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IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

TENAFLY ERUZ ASSOCIATION, INC.
CHAIM BOOK, YOSIFA BOOK,
STEPHANIE DARDIK GOTLIEB, and
STEPHEN BRENNER
Plaintiffs-Appellants,

v.

THE BOROUGH OF TENAFLY, ANN MOSCOVITZ, individually and in her official capacity as Mayor of Borough of Tenafly, CHARLES LIPSON, MARTHA B. KERGE, RICHARD WILSON, ARTHUR PECK, JOHN T. SULLIVAN, each individually and in their official capacities as Council Members of the Borough of Tenafly
Defendants-Appellees.

Docket No. 01-3301 (cmh)

District Court No.: 00-6051 (WGB)

Sat Below: Hon. William G. Bassler, U.S.D.J.

APPELLEES' MOTION TO STRIKE ARGUMENTS RAISED IN THE BRIEF OF APPELLANTS CHAIM BOOK, YOSIFA BOOK AND STEPHEN BRENNER RAISED FOR THE FIRST TIME ON APPEAL

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Appellees Borough of Tenafly, Ann Moscovitz, Charles Lipson, Martha B. Kerge, Richard Wilson, Arthur Peck and John Sullivan hereby move to strike those issues and arguments raised in the brief filed on behalf of Appellants Chaim Book, Yosifa Book and Stephen Brenner that were not raised nor discussed in the original briefs submitted to the District Court and are now being presented to this Court for the first time.

The law is well settled that this Court will "generally refuse to consider issues that are raised for the first time on appeal." Newark Morning Ledger Company v. The United States of America, 539 F.2d 929, 932 (3d Cir. 1976); Frank v. Colt, 910 F.2d 90 (3d Cir. 1990) reh'g denied (Sept. 11, 1990); Sachanko v. Gill, 388 F.2d 859, 861 (3d Cir. 1968); Tromza v. Tecumseh Products Co., 378 F.2d 601, 604 (3d Cir. 1967); Mirkowicz v. Reading Co., 84 F.2d 537, 538 (3d Cir. 1936) cert. denied 299 U.S. 579 (1936).[1]

Despite filing a single Notice of Appeal on August 20, 2001, Appellants filed two separate briefs as part of their substantive appeal. The first, dated October 31, 2001, was filed by the law firm of Weil Gotshal and Manges of New York City ("Weil") and Hellring Lindeman Goldstein & Siegal ("Hellring") of Newark, New Jersey as local counsel on behalf of Appellants Tenafly Eruv Association, Inc. ("TEAI"), and Stefanie Dardik Gotlieb (the "TEAI Brief"). The second brief, also dated October 31, 2001, was filed by the law firm of Mintz Levin Cohn Ferris Glovsky and Popeo, P.C. of Washington, D.C. on behalf of Appellants Chaim Book, Yosifa Book and Stephen Brenner (the "Book Brief").

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[1] The Supreme Court, acknowledging this general rule, has drawn an exception where a previously ignored legal theory "takes on new importance due to an intervening development in the law," making it appropriate for the federal appellate court to exercise its discretion to allow a party to revive that theory. See Singleton v. Wulff, 428 U.S. 106, 96 S.Ct. 2868 (1976); Salvation Army v. Department of Community Affairs of the State of New Jersey, 919 F.2d 183 (3d Cir. 1990).

During the underlying proceedings, all of the Appellants were represented by the Weil and Hellring firms and collectively filed the following papers to the District Courts: Memorandum of Law in Support of Appellant's application for a Temporary Restraining Order and Preliminary Injunction dated December 15, 2000 ("December 15, 2000 Memo") attached hereto as Exhibit A, Reply Memorandum of Law dated April 5, 2001 (April 5, 2001 Reply Memo"), attached hereto as Exhibit B and Plaintiffs' Post Hearing Memorandum of Law dated June 20, 2001 ("June 20, 2001 Post Hearing Memo"), attached hereto as Exhibit C (collectively referred to as the "District Court Papers").

The Book Brief contains numerous issues that were not raised nor argued before the District Court. Furthermore, there is nothing expressly cited in the Book Brief that demonstrates "any intervening developments in law" to justify the addition of their new arguments. Accordingly, Appellees respectfully request that those issues and theories raised for the first time to this Court in the Book Brief (and stated herein) be stricken and that the Court refuse to consider these new arguments.

Most, if not all of the arguments, contained within the Book Brief were not raised in the District Court. Specifically, Appellants now assert for the first time:

- That the only difference between the plastic strips (called "*lechis*") affixed to utility poles on the Borough's right-of-way by the Appellees and those plastic strips affixed by Cablevision is the religious significance the *lechis* have to the Orthodox Jewish residents of Tenafly. (Book Brief at 13, 17-18).
- That removal of the lechis amounts to "targeting" of conduct that is totally inoffensive and consistent with public welfare and public morals. Appellants did not make any such argument below. While Appellants did state that the

lechis presented no aesthetic harm or created no traffic, public health, or sanitation interest, (December 15, 2000 Memo, page 13), Appellants never argued that affixing the lechis to the utility poles is innocuous conduct, the prohibition of which somehow therefore triggers heightened scrutiny. (Book Brief at 24).

- That removal of the lechis is unconstitutional discrimination against religious speech. In the District Court, Appellants argued that their First Amendment free speech rights were violated on a completely different basis: that the Appellees "engaged in viewpoint discrimination in refusing to permit the eruv to remain, without any legitimate justification," and that Appellants' actions were unreasonable and not viewpoint neutral. (April 5, 2001 Reply Memo at 19) (June 20, 2001 Post Hearing Memo at 14). However, in the Book Brief, Appellants now argue for the first time that the utility poles should be classified as a limited public forum. Furthermore, Appellants now argue, for the first time, that the utility poles are not facilities to which access is limited by law, but are generally accessible to anyone who walks or drives by. (Book Brief at 26-28).
- That the Tenafly Borough Council's acknowledgement of religion as a factor in denying the application to affix the lechis invalidates the council's decision under the Free Exercise Clause. (Book Brief at 31)

Having made new arguments not previously raised before the District Court and having failed to present any intervening developments of law to justify the addition of these new

arguments, the arguments in the Book Brief described herein should be stricken and the Court should not, as a matter of law, consider them.

CONCLUSION

For the foregoing reasons this Court should strike those issues raised in the Brief of Chaim Book, Yosifa Book and Stephen Brenner that were not argued or briefed to the District Court in this matter.

Dated: December 27, 2001

Respectfully submitted,

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UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

TENAFLY ERUV ASSOCIATION, INC., CHAIM BOOK, YOSIFA BOOK, STEPHANIE DARDICK GOTLIEB and STEPHEN BRENNER,

Plaintiffs,

-against-

THE BOROUGH OF TENAFLY, ANN MOSCOVITZ, individually and in her official capacity as Mayor of the Borough of Tenafly, CHARLES LIPSON, MARTHA B. KERGE, RICHARD WILSON, ARTHUR PECK, JOHN T. SULLIVAN, each individually and in their official capacities as Council Members of the Borough of Tenafly,

Defendants.

MEMORANDUM OF LAW

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UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

TENAFLY ERUV ASSOCIATION, INC., CHAIM BOOK, YOSIFA BOOK, STEPHANIE DARDICK GOTLIEB, and STEPHEN BRENNER,
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THE BOROUGH OF TENAFLY, ANN MOSCOVITZ, individually and in her official capacity as Mayor of the Borough of Tenafly, CHARLES LIPSON, MARTHA B. KERGE, RICHARD WILSON, ARTHUR PECK, JOHN T. SULLIVAN, each individually and in their official capacities as Council Members of the Borough of Tenafly,

Defendants.

MEMORANDUM OF LAW

Preliminary Statement

Plaintiffs Tenafly Eruv Association, Inc. ("TEAI"), Chaim Book, Yosifa Book, Stephanie Dardick Gotlieb, and Stephen Brenner (collectively "Plaintiffs") submit this

Memorandum of Law in support of their application for a Temporary Restraining Order and preliminary injunction.

Introduction

> The Free Exercise Clause commits government itself to religious tolerance, and upon even slight suspicion that proposals for state intervention stem from animosity to religion or distrust of its practices, all officials must pause to remember their own high duty to the Constitution and to the rights it secures. Those in office must be resolute in resisting importunate demands and must ensure that the sole reasons for imposing the burdens of law and regulation are secular. Legislators may not devise mechanisms, overt or disguised, designed to persecute or oppress a religion or its practices.

Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 547 (1993).

This is an action brought by plaintiffs for a violation of their civil rights, which occurred when defendants, acting under color of law, ordered the removal of materials necessary for the maintenance of an eruv.

An eruv, under Jewish law, is an unbroken delineation of an area. The designation of an eruv allows observant Jews to carry or push objects from place to place within the area during the Sabbath. Within the eruv observant Jews may push baby carriages from their homes to the synagogue or to the homes of friends, carry books to the synagogue, and carry objects to one another's homes. Without an eruv, observant Jews with small children or who are handicapped cannot go to synagogue or to the park or playground or to friend's home.

The eruv boundary in this instance is delineated by existing telephone wires strung between existing telephone poles, and by placing on existing telephone poles rubber strips that are indistinguishable from the rubber strips used by the local utility to cover ground wires. On December 12, 2000 the Tenafly Borough Council denied plaintiff TEAI's application to maintain the eruv, and on December 13, 2000, the Borough's attorney directed Cablevision, Inc.,

which had installed the rubber strips, to remove them. On December 14, 2000, Cablevision started to remove the rubber strips, thereby starting to destroy the eruv. The Borough's actions are violations of, among other laws, the Free Exercise Clause of the First Amendment to the United States Constitution and Article 1, Section 3 of the New Jersey State Constitution. As more fully explained below, if the Borough is permitted to continue to destroy the eruv, the plaintiffs will suffer irreparable harm. By contrast, maintenance of the eruv during the pendency of this litigation will not harm the defendants in any way.

Statement of Facts

The facts relevant to this application are set forth in the affidavits and/or certifications of Chaim Book, Charles Agus, Rabbi Shmuel Golden, Yosifa Book, Stephanie Dardik Gotlieb and Stephen Brenner. Within the parameters of an Eruv, observant Jews may push baby strollers, ride in wheelchairs and carry books, food or other items to and from their synagogue, the playground or one another's homes. Affidavit of Chaim Book, sworn to on December 14, 2000 (hereinafter "Book Aff.") at ¶ 4. See also American Civil Liberties Union v. City of Long Branch, 670 F. Supp. 1293, 1294 (D.N.J. 1987) (description of eruv).

In July 1999, a group of observant Jews living in Tenafly formed TEAI in order to establish an eruv in Tenafly. In addition to the physical requirements for an eruv, TEAI needed a ceremonial proclamation from a public official whose jurisdiction covered the area in which the eruv was located. Thus, TEAI approached Mayor Ann Moscovitz, whose initial reaction to their request for a proclamation was favorable. Before going forward, however, she wanted to consult with the members of the Borough Council.

At a working session of the Tenafly Borough Council on July 9, 1999, the Mayor raised the issue. One member of the public stated that: "If this is granted, let's all be honest, more and more Orthodox people are going to move in here. They're not going to buy their meat

in the Grand Union, they're going to want to go to a Glatt Kosher Orthodox store. They are going to open up businesses in Tenafly. You are going to have the same thing that happened in Teaneck [New Jersey]." Book Aff. at ¶ 12. Defendant Charles Lipson, a member of the Borough Council stated that: ". . . in certain towns where they do it [erect an eruv], it creates an atmosphere of a community within a community that brings people of that type, Orthodox people, only ultra-Orthodox people. And what happens in communities where they do this is that you have groups of small churches that spring up. What do you do with a whole town like that?" Book Aff. at ¶ 13. After the working session, Mayor Moscovitz informed TEAI that the Council members were opposed to the eruv and would not, therefore, issue the proclamation.

For purposes of complying with religious requirements, however, TEAI needed the ceremonial proclamation and approached the office of Bergen County Executive William "Pat" Schuber and asked if he would issue the ceremonial proclamation, thereby allowing the TEAI to erect an Eruv according to Jewish law. Legal counsel for Bergen County examined the TEAI's request to determine whether there was any reason why Mr. Schuber should not issue the ceremonial proclamation. The TEAI was informed that in the opinion of the County's legal counsel there was no legal impediment to issuing the proclamation and therefore, Mr. Schuber agreed to do so. On or about December 15, 1999, Mr. Schuber issued the ceremonial proclamation. Book Aff. at ¶ 18.

It was TEAI's belief at the time that it did not need permission from the Tenafly Borough Council to establish the eruv. This belief was based on its own research and on the statements made by several members of the Borough Council at the July 9, 1999 working session. TEAI, therefore, approached Bell Atlantic (now Verizon), believing that Bell Atlantic had the right to grant permission for the use of the poles, and requested permission to erect the

Eruv upon Bell Atlantic's poles in Tenafly. Indeed, Bell Atlantic's in-house counsel, based on his own independent research, confirmed TEAI's belief that no other legal step was required before Bell Atlantic could grant such permission. Book Aff. at ¶ 20. Accordingly, Bell Atlantic agreed to grant permission and affirmatively furnished the TEAI with a standard form agreement it uses for Eruvs. On or about June 5, 2000, TEAI and Bell Atlantic entered into a license agreement, whereby Bell Atlantic agreed to allow TEAI to erect an Eruv, using the telephone poles, conditioned upon TEAI obtaining insurance coverage for the Eruv materials. TEAI then obtained an insurance policy providing $1,000,000 in coverage annually. Book Aff. at ¶ ¶ 21-22.

Upon entering the license agreement with Bell Atlantic, TEAI believed that it had fulfilled its legal obligations in obtaining permission to use the telephone poles in establishing an eruv. TEAI did not know of any additional legal requirement to obtain the consent of the Borough of Tenafly, which was confirmed by Bell Atlantic's in-house counsel. Book Aff. at ¶ 23.

As a community service, Cablevision, Inc. agreed to assist TEAI in erecting an Eruv in Tenafly, providing personnel and trucks to get the job done. The Eruv was completed in September of 2000. Book Aff. at ¶ 24, 25.

Thereafter, Mayor Moscovitz and other Council members expressed opposition to the eruv and commenced actions to have it taken down. On September 14, 2000, there was a meeting attended by Mr. Shmuel Golden, rabbi of Congregation Ahavas Torah in Englewood, New Jersey, Ms. Joy Kurland, Director of the Jewish Community Relations Council and Defendants Moscovitz and Lipson, to attempt to peacefully resolve the dispute. Defendants expressed to Golden and Kurland that they did not want Orthodox Jewish people in their town. They expressed concern that Tenafly would become like Teaneck, New Jersey, that the Orthodox

might throw rocks at Sabbath violators, and that Orthodox Jews would block traffic when they walked to the synagogue. Finally, Moscovitz and Lipson expressed their view that if the Orthodox Jews moved into town, they would jeopardize the acceptance and progress the Jewish population of the Borough had achieved. Affidavit of Rabbi Shmuel Golden, sworn to on Dec. 14, 2000, at ¶ 14.

No resolution took place, and on or about October 23, 2000, Cablevision wrote to TEAI, apologizing for the inconvenience, but informing TEAI that it had been instructed by the Borough of Tenafly to remove the eruv materials unless TEAI demonstrated that it had permission from the Borough of Tenafly to erect the Eruv. Cablevision stated that it would begin removing the materials within three business days of TEAI's receipt of the letter. Book Aff. at ¶ 39. Interestingly, in its letter, Cablevision stated "[w]e regret the position in which we find ourselves and hope you understand that Cablevision cannot afford to jeopardize its relationship with the Borough or its franchise to provide telecommunication services within the Borough." See Exhibit C to Book Aff. Clearly, Cablevision had been threatened with the loss of its franchise if it did not comply with the Borough's demand.

On November 1, 2000, Charles Agus (a supporter of the eruv) spoke to Defendant Moscovitz. As Mr. Agus's affidavit describes, the Mayor further repeated the objections to the eruv, including the purported deterioration of public schools. The Mayor told Mr. Agus "to look at Teaneck," a town which she said was very comparable to Tenafly a number of years ago. She also pointed to the prospect of the emergence of all sorts of new synagogues and the resulting "ghetto" which might result. See Affidavit of Charles Agus, sworn to on December 14, 2000, at ¶ 6-12.

Pursuant to an agreement reached by counsel, on or about November 1, 2000, the Borough of Tenafly agreed to instruct Cablevision not to remove the eruv materials for thirty days in order to allow TEAI to file an application with the Borough Council for permission to retain the eruv in place. Book Aff. at ¶ 41. On November 7, 2000, TEAI filed an application with the Tenafly Borough Council requesting that the Council not remove or order the removal of the Eruv.

Public hearings were held by the Tenafly Borough Council on November 28, 2000 and December 12, 2000, where the issue of the eruv was discussed. At the two public hearings, numerous individuals spoke in opposition to TEAI's application. Their reasons for opposing the application were either factually erroneous or overtly discriminatory. Book Aff. at ¶ 44. See also Exhibit D to Book Aff. (letter from Tenafly resident stating the horrific things that will occur if the eruv is approved).

On December 12, 2000, the Tenafly Borough Council voted to deny TEAI's application, effectively reinstating its demand that the Eruv be removed immediately. Book Aff. ¶ 47. Prior to the vote, numerous members of the community spoke in opposition to the eruv. Among these statements included that Orthodox Jewish supporters of the eruv were a "little group of a few people trying to ruin this community," and that the eruv was "a thorn in our side which will become a festering wound." Book Aff. at¶ 45.

On December 13, 2000, Borough Attorney Walter Lesnevich wrote Cablevision, informed it of the Council's vote, and requested that the rubber strips be removed as soon as possible. The very next day, Cablevision, presumably under the same threat of losing its franchise as set forth in its October 23rd letter to TEAI, commenced removing the eruv materials. Book Aff. at ¶ 42.

ARGUMENT

I. PLAINTIFFS SATISFY THE REQUIREMENTS FOR ISSUANCE OF PRELIMINARY INJUNCTION RELIEF

It is well settled in this Circuit that a party is entitled to injunctive relief upon a showing of:

1. whether the moving party has a reasonable probability of eventual success in the litigation;
2. whether the moving party will suffer irreparable harm if relief is not granted;
3. the potential harm to other interested parties from the grant or denial of injunctive relief;
4. the public interest.

Council of Alternative Political Parties v. Hooks, 121 F.3d 876, 879 (3d Cir. 1997).

As will be demonstrated below, plaintiffs have a strong likelihood of success on the merits of its claim that defendants violated the Free Exercise clause of the United States Constitution, the Civil Rights Statutes and the Fair Housing Act. The Complaint and the supporting affidavits make clear that defendants' efforts to remove the eruv in Tenafly violate plaintiffs' First Amendment rights, are motivated by discriminatory intent and that animus against the protected group "was a significant factor in the position taken" by the municipal decision-makers themselves or by those to whom the decision-makers were knowingly responsive. United States v. Yonkers Board of Education, 837 F.2d 1181, 1217, 1223, 1226 (2d Cir. 1987), cert. denied, 486 U.S. 1055 (1988).

