UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

BERGEN ROCKLAND ERUV ASSOCIATION, YISROEL FRIEDMAN, S. MOSHE PINKASOVITS, SARAH BERGER, MOSES BERGER, CHAIM BREUER, YOSEF ROSEN, and TZVI SCHONFELD, Plaintiffs, vs. THE BOROUGH OF UPPER SADDLE RIVER, Defendant.	Civil No.: 2:17-CV-05512-JMV-CLW

DEFENDANT BOROUGH OF UPPER SADDLE RIVER'S MEMORANDUM OF LAW IN SUPPORT OF ITS NOTICE OF MOTION TO DISMISS PLAINTIFFS' AMENDED COMPLAINT PURSUANT TO FED.R.CIV.P 12(b)(1) AND IN OPPOSITION TO PLAINTIFFS' REQUEST FOR INJUNCTIVE RELIEF

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Defendant Borough of Upper Saddle River ("USR" or "Defendant" or "Borough") respectfully submits this brief in support of its motion to dismiss the Amended Complaint of Plaintiffs Bergen Rockland Eruv Association ("BREA"), Yisroel Friedman, S. Moshe Pinkasovits, Sarah Berger, Moses Berger, Chaim Breuer, Yosef Rosen and Tezvi Schonfeld (collectively, "Plaintiffs") pursuant to Fed. R. Civ. P. 12(b)(1) because, as explained below, Plaintiffs' lack standing and their claims are unripe. USR further submits this brief and the accompanying declarations as opposition to Plaintiffs' request for injunctive relief.

PRELIMINARY STATEMENT

Plaintiffs are Orthodox Jews living and worshiping in Rockland County, New York. They seek to establish an *eruv* in Northern Bergen County, near the New York Border, which is a religious demarcation that often uses attachments to utility poles that guide believers as to where they can push and carry objects on their Sabbath.[1] Plaintiffs have begun to build the "back wall" portion of their *eruvin*[2] through the center of Upper Saddle River ("USR") and adjacent New

[1] USR takes no position regarding the need for an *eruv* within the Orthodox Jewish faith and has absolutely no objection to Plaintiffs' religious beliefs or observance.

[2] An *eruv* that Plaintiffs claim is already "active" runs from Rockland County south to Mahwah, then east into the northwest corner of Upper Saddle River and north back into Rockland County. This is sometimes referred to as the "Mahwah" *eruv*. A second "inactive" *eruv,* which Plaintiffs describe in their Brief as a "Planned Expansion," and which Plaintiffs admit is incomplete, would run south from Rockland County along the northwest corner of Upper Saddle River, cut east through the center of Upper Saddle River into Montvale and then go north back into

Jersey communities, despite the fact that Plaintiffs make no claim that they ever walk through, worship, or otherwise enter USR for any purpose.

The bedrock of Plaintiffs lawsuit is their assertion that no law – local, state or federal – can prevent them from maintaining and expanding their Rockland *eruv* into USR on the dubious theory that religious liberty overcomes all laws. There is, however, no New Jersey or federal religious liberty principle that allows them to place items on utility poles without regard to constitutional laws that prohibit them. Plaintiffs seem to believe that they are unilaterally entitled to build an *eruv* wherever they want, without the need to comply with any facially neutral, generally applied laws requiring municipal consent, such as Borough Ordinance §16-15 or N.J.S.A. 48:3-19, get permission from the relevant entities with interests in the impacted utility poles, or even first attempt to build an *eruv* in their own community that would avoid all of the harms they attempt to pin on USR. Nothing in the First Amendment requires such a result; to the contrary, all applicable case law mandates otherwise.

Importantly, Plaintiffs' assertions of "discriminatory intent," "selective enforcement," and "anti-Semitism" or kowtowing to "a virulent backlash . . . among

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Rockland County. See PowerPoint map attached to the Declaration of Bruce S. Rosen, Esq. ("Rosen Decl.") as Ex. A.

a vocal minority of residents"[3] are based on little more than conjecture and lack support in the evidentiary record, which overwhelmingly makes clear that USR's ordinances are facially neutral, generally applicable, and consistently enforced without regard to the content of the signs, devices or other matter attached to USR's utility poles.[4]

As such, this case is very unlike that of nearby Tenafly, where, in 2002, the Borough's refusal to allow an *eruv* was litigated to the Third Circuit. As in Tenafly, USR has a neutral sign ordinance that prohibits attachments to utility poles. But the similarity ends there. Tenafly was found to have allowed other secular and religious attachments to their poles, while refusing to allow installations of virtually indiscernible black rubber strips called "lechis" to create the *eruv*. In USR, official after official have declared in this action that USR vigorously and consistently polices its poles and regularly physically removes all manner of signs and attachments. There is no unequal treatment or discrimination against the *eruv* proponents in USR because no one – not charities, not the local fire department, and

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[3] Plaintiffs' Brief ("PB") at 24-27.

[4] Plaintiffs' Amended Complaint is also riddled with irrelevant, impertinent and prejudicial "facts" which can be summarized as fitting within the following categories: (1) allegations regarding individuals who are not plaintiffs; (2) allegations regarding individuals who are not defendants; and (3) allegations meant to tar the majority of USR residents based upon the actions of others, including non-residents.

not the local family with a lost dog - has the right to put a sign on the poles without permission. Therefore, the Motion for a Preliminary Injunction must be denied.

This case is also very much about whether an organization must obtain permission from the municipality before attaching items to utility poles in USR. Even when the reason for the attachment is religious, the answer is "Yes." The Plaintiffs did not apply for such permission.

Recognizing this threshold and dispositive problem, plaintiffs appear to claim they do not have to obtain permission from USR because they can rely on a license to install lechis obtained from Rockland Electric, Inc., Orange & Rockland Utilities Inc.'s subsidiary ("O&R") by a Rabbi organizing the *eruv*. There are several significant problems with this assertion:

- There is a state statute and a municipal ordinance, noted above, that require municipal approval for any items to be attached to utility poles, regardless of their content.

- The O&R license sets forth the exact poles upon which lechis can be installed and Plaintiffs have put lechis on poles other than those covered by the license. Exhibits provided by Plaintiffs show that the license authorizes the attachments of lechis on only 40 utility poles (34 of which can be located in USR), while municipal officials count lechis on 109 poles in USR.

- None of the licensed poles on the list provided by Plaintiffs are part of the *eruv* that Plaintiffs have claimed to be active; they are all on the part of a second (or expanded) *eruv* that is admittedly incomplete.

- Plaintiffs have attached lechis to a number of poles in USR that are

> jointly owned by Verizon Communications, Inc. ("Verizon") and O&R. A Joint Use Agreement between those utilities requires that both provide approval before any non-utility attachments can be added to the poles. No such approval was requested of, or provided by, Verizon.

Plainly, the purported O&R license is not "valid" and in any case cannot constitute authorization by the municipality itself, as required by USR's ordinance and New Jersey's statute. USR requires Plaintiffs, as with every other entity or individual, to obtain the requisite permissions. Having never even applied for permission from the governing body, their claims are unripe and they lack standing to allege constitutional or statutory violations against the Borough.[5]

We urge the Court to take the time to look through the PowerPoint graphics attached as an exhibit and which show the extent to which these approvals are lacking.

For these reasons and those which follow in more detail, this matter should be dismissed for lack of ripeness and standing, or in the alternative, this Court should deny the preliminary injunction sought by Plaintiffs.

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[5] To make matters worse, Plaintiffs' failure to secure these requisite consents has led to potential safety hazards posed by the lechis, some of which appear to have been installed in a manner that could cause fires or other problems. For example, a metal wire was installed between poles, seemingly to connect the poles where there was no previous connection and at least one lechi touches an active conduit. Those heightened safety risks to the community remain each day that the lechis remain in place. Had Plaintiffs followed proper procedure, the lechis could have been better evaluated for other potential safety and property damage risks.

COUNTERSTATEMENT OF FACTS

On their Sabbath, adherents of Orthodox Judaism may not carry or push items from place to place outside of the home. See Declaration of Rabbi Chaim Steinmetz, submitted by Plaintiffs ("Steinmetz Decl.") ¶ 3. An *eruv* is a boundary under Jewish law that allows for such carrying outside the home by creating a series of doorways that essentially extends the boundary of the home within which they may push and carry. Id. ¶ 7; see also Rabbi Yosef Gaviel Bechhofer, The Contemporary *Eruv*: *Eruv*in in Modern Areas 6-9 (1988); http://www.rockland*eruv*.org/pages/*eruv*-terms.php; http://www.*eruv*.org/; David A.M. Wilensky, Walking the Line: A tour of San Francisco's Jewish metaphysical geography (June 14, 2017) (available at https://www.jweekly.com/2017/06/14/walking-the-line-a-tour-of-san-franciscos-jewish-metaphysical-geography/); Rabbi Yirmiyohu Kaganoff Shlita, An *Eruv* Primer (available at http://rabbikaganoff.com/an-*eruv*-primer/). An *eruv* may be created several different ways. See previous sources, supra. *Eruvim* are often created using man-made materials, such as utility poles connected by overhead wires and with attachments demarcating the sides of each doorway, called "lechis." See previous sources, supra. When this method of construction is utilized, often, the existing utility lines act as the top of the doorway. See previous sources, supra.

Plaintiffs are all residents of Rockland County who live and worship in that county. See Amended Complaint ("Am. Compl.") ¶1. There is no allegation in the

Amended Complaint that any of the Plaintiffs require use of the *eruv* to walk, worship, reside or partake in *any* activity in Upper Saddle River. See generally Am. Compl.

Plaintiffs' planned USR *eruv* consists of two portions, both of which encompass parts of several Rockland County towns. The first section, which Plaintiffs allege is an "active" *eruv*, comes south and east across Mahwah, New Jersey and then north along the northwest potion of USR. The second, which they allege is an inactive *eruv*, connects comes south along the northwest portion of USR, across the center of USR into Montvale and then north back into Rockland County, New Jersey. See Am. Compl., ¶¶ 7 – 9; see also Rosen Decl. Ex A (containing a PowerPoint series of slides describing the *eruvin* including the residences of Plaintiffs and the location of synagogues).

Plaintiffs Friedman and Pinkasovits allege that they fall within the "active" *eruv*. See Am. Compl., ¶ 8, n. 1; see also Rosen Decl., Ex. A; Declaration of Plaintiff Yisroel Friedman ("Friedman Decl."), ¶8; Declaration of Plaintiff S. Moshe Pinkasovits ("Pinkasovits Decl."), ¶ 14. The active *eruv* runs along West Saddle River Road, Sparrowbush Road, Cherry Lane and Hillside Avenue. Id. Plaintiffs Sarah Berger, Moses Berger, Breuer, Rose and Shonfeld allege they do not fall within an active *eruv*, accordingly the *eruv* which connects into Montvale, New Jersey is inactive. See Am. Compl., ¶ 8, n. 1; see also Rosen Decl., Ex. A (map of

the *eruv*in); Declaration of Plaintiff Chaim Breuer ("Breuer Decl."), ¶ 8; Declaration of Plaintiff Sarah Breuer ("S. Berger Decl."), ¶ 8; Declaration of Plaintiff Moses Berger ("M. Berger Decl."), ¶ 8; Declaration of Plaintiff Tzvi Schonfeld ("Schonfeld Decl."), ¶ 8; Declaration of Plaintiff Yosef Rosen ("Rosen Decl."), ¶ 8. Accordingly, the inactive *eruv* runs along a small portion of West Saddle River Road (below Sparrowbush Road), Old Church Stone Road, a portion of East Saddle River Road, and across Weiss Road. Id. See map Rosen Decl. at Ex. A.

The lechis forming the religious boundary in USR are not like the black rubber strips that were stapled to the sides of utility poles in Tenafly, which were deemed "unobtrusive" and "typically unnoticeable to the casual observer." Tenafly Eruv Ass'n v. Borough of Tenafly, 309 F.3d 144, 168 (3rd Cir. 2002). The lechis in this case are made from half-inch thick white PVC plastic plumbing piping affixed to utility poles with silver metal brackets, making them visible and apparent. See Declaration of Patrick Rotella ("Rotella Decl.") ¶ 45; Exs. N – S and U –X to Ex. T (comparing lechis in Tenafly and USR); see also Am. Compl., ¶¶ 5, 29; Steinmetz Decl., ¶ 7. In fact, when USR Chief of Police Patrick Rotella sought to take a picture of the Tenafly lechis for comparison purposes, the Tenafly lechis were so difficult to locate that Chief Rotella required the assistance of the Tenafly Chief of Police, Robert Chamberlain, to locate them. See Rotella Decl. ¶ 45. In contrast, the lechis in USR are objectively prominent, visible, and easily located. See Rotella Decl., ¶¶

33-45, Exs. N - X. Moreover, there is more than one *lechi* on a utility pole where there is an intersection, and utility poles indicated with the lechis change sides of the road where there are large curves in the road. Id. ¶ 45, Exs. N - T, Ex. V.

In addition, the religious boundary formed by the lechis attached to the utility poles on Hillside Avenue and Castle Hill Court have a large, ungrounded metal wire strung from *lechi* to *lechi*. Id. at ¶ 45, Ex. R - S. In fact, the lechis in USR are meant to be apparent as they demarcate the religious boundary line that guides adherents to stay within the *eruv* when walking to worship. Id. at ¶ 45, Ex. J-T; see also Declaration of James Dougherty ("Dougherty Decl."), ¶22.

The Alleged License Agreement Is Invalid

Plaintiffs allege they have a "valid license" from the utility company that "owns and/or uses the utility poles in USR," see Am. Compl., ¶ 7,[6] but, in fact, that assertion is incorrect. The utility poles in USR are subject to control of O&R, Verizon, or a joint use agreement between the two utilities. Plaintiffs' agreement is only with O&R.

