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UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

BERGEN ROCKLAND ERUV ASSOCIATION, YISROEL FRIEDMAN, S. MOSHE PINKASOVITS, SARAH BERGER, MOSES BERGER, CHAIM BREUER, YOSEF ROSEN, and TZVI SCHONFELD Plaintiffs, -against- THE BOROUGH OF UPPER SADDLE RIVER Defendant.	Civ. No. 2:17-cv-05512-JMV-CLW MOTION DATE: DECEMBER 18, 2017 ORAL ARGUMENT REQUESTED

PLAINTIFFS' MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANT'S MOTION TO DISMISS AND REPLY IN FURTHER SUPPORT OF PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

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Plaintiffs respectfully submit this Memorandum of Law in opposition to Upper Saddle River's ("USR") Motion to Dismiss (Dkt. 29) and in reply in further of support of Plaintiffs' Motion for a Preliminary Injunction (Dkt. 25).

PRELIMINARY STATEMENT

USR's 545 pages of prolix papers respond to Plaintiffs' Complaint and preliminary injunction motion by firing a series of scattered shots in the hopes that one will hit. In offering this hodgepodge of arguments – each transparently crafted to deprive Plaintiffs of their well-settled constitutional rights – USR has misstated the law, misstated the facts, and directly contradicted itself in material ways.

The centerpiece of USR's response is that it enacted an Ordinance in 2015 not to impede Plaintiffs' constitutional rights with invidious intent, but to regulate "political signs" following a "particularly challenging" 2014 election campaign. There are several, glaring logical flaws with this cover story. *First*, there is not a shred of contemporaneous evidence to support it. USR offers nothing more than the ambiguous declaration testimony of its salaried administrator and counsel, rather than that of the Mayor or any Councilmember.

Second, USR admits that it has had multiple sign laws on the books for over two decades. These would plainly have addressed this supposed proliferation of signs. And, the language added in 2015 that USR claims applies to the lechis – "device[s], and other matter" – is wholly unnecessary if USR's intent was to

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regulate political signs. Further, USR desperately attempts to avoid the binding effect of the Third Circuit's analogous decision in *Tenafly Eruv Ass'n v. Borough of Tenafly*, 309 F.3d 144 (3d Cir. 2002) by insisting that it has been enforcing its sign laws in a neutral manner since 1994. But if USR has been pulling down signs in the Borough for the past twenty years under its existing laws, this is further proof that it did not need the Ordinance, and its sole justification for it falls flat.

Third, USR's own timeline speaks for itself: USR admits that it let nearly a year go by without addressing its purported concerns about political signs; that it learned about the eruv in August 2015; and that it immediately passed the Ordinance. There is only one reasonable interpretation of these events: USR was motivated to enact the Ordinance not to combat "political signs," but to outlaw the thin PVC pipes that are a functional part of the eruv Plaintiffs seek to maintain and extend—and thus keep USR free of Orthodox Jews.

Tellingly, just months ago, USR's neighboring town of Mahwah proposed ***the exact same Ordinance with the exact same language with the exact same intent***. Mahwah's efforts to block the Eruv – part of a notorious campaign of discrimination against out-of-state Orthodox Jews – have been rightly condemned, including by Governor-elect Phil Murphy, Senator Cory Booker, Representative Josh Gottheimer, and by the Bergen Record in numerous editorials.[1] Indeed, the

[1] *See* Phil Murphy, *It's Time to Urgently Speak Out Against Anti-Semitism in All*

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State of New Jersey filed suit under the U.S. and New Jersey Constitutions, declaring Mahwah "legally wrong" and "on the wrong side of history" for ***even attempting*** to pass its own identical version of USR's Ordinance. *See* Buchweitz Reply Decl. Exs. X-Y. USR should not get a free pass for the exact same conduct.

The rest of USR's factual response can be summarized as hyper-technical nitpicking about poles and licenses. Even if USR had a say in Plaintiffs' private negotiations with the utility companies Orange & Rockland and Verizon – or in the utility companies' private negotiations with each other – all of USR's questions have been laid to rest by the evidence submitted with this brief. Declarations submitted by Plaintiffs' representative, Orange & Rockland, and Verizon make clear that the utilities have no problem with the attachment of lechis in USR. The record further makes clear that in June 2017, Plaintiffs obtained multiple consents from multiple USR officials with at least apparent authority, before Borough Counsel reversed course the following month.

USR's legal responses fare no better. USR distorts the Third Circuit's test for granting preliminary injunctions in First Amendment cases: contrary to USR, Plaintiffs need only show that they "can win" on the merits, meaning that their chances are "significantly better than negligible." *Reilly v. City of Harrisburg*, 858

Forms, TIMES ISRAEL (Oct. 19, 2017) (Buchweitz Reply Decl. Ex. P); Sen. Cory Booker and Rep. Josh Gottheimer, *Anti-Semitism Has No Home in New Jersey*, RECORD (Nov. 3, 2017) (*Id.* Ex. Q); RECORD Editorials (*Id.* Exs. R-W).

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F.3d 173, 179 (3d Cir. 2017). USR also makes the telling argument that invidious intent is not even *relevant* to the Court's Free Exercise inquiry, based solely on a footnote from a dissent from a grant of certiorari by Justice Alito, who himself sides with *Plaintiffs* on the issue. *See Fraternal Order of Police Newark Lodge No. 12 v. City of Newark*, 170 F.3d 359, 365 (3d Cir. 1999) (Alito, J.). And, USR attempts to apply a century-old state utilities law in a contorted and inapplicable manner. Regardless of whether USR chooses to ignore the vast majority of the eruv caselaw that Plaintiffs have cited, it is now black letter law that allowing eruv proponents to attach lechis to poles as part of an eruv is a reasonable accommodation of religion. It is thus unsurprising that USR brings no motion to dismiss for failure to state a claim, relying instead on "ripeness" and "standing" principles that can be easily dispensed with.

At bottom, in most of the United States, eruvin just like the one proposed here are welcomed with open arms as a sign of diversity. As President George H.W. Bush put it, "[b]y 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 . . . I look upon this work as a favorable endeavor. G-d bless you." Buchweitz Decl. Ex. H. Indeed, since this motion was filed, San Jose, California became the last of the top ten cities in the U.S. to have an eruv—without rancor or

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controversy.[2] The hatred that USR and its neighbors have displayed in attempting to prevent Plaintiffs' Free Exercise of religion should not be countenanced. The motion to dismiss should be denied and the motion for preliminary injunction should be granted.

COUNTERSTATEMENT OF FACTS

A. Plaintiffs Need to Expand The Eruv Into a Small Portion of USR

Plaintiffs are observant Jews who maintain the sincerely held religious belief that their faith forbids them to carry or push objects, such as strollers and wheelchairs, outside of their homes on the Sabbath and Yom Kippur, unless their homes are enclosed within an eruv. *See* Am. Compl. ¶¶ 2-3; Steinmetz Decl. ¶¶ 2-7. As the exhibits to USR's own declarations make clear, eruvin are designed to be "mostly invisible to people who don't know what to look for," and "hundreds of cities in the US and around the world have eruvs." *See* Rosen Decl. Ex. C; *see also* Rosen Decl. Ex. D (noting that the San Francisco eruv is "effectively invisible," but is "an essential part of life for strictly Shabbat-observant Jews").

Plaintiffs reside in Rockland County, New York, close to the New York-New Jersey border. Am. Compl. ¶ 31. They seek to expand an eruv already in place in Rockland County, such that it would encompass the homes of Plaintiffs

[2] See Julia Baum, *New Eruv Puts San Jose Jewish Community At Ease on Sabbath*, MERCURY NEWS (Nov. 6, 2017) (Buchweitz Reply Decl. Ex. Z).

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and other Jews who live close to the border that wish to be within an eruv. *Id.* ¶ 11. The Vaad HaEruv, which is responsible for the eruvin in this area, determined after extensive review that the only feasible way to expand the existing Rockland County eruv (the "Eruv") so that it covered all of the members of the Jewish Community of Rockland County was to cross into a stretch of Bergen County, including a small portion of USR (the "Planned Eruv Expansion"). *See* Reply Declaration of Rabbi Chaim Steinmetz ("Steinmetz Reply Decl.") ¶ 18. The existing Eruv in Rockland County extends as far as it can within New York, but an expansion is necessary to encompass the homes of many observant Jews living along the border, including several of the named Plaintiffs. *See id.* ¶ 19. The Vaad HaEruv was at all times Plaintiffs' agent, acting at the direction of Plaintiffs to put up the Eruv for the Plaintiffs' benefit. *See* Am. Compl. ¶ 5; *see also* Steinmetz Reply Decl. Ex. H.

At the same time that USR claims to have "no objection to Plaintiffs' religious beliefs or observance," USR Br. at 1 n.1, and concedes that it "has no basis to deny Plaintiffs' religious beliefs or observances," *id.* at 29, it derides Plaintiffs' allegations as "implausible" merely because Plaintiffs "live and work outside of USR, across the New York border." *Id.* at 42. But Plaintiffs' authority on eruvin concluded that a small extension of the Eruv into USR is necessary to fully cover the homes of residents of Rockland County. Whether there are

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"synagogues located in USR," *see id.*, is both beside the point and beyond the judicial ken; Plaintiffs require the Planned Eruv Expansion, including a small portion within USR, in order to freely "live and worship" in Rockland County. *Id.*

B. USR Passes an Ordinance to Derail the Eruv in 2015

In 2015, the Vaad HaEruv approached Orange & Rockland Utilities, Inc. ("O&R") and requested permission to affix thin PVC plastic pipes known as "lechis," which are necessary for construction of the Eruv, to utility poles in USR owned or used by O&R's New Jersey utility subsidiary Rockland Electric Company. *See* Steinmetz Decl. ¶¶ 8-9; Ex. G. USR first learned about the Vaad HaEruv's agreement with O&R to expand the Eruv in August 2015. *See* USR Br. at 20-21; Regan Decl. ¶ 16; Preusch Decl. ¶ 21. It is undisputed that the USR Council expressly discussed the Eruv in closed session on August 18, 2015. *See* USR Br. at 20-21; Buchweitz Decl. Ex. D. It is further undisputed that at the next two meetings, the USR Council introduced and approved Ordinance No. 16-15 (the "Ordinance"), which makes it illegal to "[p]ost or affix any sign, advertisement, notice, poster, paper, device, or other matter to any public utility pole, shade tree, lamp post, curbstone, sidewalk, or upon any public structure or building, except as may be authorized or required by law." *See* Buchweitz Decl. Exs. E-F.

