IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

YESHIVA GEDOLA NA'OS YAAKOV, INC., *et al.*, *Plaintiffs*, vs. **TOWNSHIP OF OCEAN, N.J.,** *et al.*, *Defendants*.	Civil Action: 3:16-cv-0096-FLW-DEA

AMICUS CURIAE AGUDATH ISRAEL OF AMERICA'S MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFF'S MOTION FOR A PRELIMINARY INJUNCTION

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INTRODUCTION

Amicus curiae Agudath Israel of America ("Agudath Israel") submits this memorandum of law in support of the pending motion by plaintiff Yeshiva Gedola Na'os Yaakov, Inc. ("the Yeshiva") for a preliminary injunction. Agudath Israel has set forth its interest in this matter in the Statement of Facts in the brief filed simultaneously herewith in support of its motion for leave to file this submission, incorporated herein by reference in the interest of space and to avoid unnecessary repetition. For the same reason, we rely here, with respect to facts, on the submissions in plaintiff's Memorandum of Law in Support of Motion for Preliminary Injunction filed June 17, 2016 [Doc 33-1] ("Pl. Br.").[1]

There is no serious legal question that the Yeshiva was wrongfully deprived, in violation of its statutory and constitutional rights, of the use variance for which it applied. The Board indulged in every conceivable stratagem to delay consideration of the Yeshiva's application. It did so by imposing massive unnecessary cost on the Yeshiva as it went through the application process, unnecessarily exposing the Yeshiva to outrageous harassment in the form of offensive, obnoxious and legally irrelevant "public comment" throughout the hearing process, and ultimately – despite this Court's attempts at intervention and guidance – wrongfully denying the application despite the conspicuous absence of any evidentiary or legal basis to do so.

The Board's action, the record shows, was motivated **entirely** by anti-Semitic animus. In particular, the Board's willingness – eagerness – to participate in such an ugly spectacle – in the face of this Court's close supervision, and even as its own counsel warned the Board, on the record, of the legal landmines it was planting for itself – reflects a chilling trend of harsh reaction to the growth and dynamism of this community of distinctively "Jewish Jews" in our State

[1] Certain citations to the record set forth in the plaintiff's brief are not repeated here, but the page of plaintiff's brief providing the original citation is provided.

known as Haredim.[2] Considering the calculating willingness of a public entity to participate in the overtly biased process that the record reflects here, as well as the social and demographic trends at work in this District today, the Court thus stands at a juncture whose importance far outweighs the seeming importance of whether or not Ocean Township improperly withheld a use variance from the Yeshiva.

At the end of the day, however, it did – unduly, illegally, and unconstitutionally. And it is solely on the basis of the law and the Constitution that the plaintiffs' motion will and must be decided. By their lights, the Board's actions unlawfully and unconstitutionally deprived the Yeshiva of its religious freedom to operate an intensive, elite residential Talmudic academy or *yeshiva gedola* pursuant to an established, honored tradition in the world of "Lithuanian" rabbinical scholarship in a location the record shows no evidence of having any negative effect on the Township or the zoning plan. Agudath Israel submits the following points below to amplify the arguments of the plaintiffs as to why the Court should grant them the relief requested.

[2] The term "ultra-orthodox" has often been used to describe both non-hasidic followers of the "Lithuanian" yeshiva movement who are, in the main, the community that makes up the burgeoning population in Lakewood, New Jersey (as well as that of the Yeshiva) (*see infra*) as well as Hasidim. Neither group appreciates the "ultra-" terminology, however, which is inherently judgmental. Increasingly, therefore, to the extent labels are required, the term Haredim, having been imported from Israeli usage to the United States (from the Hebrew *chareidim*, which roughly translated means "those who tremble in awe"), has been adopted. *See*, Sara Levin, "Is 'Ultra-Orthodox Out?," *Moment*, July/August 2014, found at http://www.momentmag.com/jewish-word-haredi/ (July 1, 2016).

ARGUMENT

THE YESHIVA IS LIKELY TO SUCCEED ON THE MERITS BECAUSE THE TOWNSHIP'S DENIAL OF A USE VARIANCE BASED ON THE RECORD HERE CONSTITUTES A VIOLATION OF THE FIRST AMENDMENT AND THE RLUIPA.