Equally clear is the fact that absent injunctive relief from this Court, the eruv will be removed – as indeed Cablevision, under direction from the Borough, has already commenced

-- causing irreparable harm to plaintiffs. It is axiomatic that a loss of First Amendment freedoms, including the right to the free exercise of religion, **even for minimal periods of time**, constitutes irreparable injury. See, e.g., Gannett Satellite Information Networks, Inc. v. Pennsauken, 709 F. Supp. 530 (D.N.J. 1989) *citing* Elrod v. Burns, 427 U.S. 347, 373 (1976); Paulsen v. County of Nassau, 925 F.2d 65, 68 (2d Cir. 1991). Conversely, the continued existence of the eruv during the pendency of this litigation can not harm defendants or any other persons or entities in any way. It is not physically obtrusive, does not negatively impact the physical safety of Borough residents, does not cost the municipality any money or in any way burden the municipality or its residents. Its existence does not violate the establishment clause of the First Amendment, is not a religious symbol, nor does it play a theological role in the observance of the Sabbath. American Civil Liberties Union v. City of Long Branch, 670 F. Supp. 1293, 1295 (D.N.J. 1987).

Finally, plaintiffs submit that the balance of equities clearly favor plaintiffs because they are severely harmed while the continued existence of an eruv creates no adverse effects whatsoever to defendants.

II. PLAINTIFFS ARE LIKELY TO SUCCEED ON THE MERITS OF ITS CLAIMS AGAINST DEFENDANTS

1. Plaintiffs Are Likely to Succeed on Their First Amendment Claim

The First Amendment, which is applicable to the states through the Fourteenth Amendment, see, e.g. Cantwell v. Connecticut, 310 U.S. 296, 303, 84 L. Ed. 1213, 60 S.Ct. 900 (1940), prohibits states from making any law prohibiting the free exercise of religion. Moreover, it is firmly established that "if the object of a law is to infringe upon or restrict practices because of their religious motivation, the law . . . is invalid unless it is justified by a compelling interest and is narrowly tailored to advance that interest," a test that the law will survive "only in rare

cases." Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 546 (1993). The Supreme Court has further stated that "a law targeting religious beliefs as such is never permissible." Id. at 533. "At a minimum the protections of the Free Exercise Clause pertain if the law at issue discriminates against religious beliefs or regulates or prohibits conduct because it is taken for religious reasons." Id. at 532 (emphasis supplied). Here, there can be no question that the action of the Borough's Council targeted the religious beliefs of the plaintiffs. There is no other explanation for the action since, as pointed out above, the eruv is not in any way harmful to the Borough or its residents.

Defendants in this case would presumably urge this Court to regard their actions as "facially neutral." Even if this Court were to accept the assertion that a municipality *might* choose to take down an eruv on neutral grounds, the Supreme Court has stated that the analysis does not end at that point. In City of Hialeah, the Supreme Court observed that:

> The Free Exercise Clause, like the Establishment Clause, extends beyond facial discrimination. The Clause "forbids subtle departures from neutrality," and "covert suppression of particular religious beliefs." Official action that targets religious conduct for distinctive treatment cannot be shielded by mere compliance with the requirement of facial neutrality. The Free Exercise Clause protects against governmental hostility which is masked as well as overt.

508 U.S. at 531 (internal citations omitted).

In the City of Hialeah case, the Supreme Court went beyond merely analyzing the text of the laws in question and examined the "city council's object" in enacting the ordinances. The Court found that municipal ordinances involved were "enacted 'because of,' not merely 'in spite of,' their suppression of ... religious practice" and based this conclusion on the "events

preceding their enactment."[1] Specifically, the court evaluated the minutes and taped excerpts of a public meeting which evinced "significant hostility exhibited by residents, members of the city council, and other city officials toward the . . . religion and its practice . . . . The public crowd that attended the ... meetings interrupted statements by council members critical of [the religious group] with cheers . . . ." The Court further noted that "Other statements by members of the city council were in a similar vein." 508 U.S. at 540-42. Based on these comments, the Court concluded that the "ordinance had as their object the suppression of religion." Id. at 542.

In the case at bar, the first public meeting held on July 9, 1999, was marked by several statements critical of Orthodox Jews. One member of the public stated that: "If this is granted, let's all be honest, more and more Orthodox people are going to move in here. They're not going to buy their meat in the Grand Union, they're going to want to go to a Glatt Kosher Orthodox store. They are going to open up businesses in Tenafly. You are going to have the same thing that happened in Teaneck [New Jersey]." Book Aff. at ¶ 12. Defendant Charles Lipson, a member of the Borough Council further stated that: ". . . in certain towns where they do it [erect an eruv], it creates an atmosphere of a community within a community that brings people of that type, Orthodox people, only ultra-Orthodox people. And what happens in communities where they do this is that you have groups of small churches that spring up. What do you do with a whole town like that?" Book Aff. at ¶ 13.

[1] In assessing whether the Borough acted with discriminatory intent, the City of Hialeah Court specifically noted that the Supreme Court's equal protection cases provide guidance in determining the Council's intent. Id at 540 citing Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 252, 266 (1977). Relevant evidence of discriminatory intent includes, among other things, the historical background of the decision under challenge, the specific series of events leading to the enactment or official policy in question, and the legislative or administrative history, including contemporaneous statements made by members of the applicable governmental body. Id.

Mayor Moscovitz's subsequent comments were in a similar vein. For example, at the meeting on September 14, 2000, attended by Mr. Shmuel Golden, rabbi of Congregation Ahavas Torah in Englewood, New Jersey, Ms. Joy Kurland, Director of the Jewish Community Relations Council, Mayor Moscovitz expressed to Golden and Kurland that she did not want Orthodox Jewish people in their town. She expressed concern that Tenafly would become like Teaneck, New Jersey, that the Orthodox might throw rocks at Sabbath violators, and that Orthodox Jews would block traffic when they walked to the synagogue. Finally, Moscovitz expressed her view that if the Orthodox Jews moved into town, "they would jeopardize the acceptance and progress the Jewish population of the Borough had achieved." Affidavit of Rabbi Shmuel Golden, sworn to on Dec. 14, 2000, at ¶ 14.

Just as in City of Hialeah, there can be no question that the Borough's decision to take down the eruv in Tenafly was made specially because of a religious practice -- specifically a religious practice of Orthodox Jews. There can be no other explanation.

According to City of Hialeah, the next step in the analysis is whether rules that burden religious practice are of general applicability. The Free Exercise Clause "protects religious observers against unequal treatment, and inequality results when a legislature decides that the governmental interest it seeks to advance are worthy of being pursued only against conduct with a religion motivation." Id. at 542-43. Thus, government cannot in a selective manner impose burdens only on conduct motivated by religious belief. Id. at 543.

In the City of Hialeah case, the ordinances in question -- barring ritual slaughter of animals -- failed to meet this test of general applicability. The ordinances did not ban all animal killing, notwithstanding the City's proffered interest in preventing cruelty to animals, but only these occurring during religious sacrifice. Id. Thus, the ordinances addressed the city's

purported interests "only against conduct motivated by religious belief, precisely what the requirement of general applicability is intended to prevent. Id. at 545-46.

Here, as evidenced by the comments of the Mayor, members of the Council, and certain Borough residents, the Borough's action is even more specifically targeted to "conduct motivated by religious belief."

Finally, the Borough cannot enunciate a "compelling interest" that warrants removal of the eruv. The rubber strips are the only physical objects added to the poles, and they are indistinguishable from the rubber strips utilized to hide ground wires. Book Aff. at ¶ 57. Thus, there can be no aesthetic objection. Certainly, the rubber strips create no traffic, public health or sanitation issue. In contrast, in the City of Hialeah case the City of Hialeah argued that its compelling interest was protecting public health and preventing cruelty to animals, which, on their face, enunciate legitimate governmental interests. Nevertheless, because narrower regulation would have achieved these goals, the overbroad regulations in question that flatly prohibited the ritual slaughters employed in the Santeria religion, were invalid. Here, the Borough Council can enunciate no interest other than its resident's objection to the eruv because of bias, prejudice and animus. Clearly, this is insufficient.

2. Plaintiffs' Are Likely to Succeed on Their Claims Under 42 U.S.C. § 1983

A violation of one's rights under the Free Exercise Clause of the First Amendment is actionable under federal civil rights statutes. Section 1983 of Title 42 creates a cause of action against any person who, acting under color of state law, deprives another of "any rights, privileges, or immunities secured by the Constitution and laws" of the United States, including the First Amendment right to the free exercise of religion. See, e.g., City of Hialeah, 113 S. Ct. at 2224. Where a municipality's own policies deprive individuals of their federal

rights, the municipality itself may be held liable. Monell v. New York City Department of Social Services, 436 U.S. 658, 690-94 (1978).

To state a claim under 42 U.S.C. § 1983, "a plaintiff must allege the violation of a right secured by the Constitution and the laws of the United States, and must show that the alleged deprivation was committed by a person acting under color of state law." West v. Atkins, 487 U.S. 42, 48 (1988). The Supreme Court has explained, "The traditional definition of acting under color of state law requires that the defendant in a Section 1983 action have exercised power 'possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law.'" West, 487 U.S. at 49 (quoting, United States v. Classic, 313 U.S. 299, 326 (1941)).

In the present case, there can be no question that Plaintiffs are likely to succeed on their § 1983 claim. Once the violation of plaintiffs' First Amendment Free Exercise rights has been established, perforce the § 1983 claim has been made. See City of Hialeah, 508 U.S. at 528 (plaintiffs filed case pursuant to § 1983 alleging violations under Free Exercise Clause of First Amendment); West, 487 U.S. at 49 ("if a defendant's conduct satisfies the state-action requirement of the Fourteenth Amendment, that conduct is also action under color of state law and will support a suit under § 1983." (internal quotations omitted)).

3. Plaintiffs Are Likely To Succeed on Their Claims Under 42 U.S.C. § 1985

Title 42 U.S.C. § 1985(3) creates a cause of action where "two or more persons in any State . . . conspire . . . for the purpose of depriving . . . any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws." This section, however, requires that "some racial, or perhaps otherwise class-based, invidiously discriminatory animus [lay] behind the conspirators' action." Griffin v. Breckenridge, 403 U.S. 88 (1971). Though the mere fact that "individuals . . . share a desire to

engage in conduct" does not render them a "class" under 42 U.S.C. 1985(3), Bray v. Alexandria Women's Health Clinic, 506 U.S. 263 (1993), proof that the defendants' impetus was the plaintiffs' religion suffices. See Jews for Jesus, Inc. v. Jewish Community Relations Council of New York, Inc., 968 F.2d 286, 291 (2d Cir. 1992); Colombrito v. Kelly, 764 F.2d 122, 130-31 (2d Cir. 1985); see also Remarks of Senator Edmunds during debate preceding passage of Civil Rights Act of 1871, Cong. Globe, 42d Congress, 1st Sess. 567 (1871) (if a "conspiracy was formed against [a] man . . . because he was a Catholic, or because he was a Methodist . . . then this section could reach it"). Accord Taylor v. Gilmartin, 686 F.2d 1346, 1356-58 (10th Cir. 1982), cert. denied, 459 U.S. 1147 (1983); Ward v. Connor, 657 F.2d 45, 48 (4th Cir. 1981), cert. denied, 455 U.S. 907 (1982).

Establishment of a Section 1985(3) claim requires proof of a conspiracy between "two or more persons." A conspiracy, for these purposes, need not be shown by proof of an explicit agreement but can be established by showing that the "parties have a tacit understanding to carry out the prohibited conduct." United States v. Rubin, 844 F.2d 979, 984 (2d Cir. 1988); see also United States v. Wardy, 777 F.2d 101, 107 (2d Cir. 1985), cert. denied, 475 U.S. 1053, 89 L. Ed. 2d 587, 106 S. Ct. 1280 (1986); Snell v. Tunnell, 920 F.2d 673, 702 (10th Cir. 1990) (conspiracy may be established by showing that "participants in the conspiracy . . . share the general conspiratorial objective") (internal quotes omitted), cert. denied, 499 U.S. 976 (1991). The term "persons" for purposes of Section 1985(3) includes municipalities. See Owens v. Haas, 601 F.2d 1242, 1247 (2d Cir.), cert. denied, 444 U.S. 980 (1979). Accordingly, a claim under Section 1985(3) may be established against a municipality if "it is proved that the [municipality] is involved in the conspiracy or that the aim of the conspiracy is to influence the

activity of the [municipality]." United Brotherhood of Carpenters & Joiners of America, Local 610, AFL CIO v. Scott, 463 U.S. 825, 830, 77 L. Ed. 2d 1049, 103 S. Ct. 3352 (1983).

Importantly, since the loss of First Amendment freedoms, including the right to the free exercise of religion, **even for minimal periods of time**, constitutes irreparable injury, see, e.g., Elrod v. Burns, 427 U.S. 347, 373, 49 L. Ed. 2d 547, 96 S. Ct. 2673 (1976), Paulsen v. County of Nassau, 925 F.2d 65, 68 (2d Cir. 1991), the victim of a conspiracy to violate First Amendment freedoms has standing to bring suit before the conspiracy has resulted in economic or tangible injury. Virginia v. American Booksellers Association Inc., 484 U.S. 383, 393, 98 L. Ed. 2d 782, 108 S. Ct. 636 (1988) (facial First Amendment challenge to law limiting display of sexually explicit material, prior to law's enforcement, was not premature).

4. Plaintiffs Are Likely to Succeed on Their Claim Under the Fair Housing Act

The Fair Housing Act makes it unlawful "to refuse to sell or rent . . . or otherwise make unavailable or deny, a dwelling to any person because of . . . religion." 42 U.S.C. § 3604(a). The phrase "otherwise make unavailable" has been interpreted to reach a wide variety of discriminatory housing practices, including discriminatory zoning restrictions. See, e.g., Huntington Branch, National Association For the Advancement of Colored People v. Town of Huntington, 844 F.2d 926, 938 (2d Cir.), aff'd, 488 U.S. 15 (1988) (per curiam); Casa Marie, Inc. v. Superior Court of Puerto Rico, 988 F.2d 252, 257 n.6 (1st Cir. 1993).

a. Plaintiffs' Standing under the Fair Housing Act

The FHA confers standing to challenge such discriminatory practices on any "aggrieved person," 42 U.S.C. 3613(a)(1)(A). That term is defined to include any person who:

(1) claims to have been injured by a discriminatory housing practice; or

(2) believes that such person will be injured by a discriminatory housing practice that is about to occur. 42 U.S.C. 3602(i).

This definition requires only that a private plaintiff allege "injury in fact" within the meaning of Article III of the Constitution, that is, that he/she allege "distinct and palpable injuries that are 'fairly traceable' to [defendants'] actions." Havens Realty Corp. v. Coleman, 455 U.S. 363, 375-76 (1982). An injury need not be economic or tangible in order to confer standing. See, e.g., id. at 376 (deprivation of social benefits of living in an integrated neighborhood constitutes cognizable injury); Gladstone, Realtors v. Village of Bellwood, 441 U.S. 91, 111-12 (1979) (same). See also H.R. Rep. No. 711, 100th Cong. 2d Sess. 23, reprinted in 1988 U.S. Code Cong. & Admin. News 2173, 2184 (current statutory definition of "aggrieved person" was meant "to reaffirm the broad holdings" of Havens Realty Corp. v. Coleman and Gladstone, Realtors v. Village of Bellwood).

The explicit grant of standing to anyone who believes he or she "will be injured by a discriminatory housing practice that is about to occur," 42 U.S.C. 3602(i), means that a person who is likely to suffer such an injury need not wait until a discriminatory effect has been felt before bringing suit. Thus, where it has been established that a zoning ordinance will likely be applied in a discriminatory manner, it is unnecessary that the municipality actually so apply it before the ordinance may properly be challenged. For example, in Park View Heights Corp. v. City of Black Jack, 467 F.2d 1208, 1214-16 (8th Cir. 1972), the defendant city contended that its incorporation and adoption of restrictive zoning ordinances created no harm that was yet justifiable because none of the plaintiffs had yet filed a building permit application that had been rejected. The Eighth Circuit rejected this contention, holding that the plaintiffs had alleged a cognizable harm under the FHA.

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b. Discriminatory Intent of Tenafly's Actions

The decision of the Council to take down the eruv constitutes an unconstitutional act by the Borough as well as a violation of the FHA because the true motive for removing the eruv was discriminatory. As the Complaint and supporting affidavits make clear, the plaintiffs have established a prima facie showing that the Borough acted to remove the eruv because it wanted to discourage Orthodox Jews from moving into the Borough.

It is widely recognized that an FHA violation may be established on a theory of disparate impact or one of disparate treatment. See Huntington Branch, National Association For the Advancement of Colored People v. Town of Huntington, 844 F.2d at 934-35. Under the latter theory, a plaintiff can establish a prima facie case by showing that animus against the protected group "was a significant factor in the position taken" by the municipal decision-makers themselves or by those to whom the decision-makers were knowingly responsive. United States v. Yonkers Board of Education, 837 F.2d 1181, 1217, 1223, 1226 (2d Cir. 1987) ("Yonkers"), cert. denied, 486 U.S. 1055 (1988). If the motive is discriminatory, it is of no moment that the complained of conduct would be permissible if taken for nondiscriminatory reasons. See, e.g., id. at 1218-19 (where site restrictions on low-income housing were imposed with discriminatory motive, fact that town had no duty to provide low-income housing was not significant); United States v. City of Parma, 661 F.2d 562, 574-75 (6th Cir. 1981) (city's abandonment of application for federal housing funds for racially discriminatory reasons violated FHA), cert. denied, 456 U.S. 926, 72 L. Ed. 2d 441, 102 S. Ct. 1972 (1982).

Importantly, discriminatory intent may be inferred from the totality of the circumstances. As the Supreme Court noted in Village of Arlington Heights v. Metropolitan Housing Development Corp., unlawful intent can be gleaned from the "historical background of the decision . . .;" "the specific sequence of events leading up to the challenged decision . . .";

"contemporary statements by members of the decision-making body . . ."; and "substantive departures . . ., particularly if the factors usually considered important by the decision maker strongly favor a decision contrary to the one reached." 429 U.S. 252, 267-68 (1977)); see also United States v. City of Black Jack, 508 F.2d 1179, 1185 n.3 (8th Cir. 1974) (racist statements by "leaders of the incorporation movement" and fact that "racial criticism . . . was made and cheered at public meetings" could be considered evidence of improper purpose), cert. denied, 422 U.S. 1042 (1975); see also Easter Seals Society of New Jersey, Inc. v. Township of North Bergen, 798 F. Supp. 228, 234 (D.N.J. 1992) (assessing the discriminatory intent of a municipality based on the statements of public officials).