Despite this clear timeline, USR insists that "the topics of *lechis* and *eruvin* were never discussed" in connection with the Ordinance. USR Br. at 21. USR

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makes this sweeping statement without a Declaration from its Mayor or any Council member; instead, it relies solely on its paid employees and agents – specifically, the Borough attorney (Mr. Regan) and Borough administrator (Mr. Preusch) – who provide the ambiguous testimony that they merely do not recall "any conversations or communications involving the Mayor and Council related to enacting [the Ordinance] to subvert or prevent the creation of an *eruv*." *Id.* at 22.

USR also insists that the "primary motivation" behind the Ordinance was not the Eruv, but rather combatting "the proliferation of political signs on public property." *Id.* at 15-17. USR contends that there was a "proliferation of political signs illegally attached to utility poles" during a "contentious 2014 election season." *Id.* The best that USR comes up with for why it waited *an entire year* to address this concern – or, more to the point, why it waited until it got word of the Eruv – was that it got "sidetracked by other more pressing issues." *Id.* at 16.

But there are two even more fundamental flaws in USR's alternative facts—USR could have regulated political signs under its existing sign laws, and the language added in the 2015 Ordinance has nothing to do with political signs. According to USR's own papers, ***USR has already been regulating*** "signs on utility poles" since 1994 when it amended its Code to provide that "[o]nly freestanding signs shall be permitted, and no sign shall be attached to a tree, pole, building or structure." *See id.* at 14; Preusch Decl. Ex. A. The following year,

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USR again revised its Code to further clarify that "No signs shall be permitted to be posted on such structures as telephone poles, street signs, trees, or fences." *See* USR Br. at 15; Preusch Decl. Ex. C.[3] Thus, USR could easily have regulated political signs without further revising its Code. Further, the language USR added in 2015 to cover "device[s]" or "other matter" – which it now claims applies to lechis – makes no sense if USR only had "political signage" in mind.[4]

C. USR's Short-Lived Consent to the Eruv in 2017 Gives Way to Obstruction and Intransigence

As described in greater detail below, Plaintiffs' community representatives obtained a license from O&R to attach lechis to utility poles in USR. *See* Am. Compl. ¶ 53; Steinmetz Decl. ¶ 8-9. Given its private contractual arrangement with O&R, Plaintiffs were not required to apply for or obtain USR's approval to attach lechis to utility poles in USR because no state or local law requires such approval. *See infra* § II.A.3. But even if Plaintiffs were so required, they obtained

[3] USR's code defines a "sign" as "[a]ny inscription written, printed, painted or otherwise placed on a board, plate, banner or upon any material object or any device whatsoever which, by reason of its form, color, wording, activity or technique or otherwise, attracts attention to itself, used as a means of identification, advertisement or announcement." *See* USR Br. at 14-15; Preusch Decl. Ex. B.

[4] USR points to an email dated Sep. 29, 2015 that it and many other towns received from O&R about "safety and litter control" concerns arising from political signs. Preusch Decl. Ex. H. But USR received this email blast ***after*** the Ordinance was already drafted, and it does not contend that any USR official even looked at it at the time. *Id.* ¶ 28. O&R has now confirmed that (i) this email was not directed at USR, and (ii) lechis implicate none of the "safety and litter control" concerns referenced in that email. Sullivan Decl. ¶¶ 3, 17.

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consent from various USR officials and followed every requirement asked of them, only to have those permissions abruptly rescinded amid a firestorm of animus.

USR contends that there were "misrepresentations" and a "misunderstanding among USR personnel" regarding events that took place in June and July, 2017. USR Br. at 23-24. Not so. USR's own declarants aver that nothing was misrepresented or hidden from them:

- On **June 12, 2017**, Rabbi Steinmetz called the USR Police Department to give advance notice that he would be working on utility poles in USR. The dispatcher apparently took from this call that Rabbi Steinmetz was a contractor for O&R working on the utility poles. *See* Hyman Decl. That is entirely accurate. As O&R explained to USR Police Chief Rotella in an email *that same day*, the Vaad HaEruv "is a ***contractor*** that is installing ERUV on utility poles within the Borough of Upper Saddle River." *See* Preusch Decl. Ex. F; *see also* Steinmetz Reply Decl. ¶¶ 11-13; Dougherty Decl. ¶ 18.

- On **June 15, 2017**, the purpose of the Eruv was discussed "at length" at a meeting between Plaintiffs' community representatives and USR Code Officials Jim Dougherty and Steven Forbes, thus dispelling any notion that USR was unaware of the nature of the Vaad HaEruv's work. *See* USR Br. at 25; Forbes Decl. ¶ 10; Dougherty Decl. ¶ 22. Quite the opposite, "the members of the Vaad HaEruv wanted to know what they needed to do to proceed with installing lechis to utility poles." Dougherty Decl. ¶ 23.[5]

- On **June 20, 2017,** Police Chief Rotella met personally with the Vaad

[5] Mr. Dougherty left the meeting to confer with USR Administrator Preusch, and returned to tell the Vaad HaEruv that they could proceed with its work. While Mr. Dougherty claims to have included a caveat that his permission to proceed was "temporary," Dougherty Decl. ¶¶ 23-24, Mr. Preusch made no mention of any such caveat. Preusch Decl. ¶ 56; *see also* Steinmetz Reply Decl. ¶¶ 8-9 & Pinkasovits Reply Decl. ¶ 7.

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HaEruv for a "pre-construction meeting." During this meeting, the Police Chief, like the Code Officers, believed "that the Vaad HaEruv was allowed to temporarily proceed." USR Br. at 27; Rotella Decl. ¶¶ 23-24.

- From **June 20, 2017 – July 19, 2017** (when USR sharply reversed course), it is undisputed that the Vaad HaEruv complied with every request that was made of it: it employed a "flag man," placed road signs near the worksite, and completed a "Contractor Road Construction" form. Steinmetz Decl. at ¶¶ 14-16 and Ex. I.

Cutting through their various caveats and disclaimers, one critical fact becomes clear: ***every relevant USR officer or official responsible for code enforcement*** allowed the Vaad HaEruv to proceed—including Chief of Police Rotella, Borough Administrator Preusch, Code Officer Dougherty, and Code Official Forbes. With the consent of those officials, Plaintiffs' representatives were able to complete a portion of their work – incurring significant expenses in the process – and partially expand the Eruv to cover many families living along the state border, including Plaintiffs Friedman and Pinkasovits. *See* Friedman Decl. ¶¶ 8-9; Pinkasovits Decl. ¶¶ 14-16. Mr. Dougherty at times personally observed the work, as did USR police officers. See Steinmetz Reply Decl. ¶ 14.

The record amply details what followed. Following a nasty and xenophobic backlash that spread like wildfire on social media among its residents – *i.e.*, the chapter of this story that USR scrupulously avoids addressing (*see* USR Br. at 3 n. 4 & 28) – USR changed course. Backtracking on the consents of its own officials, USR chose to invoke the Ordinance and two inapplicable state statutes (one of

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which it no longer relies on), as detailed in correspondence to O&R demanding the removal of the Eruv from "poles owned and maintained by [O&R]" (the "Threat Letters").[6] *See* Steinmetz Decl. Exs. C-F. It also voided the Contractor Road Construction Information Form that it had issued the prior month. USR Br. at 28.

USR now demands that Plaintiffs should have followed a previously undisclosed "procedure for seeking relief from USR." *See* USR Br. at 34-35. A declaration from Borough Attorney Robert Regan first suggests that Plaintiffs "must comply with the permitting requirements" necessary to "display a sign within USR." Regan Decl. ¶ 25. But as Plaintiffs have shown, the caselaw has uniformly held that lechis are ***not*** signs. Even USR accepts that logical conclusion, given that (i) its Motion never mentions the "permitting requirements" referenced in Mr. Regan's Declaration; (ii) USR never argues that the lechis are governed by either of the two provisions of its Code that regulate "signs"; and (iii) USR's application for displaying a "sign," available on its website, cannot possibly pertain to PVC pipes that display no message. Mr. Regan next submits – without elaboration – that Plaintiffs should "seek a waiver" of the Ordinance, or request that "USR amend and modify the existing code." *Id.* at ¶¶ 26-27.

Tellingly, though, Mr. Regan never once mentioned any of these

[6] USR's Threat Letters were only directed to O&R, and not Verizon. USR's Motion marks the first time that it has ever invoked Verizon in connection with these issues.

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"procedures" in his Threat Letters, and it is thus a transparent afterthought for USR to now complain that "none of [these procedures] happened here." USR Br. at 35. Rather than outline any "procedures," USR categorically demanded the "removal of the eruv," and threatened to take down the lechis if they were not removed by July 26, 2017. *See* Steinmetz Decl. Exs. C-F. O&R responded by questioning the "the need for such an accelerated timeframe, as the eruv facilities plainly present no threat to public safety." *See* Steinmetz Reply Decl. Ex. H. USR's sole response was to reiterate its removal demand and to threaten that "failure to have the eruv removed . . . will result in the Borough acting to have the eruv removed." Steinmetz Decl. Ex. F. Faced with these demands – and bombarded with anti-Semitic invective and acts of vandalism against the Eruv – Plaintiffs were forced to file this lawsuit and seek emergency injunctive relief. Within hours of Plaintiffs filing a TRO, USR agreed to allow the lechis that were already up to stay up, and to allow Plaintiffs to make repairs for vandalism and ordinary maintenance. *See* Buchweitz Decl. Ex. I.