While "[z]oning boards may choose which witnesses, including expert witnesses, to believe . . . to be binding on appeal, that choice must be reasonably made. In addition, the choice must be explained, particularly where the board rejects the testimony of facially reasonable witnesses. The board cannot rely upon unsubstantiated allegations, nor can it rely upon net opinions that are unsupported by any studies or data." *Board of Educ. of City of Clifton v. Zoning Bd. of Adjustment of City of Clifton*, 409 N.J. Super. 389, 434-435 (App. Div. 2009) (internal quotes and citations and omitted). It is difficult to imagine a record more flagrantly violating these guidelines than the one presented to the Court here. Given the overwhelming gross campaign of anti-Semitic fervor whipped up by the Yeshiva's application and the hearings that followed it, the only plausible explanation for the Board's ham-handed violations of the most fundamental principles of New Jersey zoning law is unlawful and unconstitutional discriminatory animus against the Yeshiva. As the Second Circuit explained in *LeBlanc-Sternberg v. Fletcher*, 67 F.3d 412 (2d Cir. 1995):

> Discriminatory intent may be inferred from the totality of the circumstances, including the fact, if it is true, that the law bears more heavily on one [group] than another as well as the historical background of the decision 'the specific sequence of events leading up to the challenged decision contemporary **statements** by members of the decisionmaking body and substantive departures . . . , particularly if the factors usually considered important by the decisionmaker strongly favor a decision contrary to the one reached.

67 F.3d at 425-426 (some internal quotes and citations omitted).

Agudath Israel will not, of course, recapitulate the arguments and citations set out in plaintiffs' moving brief. Its particular interest as amicus, however, is to amplify three points. The first is to underscore the critical nature of the dormitory facility sought by the Yeshiva to its mission and to reinforce the basis for the Yeshiva's position that its brand of intensive, residential discipleship is part of a long, received tradition in Jewish religious practice. The second begins with the argument beginning at page 30 of plaintiff's submission, and concerns the nebulous "factual" basis of the Township's rejection of plaintiff's application on the fallacious "intensity" rationales for the denial of the Yeshiva's application raised not only by witnesses but even by the Board chairman himself.[3] And the third addresses the more general, and for that reason more troubling, issue of the ugly discriminatory campaign that the Township, a municipal unit of the State of New Jersey, readily made itself a party to here, based on essentially uncontradicted evidence of record.

1. The traffic pretext cited by the Board in denying the Yeshiva's application is wildly inconsistent with the facts of record.

The Township's vague invocation of "intensity" as grounds for denying the Yeshiva's application for a use application cannot, on the record before the Board, be remotely justified by any of the specific grounds it has offered. For this reason, at the very least, the Yeshiva is likely to succeed at demonstrating that its religious exercise has been substantially burdened without justification that the Township's actions were the least restrictive way to achieve a compelling government interest under the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA), 42 U.S.C. §§ 2000, *et seq*. ("RLUIPA"). See, *Westchester Day School v. Village of Mamaroneck*, 504 F.3d 338, 353 (2d Cir. 2007). This record also demonstrates a high likelihood of success with respect to the Yeshiva's discrimination claims under the Free Exercise Clause,

[3] See Pl. Br. at 34, n. 16.

the Equal Protection Clause, the Nondiscrimination provision of the RLUIPA and the Fair Housing Act[4] and their "Equal Terms" claim for the reasons set out in plaintiffs' brief.[5]

Two of the Township's three claims – the third is addressed in the next subheading – are (i) that the students in the Yeshiva would – it speculates – introduce automobiles into the Township's theretofore virgin environment, supposedly increasing traffic and parking congestion; and (ii) that the supposed cacophony generated by a 20-minute-long evening devotion on the three-acre site would create "excessive noise" so detrimental to the neighborhood as to justify the denial of the variance. Jennings Feb. 3 Decl. Exh G. at 4. Neither rationalization is supported by law or by any fact in the record, as plaintiffs demonstrate.[6]