On or about June 1, 2015, Rabbi Steinmetz, representing an organization called the Vaad haEruv, entered into a License Agreement ("the License Agreement") with Rockland Electric Company, a subsidiary of Orange & Rockland

[6] See also Steinmetz Decl. ¶ 8 (describing utility company as "the organization that owns or uses *certain* utility poles in Upper Saddle River")(emphasis added).

Utilities, Inc., that provides for electric service to certain municipalities in Northern New Jersey. See Steinmetz Decl., ¶ 8, Ex. A.[7] The License Agreement provides that no lechis may be attached to the poles until the utility provides a specific endorsement ("the Endorsement"). Id. at Ex. A, Article II, A. The Endorsement was not issued until two years later, on or about July 13, 2017, See Endorsement attached to Steinmetz Decl. ¶ Ex. G, and work did not begin until after the Endorsement was received. See Steinmetz Decl., ¶ 10; Dougherty Decl., ¶ 14; Declaration of Theodore Preusch ("Preusch Decl."), ¶ 52. The License Agreement also states that there can be no assignment without consent. See Steinmetz Decl., ¶ 17, Ex. A.

Neither the Amended Complaint nor any of the Declaration filed by Plaintiffs in this matter indicate whether the license agreement was transferred to the Plaintiffs. Plaintiffs assert in their brief (PB at 10) that Vaad haEruv is "Plaintiffs' agent for the planning, organization, and construction of an *eruv*," but there is nothing in the record to support that assertion or even to explain what Vaad haEruv is. Rabbi Steinmetz and Vaad haEruv are not Plaintiffs and none of the actual Plaintiffs are parties to the License Agreement presented to the Court. There is no evidence that Vaad haEruv was ever acting on Plaintiffs' behalf, that the License Agreement was

[7] https://www.oru.com/en/about-us/company-information.

ever transferred to Plaintiffs, or that Vaad haEruv has any relationship to the individual Plaintiffs or the Bergen Rockland Eruv Association.

The O&R Endorsement provides the Licensee with a limited number of specific poles upon which to install lechis. See Steinmetz Decl., Ex. G. A comparison of the poles listed in the Endorsement and those with lechis already installed shows that almost all of the existing lechis were installed on poles that O&R did not have authority to license. Rather, *all* of the utility poles on which lechis have been installed are subject to a joint use agreement (the "Joint Use Agreement") from 1963 between Verizon Communications and O&R. See Declaration of David Gudino, Esq. ("Gudino Decl."), ¶¶ 3 – 6 and Ex. B (Joint Use Agreement); Preusch Decl., ¶¶ 74-75; Forbes Decl., Ex. A (List of utility poles with lechis). The Joint Use Agreement makes clear that the consent of both Verizon and O&R is needed before a valid license may be issued on these poles. The relevant section of the Joint Use Agreement, Page Ten, IV Relating to Attachment Rentals, Paragraph Twenty-Four states:

> [Verizon] may, with the concurrence of [O&R], grant permission to other communication companies or parties to attach communication wires or cables within [Verizon's] space reservation.
>
> ...
>
> **[O&R] may, with the concurrence of [Verizon], grant permission to other companies or parties using supply circuits to attach supply wires or cables within [O&R's] space reservation.**

See Joint Use Agreement, Ex. B to Gudino Decl. (emphasis added).

Further, the Joint Use Agreement states, in relevant part, at Page Fifteen, VI Relating to Joint Use Generally, Paragraph Forty-Two:

> If either of the parties hereto…
> On and subsequent to the effective date of this Agreement … all agreements or contracts covering the attachment by a third party of supply circuits to jointly used poles shall be made by [O&R], and all agreements or contracts covering the attachment by a third party of communication wires or cables to jointly used poles shall be made by [Verizon], **all such agreements or contracts for attachments to jointly used poles being subject to the approval of both parties hereto**.

Id. at ¶ 8 and Ex. B (emphasis added).

The Vaad haEruv, the Bergen Rockland Eruv Association, and the other individual Plaintiffs have not sought the approval of Verizon to use its poles, as is required by the Joint Use Agreement. See Gudino Decl. ¶ 9.

Further, O&R has not sought the concurrence and approval of Verizon for the Plaintiffs to use the poles identified in Exhibit A to install lechis or construct an *eruv*, in any part of Upper Saddle River. Id. at ¶ 10.

Even if Valid, Plaintiffs Exceeded the Authority of the License Agreement

A survey performed by USR Code Official Steven Forbes revealed that Plaintiffs have attached lechis to 109 utility poles in USR. See Forbes Decl., ¶¶ 12-13, Ex. A (utility pole list); Preusch Decl., ¶ 61. Yet the Endorsement, see Exhibit

G to Steinmetz Decl. reveals that the Vaad h*a*Eruv was approved to install lechis on only 40 utility poles, 36 of which are within USR. See Preusch Decl., ¶¶ 64 – 68, 72 - 73.[8] Further, two of those 36 utility poles could not be located by Forbes. See Forbes Decl., Ex. A; Preusch Decl., ¶¶ 72-73. Additionally, it recently came to USR's attention that proper consent was not obtained for the installation of a potentially dangerous ungrounded metal wire attached to the lechis and strung from utility pole to utility pole on Hillside. Rotella Decl., ¶ 38, ¶ 45c, Ex. R - S; Preusch Decl., ¶ 80. Further, USR has learned that the lechis installed in USR are made of ungrounded PVC plumbing grade pipes. See Forbes Decl., ¶¶16 – 17. It is not an intended use for PVC plumbing grade pipe to be placed on utility poles. Forbes Decl. ¶ 16. USR has also learned that the lechis make physical contact with Verizon's conduit. Id. Beyond the obvious risk that lightning might strike these lechis causing a fire and service disruption, physical unauthorized contact with Verizon's conduit could result in could cause damage to USR's utility service/system. As such, even if Plaintiffs' license were valid (and it is not), they have exceeded the authority of the license.

[8] More specifically, utility pole numbers 57170-38903, located at 194 Upper Saddle River Rd. and 57284-38918, located at 168 Upper Saddle River, are both within the Borough of Montvale, New Jersey. Id. at ¶ 65 - 66. Utility pole numbers 57307-38025 and 57308-39035 are at 1019 Chestnut Ridge Rd in Chestnut Ridge, New York. Id. ¶¶ 67 - 68.

As the Declarations of Preusch, Forbes, and Gudino make clear, Plaintiffs have attached lechis to a significant number of utility poles that require Verizon's consent under the Verizon Joint Use Agreement without getting Verizon's consent. See Preusch Decl., ¶ 62-77; see also Forbes Decl., Ex. A-B; Gudino Decl., ¶¶ 4, 6. Rosen Decl. Ex. H (Power Point depicting location of licensed poles, lechis and poles owned by Verizon and subject to the Joint Use Agreement). Most of these fall within the section of the *eruv* that Plaintiffs consider "active." See Preusch Decl., ¶ 71, 78 - 79; Forbes Decl., Ex. A.; Rosen Decl. Ex. H. Twenty-one of the utility poles licensed by O&R are actually owned by Verizon. See Steinmetz Decl., Ex. G; Gudino Decl., ¶ 4, Ex. A; Preusch Decl., ¶ 77; Forbes Decl., Ex. A; Rosen Decl. Ex. H.

The Borough Has Consistently Enforced Its Facially Neutral Ordinances Keeping Utility Poles Clear of Non-Utility Attachments

A. History of the Borough's Ordinances

The first evidence of regulation of signs on utility poles in USR appears to be in 1994. See Preusch Decl. ¶ 7. On or about November 9, 1994, the USR Code was amended to provide "no sign shall be attached to a tree, **pole**, building or structure." Id. at ¶ 8, Ex. A (emphasis added). Since November 4, 1985, the USR Code in general has defined a sign as "[a]ny inscription written, printed, painted or otherwise placed on a board, plate, banner or upon any material object or any device whatsoever which, by reason of its form, color, wording, activity or technique or

otherwise, attracts attention to itself, used as a means of identification, advertisement or announcement." Id. at ¶ 9, Ex. B (USR Code 150-3).

USR Code §150-21 prohibits the attaching of signs to utility poles. Id. at ¶ 10. On December 13, 1995, USR further clarified its regulation of utility poles when it passed Ordinance 19-95, revising USR Code §76-46, which states that "[n]o signs shall be permitted to be posted on such structures as **telephone poles**, street signs, trees or fences." Id. at ¶ 11, Ex. C (Ordinance 19-1995)(emphasis added).

In 2014, USR had a particularly challenging election year, during which there was a proliferation of political signs illegally attached to utility poles, street signs and other stationary items. Id. at ¶ 13; see also Declaration of Robert T. Regan, Esq. ("Regan Decl."), ¶ 10. At the time, the administration, mayor, and council all knew of the recent proliferation of illegal signage around USR as early as mid-summer, and perceived it to be inconsistent with the intent of the ordinances. See Preusch Decl., ¶ 14; Regan Decl., ¶ 11 The proliferation of signs was largely propelled by political controversies regarding a referendum to rezone a large tract in USR that some believed could be used to meet USR's fair housing obligations. Preusch Decl. ¶ 14; See also Regan Decl. ¶ 11. Political signs were continually (and illegally) posted on public property, despite the best efforts of Borough Police to remove them. See Preusch Decl., ¶¶ 14-15.

Following the contentious 2014 election season, a council person inquired of Administrator Preusch whether there was anything USR could do to more effectively limit signage on USR's utility poles during election season. Id. ¶ 15. Accordingly, Preusch researched the ordinances of other municipalities that might avoid a recurrence of the 2014 election year when so many signs were posted illegally and the police force and local officials had to remove the many signs pursuant to local law. Id. Mr. Preusch worked with Borough Attorney Robert T. Regan and eventually after examining various potential ordinances and ultimately agreed that the current Montvale ordinance would be a potential fit. Id.; see also Regan Decl., ¶ 18. In furtherance of drafting an ordinance that would address the Mayor and Council's concerns about posting signs, devices, and other matter on utility poles, given that the primary impetus was the proliferation of political signage, Regan researched free speech issues and ordinances from similarly-situated municipalities and took from that research that the ordinance needed to be content and viewpoint neutral. See Regan Decl., ¶ 18.

However, the effort to pass such legislation was sidetracked by other more pressing issues and was not revisited for almost a year. See Preusch Decl., ¶ 16; see also Regan Decl., ¶ 12. In late summer of 2015, anticipating an active 2015 election season and recalling the difficulties faced in 2014, the USR Borough Council and its counsel worked to update the Sign Ordinance via Ordinance 16-15. (referred to

herein as "Ordinance 16-15", or "§ 122-17G") See Preusch Decl., ¶¶ 17-18, Ex. D; Regan Decl., ¶ 12. The primary motivation behind Ordinance 16-15 was to address the proliferation of political signs on public property but it was drafted to include all signs regardless of content or viewpoint. See Regan Decl., ¶¶ 13-14.

The first reading of Ordinance 16-15 occurred at the September 3, 2015, regular meeting of the mayor and council. See Preusch Decl., ¶ 26, Ex. G; Regan Decl., ¶ 19, Ex. A. At the October 1, 2015 regular meeting of the mayor and council, Ordinance 16-15 was introduced for public comment; no public comment was made in response to the introduction of the ordinance. See Preusch Decl., ¶¶ 29 - 32, Ex. I; Regan Decl., ¶¶ 20 - 23, Ex. B.

B. History of Enforcement of These Ordinances

Unauthorized signs, devices or other matter are routinely removed to enforce USR's signage law. See Rotella Decl., ¶¶ 14 - 21; see also Declaration of David Lally ("Lally Decl."), ¶¶ 11 - 16; Declaration of Donald Hausch ("Hausch Decl."), ¶¶ 9 – 12. USR has consistently enforced its ordinances regulating utility pole use and has done so without regard to the content or viewpoint of the signs. See Preusch Decl., ¶¶ 33 – 38, 43 – 48, Ex. K - Q; Forbes Decl., ¶¶ 1 – 7; Dougherty Decl., ¶¶ 4 – 13; Rotella Decl., ¶¶ 14 – 21, Ex. A, C - I; Lally Decl., ¶¶ 11 - 16; Hausch Decl., ¶¶ 9 – 14; Declaration of Michael Spina ("Spina Decl."), ¶¶ 16, 19. Both the current and former Chiefs of Police consistently ensured that their officers removed

unauthorized signs and devices from utility poles. See Preusch Decl., ¶ 47; Rotella Decl., ¶¶ 7, 17-19, Ex. B; Spina Decl., ¶¶ 5 – 12, 17 – 18, Ex. B.

It has been the responsibility of USR's Police Department ("USR PD") and the Department of Public Works ("DPW") to enforce the prohibition on signs and devices and other materials on utility poles by removing unauthorized signs, devices and other materials placed on utility poles. See Preusch Decl., ¶¶ 39 – 42; Forbes Decl., ¶¶ 1 – 6; Dougherty Decl., ¶¶ 3 – 9; Rotella Decl., ¶¶ 4 – 12; Lally Decl., ¶¶ 7 - 10; Hausch Decl., ¶¶ 4 – 8; Spina Decl., ¶¶ 7 – 15. Both USR PD and DPW have consistently enforced the law in a content neutral manner.

If a sign, device or other matter that violated the law is within a USR PD officer's reach and can be safely removed by the officer, the unauthorized sign, device, or other matter would be removed by a USR PD officer without regard to the content of the sign or device. (See above Declarations cited). If a sign, device, or other matter that violates the law is out of reach or affixed in a manner that prevents and officer from safely removing the unauthorized sign, device, or other matter with his or her hands, then the officer would (1) notify the property owner and have the property owner remove the unauthorized sign device, or other matter; (2) the DPW would be notified and a DPW staff member would be dispatched to remove the unauthorized sign, device, or other matter using a truck or other device that could

safely reach the item. This is also done without regard to the content of the item. (See above Declarations cited, supra.).