Not even this lawsuit, however, has chilled USR's campaign against the Eruv. The following week, the USR Council met in closed session to discuss "the possibility of installing the town's infrastructures underground" (i.e., ***eliminating all utility poles throughout USR***). *See* Buchweitz Reply Decl. Ex. M. This would, of course, have the effect of removing the overhead wires and lechis on

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utility poles that are utilized to create the Eruv, which was the subject of the meeting.

D. USR Does Not Enforce Its Ordinance Until Plaintiffs File Suit

USR claims that the USR Police Department was made aware of the Ordinance through a single email from Police Chief Rotella in the days after it was passed. *See* Rotella Decl. Ex. B; Spina Decl. Ex. A; Lally Decl. Ex. B. But in the almost two years that followed the passage of the Ordinance – indeed, until Plaintiffs filed this lawsuit – there are no documents evidencing any efforts by USR to enforce it. As USR confirmed in response to a recent OPRA request, no such documents exist. *See* Buchweitz Reply Decl. ¶ 7 & Ex. N. Instead, USR points to a new "administrative policy" suddenly implemented on July 26, 2017—***the day after Plaintiffs' counsel responded to USR's Threat Letters noting USR's selective enforcement***. *See* Lally Decl. ¶ 18 & Ex. C. Pursuant to this new "policy," USR now creates a "computer-aided dispatch" anytime a police officer removes an "unauthorized sign, device or other matter." *Id*. USR also "reminded" its police force that that they "shall enforce" the Ordinance. *Id*.

Even today, USR's enforcement continues to be selective and discriminatory. For example, Police Chief Rotella appended to his Declaration several pictures of utility poles in USR that have lechis attached to them. What these pictures demonstrate are the array of "other matter" that are also attached to

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these same utility poles—including PVC strips and piping, white and black tubes, numbers, nails, staples, and various other appendages. *See, e.g.*, Rotella Decl. Ex. O (pictures 2 and 3); Ex. P (pictures 3, 4, and 6); Ex. R (pictures 2, 3, and 5); *see also* Buchweitz Decl. Ex. G (same). USR is not enforcing its Ordinance as to *any* of this "other matter," which remains up on utility poles throughout USR.

E. USR's Technical Challenges to Plaintiffs' Licenses Are Misplaced

USR devotes a large portion of its Motion to Dismiss to (i) questioning the scope of Plaintiffs' licenses with O&R; and (ii) contending that Plaintiffs do not have separate approval from Verizon to use certain of the utility poles (specifically, those owned by Verizon but used by O&R pursuant to a 1962 Joint Use Agreement). USR Br. at 9-14, 35-36.

Even assuming that USR can raise these facts on a motion to dismiss – and it cannot – none of them deprive Plaintiffs of standing to pursue their claims. *See* § III, *infra*. Nonetheless, to correct the record as a factual matter, Plaintiffs respectfully refer the Court to the Reply Declarations of Rabbi Chaim Steinmetz and Kenneth Sullivan (of O&R) ("Sullivan Reply Decl."), each of which address USR's contentions regarding the utility pole permits in great detail.

With respect to Verizon, any issue has been resolved by the Declarations of David Gudino of Verizon ("Gudino Reply Decl.") and Mr. Sullivan, submitted herewith. These declarations make clear that even those lechis on Verizon poles

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were reviewed by O&R, and that Verizon would, in any event, permit attachment of lechis pursuant to its general policy "to allow for the installation of lechis," just as it has "in other communities in New Jersey and elsewhere," if USR had not threatened Verizon with an injunction if it grants such formal approval to Plaintiffs. *See* Gudino Reply Decl. ¶ 4; Buchweitz Reply Decl. Ex. O. At most, USR has identified potential contractual issues between and among Verizon, O&R and the Vaad HaEruv. USR has no place in these private contractual matters.

I. LEGAL STANDARD

A complaint must contain "a short and plain statement of the claim showing that the pleader is entitled to relief, in order to give the defendant fair notice of what the . . . claim is and the grounds upon which it rests." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (citation and internal quotation marks omitted). On a motion to dismiss for lack of subject matter jurisdiction under Fed. R. Civ. P. 12(b)(1), the district court must determine whether the motion is a "facial" or "factual" attack. *Constitution Party of Pa. v. Aichele*, 757 F.3d 347, 357 (3d Cir. 2014) (citation omitted). A facial attack "contests the sufficiency of the pleadings," *see id.*, while a factual attack challenges a plaintiff's ability to factually meet the jurisdictional requirements. *Mortensen v. First Fed. Sav. & Loan Ass'n*, 549 F.2d 884, 891–92 (3d Cir. 1977).

USR's motion constitutes a facial attack because USR contends that the

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Amended Complaint lacks sufficient allegations to establish ripeness and standing. *See* USR Br. at 31 ("The claims, as pleaded, are facially defective."). In reviewing a facial attack, courts apply the "same standard of review it would use in considering a motion to dismiss under Rule 12(b)(6), *i.e.*, construing the alleged facts in favor of the nonmoving party." *Constitution Party*, 757 F.3d at 357. Accordingly, "the court must only consider the allegations of the complaint and documents referenced therein and attached thereto, in the light most favorable to the plaintiff." *Gould Elecs. Inc. v. United States*, 220 F.3d 169, 176 (3d Cir. 2000), *holding modified by Simon v. United States*, 341 F.3d 193 (3d Cir. 2003). To survive a facial attack, the complaint need only include sufficient allegations that, "if accepted, meet the legal requirements for standing." *Constitution Party*, 757 F.3d at 360. Even if this Court views USR's motion as a factual attack and looks at material beyond the pleadings, the record plainly establishes both the ripeness of this suit and Plaintiffs' standing to bring it.

II. PLAINTIFFS' CLAIMS ARE RIPE FOR ADJUDICATION

A. Plaintiffs Did Not Need to Seek Municipal Consent

1. Plaintiffs Do Not Need to Seek Municipal Consent Under The Unconstitutional Ordinance

USR contends that the Ordinance that it passed mere weeks after learning about the Eruv requires municipal consent. *See* USR Br. at 34-35. USR is wrong. *First*, and most fundamentally, any argument under the Ordinance fails because it

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is unconstitutional and invalid—it was both passed with invidious intent and then selectively enforced, as Plaintiffs have alleged. *See* Am. Compl. ¶¶ 70-71; Moving Br. at 21-27; § IV.A.1-3, *infra.*

Second, even on its own terms, the Ordinance does not say what USR claims it says. That is, the Ordinance includes no language expressly requiring "municipal consent," or explaining the process for obtaining such consent. Rather, it provides for an exception where the attachments are "authorized or required by law." As Plaintiffs have shown, the lechis are, indeed, "authorized or required by law"—specifically, through the body of caselaw holding that the creation of an eruv is a reasonable accommodation of religious practice. *See Westhampton Beach*, 778 F.3d at 395 ("permitting an organization to attach lechis to utility poles serves the secular purpose of accommodation"); *Smith v. Cmty. Bd. No. 14*, 491 N.Y.S.2d 584, 586 (N.Y. Sup. Ct., Queens Cty. 1985), *aff'd* 133 A.D.2d 79 (N.Y. App. Div. 1987) (finding New York City's actions in support of an eruv not only valid, but mandated by the principle of accommodation of religious practices); *Southampton*, 2015 WL 4160461, at *6 (reversing denial of zoning variance for lechis because municipality abused its discretion when it "ignored its affirmative duty to suggest measures to accommodate" creation of an eruv).

Third, according to USR's own (absurd) explanation that it passed the Ordinance not to target the Eruv but as a response to "political signage," *see* USR

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Br. 15-17, the consequence to USR is that the Ordinance does not apply to the lechis—which are not "signs" or anything even similar. *See* Amend. Compl. ¶ 82; *Southampton*, 2015 WL 4160461, at *6 (concluding that Southampton's interpretation that lechis are "signs" was "contrary to the language of the law, irrational and unreasonable"); *Tenafly*, 309 F.3d at 164 (concluding that lechis do not communicate any idea or message). Nor, for that matter, does USR ever argue that a lechi is an "advertisement, notice, poster, [or] paper." Instead, USR contends that the lechis fall within the latter terms "device, or other matter." *See* Forbes Decl. ¶ 10.

But that interpretation runs directly contrary to the canon of construction *ejusdem generis*, which requires courts to limit its interpretation of latter terms in a list (here, "device, or other matter") in the context of the items that precede it (here, "sign, advertisement, notice, poster, [and] paper"). *See Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 109, 115 (2001) (holding that "contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce" included only transportation workers in foreign or interstate commerce). Here, the Ordinance's primary terms all fall within the genus of "signs." Given the lack of a defined or discernable meaning for "device, or other matter," this Court should not afford this general term its broadest application. To do so would upend uniform precedent that lechis are not "signs,"

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and also render superfluous the Ordinance's prior enumeration of items.

2. USR's Lack of Protocol for Obtaining Consent Is Further Evidence That Consent Is Not Required

USR further argues that Plaintiffs should have followed a "protocol" for seeking municipal consent that USR never once mentioned even exists, and then criticizes Plaintiffs for not intuiting this "process." USR Br. at 34-35. USR now contends that "Plaintiffs were required to send a letter to the Borough Clerk" requesting that the "Mayor and the Borough Council" consider an "application" for Plaintiffs' "intended use of the poles." *Id.* This "application" would then be decided by either the "Mayor and Council" or the "Joint Planning Board and Board of Adjustment" – which one, USR does not say. *Id.*

There are multiple, glaring flaws with USR's feigned process concerns. The first flaw is its post-hoc transparency: ***not once*** in any of the Vaad HaEruv's several interactions with USR Code Officers and the USR Police Department did anyone from USR mention an "application process." Nor did any of Mr. Regan's multiple Threat Letters so much as hint that Plaintiffs should proceed by way of an "application." *See* Buchweitz Decl. Ex. C. Instead, the Threat Letters demanded the removal of the lechis, full stop. *Id.* And, when Plaintiffs' counsel responded to Mr. Regan's Threat Letters with the offer that "we are available to discuss any questions or concerns with either you or the Borough," ***USR never even responded***. *See* Buchweitz Reply Decl. ¶ 4 & Ex. K.