In the case at bar, the first eruv meeting conducted by the Borough on July 9, 1999, was suffused with disparaging comments about Orthodox Jews, including a telling comment by Defendant Councilman Charles Lipson who stated: ". . . in certain towns where they do it [erect an eruv], it creates an atmosphere of a community within a community that brings people of that type, Orthodox people, only ultra-Orthodox people. And what happens in communities where they do this is that you have groups of small churches that spring up. What do you do with a whole town like that?" Book Aff. at ¶ ¶ 12-13.

At the September 21, 2000, meeting at which Mr. Shmuel Golden, rabbi of Congregation Ahavas Torah in Englewood, New Jersey and Ms. Joy Kurland, Director of the Jewish Community Relations Council met with Defendant Moscovitz and Defendant Lipson in an attempt to peacefully resolve the dispute, Defendants expressed to Golden and Kurland that they did not want those (Orthodox Jewish) people in their town. They expressed concern that Tenafly would become like Teaneck [New Jersey], that the Orthodox might throw rocks at Sabbath violators, and that Orthodox Jews would block traffic when they walked to the

synagogue. Finally, Moscovitz and Lipson expressed their view that if the Orthodox Jews moved into town, "they would ruin it for those of us who have lived here for a long time." Golden Aff. at ¶ 14.

Accordingly, plaintiffs respectfully suggest that the "historical background of the decision" to take down the eruv coupled with "the specific sequence of events leading up to the challenged decision" and the "contemporary statements by members of the decision-making body . . ." as set forth in the Complaint and supporting affidavits establish a prima facie case for an FHA violation in accordance with the above-referenced case law.

III. DEFENDANTS' ACTION, IF NOT ENJOINED, WILL IRREPARABLY INJURE PLAINTIFFS

As set forth in the accompanying affidavits and certifications, absent injunctive relief plaintiffs will be irreparably harmed. They will not be able to attend synagogue if the eruv does not remain in place. This inability to worship with fellow members of their faith because of the Borough's decision to remove the eruv, standing alone, constitutes irreparable injury. See Elrod v. Burns, 427 U.S. 347 (1976) (loss of First Amendment rights, including right to free exercise of religion, even for minimal periods of time, constitutes irreparable injury); see also Monterey Mechanical Co. v Wilson, 125 F.3d 702, 715 (9th Cir. 1997) ("an alleged constitutional infringement will often alone constitute irreparable harm"), quoted in Association for Fairness in Business, Inc. v. State of New Jersey, 2000 U.S.Dist. LEXIS 1168 (D.N.J. Feb. 8, 2000). By contrast, maintenance of the eruv during the pendency of this action will not harm defendants at all since the eruv is virtually invisible and puts no aesthetic, safety, traffic or fiscal burden on the Borough or its residents.

IV. THE PUBLIC INTEREST WARRANTS GRANTING THE INJUNCTION

It is in the public interest to permit the eruv to remain in place and be maintained by TEAI because the eruv permits Jewish families to spend more time together on Sabbath, and it promotes traditional family values. As former President, George Bush noted in 1990 on the inauguration of the eruv in Washington, D.C.:

> Now, you have built this eruv in Washington, and the territory it covers includes the Capitol, the White House, the Supreme Court, and many other Federal buildings. By permitting Jewish families to spend more time together on the Sabbath, it will enable them to enjoy the Sabbath more and promote traditional family values, and it will lead to a fuller and better life for the entire Jewish community in Washington. I took upon this work as a favorable endeavor.

Exhibit A to Book Aff. See also Proclamation of Office of Mayor, Washington, D.C., April 3, 1990 ("Office of Mayor of District of Columbia deems it to be in the public interest to grant eruv); Proclamation of Mayor, City of Baltimore, Nov. 7, 1979 ("Office of Mayor of City of Baltimore deems it to be in the public interest to grant eruv"); Proclamation of Mayor of City of Cincinnati, July 16, 1985 ("Office of Mayor of Cincinnati deems it to be in the public interest to grant eruv"); Proclamation of Mayor of City of Jacksonville, Fla., June 15, 1999 ("Office of Mayor of City of Jacksonville deems it to be in the public interest to grant eruv") (collectively annexed to the Book Aff. as Exh. B).

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

TENAFLY ERUV ASSOCIATION, INC., CHAIM BOOK, YOSIFA BOOK, STEFANIE DARDIK GOTLIEB, and STEPHEN BRENNER,

Plaintiffs,

Case No. 00-6051(WGB)

-against-

BOROUGH OF TENAFLY, ANN MOSCOVITZ, individually and in her official capacity as Mayor of the Borough of Tenafly, CHARLES LIPSON, MARTHA B. KERGE, RICHARD WILSON, ARTHUR PECK, JOHN T. SULLIVAN, each individually and in their official capacities as Council Members of the Borough of Tenafly,

Defendants.

PLAINTIFFS' REPLY MEMORANDUM OF LAW

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SUMMARY OF REPLY ARGUMENTS

We began our moving memorandum with a quote from the United States Supreme Court that bears repeating:

> The Free Exercise Clause commits government itself to religious tolerance, and upon even slight suspicion that proposals for state intervention stem from animosity to religion or distrust of its practices, all officials must pause to remember their own high duty to the Constitution and to the rights it secures. Those in office must be resolute in resisting importunate demands and must ensure that the sole reasons for imposing the burdens of law and regulation are secular.

Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 547 (1993). Defendants' response makes it absolutely clear that they have lost sight of this duty. Moreover, defendants have erroneously and without support proclaimed that an eruv is not necessary to the practice of plaintiffs' religion. This misguided and incorrect proclamation is an explicit rejection by the defendants of the clear admonition of the Supreme Court that it is not the place of the legislature or the courts to make judgments on the tenets of a religious faith or the appropriate observance thereof. Employment Division, Oregon Department of Human Resources v. Smith, 494 U.S. 872, 887 ("[i]t is not within the judicial ken to question the centrality of particular beliefs or practices to a faith or the validity of particular litigants' interpretation of those creeds.").

Under Supreme Court and Third Circuit precedent, the action of defendants, who intentionally discriminated against the religious practices of the plaintiffs, serves no legitimate purpose and is indefensible under the Free Exercise Clause of the First Amendment even if compelling state interests were present to justify its action. Further, the defendants hardly argue that any state interest, no less a compelling interest, drove their decision. Therefore, defendants' action also places a substantial burden on the practice of plaintiffs' religion and cannot be

justified. In addition, the defendants' action violates the First Amendment's Freedom of Speech Clause because it was unreasonable and not viewpoint neutral. Therefore, plaintiffs have established a likelihood of success on the merits of their claim under the First Amendment, and have satisfied the standards for a preliminary injunction. Point I, infra.[1]

Because plaintiffs have shown a likelihood of success on the merits of their constitutional claim, their claims under 42 U.S.C. § § 1983 and 1985 are equally valid. Point II, infra.

Finally, defendants misconstrue plaintiffs' claim under the Fair Housing Act. Because defendants acted with a discriminatory motive when they denied plaintiffs' request in an attempt to make Tenafly unavailable as a possible home to Orthodox Jews who require and/or desire the presence of an eruv in the community they live in or intend to move into, plaintiffs have made a cognizable FHA claim, and have the standing to bring such a claim. Point III, infra.[2]

STATEMENT OF FACTS

Contrary to the claims made in the defendants' papers, there are no issues of fact which need to be decided on this motion as plaintiffs are relying only on the statements made by

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[1] In their response, defendants take substantive issue with plaintiffs only on the issue of likelihood of success on the merits. Def. Br. at 3. For example, defendants contend that without a constitutional violation, no irreparable injury has been shown, and that the public interest is not served if there is no constitutional violation. Id. Thus, defendants concede that if plaintiffs establish a likelihood of success on the merits on their constitutional claim, they will also have satisfied the other requirements for a preliminary injunction.

[2] Defendants also raise an absolute immunity defense for the individual defendants. This defense has no applicability to plaintiffs' request for a preliminary injunction against the Borough, and is more appropriately made in a motion to dismiss. Plaintiffs will address it when and if defendants make such a motion but suffice it to say, absolute immunity is not available to officials who are acting in a non-legislative capacity. See Lake County Estates, Inc. v. Tahoe Regional Planning Agency, 440 U.S. 391, 405 (1979) (holding that regional legislatures can be absolutely immune from § 1983 liability only when acting in a legislative capacity).

the defendants and people who spoke at public meetings. What these statements show is that the purported rationale for the decision of the Council denying the plaintiffs the right to maintain the eruv is a pretextual afterthought. The real reason comes through loud and clear in the contemporaneous statements and even in the affidavits of the defendants — the Council did not want an eruv because it would attract more Orthodox Jews to the community.

This is made abundantly clear by contrasting the first public statements of the Mayor supporting the eruv with her later vociferous opposition. For example, at the work session of the Council on July 8, 1999, which was supposedly non-public but was attended by many people, the Mayor first explained the reason for the eruv and then said that "[t]oday, it's done very much more simply because the town is encircled by wires." 7/8 T. at 1.[3] She went on the say: "[b]ut it's something that could never be seen by anybody is nothing significant about this. Anybody not looking for it would not know it was even there. It's not an obvious thing but allows these people to bring their children to temple. That's all." Id. at 2. The Mayor went on: "I believe that we should be inclusive and I think that here is something that will inconvenience nobody. It is not something that even seems. You don't know what wires are going up your telephone pole. I mean, you just don't know. You don't see, you don't look; you won't see this and I would hate to think that Tenafly would deny these people who are going to pay for it themselves the right to put these old wires on parameter poles in this town. It just; I would be very upset if this Council did not permit such a simple request." Id. at 5.

Councilman Lipson disagreed. "I do know that in certain towns where they do

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[3] The transcript of this work session has been prepared by plaintiff's counsel from the audio tape provided by the Borough, and is annexed to the accompanying Certification of Richard Shapiro ("Shapiro Reply Cert.") as Exhibit A. Plaintiffs will provide the tape to the Court at the Court's request. Transcripts of the Council meetings on November 28, 2000 and December 12, 2000 have been transcribed by defendants and these transcripts are annexed to the Shapiro Reply Cert.

this, it creates and atmosphere of the community within a community that brings people, orthodox people . . . . You have groups of small churches that sprang up because, that's what you do in a whole town like that, the whole town becomes a church which is really what they're doing. They're asking for a home. The whole town becomes their home." Id. at 2. As the meeting progressed, another speaker rearticulated the real reason for the opposition when he commented that there was opposition from "some of my Jewish friends" and when he asked them why, they said: "They think we're going to turn it into an Orthodox community." Id. at 7.

During the same meeting, Dr. Murray Meltzer, the husband of a co-worker of Councilwoman Kerge, made the first of his statements opposing the eruv. Among other things, he said: " In essence it has the potential for changing the entire character of the community.... My brother brought his family up in Long Island in the community of Lawrence, Long Island. There was an eruv created by the orthodox and the entire community changed over a period of five to ten years to the point where shopkeepers were ostracized if they kept their shops open on Saturday.... This is something that has considerable implications in terms of changing the social community." Id. at 9.

In the wake of these and other sentiments expressed by Council members and residents by September 2000, the Mayor was no longer a supporter of the eruv. Indeed, just the opposite. That opposition was expressed at the meeting among the Mayor, Councilman Lipson, Rabbi Golden and Ms. Kurland. Affidavit of Rabbi Goldin in Support of Plaintiffs' Request for a Temporary Restraining Order, at ¶ ¶ 7-14. The Mayor acknowledges now that she said that "some people had expressed concern that the Orthodox might act to stop people from doing things on the Sabbath," although she states that she did not think it would happen here.

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as Exhibits B and C. References to these transcripts are cited herein as "[Date] T. at [page]."

Moscovitz Aff. at ¶ 16. She also admits telling Rabbi Goldin that "stones had been thrown at my daughter while she was on horseback in the Catskills on the Sabbath." Id.

During the subsequent Borough council meetings further opposition to the eruv was expressed. For example, at the November 28, 2000, hearing members of the Tenafly community made comments such as: "It's just a group of people who are trying to circumvent their own religious laws to erect a contrivance to get around it," 11/28 T. at 43, and "[i]t's like a hostile take-over of our community." Id. at 44.

At the December 12, 2000 hearing, statements from community members included: "The Eruv is the antithesis of inclusiveness. It is drawing a line in the sand. It is a strand in the sky. It is a separation, a demarcation, us from them, members of the tribe on one side, members of the community on the other side." 12/12/00 T. at 38. Another speaker said: "The same way increased housing would change the fabric of our community, so would allowing a select group of individuals to encase our entire community." Id. at 77.[4]

Thus, it is clear that the real reason defendants rejected the eruv was because it would attract more Orthodox Jews to the Community.

ARGUMENT

POINT I

THE DEFENDANTS' ACTION VIOLATES PLAINTIFFS' FIRST AMENDMENT RIGHTS

A. The Defendants' Action Violates Plaintiffs' First Amendment Rights Because The Action Of The Borough Council Intentionally Discriminated Against Plaintiffs' Religious Exercise

Government actions that "intentionally discriminat[e] against religious exercise a fortiori serve no legitimate purpose, [and therefore] no balancing test is necessary to cabin

[4] Additional statements opposing the eruv that were overtly discriminatory are set forth in

religious exercise in deference to such actions." Brown v. Borough of Mahaffey, 35 F.3d 846, 850 (3d Cir. 1994). Thus, contrary to defendants' claim, Def. Br. at 15-18, plaintiffs need not, although they can and will, show a substantial burden on the practice of their religion. Rather, all plaintiffs have to show is that defendants have intentionally discriminated against plaintiffs' religious activity. 35 F.3d at 850.

In Brown, the Borough "manifested hostility towards [plaintiffs'] religious activity by intentionally locking" a gate that provided access to the property where plaintiffs held revival meetings. As a result, attendees at the meeting were unable to drive up to the tent; instead, they were forced to park outside the gate and walk 100 to 200 feet to reach the tent. The locked gate also impeded the ability of disabled individuals to attend the meetings, and may have deterred others from attending because of the difficulty in reaching the tent. 35 F.3d at 848. The District Court granted summary judgment to defendants on the grounds that plaintiffs could not prove defendants' action placed a substantial burden on plaintiffs' exercise of religion. Id. at 849.[5]

The Third Circuit reversed, holding that the:

> "substantial burden" . . . analysis is inappropriate for a free exercise claim involving intentional burdening of religious exercise. The 'substantial burden' requirement was developed in the Supreme Court's free exercise jurisprudence . . . in order to balance the tension between religious rights and valid government goals advance by "neutral and generally applicable law" which create an incidental burden on religious exercise.

Plaintiffs' original brief at pp. 3-7.

[5] The District Court's analysis addressed, in part, the Religious Freedom Restoration Act, 42 U.S.C. § 2000, which was later held unconstitutional in City of Boerne v. Flores, 117 S. Ct. 2157 (1997). However, the Third Circuit specifically held that its conclusion was based on case law "involving intentional burdening of religious exercise" and therefore the substantial burden test required by RFRA was inapplicable. Id. at 849. Thus, the Brown decision remains good law following City of Boerne.

Id. The Third Circuit then noted that:

> [a]pplying such a [substantial] burden test to non-neutral government actions would make petty harassment of religious institutions and exercise immune from the protection of the First Amendment. A burden test is only necessary to place logical limits on free exercise rights in relation to laws or actions designed to achieve legitimate, secular purposes.

Id.

The Borough's action here ordering the removal of the eruv is no different than the Borough action locking the gate in Brown. Just as locking the gate impeded the ability of church members to attend revival meetings, removal of the eruv would impede the ability of Orthodox Jews to attend synagogue.

That defendants have intentionally discriminated against plaintiffs' religious conduct is made absolutely clear by the transparently pretextual nature of their stated rationale. For example, in their brief and affidavits defendants claim that because the eruv creates a "private domain," Def. Br. at 24, and because of the inability to "opt out" of the eruv, they voted to have it removed:

- Councilman Sullivan: "I am particularly concerned that there is no procedure for a citizen of Tenafly to opt out of the religious Orthodox Jewish sect's domain. Persons living within the eruv must be part of that domain whether they want to or not." (Sullivan ¶ 6).

- Councilwoman Kerge: "I believe that this accommodation would affect the rights of those who do not want to live within an eruv. I do not want to vote to establish something that makes people within an eruv feel awkward or put upon by a symbol of a religious group." (Kerge Aff. ¶12.)

However, the "private domain" is a legal fiction under Jewish Law which has no effect or impact on non-Jews or non-observant Jews. American Civil Liberties Union of New Jersey v. City of Long Branch, 670 F. Supp. 1293, 1294 (D.N.J. 1987). The proclamation issued by County Executive Schuber plainly states:

> The said eruv shall not be valid or binding for any other purpose and this proclamation creates no rights, duties or obligations enforceable in any court whether in law or in equity.

Lesnevich Aff., Exhibit A.

Thus, the proclamation is totally irrelevant to, and has no effect on, any non-Jew or non-observant Jew. What may be a fictitious private domain for those who observe Jewish Law remains an unfettered public domain for everyone else. Non-Jews and non-observant Jews may do anything and everything they did before the eruv was put up. Indeed, the eruv has been up for seven months and no one has even suggested to this Court that it has had any effect on his or her actions or activities.

Moreover, as the Mayor herself argued at the July, 1999 work session, the is a "simple" thing that consists of nothing more than existing telephone wires strung on existing telephone poles and rubber covers – lechis -- identical to those used by Verizon to cover its wires.[6] 7/8 T. 5. There is obviously nothing to "opt out" of. There is an eruv in Manhattan which "surrounds" St. Patrick's Cathedral. There is an eruv in Washington, D.C. which "surrounds" The White House. Affidavit of Chaim Book in Support of Plaintiff's Request for a Temporary Restraining Order ("Book Aff."), at ¶ 8. Neither the Archbishop of New York nor the President of the United States has found it necessary to "opt out" of these supposed religious enclosures. To the contrary, when the Washington, D.C. eruv was completed in 1990, then President George Bush wrote to the orthodox congregation expressing his support for the eruv. Book Aff. Exh. A.

Indeed, the "opt out" argument proves too much. Out of what do these people want to opt? Religious symbolism or practices. Thus, it is clear that the Council's

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[6] Defendants repeatedly refer to the wire that was strung in the Nature Preserve. This wire was removed before the December 12 vote and has never been an issue in this case.

action in refusing to allow the eruv and ordering its removal is targeted at the religious practices of the plaintiffs.

Further, defendants' argument that removing the eruv, which would exclude one group – Orthodox Jews – somehow confirms the tradition of the Borough as inclusive is better placed in Alice in Wonderland than in court papers. It is unfathomable how discriminatory actions promote inclusiveness.

