 403 U.S. 88, 102 (1971). The words "otherwise class-based," create a window for groups of persons who are not classified by race to recover under the statute. *See id.* Since *Griffin*, federal courts have, "almost without exception," defined "class-based animus" to include discrimination based on religion. *Ward v. Connor*, 657 F.2d 45, 48 (4th Cir. 1981) ("[R]eligious discrimination, being akin to invidious racial bias, falls within the ambit of s[ection] 1985[3] . . . "), *cert. denied*, 455 U.S. 907 (1982); *see also, e.g.*,

[15] The HOA also contends that "the Supreme Court has only recognized two rights protected under § 1985(3): the right to be free from involuntary servitude and the right to interstate travel." HOA Opp. at 20 (citing *Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263, 278 (1993)). But *Bray* addressed *purely private* conspiracies, *see Bray*, 506 U.S. at 278, whereas here, Plaintiffs allege a conspiracy between private individuals (members of the HOA) and state actors (Township officials). Accordingly, the limits of § 1985(3) claims discussed in *Bray* are not applicable. *See Halimi v. Pike Run Master Ass'n*, 2011 WL 5926670, at *4 (D.N.J. Nov. 28, 2011) (plaintiffs "claiming an infringement of right that has its source in the First Amendment . . . in making out a case under the civil rights conspiracy statute," must show that the "state was somehow involved in or affected by the conspiracy").

Colombrito v. Kelly, 764 F.2d 122, 130 (2d Cir. 1985); *Taylor v. Gilmartin*, 686 F.2d 1346, 1357-58 (10th Cir. 1982), *cert. denied*, 459 U.S. 1147 (1983).

While the Third Circuit has not explicitly addressed this issue, its *dictum* suggests that religion-based animus would be actionable under section 1985(3). *See Wilson v. Rackmill*, 878 F.2d 772, 775 (3d Cir. 1989) (complaint alleging defendants "acted against [plaintiff] out of racial and religious animus," "may have stated a claim for conspiracy under § 1985"); *see also Startzell v. City of Philadelphia*, 2006 WL 1479809, at *5 (E.D. Pa. May 26, 2006) (holding "religious groups are a protected class under section 1985(3) after considering (1) that there is no direct authority from the Supreme Court or the Third Circuit on this issue; (2) indirect indications from the Third Circuit . . . ; and (3) the holdings of other federal courts"); *Sunkett v. Misci*, 183 F. Supp. 2d 691, 706 (D.N.J. 2002) (noting that "the Supreme Court's opinions, and the Third Circuit cases interpreting them, seem to demand that a § 1985(3) defendant have discriminated on the basis of relatively immutable, highly identifiable, and discrete group identification, such as race, gender, disabled status, or perhaps religion"). Accordingly, amendment would not be futile.

Second, contrary to Defendants' contentions, Plaintiffs have alleged a conspiracy between Mahwah and the HOA. "A conspiracy, for [the] purposes [of a section 1985(3) claim], need not be shown by proof of an explicit agreement but

can be established by showing that the 'parties have a tacit understanding to carry out the prohibited conduct.'" *LeBlanc-Sternberg v. Fletcher*, 67 F.3d 412, 427 (2d Cir. 1995); *see also Snell v. Tunnell*, 920 F.2d 673, 702 (10th Cir. 1990) (a conspiracy under § 1985(3) may be established by showing that "participants in the conspiracy . . . share the general conspiratorial objective"), *cert. denied*, 499 U.S. 976 (1991).

Here, the FAC includes facts, which, if proven true, demonstrate a conspiratorial objective, shared between Defendants, to deprive Plaintiffs of their First and Fourteenth Amendment rights. These facts include, *inter alia*: (i) "from December 2016 through May 2017 representatives of the Mahwah Council, including the Mayor, *regularly visited and conferred with* the [HOA] *regarding action to take against Ramapough's use of Sweet Water*"; (ii) "agents of the [HOA] *communicate with agents of Mahwah as frequently as once per day, collaborating to prevent Ramapough prayer and assembly*"; and (iii) at a March 22, 2018 Town Council meeting, Mahwah Town Council president Robert Hermansen said, "*[i]t's time to move forward one way or the other*." Later, Mr. Hermansen suggested, "*[d]o we go in and take the rocks down oursel[ves]*?" At that same Council meeting, [HOA] member Charles Brammer said, "*[w]e need something done. Not a year from now. Not six months from now. It better be done now. We're tired of it*." FAC ¶¶ 71, 80, 82 (emphasis added).

Moreover, the FAC sets forth numerous facts showing Defendants acted in furtherance of the conspiracy, including allegations that: (i) members of the HOA lodged unfounded and malicious complaints to the Mahwah Police Department; (ii) Township attorney Brian Chewcaskie told a Bergen County Superior Court that Mahwah was prepared to act unilaterally without an order to prohibit prayer by the Ramapough through "self-help" regardless of how that court ruled on a motion by Mahwah seeking an order enjoining the Ramapough from using their land for religious purposes and requiring the Ramapough to take down certain sacred religious items; (iii) the HOA instituted numerous unfounded lawsuits against the Ramapough; and (iv) Mahwah instituted litigation against Ramapough, which HOA attorneys assisted and participated in. FAC ¶¶ 73, 78, 82. Taken together, these facts, if true, show that Defendants (motivated by religious animus) had at least a tacit understanding to prevent Plaintiffs from freely practicing their religion, and then acted in concert to prevent Plaintiffs from doing so.

