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UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

YISROEL FRIEDMAN and S. MOSHE PINKASOVITS

Plaintiffs,

-against-

THE BOROUGH OF UPPER SADDLE RIVER and JOANNE L. MINICHETTI, individually and in her official capacity as Mayor of the Borough of Upper Saddle River

Defendants.

PLAINTIFFS' MEMORANDUM OF LAW IN SUPPORT OF THEIR MOTION FOR A TEMPORARY RESTRAINING ORDER

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Plaintiffs Yisroel Friedman and S. Moshe Pinkasovits ("Plainitffs") respectfully submit this Memorandum of Law in Support of Their Motion for a Temporary Restraining Order ("TRO") enjoining Defendants the Borough of Upper Saddle River (the "Borough") and Joanne L. Minichetti (together, "Defendants") from taking any actions that would prevent Plaintiffs from establishing, maintaining and/or repairing an eruv in the Borough.

PRELIMINARY STATEMENT

Plaintiffs will suffer immediate, irreparable harm absent a TRO enjoining Defendants from violating Plaintiffs' First Amendment rights and liberties to fully practice their religion by taking any action that would prevent Plaintiffs from establishing, maintaining and/or repairing the existing "eruv" in the Borough. An eruv is an area within which certain observant Jews may "carry" items from place to place (*e.g.*, pushing a stroller or wheelchair), an activity which, based on certain sincerely-held religious beliefs, is otherwise forbidden outside the home on Sabbath or Yom Kippur. Without the existing eruv, Plaintiffs and their observant neighbors cannot push their children's strollers or wheelchair-bound relatives to synagogue, or carry items such as books, food, water bottles, medications, house keys, personal identification, prayer shawls, or reading glasses on those days outside of their homes. Removal of the eruv would thus require Plaintiffs to stay home, separated from their community and forego religious observance, or

alternatively, violate the very religious faith they seek to observe more fully. The First Amendment does not tolerate this choice.

Plaintiffs' likelihood of success is indisputable: *every* court to hear an eruv challenge – including the Third Circuit Court of Appeals in *Tenafly Eruv Ass'n v. Borough of Tenafly*, 309 F.3d 144, 176 (3d Cir. 2002), *cert denied* 539 U.S. 942 (2003), and Second Circuit Court of Appeals *Jewish People for the Betterment of Westhampton Beach v. Vill. of Westhampton Beach*, 778 F.3d 390, 395 (2d Cir. 2015) – has found eruvin (plural) protected by the First Amendment's Free Exercise Clause, which guarantees Plaintiffs' fundamental right to practice their sincerely-held religious beliefs. Indeed, hundreds of eruvin exist nationwide without controversy, including throughout numerous counties in New Jersey and New York, as well as around the White House and U.S. Supreme Court in Washington, D.C.

In fact, prior to Defendants' recent about-face under mounting anti-Semitic pressure from a vocal minority of Borough residents, Defendants (including defendant Mayor Minichetti's office) approved the eruv – in this case, created by the attachment of unobtrusive half-inch PVC piping to utility poles owned by Orange & Rockland Utilities, Inc.'s ("O&R") New Jersey utility subsidiary, Rockland Electric Company (together with O&R the "Utility Company") pursuant to valid license agreements – subject only to scheduling/safety requirements that

Plaintiffs followed. Yet Defendants now have threatened, without lawful basis, to remove the lechis in the Borough that are used to create the existing eruv. Defendants' expected position, that the eruv violates a local sign ordinance, is without merit. Courts have repeatedly found that utility companies have the authority to license their poles for the attachment of lechis (*see Verizon New York, Inc., et al. v. The Village of Westhampton Beach, et al.*, 2014 WL 2711846 (E.D.N.Y. Jun. 16, 2014)) and that lechis are not "signs." *See East End Eruv Ass'n v. Town of Southampton, et al.*, 2015 WL 4160461 (Sup. Ct. Suffolk Cty. June 30, 2015). But, even if the Borough's ordinance did apply to lechis, Defendants' discriminatory purpose in enacting such ordinance, and its selective enforcement of the ordinance against the Plaintiffs, renders it unconstitutional and an impermissible basis from which to demand the removal of the lechis from the Utility Company's poles.