The unrebutted evidence of record established that students do not typically have access to automobiles on campus in institutions such as the Yeshiva, as explained by Rabbi Lesin in his June 17 Declaration (see ¶ 8-9). In simply disregarding this evidence, as plaintiffs note, the Board ran afoul of *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 423 (2006). Even if the Board had some made some effort to cover its tracks in making its "intensity of use" findings, discussed in detail below, and had deigned to make a specific "finding" that (albeit based on nothing but whimsy) the Yeshiva's no-cars "rule" was "unenforceable," the Board's "traffic and parking" finding would still be at least arbitrary and capricious. That is because the Board would still have ignored the evidence contained in Rabbi Lesin's February 2 Declaration [ECF Doc. 12-6], which, after four months, also remains unrebutted, and which affirmatively negates any casual inference regarding car use by the Yeshiva's students. Before addressing that neglected testimony, however, it is appropriate to

[4] See Pl. Br. at 41.
[5] See Pl. Br. at 44.
[6] Pl. Br. at 14.

elucidate and provide historical context of the religious tradition that is the basis of the dormitory requirement so eloquently described in Rabbi Lesin's declarations.

2. The Yeshiva's application to establish a dormitory-based institution is fundamental to its religious mission and is based on an esteemed and widely accepted tradition in Judaism.

Rabbi Lesin's February 2 Declaration describes evocatively the holistic, all-encompassing environment of the **elite** Talmudic institution that the Yeshiva has constructed for its students. It paints a picture of a world quite unlike that of a typical post–high-school male dormitory environment, to say the least. Yeshivas built on the elite model described by Rabbi Lesin require that students commit themselves to maintaining an "isolated, full-time commun[al]" existence" during their periods of study – "removed from the distractions of secular life so that they may concentrate on their studies, experience a community of dedicated religious practitioners and scholars, and single-mindedly devote all their attention to spiritual development . . ." *Id.* at ¶¶ 28-29. As Rabbi Lesin states – and this is a detail in the February 2 Declaration that may well have been lost in the intervening months of litigation and calumny – these students are engaged in a week made up of **six days of study, devotion and prayer that start at 7:30 AM and end at 11:15 at night**. *Id.* at ¶ 52.

The students do not drive on the Sabbath, of course.

The record shows that, regardless of whether anyone believes the rule regarding "cars on campus" is enforceable or not, the Yeshiva's founding principle is that students are to essentially, show up, stay put, and focus with unrelenting drive on scholarship, self improvement and spiritual improvement – not cruising the streets of Ocean Township. Quite to the contrary: Indeed, this is **precisely why** the Yeshiva sought a variance for dormitory facilities. As Rabbi Lesin explained in that February Declaration, "The inability to provide dormitories for students also means that the Yeshiva's students may be exposed to inappropriate people, experiences and

influences while outside the school, inhibiting their development of the proper moral and spiritual frame of mind." *Id.* at ¶ 45.

Thrusting aside the rule of *O Centro Espirita*, or even any attempt to appear objective, the Board provided no basis for disregarding this unrebutted evidence when concluding in its decision that the Yeshiva's use would be "intense" with reference to traffic or automobiles.

It cannot be emphasized enough that, as he explains in his February 2 Declaration, Rabbi Lesin did not invent this approach to Talmudic education. Indeed, this approach was the foundation of none other than the "Lakewood yeshiva," i.e., Beth Medrash Govoha ("BMG"). Its founder, the revered Rabbi Aharon Kotler, had himself been a star student at the elite *yeshiva gedola* known as Knesses Yisrael in what was then known Slabodka, Lithuania (now Vilijampolė, a suburb of Kaunas) which was built on the same approach.[7]

In fact throughout Jewish history the heights of scholarship were, with some notable exceptions, typically scaled by students who at critical junctures in their academic careers picked themselves up to sit at the feet of great Talmudic masters in intense, focused environments such as that created by the Yeshiva. This model resonates particularly in the "Lithuanian" Talmudic tradition of which the Yeshiva is part, spanning the generations from Rabbi Lesin to his own mentors – back through Slabodka, to which the greatest minds and spirits of much of Jewish Poland and Lithuanian flocked for decades. Slabodka itself traced its spiritual and academic lineage to the "mother of yeshivas," known traditionally as Volozhin (in present-day Belarus), whose founder, Rabbi Chaim Itzkowitz of Volozhin, established the model for the Yeshiva described by Rabbi Lesin, and on which hundreds of similar institutions in the world today are