Nor do the Borough's protestations that the eruv is not a religious symbol prove that there can be no impact on religion. The presence of the eruv, no less than the gate in Brown, allows Orthodox Jews to more fully practice their religion. The corollary is obvious. Denial of the opportunity to have an eruv restricts that ability. When the Council voted to disapprove the eruv, it knew full well that their action would have the effect of preventing some Orthodox Jews – like Stephanie Dardik Gottlieb, who spoke at the Council Meetings on November 28, 2000 and December 12, 2000 and who has small children – from going to synagogue on the Sabbath. 11/28 T. at 34-37; 12/12 T. at 96-97. In Brown, the action of the Borough merely impeded or deterred people from attending the revival meetings. A fortiori, action which prevents attendance at Sabbath services must "manifest hostility towards plaintiffs religious activity." Brown, 35 F.3d at 849.

Certain other defendants leave no doubt that their action in rejecting the eruv was targeted at the beliefs and practices of the plaintiffs:

- Councilman Wilson: "I am aware that one of the main reasons the first eruv was approved was because the authorities of the day, including the Catholic church were very happy for Jews of all kinds to restrict themselves from activities within a confined area. Indeed, these first steps were the beginning of what was later to be known and characterized as ghettos. The most famous of these is the Warsaw ghetto in Poland . . . In my opinion the community of Tenafly would be at great risk and would encourage the creation of what has become

in recent history a symbol of the restriction of religious freedom if an eruv is erected." (Wilson Aff. ¶¶ 4-5).

- Councilman Lipson: "The main reason I voted against allowing an eruv to be established on public property is that I believe it would be disruptive . . .. If we allow an eruv for Orthodox Jews then how do we say no any other group, religious or non-religious that wants to use the right of way for their own purpose? It would be terrible precedent." (Lipson Aff. ¶¶ 3, 4, 10, 11)

Whether couched as historical analysis or a concern that "it would be disruptive," these statements establish that the defendants were taking their action in order to discriminate against the religious beliefs of the plaintiffs who depend on the eruv to be able freely to practice their religion.

Councilman Sullivan is the only Borough official who professes to have conducted any research of the issue. Curiously, he states that he made inquiries of San Diego and Palo Alto, California officials. Sullivan Aff. ¶ 2. He makes no mention of researching the many communities in New Jersey that have had an eruv for several years. Had he talked to John McKeon, the Mayor of the Township of West Orange, for example, he would have learned that: West Orange has had an eruv for over 20 years; the benefits of the eruv far outweighed any problems, which stem mostly from misconceptions people have about it; the existence of the eruv has attracted many additional families to West Orange, including professionals, academics and business people, nearly all of whom have participated actively in the life of the community; the section of West Orange in which the eruv is located continues to attract non-Orthodox and non-Jewish people which has allowed West Orange to maintain its diversity and grow in influence. See Opinion, New Jersey Jewish News, March 15, 2001, attached as Exhibit D to the Shapiro Reply Cert.

Nor does Mr. Sullivan mention researching other communities in New Jersey or

on the East Coast that have eruvs. See Book Aff. at ¶ 8 (citing eruvs in Teaneck, Fort Lee, Edison, Elizabeth and Long Branch, New Jersey; Manhattan, Forest Hills and Lawrence, New York; Cincinnati, Ohio; Jacksonville, Florida; Philadelphia, Pennsylvania; Baltimore, Maryland; Charleston, South Carolina, and Washington, D.C.). Instead, he relies upon an analysis prepared by the City Attorney of Palo Alto, California to conclude that an eruv would be inappropriate in Tenafly, New Jersey.

Far from justifying the Council's position, however, the Palo Alto analysis bases its conclusion on California state law, not federal law: "California law, however, is different enough from Federal standards to dramatically raise the risk of losing a [legal] challenge. ... California may well forbid what the federal constitution tolerates." Shapiro Reply Cert., Exhibit E, at 6. That Defendant Sullivan had to search so far to find "support" for his objection to the eruv, however inapplicable it may be, while ignoring all the Towns in New Jersey that have successfully lived with eruvs for many years, is telling.[7]

Finally, defendants make the remarkable statement that "[t]wo courts have considered and rejected the argument that the Free Exercise Clause requires a municipality to grant permission for the construction of an eruv." Def. Br. at 22-23, citing American Civil Liberties Union of New Jersey v. City of Long Branch, 670 F. Supp. 1293 (D.N.J. 1987) and Smith v. County Board No. 14, 128 Misc. 2d 944, 491 N.Y.S.2d 584 (Queens Cty. 1984). This is a blatant misrepresentation of the holdings of these cases. There is nothing in the Long Branch opinion which even discusses, no less rejects, the argument that the Free Exercise Clause requires a municipality to grant permission to construct an eruv. The Smith Court did consider

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[7] That defendants have proffered such reasons for their vote can only lead to the conclusion that the decision was unreasonable, arbitrary and capricious, and therefore illegal under New Jersey state law. See infra Point I.2.b.

the Free Exercise argument. Far from rejecting the Free Exercise argument, the Court stated:

> What is mandated by the court is accommodation for religious practices. This notion recognizes "that there are necessary relationships between government and religion; that government cannot be indifferent to religion in American life; and that, far from being hostile of even truly indifferent, it may, and sometimes must, accommodate its instructions and programs to the religious interests of the people". (Tribe, 2 American Constitutional Law, 1978, § 14-4, p. 822; see Lynch v Donnelly, 465 U.S. ___, ___, 104 S.Ct. 1355, 1359, 79 L.Ed.2d 604, 610.) Thus, in the instant case, the court determines that the actions of the City agencies did not establish religion but were a valid accommodation to religious practice. (128 Misc.2d 944, 947, 491 N.Y.S.2d 584, 586).

Having established that Defendants intentionally discriminated against plaintiffs' religious exercise, plaintiffs have established a likelihood of success on the merits of its First Amendment claim.

B. Defendants' Action Violates The First Amendment Because It Burdens Religious Exercise In A Non-Neutral And Specific Manner

Defendants are no better off if this Court determines that it must assess defendants' action under a "substantial burden" test. As discussed below, defendants have placed a substantial burden on plaintiffs' ability to practice their religion by ordering the removal of the eruv, and defendants' proffered defense that an eruv is not necessary to practice religion and is a "circumvention" of Jewish law is an impermissible determination of religious "necessity" as a matter of law and wrong as a matter of fact.

1. The Defendants' Action Ordering the Removal of the Eruv Is Neither Neutral Nor Generally Applicable

Defendants contend that plaintiff's reliance upon Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520 (1993), is misplaced because the ordinances in question there were enacted specifically to suppress an essential element of the Santeria worship service. Id. at 534; Defs. Br. at 12. To the contrary, City of Hialeah is directly relevant.

City of Hialeah reiterated longstanding Free Exercise analysis prohibiting government action specifically directed at burdening religious practices. That is precisely what is at issue in this case. Defendants have taken an ordinance and, in their discretion, applied it in a way that substantially burdens the religious practice of a particular religious group. It is of no moment to say the Tenafly Borough Ordinance is "generally applicable" and "facially neutral." The original enactment of such an ordinance may very well be constitutional,[8] however, defendants applied this ordinance in a manner which substantially burdens the religious practices of the plaintiffs. As the Supreme Court stated in Smith:

> the "exercise of religion" often involves not only belief and profession but the performance of (or abstention from) physical acts: assembling with others for a worship service...proselytizing, abstaining from certain foods or certain modes of transportation. It would be true, we think (though no case of ours has involved the point), that a State would be "prohibiting the free exercise[of religion]" if it sought to ban such acts or abstentions only when they are engaged in for religious reasons, or only because of the religious belief they display.

494 U.S. at 877 (emphasis supplied). While in Smith the Court declined to carry the meaning of "free exercise of religion one step further" and strike down a criminal law that was not specifically directed a plaintiff's religious practice, but that was, instead, generally applicable to all, id. at 879, in City of Hialeah the ordinances in question did specifically target a particular religious practice and were not generally applicable. Thus, absent some legitimate state interest – which the City of Hialeah was unable to articulate – the ordinances had to be, and were, struck down. The instant case is no different.

Since the City of Hialeah decision, the leading case in the Third Circuit striking

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[8] Plaintiffs do not concede the constitutionality or legality of the Borough ordinance. For purposes of the preliminary injunction request, however, it is not necessary for the Court to address this issue.

down a law as not generally applicable is Fraternal Order of Police v. City of Newark, 170 F.3d 359 (3d Cir.), cert. denied, 120 S. Ct. 56 (1999). Muslim police officers, who are required by their faith to wear beards, challenged the City of Newark's requirement that police officers be clean shaven. However, the rule had two exceptions – one for medical conditions that made shaving difficult, and one for undercover officers. The Third Circuit held that the existence of the medical exception undermined the city's claimed interest in uniformity and made the rule not generally applicable. Further, permitting a medical but not a religious exception reflected a judgment on the part of the City that the officer's religious beliefs were less important than other individual needs. Id. at 366.

The situation here, if anything, is even more egregious. Religion has been singled out by the defendants. Religious practice is the only thing that is burdened. Thus, the Borough has forbidden use of the telephone pole as an accommodation of religion, but permits Verizon to use the poles in the exact same manner for a secular purpose. Similarly, the Borough has permitted house numbers and garage sale signs to be affixed to telephone poles. See accompanying affidavit of Jay Nelkin ("Nelkin Aff.") at ¶ 5 and Exhibit C (pictures of garage sale signs and house numbers permanently affixed to telephone poles). Presumably these would be prohibited under the same Borough ordinance.

The Borough has also permitted use of the telephone poles and other public facilities for other religious purposes. Thus, the Borough has:

- Permitted the hanging of Christmas decorations on telephone poles (Nelkin Aff. at ¶ 4 and Exhibit B);
- Permitted the placement of signs giving directions to churches and listing the times of worship services (Nelkin Aff at ¶ 3 and Exhibit A);
- Permitted for at least the past thirteen years, and supported with police presence, an annual three-hour Good Friday march through the center

of the Borough, which starts and ends with a worship service in one of the Borough's churches and is led by a person holding a four-foot cross (12/12 T. at 66); and

- Permitted the placement of a creche in the public park opposite City Hall (7/8 T. at 6, 10; 11/28 T. at 50, 51; 12/12 T. at 35).

Having reasonably accommodated these religious practices, the Council simply cannot now say that it cannot be required to accommodate the religious practices of the Orthodox Jews who need the eruv to be able fully to practice their religion. There is nothing in the Christian religion which requires that a creche be displayed or that a march be held on Good Friday, but the Borough has reasonably accommodated those activities. And, these activities are more obvious to non-participants than the telephone wires and lechis which constitute the eruv. When the Borough Council approved these activities was there any concern expressed about their exclusive nature? Was there any concern expressed that certain residents felt excluded because the Borough was permitting a religious display or activity of a different religion? Was there any concern expressed that members of other religions had no way to "opt out"? Plaintiffs here have no objection to the defendants' reasonable accommodation of these other religious practices, but do object to the defendants' inconsistent and unreasonable treatment of plaintiffs' request for an eruv.

Finally, the history behind the government's action is relevant to consider in determining whether the object behind the action was the suppression of religion. City of Hialeah, 508 U.S. at 540-42. In their moving brief, and in the Statement of Facts, plaintiffs have set forth extensive evidence of the history leading to the Borough's decision – all of it making quite clear that the motivating force behind the actions of the Borough Council was hostility directed at Orthodox Jews as a group and the fear that permitting the eruv would lead to further expansion of the Orthodox Jewish community. Pl. Br. at 3-8.

What all this proves is that defendants' action was not neutral or generally applicable. Rather it was applied here in a discriminatory manner the effect of which is to substantially burden religion.

2. The Defendants' Action Is Not Justified By A Compelling Interest

"It is the rare case" in which a discriminatory law can be justified by a compelling interest. Burson v. Freeman, 112 S. Ct. 1846, 1857 (1992) (plurality). The Borough's interest must uniquely justify discrimination against religion, and it must be so important that it overrides a prescribed constitutional right.[9] Nowhere have defendants enunciated such an interest.

a. The Defendants Have Not Articulated Any Lawful Interest For Its Discrimination Here

(i) The Defendants' Claim That An Eruv Is Not Necessary For The Exercise of Religion Cannot Be Considered As A Matter of Law and Is Wrong

Defendants make several arguments in defense of their decision to order the removal of the eruv. Among them is the meritless – both legally and factually – claim that the eruv is not necessary for plaintiffs' religious practices because they are, according to defendants, trying to "circumvent" the beliefs of their own religion.

First, this argument is legally untenable since the defendants are asking this Court to make a determination of what is and what is not a validly held religious belief. This, of course, is not the province of the courts. "It is not within the judicial ken to question the centrality of particular beliefs or practices to a faith, or the validity of particular litigants' interpretations of those creeds. Repeatedly and in many different contexts we have warned that courts must not presume to determine the place of a particular belief in a religion or the plausibility of a religious claim." Smith, 494 U.S. at 887 (internal citations omitted).

[9] Cases approving the imposition of state controls over religious practices illustrate the kinds of grave and immediate threats to important state interests which the Supreme Court has recognized. E.g., Jacobson v. Massachusetts, 197 U.S. 11 (1905) (vaccination); Prince v. Massachusetts, 321 U.S. 158 (1944) (child labor laws). Compare Wisconsin v. Yoder, 406 U.S. 205, 217-18, 229-30 (1972) (the substantial interest in education yields to the religious interest of

Nor is defendants' argument correct as a factual matter. As established in the accompanying affirmation of Rabbi Hershel Schachter:

- The institution of the eruv has been practiced for over 2,000 years and is based on principles derived from the Bible, developed in the Talmud and codified in the codes of Jewish law; and

- The existence of an eruv allows persons who otherwise would be unable to do so, to participate in communal prayer – in the same place and at the same time as others --on the Sabbath and Yom Kippur and, thereby meaningfully and significantly enhance their Jewish observance. Indeed, certain portions of the prayer service, including the weekly torah reading, can only be done in a group, and not alone in private prayer.

Thus, there is no authority – and the defendants provide none – for the assertion that "observant Jews in Tenafly may perform every element of Jewish observation without an eruv." Def. Br. at 16. That orthodox Jews have lived in Tenafly and elsewhere without an eruv does not change the fact that an eruv provides a meaningful and significant enhancement of Jewish observance. Schachter Aff. at ¶ 4. Indeed, the hundreds of eruvs which exist all over the country and throughout the world are testament to the fact that they, in fact, significantly enhance Jewish observance.

(ii) Defendants' Other Justifications For Rejecting The Eruv Are A Pretext

Defendants attempt to justify their rejection of the eruv in several other ways. Each is unavailing. The "inclusiveness," and "opt out" arguments have been dealt with above. See supra at pp. 8-9.

Defendants also contend that the eruv would "entangle government in making judgments about the relative weight of requests for special accommodation brought by various religious groups." Def. Br. at 25. But defendants apparently have no difficulty in making such

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parents in the formation of their children).

judgments about religious holiday displays or parades, which are both permitted by the Borough in reasonable accommodation of religious beliefs. See Nelkin Aff. at ¶ 3 and Exhibit A (pictures of directional signs, including hours of religious services, of various church denominations); id. ¶ 4 and Exhibit B (pictures of Christmas-related decorations affixed to telephone poles); 12/12 T. at 66 (Good Friday march and creche on Town property).[10]

b. The Defendants' Refusal To Accommodate The Free Exercise of Religion Here Is Contrary to The Defendants' Accommodations Of Other Religions And Therefore Violates New Jersey Law Requiring A Municipality to Exercise Its Power Reasonably and Not Arbitrarily

The Borough contends that N.J.S.A. 48:3-19 and Tenafly Ordinances 691 and 1127 provide the Borough the authority to regulate use of telephone poles . While plaintiffs do not concede these statutes support defendants' position, nevertheless it has long been settled law in New Jersey that a municipal corporation must act reasonably in its exercise of power. "All powers delegated to municipalities must be exercised reasonably and not arbitrarily." Elber v. City of Newark, 54 N.J. 487, 256 A.2d 44, 46 (1969); Kennedy v. City of Newark, 29 N.J. 178-184-85 (1959); Bounds v. Prospero, 319 N.J. Super. 277, 283, 725 A.2d 103, 106 (1999). Further, the "discretionary activity of municipal governing bodies in this state has traditionally been subjected to close judicial scrutiny in order to prevent arbitrary and unreasonable action." West Point Island Civic Association v. Township Committee of the Township of Dover, 54 N.J. 339, 346, 255 A.2d 237, 240 (1969). There can be no dispute that the defendants here, in "enforcing" the Borough's ordinance, acted in a discretionary manner. See id. at 345, 255 A.2d at 240.

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[10] To the extent defendants are arguing that a compelling state interest is avoiding an unconstitutional entanglement with religion, such a claim of entanglement must be legitimate. Hartmann v. Stone, 68 F. 3d 973, 979 (6th Cir. 1995). Actions that violate the Free Exercise Clause "cannot be saved by relying on implausible Establishment Clause concerns." Id. In light

In Elber, the Supreme Court held that Newark's policy of not charging the accumulated overtime accounts of Jewish police officers for paid time off allowed for Jewish holidays was "obviously unreasonable and arbitrary, and hence illegal," because this benefit was not extended to any other member of the police force. 54 N.J. at 491; 256 A.2d at 46. As the Court noted, "[p]lainly, all members of the force must be treated equally." Id.

Here, assuming one could find a non-discriminatory rationale for its decision, it is clear that defendants' decision to remove the eruv was unreasonable and arbitrary since the Borough has reasonably accommodated other religious groups. See supra, discussion at pp. 14-15. Accordingly, the Borough Council's vote is illegal and void.

C. The Defendants' Action is Unconstitutional Viewpoint Discrimination

In the same way that defendants' action was not neutral or generally applicable, their action prohibiting the plaintiffs' use of the telephones poles erected on the public right of way can not survive a First Amendment freedom of speech claim because their action was unreasonable and not viewpoint neutral. See, e.g., Lamb's Chapel v. Center Moriches Union Free School District, 508 U.S. 384, 393 (1993).

In Lamb's Chapel, the Supreme Court held that a school district violated an organization's free speech right by denying it use of school facilities during off-hours solely because of the religious viewpoint of the program it wished to present. The Court rejected the district's claimed compelling state interest because the school property was open to a wide variety of uses, the district was not directly sponsoring the religious group's activity, and any benefit to religion was no more than incidental. Id.; see City of Long Branch, 670 F. Supp. at 1293 (permitting eruv is reasonable accommodation); see also Capitol Square Review and

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of the Long Branch decision, such an argument is implausible.

Advisory Board v. Pinette, 515 U.S. 753 (1995) (applying Lamb's Chapel holding to cross erected for religious purposes in public park).

In light of all the other uses permitted of the telephone poles, supra, at 14-15, it is clear that defendants' action was not viewpoint neutral, but instead specific to Orthodox Jews. Nor are the compelling state interest factors rejected by the Court in Lamb's Chapel at issue here. By its very terms, defendants' action selects the views of Orthodox Jews for disfavored treatment, which is impermissible. Id.; see also Rosenberger v. Rector and Visitors of University of Virginia, 515 U.S. 819, 829- 37 (1995) (selecting those student journalistic efforts with religious viewpoints for disfavored treatment, in contrast to those students without a religious standpoint, is unconstitutional viewpoint discrimination).