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The second flaw is that USR *has* no "application process" under the Ordinance. While Mr. Regan's Declaration mentions that "permitting requirements" exist in USR to "display a sign," USR's brief carefully avoids contending that these permitting requirements were necessary here. *Compare* Regan Decl. ¶ 25 *with* USR Br. at 34-35 (only citing Regan Decl. ¶¶ 24, 26). USR's brief ignores Mr. Regan's non-sequitur for good reason: the application requirements for displaying a "sign" under USR Code Chapter 150:37 only make sense in the context of signs (among other things, USR asks for the "dimensions" of a sign, the "sketch" of the proposed sign, and the type of "illumination" required). *See Community Sign Permit Application*, www.usrtoday.org/wp-content/.../COMMUNITY-SIGN-PERMIT-APPLICATION.pdf. These requirements simply do not apply to PVC pipes.

3. N.J.S.A § 48:3-18 – Which USR Ignores – Expressly Does Not Require Municipal Consent

USR next contends that Plaintiffs' claims are not ripe because Plaintiffs have not sought "municipal consent," as purportedly required by N.J.S.A. § 48:3-19.[7] *See* USR Br. 33-34. USR is incorrect. The applicable statute here, if any, is N.J.S.A. § 48:3-18, which precedes the statute that USR relies upon, but which

[7] N.J.S.A. § 48:3-19 provides that "[t]he consent of the municipality shall be obtained for the use by a person of the poles of another person unless each person has a lawful right to maintain poles in such street, highway or other public place."

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USR ignores.

N.J.S.A § 48:3-18 provides that "[a]ny person, municipal or otherwise, may enter into a written agreement with any such other person owning or using any poles erected under municipal consent in any street, highway or other public place for the use by the former person of the poles upon such terms and conditions as may be agreed upon by the persons." Here, the License Agreement between the Vaad HaEruv and O&R qualifies as a "written agreement" between "any person" (*i.e.*, the Vaad HaEruv) and "another person owning or using [] poles erected under municipal consent" (*i.e.*, O&R) for the "use by the former person" (*i.e.*, the Vaad HaEruv) of poles located in USR. Indeed, USR cannot dispute that O&R ***already has*** "municipal consent" to ***own or use*** utility poles within Upper Saddle River. Because Plaintiffs' agent has already complied with the requirements in N.J.S.A. § 48:3-18, no further consent by USR is necessary.

Moreover, even if § 48:3-19 did apply – and it does not – the outcome would not change. The plain terms of N.J.S.A. § 48:3-19 do not require municipal consent where "each person has a lawful right to maintain poles in such street, highway or other public place." Here, both Plaintiffs (through the License Agreement) and O&R (through USR's prior consent) already have "a lawful right to maintain" the poles. Accordingly, no further municipal consent is required.

USR's interpretation of N.J. § 48:3-19 is also unprecedented. USR cites no

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case construing this statutory scheme as somehow barring utility companies from entering into private agreements with licensees absent municipal consent. Certainly, the Third Circuit in *Tenafly* did not find that N.J. § 48:3-19 posed any bar to granting full relief to the eruv proponents, despite a lack of municipal consent. Nor is it for USR to object on the basis of a state statute. And, prior to their changes of heart, both Montvale and Mahwah found no such restriction on Plaintiffs' private contractual arrangements with O&R. In fact, their attorneys reached the ***opposite conclusion***. *See* Buchweitz Ex. A (Statement of former Montvale Mayor Roger Fyfe) ("I contacted Orange and Rockland and consulted with our municipal attorney . . . . [a]bsent any compelling safety concerns, there is little role for Montvale to play in what amounts to a private negotiation between Orange and Rockland and the community that requested the eruv"); Ex. B (Statement of current Mahwah Mayor Bill Laforet) ("Advice by our attorney is that we cannot do anything about the installation of these plastic pipes or the utility poles establishing a[n] ERUV . . . both [t]he Board of Public Utilities and O&R are obligated to allow these ERUV markings. But they have NO OBLIGATION to notify the municipality.") (emphasis in original).

What is more, legislative history further supports Plaintiffs' interpretation. Both N.J.S.A. § 48:3-18 and N.J.S.A. § 48:3-19 fall within Title 48 of New Jersey's Revised Statutes, which concerns "Public Utilities," and are part of an

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Article entitled "Joint Use of Poles." The preamble to these statutes confirms that the intent behind their enactment was to "encourage and provide a reduction for the number of poles located in the streets, highways and other public places of this state." Ch. 136, 139 Stat. 245 (1915); Ch. 198, 186 Stat. A486 – § 13 (1962). In other words, the very purpose of this article is to *encourage* – rather than impede – the sharing, renting, and/or licensing of utility poles. To that end, the State Legislature provided utility companies with increased freedom to enter into private agreements to facilitate the shared use of utility poles. USR's isolated interpretation of N.J.S.A. § 48:3-19 ignores that important context.

B. In Any Event, Plaintiffs Obtained Appropriate Consents

Even if Plaintiffs were required to obtain municipal consent under state or local law – and they were not, as Plaintiffs have shown – USR's ripeness argument still fails as a factual matter. As Plaintiffs have alleged, and USR's papers confirm, the Vaad HaEruv obtained multiple consents from multiple officials—including the Chief of Police, the Borough Administrator, and two senior Code Officers. *See* Counterstatement of Facts, § C. These are the individuals and departments, according to USR's own Declarations, that are responsible for code interpretation and enforcement in USR. *See, e.g.*, Preusch Decl. ¶¶ 39-42.

USR's rejoinder is that Plaintiffs only received consent from a "single person at the Police Department," and that the USR Police Department "is not

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authorized to act on behalf" of USR. USR Br. at 36. The former is wrong factually; the latter is wrong legally. In fact, it was not one, but multiple, USR officials who gave Rabbi Steinmetz and the Vaad HaEruv permission to proceed, including Code Officers Dougherty and Forbes (who met with the Vaad HaEruv "at length" on June 15, 2017); Borough Administrator Preusch (who met with Mr. Dougherty, and certainly speaks for the Borough)[8]; and Police Chief Rotella (who "provided his consent" so long as the Vaad HaEruv complied with notification and safety protocols, and then "approved" a Contractor Road Construction Information form). *See* Counterstatement of Facts, § C. In short, Plaintiffs' representatives obtained permissions every step of the way ***from multiple USR*** officials, and complied with all of the USR Police Department's directives. *Id.* Not one of these Borough officials ever suggested obtaining written approval from the USR Mayor or Council. *Id.* That "requirement" first surfaced in USR's legal papers.

Nor is USR correct that it cannot be bound by the authorization of its own Police Department. For that curious principle of law, USR cites only two cases—both from Pennsylvania state courts in the 1980s. Both are inapposite. In

[8] Mr. Preusch says he was "misunderstood" by Mr. Dougherty, but he corroborates Rabbi Steinmetz's testimony that Mr. Dougherty allowed the "Vaad haEruv [to] proceed." *See* Preusch Dec. at ¶14 ("I now know, after further discussions with Mr. Dougherty, that he misunderstood me as suggesting the Vaad haEruv could proceed if [it] participated in a pre-construction meeting with the USR PD and complied with traffic safety requirements identified by the USR PD.").

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Abington Heights School District v. Township of South Abington, 456 A.2d 722 (Pa. Commw. Ct. 1983), the Court found that defendant-township could not be bound by certain supervisors because there was no evidence that, outside of the supervisors themselves, the township ever represented to plaintiff that the supervisors had authority to act. *Id*. at 724. Here, Mr. Dougherty admits that, with the knowledge of Administrator Preusch, he specifically instructed Rabbi Steinmetz to liaise with the USR Police Department for further instructions and protocols. Similarly, in *Wilson v. West Hanover Township*, 43 Pa. D. & C.3d 322 (Pa. Ct. Com. Pl. 1986), the Court found that plaintiff could not rely on the authority of defendant-township's supervisor because plaintiff "failed to take the precautions of a reasonable man in obtaining a written approval by the township." *Id*. at 330. In contrast here, the Vaad HaEruv did everything asked of it by USR's code officers and police department. *See* Am. Comp. ¶¶ 53-63.

USR likely cites Pennsylvania law because New Jersey law undermines its position. In *Borough of Emerson v. Emerson Police Benevolent Ass'n Local 206*, 2006 WL 1161564, at *5 (N.J. Super. Ct. Ch. Div. Apr. 28, 2006), the Court found on similar facts that the police chief had authority to bind the municipality based on the doctrines of apparent authority and equitable estoppel: "Scarpa, as borough administrator, was the principal who acted in a manner to mislead Kalyouseff to believe Chief Saudino possessed authority . . . Chief Saudino [therefore] had

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apparent authority such that the Borough may be bound by the doctrine of equitable estoppel." *Id*. Here, Mr. Dougherty, after talking to Borough Administrator Preusch, allowed the Vaad haEruv to proceed and to follow up with the USR Police Department. Under *Emerson*, this provided the USR Police Department with the apparent authority to consent on USR's behalf.

C. Attempts To Obtain Further Municipal Consent Would Be Futile and Unnecessary

The main thrust of USR's "ripeness" argument is that Plaintiffs have supposedly not sought or received municipal consent (*i.e.*, they have purportedly not "exhausted administrative remedies" despite the various consents they received). USR Br. at 37-39. Yet USR hardly hides the fact that any such application would be a complete waste of time: USR would deny it out-of-hand. *See* Buchweitz Decl. Ex. C (demanding the take-down of the lechis). USR was not and is not interested in a dialogue, a meeting, or a processed application. *Id.* Further, although USR strives mightily to deflect attention from the rank animus expressed by its residents on social media and at raucous town hall meetings,[9] it cannot credibly argue, in this toxic environment, that it would seriously entertain a request to permit the very objects it has gone to such lengths to outlaw.

[9] *See* Am. Compl. at ¶¶ 68-69, 77, 80 (*e.g.*, "Our town is such a great place and if these things move in they will ruin it. They think that can do whatever the hell they want and we'll be known as a dirty town if they move in. Please keep them out…"); ("It's not their community. It's our community.").