[7] Yitzchok Dershowitz, *The Legacy of Maran Rav Aharon Kotler* (Lakewood 2005) at 16. Indeed, when establishing BMG "in the image" of the great European yeshivas he left behind, the highly sensitive Rabbi Kotler is said to have expressed reservations as to whether Lakewood, for all its relative isolation, was the right staging area for the endeavor. Could a location, he asked, "where people came for pleasure and vanity" ever be an appropriate environment to host an institution focused entirely on spiritual development? *Id.*

based. These all share fundamental features, among them "the necessity for personal influence and interaction between the teacher and the student [and] communal study, rather than private isolated study and research."[8] This is the premise of the variance request for dormitory facilities.

None of these facts mattered here. The Board did not ask or care whether or not students in the Yeshiva were, as Rabbi Lesin testified, really enrolling in the Yeshiva to do what its name – which, in Hebrew, comes from the root meaning both "settle" and "sit" – implies: Sit and learn. Determined to reach a predetermined outcome and not interested in the evidence, the Board simply "concluded" that (as different and strange as they were for purposes of being despised) Yeshiva students must be every bit the same as any other post-high school males – driving back and forth, generating traffic and taking up parking spaces.

Disregarding the teaching of *City of Clifton*, *supra*, the Board made no effort to justify ignoring plaintiffs' testimony or that of its experts. It did not even attempt to rationalize adopting the gauzy, conclusory characterization – a "net opinion[] . . . unsupported by any studies or data" – of the objectors' solitary expert. And by all indications, despite its protestations, it placed great weight on other "unsubstantiated allegations," such as the wild claim by a neighboring building complex owner that he figured that students of the Yeshiva would trespass in his parking lots. (Jennings June 17 Decl. Exh B at 75:24-77:13). Obviously such "unsubstantiated fears . . . cannot form the basis for a denial of an otherwise viable application." *Nynex Mobile Communications Co. v. Hazlet Tp. Zoning Bd. of Adjustment*, 276 N.J. Super. 598, 612-613 (App. Div. 1994).

3. The "noise" pretext relied on by the Board in denying the Yeshiva's application has no basis in the record and is discriminatory on its face.

[8] Berel Wein, *Triumph of Survival* (Brooklyn 1990) at 124-125.

The Board's "noise" pretext is even flimsier. Plaintiffs address this in their brief, of course. (Pl. Br. at 34.) It is worth noting that the ethereal nature of "noise" objections to a use variance lends it some usefulness as an indicator of meritlessness, or worse *See LeBlanc-Sternberg*, *supra*, 67 F.3d at 431 (2d Cir. N.Y. 1995) (opponents "cited potential traffic and noise problems among their reasons for opposing home synagogues but tolerated existing traffic and noise caused by secular uses; indeed, such problems emanating from a country club were deliberately ignored for the stated reason that if they were challenged, the owner might sell the property to Orthodox Jews").

Thus courts properly take a dim view of objections based on "a joyful noise" emitting from a house of worship even where, unlike the use applied for by the Yeshiva, the contemplated use is more intense, boisterous and in much more dense zoning environments on the ground that such noise cannot be deemed "detrimental" to a zoning ordinance. See, *Lucas Valley Homeowners Ass'n v. County of Marin*, 233 Cal. App. 3d 130, 155 (Cal. App. 1st Dist. 1991) (reversing reversal of trial court's vacatur of grant of use variance for "Chabad" Hasidic facility to convert a single-family residence into a neighborhood synagogue with associated uses; noise considerations concerning application sufficiently mitigated by limiting of outdoor or quasi-outdoor functions to once every two months and not more than six per year, prohibiting amplified musical instruments or live bands outdoors; limiting hours during which outdoor activity after 10 a.m. and before 8:30 p.m. and regulating outdoor activities of children).

4. The "safety" pretext relied on by the Board in denying the Yeshiva's application has no basis in the record and is discriminatory on its face.

Plaintiffs are not in District Court to appeal from the "mere" arbitrary and capricious denial of a use variance – though that would be sufficient to grant the relief sought by plaintiffs.

