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

AL FALAH CENTER, et al., Plaintiffs, vs. TOWNSHIP OF BRIDGEWATER, et al., Defendants.	Civil Action No. 3:11-cv-02397 MAS LHG ELECTRONICALLY FILED

REPLY MEMORANDUM IN FURTHER SUPPORT OF PLAINTIFFS' MOTION FOR A PRELIMINARY INJUNCTION

ARCHER & GREINER, P.C.
Christopher R. Gibson
James M. Graziano
One Centennial Square
33 East Euclid Avenue
Haddonfield, NJ 08033
(856) 354 3077

Attorneys for Plaintiffs

Faiza Patel
The Brennan Center for Justice
161 Sixth Avenue
New York, NY 10013
(646) 292-8310

Rachel Levinson-Waldman
Brennan Center for Justice
at NYU Law School
1730 M Street NW, Suite 413
Washington, D.C. 20036
(202) 249-7193

Of Counsel

ARNOLD & PORTER LLP
Peter L. Zimroth (admitted *pro hac vice*)
Bruce R. Kelly (admitted *pro hac vice*)
Kerry A. Dziubek (admitted *pro hac vice*)
399 Park Avenue
New York, NY 10022
(212) 715 1000

Attorneys for Plaintiffs

ASIAN AMERICAN LEGAL DEFENSE AND EDUCATION FUND
Kenneth Kimerling (admitted *pro hac vice*)
Bethany Li (of counsel)
99 Hudson St., 12th Fl.
New York, NY 10013
(212) 966-5932

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PRELIMINARY STATEMENT

Defendants' papers on both pending motions stand out for what they don't dispute and actions they don't defend, including the following:

- For 75 years until the enactment of Ordinance 11-03, Bridgewater permitted or conditionally permitted houses of worship on all residential roads.
- During this entire period no planning document suggested that houses of worship compromised the integrity of residential neighborhoods in any way.
- In accordance with this long history and the existing law, Al Falah submitted a site plan application that required no variances and would have been approved by the Planning Board in due course.
- When the application became public, it engendered virulent and vocal anti-Muslim animus.
- The Defendants understood that Al Falah's application would have to be approved by the Planning Board and so decided to change the law.
- They made that decision in response to Al Falah's application.
- They made the decision before any study was authorized or done to determine whether such a significant change was necessary or justified.
- Defendants acted with extraordinary speed so that the change would preclude Planning Board approval of Al Falah's application.
- Township officials dissembled when they publicly described the genesis of the Ordinance and when they said it just "change[d] the venue."
- The lack of a permanent mosque significantly impairs Plaintiffs' ability to practice their religion.
- Two of the three "alternative" sites are on the market for far more than Al Falah paid for the Redwood Inn; the third is not for sale.

In addition, Defendants say nothing in defense of the reexamination report that supposedly justified this abrupt change. They do not controvert that it was

done more quickly than any other reexamination report in memory, that it was completed without any study or the most fundamental field work that even Defendants' litigation expert said he would have done, and that the central justification it proposed—that the functions and activities of houses of worship had recently changed—is false. Nor do Defendants attempt to defend the testimony of the report's author that the "Draft" ordinance that she prepared, before the Planning Board even voted to authorize a reexamination report, was not in fact a draft ordinance.

In the face of all the non-disputed evidence (most of which comes from the Township's own documents and testimony), Defendants say Plaintiffs are not entitled to relief based on four principal propositions. First, they say Al Falah should have sought relief from Ordinance 11-03 by applying to the Zoning Board for a variance. This argument is at the center of almost all of Defendants' points, e.g., that Defendants assertedly did not discriminate against Plaintiffs because Ordinance 11-03 did not "prohibit" a house of worship on the Redwood Inn site (Def. 10/22 Mem. (Doc. 80) 7-8, 14-23), that the Ordinance did not impose a substantial burden on Plaintiffs' religious practice (*id.* at 27-29), and that Plaintiffs cannot show irreparable injury (*id.* at 41-44). Second, they say Plaintiffs cannot prevail because they have not proved that the individual defendants uttered anti-Muslim statements. Third, Defendants say Plaintiffs have not proved the

unconstitutionality of Ordinance 11-03 because the ZBA can narrow the meaning of the ordinance in some unexplained way. Fourth, Defendants say Plaintiffs' claims must fail because their actions were lawful under New Jersey law. As demonstrated below, each of these propositions is without merit.