POINT II

BECAUSE DEFENDANTS' ACTION VIOLATES THE FIRST AMENDMENT, PLAINTIFFS HAVE ESTABLISHED A VIOLATION OF 42 U.S.C. §§ 1983 AND 1985

The sum of defendants' response to plaintiff's allegation regarding 42 U.S.C. § 1983 is nothing more than if there is no violation of the First Amendment, there is no violation of § 1983. Def. Br. at 27. Having demonstrated a violation of the First Amendment, plaintiffs have, in fact, established a violation of § 1983.

Defendants also misstate the requirements of a claim under § 1985: it is not necessary to claim an equal protection violation, but only a violation of one's civil rights. Owens v. Haas, 601 F.2d 1242, 1247 (2d Cir. 1979). Also, a conspiracy may include a municipality as one of the conspirators. Id. Plaintiffs have certainly met both pleading requirements.

POINT III

THE DEFENDANTS' ACTIONS VIOLATE THE FEDERAL FAIR HOUSING ACT

A. Plaintiffs Have Properly Asserted A Cognizable Fair Housing Claim

The defendants completely misconstrue the nature and the basis of plaintiffs' Fair

Housing Act claim.[11] This case is remarkably similar to the claim successfully brought by Orthodox Jews in Leblanc-Sternberg v. Fletcher, 67 F.3d 412 (2d Cir. 1995), where the Second Circuit held that the FHA was violated when a village, with discriminatory intent, sought to deter Orthodox Jews from purchasing homes within the village by preventing the development and use of home synagogues Id. at 428. In this case, defendants have taken a substantially similar approach to exclude Orthodox Jews from the Tenafly community. Instead of devising a way to prevent Orthodox Jews from building and using synagogues, defendants have found a way of preventing Orthodox Jews from getting to synagogue.[12] Accordingly, plaintiffs have properly alleged a claim under the FHA using the theory of disparate treatment.[13]

Defendants' assertion that the plaintiffs are improperly using the FHA to require defendants to reasonably accommodate plaintiffs' religious beliefs is incorrect. Def. Br. at 34-35. An accommodation is defined in the FHA as a deviation or alteration of some pre-existing

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[11] The FHA is a very broad statute which forbids any practice that makes housing unavailable to persons on a discriminatory basis. See Hack v. President and Fellows of President and Fellows of Yale University, 237 F.3d 81, 88 (2d Cir. 2000). The Supreme Court has repeatedly directed courts to give a "generous construction" to the FHA, as the statute's purpose is to "promote integration and root out segregation." See Trafficante v. Metropolitan Life Insurance Co., 409 U.S. 205, 211-12 (1972). Congress intended the anti-discrimination provisions of the FHA to be broadly applied to "ultimately result in residential integration." See Huntington Branch, NAACP v. Town of Huntington, 844 F.2d 926, 936 (2d Cir.), aff'd in part, 488 U.S. 15 (1988). The phrase "otherwise make unavailable or deny" extends the prohibitions of the FHA to reach conduct beyond the simple selling or renting of a dwelling, and has been interpreted to reach a wide variety of discriminatory housing practices as many courts have interpreted the phrase to be "as broad as Congress could have made it." Wood v. Foster, 884 F. Supp. 1169, 1175 (N.D. Ill. 1995).

[12] The fact that LeBlanc-Sternberg involved the establishment of a zoning ordinance while the case at bar concerns the enforcement of a general municipal ordinance makes no difference. The Second Circuit focused on the discriminatory motives behind the defendants' actions and the effects on Orthodox Jews the defendants intended to engender more than it did on the nature of the act taken. Id. at 428, 430-31. The motives and intended effects in this case are the same, and therefore just as impermissible under the FHA.

[13] See Village of Arlington Heights v. Metropolitan Housing Development Corp. 429 U.S. 252, 267-68 (1977); LeBlanc-Sternberg v. Fletcher, 67 F.3d 412, 425 (2nd Cir. 1995); United States v. Yonkers Board of Education, 837 F.2d 1181, 1181, 1217, 1223, 1226 (2d Cir. 1987), cert. denied, 486 U.S. 1055 (1988).

rule, policy, practice or service that is made when necessary to afford such persons an equal opportunity to use and enjoy a dwelling, for example, to meet the needs of handicapped individuals. 42 U.S.C. 3604(f)(3)(B); see Hack, 237 F.3d at 103. Plaintiffs have not made a request to make any sort of change to a method of operation that is currently employed within Tenafly. Plaintiffs' FHA claim is based upon the fact that when defendants refused plaintiffs' request, they did so for discriminatory reasons and with the intention to keep Orthodox Jews from moving into Tenafly, thereby bringing defendants' decision under the purview of the FHA. See LeBlanc-Sternberg, 67 F.3d at 425; Kessler Institute for Rehabilitation Inc. v. Mayors Council of the Borough of Essex Falls, 876 F.Supp. 641, 664 (D.N.J. 1995).

B. Plaintiffs Have Standing To Bring Their Fair Housing Claim

Defendants next contend that that plaintiffs do not have standing because they have not alleged that defendants have refused or denied housing or that defendants action impacted the terms, conditions, or privileges of a sale or rental of a dwelling. Def. Br. at 32. However, it is well established that an injury "need not be economic or tangible in order to confer standing."[14] Havens Reality Corp. v. Coleman, 455 U.S. 363, 371, 376 (1982). The sole requirement for standing to sue under the FHA is the "Article III minima of injury in fact: that the plaintiff allege that as a result of the defendant's actions he suffered a distinct and palpable injury." Id. at 372. One court has held that Orthodox Jews' suffered an injury in fact, and thus had standing, because their ability to associate with others of similar beliefs was limited by the chilling effect the incorporation of Airmont had on the desire of Orthodox Jews to move into that community. See Leblanc-Sternberg v. Fletcher, 781 F. Supp. 261 (S.D.N.Y. 1991). Here, plaintiffs have successfully provided the factual allegation required to establish standing by

[14] The deprivation of either "the social and professional benefits of living in an integrated society," see Gladstone, 441 U.S. at 111, or "the deprivation to the right to important social, professional, business and economic, political and aesthetic benefits of interracial associations" constitute cognizable injuries under the FHA. Havens Reality Corp. v. Coleman, 455 U.S. 363, 376 (1982). A deprivation of a Constitutional right constitutes a cognizable injury under Article III. See, e.g., Warth v. Seldin, 422 U.S. 490 (1975) ("the actual or threatened injury required by Art. III may exist solely by virtue of 'statutes creating legal rights, the invasion of which creates standing'.")

effectively alleging both that they were deprived of their constitutional right to freely exercise their religion and that it was the defendant's actions which lead to this injury.

Plaintiffs also have standing because they were the direct targets of the defendants' discrimination against Orthodox Jews. See Point I, supra, Complaint at ¶ ¶ 22, 34, 39, 41, 54, 73-74. A person who is directly targeted by the discriminatory housing practice in question possesses standing as an "aggrieved person" under 42 U.S.C.§ 3616(a)(1)(A). See Kessler Institute for Rehabilitation, Inc., 876 F. Supp. at 652.

Finally, plaintiffs have standing because they are alleging that the removal of the eruv will have a discriminatory effect on Orthodox Jews, forcing some Jews already living in Tenafly to move out of the community while preventing Orthodox Jews who live elsewhere from moving into the community. See Complaint at ¶ ¶ 73-74; Brenner Affidavit at 6. Just as the Orthodox Jews in Leblanc-Sternberg, plaintiffs will be injured because they will be denied the ability to associate with other individuals who share similar beliefs and customs. See 781 F. Supp. at 270. Plaintiffs do not have to wait for this development to manifest to bring suit, because "a person who is likely to suffer such an injury need not wait until a discriminatory effect has been felt before bringing suit." See Leblanc-Sternberg, 67 F.3d at 425.

Conclusion

For all the forgoing reasons, and those set out in plaintiffs' moving brief, plaintiffs' request for a preliminary injunction should be granted in all respects.

Dated: April 5, 2001
New York, New York

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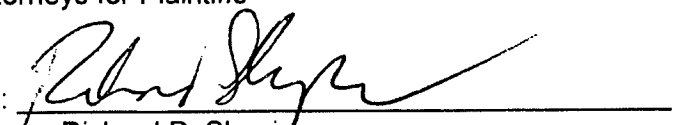
By: 
Richard D. Shapiro

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

TENAFLY ERUV ASSOCIATION, INC., CHAIM BOOK, YOSIFA BOOK, STEPHANIE DARDICK GOTTLIEB, and STEPHEN BRENNER,

Plaintiffs,

Case No. 00-6051 (WGB)

-against-

THE BOROUGH OF TENAFLY, ANN MOSCOVITZ, individually and in her official capacity as Mayor of the Borough of Tenafly, CHARLES LIPSON, MARTHA B. KERGE, RICHARD WILSON, ARTHUR PECK, JOHN T. SULLIVAN, each individually and in their official capacities as Council Members of the Borough of Tenafly,

Defendants.

PLAINTIFFS' POST HEARING MEMORANDUM OF LAW

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Preliminary Statement

The record establishes that the action of the Borough Council, in denying the application of the Tenafly Eruv Association, Inc. ("TEAI") to maintain an eruv, was motivated by the desire to prevent an influx of Orthodox Jews into Tenafly. Whether expressed as a concern that Tenafly would become a ghetto; that Orthodox Jews would throw stones at cars and block traffic on the Sabbath; that the school system would be adversely affected; that many little synagogues would be established; or there would be a "community within a community," the common thread and theme was the same – the fear that an eruv would lead to an influx of Orthodox Jews. To prevent such an influx the Council denied the eruv application, thereby intentionally discriminating against plaintiffs' religious exercise.

The Third Circuit has held that government actions which intentionally discriminate against religious exercise serve no legitimate purpose and must be struck down even without a balancing test. Brown v. Borough of Mahaffey, 35 F.3d. 846 (3d. Cir. 1994). The defendants' action which intentionally discriminated against plaintiffs' religious exercise must, therefore, be invalidated. See Point IA.

The Supreme Court of the United States has held that government action which has an impermissible object, is not generally applicable and is not justified by a compelling state interest cannot be sustained. Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520 (1993). The Borough Council's denial of the eruv application is such an action and, therefore, cannot be sustained. See Point IB.

The Supreme Court has also held that religious speech is as fully protected by the First Amendment as secular expression. A municipality cannot, therefore, discriminate against

the expression of a religious viewpoint. Defendants' action here is just such viewpoint discrimination. See Point II.

Further, the defendants' action is unreasonable and arbitrary because they have not offered any legitimate rationale for their actions and because they have not treated plaintiffs' request equally and in the same manner as they have accommodated the religious beliefs of other Tenafly residents. See Point III.

Finally, government action that makes housing unavailable to a particular religious group violates the Fair Housing Act. The action of the defendants is such an action and, therefore, is invalid. See Point IV.

During the course of the hearing, the Court posed certain questions and raised certain issues – the relevance of motivation to plaintiffs' constitutional claims, the applicability of the Grossbaum case, whether the action of the Borough Council can be distinguished from the denial of a parade permit, inter alia. Plaintiffs' responses to those questions are included in the relevant sections of the Argument.[1]

[1] Amicus ACLU-NJ again argues that approval of an eruv is a violation of the Establishment Clause of the First Amendment. Since defendants have conceded that this argument is inapplicable and the Court has already ruled that the argument will not be considered, Tr. 4/25 at pp. 28-29, plaintiffs will not respond to it.

ARGUMENT

POINT I

DEFENDANTS HAVE VIOLATED PLAINTIFFS' FIRST AMENDMENT RIGHTS

A. The Defendants' Action Violates Plaintiffs' First Amendment Rights Because The Action of The Borough Council Intentionally Discriminated Against Plaintiffs' Religious Exercise

In Brown v. Borough of Mahaffey, 35 F.3d 846 (3d Cir. 1994), the Third Circuit held that the Borough's action violated plaintiffs' First Amendment rights because the actions "intentionally discriminated against [plaintiffs'] religious exercise." Id. at 850. Since such actions "a fortiori serve no legitimate purpose, no balancing test is necessary to cabin religious exercise in deference to such actions." Id. Plaintiffs have established that the action of the Tenafly Borough Council intentionally discriminated against plaintiffs' religious exercise and have, therefore, established, without more, a violation of their First Amendment rights.

The record conclusively establishes that the motivation of the Borough Council in denying the Tenafly Eruv Association's ("TEAI") application to establish the eruv was to keep Orthodox Jews out of Tenafly. Defendants accomplished that goal by denying the eruv application, thereby intentionally discriminating against plaintiffs' religious exercise, knowing that by doing so other Orthodox Jews would not move in.

The members of the Council and the Mayor articulated their rationale at the hearing in different ways.[2] Councilman Wilson expressed his opposition by referring to medieval history and observing:

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[2] Except for Councilman Sullivan, defendants gave no reason for the denial of TEAI's request at the public hearing in December 2000. They first provided their reasons in response to plaintiffs' motion for a preliminary injunction, having had several months to reflect on and consider their decision.

> when you create a neighborhood by virtue of defining that neighborhood through the use of this religious symbol, however its physical characteristics may be, there is a tendency over the years to then have only people of that particular Orthodox Jewish faith to live in that neighborhood.

Tr. 4/30 p. 78. In other words, if there is an eruv, only Orthodox Jews will live in Tenafly.

Councilman Peck admitted that voting to deny the eruv application would have an impact on those Orthodox Jews who believed an eruv was necessary and were considering Tenafly as a place to live:

> A. Yes, I did think so. But as you've said, many people have said here today, there were many, many communities, including neighboring communities of Tenafly, where an eruv already exists, so it did not seem to me that this, to use your phrase, impact, would be necessarily severe.
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> Q. You mean they would live in Englewood but they wouldn't live in Tenafly, is that what you mean to say?
>
> A. Yes.

Tr. 4/30 p. 106. In other words, if Tenafly did not have an eruv and Orthodox Jews could not, therefore, freely practice their religion, they would move to Englewood, not Tenafly.

Councilman Lipson changed his story at the hearing. In his affidavit he claimed that he voted against the eruv because it would be disruptive. At the hearing, he testified that he voted against the eruv because TEAI "put up an eruv in the town without coming before the Mayor and Council to ask for permission." Tr. 5/1 p. 8. That reason was not even mentioned in the affidavit.

TEAI's failure to get permission is a recurring, pejorative theme. First, the argument is irrelevant to the constitutional issues before the Court. Second, it is frivolous. TEAI did apply for permission. Complaint, Exh. A. Moreover, as late as November 2000, it was the understanding of the TEAI and the Borough attorney that there was no ordinance that required an

application. In a letter dated November 2, 2000, which was distributed to the Mayor and every member of the Council and discussed at the Council meeting of November 21, 2000, Mr. Shapiro, counsel to TEAI, confirmed the advice he had been given by the Borough attorney that "the Borough has no specific ordinance covering this matter . . ." Pl. Exh. 14; Tr. 11/21 p. 3.[3] Neither the Mayor, any member of the Council, nor the Borough attorney voiced any disagreement with Mr. Shapiro's statement. Id. Even as late as minutes before the Council voted on December 12, 2000, Councilman Sullivan stated: "To the best of my knowledge – and this can be confirmed – there is no ordinance, no resolution that says that you cannot hang something from a utility pole, to the best of my knowledge, and please correct me if I'm wrong. There's no ordinance." Tr. 5/8 p. 17. Councilman Sullivan's testimony that he was simply "asking a question in the negative" is not credible.[4] Defendants' continued emphasis on this issue is a transparent attempt to cast aspersions on plaintiffs' integrity and good faith and further demonstrates the irrational hostility which led to the action of the Council.[5]

Returning to Councilman Lipson, it is clear from his affidavit and testimony that: he realized that the vote of the Council would have an impact on the people who believe an eruv is necessary, Tr. 5/1 p. 28; he feared that an eruv would lead to the establishment of many small houses of worship, id. at 15; and, he wanted to keep Tenafly "the way it is." Id. at 29-30. In

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[3] This transcript is being provided to the Court contemporaneously with the filing of this Brief, along with the tape recording of this and the three other council meetings during which the eruv was discussed.

[4] It is also contradicted by his handwritten notes, which were produced after his testimony, and which state: "no ordinance in Tenafly to prevent sticking something up on the pole." Pl. Exh. 32 at 1.

[5] This hostility is further demonstrated by the Borough's May 2001 newsletter to the Tenafly community, in which the Borough Council once again attacks plaintiffs' religious beliefs, and

other words, Orthodox Jews who could not freely practice their religion without an eruv would not move to Tenafly. As a result, Tenafly would stay the "way it is."

Councilwoman Kerge was more diplomatic and circumspect but she, too, was motivated by the desire to keep Orthodox Jews out of Tenafly. She couched her opposition as a concern about "the concept of building a community within a community." Tr. 5/1 p. 52. And, the community she was talking about was "the Orthodox Jewish Community that was seeking to put up the eruv." Id.[6] When asked whether the goals of this new community – growing spiritually, maintaining a spiritual and respectful place for prayer, maximizing each person's potential with respect to Bible study, transmitting proper values to future generations, sharing our values and learning from Jews and other denominations as well as the surrounding non-Jewish community, wanting a community that celebrates its diversity and respect for all religions and nationalities, raising our children in a town that stands for tolerance and high standards in its educational system and wanting Tenafly to continue in the tradition of inclusiveness and support for each individual and religious belief, id. at 53-57 – raised any serious questions for her, she said no. She did question the "community's" goal to take an active role in communal affairs, claiming not to know whether that meant taking an active role in the total Tenafly community. Id. at 54. Passing for a moment on that, especially in the context of the entire statement the meaning is obvious, Councilwoman Kerge did not raise a question with anyone as to what "communal affairs" meant as it was stated in the vision statement. Id. at 66. In any event, if her

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repeats defendants' misunderstanding of and misstatements about the need for an eruv. Pl. Exh. 33.

[6] While she admitted that Catholics and Koreans lived in Tenafly, she would not concede that there was a "Catholic Community" or a "Korean Community" in Tenafly. Tr. 5/1 pp. 52-53.

concern was that "communal affairs" meant the affairs of the new Orthodox Jewish community, it further demonstrates her focus on, and opposition to, Orthodox Jews moving to Tenafly.

Ms. Kerge also testified that she spoke to many people, received many phone calls and much correspondence, listened carefully at the public hearings and took all of that into consideration when she cast her vote. Id. at 48, 49. Finally, Ms. Kerge admitted that: people buy houses because they fill their needs, id. at 58; that certain Orthodox Jews believe that without an eruv they can't do certain things they would like to do on the Sabbath, id. at 59; and, that Stefanie Dardik Gotlieb and others testified that they need the eruv in order to go to synagogue on Sabbath. Id. at 59. In light of this testimony, her refusal to acknowledge that, without an eruv, Orthodox Jews who needed an eruv to go to synagogue on the Sabbath would not buy houses in Tenafly, is simply not credible.