Westchester Day Sch., *supra*, 504 F.3d at 350 (imposing liability under RLUIPA where land use restrictions are imposed on religious institution arbitrarily or capriciously). They seek redress for a manifest, purposeful denial of their rights. That the Township's traffic and noise pretexts for its "intensity" finding are not only utterly unsupportable on the record, but are transparently pretextual, is obvious. Far more troubling, however, is the other rationalization in record – whether directly adopted by the Board, encouraged by it in the course of the outrageous and irregular course of its proceedings, or relied on it implicitly or otherwise – that is as dark and menacing of a municipal endorsement of outright anti-Semitism as could be imagined in the State of New Jersey: That Haredim are actually a literal menace – a danger to small children, hidden criminals. These are the tropes of classic anti-Semitism brought to central New Jersey.

It is unfortunately not so unimaginable. According to the Anti-Defamation League, "**New Jersey ranked third in the nation for anti-Semitic incidents in 2015**, behind New York and California, which reported 198 and 175 incidents, respectively. The New Jersey counties with the highest totals were Ocean (23), Middlesex (15), and Monmouth (15)."[9] This is a trend that cannot be encouraged. Unfortunately, the officials Township of Ocean, New Jersey failed to lead here by resisting it. It failed tragically.

Plaintiffs' brief lays out, in heart-breaking detail, the sordid nature of that failure. Defendants will respond, as they did in the first round of preliminary injunction briefing, by attempting to distance themselves from the rabidly anti-Jewish public commentary; the anonymous explosions of hatred; the social media vitriol; the infusion of irrelevant and ignorant prejudices into a question of simple zoning law. The defense that these were merely the acts of private parties is at best only partly exculpatory, if at all, under these circumstances. Plaintiffs

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[9] Anti-Defamation League, "ADL Audit: Anti-Semitic Incidents in New Jersey Rise 28 Percent In 2015," June 22, 2015, found at http://newjersey.adl.org/news/adl-audit-anti-semitic-incidents-in-new-jersey-rise-28-percent-in-2015/ (June 29, 2016).

have drawn a vivid narrative where an intensifying level of of anti-Semitic expression, planning and activity in Ocean Township surrounding plaintiffs' application could readily be inferred, as it reached a fever pitch on the eve of the final hearing, to have driven the votes that resulted in the denial of the Yeshiva's application. Again: "Discriminatory intent may be inferred from the totality of the circumstances." *LeBlanc-Sternberg*, 67 F.3d at 425. See also, *United States v. City of Black Jack*, 508 F.2d 1179, 1185 n.3 (8th Cir. 1974), *cert. denied*, 422 U.S. 1042 (1975) (racist statements by opponents of minority group and fact that racial criticism was made and cheered at public meetings could be considered evidence of improper purpose in a public board making its decision). It is hard to see how such evidence would not be relevant here, considering that the record is bare of **any** other conceivable basis for the Board's denial of the variance.

Indeed, it is worth quoting the key conclusions of law and fact in *LeBlanc-Sternberg*, considering the sad similarity the facts in that matter bear to much of what stains the record in this matter:

> The defendants who were the Village's mayor and three of its four trustees when the Village adopted its own zoning code testified that they opposed approvals for home synagogues.
>
> The events cited by [the Airmont Civic Association ("ACA")] leaders as evincing a need for Airmont's incorporation and gaining control of zoning amply supported a finding that the impetus was not a legitimate nondiscriminatory reason but rather an animosity toward Orthodox Jews as a group. They wrote and spoke of Ramapo's interpretation of its [zoning] provision to permit home synagogues and of its adoption of multiple-family housing as leading to the "grim picture of a Hasidic belt." . . . And whereas ACA opposed even a slight zoning variance for the construction of a synagogue on a lot that was very nearly two acres, there was testimony that its board unanimously elected not to oppose a height variance for a Catholic mausoleum spire "because this is the Catholic church that wants it."
>
> Lest the events themselves left any doubt, the record is replete with other statements of anti-Hasidic animus made or adopted by ACA leaders, such as, "i [*sic*] **will not** have a hasidic community in my backyard" (emphasis in original);

> and "the reason of forming this village is to keep people like you out of this neighborhood."
>
> Taking the evidence in the light most favorable to the private plaintiffs, there was ample support for the jury's implicit finding that Airmont's zoning code would be interpreted to restrict the use of home synagogues, that the motivation behind the enactment was discriminatory animus toward Orthodox and Hasidic Jews, and that Airmont pursued this goal jointly with ACA. Accordingly, the private plaintiffs established the Village's liability on the claims asserted under the FHA, the First Amendment, and §§ 1983 and 1985(3).