ARGUMENT

I. PLAINTIFFS WILL PREVAIL ON THE MERITS

A. Al Falah Should Not Be Required To Pursue a Variance Because Doing So Would Be Futile and Would Compound Plaintiffs' Injury

The Court's June 29, 2011 decision applying *County Concrete Corp. v. Township of Roxbury*, 442 F.3d 159 (3d Cir. 2006), rejected Defendants' argument that Plaintiffs' failure to seek a variance makes their claims unripe. Defendants now recycle their argument, claiming that Al Falah's case fails on the merits because the option of applying for a variance was "available" and not followed. In doing so Defendants continue a cynical tactic already evident when the Ordinance was passed. Upon passage, the chair of the Township Council, Mr. Norgalis, announced that the Ordinance was really not so significant for Al Falah because it "simply changes the venue for presentation from the planning board to the zoning board." PX78 at 169:18-21.[1] Mr. Norgalis, who previously served on the ZBA,

[1] Plaintiffs have adopted the same citation format for record citations as in their previous memoranda.: (1) deposition testimony is cited as "[Name] Tr. [page and line reference]," (2) deposition exhibits are cited as "PX__" for documents marked in depositions taken by Plaintiffs and "DX __" for documents marked in

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certainly knew that this statement was disingenuous and that much more than a change in venue was involved. He certainly knew that the ZBA operates under an entirely different set of rules than the Planning Board, which would have been required to approve Al Falah's application. He also knew that the ultimate municipal decision-maker in the Bridgewater's variance process would be the Township Council which had just passed the Ordinance.

Finally, Mr. Norgalis must have known that the variance process would be bruising for Al Falah. The Township had recently lived through the Hindu Temple affair. It took the Hindu Temple five years of ZBA hearings and lawsuits in both state and federal court before the Temple received its variance. Chow Dec. Ex. L; Savo Tr. 41:22-44:9. The Hindu Temple was an established and sizable religious community. Perhaps it could survive that expensive process. But Al Falah is a relatively small religious community with limited funds struggling to get started in a hostile environment. It cannot so easily survive this process.

In fact, seeking a variance would be futile and would serve only to exhaust Al Falah. Under New Jersey law Al Falah cannot obtain a variance unless its application meets both the "positive criteria" (that there are "'special reasons' for

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depositions taken by Defendants, and (3) declarations and accompanying exhibits, including the declarations that were originally submitted in support of Plaintiffs' motion when first filed in May 2011, are cited as "[Name] Dec." All cited deposition exhibits and deposition transcript excerpts are attached to the Declaration of Yue-Han Chow, Supplemental Declaration of Yue-Han Chow, or Second Supplemental Declaration of Yue-Han Chow.

the grant of the variance") and the "negative criteria" (that the variance "can be granted without substantial detriment to the public good" and that the proposed use "will not substantially impair the intent and the purpose of the zone plan and zoning ordinance"). N.J. STAT. ANN. § 40:55D-70(d); *Sica v. Bd. of Adjustment of Twp. of Wall*, 127 N.J. 152, 156, 603 A.2d 30, 32 (1992). Defendants say, and we do not dispute, that under *Sica* Al Falah would meet the positive criteria because a house of worship is an "inherently beneficial use."[2]

But "inherently beneficial uses" are not excused from meeting the "negative criteria." In 1997, after the decisions in *Sica* and *Coventry Square v. Westwood Zoning Bd. of Adjustment*, 138 N.J. 285, 299, 650 A.2d 340 (1994), the New Jersey legislature amended its law to state this requirement expressly. It added the italicized words to the statute, so that it now reads in pertinent part:

> No variance or other relief may be granted under the terms of this section, *including a variance or other relief involving an inherently beneficial use*, without a showing