While Councilman Sullivan claimed personally to be in favor of the eruv, Tr. 5/8 p. 25, and proffered various purported rationales for his vote, the reason he voted against the eruv was because "there were a variety of constituents who had objected to the eruv, and [we] had to represent them as well as the members of the Eruv Association." Id. at 24. And, he apologized to Mr. Nelkin after the vote, saying: "you have no idea how much opposition you face and how much fear and hatred there is that you have to overcome." Id. at 31. The fear and hatred was openly expressed in correspondence and at the public hearings. As Mr. Nelkin testified: "There were so many people that had unbelievably hateful things to say about Orthodoxy and Observant Jews." Id. at 35. Obviously, Mr. Sullivan succumbed to the vocal opposition to the eruv based on the "fear and hatred" of Orthodox Jews.

Finally, Mayor Moscovitz, even though she did not vote, played a pivotal role in the defeat of the eruv application and she made her reasons clear to Rabbi Goldin, Mr. Agus and

Mr. Book: she didn't want Orthodox Jews moving into Tenafly and throwing stones at cars and blocking traffic, Tr. 5/1 p. 127; she expressed the concern that an increased number of observant Jews in Tenafly would harm the public schools, id. at 115; she expressed the concern that, if Orthodox Jews moved to Tenafly many little synagogues would be formed – the "Spring Valley phenomenon," id.; she expressed the concern that an influx of Orthodox Jews would cause local businesses to potentially go out of business; id. at 116; and she expressed the concern that an influx of Orthodox Jews would jeopardize the acceptance and progress the Jewish population of the Borough has achieved. Goldin Aff. ¶ 14.

The Mayor and each member of the Council who voted to deny the eruv application were motivated by their, or their constituents', fear that approval of the eruv would lead to an influx of Orthodox Jews. To prevent such an influx, they disapproved the eruv, thereby preventing the plaintiffs from practicing their religion in the way they deemed necessary and appropriate. By intentionally discriminating against plaintiffs' religious exercise, the Council's action violated plaintiffs' First Amendment rights.

B. The Defendants' Action Violates Plaintiffs' First Amendment Rights Because It Had An Impermissible Object And Was, Therefore, Not Neutral, Was Not Generally Applicable And There Is No Compelling State Interest

In the very first paragraph of its decision in Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520 (1993), the Supreme Court observed that:

> [t]he principle that government may not enact laws that suppress religious belief or practice is so well understood that few violations are recorded in our opinions.

Id. at 523 (citations omitted). The Court went on to invalidate the challenged ordinances because they "had an impermissible object, and in all events the principle of general applicability was violated because the secular ends asserted in defense of the laws were pursued only with respect to conduct motivated by religious beliefs." Id. at 524.

The testimony at the hearing incontrovertibly established that the challenged action – the decision of the Borough Council denying the eruv application – had an "impermissible object"[7] – denial of the opportunity to Orthodox Jews freely to practice their religion – and was not, therefore, neutral; and violated "the principle of general applicability . . . because the secular ends [regulation of the public right of way in general and the use of telephone poles in particular] were pursued only with respect to conduct motivated by religious beliefs."

1. The Action Of The Borough Council Had An Impermissible Object And Was Not, Therefore, Neutral

Just as the record in City of Hialeah "compell[ed] the conclusion that suppression of the central element of the Santeria worship service was the object of the ordinances," 508 U.S. at 534, the record here compels the conclusion that the prevention of religious practices of Orthodox Jews – e.g., attending synagogue on Shabbat – was the object of the Council action. That such was the object of the Council action is established, among other things, by "the effect of [the action] in its real operation." Id. at 535. The effect of the Council action, if implemented, would be, inter alia, to restrict the ability of Orthodox Jews to go to synagogue (Tr. 5/14 pp. 8, 54-55; Tr. 5/1 pp. 123-24), thereby inhibiting their practice of their religion.[8]

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[7] Amicus ACLU-NJ "believes that the [TEAI] has clearly satisfied its initial burden that an impermissible motive was a substantial or motivating factor leading to the decision by the Borough not to permit the eruv." See ACLU-NJ Letter Br. at 5. While amicus describes the impermissible motive somewhat differently, id., the impact is the same – "[t]he burden thus shifts to the defendants Borough of Tenafly to prove ... that the impermissible motives were not the 'but for' cause of the decision," id., a burden which the Borough has not thus far satisfied. Id.

[8] It is not necessary to examine the defendants' motivation in assessing plaintiffs' Free Exercise claim. As the Seventh Circuit noted in Grossbaum v. Indianapolis-Marion County Building, 100 F.3d 1287 (7th Cir. 1996), cert. denied, 520 U.S. 1230 (1997):

Defendants' argument that there is no violation of plaintiffs' free exercise rights because plaintiffs do not need an eruv in order to observe their religion and are attempting to circumvent the tenets of their own religion is both legally and factually flawed. As the Supreme Court has made clear, the courts should not "question the centrality of particular beliefs or practices to a faith, or the validity of particular litigants' interpretations to those creeds." Employment Division, Oregon Department of Human Resources v. Smith, 494 U.S. 872, 887 (1990). Thus, whether some Orthodox Jews live without an eruv is irrelevant. The plaintiffs and other Orthodox residents of Tenafly have testified that they need an eruv properly and completely to observe their religion. Tr. 5/14 pp. 8, 54-55; Tr. 5/1 pp. 123-24; Statements of Stefanie Dardik Gotlieb before Borough Council meetings, Tr. 11/28 pp. 34-37, Tr. 12/12 pp. 96-97 (Exhs. B, C to Shapiro Reply Aff.).[9] Indeed, as Rabbi Schachter states:

- The institution of the eruv has been practiced for over 2,000 years and is based on principles derived from the Bible, developed in the Talmud and codified in the codes of Jewish law; and

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> The subjective motivations of government actors should also not be confused with what the Supreme Court recently referred to, in a Free Exercise Clause case, as the "object" of a law. [citing City of Hialeah] . . . . The Court there determined that three ordinances impermissibly "had as their object the suppression of religion." The Court made this determination by analyzing both the text and the effect in "real operation" of the ordinances. The Court did not, however, analyze the motive behind the ordinances. Justice Kennedy's investigation into motive . . . was joined by only Justice Stevens.

Id. at 1292 (other internal citations to City of Hialeah omitted).

[9] There are eruvs presently in numerous cities and towns around the country, including Teaneck, Fort Lee, Edison, Elizabeth, and Long Branch, New Jersey; Manhattan, Forest Hills and Lawrence, New York; Baltimore, Maryland; Charleston, South Carolina; Cincinnati, Ohio; Jacksonsville, Florida; and Washington, D.C. See Book Aff. ¶ 8. Obviously, there are many Orthodox Jews who believe they need an eruv to practice their religion.

- The existence of an eruv allows persons who otherwise would be unable to do so, to participate in communal prayer – in the same place and at the same time as others – on the Sabbath and Yom Kippur and, thereby meaningfully and significantly enhance their Jewish observance. Indeed, certain portions of the prayer service, including the weekly torah reading, can only be done in a group, and not alone in a private prayer.

Schacter Aff. ¶ ¶ 3-4. One person's circumvention[10] is another person's need and another person's meaningful and significant enhancement. The Court cannot be involved in deciding "the validity of [the plaintiffs'] interpretation [of their] creeds." Smith, 494 U.S. at 887.

Finally, just as in City of Hialeah, the action is not neutral because the only conduct subject to the action of the Council is the free exercise of the Orthodox Jewish religion. The only instance in which the Borough Council has applied the Ordinance relied on here was to reject the eruv application.

2. The Borough Ordinance Is Not Generally Applicable

In City of Hialeah, the court stated:

> The principle that government, in pursuit of legitimate interests, cannot in a selective manner impose burdens only on conduct motivated by religious belief is essential to the protection of the rights guaranteed by the Free Exercise Clause.

508 U.S. at 543. Thus, even if there were legitimate interests served by the Borough Council's action, it could not be sustained because it burdens only plaintiffs' religious practices. While forbidding the use of the utility poles for the eruv, the Borough permits their use by Verizon for telephone wires, by Metricom for wireless communication devices, and to display Christmas decorations, garage sale signs and house numbers. When a dispute arose concerning regionalization of the school system, the advocates of one position put orange streamers on the

[10] Knowing, as they must, that the "circumvention" argument is legally irrelevant, the defendants' continued emphasis on this argument can only be seen as further evidence of their antipathy to the religious practices of the plaintiffs.

telephone poles to express their view. Tr. 5/1 p. 75. No application for permission was made to the Borough nor did the Borough do anything to take them down. Id. at 76.

In addition, the Borough has:

- permitted the use of its right of way for signs giving directions to Churches and listing the times of worship services;
- permitted placement of a creche in the public park opposite City Hall;
- sponsored a visit with Santa in Borough Hall and an Easter Egg roll on the lawn outside Borough Hall; and
- permitted and supported with police presence, an annual three-hour Good Friday march through the center of the Borough, which starts and ends with a worship service in one of the Borough's churches and is led by a person holding a four-foot cross.

See Pl. Reply Brief at pp. 14-15.

The Borough has, thus, allowed the use of municipal property in general and the utility poles in particular for countless secular and religious purposes.[11] Some of these activities – the creche, the Good Friday march, the visit with Santa and the Easter Egg roll – have significantly more of a religious connotation and are more obviously religious, and, therefore, exclusionary, to non-participants than the telephone wires and lechis which form the eruv.[12] Plaintiffs do not object to the Borough's accommodation and even sponsorship of these

[11] The Borough's post-hearing decision to ask the churches in Tenafly to remove religious symbols and times of worship services from directional signs, see Letters of Joseph DiGiacomo, May 18, 2001, annexed to Letter of Walter Lesnevich to the Court, May 24, 2001, does not eliminate the problem. A directional sign to a church or synagogue is still the use of public property to accommodate and facilitate the ability of worshippers to attend religious services.

[12] Defendants contend that the "permanent" nature of the eruv somehow makes it "bad" and distinguishes it from the "good" "temporary" displays such as the creche, Good Friday march, and Christmas decorations. In Establishment Clause cases concerning such "temporary" displays, no court, including the Supreme Court, has ever recognized the temporary nature of the display when it held the display violated the Constitution. In any event, the directional signs are permanent.

activities. Having done so, however, the Borough simply cannot deny the accommodation sought by the plaintiffs.

In Fraternal Order of Police v. City of Newark, 170 F.3d 359 (3d Cir.), cert. denied, 528 U.S. 817 (1999), the Third Circuit, in an analogous situation, invalidated the City of Newark's requirement that Police Officers be clean shaven. The Court held that the regulation violated the free exercise right of plaintiffs – Muslims whose faith required them to wear beards – because there was a medical exception to the regulation and the defendants could not, therefore, claim that the rule was generally applicable. In addition, permitting a medical but not a religious exception reflected a judgment by the City that plaintiffs' religious beliefs were less important than other individual needs. Id. at 366.

Just as in Fraternal Order, the Borough Council's action denying the eruv application was not generally applicable and reflected an impermissible judgment by the Borough that plaintiffs' religious beliefs were less important than the many other secular and religious uses of Borough property.

3. Defendants Have Not Articulated Any State Interest Which Justifies Its Action

In City of Hialeah, the Supreme Court held:

> A law burdening religious practice that is not neutral or not of general application must undergo the most rigorous of scrutiny. To satisfy the commands of the First Amendment, a law restrictive of religious practice must advance "interests of the highest order" and must be narrowly tailored in pursuit of those interests.

508 U.S. at 546 (citations omitted).

The "justifications" offered by the defendants fall woefully short of advancing "interests of the highest order." Indeed, no legitimate interest has been identified by the defendants. The only rationales proffered – the "opt out" and "inclusiveness" arguments – are

ludicrous. See Plaintiffs' Reply Brief In Further Support of Motion For Preliminary Injunction at 8-9.

* * *

In sum, defendants' action in rejecting the eruv had an impermissible object and was not, therefore, neutral, was not generally applicable and defendants have not articulated any state interest, no less one "of the highest order," to justify the action. Thus, it violates plaintiffs' First Amendment rights.

POINT II

DEFENDANTS HAVE VIOLATED PLAINTIFFS' FIRST AMENDMENT FREE SPEECH RIGHTS BY DISCRIMINATING AGAINST THEIR VIEWPOINT WITHOUT JUSTIFICATION

The Free Speech Clause of the First Amendment does not permit governmental restrictions on speech when the restrictions are based on the speaker's viewpoint, absent compelling justification. Cornelius v. NAACP Legal Defense Educational Fund, Inc., 473 U.S. 788, 806 (1985). Plaintiffs submit that the evidence unequivocally shows that defendants engaged in viewpoint discrimination in refusing to permit the eruv to remain, without any legitimate justification whatsoever.[13]

A. The Defendants' Action Is Properly Considered Viewpoint Discrimination

The Supreme Court has forcefully stated that "private religious speech, far from being a First Amendment orphan, is as fully protected under the Free Speech clause as secular private expression." Capital Square Review & Advisory Board v. Pinette, 515 U.S. 753, 760

[13] For purpose of analyzing plaintiffs' free speech rights under the First Amendment, as discussed below, it makes no difference whether the forum is the utility pole or the public right of way, or whether it is considered a limited public forum or a nonpublic forum; viewpoint discrimination is simply impermissible.

(1995); see Good News Club v. Milford Central School, 2001 U.S. LEXIS 4312 (U.S. June 11, 2001). And, in Widmar v. Vincent, 454 U.S. 263 (1981), the Court noted that worship services are protected by the Free Speech Clause, and it expressly rejected any distinction between worship services and other religious speech. Id. at 269-70 n. 6.[14]

The unrebutted evidence in this case demonstrates that the eruv enables Orthodox Jews, who would otherwise be restricted to their homes, to travel to a place of worship on the Sabbath or holidays and worship together with others. Schachter Aff. ¶ 4; Tr. 5/14 pp. 8, 54-55, 59; Tr. 5/1 pp. 123-24. Accordingly, the eruv enables protected religious speech to take place, and is just as protected under the First Amendment as the worship service itself. See Southern New Jersey Newspapers, Inc. v. State of New Jersey Department of Transportation, 542 F. Supp. 173 (D.N.J. 1982), where the Court was faced with determining whether "honor boxes" used for newspapers are entitled to First Amendment protection. The Court concluded that because honor boxes "play a role in the distribution of plaintiff's newspapers, this court agrees with the position that such devices are entitled to full constitutional protection." Id. at 182-83 (emphasis supplied); see also Preferred Communications, Inc. v. City of Los Angeles, 13 F.3d 1327, 1331 (9th Cir.) (per curiam) (ability of a cable television operator to provide programming to Los Angeles – the protected First Amendment activity – was implicated by the City's refusal to allow construction of the system itself), cert. denied, 512 U.S. 1235 (1994). The eruv is no different from the "honor boxes" in Southern New Jersey Newspapers or the cable system in Preferred Communications and is thus entitled to protection under the First Amendment.

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[14] Widmar rejected any distinction between religious worship and other religious speech for three reasons: that the distinction lacks intelligible content; that even if the distinction could be specified, government would be incompetent to administer it; and that there is nothing in First Amendment policy or principle to support it. Id.; see Douglas Laycock, "Equal Access and

Defendants cannot justify their discrimination by contending that religion is just a subject matter and not a source of a viewpoint. The Supreme Court has rejected this argument several times, most recently just last week in Good News Club v. Milford Central School, 2001 U.S. LEXIS 4312 (U.S. June 11, 2001); see also Rosenberger v. Rector and Visitors of University of Richmond, 515 U.S. 819 (1995); Lamb's Chapel v. Center Moriches School District, 508 U.S. 384 (1993).[15] Categorical discrimination against religious speech is in and of itself viewpoint discrimination.

As the Supreme Court emphasized in Good News Club, any distinction between religion as viewpoint and religion as subject matter is untenable:

> We disagree that something that is "quintessentially religious" or "decidedly religious in nature" cannot also be characterized properly as the teaching of morals and character development from a particular viewpoint. What matters for purposes of the Free Speech Clause is that we can see no logical difference in kind between the invocation of Christianity by the Club and the invocation of teamwork, loyalty, or patriotism by other associations to provide a foundation for their lessons . . . . [I]n our view, religion is used by the Club in the same fashion that it was used by Lamb's Chapel and by the students in Rosenberger: religion is the viewpoint from which ideas are conveyed.

Moments of Silence: The Equal Status of Religious Speech by Private Speakers," 81 Nw. U.L. Rev. 1, 56-57 (1986).

[15] The distinction between "religious" and "nonreligious" speech is a distinction based directly and inescapably on the speaker's viewpoint. It turns on whether or not the speaker promotes religion in some respect, or is neutral or hostile to religion instead. See Widmar, 454 U.S. at 271 n. 9; see also May v. Evansville-Vanderburgh School Corp., 787 F.2d 1105, 1114 (7th Cir. 1986) (Posner, J.) (prohibiting religious speech in public or nonpublic forum where other speech is allowed "would be a restriction discriminating against a particular point of view and would therefore flunk the test . .. [of] Cornelius, provided that the defendants have no defense based on the establishment clause").

2001 U.S. LEXIS at *23-25 (internal citations omitted); see id. at *45 (Scalia, J., concurring) ("Shaping the moral and character development of children certainly pertains to the welfare of the community").

Similarly, in Lamb's Chapel, the Supreme Court reversed the Second Circuit's conclusion that a school district's policy of excluding religious speech from after-hour uses of school facilities "was viewpoint-neutral because it had been, and would be, applied in the same way to all uses of school property for religious purposes." 508 U.S. at 393. Rather, the Court held, "it discriminates on the basis of viewpoint to permit school property to be used for the presentation of all views about family issues and child rearing except those dealing with the subject matter from a religious standpoint." Id. The Court explicitly rejected the Second Circuit's reasons that since the school legitimately could have excluded certain categories of subject matter in its facilities, it could bar all religious uses as being simply another category of subject matter: "The Court of Appeals, as we understand it, ruled that because the District had the power to permit or exclude certain subject matter, it was entitled to deny use for any religious purpose, including the purpose of this case. The Attorney General also defends this as a permissible subject-matter exclusion rather than a denial based on viewpoint. . . ." Id. at 396. This, the Court held, referring to its discussion of the meaning of viewpoint earlier in the opinion, is "a submission that we have already rejected." Id.[16]

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[16] See also Chandler v. James, 180 F.3d 1254, 1265 (11th Cir. 1999) ("Suppression of religious speech constitutes viewpoint discrimination, the most egregious form of content-based censorship"), vacated and remanded, 530 U.S. 1256, on remand, reinstated, 230 F.3d 1313 (11th Cir. 2000), petition for cert. filed, __ U.S.L.W. __ (Apr. 20, 2001); Church of the Rock v. City of Albuquerque, 84 F.3d 273, 1279 (10th Cir. 1996), cert. denied, 519 U.S. 949 (1996) ("Any prohibition of sectarian instruction where other instruction is permitted is inherently non-neutral with respect to viewpoint."); Good News/Good Sports Club v. School Dist. of the City of Ladue, 28 F.3d 1501, 1506 (8th Cir. 1993), cert. denied, 515 U.S. 1173 (1995) ("the Lamb's Chapel Court refused to cabin religious speech into a separate excludible speech category; rather the

Thus, when subject matter and viewpoint are so closely aligned, as they are here, public officials can not exclude the subject matter without discriminating against the associated viewpoint, and doing so is viewpoint discrimination.