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Where application to a government body would be futile, a controversy is prudentially ripe even in the absence of a final governmental decision. Indeed, it is well-settled that "litigants are not required to make futile gestures to establish ripeness," especially where, as here, "there is no question as to what the result of an application . . . would be." *Assisted Living Assocs. of Moorestown, L.L.C. v. Moorestown Twp.*, 996 F. Supp. 409, 426–27 (D.N.J. 1998) (collecting cases). Circuit courts routinely apply this futility principle. *See United States v. Vill. of Palatine, Illinois*, 37 F.3d 1230, 1234 (7th Cir.1994) (holding that plaintiff did not need to resort to "manifestly futile" or "foredoomed" procedures to remedy zoning decision); *Bannum, Inc. v. City of Louisville*, 958 F.2d 1354, 1362–63 (6th Cir. 1992) (finality means that "further administrative action by [the applicant] would not be productive . . . .); *Herrington v. Cty. of Sonoma*, 857 F.2d 567, 569 (9th Cir. 1988) ("[I]t would be inappropriate to require the [plaintiffs] to have formally completed a hopeless application.").

In arguing that Plaintiffs were nonetheless required to "exhaust[] administrative remedies," USR mischaracterizes this case as a mere "land use dispute." USR. Br. at 38-39. But it is far more than that: Plaintiffs have asserted violations of their constitutional rights, including through a 42 U.S.C. § 1983 claim. In this context, the Third Circuit and this District have repeatedly held that plaintiffs are *not* required to exhaust administrative remedies. *See Hochman v. Bd.*

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of Ed. of Newark, 534 F.2d 1094, 1097 (3rd Cir. 1976) ("When appropriate federal jurisdiction is invoked alleging violation of First Amendment rights, as [plaintiff] does here, we may not insist that he first seek his remedies elsewhere no matter how adequate those remedies may be."); *Mears v. Board of Educ.*, No. 13-3154, 2014 WL 1309948 *5 (D.N.J. Mar. 21, 2014) ("With regard to § 1983 claims, there is no exhaustion of administrative remedies requirement before filing in federal court."); *Freeland v. Lower Merion Sch. Dist.*, No. 94-2559, 1995 WL 129200 at *4 (E.D. Pa. Mar. 24, 1995) (same).[10]

In sum, Plaintiffs have unquestionably alleged an intractable disagreement between the parties concerning their rights and obligations. *See* Am. Compl. ¶¶ 104-108 (Claim for Declaratory Relief that USR does not separately move to dismiss). Given that there ***already*** "now exists an actual, justiciable controversy"

[10] One of the few *eruv*-related cases that USR cites, *EEEA v. Westhampton Beach*, 828 F. Supp. 2d 526 (E.D.N.Y. 2011), should counsel *against* dismissal. There, one of the municipal defendants (Southampton) avoided a preliminary injunction by claiming that it had a "permit and variance process" and that administrative proceedings should determine if lechis are "signs" within the meaning of a local sign ordinance. *Id.* at 538. In contrast to this case, there was no evidence that "discrimination played a part in [the] enactment" of Southampton's sign ordinance, and the court thus found it "neutral" for First Amendment purposes. *Id.* at 539. What USR does not mention is that Plaintiffs were forced to spend years mired in local proceedings, where they were rejected at every stage, a state court judge annulled the zoning board's rejection of the eruv proponents' application, finding it arbitrary, capricious, and an abuse of discretion. *See East End Eruv Ass'n v. Town of Southampton, et al.*, No. 14-21124, 2015 WL 4160461 (N.Y. Sup. Ct. Suffolk Cty., June 30, 2015). This Court can reach that same conclusion on this record.

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between Plaintiffs and USR that is ripe for adjudication, *see id.*, it makes no sense for Plaintiffs to engage in the "futile gesture" of a process with a predestined outcome. *See Assisted Living Assocs. of Moorestown*, 996 F. Supp. at 426.

III. PLAINTIFFS HAVE STANDING TO BRING THEIR CLAIMS

By not moving to dismiss under Fed. R. Civ. P. 12(b)(6), USR concedes that Plaintiffs have properly stated claims for relief under the First and Fourteenth Amendments, 42 U.S.C. § 1983, 42 U.S.C. § 2000cc (RLUIPA), and for a Declaratory Judgment. USR instead argues that Plaintiffs do not have standing to pursue these claims. USR Br. at 40-48. For the reasons detailed below, USR is wrong on all counts.

A. Plaintiffs Have Alleged an Injury-In-Fact

To allege injury-in-fact, a plaintiff must merely show "a concrete and particularized legally protected interest resulting in harm that is actual or imminent, not conjectural or hypothetical." *In re Nickelodeon Consumer Privacy Litig.*, 827 F.3d 262, 272 (3d Cir. 2016) (citation omitted). A particularized injury "must affect the plaintiff in a personal and individual way." *Spokeo, Inc. v. Robbins*, 136 S. Ct. 1540, 1548 (2016). An injury-in-fact must also be presently occurring or sufficiently "imminent." *N.J. Physicians, Inc. v. President of U.S.*, 653 F.3d 234, 238 (3d Cir. 2011).

USR's first argument – that Plaintiffs' injuries are "self-inflicted" because

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they purportedly failed "to apply for or obtain [] relevant consents" for the lechis – can be easily rejected. USR Br. at 41-42. This is merely a reprised "ripeness" argument, and it fares no better repackaged as an attack on Plaintiffs' standing. As Plaintiffs have shown, they were not required to obtain any consents under either state or local law (but obtained permission from various USR officials in any event). *See supra* § II.A-B.

USR's other argument – that Plaintiffs' allegations are "meaningless" because Plaintiffs do not "live in, pray in, or walk through USR to get to services" (USR Br. at 42-44) – wholly misconstrues the Complaint. USR may want to engage in cynical hypotheticals and slippery slopes – asking, for example, whether Plaintiffs could "extend the *eruv* to someplace like Princeton"[11] – but Plaintiffs' well-pleaded allegations sufficiently explain why a reasonable accommodation by USR is necessary in these circumstances.

Plaintiffs reside in an area of New York State that directly borders USR. Am. Comp. ¶ 31. They require a small extension of the Eruv into USR not so they can "walk through USR," but in order for their homes in "Airmont and other parts of Rockland County" to be encompassed within the Eruv. *Id.* at ¶¶ 85-86. Because of a "lack of contiguous utility poles (or other acceptable natural or man-

[11] Princeton has an eruv of its own, free of any of the hostility displayed by USR. *See* Am. Compl. ¶ 49.

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made boundaries) along the New York/New Jersey border," the only feasible way for Plaintiffs to enclose their homes within an eruv is by dipping into a portion of USR. *See* Steinmetz Reply Decl. ¶ 18; Am. Compl. ¶ 11. While USR derides that choice as "inherently implausible" and questions "why an eruv completed in Rockland County . . . would not fully serve [Plaintiffs'] needs," *see* USR. Br. at 42, it is not for USR or the courts to assess Plaintiffs' interpretation of tenets of their faith. *See, e.g.*, *Hernandez v. Comm'r*, 490 U.S. 680, 699 (1989) ("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.").

If USR is successful in its efforts to take down the Eruv and thwart the Planned Expansion, those Plaintiffs presently within the Eruv will immediately be unable to carry or push strollers or wheelchairs on the Sabbath, while those Plaintiffs presently outside of the Eruv will continue to face practical difficulties and hardships with each passing Sabbath. Am. Compl. ¶¶ 2-3, 13, 31-40. These harms impact the lives of Plaintiffs and many others, disproportionately hurting the elderly, disabled, and families of young children, who will be left without the ability to push wheelchairs and strollers on the Sabbath. *Id.* Far from "speculative" or "hypothetical," Plaintiffs have pleaded a quintessential example of an "actual" and "imminent" – indeed, irreparable – injury-in-fact. *See Elrod v. Burns*, 427 U.S. 347, 373 (1976) ("[t]he loss of First Amendment freedoms, for

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even minimal periods of time, unquestionably constitutes irreparable injury."); *Tenafly*, 309 F.3d at 178 (holding that eruv proponents "easily [satisfied] the irreparable injury requirement"). Few injuries could be more "personal and individual," *see Spokeo*, 136 S. Ct. at 1548, than being confined to one's home and isolated from one's community.

B. Plaintiffs' Injuries Are Traceable To USR's Conduct

USR next makes a near-identical argument that Plaintiffs' injuries are purportedly "self-inflicted," such that none of Plaintiffs' injuries can be "traced to any action (or inaction) by USR." USR Br. at 43-46. To satisfy the "traceability" prong, Plaintiffs need only allege that USR's challenged actions, and not the actions of some third party, caused their injury. *Toll Bros. v. Twp. of Readington*, 555 F.3d 131, 142 (3d Cir. 2009); *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992). Because Plaintiffs allege that their injuries arise directly "as a result of USR's actions" – including by passing (and then selectively enforcing) an illegal Ordinance to target the Eruv, voiding the Vaad HaEuv's license to work, and sending multiple Threat Letters – Plaintiffs easily establish traceability. *See* Am. Compl. ¶¶ 1, 12-15, 31-39, 65, 68-80, 85-89, 92-94, 96-101 (alleging that but for USR's actions, Plaintiffs would have completed their work on the Planned Expansion, and all Plaintiffs would currently be enclosed within the Eruv).