[2] Neither New Jersey's treatment of houses of worship as inherently beneficial nor Bridgewater's treatment of them as conditionally permitted uses throughout residential zones prior to enactment of Ordinance 11-03 is inconsistent with the statement in *Congregation Kol Ami v. Abington Twp. Bd. of Commr's*, 309 F.3d 120, 143-44 (3d Cir. 2002), twice cited by Defendants, that "we do not believe land use planners can assume any more that religious uses are inherently compatible with family and residential uses." Def. 10/22 Mem. (Doc. 80) 21, 44-45. Defendants' quotation of this language at page 21 of their memorandum omits the source the Third Circuit cited for it: a newspaper story about 24-hour megachurches with congregations exceeding 20,000, including one with a Communion Dispensing Machine that can fill 40 communion cups in 2 seconds. *Megachurches as Minitowns*, NYT F1, F6 (May 9, 2002). The conditional use criteria Bridgewater imposed on houses of worship in residential zones before enactment of Ordinance 11-03 ensured it would face no such problems, and Al Falah's application threatened none.

> that such variance or other relief can be granted without substantial detriment to the public good and will not substantially impair the intent and the purpose of the zone plan and zoning ordinance.

N.J. STAT. ANN. § 40:55D-70(d) (emphasis added). The amendment "serves as a reminder that even with an inherently beneficial use, an applicant must satisfy the negative criteria." *Smart SMR of N. Y., Inc. v. Borough of Fair Lawn Bd. of Adjustment*, 152 N.J. 309, 324, 704 A.2d 1271, 1279 (1998); *see* William M. Cox & Stuart R. Koenig, *New Jersey Land Use, Zoning & Administration* at 190-91.

Al Falah's proposed use was the only religious use of a specific property that the Township Council considered when enacting Ordinance 11-03. Defendants never explain how Al Falah, burdened by this record, could ever satisfy either of the negative criteria. With respect to the first criterion ("substantial detriment to the public good"), when it passed Ordinance 11-03 the Township Council adopted the position (albeit without support and contrary to a 75 year history) that the Redwood Inn was not an appropriate site for Al Falah's proposed mosque because a house of worship there would impair the neighborhood character through "undue intrusion from traffic, noise, light and degraded air quality." PX45 at 6. This rationale, however, did not lead the Council to provide that the location of houses of worship on certain roads should depend on the number of congregants, the size of the facility, how cars travel to and from it, where the congregants came from, or how much noise or light the facility would generate. The Ordinance is absolute:

houses of worship are not conditionally permitted except on the named roads, period.

Nor has there been any suggestion how Al Falah could satisfy the second negative criterion—that permitting a mosque on the site of the Redwood Inn would "not substantially impair the intent and the purpose of the zone plan and zoning ordinance." An application by Al Falah to the ZBA would present the "particularly damning" deficiency that Ordinance 11-03 was enacted so recently.[3] But here there is more than recency of enactment. Ordinance 11-03 was passed with the Redwood Inn site clearly in mind. Almost all of the comments at the hearings of the Planning Board and the Township Council focused on whether that site was appropriate for a mosque. The rationale adopted by the Council when it enacted the Ordinance was that certain locations, including the Redwood Inn, were not appropriate for houses of worship because they would compromise the "character" of the surrounding neighborhood—again, without regard to size or any other parameter. *See, e.g.*, PX48, PX45 at 6-7, PX30 at 1. The Council confirmed that it holds this view by presenting in this litigation the report of a planning expert, Mr. Banisch, arguing on multiple grounds that the Redwood Inn site is the

[3] *See Twp. of N. Brunswick v. Zoning Bd. of Adj. of N. Brunswick*, 378 N.J.Super. 485, 494, 876 A.2d 320, 325 (N.J. App. 2005) (finding that a zoning board of adjustment usurped the power of the municipality's governing body by granting a variance to permit multi-family residential development only a year after property had been rezoned to preclude it; court found the recency of the rezoning to be "particularly damning").

wrong place for a house of worship. *E.g.*, PX102 at 61-63, PX103 at 17, PX149. There are many flaws in his arguments, but he speaks for his client.