B. Viewpoint Discrimination By The Government Is Forbidden Absent Compelling Reasons, Even In A Nonpublic Forum

The Supreme Court has recognized three distinct categories of government property: (1) the traditional public forum (2) the designated public forum and (3) the nonpublic forum. See generally Gregoire v. Centennial School District, 907 F.2d 1366 (3d Cir.) (compiling cases), cert. denied, 498 U.S. 899 (1990). In all three forums, viewpoint discrimination is forbidden. International Society for Krishna Consciousness v. Lee, 505 U.S. 672, 678 (1992) ("ISKCON"). While some content-based discrimination is permissible in a limited or nonpublic forum if it does not interfere with the purpose of the forum, when the government targets "particular views taken by speakers on a subject," such viewpoint discrimination is "presumed impermissible." Rosenberger, 515 U.S. at 829-30; see Good News Club v. Milford Central School, 2001 U.S. LEXIS 4312 at *10 ("Because the restriction is viewpoint discriminatory, we need not decide whether it is unreasonable in light of the purposes served by the forum"). Viewpoint discrimination is an "egregious form of content discrimination." Rosenberger, 515 U.S. at 829. As the Tenth Circuit has noted:

> Courts must examine viewpoint-based restrictions with an especially critical review of the government's asserted justifications for these restrictions. At a minimum, to

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Court adopted a more expansive view, recognizing that a religious perspective can constitute a separate viewpoint on a wide variety of seemingly secular subject matter") (emphasis in original); Hedges v. Wauconda Community Unit School Dist. No. 118, 9 F.3d 1295, 1298 (7th Cir. 1993) ("Even when the government may forbid a category of speech outright, it may not discriminate on account of the speaker's viewpoint. Especially not on account of a religious subject matter, which the free exercise clause of the first amendment singles out for protection") (citation omitted).

> survive strict scrutiny the [government's] policy must be "narrowly drawn to effectuate a compelling state interest."

Church of the Rock v. City of Albuquerque, 84 F.3d 1273, 1279-80 (10th Cir.) (quoting Perry Education Association v. Perry Local Education Association, 460 U.S. 37, 46) (1983)), cert. denied, 519 U.S. 949 (1996); see Sunnum v. Callaghan, 130 F.3d 906, 917 (10th Cir. 1997) (reiterating analysis); see also Rosenberger, 515 U.S. at 829 (school room); Capitol Square, 515 U.S. at 761 (park); ISKCON, 505 U.S. at 679 (airport); Cornelius, 473 U.S. at 806 (charitable fundraising campaign); Perry, 460 U.S. at 49 (school's internal mail system); Adderly v. Florida, 385 U.S. 39 (1966) (prison); Greer v. Spock, 424 U.S. 828 (1976) (military base).

The question in this case is whether the Borough, having permitted speech-related public use of its utility poles and public right of way, can constitutionally exclude certain speech on the basis of the speech's religious point of view, without offering any justification related to the special needs or purposes of the forum in question. The Supreme Court has repeatedly made clear that even in the case of completely nonpublic forums, where the government's power to regulate speech is at its height, the Constitution will rarely tolerate discrimination between otherwise comparable uses based solely on the views expressed by the speaker. See, e.g., ISKCON, 505 U.S. at 679; id. at 687 (O'Connor, J., concurring in the judgment); United States v. Kokinda, 497 U.S. 720, 725, 731 (1990) (plurality opinion); Perry, 460 U.S. at 46; Widmar, 454 U.S. at 280 (Stevens, J., concurring in the judgment); see also Christ's Bride Ministries, Inc. v. Southeastern Pennsylvania Transportation Authority, 148 F.3d 242, 253 (3d Cir. 1998) (in either traditional public or designated public forum, government's content-based restrictions must survive strict scrutiny; in nonpublic forum, however, government's restrictions must be viewpoint neutral and reasonable in light of purpose served by the forum), cert. denied, 525 U.S. 1068 (1999); cf. Good News Club, 2001 U.S. LEXIS 4312 at *42 (Scalia, J., concurring)

("Lacking any legitimate reason for excluding the Club's speech from its forum – 'because it's religious' will not do – respondent would seem to fail First Amendment scrutiny regardless of how its action is characterized. Even subject matter limits must at least be 'reasonable in light of the purpose served by the forum.'") (internal citations omitted) (emphasis in original).

It is immaterial whether the government was motivated by hostility toward religious viewpoints. "Illicit legislative intent is not the sine qua non of a violation of the First Amendment." Simon & Schuster v. Members of the New York State Crime Victims Board, 502 U.S. 105, 117 (1992) (citation omitted); accord Leathers v. Medlock, 499 U.S. 439, 446 (1991). A party claiming violation of his or her First Amendment rights "need adduce 'no evidence of an improper censorial motive.'" Simon & Schuster, 502 U.S. at 117 (citation omitted); see Good News/Good Sports Club v. School District of the City of Ladue, 28 F.3d 1501 (8th Cir. 1993) ("The relevant inquiry was whether the Lamb's Chapel group was excluded because of its religious viewpoint, irrespective of whether the school district opposed that viewpoint"), cert. denied, 515 U.S. 1173 (1995).

Further, the government acts unconstitutionally if it adopts or regulates in deference to the hostility of others toward a particular viewpoint. See Air Line Pilots Association v. Department of Aviation, 45 F.3d 1144, 1157-58 (7th Cir. 1995) (government property manager may not bar a speaker's message solely in effort to cater to objections of others); see also United States v. Borough of Audubon, 797 F. Supp. 353, 361 (D.N.J. 1991); Smith v. Town of Clarkton, 682 F.2d 1055, 1065 (4th Cir. 1982). A fortiori, the government acts unconstitutionally if itself acts with a motive to discourage or suppress a particular viewpoint. Good News Club, 2001 U.S. LEXIS 4312 at *10; see Rosenberger, 515 U.S. at 829 (when the "rationale for the restriction" is the "specific motivating ideology or the opinion or perspective of

the speaker," the government engages in forbidden viewpoint discrimination); Cornelius, 473 U.S. at 811 ("The existence of reasonable grounds for limiting access to a nonpublic forum ... will not save a regulation that is in reality a facade for viewpoint-based discrimination").

C. The Reasons For Discriminating Against Plaintiffs' Use Of The Eruv Are Neither Compelling Nor Reasonable

The compelling interest test is a very high, but not altogether insurmountable, barrier. For example, in Muller v. Jefferson Lighthouse School, 98 F.3d 1530 (7th Cir. 1996), cert. denied, 520 U.S. 1156 (1997), the Seventh Circuit concluded that censoring an elementary school student from advocating to first graders that "the life of a drug dealer is preferable to that of the civilized citizen," while not viewpoint neutral, would likely be constitutional because it serves a compelling interest. Id. at 1542.

Here, defendants have not come close to presenting a compelling interest. Indeed, there are no facts to suggest that the action of the Borough had any justification other than a desire not to have Orthodox Jews and their viewpoint in Tenafly. Tr. 5/1 p. 23; Tr. 5/1 pp. 52, 62, 67; Wilson Aff. ¶ 5; Lipson Aff. ¶ ¶ 9-10; Sullivan Aff. ¶ 7; Kerge Aff. ¶ 9; Tr. 5/14 pp. 38-39; see Letter Br. of Amicus ACLU-NJ at 5-6.

Nor can defendants' action be considered reasonable.[17] In determining the reasonableness of regulations on speech in nonpublic forums it is appropriate to consider the interests served by the regulation and whether alternative channels of communication are

[17] Amicus ACLU-NJ raises the Establishment Clause as a legitimate reason for disapproving the eruv. See Letter Br. at 2-3. As discussed above at note 1, this Court has acknowledged that the Establishment Clause is not an issue in this case. In addition, as a legal matter, it is not at all "clear whether a state's interest in avoiding an Establishment Clause violation would justify viewpoint discrimination." Good News Club, 2001 U.S. LEXIS 4312 at *26 (citing Lamb's Chapel, 508 U.S. at 394-95). Third, Chief Judge Thompson concluded in American Civil Liberties Union of New Jersey v. City of Long Branch that permitting an eruv does not violate the Establishment Clause. 670 F. Supp. 1293 (D.N.J. 1987). Accordingly, the Establishment Clause does not provided a legitimate reason in this case to disapprove the eruv.

available. Members of the City Council of the City of Los Angeles v. Taxpayers for Vincent, 466 U.S. 789, 815 (1984) (ordinance had a legitimate interest – aesthetics – it was viewpoint neutral – all signs in the public property were prohibited – and there were other channels of communication available – pamphlets and brochures).

There are no such interests or potential alternative channels in this case. No safety, health or aesthetic concern has been raised by defendants.[18] Indeed, the reasons articulated by the defendants have been conclusively established as discriminatory and therefore, by definition, unreasonable. See Good News Club, 2001 U.S. LEXIS 4312 at *42 (Scalia, J., concurring); Point I, supra; see also Ebler v. City of Newark, 54 N.J. 487, 256 A.2d 44, 46 (1969) ("All powers delegated to municipalities must be exercised reasonably and not arbitrarily"); Pl. Reply Br. at Point I(B)(2)(b). And, there is no alternative channel of communication because there is no other manner in which the Orthodox Jews who need the eruv are able to gather together to worship on the Sabbath and the holidays. Tr. 5/14 pp. 54-55. Thus, the Borough's action can only be seen as unreasonable.

As Justice O'Connor suggested in her concurring opinion in ISKCON, the government should be required to offer some "independent reason" for limiting speech even in a nonpublic forum – to make some showing that the expressive activity at issue is "incompatible" with the nature and function of the forum. 505 U.S. at 689. Thus, the government must show that the "proposed conduct would 'actually interfere' with the forum's stated purpose." Air Line Pilots Ass'n v. Department of Aviation, 45 F.3d 1144, 1159 (7th Cir. 1995); see Christ's Bride Ministries, Inc. v. Southeastern Pennsylvania Transportation Authority, 148 F.3d 242, 255-56

[18] In its letter brief, amicus ACLU-NJ raises "safety and logistical" issues regarding the placement of lechis at the top of the utility poles. Letter Br. at 1. There is nothing in the record

(3d Cir. 1998) (even if the speech in question had not been in a limited public forum, the government's removal of the posters was not "reasonable" as gauged by the nature and function of the forum itself), cert. denied, 525 U.S. 1068 (1999).

No such "independent reason" or functional justification – sufficient or insufficient – has been offered for the exclusion of religious speech from the utility poles or the public right of way in the circumstances of this case. See ISKCON, 505 U.S. at 698-99 (Kennedy, J., concurring) (considering "compatibility" in determining whether forum is public); id. at 711 (Souter, J., concurring) (same, citing Grayned v. City of Rockford, 409 U.S. 104, 116). Certainly, the attachment of lechis to the utility poles in no way "interferes" with the forum's stated purpose, and the Borough has offered no evidence – and it cannot – that it does.

Grossbaum v. Indianapolis-Marion County Building, 100 F.3d 1287 (7th Cir. 1996), cert. denied, 520 U.S. 1230 (1997), is not to the contrary. First, the regulation in question in Grossbaum was both content neutral and generally applicable. Id. at 1298-99. In other words, all private groups were denied use of the forum for purposes of any speech. As discussed above in Point I(B)(2), the government's action here is not generally applicable – the Orthodox Jews have been singled out. Other groups have been permitted to express their views. See Point I, supra; Pl. Reply Brief in Further Support of Motion for Preliminary Injunction at 14-15.

Second, in Grossbaum, the court concluded that the Building Authority's reasons for limiting access were reasonable. 100 F.3d at 1299, citing 909 F. Supp. at 1205, 1207, 1209-10 (if building lobby remains public forum, lobby will become significantly more crowded, new security measures will further increase traffic, and ability to manage property for tenants will be

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on these "issues," the Borough has never raised them, and the Court should, therefore, disregard them as a reason for limiting plaintiffs' speech.

increasingly difficult). As discussed above, by contrast, the defendants' action here cannot be viewed as reasonable.

D. The Ad Hoc Nature of Defendants' Action Is Constitutionally Infirm

An additional objection to the Borough's unreasonable denial of permission to maintain the eruv is the complete lack of standards under which the defendants acted in denying TEAI's application. Allowing government officials to make decisions as to who may speak on public property without any criteria or guidelines to circumscribe their power, "strongly suggest[s] the potential for unconstitutional conduct, namely favoring one viewpoint over another." Sunnum v. Callaghan, 130 F.3d 906, 920 (10th Cir. 1997); cf. Gregoire v. Centennial School District, 907 F.2d 1366, 1374-75 (3d Cir.) (standards impermissibly vague because "can be stretched or contracted to fit whatever school district decides"), cert. denied, 498 U.S. 899 (1990).

Just last month, the Second Circuit held that the Town of Babylon had violated a religious group's First Amendment rights because the written policy utilized by the Town to deny the group access to the public facility was utterly silent on the issue of whether the public facilities could be used for religious activities of any kind, and it therefore gave the government "unfettered discretion 'to discriminate based on the content or viewpoint of speech.'" Amandola v. Town of Babylon, 2001 U.S. App. LEXIS 10992, at *13 (2d Cir. May 25, 2001), quoting City of Lakewood v. Plain Dealer Publishing Co., 486 U.S. 750, 759 (1988). The written policy in question there provided that "the Town reserves the right to refuse or terminate permission to use any Town facility for any reason." Id.

The Borough's ordinance here is no different. It requires permission to place anything on the utility poles, without providing any standards for determining what will and

what will not be permitted. Lenevich Aff. Exh. B. As in Amandola, this is an inadequate standard to be constitutionally permitted in the area of free expression. As is evident in this case, it subjects religiously affiliated groups to a system that is guided by no definite and understandable criteria.[19]

As the Supreme Court has stated:

> [A] law or policy permitting communication in a certain matter for some but not for others raises the specter of content and viewpoint censorship. This danger is at its zenith when the determination of who may speak and who may not is left to the unbridled discretion of a government official . . . because without standards governing the exercise of discretion, a government official may speak and who may not based upon the content of the speech or the viewpoint of the speaker.

City of Lakewood, 486 U.S. at 763-64; see also Forsyth County, Georgia v. Nationalist Movement, 505 U.S. 123, 130-33 (1992); Board of Commissioners of City of Los Angeles v. Jews for Jesus, Inc., 482 U.S. 569, 576 (1987); Grayned v. City of Rockford, 408 U.S. 104, 108-09 (1972); Coates v. Cincinnati, 402 U.S. 611, 614 (1971); Shuttlesworth v. City of Birmingham, 394 U.S. 147, 150-51 (1969). This constitutional rule is violated if a public official is entitled, with no specific standard, to select among groups that wish to use public property for private expression.

The lack of standards and the total discretion vested in the officials enforcing the government policy also "has the potential for becoming a means of suppressing a particular point of view." Forsyth County, 505 U.S. at 130-31, citing Heffron v. International Society for

[19] This is made abundantly clear by the Borough's recent, post-hearing decision to demand that the Churches in Tenafly "remove any signs containing religious symbols and/or hours of service." Letters of Joseph DiGiacomo, May 18, 2001, annexed to Letter of Walter Lesnevich to the Court, May 24, 2001. The Borough decided on a whim what is permitted and what is not, with no guiding standards whatsoever.

Krishna Consciousness, 452 U.S. 640, 649 (1981). The chilling effect from potential arbitrary enforcement that inevitably results from such standardless discretion cannot be avoided. See City of Lakewood, 486 U.S. at 755-769; see also Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546, 553 (1975).

Finally, the lack of standards is unconstitutional because "[t]he opportunity for abuse, especially where a statute has received a virtually open-ended interpretation, is self-evident." Lewis v. City of New Orleans, 415 U.S. 130, 135-136 (1974) (Powell, J. concurring); see also Houston v. Hill, 482 U.S. 451 465 (1987); Kolender v. Lawson, 461 U.S. 352, 358 (1988). In City of Lakewood, the Supreme Court noted that the lack of standards makes it far too easy for officials to use "post-hoc rationalizations" and "shifting or illegitimate criteria" to justify their behavior, and thus made it difficult for courts to determine whether an official has engaged in viewpoint discrimination. 486 U.S. at 758; see also Cornelius, 473 U.S. at 811-13 (remanding for determination whether government's justifications were "façade" for viewpoint discrimination). As set forth in Point I, supra, just such a "post-hoc rationalization" and "shifting of criteria" has occurred here.

* * *

Defendants' action in rejecting the eruv application constituted discrimination against plaintiffs' viewpoint, thereby violating their first Amendment rights.

POINT III

DEFENDANTS' REFUSAL TO PERMIT THE ERUV IS ARBITRARY, CAPRICIOUS AND UNREASONABLE AND THEREFORE VIOLATES NEW JERSEY STATE LAW

As set forth above in Point I, supra, defendants' decision to remove the eruv was unreasonable and arbitrary because, first, the Borough has reasonably accommodated other religious groups, and, second, they have not offered any legitimate reasons – e.g., safety, health,

aesthetic, traffic – for refusing plaintiffs' request here. See also Pl. Reply Br. at 14-15. Accordingly, defendants acted in violation of New Jersey state law. Ebler v. City of Newark, 54 N.J. 487, 256(a) 2d. 44, 46 (1969); Pl. Reply Br. at 18-19.

Municipalities are given the power to make and enforce ordinances regarding a variety of subjects, including the use of utility poles. N.J.S.A. 48:3-19. This power to regulate is granted under the municipality's police power to protect the general health, safety and welfare of its citizens. Bonito v. Mayor and Council of the Township of Bloomfield, 197 N.J. Super. 390, 397, 484 A.2d 1319, 1322 (1984). Such power can be exercised only in those areas "where regulation is needed for the common good, that is, public health, safety, morals or general welfare, and then only by reasonable means substantially connected with the public interest to be advanced." Id. And, "all police power legislation is subject to constitutional limitation that it shall not be unreasonable, arbitrary or capricious." Id. at 398, 484 A.2d at 1323.