In short, absent the TRO immediately enjoining Defendants from following through on their threats to take down the lechis and/or interfering with Plaintiffs' efforts to repair any lechis broken by recent acts of vandalism, Plaintiffs will be irreparably harmed each passing Sabbath on which they are deprived of their ability to freely exercise their religion. Plaintiffs respectfully submit that this Court should follow governing Third Circuit case law directly on point and grant the TRO.

STATEMENT OF FACTS

The facts relevant to this motion are set forth in Plaintiffs' Complaint, as well as the accompanying declarations of plaintiffs Yisroel Friedman and S. Moshe Pinkasovits, and eruv expert Rabbi Chaim Steinmetz. A brief summary of the most pertinent facts follows.

The eruv, a 2,000 year-old Jewish institution, demarcates the area in which one may permissibly carry items outside the home on Sabbath and Yom Kippur. Steinmetz Dec. at ¶¶ 2-3. Without an eruv, those with young children (who cannot walk on their own), as well as disabled and elderly persons confined to wheelchairs, cannot attend synagogue services on the Sabbath and on Yom Kippur, and are therefore denied the opportunity fully to practice their religion. *Id*. at ¶ 4. Further, certain portions of the prayer service, including the Torah reading and the Mourner's Kaddish, can only be done in a group and not alone in private prayer or even in small groups. *Id.* at ¶ 5. As a result, those who cannot be in synagogue cannot participate in these important rituals.

Further, various celebratory and commemorative events, such as *b'nai mitzvah*, *auf ruf* (pre-wedding celebration), baby-namings, circumcisions, and *yizkor* (a communal mourning observance), may also fall on the Sabbath or Yom Kippur. Those confined to their homes are unable to participate in these public observances and are therefore deprived of meaningful and significant aspects of

Jewish observance. *Id*. The eruv also enables observant Jews to carry other items outside their homes. The ability to carry house keys, medications, identification, food, water, games, toys, books, spare pairs of shoes, a raincoat, and other items create a safer environment and permit observant Jews to mingle more freely with their neighbors, thereby facilitating the friendship, camaraderie, and community that is so central to the Jewish and American traditions. *Id*. at ¶ 6.[1]

[1] The first eruv in the United States was established in 1894 in the city of St. Louis, Missouri. Since then at least twenty-eight out of the fifty states now contain one or more municipalities with an eruv. These include, among many others: Cherry Hill, East Brunswick, Englewood, Fort Lee, Maplewood, Paramus, Passaic-Clifton, Rutherford, Teaneck, Edison, West Orange, Long Branch, Tenafly, and Ventnor, New Jersey; Westhampton Beach, Southampton, Quogue, Huntington, Stony Brook, Patchogue, East Northport, Merrick, Mineola, North Bellmore, Plainview, Great Neck, Valley Stream, West Hempstead, Long Beach, Atlantic Beach, Lido Beach, Roslyn, Searingtown, Forest Hills, Kew Gardens, Belle Harbor, Holliswood, Jamaica Estates, New Rochelle, Scarsdale, White Plains, Albany, and Manhattan, New York; Bridgeport, Hartford, Norwalk, Stamford, New Haven, and Waterbury, Connecticut; Boston, Cambridge, Springfield, and Worcester, Massachusetts; Providence, Rhode Island; Berkeley, La Jolla, Long Beach, Los Angeles, Palo Alto, San Diego, and San Francisco, California; Pittsburgh, Philadelphia, and Lower Merion, Pennsylvania; Chicago, Buffalo Grove, Glenview- Northbrook, and Skokie, Illinois; Ann Arbor, Southfield, Oak Park, and West Bloomfield Township, Michigan; Baltimore, Potomac, and Silver Spring, Maryland; Charleston, South Carolina; Birmingham, Alabama; Atlanta, Georgia; Las Vegas, Nevada; Miami, Ft. Lauderdale, Boca Raton, Boyton Beach, Deerfield Beach, Delray Beach, and Jacksonville, Florida; Denver, Colorado; Cleveland, Cincinnati, and Columbus, Ohio; Portland, Oregon; Memphis and Nashville, Tennessee; New Orleans, Louisiana; Dallas, Houston, and San Antonio, Texas; Richmond, Virginia; Seattle, Washington; Phoenix, Arizona; and Washington, D.C. Most recently, eruvin have been established in Plano and Austin, Texas; Scottsdale, Arizona; and Omaha, Nebraska.