If the owner of the removed unauthorized sign, device, or other matter is clear from the face of the item removed, then the owner is notified that the unauthorized sign, device, or other matter is at the USR PD. (See above Declarations cited, supra.). However, if the owner fails to retrieve the sign or device, it is discarded. (See above Declarations cited, supra). Several police and other USR personnel can remember numerous occasions when unauthorized signs, devices or other matter removed from USR utility poles were piled up behind the USR PD building, waiting to be picked up and disposed of by the DPW or retrieved by their owners. See Preusch Decl., ¶¶ 33 – 38, 43 – 48, Ex. K - P; Forbes Decl., ¶¶ 1 – 7; Dougherty Decl., ¶¶ 4 – 13; Rotella Decl., ¶¶ 14 – 21, Ex. A, C - I; Lally Decl., ¶¶ 11 - 16; Hausch Decl., ¶¶ 9 – 12; Spina Decl., ¶¶ 16, 19.

USR has consistently enforced and continues to consistently enforce this prohibition, even against extensions or divisions of its own government. See Preusch Decl., ¶¶ 43 – 44; Dougherty Decl., ¶¶ 9 – 11; Rotella Decl., ¶¶ 13, 15; Spina Decl., ¶¶ 12-13. For example, in or around 2013 or 2014, an employee of the USR Building Department caused the USR Fire Department's signs, advertising its car show fundraiser, to be removed from utility poles because they violated local law. Id. As far back as approximately twenty years ago, Preusch recalls the Lion's

Club - located just behind Borough Hall - had its signs, advertising its carnival, removed from utility poles. See Preusch Decl., ¶ 45.

USR officers undergo specific training as to removal of signs or devices on utility poles. Spina Decl. ¶¶ 10-12. Plaintiffs allege that enforcement has not been consistent and include five photographs purporting to be violations of the sign ordinance or indicative of lax enforcement in their Amended Complaint. See Am. Compl., Exhibit F; see also Pinkasovits Decl., Exhibit A; Forbes Decl., ¶ 7; Rotella Decl., ¶¶ 11 – 13 (as to these signs). The photographs appended to the Pinkasovits Decl. are the same photographs that were included in the original motion for a temporary restraining order filed by the Plaintiffs in July 2017. Rotella Decl., ¶¶ 11 – 13; Forbes Decl. ¶ 7. Once the enforcement officials in USR became aware of these alleged violations, they removed all five signs pursuant to local law. Rotella Decl. ¶¶ 11-13. The only reason those signs were not removed earlier is that enforcement officials were unaware of them. Id.

There Is No Connection Between Ordinance 16-15 and the Establishment of the *Eruv*

Plaintiffs' attempt to manufacture a theory of discriminatory intent despite the above facts and in an attempt to deflect attention from their failure to apply for permission to attach lechis to utility poles. The minutes of the closed session of the Mayor and Borough Council on August 18, 2015, reflect a brief discussion of a

license agreement between the Vaad haEruv and Orange and Rockland Utilities, Inc.:

> Mayor Minichetti said an agreement between Vaad Haeruv [sic] and Rockland Electric Co. allows for the installation of a *ERUV* system on poles owned by Orange and Rockland Utilities. She noted the attachments would be located on Weiss Road, Old Stone Church Road and Lake Street to Montvale, which the Licensee would inspect on a weekly basis to ensure they are intact. Mr. Preusch will contact Rockland Electric representative Michelle Damiani for further information.

See Buchweitz Decl., Ex. D.

The minutes of the closed meeting of the Mayor and Borough Council on September 3, 2015, reflect a statement by Borough Attorney Regan that the proposed sign ordinance would be brought to the regular meeting for a first reading. See Regan Decl., Ex. A; see also Preusch Decl., ¶¶ 23, 26, Ex. G.

The topics of lechis and *eruvin* were never discussed in connection with Ordinance 16-15. See Preusch Decl., ¶¶ 19 – 26; Regan Decl., ¶¶ 13 - 19. The first time Borough Administrator Mr. Preusch heard anything about a proposed *eruv* extension into USR was around August 10, 2015, during one of his regular consultations with Mayor Joanne Minichetti. The Mayor informed Mr. Preusch that she had heard about an alleged application made to O&R to place lechis on utility poles within USR. See Preusch Decl., ¶ 21. The Mayor asked Mr. Preusch to obtain information from O&R about the alleged license, and Mr. Preusch emailed Michelle

Damiani of O&R to follow up. Id. at ¶21 and Exhibit E (email exchange). However, Damiani failed to respond to the substance of his inquiry and forwarded his email to the O&R's Joint Use Department. Id. at ¶22, Ex. E. This inquiry was discussed very briefly and matter-of-factly at the executive session of the Mayor and Council and reflected in the August 18, 2015 closed meeting minutes in reference to the license agreement being reached between Vaad ha*Eruv* and O&R. See Buchweitz Decl., Ex. D; Preusch Decl., ¶ 23; Regan Decl., ¶¶ 16-17.

It was not until almost two years later, on June 12, 2017, that O&R responded substantively to Preusch's August 10, 2015 inquiry, wherein Ms. Damiani emailed Police Chief Rotella to inform him that the Vaad haEruv had been granted a license to place lechis on utility poles to create an *eruv* in USR. See Preusch Decl., ¶¶ 24 – 25.

Preusch and Regan recall that there was no further substantive discussion between the Mayor and Council concerning the *eruv* at that time, and that the Vaad haEruv and O&R never followed through to discuss the *eruv* further with USR. See Preusch Decl., ¶¶ 19 – 26, 30 - 31; Regan Decl., ¶ 13 – 19, 21 – 22. Neither Preusch nor Regan knows of any conversations or communications involving the Mayor and Council related to enacting Ordinance 16-15 to subvert or prevent the creation of an *eruv*. Id.

Moreover, the need for Ordinance 16-15 was made manifest during its introduction process. See Preusch Decl., ¶¶ 27 - 28. Despite diligence by the USR PD to remove signs on public property, the proliferation of signs on utility poles had reached such a point during the 2015 election season that O&R complained to USR about the number of political signs affixed to its utility poles due to the hazards they can introduce. Id. On or about September 29, 2015, the Borough received an email forwarded by Neil Winter of O&R reiterating the utility's longstanding policy of prohibiting the posting of signs on utility poles-- stating that "staples, tacks or nails… present a potential hazard to O&R employees working on the poles' among several other reasons that signs should not be placed on poles. Id. The Borough received that email between the first and second reading of Ordinance 16-15. Preusch Decl., Ex. H.

Preusch recalls that no one connected with the *eruv* introduced public comments or contacted the administration and/or the Mayor and Council to discuss, suggest amendments to, or stake out a position with regard to the ordinance. Id. at ¶¶ 30-31. Nor did any member of the public raise any issues with respect to the ordinance. Id.

Plaintiffs' Installed Lechis

Plaintiffs never obtained consent from USR to install the lechis on utility poles, as required by state and local law. USR's purported "consent" to the

installation of the lechis from an individual at the USR Police Department was a misrepresentations by Plaintiffs' representative, following by a misunderstanding among USR personnel. But none involved any request to the Council for waiver or approval.

Rabbi Steinmetz claims that he called the USR PD and informed the department that he "would be attaching lechis to utility poles in Upper Saddle River pursuant to [the O&R license] and that he was given approval. On the call, [he] agreed to the requests of the [USR PD] that [he] would only affix lechis in the presence of a flag man, and that [he] would place a sign on the road when working on the utility poles for traffic safety purposes." Steinmetz Decl. ¶9.

But USR retained the recording of that call and that's not what happened contrary to Plaintiffs' allegations, the recorded call confirms the following: On or about June 12, 2017, Rabbi Steinmetz called the USR police department without identifying himself. See Declaration of Robert Hyman ("Hyman Decl."), ¶¶ 3 –11, Ex. A (audio recording of call); Rosen Decl. Ex. I (transcript of call). On the call, Rabbi Steinmetz misrepresented the nature of his work, stating only that he was conducting "utility work," which, from the context, suggested that he was a contractor working for a utility company. Hyman Decl. ¶¶ 3-11. Further, after implying he was doing work for a utility company, Rabbi Steinmetz inquired whether he needed a police escort or a flagman. Id. Believing Rabbi Steinmetz was

working for a utility company, the USR PD dispatcher stated that a flagman was sufficient. Id.

On June 12, 2017, Vaad haEruv representatives came into USR and began installing lechis on utility poles within USR. See Preusch Decl., ¶ 52; Dougherty Decl., ¶¶ 14 - 16. USR Code Official James Dougherty, Scott Meier of O&R and members of the Vaad haEruv collectively determined that the best course of action would be for the Vaad haEruv members to discontinue their work while the Borough determined whether the Vaad haEruv could perform the installation of lechis consistent with local law and consistent with the type of consent the Vaad haEruv needed from USR to do so. See Preusch Decl., ¶ 53; Dougherty Decl., ¶¶ 19 - 20.

On June 15, 2017, Vaad haEruv representatives came to the Borough to discuss with Borough officials (Messrs. Forbes and Dougherty) what needed to be done for them to install lechis on utility poles to create an *eruv*. See Preusch Decl., ¶¶ 54, 55; Dougherty Decl., ¶ 21; Forbes Decl., ¶ 9. During this meeting, the Vaad haEruv representatives for the first time discussed the purpose of an *eruv* and the installation/inspection of lechis. See Dougherty Decl., ¶ 22; Forbes Decl., ¶10. Further, the Vaad haEruv representatives explained that lechis were placed on poles as a directional sign, which communicated to the observer the direction and contour of the outer limits of the religious boundary line. Dougherty Decl. ¶ 22. For example, if an observer approaches a three-way intersection and the *eruv* is intended

to go in only two directions, there would be lechis on two sides of the utility pole indicating the direction of the boundary. Id. Additionally, the Vaad haEruv representatives told Forbes that these are religious signals to believers. See Forbes Decl., ¶10, and Forbes determined that the lechis were "devices" under the Ordinance. Id.

During their conversation, Mr. Dougherty excused himself, without stating where he was going and spoke to Administrator Preusch about their requests. See Dougherty Decl., ¶ 23; see also Preusch Decl., ¶ 54. Dougherty explained to Preusch that representatives of the Vaad haEruv were inquiring what had to be done for the Vaad haEruv to install lechis on utility poles and complete an *eruv* that would encompass portions of USR. See Dougherty Decl., ¶ 23; Preusch Decl., ¶ 55.

At the conclusion of the conversation, Preusch advised Dougherty that he should refer the Vaad haEruv's representatives to the USR PD, as USR Code provides that USR PD was responsible for enforcing USR Code §122-17G. See Preusch Decl., ¶ 56. Mr. Dougherty understood Preusch as suggesting that the Vaad haEruv could proceed temporarily while the Borough considered the issue of whether the Vaad haEruv participated in a pre-construction meeting with the USR

PD and complied with the traffic safety requirements identified by the USR PD. See Dougherty Decl., ¶ 23. [9]

The Vaad haEruv was treated no differently than any other contractor operating within USR. See Rotella Decl., ¶ 30. On June 20, 2017, Police Chief Rotella met with Rabbi Steinmetz and Plaintiff Moshe Pinkasovits regarding work the Vaad haEruv intended to perform, consisting of attaching lechis to utility poles. Id. ¶¶ 24 - 25. This pre-construction meeting did not "authorize" or "condone" the installation of lechis to utility poles within USR. Id. ¶¶ 24 – 29. Indeed, Chief Rotella did not have the authority to authorize or condone such installation. Id. That must be done by the municipality itself. See Regan Decl., ¶¶ 24 – 27.

Rather, a pre-construction traffic-related meeting is held after a contractor fills out a Contractor Road Construction Information Form. See Rotella Decl., ¶¶ 24 – 29; see also Steinmetz Decl., Ex. B. One of the purposes of this form and meeting is for the contractor to fully appraise the USR PD of where work will take place, when, by whom, and what work will be performed. See Rotella Decl., ¶¶ 24 – 29. Another purpose of the Contractor Road Construction Information Form and pre-construction meeting is to inform the USR PD of where contractors are located so an officer does

[9] Subsequently, Preusch learned from the Borough Counsel that USR Code §122-17G and N.J.S.A. 48:3-19 require approval of the governing body before anything may be mounted to utility poles within the Borough.

not drive through an active construction site while responding to a call, if possible. Id.

On or about June 20, 2017, Chief Rotella believed in good faith that the Vaad haEruv was allowed to *temporarily* proceed with the installation of lechis *pending* further consideration by the USR. Rotella Decl., ¶ 23. Accordingly, a traffic safety pre-construction meeting was held. Id., at ¶¶ 23-24. Still, the Vaad haEruv had not followed the procedures required for any contractor, e.g., obtaining permission to do the work, in this case, attaching items to utility poles.

Subsequently, USR further considered the installation of lechis to utility poles and it concluded that the Vaad haEruv's installation of lechis to utility poles violated state statutes and local ordinances. See Rotella Decl., ¶ 31; Preusch Decl. ¶ 57. Accordingly, on July 19, 2017, the Contractor Road Construction Information Form issued on June 20, 2017, was voided, disallowing the contractor from obstructing traffic and operating within the roadways and rights of ways of USR. Rotella Decl., ¶ 32.