Third, the HOA's contention that "[t]he [Proposed Amended Complaint] contains no colorable allegations that Mahwah's zoning ordinance have been applied 'unequally'" is irrelevant. HOA Opp. at 16-20. For purposes of a § 1985(3) claim, Plaintiffs are not required to show that Mahwah's zoning ordinance has been applied "unequally" against Plaintiffs. Rather, Plaintiffs are required to—and did—allege that Defendants conspired to deprive Plaintiffs of their constitutional

rights (here, their First and Fourteenth Amendment rights), *see, e.g.*, FAC ¶¶ 71, 77, 80; that this conspiracy was based on anti-Ramapough hostility, *see, e.g.*, *id.* ¶¶ 69, 74, 75; that various acts were committed in furtherance of the conspiracy, *see, e.g.*, *id.* ¶¶ 65, 73, 77, 78, 82; and, as a result of the conspiracy, that Defendants caused injury to Plaintiffs, *see, e.g.*, *id.* ¶ 69. *See Mitchell v. Fuentes*, 2013 WL 2253585, at *7 (D.N.J. May 22, 2013) (allegations that defendants had "disparaging" conversations during which they "agreed to issue [p]laintiff 'bogus tickets,' and then acted in concert to issue these tickets" were sufficient to show that defendants "had an agreement to issue . . . citations based not (solely) on his excessive speed, but on his race" and state a claim for conspiracy under § 1985(3)). Accordingly, Plaintiffs' motion for leave to amend should be granted and Plaintiffs should be entitled to seek discovery on this claim.

B. The First Amendment Does Not Bar Plaintiffs' Claims Against the HOA

Defendant HOA also argues that Plaintiffs' claims against the HOA are necessarily futile because private actors cannot face civil liability under § 1985(3) for engaging in speech or petitioning activities. *See* HOA Opp. at 23–30. The HOA is wrong. It is well established that not all speech and petitioning activities are protected by the First Amendment and, accordingly, that civil liability *can* be based on speech and petitioning activity in appropriate circumstances. *See, e.g.*, *Prof'l Real Estate Inv'rs, Inc. v. Columbia Pictures Indus., Inc.*, 508 U.S. 49, 56

(1993) (antitrust liability can be based on the filing of a "sham" lawsuit); *Bill Johnson's Rests., Inc. v. NLRB*, 461 U.S. 731, 743 (1983) ("Just as false statements are not immunized by the First Amendment right to freedom of speech, baseless litigation is not immunized by the First Amendment right to petition." (citations omitted)); *We, Inc. v. City of Philadelphia*, 174 F.3d 322, 327 (3d Cir. 1999) ("[T]he Petition Clause is on a par with the freedoms to speak, publish, and assemble. It follows that the protection afforded by *Noerr–Pennington* is no more absolute or extensive than that provided by other First Amendment guarantees"); *In re IBP Confidential Bus. Documents Litig.*, 755 F.2d 1300, 1313 (8th Cir. 1985), *on reh'g*, 797 F.2d 632 (8th Cir. 1986) (explaining that *Noerr-Pennington* doctrine does not apply to activities "which, although 'ostensibly directed toward influencing governmental action,' are actually nothing more than an attempt to harm another," as well as "unprotected activity," including violence, illegal acts, and some defamatory speech).

In the FAC, Plaintiffs do not seek to hold the HOA liable in protected activity, as the HOA contends. Rather, the FAC alleges, among other things, that the HOA and its members have harassed Plaintiffs, *see* FAC ¶¶ 4–5, 73–74; made numerous false and malicious complaints to the Township's police department, *id.* ¶ 73; dropped bags of dog feces on Plaintiffs' property, *id.* ¶ 75; trespassed on Plaintiffs' property, *id.* ¶ 76; attempted to entrap Plaintiffs, *id.* ¶ 77; and filed

numerous unfounded "sham" lawsuits against Plaintiffs in the New Jersey state courts, *id.* ¶ 81. In other words, Plaintiffs seek to hold Plaintiffs liable for their *unprotected* and unlawful actions.[16]

Given these allegations, Plaintiffs' claim against the HOA is not *clearly futile* since, with the benefit of discovery, Plaintiffs could prove that the HOA's speech and petitioning activities constituted either unprotected activity or sham litigation. *See Campbell v. Pa. Sch. Bds. Ass'n*, 2018 WL 3092292, at *5 (E.D. Pa. June 20, 2018) (denying motion to dismiss because court was could not conclude that defendants' state suit was not a "sham" on motion to dismiss record); *Zhang Jingrong v. Chinese Anti-Cult World All.*, 287 F. Supp. 3d 290, 305 (E.D.N.Y.