The portion of the eruv that Plaintiffs seek to protect – but which has just recently been vandalized, necessitating immediate repair work (Pinkasovits Dec. at ¶ 16) – is innocuous and unobtrusive, constructed merely of half-inch thick PVC pipes affixed, under a valid license, to utility poles owned by the Utility Company. Steinmetz Dec. at ¶¶ 7, 8. Following communications between Defendants and Rabbi Steinmetz, during which Rabbi Steinmetz provided all necessary documents and information and complied with Defendants' permitting requirements, Defendants approved the eruv's construction. *Id*. at ¶¶ 8-14.[2] Construction concluded approximately four weeks ago. *Id*. at ¶ 14.

The positive impact on Plaintiffs, who now live within the eruv's demarcated area, has been life changing. As Mr. Pinkasovits declares:

> As a result of these and other recent efforts, my house now falls within an eruv. Accordingly, for the past three Sabbaths, my family

[2] In mid-June 2017, Rabbi Steinmetz called Borough Police to advise them of his plans. The Police consented provided that Rabbi Steinmetz had a "flag man" and placed road signs for traffic safety purposes – Rabbi Steinmetz complied. *See* Steinmetz Dec. at ¶ 8. The following day, after complying with a temporary stop-work order from Mayor Minichetti, Rabbi Steinmetz met with James Dougherty, Director of Code Enforcement, and Steven Forbes, Property Zoning Officer. During this meeting, Mr. Dougherty informed Rabbi Steinmetz that the Mayor had consented again to construction work. *Id*. at ¶¶ 10, 11. One week later, Rabbi Steinmetz met with Police Chief Patrick Rotella to address additional eruv questions. After Rabbi Steinmetz explained the eruv's important purpose, Chief Rotella consented to continued construction, provided Rabbi Steinmetz reconfirm that he would employ a "flag man," place road signs near the worksite, and complete a "Contractor Road Construction" form – Rabbi Steinmetz again complied in all respects, as repeatedly confirmed by patrol officers. *Id*. at ¶¶ 12-14 and Ex. E.

> and I have been able to more fully practice our religion. More specifically, over the past three Sabbaths, my family and I have been able to carry items such as prayer shawls and prayer books to our synagogue and have been able to bring food, games, gifts, and books to the homes of fellow community members. We, and several of our neighbors, have also been able to push strollers and wheelchairs within the confines of the newly expanded eruv. This has enabled us to more fully practice our religion, both at our synagogue and at communal activities in the homes of fellow community members on the Sabbath. None of this would be possible without an eruv.

Pinkasovits Dec. at ¶ 10. Mr. Friedman similarly declares:

> The ability to push a stroller is particularly important to me and my family, as my wife and I have two young children – one infant and one toddler – both of whom are not able to walk all the way to our synagogue on the Sabbath. As a result of now having an eruv, my entire family is able to fully observe the Sabbath, as we are now able to push our two young children to our synagogue and to the houses of other community members in their strollers. If the eruv were removed, either I or my wife would no longer be able to fully observe the Sabbath, because one of us would have to remain at home with our young children throughout the Sabbath.

Friedman Dec. at ¶ 4. Moreover, Plaintiffs are clear that the eruv's benefits inure to the entire community. *Id.* at ¶¶ 5-6; Pinkasovits Dec. at ¶ 11. As just one example, the eruv has enabled the wheelchair-bound father-in-law of Mr. Friedman's neighbor to fully participate in Sabbath rituals, whereas before the father-in-law was confined to his family's home and unable to attend temple or meals with other community members. Friedman Dec. at ¶ 5.

Notwithstanding giving initial approval (*see* fn. 2 *supra*), Defendants now demand the immediate removal of the lechis on the Utility Company's property.