In cobbling together a "traceability" argument, USR offers no more than the

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same arguments discussed above—namely, that Plaintiffs (i) allegedly failed to obtain "requisite permissions" and (ii) have not plausibly alleged "that they need an *eruv* in USR," since they live in Rockland County. *See* USR Br. at 44-45. Plaintiffs have already responded to both arguments above, and incorporate that discussion here. But as to USR's argument that Plaintiffs have no standing since their "real claim" is that they need an Eruv "in New York," *see id.*, it bears noting that USR's counsel publicly told USR residents earlier this year why this very argument does not hold water: "Standing for the First Amendment knows no state boundaries. Standing knows . . . no municipal boundaries. If there is truly something that affects [Plaintiffs'] rights, the courts will hear it. And the courts will be lenient in hearing this because this has been heard already in two major circuits in this area." *See* Buchweitz Reply Decl. Ex. L (CD of Aug. 3, 2017 USR Town Council Meeting, Comments of Bruce S. Rosen at 24:43); *see also id.* at 19:48 (noting further that "courts are hostile to towns that try to stop eruvs. If you don't believe me, just Google it.").[12]

[12] USR's purported "traceability" cases, *see* USR Br. at 45-46, are all inapposite because in each case, plaintiffs' conduct caused their own injuries. *See*, *e.g.*, *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 415 (2012) (Plaintiffs' alleged injury was caused by preventative measures they took "based on their fears of hypothetical future harm"). By contrast here, Plaintiffs' injuries are a direct result of USR's alleged conduct. *Warth v. Seldin* is likewise inapplicable. There, the Court found that although the plaintiffs allegedly shared attributes common to unidentified persons who may have suffered injuries, they had not shown that they

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C. Plaintiffs' Injuries Are Redressable

USR's final argument – that Plaintiffs' claims are not fully "redressable" because Plaintiffs seek "an expansive *eruv* across several communities" – is incorrect. *See* USR Br. at 46-48. Redressability is "not a demand for mathematical certainty," and it is sufficient for a plaintiff to allege that an order "striking down [an] ordinance is likely to redress" the claimed injury. *See Toll Bros.*, 555 F.3d at 143 (reversing district court and finding that developer had standing to pursue claims that municipal zoning restrictions prevented its planned development from going forward). Plaintiffs have alleged exactly that, *see* Am. Compl. ¶¶ 107-108, and the injunction they seek would plainly redress their injury.

USR makes three redressability arguments: (1) it has never received a "meaningful application" from Plaintiffs; (2) it "cannot redress the rejections" by Mahwah and Montvale (who Plaintiffs have also been forced to sue for similar constitutional violations); and (3) it cannot "unilaterally grant" relief to Plaintiffs "under due process and separation of church and state theories." USR Br. at 47. Each of these arguments fail.[13]

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had personally been injured. 422 U.S. 490, 502 (1975). In this case, USR has injured each named Plaintiff. *See* Am. Compl. ¶¶ 31-38.

[13] Plaintiffs have alleged that they have licenses for the Eruv and to proceed with the Planned Eruv Expansion. *See* Am. Compl. at ¶¶ 5-7, 10, 53-54. The factual dispute that USR attempts to raise regarding the scope of those licenses goes well beyond the pleadings, and cannot be considered on a motion to dismiss for lack of

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First, USR's complaint that it has not received a "meaningful application" rings especially hollow: USR never suggested that it even *has* an "application process" under the Ordinance; it never requested that Plaintiffs submit any such "application"; and it made it crystal clear that it will not approve one. *See supra* § II.A.3. That is, of course, the very reason that Plaintiffs have sued for redress.

Second, it is no bar to standing that Plaintiffs have sued Mahwah and Montvale in related actions pending before this Court. Contrary to USR's unsupported misimpression, *see* USR Br. at 47, even if Plaintiffs were to prevail only in this action but not the other two related actions, they would still be able to complete a portion of the Planned Expansion and enclose some of the Plaintiffs who are currently outside of the Eruv within it. *See* Steinmetz Reply Decl. ¶ 19. Because a favorable ruling in this case "would tangibly improve the chances of construction" of the Planned Expansion, no more is necessary under well-settled redressability principles. *See Toll Bros.*, 555 F.3d at 143 (citation omitted).

Third, USR rather stealthily argues that nebulous "due process" and "separation of church and state theories" bar it from granting relief to Plaintiffs. USR Br. at 47. This is, first, a tacit admission that any further attempt at

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standing. *See, e.g.*, *Toll Bros.*, 555 F.3d at 134 n. 1 ("For purposes of ruling on a motion to dismiss for want of standing, both the trial and reviewing courts must accept as true all material allegations of the complaint, and must construe the complaint in favor of the complaining party.").

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"municipal consent" would be hopelessly futile. But even more fundamentally, it is simply too late in the day to continue advancing this claim. Both the Third and Second Circuits have flatly rejected the argument that reasonable accommodations by governmental actors for an eruv would somehow violate "separation of church and state theories." *See Tenafly*, 309 F.3d at 173-78 ("the Borough has no Establishment Clause justification for discriminating against the plaintiffs' religiously motivated conduct"); *Westhampton Beach*, 778 F.3d at 396 (holding that a "public utility's action permitting [an eruv association] to erect [an] eruv is not an unconstitutional establishment of religion," finding that "every court to have considered whether similar government actions violate the Establishment Clause has agreed that they do not," and collecting cases).

IV. PLAINTIFFS NEED ONLY SHOW THAT THEY "CAN WIN" ON THE MERITS

A. It Is USR's Burden to Show That Its Ordinance Withstands Strict Scrutiny Review, And It Has Not

USR concedes that to satisfy the first preliminary injunction factor, Plaintiffs need only show that they "can win on the merits (which requires a showing significantly better than negligible but not necessarily more likely than not)." USR Br. at 48 (citing *Reilly*, 858 F.3d at 179).

While citing *Reilly* for the injunction standard generally, USR distances itself from *Reilly*'s broad holding that "***in First Amendment cases***," Plaintiffs

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"must be deemed likely to prevail [for the purpose of considering a preliminary injunction]" because the Government, rather than Plaintiffs, "bears the burden of proof on the ultimate question." *Reilly*, 858 F.3d at 180. USR insists that "the standard quoted in *Reilly* . . . is applied only in cases involving content-based restrictive ordinances," supposedly because *Reilly* quoted from *Ashcroft v. ACLU*, 542 U.S. 656, 666 (2004). But nothing in *Reilly* so limits its holding. Indeed, USR omits *Reilly's* very next line, which broadly explains that "'the burdens at the preliminary injunction stage track the burdens at trial,' and *for First Amendment purposes* they rest with the Government." *Reilly*, 858 F.3d at 180 (quoting *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal, et al.*, 546 U.S. 418, 429 (2006) (emphasis added). In turn, *Gonzales* rejected the narrow application of *Ashcroft's* burden-shifting that USR proffers here: "The fact that *Ashcroft* involved such a [content-based] restriction was the reason the Government had the burden of proof at trial under the First Amendment, ***but in no way affected the Court's assessment of the consequences of having that burden for purposes of the preliminary injunction***." *Gonzales*, 546 U.S. at 429 (emphasis added).

Here, the Free Exercise Clause itself requires USR to justify its Ordinance. Because USR enacted the Ordinance with invidious intent, strict scrutiny applies. And, since USR cannot show any interest that its Ordinance advances – let alone "interests of the highest order" that are "narrowly tailored in pursuit of those

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interests" – it cannot withstand strict scrutiny, and Plaintiffs "must be deemed likely to prevail." *See Reilly*, 858 F.3d at 180 & n.5; *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 546 (1993).

1. USR Enacted The Ordinance With Discriminatory Intent

Plaintiffs have shown that immediately upon hearing about the Eruv in 2015, USR's Council passed its sweeping Ordinance with the discriminatory intent of targeting the Eruv and keeping USR essentially off-limits to Orthodox Jews. Moving Br. at 4-5, 21-22; Counterstatement of Facts § B. USR's cover story about "political signage" is nonsensical, and USR fails to point to a single piece of contemporaneous evidence to support it. If USR was truly concerned about already-regulated "political signage," it could have simply enforced its pre-existing sign laws. *See Cottonwood Christian Ctr. v. Cypress Redevelopment Agency*, 218 F. Supp. 2d 1203, 1225 (C.D.Cal. 2002) ("At first blush, the City's concern about blighting rings hollow. Why had the City, so complacent before Cottonwood purchased the Cottonwood Property, suddenly burst into action? . . . [T]he activity suggests that the City was simply trying to keep Cottonwood out of the City, or at least from the use of its own land."); *see also Gonzalez v. Douglas*, No. CV-10-623-TUC-AWT, 2017 WL 3611658, at *15 (D. Ariz. Aug. 22, 2017) (finding that a statute was enacted with discriminatory intent in part because "existing statutes could have been used to address the purported issues").

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2. USR Is Wrong That "Discriminatory Intent Is Legally Irrelevant"

USR's alternative position – that even if it did enact the Ordinance with discriminatory intent, it had constitutional impunity to do so – is astonishing. USR contends that evidence of discriminatory intent is somehow "legally irrelevant" to free exercise claims. USR Br. at 53-54. USR even claims that "the Supreme Court in a 2016 decision" has "confirmed" its position. *Id.* at 54. This is breathtakingly misleading. What USR mischaracterizes as a Supreme Court holding is, in fact, one sentence from one footnote in Justice Alito's dissent from a denial of certiorari. *Id.* (citing *Stormans, Inc. v. Wiesman*, 136 S. Ct. 2433, 2437 n.3 (2016)). USR ignores that Justice Alito would have granted certiorari *specifically to address* "evidence of discriminatory intent" that he likened to the "strong evidence" found in *Lukumi*. *Id.* at 2437 (noting that the Ninth Circuit "did not hold that such evidence was irrelevant," but instead concluded, erroneously in Justice Alito's view, that the record did "not reveal improper intent").

The balance of USR's position is Justice Scalia's concurrence in *Lukumi*, in which he was characteristically reluctant to "determine the singular 'motive' of a collective legislative body" through legislative history, and instead invalidated the law because of its discriminatory effects on the Santeria religion. USR Br. at 56 (citing *Lukumi*, 508 U.S. at 558 (Scalia, J., concurring in part and concurring in the

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judgment)). Other than an erroneous reading of *Tenafly*, USR cites ***nothing else***.[14] This omission is unsurprising, given the number of cases following *Lukumi* that utilize a discriminatory intent analysis for First Amendment and Free Exercise claims.