The Borough thereafter asserted its rights under the ordinance and statute. See Steinmetz Decl., Exs. C-F and ultimately agreed to a "standstill agreement regarding the so-called "active eruv," Buchweitz Decl., Ex. I, pending this Court's determinations. The supposed "unmasked animus" of a handful of attendees at the Borough Council meeting is completely irrelevant. (PB. at 16).

MOTION TO DISMISS

USR has no basis to deny Plaintiffs' religious beliefs or observances. USR does, however, require Plaintiffs, as with every other entity or individual, to obtain the requisite permissions from municipalities to affix any objects to USR's utility poles. To establish the *eruv* according to their beliefs, Plaintiffs seek to attach lechis, which could be pieces of plastic pipe or plastic strips, to utility poles to create this religious boundary. Under the law, Plaintiffs may not attach signs or other items to utility poles in USR without applying for a permit and obtaining the governing body's permission. They must also obtain permission from the utility company or companies that own the utility poles, which often have joint use agreements with other utility companies, whose consent would also be required. Instead of taking these necessary steps, Plaintiffs now assert that they have a "right to an *eruv*," regardless of governing law or ownership of the utility poles. See Am. Compl. ¶15. Having never applied for or obtained the permissions necessary from USR and *all* of the relevant utility companies, their claims are unripe and they lack standing to allege constitutional or statutory violations against the Borough.

Nevertheless, they bring this action for a determination that USR must, as a matter of law, permit them to attach items to utility poles in USR for the purpose of extending two *eruvin* into USR, regardless of the law. They seek this ruling, even

though on the face of their pleadings and the materials before this Court, it is clear that:

- **Plaintiffs' claims are not yet ripe**. They have not sought a municipal determination — as required under the laws of the State of New Jersey and USR — as to whether they may attach signs or devices to the utility poles that demarcate the *eruvin* and therefore do not have the requisite final determination by the municipality required to proceed to federal court.

    - The "consent" Plaintiffs allege to have received from O&R is invalid, as it violates a joint agreement with Verizon, which actually owns many of the poles upon which lechis have been installed. See Am. Compl. at ¶ 7 (alleging only that the O&R "Utility Company" that allegedly granted consent to the *eruv* "owns *and/or* uses the utility poles in USR," instead of alleging that they actually own the relevant poles or have authority to license their use). Moreover, these licenses are subject to N.J.S.A. 48:3-19, which requires "consent of the municipality for the use by a person of the poles of another person…" – without this consent they are necessarily void.
    - The "consent" Plaintiffs allege to have received from the Police Department is insufficient as a matter of law to satisfy the requirements of N.J.S.A. 48:3-19 and USR's facially neutral and neutrally-applied ordinance, Borough Ordinance 16-15, which prohibits the affixation of "materials" on utility poles in USR without USR's consent.
    - USR has opposed Plaintiffs' efforts to attach lechis to USR utility poles because of Plaintiffs failure to follow legal requirements. If and when Plaintiffs do pursue appropriate legal avenues, their application will be given due consideration. Until then, this lawsuit is unripe, and, therefore, this Court lacks subject matter jurisdiction.

- **Plaintiffs lack standing to bring their claims** because they fail to plausibly allege or demonstrate that their alleged harm is caused by the actions of USR, as opposed to their own actions or failure to act.

    - Plaintiffs' alleged harms are self-inflicted. *Their* failure to secure the requisite consent of USR and the relevant utilities caused any alleged harm, not any action taken by USR.

- Plaintiffs do not live in USR or go to synagogue in USR. See Am. Comp. at ¶¶ 2, 31, 35-38. They do not walk through Upper Saddle River to get to synagogue, because there are no synagogues in Upper Saddle River. Preusch Decl. ¶ 50.
- Plaintiffs fail to plausibly allege or demonstrate that they need an *eruv* built in USR to address their alleged harm. Plaintiffs' complaint states that they live outside of USR and go to synagogue outside of USR. There is no allegation that they walk through USR to get to religious services. Thus, there is no injury-in-fact fairly traceable to USR.

Plaintiffs' legal theory is that they are legally entitled to affix *lechis* to telephone poles wherever they want, whether they comply with facially-neutral local laws requiring municipal consent or get permission from the relevant authorities and entities. Nothing in the First Amendment justifies such a position.

LEGAL ARGUMENT

I. THE APPLICABLE STANDARD OF REVIEW

A plaintiff's standing to sue "is the threshold question in every federal case, determining the power of the court to entertain the suit." Warth v. Seldin, 422 U.S. 490, 498 (1975). USR moves to dismiss the Amended Complaint in its entirety under Rule 12(b)(1) because: (1) Plaintiffs' claims are not ripe and (2) Plaintiffs lack standing to bring them. The claims, as plead, are facially defective. However, since these arguments both raise questions about this Court's subject matter jurisdiction, this Court may also consider material outside of the pleadings to decide them, and no presumptive truthfulness attaches to Plaintiffs' allegations. As the Third Circuit has made clear:

> Because at issue in a factual 12(b)(1) motion is the trial court's jurisdiction - its very power to hear the case - there is substantial authority that the trial court is free to weigh the evidence and satisfy itself as to the existence of its power to hear the case. In short, no presumptive truthfulness attaches to plaintiff's allegations, and the existence of disputed material facts will not preclude the trial court from evaluating for itself the merits of jurisdictional claims. Moreover, the plaintiff will have the burden of proof that jurisdiction does in fact exist.

Mortensen v. First Fed. Sav. & Loan Ass'n, 549 F.2d 884, 891 (3d Cir. 1977). In analyzing the ripeness and standing issues, then, this Court can either (a) dismiss the claims based on the insufficiency of the pleadings or (b) look at material outside of the Amended Complaint and examine all evidence before the Court to ascertain its own jurisdictional basis. Either way, Plaintiffs have the burden of establishing subject matter jurisdiction. Id.

II. PLAINTIFFS' CLAIMS ARE NOT RIPE

The function of the ripeness doctrine is to determine whether a party has brought an action prematurely; it counsels abstention until such time as a dispute is sufficiently concrete to satisfy the constitutional and prudential requirements of the doctrine. Peachlum v. City of York, 333 F.3d 429, 430 (3d Cir. 2003).

Without explanation, Plaintiffs have failed to secure the consent of USR before affixing lechis on telephone poles in USR to establish an *eruv* in USR. It is difficult to understand why Plaintiffs have never sought such consent: it is required

by facially-neutral and facially-applied municipal ordinances.[10] Other citizens routinely apply for relief from USR's signage law. Regan Decl., ¶ 25.

Rather than seek consent from the municipality itself, Plaintiffs misleadingly allege that they received "consent" from (1) the Orange & Rockland utility company, which, in a very carefully worded paragraph of the Amended Complaint, is not even alleged to own (and does not own) all of the relevant utility poles[11] and (2) a single person at the USR Police Department, who is not alleged to have had (and did not have) authority to consent for the municipality. Neither of these purported "consents" is legally sufficient – both as a matter of pleading or after consideration of the considerable evidence on the issue. Without having asked for appropriate consent from the municipality to build the *eruvin*, Plaintiffs' claims are unripe and should be dismissed for lack of subject matter jurisdiction.

A. Plaintiffs' Have Not Even Attempted to Seek a Municipal Determination

Both state and local law require application for and granting of municipal consent before anything can be affixed to utility poles in USR. N.J.S.A. 48:3-19 provides that:

> **48:3-19. Municipal consent.** The consent of the municipality shall be obtained for the use by a person of the poles of another person unless

[10] N.J.S.A. 48:3-19; Ordinance 16-15.
[11] See Amended Complaint ¶ 7 (alleging only that the utility company "owns *and/or uses* the utility poles" in question) (emphasis added).

> each person has a lawful right to maintain poles in such street, highway or other public place.

N.J.S.A. 48:3-19. Plaintiffs plainly do not have "a lawful right to maintain [utility] poles" in the streets of USR. As such, they must apply and get "the consent of the municipality" – here, USR – before affixing anything to utility poles located in USR.

Likewise, Ordinance 16-15 (§122-17G of the Upper Saddle River Borough Code) provides that:

> It shall be unlawful to . . . G. Post or affix any sign, advertisement, notice, poster, paper, device, or other matter to any public utility pole, shade tree, lamppost, curb stone, sidewalk, or upon any public structure or building, except as may be authorized or required by law.

Ordinance 16-15. Plaintiffs cannot seriously maintain that they have a constitutional right to attach items to utility poles wherever they want without seeking the requisite consent from the municipality in question. The attachment of items to utility poles, even when part of construction of a religious boundary, is not "authorized or required by law." Accordingly, the Ordinance also requires the consent of USR in this case.

To abide by the law, Plaintiffs were required to send a letter to the Borough Clerk requesting that the Mayor and the Borough Council consider the application for Plaintiffs' intended use of the poles. See Regan Decl. ¶¶ 24, 26. The governing body could then have requested additional information regarding the request. Id. Ultimately, the Mayor and Council — or, in the alternative, the Joint Planning Board

and Board of Adjustment — would consider the application. Id. None of this happened here.

These state and local requirements are facially neutral. They are not directed at any specific group, speech, or items, religious or otherwise. They apply to *all* items affixed to telephone poles in USR and to *anyone* seeking to affix *anything*. Each requires formal consent from the municipality of USR before items may be lawfully affixed to any USR utility poles.

Plaintiffs have, from the beginning and throughout, ignored these requirements of law. Rather than seek consent from USR itself through the City Council or the Joint Planning and Zoning Board, Plaintiffs (1) sought consent from O&R, which does not even own most of the utility poles at issue and (2) had a brief interaction with the Police Department in USR after at first misrepresenting what they were doing in a call with the dispatcher. Hyman Decl. ¶¶ 3-11, Ex. A; Rosen Decl. Ex. I. Neither form of consent satisfies the legal requirements of N.J.S.A. 48:3-19 and Ordinance 16-15 that are prerequisites to making Plaintiffs' claims ripe for resolution before this Court at this time.

Rather than adhering to proper procedures for seeking a variance to the Ordinance to affix any "matter to any public utility pole," as would be required of anybody else seeking similar relief, Plaintiffs rely upon an O&R "license" as their primary basis for municipal consent. That argument fails, however, for two main

reasons: (1) consent from a utility company is insufficient to satisfy the requirements of N.J.S.A. 48:3-19 and Ordinance 16-15, both of which require application to the local government and municipal consent and (2) O&R is not even alleged to – and does not – own the majority of the utility poles in question. Obviously, neither Verizon nor O&R have the authority to act on behalf of USR itself.[12] Plaintiffs are required to pursue the legal due diligence under the law of the municipality and state and under the requirements of the utility companies. They have not here.

For the same reason, Plaintiffs' argument that they obtained the consent of the USR Police Department also fails. See Am. Compl. ¶ 54. A single person at the Police Department is not authorized to act on behalf of the municipality of USR. (That would be true even of the Chief of Police.) And Plaintiffs clearly either knew or should have known that was the case. See Abington Heights School District v. South Abington, 456 A.2d 722, 724 (Pa. Commw. Ct. 1983) ("The township can

[12] This is reinforced by Verizon N.Y., Inc. v. Vill. of Westhampton Beach, 2014 U.S. Dist. LEXIS 84479 (E.D.N.Y 2014). While the Verizon Court found that there was no basis for the municipality to prevent Verizon from entering into a license to allow the construction of an *eruv*, it do so on the bases that *there was no ordinance in place preventing the placement of* lechis, unlike in this matter. Here, both N.J.S.A. 48:3-19 and Ordinance 16-15 require the municipalities' consent to "affix" something to or otherwise "use" USR's utility poles. Verizon makes clear that utility consent is trumped by a valid ordinance preventing the placement of lechis without municipal consent.

only be bound by the formal actions of the Board of Supervisors"); Wilson v. West Hanover Township, 43 Pa. D. & C.3d 322, 330 (Pa. Com. Pl. 1986).

In any event, the recorded interaction between Plaintiffs and the Police Department reveals that Plaintiffs did not even obtain the insufficient "consent" that they allege they did. As noted above, Plaintiffs misleadingly fail to identify themselves as members of an *eruv* association, never ask what they need to do to get permission to attach items to utility poles, and merely ask the Police a generic question and get a generic response. Hyman Decl., ¶¶ 3-11, Ex. A, Rosen Decl. Ex. I. This, like the so-called "consent" from the utility company that does not own the majority of utility poles in question, is legally insufficient and does not come close to constituting consent for the municipality. See Goldfine v. Kelly, 80 F. Supp.2d 153, 160 (S.D.N.Y. 2000)("Informal efforts to gain approval for land development are insufficient, by themselves, to constitute final government action."); Celentano v. W. Haven, 815 F. Supp. 561, 569 (D. Conn. 1993)("An unsuccessful effort to negotiate an informal resolution of a zoning dispute with a local agency, however, does not, by itself, constitute final government action).

Without an application and a final decision from the local government, Plaintiffs' claims are not ripe for determination by this Court. Williamson Cty. Reg'l Planning Comm. v. Hamilton Bank, 473 U.S. 172, 186-90 (1985) (claim is not "ripe" without a final decision from the local authority as to the nature and extent of the

request); Sameric Corp. v. City of Philadelphia, 142 F.3d 582, 597 (3d. Cir. 1998) (Noting "again … the importance of the finality requirement and our reluctance to allow the courts to become super land-use boards of appeals"); see also Acierno v. Mitchell, 6 F.3d 970, 974-75 (3d Cir. 1993). This comports with the ripeness test in Abbott Labs v. Gardner, 387 U.S. 136, 149 (1967), as to "whether the issues presented are fit for review," i.e., exhaustion of administrative remedies. Courts have repeatedly cautioned that land use disputes are matters of local concern suited for local resolution. Congregation Kol Ami v. Abington Township, 309 F.3d 120 (3d Cir. 2002); Taylor Inv., Ltd. v. Upper Darby Township, 983 F.2d 1285, 1291-1292 (3d. Cir. 1993). While Williamson dealt with zoning ordinances, its test has been applied "even where the attack is premised on substantive due process, procedural due process, and equal protection." See Taylor, 983 F.2d 1292; see also Murphy v. New Milford Zoning Comm., 402 F.3d 342 (2d Cir. 2005)(applying the final decision test for ripeness to as-applied RLUIPA claims and as-applied First Amendment Free Exercise claims); E. End *Eruv* Ass'n v. Westhampton Beach, 828 F. Supp. 2d 526, 537-538 (S.D.N.Y. 2011)(requiring a final decision before the Court would consider town's refusal to allow the erection of an *eruv*).