The Borough's about-face appears calculated to appease the anti-Semitic backlash from a vocal minority of residents in the Borough and adjacent towns, including the Facebook Group "Citizens for a Better Upper Saddle River," and the "Petition to Protect the Quality of Our Community in Mahwah." Borough Councilman Jonathan Ditkoff correctly noted that the former "contains posts and comments that are anti-Semitic," capturing the attention of the Anti-Defamation League. Illustrative examples of the public comments to the latter unfortunately speak for themselves:

- "Get those scum out of here."
- "They are clearly trying to annex land like they've been doing in Occupied Palestine. Look up the satanic verses of the Talmud and tell me what you see."
- "Our town is such a great place and if these things move in they will ruin it. They think that can do whatever the hell they want and we'll be known as a dirty town if they move in. Please keep them out…"
- "I don't want these rude, nasty, dirty people who think they can do what they want in our nice town."
- "I don't want my town to be gross and infested with these nasty people."
- "I do not want these things coming into my town and ruining it."

Complaint at ¶ 48.

On the heels of these and other incendiary and wildly anti-Semitic remarks, the Borough sent a July 18, 2017 letter to the Utility Company, forwarded to Rabbi Steinmetz on July 20, 2017, alleging that the lechis that comprise the eruv in the

Borough violate Borough Ordinance 16-15.[3] It demanded "that the devices and materials placed on the utility poles [must] be immediately removed" and stated that "[f]ailure to comply with this directive will result in the Borough pursuing all available remedies to secure removal of these devises and fixtures." Steinmetz Dec. at Exs. C and D.[4] Although Defendants allege that the Ordinance bars the eruv, it is notable that the Borough enacted the Ordinance in October 2015, only after discussions had started about establishing an eruv in the area. Moreover, Defendants' argument is clearly pretext because (i) numerous Borough officials previously approved the eruv (*see* Steinmetz Dec. ¶¶ 8-14), and (ii) Defendants have selectively enforced the Ordinance. *See* Pinkasovits Dec. at ¶¶ 13-15 (inclusive) and Ex. A (photos of other materials, more conspicuous than lechis, that Defendants have not removed due to the Ordinance); Complaint at ¶ 53 and Ex. E (picture of "Lost Dog" sign on pole at residential intersection in Borough).

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[3] Borough Ordinance 16-15 provides, in relevant part, that it is unlawful to "[p]ost or affix any sign, advertisement, notice, poster, paper, device or other matter to any public utility pole, shade, tree, lamp post, curbstone, sidewalk, or upon any public structure or building, *except as may be authorized or required by law*" (emphasis added).

[4] By email dated July 21, 2017, the Borough followed-up on its previous letter, adding that Rabbi Steinmetz must remove the eruv by noon on July 26, 2017 or "the Borough will act to remove these devices, materials and items." Steinmetz Dec. at Ex. E. The Borough reiterated this demand by letter dated July 24, 2017. Steinmetz Dec. at Ex. F ("failure to have the eruv removed by [noon on July 26, 2017] will result in the Borough acting to have eruv removed.").

Absent a TRO preventing Defendants from removing the eruv merely to appease certain reactionary constituents, Plaintiffs, their families and similarly-situated members of the Jewish community will be irreparably injured by an inability to fully practice their faith. As Mr. Friedman explains, "[i]f any of these lechis are removed, the eruv that encompasses my house will become invalid, and, as a direct result of the actions of [Defendants], my family and I, along with many other community members, will no longer be able to freely and fully practice our religion." Friedman Dec. at ¶ 7; *see also* Pinkasovits Dec. at ¶ 12.

On July 25, 2017, Plaintiffs' counsel responded to Defendants' email by alerting Defendants to Plaintiffs' well-settled First Amendment right to maintain the eruv. Complaint at ¶ 57 and Ex. H. In addition, on the morning of July 27, 2017, Mr. Pinkasovits inspected the lechis in the Borough, which revealed that many appear to have been vandalized, as they have been ripped off the utility poles. *See* Pinkasovits Dec. at ¶ 16. When it became clear Defendants would not respect Plaintiffs' constitutional rights and cease their takedown demand, which provided a July 26, 2017 deadline, Plaintiffs filed suit under the First and Fourteenth Amendments and multiple federal statutes, and they now bring the instant motion for a TRO.