This Circuit, for example, has held that "discriminatory intent" can "trigger heightened scrutiny under *Smith* and *Lukumi*" in the context of a Free Exercise challenge. *Fraternal Order of Police Newark Lodge No. 12 v. City of Newark*, 170 F.3d 359, 365 (3d Cir. 1999) (Alito, J.) (holding that police department violated the Free Exercise Clause when it refused religious exemptions from its prohibition against officers wearing beards); *see Lighthouse Inst. For Evangelism, Inc. v. City of Long Branch*, 510 F.3d 253, 275 (3d Cir. 2007) (because there was "no evidence that it was developed with the aim of infringing on religious practices," government's redevelopment plan was deemed neutral and heightened scrutiny did not apply). Other Circuit courts are in accord. *See, e.g., Chabad Lubavitch of Litchfield Cty., Inc. v. Litchfield Historic Dist. Comm'n*, 768 F.3d 183, 198 (2d Cir. 2014) ("*Lukumi* looked to equal protection principles in analyzing whether a law

[14] USR notes that the *Tenafly* Court did not "consider the subjective motivations of the Council members," but that was because the "objective effects" of Tenafly's selective enforcement provided sufficient grounds for injunctive relief. USR Br. at 56-57 (citing *Tenafly*, 309 F.3d at 168 n. 30). If anything, this is a more troubling case than *Tenafly*, where there was no evidence that the Borough enacted its ordinance with discriminatory intent.

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was discriminatory. . . . We join in employing this approach [in RLUIPA cases that codify "existing Free Exercise . . . rights against states and municipalities"].");
Axson-Flynn v. Johnson, 356 F.3d 1277, 1294 (10th Cir. 2004) ("A rule that is discriminatorily motivated and applied is not a neutral rule of general applicability."); *Children's Healthcare Is a Legal Duty, Inc. v. Min De Parle*, 212 F.3d 1084, 1090 (8th Cir. 2000) ("Such discrimination can be evidenced by . . . the law's legislative history and its practical effect while in operation.").

District court decisions similarly disprove USR. In *Congregation Rabbinical Coll. of Tartikov, Inc. v. Vill. of Pomona*, 915 F. Supp. 2d 574, 613-15 (S.D.N.Y. 2013), the defendant village enacted a series of ordinances that were alleged "to regulate characteristics unique to an Orthodox/Hasidic rabbinical college, in effect imposing a 'religious gerrymander.'" Citing *Lukumi*, the Court rejected the argument (now made by USR) that the town's "subjective motivation" was "irrelevant," holding that courts considering Free Exercise challenges "may find 'guidance' in Equal Protection jurisprudence," including "consideration of direct and circumstantial evidence regarding the objects of those who enacted the law in question." *Id.* at 620; *see also Gonzalez*, 2017 WL 3611658 at *21 ("The Court concludes that plaintiffs have proven their First Amendment claim because both enactment and enforcement were motivated by racial animus.") As these and numerous other cases attest, any "open question" regarding the relevancy of

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discriminatory intent in First Amendment cases has been answered in Plaintiffs' favor. While USR may be reluctant to have this Court "peak[] [sic] behind the curtain" given the nature of its conduct, *see* USR Br. at 56, it cannot so easily evade strict scrutiny inquiry.

3. The Ordinance Has Not Been "Generally Applied"

USR concedes that an ordinance is not "generally applicable" under *Lukumi* and *Tenafly* if the government enforces it at its discretion, and thereby "single[s] out the plaintiffs' religiously motivated conduct for discriminatory treatment." *Tenafly*, 309 F.3d at 168 (citing, *inter alia*, *Lukumi*, 508 U.S. at 537). USR instead argues that it can avoid *Tenafly's* fate purportedly because it has "a long history of prohibiting objects from being affixed to utility poles without a permit." USR Br. at 62. Unfortunately for USR, the record tells a different story.

As discussed above, nowhere in the hundreds of pages submitted by USR is there a ***single instance*** – not a summons, not a code violation, and not a citation – in which USR enforced the Ordinance from the time it was enacted in October, 2015 until Plaintiffs filed this lawsuit in July, 2017.[15] See Counterstatement of

[15] USR focuses instead on its purported enforcement of its two inapplicable "sign laws." *See* USR Br. at 62-63. Neither of these sign laws are the subject of this lawsuit, and USR points to only one incident from "2013 or 2014" involving the USR Fire Department, another "from approximately twenty years ago" involving the Lion's Club, and five complaints about "signs" recorded over a 23-year period. *See* Preusch Decl. ¶¶ 33-38; *see also* Hausch, Lally, Spina and Rotella

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Facts § D. USR's enforcement efforts were not just "not . . . perfect," *see* USR Br. at 64, but non-existent. Plaintiffs acknowledge that in response to their allegations of selective enforcement, USR has apparently begun to engage in some modicum of enforcement of the Ordinance in the past few months. USR, for example, "reminded" its officials of the Ordinance, and adopted a new "administrative policy" the day after Plaintiffs' responded to USR's Threat Letters to create evidence of enforcement. *See* Counterstatement of Facts § D. USR also claims to have removed the various signs and items identified in Plaintiffs' moving papers—including "lost animal" signs; signs listing street numbers; mailboxes affixed to utility poles; and flags attached to utility poles. *See* USR Br. at 64 (addressing Pinkasovits Decl. Ex. A and Buchweitz Decl. Ex. H). These belated efforts of post-litigation enforcement are both unsurprising and immaterial: vocal citizens adamantly opposed to the Eruv have demanded nothing less. Indeed, an "anonymous citizen" even compiled and sent to USR PD a list of ***46 violations*** of the Ordinance observed in a one-week period of time in August 2017. *See* Rotella Decl. ¶ 21(c) & Ex. F. That this many violations were present only confirms USR's selective enforcement.

USR's declarations also show that ***still today***, USR continues to selectively

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Declarations. This is far from vigorous enforcement, but even if it was, it only begs the question of why the Ordinance was even needed in 2015.

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enforce the Ordinance. Police Chief Rotella's pictures depict an array of "matter" attached to USR utility poles. *See* Counterstatement of Facts § D. Plaintiffs have also submitted evidence of many additional examples of PVC and other piping – entirely indistinguishable from the lechis – which have been attached to utility poles in USR for years, and remain up today without consequence. *See* Buchweitz Decl. Ex. G. USR never explains why some pole attachments are allowed, but the lechis must go.

Plaintiffs have also shown that the USR Council is considering doing away with utility poles altogether to thwart even the possibility of an eruv. *See* Counterstatement of Facts § C. While the Council carefully couched its discussion in the purportedly neutral terms of "eliminat[ing] black-outs during severe storms" and "constructing sidewalks for safety," *see* Buchweitz Reply Decl. Ex. M, that meeting was devoted to the Eruv—including the hiring of additional counsel for this case, and cautioning speakers at the open session to be held later that night not to be overtly "discriminatory" in their comments against the Eruv (as the video from that meeting attests, they failed in that regard). *See id.* Ex. L. Feigning "neutrality" through fig-leafs such as "political signage" or "black-outs" does not pass constitutional muster. *Lukumi*, 508 U.S. at 534 ("The Free Exercise Clause protects against government hostility which is masked, as well as overt.").

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4. The Ordinance is Constitutionally Vague

Plaintiffs have further shown that the Ordinance is impermissibly vague under both prongs of the void-for-vagueness analysis, as it (i) fails to give the person of ordinary intelligence a reasonable opportunity to know what is prohibited; and (2) does not provide clear standards for law enforcement to apply in enforcing it. *See* Moving Br. at 28-32.

Although USR concedes that the Ordinance does not define a single term that it contains, it believes that those terms have a "plain and ordinary meaning." USR Br. at 65-66. While USR only offers the "plain meaning" of *one* term – "public utility pole" – it maintains that the Ordinance should apply to literally "anything," including, apparently, chalk residue or a thumb-tack. *Id.* at 65. That blunderbuss interpretation cannot be right. First, USR itself has submitted numerous pictures of utility poles in USR that are covered in attachments, appendages, and "other matter" that USR has not challenged under the Ordinance. Second, accepting *arguendo* USR's position that the Ordinance was intended to curb "political signs," it had no reason to draft the Ordinance so vaguely and over-broadly. *See Knoedler v. Roxbury Twp.*, 485 F. Supp. 990, 993 (D.N.J. 1980) (holding that the term "any other paraphernalia or appliance" was impermissibly vague because a "merchant might have difficulty . . . speculating as to which items come within the ordinance's coverage").

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5. The Lechis Are "Authorized or Required By Law"

Plaintiffs have shown that even if the Ordinance was enacted and enforced neutrally – and it was not – the lechis qualify for an express exception: they are "authorized or required by law." *See* Moving Br. at 32-33. In response, USR argues that (i) Plaintiffs' license with O&R is insufficient authorization; and (ii) "[n]o accommodation, reasonable or otherwise, is required." USR Br. at 67-72. The first argument fails because it impermissibly injects USR into private contractual arrangements with O&R. Notably, O&R itself disagrees with USR's position, as it has provided the necessary approvals for the utility poles at issue. The second argument ignores the body of caselaw relating to eruvin specifically holding the exact opposite—that USR has an affirmative duty to suggest measures to accommodate the creation of the Eruv.

a. O&R Has Authorized the Lechis, and Nothing More Is Needed

Plaintiffs have shown that the Vaad HaEruv and O&R entered into a License Agreement in 2015, still operative, through which O&R granted an express license allowing the Vaad HaEruv to affix lechis to certain of the poles it owns or uses in USR, including those needed for the Planned Eruv Expansion. *See* Moving Br. at 10-11; Steinmetz Decl. Ex. A, Ex. G.

USR's first response is to serially nitpick this evidence, contending that only some, and not all, of the 109 poles with lechis are covered by the licenses with

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O&R that Plaintiffs initially submitted. USR Br. at 70-71. Plaintiffs respectfully refer the Court to the Reply Declarations of Rabbi Steinmetz and Kenneth Sullivan (of O&R), which each address USR's contentions at length. *See* Steinmetz Reply Decl. ¶¶ 22-28; Sullivan Reply Decl. ¶¶ 2-8. For purposes of granting Plaintiffs' motion, though, there is only one crucial fact: O&R has either already provided or is providing the approvals necessary for the Eruv and the Planned Eruv Expansion. *See* Steinmetz Reply Decl. ¶¶ 22-28 & Ex. J; Sullivan Decl. ¶¶ 4-8. Indeed, the relief that Plaintiffs seek on this motion is limited to enjoining USR from interfering with the Eruv and Plaintiffs' completion of Planned Expansion – a complete and final pole list is unnecessary at this time. *See* Dkt. No. 25-29.