The decision in E. End Eruv Ass'n is particularly instructive and directly analogous to the matter at bar. There, Plaintiffs sought to install an *eruv* in three adjoining municipalities for a synagogue in one of them. While the Plaintiffs sought

licenses from various utility companies to affix lechis to the utility poles, neither the Plaintiffs nor the utility companies sought approval from the township of Southampton. Id. at 537. As such, the Court determined that it had no subject matter jurisdiction over Plaintiffs' claims related to Southampton because they were unripe. Id. at 538. The Court stated that "[u]nder the circumstances, it appears that the Sign Ordinance[13] is at least arguably applicable to the lechis, such that whether the sign ordinance applies to the attachment of lechis to utility poles in Southampton should be an issue for Southampton in the first instance." Id. at 537. For these same reasons, Plaintiffs' claims must be dismissed as they are not ripe for this Court's consideration.[14]

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[13] Southampton's Sign Ordinance prohibited signs being placed in public right-of-ways, including on utility poles, without a permit. E. End *Eruv* Ass'n., at 532.

[14] Finally, any claim that it would be futile to request municipal consent in this case is without merit. The Third Circuit does not recognize any futility exception to the ripeness doctrine in land use cases, such as this one. See Holland Transp., Inc. v. Upper Chichester Twp., 75 Fed. Appx. 876, 878 (3d Cir. 2003). And even if it did, Plaintiffs would be unable to satisfy it here, as they have failed to make even "one meaningful application" for municipal consent to construct an *eruv* in USR. See, e.g., DLX, Inc. v. Kentucky, 381 F.3d 511, 525 (6th Cir. 2004)(futility exception "only applies where a landowner has submitted at least one meaningful application"). That USR has rejected Plaintiffs' improper attempts to sidestep the law and build an *eruv* without obtaining the requisite legal consent from USR, does not mean that a proper application for consent would not be given due consideration. As such, there is no basis to conclude that an appropriate request for consent would be futile.

III. PLAINTIFFS LACK STANDING TO BRING THEIR CLAIMS

Constitutional standing is a core threshold matter for justiciability. Article III of the Constitution "limits the judicial power of the United States to the resolution of 'Cases' and 'Controversies.'" Hein v. Freedom from Religious Foundation, Inc., 551 U.S. 587, 597-98, 127 S. Ct. 2553, 168 L. Ed. 2d. 424 (2007) (quoting DaimlerChrysler Corp. v. Cuno, 547 U.S. 332, 342, 126 S. Ct. 1854, 164 L. Ed. 2d 589 (2006)).

Plaintiffs lack Article III standing in this case because they do not plausibly allege any injury-in-fact that is traceable to the actions of USR. Rather, any injury that they purportedly suffer is a result of their failure to obtain the needed permissions from the local government and utility companies. Similarly, because Plaintiffs do not plausibly allege that their religious practice requires *eruvin* in USR (as opposed to where Plaintiffs live and pray), any alleged harm flows from Plaintiffs' own actions or failure to act.

To satisfy Article III's standing requirements, a plaintiff must show that:

> (1) it has suffered an 'injury in fact' that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical;
>
> (2) the injury is fairly traceable to the challenged action of the defendant; and
>
> (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.

Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc., 528 U.S. 167, 181, 120 S. Ct. 693, 145 L. Ed. 2d 610 (2000) (citing Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-561, 112 S. Ct. 2130, 119 L. Ed. 2d 351 (1992)). The burden of demonstrating standing is on Plaintiffs, and thus, "to survive a motion to dismiss for lack of standing, a plaintiff 'must allege facts that affirmatively and plausibly suggest that it has standing to sue.' Speculative or conjectural assertions are not sufficient." Finkelman v. NFL, 810 F.3d 187, 194 (3d Cir. 2016)(citations omitted). Plaintiffs here have failed to do so thereby necessitating dismissal of their Amended Complaint.

A. Plaintiffs Fail to Plausibly Allege Injury-In-Fact

To satisfy the injury-in-fact requirement of Article III standing, a plaintiff's injury "must be concrete in both a qualitative and temporal sense." Reilly v. Ceridian Corp., 664 F.3d 38, 42 (3d Cir. 2011). Thus, "the complaint must allege an injury . . . that is 'distinct and palpable,' as distinguished from merely 'abstract' and the alleged harm must be actual or imminent, not 'conjectural' or 'hypothetical.'" Id. Accordingly, a plaintiff "lacks standing if his 'injury' stems from an indefinite risk of future harms inflicted by unknown third parties." Id.

First, for the reasons outlined above, any injury Plaintiffs have allegedly suffered *vis-à-vis* the USR portion of the *eruvin* has been self-inflicted due to Plaintiffs' failure to apply for or obtain the relevant consents to attach lechis to utility

poles in USR. Further, Plaintiffs do not allege that applying for appropriate approvals violate their religious beliefs and, therefore, USR's requirement of participation in the system to obtain approval like any other citizen does not impose an injury.

Second, Plaintiffs allege that they have been harmed because, without both the completed *eruv* and the proposed expanded *eruv* into parts of USR, "a significant number of residents living along the New York/New Jersey border — including Plaintiffs Sarah and Moses Berger, Brewer, Rosen, and Schonfeld — will continue to fall outside of the *Eruv*," see Am. Compl. ¶ 11, and will allegedly be "unable to push or carry any objects . . . outside their homes on the Sabbath and Yom Kippur." Id. at ¶¶ 31-39. This allegation is implausible. Plaintiffs live and work outside of USR, across the New York border. See Am. Compl. ¶¶ 2, 35-38. Preusch Decl. ¶ 50 (no synagogues located in USR). They claim they need to be within a completely constructed *eruv* that encompasses their residences and synagogues, so they may push and carry certain items on the Sabbath and High Holidays. Id. They do not, however, allege that they live in, pray in, or walk through USR to get to services. Although Plaintiffs allege that they are harmed or will be harmed if there is no *eruv* extending into USR, that notion is inherently implausible. It is not clear why an *eruv* completed in Rockland County, where Plaintiffs live and worship, would not fully serve their needs.

Despite this reasonable solution to Plaintiffs' alleged problem, the Amended Complaint offers absolutely nothing. Although Plaintiffs' own declarations concede that "[a]n *eruv* may be established in a number of ways" and that attaching lechis to utility or telephone poles is only one way,[15] they nowhere allege that they cannot build an *eruv* (using utility or telephone poles or another acceptable method) in Rockland County, where Plaintiffs reside, that would adequately address their concerns. In fact, they do not allege that they have even explored this option. Because Plaintiffs do not allege that they cannot build an *eruv* in Rockland County that will address their concerns, any purported injury is entirely speculative and self-inflicted, depriving Plaintiffs of Article III standing.[16]

B. Plaintiffs Fail to Plausibly Allege But-For Causation

For the same reasons, Plaintiffs cannot satisfy the "but-for causation" element of Article III standing. "This element requires the alleged injury to be 'fairly traceable to the challenged action of the defendant, and not the result of the independent action of some third party not before the court.' This requirement is 'akin to 'but for' causation' in tort and may be satisfied "even where the conduct in

[15] See Steinmetz Decl. ¶ 7.

[16] Plaintiffs' failure to even *explore* this option provides an independent ground for dismissal on ripeness grounds as well. Without demonstrating the lack of the viability of this alternative, Plaintiffs have no basis to allege injury-in-fact, and hence, no basis to say that there is an actual controversy at this point.

question might not have been a proximate cause of the harm." An 'indirect causal relationship will suffice,' provided that 'there is a 'fairly traceable connection between the alleged injury-in-fact and the alleged conduct of the defendant.'" Finkelman, at 193-94 (citations omitted).

Plaintiffs' alleged harm cannot plausibly be traced to any action (or inaction) by USR. Plaintiffs affirmatively created their own harm by failing to obtain the requisite permissions from the government and the relevant utility companies. They installed lechis on USR utility poles without the requisite municipal consent in violation of New Jersey and local law. To that end, Plaintiffs' *own* actions caused their alleged harm, not the fact that USR requires permission before attaching items to utility poles.

Plaintiffs also do not allege that they live in, pray in, or enter USR to attend religious services, rendering meaningless any harm arising from the requirement of application in URS and even if they were not accorded permission to attach items to utility poles in USR.

If Plaintiffs' current allegations are sufficient to allege but-for causation, there would be no logical stopping point. Could Plaintiffs extend the *eruv* to someplace like Princeton so they could purportedly take certain actions on the Sabbath and Yom Kippur in New York? Obviously not. But the allegations here are no different. Plaintiffs do not plausibly allege that they *need* an *eruv* in USR. Their real claim is

that they need an *eruv* that extends to their homes and synagogues in New York. USR's failure to approve the *eruv* without any proper request for consent has not caused Plaintiffs any actual harm because Plaintiffs do not allege that they cannot build an *eruv* in Rockland County that will avoid the alleged harms entirely.

Courts must reject standing for Plaintiffs whose harm is self-inflicted, as here. See Clapper v. Amnesty Int'l USA, 568 U.S. 398, 415 (2012)("Respondents cannot manufacture standing merely by inflicting harm on themselves…."); Campeau v. Soc. Sec. Admin., 575 Fed.Appx. 35, 38 (3d Cir. 2014) (plaintiff lacked standing in suit against Soc. Sec. Admin. in alleging that it failed to properly treat his request to amend, and to provide him access to such records as he could not use, inter alia, the self-imposed travel expenses as injury, and if an injury, same was not fairly traceable to the Government's purported activity); Kaymack v. AAA Mid-Atlantic, Inc., 2012 WL 3887040 (E.D. Penn. 2012) (plaintiff challenged AAA's practice of backdating renewal memberships to the date of expiration, rather than the actual date of renewal claiming a loss of coverage as well as a dollar loss for the 16 day period in between such time frame for plaintiff; and the court dismissed her action holding that she lacked standing, due in part to her failure to use her card for such period without any prevention other than herself [this being the self-inflicted injury]).

In Warth v. Seldin the Supreme Court considered – and found lacking -- the standing of low and moderate income plaintiffs who asserted claimed that the town

of Penfield's zoning practices, including allegedly unreasonable requirements related to lot size, floor area, and habitable space, had prevented them from acquiring residential property in the town. Id. at 496. None of the Plaintiffs had ever lived in Penfield, though each claimed that he desired to and had tried to locate housing in Penfield within his family's financial means, without success. Id. at 495. The Supreme Court determined that these Plaintiffs lacked standing because their harm was not "but for" Penfield's zoning practices:

> We may assume that [the zoning officials] actions have contributed, perhaps substantially, to the cost of housing in Penfield. ***But there remains the question whether plaintiffs' inability to locate suitable housing in Penfield reasonably can be said to have resulted, in any concretely demonstrable way, from respondents' alleged constitutional and statutory infractions.***

Id. at 504 (emphasis added). In other words, Plaintiffs' harms were not fairly traceable to the actions of the Penfield zoning ordinances, even though they may have contributed to the allegedly prohibitive cost of Penfield housing.

C. Redressability

The third and final prong to establish constitutional standing is the concept of redressability. Redressability means that "it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." Friends of the Earth at 181. Plaintiffs cannot satisfy this prong either. Even if Plaintiffs were to prevail on their demand for permission without having to ask for it in USR, the *eruv*

they seek extends to several municipalities and permission in USR will not achieve what they seek: an expansive *eruv* across several communities.

In addition to filing suit against USR, Plaintiffs have filed almost identical lawsuits in this District against the neighboring towns of Mahwah and Montvale, which have denied the Rockland *eruv* expansion into these municipalities. See Civil Docket numbers 2:17-cv-06054 (v. Mahwah, filed 8/11/17) and 2:17-cv-08632 (v. Montvale, filed 10/18/17). Without the other portions of the two *eruvin*, the USR portions are incomplete and thereby defective, according to Plaintiffs' allegations. Because Plaintiffs have not alleged any facts in this case supporting their right to construct the *eruvin* in Mahwah and Montvale, they cannot demonstrate that relief in this case will redress the alleged harms.

First, USR cannot redress any harm relative to the *eruv* and lechis because it has never received a meaningful application. Second, USR cannot redress the rejections by the other relevant communities.[17] USR also may not unilaterally grant immunity to the laws of USR or the state of New Jersey without violating the state and federal constitutions, under due process and separation of church and state theories. Board of Education of Kiryas Joel v. Grumet, 512 U.S. 687 (1994).

Moreover, because Plaintiffs have failed to obtain consent from Verizon to place lechis on the utility poles owned by Verizon, (Gudino Decl. ¶¶ 9-10), it is clear

[17] The pendency of those proceedings also argues against ripeness in this case.

that a favorable decision in this case will not necessarily address the alleged harm. Without additional consent from Verizon, the lechis still cannot be placed on the relevant utility poles at issue here.