ARGUMENT

In order to obtain temporary injunctive relief, a movant must demonstrate: (1) it is likely to suffer irreparable injury absent injunctive relief, and (2) it is reasonably likely to prevail in litigation. *See Tenafly Eruv Association, Inc. v. The Borough of Tenafly*, 309 F.3d 144, 157 (3d Cir. 2002); *S. Camden Citizens in Action v. N.J. Dep't of Environmental Protection*, 274 F.3d 771, 777 (3d Cir. 2001). If movant makes these two threshold showings, the court considers, to the extent relevant: (3) whether granting the injunction would harm defendant more than denying same would harm movant, and (4) whether granting relief would serve the public interest. *Id.; see also Emergency Accessories & Installation, Inc. v. Whelen Engineering Co., Inc.*, 2009 WL 1587888 at *2 (D.N.J. Jun 3, 2009) (extending standard to TRO request). A TRO should issue to "preserve an existing situation *in statu quo* until the court has an opportunity to pass upon the merits of the demand for a preliminary injunction." *Garcia v. Yonkers School Dist.*, 561 F.3d 97, 107 (2d Cir. 2009).

Plaintiffs are likely to succeed on their claim that removal of the eruv violates Plaintiffs rights under the Free Exercise Clause of the U.S. Constitution. *See Tenafly*, 309 F.3d at 176 (creation of eruv through utilization of public utility poles for lechis is reasonable accommodation of religious practice under Free Exercise Clause); *Westhampton Beach*, 778 F.3d at 395 (municipal non-

interference with eruv is protected exercise of religious freedom and "[n]eutral accommodation of religious practice").

Conversely, the maintenance of the status quo thorough the continued existence of the eruv during this litigation will not harm Defendants or its residents; the eruv is not obtrusive and does not impact safety or the Borough's finances. *See American Civil Liberties Union v. City of Long Branch*, 670 F. Supp. 1293, 1295 (D.N.J. 1987); *Westhampton Beach*, 778 F.3d at 395. For these reasons, the equities clearly tip in Plaintiffs' favor.

I. PLAINTIFFS WILL SUFFER IRREPARABLE HARM ABSENT A TEMPORARY RESTRAINING ORDER

Plaintiffs will suffer irreparable harm if the eruv is taken down. The Supreme Court has recognized that "[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373 (1976); *see also Swartzwelder v. McNeilly*, 297 F.3d 228, 241 (3d Cir. 2001). Accordingly, in *Tenafly*, the Third Circuit held that plaintiffs "*easily* [satisfied] the irreparable injury requirement" where "plaintiffs have demonstrated that, if the eruv is removed, they will be unable to push and carry objects outside the home on the Sabbath, and those who are disabled or have small children consequently will be unable to attend synagogue." *Tenafly* at 178 (emphasis added).

As set forth in Messrs. Pinkasovits' and Friedman's accompanying declarations, with every Sabbath that passes, Plaintiffs will suffer the precise same harm deemed irreparable in *Tenafly* absent a TRO prohibiting Defendants from removing the lechis. *See* Pinkasovits Dec. at ¶ 12. Further, Defendants' discriminatory enforcement of Borough Ordinance 16-15 in a manner that targets Plaintiffs' ability to exercise their religion freely indisputably imposes a direct limitation on Plaintiffs' First Amendment rights. Accordingly, Plaintiffs have met their burden of showing irreparable harm sufficient to warrant a TRO.

II. PLAINTIFFS ARE LIKELY TO SUCCEED ON THEIR CLAIMS UNDER THE FIRST AMENDMENT AND 42 U.S.C. §1983

Defendants' demand that Plaintiffs remove the lechis, as well as Defendants' discriminatory enforcement of Borough Ordinance 16-15, violate Plaintiffs' constitutional and civil rights under the Free Exercise Clause,[5] providing that "Congress shall make no law . . . prohibiting the free exercise [of religion]." U.S. Const. Amend. I.