We have asked the Township to answer the following question but have not seen a response: how, in these circumstances, does the Township propose that Al Falah meet its burden to show that a mosque at the Redwood Inn would "not substantially impair the intent and the purpose of the zone plan and zoning ordinance?" Even if under a "balancing test" Al Falah would get some points because a house of worship is an inherently beneficial use, the Township Council already knew Al Falah's proposed use was inherently beneficial and passed the Ordinance nonetheless. In these circumstances, requiring Al Falah to go through the variance process is worse than simply requiring a futile action. It will increase the harm Plaintiffs already have suffered.

Finally, the Township ignores that the final decision-maker in the variance process is the Township Council itself, the very body that enacted the Ordinance. Chow Second Supp. Dec. Ex. W.[4]

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[4]Defendants try to distort the following testimony of Al Falah's land use lawyer, Ms. Tubman, into a concession:

> Q. And not withstanding the adoption of Ordinance 11-03 and the remedy available to Chughtai Foundation to make application to the board of adjustment for relief to use the Redwood Inn site as a house of worship, no such application was ever made, correct?
>
> A. Correct.

Tubman Tr. 91:8-14. As is clear from the rest of Ms. Tubman's sworn statements, all she was saying here is that "no such application was ever made." She was not

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B. Plaintiffs Can Prove Through Circumstantial Evidence That Defendants Acted With Discriminatory Intent

Defendants' response to the substantial evidence of discriminatory intent continues to be that individual Defendants did not make anti-Muslim utterances and that, for reasons left unexplained, the leading Supreme Court cases on this subject, *Washington* and *Arlington*, are not relevant to whether discriminatory intent can be proved by circumstantial evidence. Def. 10/22 Mem. (Doc. 80) 27 n.6.[5] This is a puzzling position because the Defendants have conceded that circumstantial evidence of the surrounding events can prove discriminatory intent. Pltf. 10/22 Mem. (Doc. 82) 15. The Supreme Court's jurisprudence on this point is consistent with the black letter in other areas of law that intent may be inferred from circumstantial evidence, for example, of false exculpatory statements. *United States v. Kemp*, 500 F. 3d 257, 296 (3d Cir. 2007).

Defendants attempt to distinguish *Cottonwood Christian Center v. Cypress Redevelopment Agency*, 218 F. Supp. 2d 1203 (C.D. Cal. 2002), on the ground that it involved a condemnation proceeding and this case does not. Def. 10/22 Mem.

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agreeing with the argumentative and ambiguous premise of the questioner that the remedy was "available." Her corrected answer to another question on page 93 shows she considered a variance application to be futile. See errata sheet, included as Exhibit 34 with Defendants' filing. In any event, Ms. Tubman is a fact witness, and testimony on issues of New Jersey law is impermissible. *E.g., Berckeley Inv. Grp., Ltd. v. Colkitt*, 455 F.3d 195, 217 (3d Cir. 2006); *United States v. Leo*, 941 F.2d 181, 196-97 (3d Cir. 1991); *Casper v. SMG*, 389 F. Supp. 2d 618, 621 (D.N.J. 2005)

[5] Citing *Washington v. Davis*, 426 U.S. 229 (1976) and *Village of Arlington Heights v. Metropolitan Housing Dev. Corp.*, 429 U.S. 252 (1977).

(Doc. 80) 25-26. This supposed distinction misses the point of *Cottonwood*. The court there was deciding whether "strict scrutiny" was the appropriate standard to be applied to the local government's actions. The court decided it was, because there was "strong evidence that the Defendants' actions are not neutral, but instead specifically aimed at discriminating against Cottonwood's religious uses." 218 F. Supp. 2d at 1224. The most significant evidence of discriminatory intent was the circumstantial evidence that when Cottonwood purchased the property and made known its desire to use it for religious purposes, the municipal entity "suddenly burst into action" and "became a bundle of activity." *Id.* at 1225, 1224. It is of no moment that the bundle of activity in *Cottonwood* involved development of a new plan for the town center and the institution of condemnation proceedings, whereas in our case the bundle of activity resulted in a new zoning ordinance. In both cases what set the municipality in motion was the desire that a particular property not be used for religious purposes by a particular owner.