OPPOSITION TO MOTION FOR PRELIMINARY INJUNCTION

LEGAL ARGUMENT

I. PRELIMINARY INJUNCTION STANDARD

To succeed on a preliminary injunction, a moving party must demonstrate, in the first instance: "(1) a reasonable probability of eventual success in the litigation, and (2) that it will be irreparably injured . . . if relief is not granted . . ." Reilly v. City of Harrisburg, 858 F.3d 173, 176 (3d Cir. 2017) (citation omitted). "[A] a movant for preliminary equitable relief must meet the threshold for the first two "most critical" factors: it must demonstrate that it can win on the merits (which requires a showing significantly better than negligible but not necessarily more likely than not) and that it is more likely than not to suffer irreparable harm in the absence of preliminary relief. If these gateway factors are met, a court then considers the remaining two factors [the possibility of harm to other interested persons from the grant or denial of the injunction, and the public interest] and determines in its sound discretion if all four factors, taken together, balance in favor of granting the requested preliminary relief." Id. at 179.

Citing Reilly (which, in turn, quoted Ashcroft v. ACLU, 542 U.S. 656, 666 (2004)), Plaintiffs attempt to shift this burden to USR, arguing that "[i]n First Amendment cases such as this one," the burden rests with government. See PB at 17-18 (citing Reilly, 858 F.3d at 176). But Reilly permits no such thing. The standard quoted in Reilly (based on Ashcroft) is applied only in cases involving content-based restrictive ordinances because such restrictions on speech are "presumed invalid." United States v. Stevens, 533 F.3d 218, 232 (3d Cir. 2008). Application of that standard here, where there is no such statute, is without merit.[18]

As such, the burden rests with Plaintiffs to establish these four standard elements to prevail on their preliminary injunction motion. Importantly, because a preliminary injunction is "an extraordinary and drastic remedy," the burden is high – "[it] should not be granted unless the movant, by a clear showing, carries the burden of persuasion." Mazurek v. Armstrong, 520 U.S. 968, 972 (1997). Given this difficult standard, Plaintiffs have, for all of the reasons set forth therein, unequivocally failed to sustain their burden and their request for injunctive relief must be denied.

[18] In any event, even if Reilly did apply, under Reilly, "the moving party still retains the burden of proof in two principal ways: it must prove that the law restricts protected speech and that it will suffer irreparable harm." Id. at 180 n. 5. Plaintiffs cannot meet either burden.

A. No Likelihood of Success on the Merits

1. Plaintiffs Do *Not* Have a Constitutional Right to Establish *Eruvin* As they Deem Fit.

Plaintiffs' initial assertion, that they have an unfettered right to establish an *eruv* wherever they like, is quite remarkable. First, and it cannot be emphasized enough, it is legally false; if a facially neutral and generally applied law, such as Ordinance 16-15, prohibits the installation of an *eruv*, then pursuant to Employment Div. v. Smith, 494 U.S. 872, 879 (1990), confirmed by Tenafly, there is *no* right, constitutional or otherwise, for Plaintiffs to do so. By lifting language without context from prior matters (while ignoring the portions that significantly undermine their case) that have considered *eruvin* to fabricate a fictitious bright line rule of law that *eruvin* cannot be constitutionally barred, *in any instance*, is overtly contrary to all relevant legal precedent and it is patently disingenuous for Plaintiffs to represent otherwise.

As the Third Circuit has made clear, if construction of an *eruv* is prohibited by "a law [that] is 'neutral' and 'generally applicable,' and burdens religious conduct only incidentally, the Free Exercise Clause offers no protection." Tenafly at 165 (citing Smith). That is precisely the case here. USR has a facially-neutral, generally applied ordinance that prohibits putting unauthorized signs, devices or other matter on utility poles without municipal consent. See, e.g., Ordinance 16-15.

Second, and maybe even more importantly, this willingness to assert a demonstrably false legal proposition from the outset (including with respect to the erroneous legal standard asserted by Plaintiffs) is a foreshadowing of Plaintiffs' less than forthright actions, from their deceptive and misleading factual allegations in the Amended Complaint, to their slanderous declarations of bias on the past of USR and its residents, to their frequently false legal assertions in this request for a preliminary injunction. It also provides a unique insight into Plaintiffs' collective mindset – we can do what we want, where we want, the rules be damned. Unfortunately for Plaintiffs, however, the laws of this country do not provide a universal, inerrant right to establish *eruvin* wherever and whenever and for Plaintiffs to suggest otherwise is a stain on their credibility as a whole in this litigation.

2. USR's Borough Ordinance 16-15 is Constitutional

Plaintiffs bend over backwards to argue that this case should be governed by strict scrutiny, but the applicable law as well as the underlying facts do not support application of that standard. Since Smith, the Supreme Court has made clear that neutral, generally applicable laws do not trigger strict scrutiny, *even if that law incidentally burdens religion.* On the other hand, the Court has "never held that an individual's religious beliefs excuse him from compliance with an otherwise valid law prohibiting conduct that the State is free to regulate." Id. at 878-79.

Ordinance 16-15 is neutral and generally applicable. It provides:

> It shall be unlawful to: Post or affix any sign, advertisement, notice, poster, paper, device or any 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.

In Tenafly, the Third Circuit found a virtually identical Tenafly ordinance[19] to be facially neutral and generally applicable. Tenafly, supra, 309 F.3d at 167 ("Ordinance 691 is neutral and generally applicable"). Once that determination is made, and it has been demonstrated that the ordinance has been generally applied, "the right of free exercise does not relieve an individual of the obligation to comply...." Smith, 494 U.S. at 879.

a. USR Borough Ordinance 16-15 is Facially Neutral

"A law is 'neutral' if it does not target religiously motivated conduct either on its face or as applied in practice." Blackhawk v. Pennsylvania, 381 F.3d 202, 209 (3d Cir. 2004), citing Church of Lukumi Babalu Aye v. City of Hialeah, 508 U.S. 520 at 533-40, 113 S. Ct. 2217, and Tenafly, 309 F.3d at 167. "To determine the object of a law, a court must begin within its text, for the minimum requirement is that a law not discriminate on its face." Lukumi, 508 U.S. at 533. The Lukumi Court provided specific guidance in this regard: "[a] law lacks facial neutrality if it

[19] Tenafly Ordinance 691 as set forth in Tenafly, stated: "No person shall place any sign or advertisement, or other matter upon any pole, tree, curbstone, sidewalk or elsewhere, in any public street or public place, excepting such as may be authorized by this or any other ordinance of the Borough." Tenafly, 309 F.3d at 151.

refers to a religious practice without a secular meaning discernable from the language or context." Ibid.

Ordinance 16-15 easily satisfies the test for facially neutrality. It makes it unlawful *for any person* to "affix" any "materials" to an assortment of structures including, specifically, utility poles. The ordinance makes no reference to any particular group or category, religious or otherwise. It is "uniformly imposed without allowing individualized exemptions." Blackhawk, 381 F.3d at 212 (finding a permitting requirement not neutral on its face since it contained individualized, discretionary exemptions, yet no religious exemption). Notably, Plaintiffs *themselves* do not dispute that Ordinance 16-15 is facially neutral (asserting, instead, that it is vague, was enacted with discriminatory intent, see PB at Point II.A.2., and that it was selectively enforced, id. at Point II.A.3).

b. Discriminatory Intent is Legally Irrelevant and Not Present Here

Although Ordinance 16-15 is facially neutral and, as demonstrated below, generally applicable, Plaintiffs nonetheless contend that strict scrutiny applies, allegedly pursuant to Lukumi, because "the evidence shows that USR's Borough Council passed the Ordinance with the specific, discriminatory intent targeting the *eruv*." See PB at Point II.A.2. There are two problems with this argument: it is wrong on the law and it is wrong on the facts.

As a matter of law, this conclusion is wholly inaccurate based on the various opinions which comprise Lukumi, and as confirmed by the Supreme Court in a 2016 decision:

> [It] is an open question whether a court considering a free exercise claim should consider evidence of individual lawmakers' personal intentions, as is done in the equal protection context. Compare Lukumi, 508 U.S., at 540, (opinion of KENNEDY, J.) (relying on such evidence), with *id.*, at 558, 113 S. Ct. 2217, 124 L. Ed. 2d 472 (Scalia, J., concurring in part and concurring in judgment) (rejecting such evidence).

Stormans, Inc. v. Wiesman, 136 S. Ct. 2433, 2437 n.3, 195 L.Ed.2d 870, 874 (2016). In Lukumi, the Court considered whether an ordinance that prohibited animal sacrifice violated the Free Exercise rights of the Church's congregation, which practiced the Santeria religion. Upon notice that the Church had leased property and intended to establish a house of worship the city council held an emergency meeting, at which time a resolution was adopted noting that the "City reiterates its commitment to a prohibition against any and all acts of any and all religious groups which are inconsistent with public morals, peace or safety." Id. at 526. Subsequently, the City adopted three ordinances addressing religious animal sacrifice. Id. at 527. The ordinance defined "sacrifice" as "to unnecessarily kill, torment, torture or mutilate an animal in public or private ritual not for the primary purpose of food consumption." Ibid.

The Lukumi Court applied the Smith test: if a law is neutral and of general applicability, strict scrutiny does not apply. Id. at 531. In considering facial neutrality, the Court agreed that the terms "sacrifice" and "ritual" had "strong religious connotations," but that because the ordinance defined "sacrifice" in secular terms, without reference to religion, the argument was "not conclusive" as to facial neutrality. Id. at 534. The Court then looked to the resolution, which specifically referenced religion, and "the effect of the law, which is the strong evidence of its object" -- the only conduct subject to the ordinances was the Santeria religion. Id. at 535. For these reasons, the Court determined that the ordinances were not neutral and that strict scrutiny applied. Id. at 542.

While Justice Kennedy delivered the opinion of the Court for much of the decision, he did not do so with respect Part II-A-2, id. at 521, the portion upon which Plaintiffs premise their assertion that an alleged discriminatory intent renders an ordinance facially unconstitutional. See PB at p. 23. In Part II-A-2, Justice Kennedy opined that evidence of the historical background leading to the ordinances enactment, including "contemporaneous statements made by members of the decision-making body," could be considered, much as they are in equal protection cases. Id. at 540. Important for this Court's analysis is Justice Scalia's partial concurrence in Lukumi which states:

> I do not join in that section because it departs from the opinion's general focus on the object of the *laws* at issue

> to consider the subjective motivation of the *lawmakers,* i.e. whether the Hialeah City council actually *intended* to disfavor the religion of Santeria. As I have noted elsewhere, it is virtually impossible to determine the singular "motive" of a collective legislative body, see, *e.g.,* *Edwards v. Aguillard*, 482 U.S. 578, 636-639, 96 L. Ed. 2d 510, 107 S. Ct. 2573 (1987) (dissenting opinion), and this Court has a long tradition of refraining from such inquiries, see, *e.g.,* *Fletcher v. Peck,* 10 U.S. 87, 130-131, 3 L. Ed. 162 (1810) (Marshall, C.J.); *United States v. O'Brien*, 391 U.S. 367, 383-384, 20 L. Ed. 2d 672, 88 S. Ct. 1673 (1968).
>
> Perhaps there are contexts in which determination of legislative motive *must* be undertaken. See, *e.g.,* *United States v. Lovett*, 328 U.S. 303, 90 L. Ed. 1252, 66 S. Ct. 1073 (1946). But I do not think that is true of analysis under the First Amendment (or the Fourteenth, to the extent it incorporates the First). See *Edwards, supra*, at 639 (SCALIA, J., dissenting). The First Amendment does not refer to the purposes for which legislators enact laws, but to the effects of the laws enacted: "Congress shall make no law . . . prohibiting the free exercise [of religion] . . . ." This does not put us in the business of invalidating laws by reason of the evil motives of their authors.

Id. at 558 (emphasis added in original). The Supreme Court has since confirmed that there remains an "open question" as to whether lawmakers' subjective intentions should be considered. Stormans, 136 S. Ct. at 2437 n.3.

Thus, Plaintiffs' blanket conclusion that an alleged discriminatory intent equates necessarily with strict scrutiny analysis is plainly false. Tellingly, the Tenafly Court, too, shied away from peaking behind the curtain by stating that "[i]n determining the appropriate standard to apply, we do not believe it necessary to

consider the subjective motivations of the Council members who voted to remove the *eruv*" because the "objective effects of the Borough's [selective] enforcement of Ordinance 691 are sufficient for us to conclude that it is not being applied neutrally against the *eruv*." Tenafly, 309 F.3d at 168, n.30.

Moreover, the cases erroneously cited by Plaintiffs in support of this proposition all deal with equal protection claims, which necessarily require proof of intent and, therefore, are inapplicable to the instant analysis. As such, for these reasons, Plaintiffs' analysis in this regard necessarily fails. There is plainly no basis for Plaintiffs' claims that strict scrutiny must apply – regardless of whether the ordinance is facially neutral and generally applicable – *only* because of a discriminatory intent.

In any event, there is overwhelming evidence that there is no discriminatory intent here. Plaintiffs' solely predicate their claims of discriminatory intent on two events: (1) USR's Mayor mentions in a Closed Session in August 2015 that Orange and Rockland had entered into an agreement to allow for lechis to be placed on their poles and (2) two months later, Ordinance 16-15 was enacted. Plaintiffs' proposed inference of discriminatory intent, however, is unwarranted. The actual motivation for the enactment of Ordinance 16-15 was entirely unrelated to *eruv*; the ordinance was passed because of the ever-growing concern of "sign pollution" related to USRs

elections and referenda, which became excessive in 2015. Preusch ¶¶ 13-18; Regan ¶¶10-15.