USR's next response is to attack O&R's authority to grant licenses to Plaintiffs for poles that are subject to the 1962 Joint Use Agreement between Verizon and O&R.[16] USR Br. at 69-70. USR has no basis, though, to weigh in on the private contractual arrangements of O&R and Verizon. In any event, although USR contends that "O&R has not sought the concurrence and approval of Verizon," *see* USR Br. at 70, that is not true. In fact, O&R approached Verizon on

[16] USR cites only two provisions of the Joint Use Agreement as alleged support for its position that O&R needed Verizon's "concurrence" or "approval" to issue licenses. USR Br. at 69 (citing Joint Use Agreement at ¶¶ 24, 42). But under the plain language of those two provisions, lechis do not fall within the categories of attachments that require Verizon's consent, because the lechis are not "supply circuits," "supply wires or cables," or "communication wires or cables." *See id.*

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several occasions to inform Verizon about the lechis, both in 2015 and again in 2017, and Verizon did not respond or object. *See* Sullivan Decl. ¶¶ 9-11. Notably, at the time that Mr. Gudino of Verizon submitted his declaration, he was unaware of O&R's efforts to reach out to Verizon, as he has now clarified in a new declaration in support of Plaintiffs. *See* Gudino Reply Decl. ¶ 2.

In order to move beyond this technical dispute, Plaintiffs have sought to secure permission from Verizon, completed the necessary paperwork, secured the requested insurance and surety bond, and paid the non-refundable application fee. *See* Steinmetz Reply Decl. ¶ 30. As Mr. Gudino has confirmed, Verizon "has a policy in place to allow for the installation of lechis," as it has done "in other communities in New Jersey and elsewhere." *See* Gudino Reply Decl. ¶ 4. Yet in its latest act of obstruction, USR's counsel has threatened Verizon with an injunction should Verizon grant the Vaad HaEruv the permission it seeks. *See* Buchweitz Reply Decl. ¶ 8 & Ex. O. If either USR stands down or Plaintiffs' Motion is granted, Verizon has confirmed that it stands ready to process the Eruv proponents' application and grant a license subject to its standard terms and conditions. Gudino Reply Decl. ¶ 4. The only impediment to the Eruv, in other words, was and is USR—*not* Verizon.

b. USR Is "Required By Law" to Reasonably Accommodate the Creation of an Eruv

USR devotes all of one paragraph to arguing that the lechis are not "required

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by law," going so far as to baldly contend that "[n]o accommodation, reasonable or otherwise, is required." USR Br. at 72. USR's position is, first, entirely circular: it relies on its own *ipse dixit* that the Ordinance is "facially neutral, generally applicable, and neutrally applied," and is thus governed by *Employment Division v. Smith*, 494 U.S. 872 (1990). *Id.* Yet as Plaintiffs have extensively shown, the Ordinance fails the neutrality tests demanded by *Lukumi* and its progeny, including *Tenafly*, nullifying USR's entire argument.

Moreover, USR simply ignores the wide body of law specific to *eruvin* cited in Plaintiffs' moving brief, which flatly rejects USR's remarkable position that it need not make even a "reasonable" accommodation. *Compare* USR Br. at 72 *with* Moving Br. at 20-21 (collecting cases). Bristling with misplaced indignation, USR accuses Plaintiffs of "false legal assertions" and of having a "collective mindset" that "[Orthodox Jews] can do what [they] want, where [they] want, the rules be damned." USR Br. at 51. This is an outrageous charge, particularly because it is supported by nothing. If anyone has distorted the governing caselaw, it is USR, which failed to even ***cite*** – let alone grapple with – the Second Circuit's decision in *Westhampton Beach*, this District's decision in *Long Branch,* or the New York state court decisions in *Southampton* and *Smith*.[17] USR avoids this body of cases

[17] That the lechis are both "authorized" and "required by law" further establishes that Plaintiffs have alleged an injury-in-fact, traceable to the conduct of USR, that is fully redresssable by this Court, as further discussed in § II.A.2, *supra*.

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for an obvious reason: it simply does not want to extend to Plaintiffs the same reasonable accommodations of religious practice that these cases require.

Southampton is particularly instructive. As discussed above, Southampton moved to dismiss the eruv proponents' federal case for an alleged failure to "pursue[] and exhaust[] administrative relief." *See Southampton*, 2015 WL 4160461, at *2. In the ensuing years, Southampton and its Zoning Board of Authorities threw up procedural roadblocks at every turn – wasting considerable time, money, and resources in the process – before inevitably ruling against the eruv proponents based on the very same arguments USR proffers here. *Id.* Granting the eruv proponents' Article 78 proceeding to annul that decision as arbitrary, capricious, and irrational, Justice Farnetti rejected each of the town's arguments, finding that "while religious institutions are not exempt from local zoning laws, greater flexibility is required in evaluating an application for a religious use and every effort to accommodate the religious use must be made." *Id.* at *6-7. Because USR has no answer to why it cannot make a similar reasonable accommodation here, it simply ignores *Southampton.*

Nor does USR rebut Plaintiffs' argument that New Jersey's courts have likewise "provided broad support for the constitutional guarantees of religious freedom, sometimes in a zoning context," mandating reasonable accommodations where religious rights are implicated absent "an overriding government interest."

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Moving Br. at 33, n. 17; *see, e.g.*, *Burlington Assembly of God v. Zoning Bd. of Adjustment of Florence*, 570 A.2d 495, 497 (N.J. Super. Ct. Law Div. 1989) (granting summary judgment to church where township's zoning board "impermissibly denied the right of the church to engage in a protected religious activity" without showing an "overriding governmental interest" justifying that frustration); *Farhi v. Comm'rs of Deal*, 499 A.2d 559, 563–64 (N.J. Super. Ct. Law. Div. 1985) (holding that the deprivation of Free Exercise protections requires a state showing of an "overriding governmental interest," and that "no alternative forms of regulation would combat such abuses without infringing First Amendment rights").

B. The Remaining Preliminary Injunction Factors Weigh in Favor of Granting Injunctive Relief

USR devotes scant attention to the remaining factors for a preliminary injunction, which all weigh decidedly in Plaintiffs' favor. USR Br. at 73-77. USR first offers the conclusory and circular contention that Plaintiffs have not sustained irreparable injury because "there is no First Amendment violation." *Id*. at 73. Because Plaintiffs have shown that they "can win" on the merits and "must be deemed likely to prevail," *Reilly*, 858 F.3d at 179-80, this argument fails.

While USR admits that the "loss of First Amendment freedoms for even minimal periods of time, unquestionably constitutes irreparable injury," it questions whether that is the same "irreparable injury" that is necessary for an

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injunction to issue. USR Br. at 73 (citing *Elrod*, 427 U.S. at 373). *Tenafly* unequivocally provides the answer, finding that plaintiffs "*easily* [satisfied] the irreparable injury requirement" where "plaintiffs have demonstrated that, if the eruv is removed, they will be unable to push and carry objects outside the home on the Sabbath, and those who are disabled or have small young children consequently will be unable to attend synagogue." 309 F.3d at 178 (emphasis added). This is the exact irreparable injury that Plaintiffs claim here.[18]

With respect to the balance of hardships, USR again submits that it has a purported interest in battling "sign pollution" and speculates that certain pole attachments "create serious safety concerns." USR Br. at 75-76. Neither argument tilts the balance of hardships towards USR. *First*, as discussed above, USR does not even contend that lechis are "signs," let alone explain how making a reasonable accommodation would undermine any ongoing battle against "sign pollution." *Second*, USR's purported safety concerns are plainly pretextual. The utility companies are best situated to address any purported "safety" concerns with respect to eruvin, ***and they have none***. *See* Sullivan Reply Decl. ¶ 2-3; Gudino Reply Decl. ¶ 4. Indeed, O&R has conducted pre- and post-installation walk-

[18] USR makes the puzzling argument that the *Tenafly* plaintiffs sustained a greater injury because they already "lived within the confines" of an eruv, while certain Plaintiffs here do not yet. USR Br. at 74. USR has it backwards—those Plaintiffs currently left without an eruv are suffering irreparable injury with each and every passing Sabbath.

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throughs of some of the very lechis that USR now hypothesizes may pose safety concerns, and it has not raised a safety concern. Steinmetz Reply Decl. ¶ 14. Nor did any of the USR officials who met with the Vaad HaEruv. *Id.*

As to the public interest, USR points only to its own "police powers" and "aesthetics considerations." USR Br. at 76. Police powers, though, are not unlimited, and cannot be used to discriminate against unwanted "outsiders." As for "aesthetics," lechis are unobtrusive and "nearly invisible" to those that do not know what to look for (*see Westhampton Beach*, 778 F.3d at 395); they are not at all like the political signs that "obstruct views" and "distract motorists" that were at issue in *City of Ladue v. Gilleo*, 512 U.S. 43, 48 (1994) (cited in USR Br. at 76). In any event, aesthetics are not sufficiently compelling to justify the infringement of Plaintiffs' constitutional and civil rights. *See, e.g., Beaulieu v. City of Alabaster*, 454 F.3d 1219, 1234 (11th Cir. 2006) ("interests in aesthetics and traffic safety are substantial but they are not compelling").

In analogous circumstances, the Third Circuit has held that where a regulation intrudes upon First Amendment rights, the burden of hardships and public interest weigh against the enforcement of an allegedly unconstitutional regulation. *See Swartzwelder v. McNeilly*, 297 F.3d 228, 242 (3d Cir. 2002) ("While the preliminary injunction may impinge on significant interests of the City, the preliminary injunction leaves the City free to attempt to draft new

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regulations that are better tailored to serve those interests."). Likewise, "the public interest is best served by eliminating the unconstitutional restrictions . . . while at the same time permitting the City to attempt, if it wishes, to frame a more tailored regulation that serves its legitimate interests." *Id.*

CONCLUSION

Plaintiffs respectfully request that the Court deny USR's motion to dismiss in its entirety, and grant Plaintiffs' motion for a preliminary injunction.

Dated: December 4, 2017

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