[5] Federal law recognizes a private cause of action against any person who, acting under color of state law, deprives another of "any rights, privileges or immunities secured by the Constitution and laws" of the United States. 42 U.S.C. § 1983 (2006). Such a claim is proper against individuals who exercise power "possessed by virtue of state law and . . . clothed with the authority of state law," as well as against a municipality itself where its policies serve to deprive an individual of his or her federal rights. *West v. Atkins*, 487 U.S. 42, 48 (1988); *Monell v. N.Y.C. Dep't of Social Servs.*, 436 U.S. 658, 690 (1978). Plaintiffs will address together their claims against Defendants under the Free Exercise Clause and §1983.

A. Plaintiffs Have a Constitutional Right to Maintain the Eruv

Courts have routinely upheld the constitutional right to establish and maintain an eruv as a valid accommodation to religious practice under the Free Exercise Clause.

In *ACLU v. Long Branch*, the court upheld plaintiffs' right to establish an eruv and observed that "[c]ertain accommodations by the state will always be necessary in order to insure that people of all religions are accorded the rights given to them by the free exercise clause of the First Amendment." *ACLU v. City of Long Branch,* 670 F. Supp. 1293, 1295 (D.N.J. 1987). The Third Circuit held likewise in *Tenafly*, noting "plaintiffs are not asking for preferential treatment. Instead, they ask only that the Borough not invoke an ordinance from which others are effectively exempt to deny plaintiffs access to its utility poles simply because they want to use the poles for a religious purpose." *Tenafly* at 169. The Court found with respect to plaintiffs' request that "the reasonable, informed observer would know that the *lechis* are items with religious significance and that they enable Orthodox Jews to engage in activities otherwise off limits on the Sabbath…[and] the reasonable observer would not believe that the Borough was promoting Orthodox Judaism. *Id*. at 176-77.

The Second Circuit is in accord, recently endorsing *Long Branch* and holding that "absent evidence that the erection of an eruv is facilitated in a non-

neutral manner, permitting an organization to attach lechis to utility poles serves the secular purpose of accommodation." *Westhampton Beach*, 778 F.3d at 395.[6] Recent decisions have further explained that municipalities have an affirmative duty to make accommodations for religious exercise, *including specifically with respect to lechis*. *See Town of Southampton*, 2015 WL 4160461 at *6 (reversing denial of zoning variance for lechis because municipality abused its discretion when it "ignored its affirmative duty to suggest measures to accommodate" creation of an eruv).

The eruv Plaintiffs seek to protect is no different from the eruvin upheld in *Long Branch*, *Tenafly, Westhampton Beach* and *Town of Southampton*; accordingly, Plaintiffs have a constitutional right to maintain their eruv, and the Borough has an affirmative duty to make appropriate accommodations.

B. Defendants' Enactment and Selective Enforcement of the Ordinance Violate the First Amendment's Free Exercise Clause

Defendants' religiously-motivated, selective enforcement of Borough Ordinance 16-15 against eruvin is unconstitutional, notwithstanding any argument

[6] Like the Third Circuit in *Tenafly*, the Second Circuit held that "[n]o reasonable observer who notices the strips on LIPA utility poles would draw the conclusion that a state actor is thereby endorsing religion, even assuming that a reasonable observer is aware that a state actor (LIPA) was the entity that contracted with a private party to lease the space." *Id*. at 396.

that the Ordinance is facially neutral and/or generally applicable.[7] The Supreme Court has held that "[o]fficial action that targets religious conduct for distinctive treatment cannot be shielded [from constitutional attack] by mere compliance with the requirement of facial neutrality," and state action targeted "only against conducted motivated by religious belief [is] precisely what the requirement of general applicability is intended to prevent." *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 534, 545-46 (1993).