As noted above, USR has an extensive record of protecting its utility poles. In 2014, USR had a particularly challenging election year, during which there was a proliferation of political signs being attached to utility poles, street signs, and other stationary items. Preusch Decl. ¶ 13; see also Regan Decl. ¶ 10. This was caused by controversies of considerable public interest: a referendum to rezone a large tract in USR that some believed could be used to meet USR's fair housing obligations and a local election. See Preusch Decl. ¶ 13; Regan Decl. ¶10. Political signs were frequently posted on public property without authorization, despite the best efforts of Borough Police to remove them. Preusch Decl., ¶¶ 14-15.

Following the contentious USR 2014 election season, a council person asked Borough Administrator Preusch whether there was anything USR could do to more effectively limit signage on USR's utility poles during election season. See Preusch Decl., ¶ 15. Preusch then researched other municipalities' ordinances that might address USR's concerns and help avoid a recurrence of the 2014 election year when so many signs were posted and the police force and local officials were required to act to remove the many signs under local law. Id.

Preusch worked with Borough Attorney Regan. Id., see also Regan Decl. ¶ 18. Regan researched free speech issues and ordinances from similarly-situated

municipalities and took from that research that the ordinance needed to be content and viewpoint neutral. See Regan Decl., ¶ 18. The effort to pass such legislation got sidetracked due to other more pressing issues and was not revisited for almost a year. See Preusch Decl. at ¶ 16 and Regan Decl. ¶ 12. In late summer of 2015, anticipating an active 2015 and 2016 election seasons and recalling the difficulties faced in 2014, the USR Borough Council and its counsel worked to "beef up" the Sign Ordinance. See Exhibit "D" to Preusch Decl., ¶¶ 17-18; see also Regan Decl., ¶ 12.

Despite Plaintiffs' assertions, there was, in fact, no connection between the passing of Ordinance 16-15 and the attempt by Plaintiffs to establish on *eruv*. While the minutes of the closed session of the Mayor and Borough Council on August 18, 2015, reflect a brief discussion of a license agreement between the Vaad haEruv and O&R, see Exhibit D to Buchweitz Decl., the topics of lechis and *eruvin* were not discussed in connection with Ordinance 16-15. See Preusch Decl. ¶¶ 19 – 26; Regan Decl., ¶ 13 - 19.

The first time Administrator Preusch heard anything about a proposed *eruv* extension into USR was around August 10, 2015, during one of his regular consultations with Mayor Joanne Minichetti, wherein the mayor informed Preusch that she had heard about an alleged application made to O&R for the purpose of placing lechis on utility poles within USR. See Preusch Decl. ¶ 21. The mayor

asked Preusch to inquire with O&R about it, and Preusch, in turn, sent an email emailed to his O&R contact, Michelle Damiani. Id. at Exhibit E. However, Damiani failed to respond to the substance of his inquiry and forwarded his email to the O&R's Joint Use Department. Id. at ¶22, Ex. E. In turn, no one from O&R's Joint Use Department responded to his email. Id. The Mayor's limited knowledge about a proposed *eruv* and Preusch's emails with Damiani was what was discussed very briefly at the executive session of the Mayor and Council and reflected in the August 18, 2015 closed meeting minutes. See Buchweitz Decl., Ex. D; Preusch Decl. ¶ 23; Regan Decl. ¶¶ 16-17. It was not until two years later, on June 12, 2017, that O&R responded substantively to Preusch's August 10, 2015 inquiry, when Ms. Damiani emailed Police Chief Rotella to inform him that the Vaad haEruv had been given a license from O&R to place lechis on utility poles in USR. See Preusch Decl., ¶¶ 24 – 25.

Moreover, the need for Ordinance 16-15 was actually made manifest during its introduction process. See Preusch Decl. ¶¶ 27 - 28, Ex. H. Despite diligence by the USR PD to remove signs on public property, the proliferation of signs on utility poles reached such a point during the 2015 election season that O&R complained about the number of political signs affixed to its utility poles. Id. On or about September 29, 2015, the Borough received an email forwarded by Neil Winter from O&R reiterating the utility's longstanding policy of prohibiting the posting of signs

on utility poles-- stating that "staples, tacks or nails… present a potential hazard to O&R employees working on the poles' among several other reasons that signs should not be placed on poles. Id. No one connected with the *eruv* introduced public comments or contacted the administration and/or the Mayor and Council to discuss, suggest amendments to, or stake out a position with regard to this ordinance. Id. at ¶¶ 30-31.

With that factual backdrop, any consideration of USR's intent reaches the opposite of Plaintiffs' conclusion: the record plainly further demonstrates the USR's intent was, unequivocally, non-discriminatory and only serve to further confirm constitutionally-required neutrality of the Ordinance at issue.

c. USR Borough Ordinance 16-15 is Generally Applicable and Has Been Generally Applied.

Once it is determined that an ordinance is facially neutral, as is Ordinance 16-15, the Court must determine, then, if the ordinance is "generally applicable." Tenafly, 309 F.3d at 165. As described in Tenafly, "in situations where government officials exercise discretion in applying facially neutral law, so that whether they enforce the law depends upon their evaluation of the reasons underlying a violator's conduct, they contravene the neutrality requirement if they exempt some secularly motivated conduct but not comparable religious motivated conduct." Id. at 165-55, citing Lukumi, 508 U.S. at 537; Smith, 494 U.S. at 884; Bowen v. Roy, 476 U.S. 693, 708, 90 L. Ed. 2d 735, 106 S. Ct. 2147 (1986) (plurality opinion); and Fraternal

Order of Police v. City of Newark, 170 F.3d 359, 364-65 (3d Cir. 1999). Importantly, Tenafly is instructive as to the result of a finding that an ordinance is facially neutral and generally applicable: "[b]ecause [Tenafly's] Ordinance 691 is neutral and generally applicable on its face, if the Borough had enforced it uniformly, Smith would control and the plaintiffs' claims would accordingly fail." Id. at 144.

Plaintiffs' assert that USR has "selectively enforced" its ordinance and that Tenafly is, therefore, "dispositive" on the issue. The facts, however, tell a different story. As set forth above, USR has a long history of prohibiting objects from being affixed to utility poles without a permit, regardless of the content of the signs or objects. "Sign pollution" became a real problem for USR in 2014, which ultimately lead to its decision to enact Ordinance 16-15. Preusch ¶¶13-18, Regan ¶¶10-18

USR has, for decades, regulated signs from a wide variety of sources within its jurisdiction and has done so without regard to the content of the signs. See Preusch Decl., ¶¶ 33 – 38, 43 – 48, Ex. K - P; Forbes Decl., ¶¶ 1 – 7; Dougherty Decl., ¶¶ 4 – 13; Rotella Decl., ¶¶ 14 – 21, Ex. A, C - I; Lally Decl., ¶¶ 11 - 16; Hausch Decl., ¶¶ 9 – 13; Spina Decl., ¶¶ 16, 19. Both the current and former Chiefs of Police, Rotella and Preusch, respectively, ensured that their officers removed unauthorized signs, devices or other matter from utility poles. See Preusch Decl., ¶ 47; Rotella Decl., ¶¶ 7, 17-19, Ex. B; Spina Decl., ¶¶ 5 – 12, 17 – 18, Ex. B.

The USR PD and the Department of Public Works ("DPW") enforce the prohibition by removing unauthorized signs, devices or other matter placed on utility poles. See Preusch Decl., ¶¶ 39 – 42; Forbes Decl., ¶¶ 1 – 6; Dougherty Decl., ¶¶ 3 – 9; Rotella Decl., ¶¶ 4 – 12; Lally Decl., ¶¶ 7 - 10; Hausch Decl., ¶¶ 4 – 8; Spina Decl., ¶¶ 7 – 15. Several police and other USR personnel can remember numerous occasions when unauthorized signs, devices or other materials that had been removed from USR utility poles were piled up behind the USR PD building, waiting to be picked up and disposed of by the DPW or retrieved by their owners. See Preusch Decl., ¶¶ 33 – 38, 43 – 48, Ex. K - P; Forbes Decl., ¶¶ 1 – 7; Dougherty Decl., ¶¶ 4 – 13; Rotella Decl., ¶¶ 14 – 21, Ex. A, C - I; Lally Decl., ¶¶ 11 - 16; Hausch Decl., ¶¶ 9 – 14; Spina Decl., ¶¶ 16, 19.

USR has enforced and continues to enforce this prohibition, even against extensions or divisions of its own government. See Preusch Decl., ¶¶ 43 – 44; Dougherty Decl., ¶¶ 9 – 11; Rotella Decl., ¶¶ 13, 15; Spina Decl., ¶¶ 12-13. For example, in or around 2013 or 2014, an employee of the USR Building Department caused the USR Fire Department's signs, advertising its car show fundraiser, to be removed from utility poles because they violated local law. (See citations cited above, supra.) As far back as approximately twenty years ago, Preusch recalls the Lion's Club - located just behind Borough Hall - had its signs, advertising its carnival, removed from utility poles. See Preusch Decl., ¶ 45.

Plaintiffs point to a handful of instances in which they say the ordinance was not enforced. Am. Compl. Ex F, Pinosivitz Decl. Ex. A. But despite those instances, enforcement has been consistent over the years. See Preusch Decl., ¶¶ 43 – 44; Dougherty Decl., ¶¶ 9 – 11; Rotella Decl., ¶¶ 13, 15; Spina Decl., ¶¶ 12-13. Of course, enforcement need not be perfect to show that it is not discriminatory. Importantly, upon receipt of Plaintiffs' Complaint, the instances submitted therein purporting to be violations were all immediately removed by USR Forbes Decl. ¶ 7; Rotella Decl. ¶¶ 11-13. The only reason this was not done sooner was because enforcement officials were unaware of the violations. Rotella Decl. ¶ 13

Because Ordinance 16-15 is facially neutral and has been generally applied, in accordance with Smith and Tenafly, strict scrutiny does not apply, no compelling interest is needed and Plaintiffs' right of free exercise does not render them immune to the enforcement of the Ordinance.

3. Ordinance 16-15 is not Unconstitutionally Vague

Plaintiffs' argument that Ordinance 16-15 is void for vagueness is without merit. To establish that a law is impermissibly vague, the law: (1) must fail to "give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly"; or (2) "if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them." Trade Waste Mgmt. Ass'n v. Hughey, 780 F.2d 221, 235 (3d Cir. 1985)

(quoting Grayned v. City of Rockford, 408 U.S. 104, 108-09 (1972)). Plaintiffs do not assert that the plain and ordinary language of the Ordinance is vague, merely that is undefined, which provides no legal basis to deem an ordinance vague. Moreover, Plaintiffs provide no support for their conclusion that the ordinance provides no guidance for those who apply it, other than to citing to their own confusion. Since Plaintiffs have failed to support this argument in any meaningful manner, it must necessarily be rejected.

a. The Terms are Plain and Ordinary

First, Plaintiffs argue that, because "the Ordinance does not define a single term that is contains," it "fails to provide people of ordinary intelligence a reasonable opportunity to understand what conduct it prohibits." See PB at 30. This notion has been consistently rejected as long as the terms "have a plain and ordinary meaning that does not need further technical explanation." United States v. Tykarsky, 446 F.3d 458, 473 (3d Cir. 2006)(citations omitted). Moreover, Courts have routinely relied on dictionaries to assess a statute's plain and ordinary meaning in the void-for-vagueness context. Baptiste v. AG United States, 841 F.3d 601, 610-11 (3d Cir. 2016); Hoffman Estates v. Flipside, Hoffman Estates, 455 U.S. 489, 500-01, 102 S. Ct. 1186, 1194-95, 71 L.Ed.2d 362, 373 (1982). Plaintiffs' alleged confusion with respect to what constitutes a "public utility pole" is entirely disingenuous – utility poles are used for *public* utility, regardless of who owns or uses them. N.J.S.A. 48:2-

13, in describing the powers of New Jersey Board of Public Utilities, confirms that all companies, such as Orange and Rockland, are considered "public utilities." Further, Plaintiffs' interpretation ignores the substance of N.J.S.A. 48:3-19, which expressly requires "[t]he consent of the municipality [to] be obtained for the use by a person of the poles of another person…."

Plaintiffs' confusion of the terms "as required by law" or "authorized by law" is similarly disingenuous first, because Plaintiffs' themselves argued that their actions are, in fact, "required by law" or "authorized by law," see PB at 32, but second, because the other USR ordinances define what it means to be "authorized by law" or "as required by law." See e.g. USR Code Provisions: Ordinances 76-46 (prohibiting signs on telephone poles, etc.), 98-17 (authorizing the posting of certain warning signs in certain specified locations); 150-20 (general sign provisions requiring a sign permit), and 150-21 (signs permitted in certain districts).

A person of "ordinary knowledge" can read Ordinance 16-15 and understand its' plain and ordinary terms: don't affix anything to utility poles unless you have been authorized to do so. Plaintiffs simply find that plain and ordinary meaning inconvenient.

b. The Ordinance is Clear As To Whom it Applies

USR's Ordinance makes no distinctions regarding its application – it applies to anyone that affixes anything to utility poles without prior authorization. As set

forth above, it has been generally applied across the board, to all manner of "materials," since its inception. Plaintiffs have identified no flaws in the Ordinance in this regard, except merely their dissatisfaction with its application to them. This reason is insufficient.