In Bonito, the Town council rejected an application for additional video machines at the local arcade, on the grounds that the arcade attracts many youngsters whose actions and behavior patterns are unpredictable and that more video machines would create more problems. However, the Town offered no evidence of problems attributable to the arcade that would support these concerns. Accordingly, the court determined that the Town's denial of the application was arbitrary and unreasonable. Id. at 399-400, 484 A.2d 1323-24;[20] see also Ebler, 54 N.J. at 491, 256 A.2d at 46 (Newark's policy of not charging the accumulated overtime accounts of Jewish police officers for paid time off allowed for Jewish holidays was unreasonable and arbitrary because same benefit extended to other members of police force).

[20] A town's denial of a parade permit would, as well, be arbitrary and unreasonable if it was not based on evidence of problems attributable to the parade.

Here, the defendants' action must be considered arbitrary and unreasonable under either scenario: The defendants have not offered any legitimate rationale for their action which, therefore, fails to meet the Bonito test. Defendants have not treated plaintiffs' request equally and in the same manner that they have accommodated the religious beliefs of other Tenafly citizens. Therefore, under Ebler, defendants' action was arbitrary and capricious.

POINT IV

DEFENDANTS HAVE VIOLATED THE FAIR HOUSING ACT

The Fair Housing Act is designed to ensure that no one is denied the right to live where they choose for discriminatory reasons. See Southend Neighborhood Improvement Association v. County of St. Clair, 743 F.2d 1207, 1209-10 (7th Cir. 1984). Section 3604(a) of the FHA is a broadly drafted prohibition which "reflects Congress's intent to reach every private and public practice that makes housing more difficult to obtain on prohibited grounds." United States v. Branella, 972 F. Supp 294, 302 (D.N.J. 1997). Accordingly, this section is "violated by discriminatory actions, or certain actions with discriminatory effects, that affect the availability of housing." South-Suburban Housing Center v. Greater South Suburban Board of Realtors, 935 F.2d 868, 882 (7th Cir. 1991), cert. denied, 502 U.S. 1074 (1992).[21]

By refusing to allow an eruv to be maintained, the defendants impair the housing opportunities in Tenafly of all Orthodox Jews who require an eruv to practice their religion. Tr. 5/14 pp. 8; 54-55, 59; Tr. 5/1 pp. 123-124. As set forth below, defendants violated section

[21] As we have discussed in our prior submissions to the Court, the Fair Housing Act was intended by Congress to "promote integration and root out segregation." Trafficante v. Metropolitan Life Insurance Co. 409 U.S. 205, 211 (1972); see also Hack v. President and Fellows of Yale University, 237 F.3d 81, 88 (2nd Cir. 2000). These anti-discrimination provisions are designed to prohibit "discriminatory housing practices." The Third Circuit has indicated that a "discriminatory housing practice" is any action which violates section 3604(a). Alexander v. Riga, 208 F.3d 419, 427 (3d Cir. 2000).

3604(a) of the FHA under both the discriminatory intent standard and the discriminatory effect standard,[22] and they are therefore entitled to injunctive relief.[23]

A. Defendants' Decision To Not Allow The Eruv To Be Maintained Qualifies As Conduct Prohibited Under Section 3604(A)'S "Otherwise Make Unavailable Or Deny" Language

There can be no doubt that defendants were aware that the denial of the eruv application would have a direct effect on the availability of housing in Tenafly to those Orthodox Jews to whom the presence of an eruv is necessary, e.g., Tr. 5/1 pp. 27-28, 97; Tr. 5/14 p. 8, and were thereby "otherwise mak[ing] unavailable" housing within the ambit of section 3604(a) of the FHA. See Village of Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 252, 267-68 (1977); LeBlanc- Sternberg v. Fletcher, 67 F.3d 412, 425 (2d Cir. 1995); Pl. Reply Br. 20- 23.[24] All of the individual defendants attended at least one of the two public hearings – held on November 28 and December 12, 2000 – at which the potential impact of an eruv on Tenafly was discussed. E.g., Statements of Stefanie Dardik Gotlieb, Tr. 11/28 pp. 34-37;

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[22] As discussed in Plaintiffs' Reply Memorandum of Law In Further Support of Their Request for Preliminary Injunction, plaintiffs have standing to bring this claim. See pp. 22-23.

[23] A violation of the Fair Housing Act is presumed to be irreparable harm. Easter Seal Society of New Jersey v. Township of North Bergen, 798 F. Supp. 228 (D.N.J. 1992).

[24] The Third Circuit, among other circuits, has utilized the interpretation of section 3604(a) promulgated by the Department of Housing and Urban Development as a justification to broadly apply the "otherwise make unavailable or deny" provision to a wide variety of actions which affect the housing opportunities of minorities. Growth Horizons v. Delaware County, 983 F.2d 1277 (3d Cir. 1993). HUD's regulation states:

> It shall be unlawful, because of race, color, religion, sex, handicap, familial status, or national origin, to restrict or attempt to restrict the choices of a person by word or conduct in connection with seeking, negotiating for buying or renting a dwelling so as to perpetuate, or tend to perpetuate, segregated housing patterns, or to discourage or obstruct choices in a community, neighborhood or development.

24 C.F.R. §100.70(a) (emphasis supplied).

Tr. 12/12 p. 96-97 (Exhs. B, C to Shapiro Reply Aff.). Many of the objections to the eruv were based on the prediction that the presence of an eruv would lead to an influx of Orthodox Jews moving into Tenafly. E.g., Statements of Albert Victoria, Tr. 11/28 pp. 44-47; Statements of Albert Stone, Tr. 11/28 p. 77 (Exh. B to Shapiro Reply Aff.); Statements of David Wysocki, Tr. 12/12 pp. 38-42; Statements of Dennis Halman, Tr. 12/12 pp. 77-79; Statements of Barbara Persky, Tr. 12/12 pp. 101-103 (Exh. C to Shapiro Reply Aff.).[25]

Plaintiffs' FHA claim is remarkably similar to the successful claim brought by Orthodox Jews in Leblanc-Sternberg v. Fletcher, 67 F.3d 412 (2d Cir. 1995), cert. denied, 518 U.S. 1017 (1996), where the Second Circuit held that the Village of Airmont effectively made housing unavailable within the meaning of Section 3604(a) to Orthodox Jews by preventing the development and use of home synagogues. In that case, an area of Ramapo, New York was incorporated into the Village of Airmont because of the villagers' increasing concern about the effect that the influx of Orthodox and Hasidic Jews was having on the area and their animosity toward Orthodox Jews as a group. Id. Shortly after incorporation, the village adopted a zoning code which effectively prohibited the use of home synagogues. Id. Although these home synagogues did not exist in the Ramapo area when the Orthodox Jews moved to the area and, indeed, were not established until years later, the Orthodox Jews believed that it was necessary to have them in the community in which they lived. Id. at 430-31. And, the Second Circuit acknowledged that the need for home synagogues was unique to only certain Jews in the Airmont area, specifically Orthodox and Hasidic Jews. Id.

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[25] Plaintiffs have thereby established a causal link between the defendants' denial of the eruv application and the availability of housing in Tenafly to plaintiffs and other Orthodox Jews who share in the belief that an eruv is necessary. Nationwide Mutual Insurance Company v. Cisneros, 52 F.3d 1351 (6th Cir. 1995), cert. denied, 516 U.S. 1140 (1996).

The Second Circuit rejected the village and its leaders' claims that their actions were justified by the fact that home synagogues created traffic and noise concerns, because the village tolerated the noise and traffic caused by various secular establishments – such as a country club – despite complaints of residents. Id. at 431. The Second Circuit also referred to numerous statements of anti-Orthodox animus that were made or adopted by both the village leaders and members of the Airmont community.

The fact that LeBlanc-Sternberg involved the establishment and application of a zoning ordinance while the instant case concerns the application of a general municipal ordinance is immaterial.[26] The Second Circuit focused on the discriminatory motives behind the defendants' actions and its intended effect on Orthodox Jews more than it did on the nature of the act taken. See id. at 428, 430-31. The motives and intended effects in the case at bar are the same, and, therefore, just as impermissible under the FHA.

As in Leblanc-Sternberg, defendants' denial of the eruv application is a discriminatory housing practice and plaintiffs, therefore, have a cognizable FHA claim. In both cases, the plaintiffs were Orthodox Jews who had certain requirements to freely practice their religion. In both cases, the religious need in question was unique to certain portions of the Jewish community. In both cases, the plaintiffs had moved into a community before the religious need was satisfied. In both cases, animosity towards Orthodox Jews and a desire to

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[26] It is not the exact nature of the act but rather the effect of the act taken that courts focus upon in determining whether a disputed action "otherwise makes unavailable or den[ies]" housing. See United States v. City of Parma, 661 F.2d 562, 575 (6th Cir. 1981) (zoning decisions violate the FHA only if they have a discriminatory effect). It is well established that exclusionary zoning, mortgage and insurance redlining, block-busting, racial steering and any "other actions by individuals or governmental units which directly affect the availability of housing," all qualify as discriminatory housing practices under the "otherwise make unavailable or deny" language of 3604(a). Southend Neighborhood Improvement Association v. County of St. Clair, 743 F.2d 1207, 1209-10 (7th Cir. 1984).

prevent Orthodox Jews from moving to the community was expressed publicly by the leaders and residents of the town. And, in both cases, the town's decision to not accommodate the need makes housing unavailable to Orthodox Jews.

B. Plaintiffs Have Established A Likelihood Of Success On The Merits Under The Fair Housing Act Under Both The Disparate Treatment Standard And The Disparate Impact Standard

Plaintiffs have established a prima facie case of housing discrimination under both a theory of intentional discrimination (disparate treatment) and a theory of discriminatory effect (disparate impact). See Doe v. City of Butler, Pennsylvania, 892 F.2d 315, 323 (3d Cir 1989); Oxford House-Evergreen v. City of Plainfield, 769 F. Supp. 1329, 1343 (D.N.J. 1991).

1. Plaintiffs Have Established A Likelihood Of Success On The Merits Under the Disparate Treatment Standard

Plaintiffs have clearly shown that the defendants' action was undertaken with the intention of discriminating against Orthodox Jews. Point I, supra; see United States v. Borough of Audubon, 797 F. Supp. 353 (D.N.J. 1991). It is sufficient for plaintiffs to show that defendants' religious animus was a motivating factor in their decision not to allow the maintenance of the eruv in Tenafly. See Oxford-House-Evergreen, 769 F. Supp. at 1343; United States v. Yonkers Board of Education, 837 F.2d 1181, 1217 (2d Cir. 1987), cert. denied, 486 U.S. 1055 (1988). However, plaintiffs do not have to show that the members of the Council were motivated "solely, primarily, or even predominantly" by discriminatory animus towards Orthodox Jews. See id. Nor do plaintiffs have the burden of proving that the majority of the defendants were motivated by this animus when they cast their vote to have the eruv removed. See United States v. Yonkers Board of Education, 624 F. Supp. 1276, 1371-2 (S.D.N.Y. 1985), aff'd, 837 F.2d 1181 (2d Cir. 1987), cert. denied, 486 U.S. 1055 (1988). Even if the action taken by defendants is otherwise justified under state law, a showing that the act was at least partially

motivated by a discriminatory purpose makes that act a violation of the FHA. See Oxford-House, Inc. v. Township of Cherry Hill, 799 F. Supp 450, 458 (D.N.J. 1992); Borough of Audubon, 797 F. Supp at 360.

In making the inquiry into whether an action was motivated by discriminatory intent, courts consider, but do not limit themselves to, the following factors: 1) whether the disputed act bears more heavily on one group than another; 2) the historical background behind the decision; 3) any contemporaneous statements made by the decision-makers and their constituents; and 4) whether there was a substantive departure from normal procedures. See Yonkers, 837 F.2d at 1221; Fowler v. Borough of Westville, 97 F. Supp. 2d 602, 612 (D.N.J. 2000). In this case, there is ample evidence in each category which establishes that the defendants acted with discriminatory intent.

a. Defendants' Decision To Not Allow The Maintenance Of The Eruv Bears More Heavily Upon Orthodox Jews

Defendants' denial of the eruv application bears *exclusively*, let alone more heavily, upon the housing opportunities of those Orthodox Jews who consider the eruv to be a necessity. E.g., Tr. 5/14 p. 14.

b. Historical Background And Contemporaneous Statements Made By The Defendants And Members Of The Tenafly Community

"Discriminatory intent may be established where animus towards one group is a significant factor in the community opposition to which the [councilmen] are responding." Borough of Audubon, 797 F. Supp at 361 (discriminatory intent found as Audubon officials stated on several occasions that they agreed with or were responding directly to community opposition, which was clearly discriminatory); Town of Clarkton, 682 F.2d at 1065 ("the evidence adduced at trial discloses beyond peradventure that the actions of the defendants terminating the project resulted directly from the community's deeply-felt, intentional, invidious

racial animus"); cf. Yonkers, 837 F.2d at 1226 ("it is sufficient to sustain a racial discrimination claim if it has been found, and there is evidence to support the finding, that racial animus was a significant factor in the position taken by the persons to whose position the official decision maker is knowingly responsive"). We have discussed at length in our previous submissions the numerous statements of religious animus by members of the public. See Point I, supra; Pl. Memo of Law in Support of Motion for Preliminary Injunction at 2-7, 11-12; Pl. Reply Memo of Law in Further Support of Motion for Preliminary Injunction at 2-5, 7-11.

The defendants' own testimony before the Court only reinforces the real reasons to their decision to order the removal of the eruv. Tr. 5/8 p. 16; Tr. 5/1 p. 49-50; Tr. 4/30 p. 104-105; Tr. 4/30 pp. 69, 77, 88; Tr. 4/30 p. 14, 30. Further plaintiffs' witnesses confirmed this animosity. As one example, Rabbi Goldin testified that Mayor Moskovitz stated that "I don't want them moving in. I don't want them throwing stones at my cars – my car on the Sabbath, I don't want them blocking my streets." Tr. 5/1 p. 127. Rabbi Goldin also testified that when he told the Mayor that her position concerning the eruv was making it impossible for Orthodox Jews to move into Tenafly, the Mayor responded that "I have to reflect my community." Id. at 128; see also Tr. 5/1 pp. 115-16 (regarding comments made by Mayor Moskovitz); Tr. 5/14 pp. 16-19, 27 (regarding comments made by John Sullivan); see also Point I, supra.

c. Defendants' Actions Constituted A Substantial Departure From Normal Procedures

Finally, the evidence shows that the defendants' reliance upon, and enforcement of, general municipal ordinance 691 to prevent the eruv from being established contrasts sharply with the Council's previous endorsements, accommodations, and/or indifference to other uses of utility poles and the public right of way. See Point I, supra.

2. Plaintiffs Have Established A Likelihood Of Success On The Merits Under The Disparate Impact Standard And Defendants Have Failed To Meet Their Burden Justifying Their Action

Under the disparate impact standard, a prima facie case is established by showing that the disputed action "actually or predictably results in [religious] discrimination; in other words that it has a discriminatory effect." Huntington Branch, NAACP v. Huntington, 844 F.2d 926, 934 (2d Cir.), aff'd, 488 U.S. 15 (1988). Plaintiffs prove discriminatory effect by showing that defendants' action has a greater adverse impact on a protected group than on others, or perpetuates an existing pattern of segregation in the community. See Oxford House-Evergreen, 769 F. Supp. at 1344. It is not necessary to prove that defendants' acted with discriminatory intent to establish a violation under this theory. See Resident Advisory Board v. Rizzo, 564 F.2d 126, 146 (3d Cir. 1977), cert. denied, 435 U.S. 908 (1978); Doe, 892 F.2d at 323. Once a prima facie case has been established, the burden falls on the defendants to prove that their actions furthered "in theory and in practice, a legitimate, bona fide interest of the Title VIII defendant, and [then] the defendant must show that no alternative course of action could be adopted that would enable that interest to be served with less discriminatory impact." Rizzo, 564 F.2d at 149.

Even if defendants provide a legitimate reason for their actions, the Third Circuit requires that the trial court must nevertheless decide whether there was a FHA violation. Id. The following factors are considered in making this decision: 1) the strength of plaintiffs' showing of discriminatory effect; 2) whether there is some evidence of discriminatory intent; 3) defendant's professed interest in taking the action complained of; and 4) whether the plaintiff seeks to compel the defendant to affirmatively provide housing for members of a protected class or merely seeks to restrain the defendant from interfering with the ability of individual property owners wishing to provide such housing. Id. at 148-49.

Plaintiffs have conclusively established that defendants' refusal to allow the maintenance of the eruv affects the religious freedom and housing opportunities of only those Orthodox Jews who need an eruv, and the chilling effect the removal of the eruv would have on current residents of Tenafly who would move out of the village because of the lack of an eruv and on those Orthodox Jews wanting to move into the Tenafly community who would have to reconsider. Tr. 5/14 at p. 32; see also Brenner Aff. ¶ 6.

Defendants have failed to provide any legitimate, nondiscriminatory reason for their decision to have the eruv removed. As discussed in Point I, supra, defendants' reasons for voting against the eruv were explicit acknowledgements that they wanted to keep Orthodox Jews out of Tenafly. These reasons are necessarily invalid. See, e.g., City of Cleburne v. Cleburne Living Center, 473 U.S. 432 (1985) (city is not entitled to require a permit for the use of a dwelling for mentally retarded people in response to the prejudices of the neighborhood in which the home was to be located); Palmer v. Sidoti, 466 U.S. 429, 433 (1984) ("Public officials sworn to uphold the Constitution may not avoid a constitutional duty by bowing to the hypothetical effects of private racial prejudice that they assume to be both widely and deeply held.").

Given defendants' failure to offer a legitimate reason for their action and provide proof that there was no less discriminatory option available, plaintiffs have successfully established a claim under the disparate impact standard. Nevertheless, if the Court believes that an analysis of the four factors set out in Rizzo is appropriate, plaintiffs have still established a violation of the FHA under the disparate impact theory.

First, plaintiffs have made a strong showing of discriminatory effect, as there is no evidence that the housing opportunities of any other religious or ethnic group is affected by the borough council's decision. Second, as explained in detail in Point I, supra, there is an

enormous amount of evidence proving the religious animus of the Tenafly community and the discriminatory intent of the defendants. Third, defendants have not offered any legitimate or reasonable explanations for their behavior. They have not cited to any rationale relating to a traffic, safety, health, or aesthetic concern in justifying their actions. In fact, defendants have completely failed to provide any legitimate justification for their action. Finally, the nature of the relief plaintiffs seek is also in the plaintiffs' favor. It is well established that courts should be far more reluctant to grant relief when the plaintiff seeks to compel the defendant to actually construct housing or take affirmative steps ensuring the integration of the community than when plaintiffs are merely seeking to enjoin the defendant from interfering with the plaintiff's ability to acquire housing within the community. Arlington Heights, 558 F.2d at 1293. Because plaintiffs are only seeking injunctive relief this factor falls in their favor as well.

* * *

Plaintiffs have therefore established that the action of defendants violated the FHA.

CONCLUSION

For all the foregoing reasons, and those set out in plaintiffs' moving and reply briefs, plaintiffs' request for a preliminary injunction should be granted in all respects.

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