67 F.3d at 430-431. While the procedural issues, and some of the legal claims being pursued by plaintiff here, are different from those at issue in *LeBlanc-Steinberg*, the haunting echoes of Airmont, New York are unmistakable in Ocean Township. It is astonishing that 20 years later, despite the definitive ruling by the Second Circuit, nothing has been learned.

Indeed, what defendants cannot escape is the vote taken by the Board to deny the Yeshiva's application for a use variance on the vague grounds of "intensity" and what can only be its reliance, absent any other factor that could have driven its decision, on testimony and submissions of the most vile anti-haredi sort. It is not just that the Yeshiva was condemned on the one hand that students "won't be interacting essentially with our community" (Pl. Br. at 14) and on the other hand by the Board Chairman himself that the Yeshiva's students couldn't be essentially "locked down" on the Yeshiva campus like presumptive criminals (Pl. Br. at 35). Rather, this theme of criminality, foreignness and danger – the menace represented by the Yeshiva's application – is recurrent in the record.

And the only thing more chilling about it is how the Board and the Township played up to it instead of taking a role of civic leadership and opposing it. It is one thing when foolish, ignorant individuals at a public meeting make baseless, irrational comments such as "I'm honestly sacred that I'm going to be living so close to 96 men" and "96 men across the street from a park where my grandchildren play") or make repeated, bizarre references to criminal

background checks (Pl. Br. at 35). But the Board did more than fail to lead. It became part of the problem right through the vote and, regrettably, right through its actions in defending itself in this litigation.

In fact, it is the Yeshiva that has been on the defensive since the moment it sought merely to assert the same rights as any other citizens of this State, any other property owner, any other American by seeking a simple use variance from the Township. A simple review of the list of concessions agreed to by the Yeshiva with respect to the conduct of these seminary students – not convicts, not rehab residents, not detainees – but **seminary students** just to even be considered for the use variance is mind-boggling. And when the Board Chairman expressed his concern, as quoted above, that "these are men who can walk off" into the pristine streets of Ocean Township (Jennings Feb. 3 Decl. Exh U at 2), the suggestion seemed to be that these haredi rabbinical students were something other than American citizens with every right to walk in any neighborhood, in any city they want to!

They may not be well-advised to do so, however. It is not Ocean Township that has to worry about yeshiva students. It is yeshiva students that have to worry about Ocean Township, as the data cited above show. Indeed, according to the FBI's most recent statistics concerning hate crimes, of the 1,140 victims of anti-religious hate crimes, 56.8 percent were victims of crimes motivated by their offenders' anti-Jewish bias.[10] The record is bare of any reports of yeshiva students in or near Ocean County assaulting or otherwise menacing their neighbors or their children.

And yet, reacting to these ugly appeals to reject, to repel, to deny the basic humanity of "the other," the Board and the Township voted "no." The Board ignored – on the record,

[10] Federal Bureau of Investigation, "2014 Hate Crime Statistics – Victims," found at https://www.fbi.gov/about-us/cjis/ucr/hate-crime/2014/topic-pages/victims_final (June 30, 2016).

seemingly as a matter of pride – the straightforward, candid and ethical advice of its own counsel, who repeatedly as much as acknowledged that is actions were legally baseless. They were more worse than that. Yet the Board, knowing that this Court was aware of its conduct, preferred local political expediency, and a continued ride on the public purse to pursue this litigation (and impose immense expense on plaintiffs) to meeting its legal, constitutional and civic duties.

It is astonishing to suggest that it should be necessary in this State, in this century, but the Board, and the Township of Ocean, need a reminder that the Township is part of the State of New Jersey and is subject to its laws and those of the United States of America and its Constitution – which protect all her citizens, regardless of race, national origin or creed.

That is why this Court should issue the preliminary injunction sought by the plaintiffs.

CONCLUSION

For all of these reasons, amicus curiae Agudath Israel of America respectfully requests that this Court enter the Preliminary Injunction in the form of the proposed order submitted by the plaintiffs.

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