Tenafly is again instructive on unconstitutionally-selective enforcement targeting religion. There, Tenafly refused to permit an eruv ostensibly because it violated an ordinance prohibiting signs in public places. However, Tenafly had "tacitly or expressly granted exemptions from the ordinance's unyielding language

[7] The Ordinance's history demonstrates it is neither facially neutral nor generally applicable; rather, it was passed with the purpose of targeting eruvin. Defendants only approved the Ordinance in October 2015, following the Second Circuit's *Westhampton Beach* decision upholding an identical eruv, and at a time when expansion of the eruv to the Borough was the topic of much local discussion. *See* Complaint at ¶ 52 (noting "[t]he Ordinance was passed *after* several conversations took place between Borough officials and Rabbi Israel Kahan, who advocated on behalf of the eruv expansion project and provided the Borough with relevant documents and licenses"). Because Defendants passed the Ordinance with religious affiliation in mind, at best, or the intent to discriminate, at worse, the Ordinance is facially unconstitutional. *See Hassan v. City of New York*, 804 F.3d 277, 301, 309 (3d Cir. 2015); *Hunter v. Underwood*, 471 U.S. 222 (1985) (facially neutral state constitutional provision was discriminatorily enacted); *see also Shrum v. City of Coweta,* 449 F.3d 1132, 1144–45 (10th Cir. 2006) ("Proof of hostility or discriminatory motivation may be sufficient to prove that a challenged governmental action is not neutral, but the Free Exercise Clause is not confined to actions based on animus.").

for various secular and religious – though never Orthodox Jewish – purposes." *Tenafly*, 309 F.3d at 167. Specifically, Tenafly had permitted citizens to affix "drab house numbers and lost animal signs to more obtrusive holiday displays, church directional signs, and orange ribbons" to utility poles. *Id.* The court found that the lechis were in fact less problematic than these allowable uses. *Id.* The Borough's selective, discretionary application of its ordinance violated the neutrality principle of the Free Exercise Clause, because it "devalue[d] . . . Jewish reasons for posting items on utility poles by judging them to be of lesser import than nonreligious reasons and thus single[d] out the plaintiffs' religiously motivated conduct for discriminatory treatment." *Id.* at 168 (citing, *inter alia*, *Lukumi*, 508 U.S. at 537); *see also Fowler v. Rhode Island*, 345 U.S. 67, 69 (1953) (Free Exercise Clause violated where city selectively enforced its park ordinance against Jehovah's Witnesses but no other religious groups).

Underscoring the discriminatory enforcement at issue, since passing Borough Ordinance 16-15 in October 2015, Defendants appear not to have used it to compel the removal of various objects from the Utility Company's poles. Pinkasovits Declaration at ¶¶13, 15. Rather, Defendants have allowed far more conspicuous signs, banners and other materials to remain affixed to the Utility Company's poles—notwithstanding the Ordinance's purported proscription. *Id.* For example, pictures of a "Lost Dog" are prominently displayed, without penalty, at a residential Borough intersection. *See* Complaint at ¶ 53 and Ex. E; *see also*

Pinkasovits Dec. at ¶ 14 and Ex. A (photos of several other items on utility poles in the Borough to which Defendants have turned a blind eye). The lechis comprising Plaintiffs' eruv are far less conspicuous than these allowed objects, as they are comparably smaller, "unobtrusive and typically unnoticeable to a casual observer." *See* Steinmetz Dec. at ¶ 7.

Rather, the only plausible explanation for Defendants enforcing the Ordinance, for the first time, nearly two years after passage, is appeasement of the openly anti-Semitic backlash that the eruv has engendered. This campaign of hatred coincides with Mayor Minichetti's political decision to revoke the eruv's prior approval. *See* Complaint at ¶ 49 ("In the face of a firestorm of opposition to the eruv in [the Borough], Mayor Minichetti decided to actively to interfere with and obstruct Plaintiffs' ability to construct the Eruv."). Just as in *Tenafly* and *Lukumi*, Defendants have enforced the Ordinance in a manner that singles out observant Judaism and violates the neutrality principle of the Free Exercise Clause. *See Tenafly* at 168. Thus, to be permissible, Defendants' actions must withstand strict scrutiny – they do not.