4. Plaintiffs' Lechis are not "Authorized or Required by Law"

Plaintiffs' allege that, despite all of their misgivings with the Ordinance, they are nonetheless in compliance because: (1) that they possess a valid license from Orange and Rockland and "nothing further is required for Plaintiffs to be authorized to affix lechis to poles in USR"; and (2) the lechis are "authorized or required by law" simply by virtue of cases such as Tenafly and Westhampton Beach. Neither argument has merit.

a. Plaintiffs' Do Not Have a "Valid" License

As set forth in USR's motion to dismiss, rather than adhering to proper procedures for seeking a variance or Governing Body approval to waive the Ordinance that would permit them to affix any "matter to any public utility pole," as would be required of anybody else seeking similar relief, Plaintiffs instead sought a license from O&R to install the lechis and, remarkably, rely upon this as their purported basis for authority. This position, however, has been flatly rejected by Verizon N.Y., Inc. v. Vill. of Westhampton Beach, 2014 U.S. Dist. LEXIS 84479 (E.D.N.Y 2014). While the Verizon Court found there was no basis

for the municipality to prevent Verizon from entering into a license to allow the construction of an *eruv*, it did so expressly because *there was no ordinance in place preventing the placement of* lechis, unlike in this matter. In fact, the Verizon Court specifically stated that these agreements "do not trump" the municipalities' authority to regulate attachments to utility poles." Id. at *84-86. The Court went on to note the municipality's police powers in regulating their utility poles:

> Courts have also recognized that the regulation of signs for aesthetic (among other) concerns is a valid exercise of police power. *See City of Ladue v. Gilleo*, 512 U.S. 43, 48, 114 S. Ct.. 2038, 2042, 129 L. Ed. 2d 36 (1994) ("While signs are a form of expression protected by the Free Speech Clause, they pose distinctive problems that are subject to municipalities' police powers. Unlike oral speech, signs take up space and may obstruct views, distract motorists, displace alternative uses for land, and pose other problems that legitimately call for regulation. It is common ground that governments may regulate the physical characteristics of signs.")

Id. at *94-95. Here, USR's Ordinance as well as N.J.S.A. 48:3-19, which both require the municipalities consent to "affix" something to or otherwise "use" USR's utility poles, renders any such license void as a matter of law. Again, the License Agreement provides that no lechis may be attached to the poles until the utility provides the Endorsement.

Further evidence of the invalidity of Plaintiffs' purported license is that the Endorsement provides the Licensee with a limited number of specific poles upon which to install lechis. See Steinmetz Decl., Ex. G. As set forth above, a comparison

of the poles on the Endorsement and those with lechis already installed shows that most, if not all, of these poles are subject to a joint use agreement (the "Joint Use Agreement") from 1963 between Verizon Communications and O&R. See Gudino Decl., ¶¶ 3 – 6; Preusch Decl., ¶¶ 73-74. The Joint Use Agreement states at Page Ten, IV Relating to Attachment Rentals, Paragraph Twenty-Four:

> [Verizon] may, with the concurrence of [O&R], grant permission to other communication companies or parties to attach communication wires or cables within [Verizon's] space reservation.
>
> …
>
> **[O&R] may, with the concurrence of [Verizon], grant permission to other companies or parties using supply circuits to attach supply wires or cables within [O&R's] space reservation**.

Gudino Decl. ¶ 7.

Further, the Joint Use Agreement states, in relevant part, at Page Fifteen, VI Relating to Joint Use Generally, Paragraph Forty-Two:

> If either of the parties hereto…
>
> On and subsequent to the effective date of this Agreement … all agreements or contracts covering the attachment by a third party of supply circuits to jointly used poles shall be made by [O&R], and all agreements or contracts covering the attachment by a third party of communication wires or cables to jointly used poles shall be made by [Verizon], **all such agreements or contracts for attachments to jointly used poles being subject to the approval of both parties hereto**.

Id. at ¶ 8.

The Vaad haEruv, the Bergen Rockland Eruv Association, and the other individual Plaintiffs have not sought the approval of Verizon for the use of poles owned by it and/or subject to the above-described Joint Use Agreement to install lechis or to construct an *eruv*, in portions of the Borough of Upper Saddle River. Id. at ¶ 9. Further, O&R has not sought the concurrence and approval of Verizon for the Plaintiffs to use the poles identified in Exhibit A to install lechis or construct an *eruv*, in any part the Borough of Upper Saddle River. Id. at ¶ 10.

Crucial to this analysis is that, even assuming solely for the sake of argument that Plaintiffs' license with O&R were valid, which it is not, Plaintiffs' construction of the *eruv* within USR exceeds any such authority granted by the O&R License. There are 109 utility poles with lechis within USR. See Preusch Decl., ¶ 61; Forbes Decl., ¶¶ 12-13, Ex. A. Rosen Decl. Ex. H. The Endorsement (Steinmetz Decl., Ex. G) reveals that the Vaad haEruv' was "approved" to install lechis on only 40 utility poles. See Preusch Decl., ¶¶ 62-68. A review of O&R's location descriptions on the Endorsement reveals that only 36 of the utility poles listed in the license are within USR. Id.

As the Declarations of Theodore Preusch, Steven Forbes, and David Gudino make clear, Plaintiffs have attached lechis to a significant number of utility poles that require Verizon's consent under the Verizon Joint Use Agreement without getting Verizon's consent. See Preusch Decl., ¶ 71-75; Forbes Decl., Ex. A; Gudino

Decl., ¶ 4, 6. Most of these fall within the section of the *eruv* that Plaintiff consider "active." See Preusch Decl., ¶ 71; Forbes Decl., Ex. A. Twenty-one of the utility poles allegedly "licensed" by O&R are owned by Verizon. See Steinmetz Decl., Ex. G; Gudino Decl., ¶ 4, Ex. A; Preusch Decl., ¶ 75; Forbes Decl., Ex. A.

As noted above, the vast majority of USR's utility poles that are not listed within the Endorsement fall within the section of the *eruv* that Plaintiffs consider "active." See Preusch Decl., ¶ 71; Forbes Decl., Ex. A. All utility poles that have a sub-number are owned by Verizon. See Gudino Decl., ¶ 4; Preusch Decl., ¶ 72. All the poles on Forbes' list are subject to the Verizon Joint Use Agreement. See Preusch Decl., ¶ 73; Gudino Decl., ¶ 6, Ex. A. Further, *all* of the poles identified in Steinmetz's Ex. G are also subject to the Verizon Joint Use Agreement. See Preusch Decl., ¶ 74; Gudino Decl., ¶ 6, Ex. A. Moreover, twenty-two of the utility poles licensed by O&R are actually owned by Verizon. See Steinmetz Decl., Ex. G; Gudino Decl., ¶ 4, Ex. A; Preusch Decl., ¶ 75; Forbes Decl., Ex. A. Plainly, the purported licenses are not "valid" and do not constitute authorization as required by Ordinance 16-15.

Moreover, as set forth above, Plaintiffs have installed – in addition to lechis – a potentially dangerous ungrounded metal wire, which has been strung from utility pole to utility pole. See Rotella Decl. ¶ 38, ¶ 45c, Ex. N – O; see also Preusch Decl. ¶ 78. This was done without the permission of USR, O&R and Verizon. Because

Plaintiffs have not sought appropriate consents, these safety issues were never addressed and, as such, remain a potentially serious safety concern for USR.

b. Lechis are not "Required by Law"

Despite Plaintiffs' bold assertion that *eruvin* are "required by law," Smith, Lukumi and Tenafly specifically counsel otherwise: "If a law is 'neutral' and 'generally applicable' and burdens religious conduct only incidentally, the Free Exercise Clause offers no protection." Tenafly, 309 F.3d at 165, citing Smith. "[A] law that is neutral and of general applicability need not be justified by a compelling governmental interest even if the law has an incidental effect of burdening a particular religious practice." Lukumi, 509 U.S. at 531, citing Smith. In fact, the Tenafly Court noted with no uncertainty that "[b]ecause [Tenafly's] Ordinance 691 is neutral and generally applicable on its face, if the Borough had enforced it uniformly, Smith would control and the plaintiffs' claims would accordingly fail." Id. at 144.

Ordinance 16-15 is facially neutral, generally applicable and has been neutrally applied. As such, Plaintiffs must comply with its requirements, regardless of the impact on their religious beliefs. No accommodation, reasonable or otherwise, is required.

B. Plaintiffs Can Not Demonstrate Irreparable Harm

Plaintiffs' argument that they will suffer irreparable harm absent a preliminary injunction relies entirely on their argument that their First Amendment rights are being violated and that they have a reasonable probability of success. Because there is no First Amendment violation, however, their argument for irreparable harm fails. There is no First Amendment right to avoid neutrally-worded laws of general applicability, even if they incidentally burden religion. See Tenafly; Smith. In fact, if this Court were to grant an injunction – and thus hold that Plaintiffs may avoid seeking the necessary approvals before attaching items to utility poles – it will be USR that will be irreparably harmed, as its right to enforce neutral and generally applicable laws will be significantly undermined. And in this case, its citizens will be subjected to continued safety risks, due to the unsafe manner in which Plaintiffs installed at least some of their lechis.

In any event, even if there *were* a First Amendment violation (and there is not), while the Supreme Court has held that the "loss of First Amendment freedoms for even minimal periods of time, unquestionably constitutes irreparable injury," Elrod v. Burns, 427 U.S 347, 373 (1976) (plurality op.), "[c]onstitutional harm is not necessarily synonymous with the irreparable harm needed for issuance of a preliminary injunction." Hohe v. Casey, 868 F.2d 69, 73 (3d Cir. 1989). Moreover, "[a] plaintiff has the burden of proving a 'clear showing of immediate irreparable

injury.'" ECRI v. McGraw-Hill, Inc., 809 F.2d 223, 226 (3d Cir. 1987) quoting Continental Group, Inc. v. Amoco Chemicals Corp., 614 F.2d 351, 359 (3d Cir. 1980). Plaintiffs, here, fail to prove any 'clear showing' and, while Plaintiffs' rely on Tenafly, it's Tenafly that dispels the notion of any such harm.

Tenafly made a determination that those Plaintiffs would experience irreparable harm if the Tenafly *eruv* were removed because they couldn't carry or push objects on the Sabbath, see Tenafly, 309 F.3d at 178. It did so because (1) it found a First Amendment violation due to selective enforcement of the facially neutral ordinance and (2) all of those Plaintiffs lived within the confines of that "active" *eruv*. Here, however, five Plaintiffs – Breuer, Sarah Berger, Moses Berger, Rosen and Schonfeld -- are not even within the confines of an existing or operating *eruv*. See Breuer Decl. ¶8; S. Berger Decl. ¶8, M. Berger Decl. ¶8, Rosen Decl. ¶8, and Schonfeld Decl. ¶8.

The two remaining individual Plaintiffs – Pinkasovits and Friedman – can suffer no harm because the lechis installed on the north-west border of USR, adjacent to Mahwah, were installed *without any authority*, as they are not even encompassed by Plaintiffs' invalid O&R License, and, therefore, necessarily constitute illegal trespass. Coupled with Plaintiffs' lack of Verizon's necessary consent pursuant to the Joint Use Agreement and USR's necessary consent pursuant to N.J.S.A. 48:3-19 (of which Plaintiffs' are not challenging the constitutionality), Plaintiffs' cannot

suffer irreparable harm from being prevented to continue these illegal activities. As such, Plaintiffs have not demonstrated the requisite 'irreparable harm" to entitle them to injunction relief.

C. The Balance of Hardships Favors USR

While Tenafly held that a preliminary injunction (prohibiting the removal of lechis) would not harm Tenafly more than those Plaintiffs, see Tenafly, 309 F.3d at 178, the same is not true here. As set forth in USR's motion to dismiss, Plaintiffs have failed to abide by the generally applicable procedural requirements for obtaining permission to affix the lechis to USR's utility poles. Certainly, this failure to do so, at a minimum, renders Plaintiffs' Amended Complaint not ripe. But it has bigger implications for USR, which has battled "sign pollution" for years. Should Plaintiffs' sheer disregard for rules and procedures be countenanced, USR governing authority will necessarily be undermined. A slippery slope will be created, with people opting to litigate rather than air disputes with the entities in the best positions to assess them. Unquestionably, this is the precise reason why a body of law exists rendering the claims of litigants unripe who fail to follow these procedures.

Moreover, Plaintiffs are believed to have installed at least some of the attachments in an unsafe manner, creating a safety hazard for the citizens of USR that continues with each passing day. Rotella Decl. ¶¶ 38, 45c, Exs. N – O; Preusch Decl., ¶ 78. Plaintiffs have not only connected lechis, but utility poles with

ungrounded metal wire and lechi(s), that make physical contact with Verizon's conduit. Forbes Decl. ¶ 16. Both of these conditions, together and alone, create serious safety concerns, which might cause a fire, a service disruption or any other damages to the utility system.

As a result, the balance of hardship should these lechis (and now metal wires) remain, undoubtedly tips in favor of USR.

D. The Public Interest

There is no public interest in permitting any group to sidestep facially neutral, generally applicable laws that have been consistently enforced in a neutral manner. Municipalities indisputably have the authority under their police powers to enact laws protecting the health, safety, and welfare of their citizens. United Haulers Ass'n. Inc. v. Oneida-Herkimer Solid Waste Mgmt., 550 U.S. 330, 342 (2007). Aesthetics considerations are a valid basis for exercising the police power. Members of the City Council v. Taxpayers for Vincent, 466 U.S. 789, 805 (1984); City of Ladue v. Gilleo, 512 U.S. 43, 48 (1994) ("While signs are a form of expression protected by the Free Speech Clause, they pose distinctive problems that are subject to municipalities' police powers. Unlike oral speech, signs take up space and may obstruct views, distract motorists, displace alternative uses for land, and pose other problems that legitimately call for regulation. It is common ground that governments may regulate the physical characteristics of signs.").

To the extent there are conductive metal wires installed in addition to the lechi(s) which are touching electrical conduits, creating potential hazards, naturally, the public safety interest in this regard is paramount to this Court's consideration.

CONCLUSION

Defendant, the Borough of Upper Saddle River, respectfully requests this court grant its Motion to Dismiss the Amended Complaint as Plaintiffs lack standing and their claims are not ripe; or, in the alternative, deny Plaintiffs' motion for injunctive relief.

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