[16] In urging the Court to deny leave to amend on *Noerr-Pennington* grounds, the HOA fixate on a handful of Plaintiffs' allegations involving protected activity, including Plaintiffs' allegations that the HOA and its members shouted racial slurs at Plaintiffs, met with Township officials regarding Plaintiffs' use of the property. *See* HOA Opp. at 24–28. But Plaintiffs are entitled to plead protected activity as a basis to demonstrate the HOA's discriminatory intent and agreement, two necessary elements of a § 1985(3) claim. *See Wisconsin v. Mitchell*, 508 U.S. 476, 489-90 (1993) ("First Amendment . . . does not prohibit the evidentiary use of speech to establish the elements of a crime or to prove motive or intent"); *Zhang*, 287 F. Supp. 3d at 305 (holding that plaintiffs had permissibly cited defendants' speech in Complaint as "evidence of Defendants' racial animus" where the "subject speech [was] not the independent basis for Plaintiffs' § 1985(3) claims"). Moreover, these allegations also support Plaintiffs' claims as to Mahwah's First Amendment and RLUIPA liability to the extent they show that Mahwah was motivated by the HOA to discriminate. *See Westchester Day School v. Vill. of Mamaroneck*, 504 F.3d 338, 353 (2d Cir. 2007) ("The Application was in fact denied . . . because the ZBA gave undue deference to the opposition of a small but influential group of neighbors . . . .").

2018) (denying motion to dismiss where the "vast majority of the speech-related allegations asserted by Plaintiffs likely constitute true threats—at least for purposes of a motion to dismiss—and therefore are not protected by the First Amendment"); *Shetiwy v. Midland Credit Mgmt.*, 980 F. Supp. 2d 461, 475-76 (S.D.N.Y. 2013) (concluding that allegations in complaint, including filing false and misleading affidavits and affirmations, placed the suits under the sham exception); *Sykes v. Mel Harris & Assocs., LLC*, 757 F. Supp. 2d 413, 429 (S.D.N.Y. 2010) (denying motion to dismiss on basis of Noerr-Pennington doctrine where plaintiff's complaint alleged litigation-related misconduct).

Indeed, because the validity of a *Noerr-Pennington* defense or an attended sham ligation argument can rarely be assessed at the motion to dismiss stage, courts routinely defer the decision until after discovery. *See Inline Packaging, LLC v. Graphic Packaging Int'l, Inc.*, 164 F. Supp. 3d 1117, 1134 (D. Minn. 2016) ("The Court finds that a decision as to whether Noerr–Pennington immunizes litigation activity here or if any protected activity constitutes a sham is better reserved until after discovery"); *Scooter Store, Inc. v. SpinLife.com, LLC*, 777 F. Supp. 2d 1102, 1115 (S.D. Ohio 2011) (explaining that "whether a party's conduct is a genuine attempt to avail itself of the judicial process or is merely a sham is a question of fact that is inappropriate for a motion to dismiss"); *Fox News Network, L.L.C. v. Time Warner Inc.*, 962 F. Supp. 339, 346 (E.D.N.Y. 1997) ("The decision

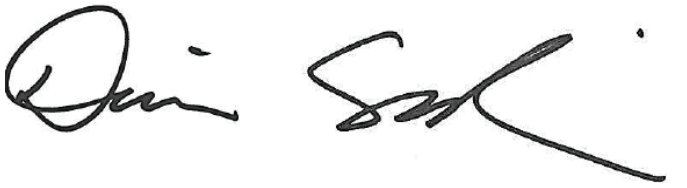
about whether the Noerr–Pennington doctrine applies should be left until after discovery, so as to more fully develop the underlying acts and possibly establish an exception.") (internal quotation marks omitted).[17] Accordingly, Plaintiffs' motion for leave to amend should be granted and Plaintiffs should be entitled to seek discovery on this claim.

CONCLUSION

For the reasons set forth above, Plaintiffs respectfully request that their motion for leave to file their First Amended Complaint be granted.

[17] The inappropriateness of classifying Plaintiffs' FAC as futile before discovery is underscored by the HOA's repeated arguments that Plaintiffs lack "evidence" of a conspiracy, which is inherently in the possession of Defendants and not Plaintiffs, to substantiate their § 1985(3) claim against the HOA. *See* HOA Opp. at 26.

Dated: New York, New York
February 13, 2019



Diane P. Sullivan
WEIL, GOTSHAL & MANGES LLP
17 Hulfish Street, Suite 201
Princeton, NJ 0854
(609) 986-1120
diane.sullivan@weil.com

Kevin J. Arquit (admitted *pro hac vice*)
WEIL GOTSHAL & MANGES LLP
767 Fifth Avenue
New York, NY 10153
(212) 310-8000
kevin.arquit@weil.com

Baher Azmy
CENTER FOR CONSTITUTIONAL RIGHTS
666 Broadway, 7th Floor
New York, NY 10012
(212) 614-6464

Valeria A. Gheorghiu
Law Office of Valeria A. Gheorghiu
113 Green Street, Suite 2
Kingston, NY 12401
(914) 772-7194

Jonathan Wallace (admitted *pro hac vice*)
P.O. Box 728
Amagansett, New York 11930
(917) 359-6234

Attorneys for Plaintiffs