C. Defendants Have No Interest – Let Alone A Compelling Interest – In Barring The Eruv

Defendants' selective enactment and application of Borough Ordinance 16-15 against the eruv does not withstand strict scrutiny because it does not "advance interests of the highest order [nor is it] narrowly tailored in pursuit of those

interests." *Lukumi*, 508 U.S. at 546. Having already approved the eruv *and* permitted objects to be maintained on the Utility Company's poles, Defendants cannot argue that they have any compelling interest in removing inconspicuous lechis. *See Tenafly*, 309 F.3d at 172. Notably, Defendants' letter demanding removal of the lechis (Steinmetz Dec. at Exs. C-F (inclusive)) cites only one interest furthered by such removal—*i.e.*, preserving the Borough's right to give "municipal approval for the use by another party of utility poles within Borough rights-of way." This purported interest reeks of pretext, however, given that Rabbi Steinmetz affixed the lechis pursuant to a valid license from the Utility Company, in close consultation with Borough officials and only after obtaining all necessary construction permits and Borough approval. *See* Steinmetz Dec. at ¶¶ 8-14. Further, it is inconceivable that the owner of the "Lost Dog" sign (*see* Complaint at ¶ 53 and Ex. E), to offer but one example, received prior approval to affix the sign to the Utility Company's poles. Thus, Defendants' decision to seek removal of the lechis, while allowing other permanent and conspicuous uses of the Utility Company's poles absent prior approval, is devoid of any compelling purpose. *See Tenafly*, 309 F.3d at 172.

Plaintiffs do not seek preferential treatment. They request only that Defendants not invoke an ordinance discriminatorily to deny Plaintiffs the use of utility poles for which Plaintiffs have a valid license. *See Id.* at 169. Defendants' religiously-motivated conduct impinges on Plaintiffs' ability to fully practice their

religious beliefs, and cannot survive strict constitutional scrutiny. Accordingly, Plaintiffs will succeed on their First Amendment and § 1983 claims.

III. THE BALANCE OF HARDSHIPS FAVORS THE PLAINTIFFS

The eruv's continued existence during the pendency of litigation will have no adverse impact on Defendants or any other purportedly-interested party in this case. The eruv is not physically obtrusive, does not affect residential safety, does not cost the Borough money to maintain (in contrast to their forcible removal), or otherwise burden Borough residents. Moreover, there is no question that the eruv's existence does not violate the First Amendment's establishment clause, nor is the eruv itself a religious symbol, or play a theological role in Sabbath observance. *See Westhampton Beach,* 778 F.3d at 396 ("LIPA's action permitting the EEEA to erect the eruv is not an unconstitutional establishment of religion"); *ACLU*, 670 F. Supp. at 1297 ("permission to create an eruv does not violate the establishment clause of the First Amendment" nor establishment prohibitions of the New Jersey Constitution). On the other side of the ledger, the eruv's *removal* would impose a substantial burden each and every passing week on Plaintiffs and other observant Jewish residents who, without the eruv, cannot fully observe the Sabbath and Yom Kippur. The balance of the equities thus plainly favors Plaintiffs.

IV. THE PUBLIC'S INTEREST FAVORS GRANTING A TRO

"Where there are no societal benefits justifying a burden on religious freedom, the public interest clearly favors the protection of constitutional rights." *Tenafly*, 309 F.3d at 178. In the context of eruv removal challenges specifically, the Third Circuit has expressly concluded that "we do not see how removing the lechis could advance any interests sufficient to outweigh the infringement of the plaintiffs' free exercise rights." *Id.* Based on this governing precedent alone, the public interest militates in favor of issuing the TRO.

Moreover, this nation's leaders have repeatedly recognized that the public's interest lies in protecting eruvin because they permit Jewish families to spend more time together on Sabbath, and therefore promote traditional family values. *See, e.g.*, Complaint at ¶ 26 (letter from President George H.W. Bush stating "[b]y permitting Jewish families to spend more time together on the Sabbath, [eruvin] will enable them to enjoy the Sabbath more and promote traditional family values, and it will lead to a fuller and better life for the entire Jewish community in Washington. I look upon this work as a favorable endeavor."). Accordingly, this factor favors granting a TRO.

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that this Court (i) issue a TRO providing that (a) Defendants, and anyone acting for or in concert

with them, are restrained and enjoined from taking any action, or causing anyone to take any action, to remove, in whole or in part, the eruv in the Borough; and (b) Defendants, and anyone acting for or in concert with them, are restrained and enjoined from taking any action, or causing anyone to take any action, to interfere with the restoration or re-establishment, maintenance, repair or upkeep of the eruv in the Borough, and (ii) grant Plaintiffs such other and further relief deemed just and proper.

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