Defendants further say that Plaintiffs must prove that the Township unequally applied a facially neutral ordinance for the purpose of discriminating against them. Def. 10/22 Mem. (Doc. 80) 23. This erroneously attempts to describe the burden of an *as applied* challenge; this Court has ruled already that this case presents a *facial* challenge. Chow Supp. Dec. Ex. M. at 49:16-50:2.

Finally, Defendants try to impute to Plaintiffs statements about how supposedly helpful the Township has been. At page 4 of their memorandum, they cite a statement from Al Falah's website that Bridgewater is a "community that welcomes a rich variety of faiths," as though that somehow meant that Bridgewater is incapable of discriminating against this particular faith. It is undisputed that there never has been a mosque in Bridgewater, and that as soon as Al Falah's application to the Planning Board threatened one, hundreds of people appeared to protest. Y. Abdelkader Dec. (5/14/2011) ¶ 9. Instead of standing up to those protests, the Township gave in to them. Al Falah's website, when read in context, is a gentle appeal to the conscience of Bridgewater to stop demonizing Muslims. See Plaintiffs' Rule 56.1 Statement in opposition to Defendants' summary judgment motion, filed simultaneously with this memorandum, which quotes the relevant portions of the website in full at Fact No. 3; DX6. Defendants also cite testimony by Mr. Jalil, a Muslim resident of Bridgewater but not a plaintiff here, to the effect that several years ago when he was looking (unsuccessfully) for a possible site for a mosque, an employee of Bridgewater's Economic Development department showed him the location of some properties on maps. Def. 10/22 Mem. (Doc. 80) 7-8. Defendants say this shows the Township "welcomed" Plaintiffs. That employee's civil behavior years ago cannot possibly establish that the Township "welcomed" Al Falah in light of the events at issue in this lawsuit.

C. Ordinance 11-03 Is Facially Invalid, and Defendants' Reliance On *Brown v. City of Pittsburgh* Is Misplaced

Defendants repeat, virtually verbatim, the argument that Plaintiffs' facial challenge to Ordinance 11-03 must fail under *Brown v. City of Pittsburgh*, 586 F.3d 263 (3d Cir. 2009), unless they prove that the Ordinance is unconstitutional in every conceivable application. *Compare* Def. 10/22 Mem. (Doc. 80) 14-15 *with* Def. 10/12 Mem. (Doc. 77) 18-19. As Plaintiffs previously demonstrated, *Brown* and similar authorities involve facial challenges to allegedly overbroad statutes, usually on free-speech grounds as in *Brown*, and have no application to a case like *County Concrete* or the present one alleging that a land use regulation was enacted with the intention to deprive a specific plaintiff of a constitutional right. *See* Pltf. 10/22 Mem. (Doc. 80) 7-9. Defendants add three points to which we respond here.

First, they say incorrectly that this Court's decision denying the motion to dismiss "did not address *Brown*." Def. 10/22 Mem. (Doc. 80) 14 n.4. Defense counsel cited *Brown* in the reply brief on that motion and at oral argument. Chow Supp. Dec. Ex. M at 9:21-10:8. The Court then denied the motion because it found the issue to be controlled by *County Concrete*, which unlike *Brown* involved a facial challenge to a zoning amendment enacted to block a specific application.

Second, Defendants say that certain changed allegations in the Second Amended Complaint admit that Ordinance 11-03 does not prohibit the use of the Redwood Inn for Plaintiffs' religious purposes, thereby defeating any facial

challenge. The revised allegations make no such admission. As the redlined copy submitted herewith shows, the Second Amended Complaint modified certain allegations to reflect more precisely how Ordinance 11-03 achieves its object of blocking Al Falah's mosque by subjecting houses of worship to an additional condition—location on a designated road—that the Redwood Inn cannot satisfy. Chow Second Supp. Dec. Ex. V at ¶¶ 41, 44, 45, 58, 62, 70.

Third, Defendants argue, quoting *Brown*, 586 F.3d at 274 (citations omitted), that a court must "consider any limiting construction that a state court or enforcement agency has proffered" and that it also must, in the absence of any such limiting construction, "'presume any narrowing construction or practice to which the law is fairly susceptible.'" Defendants do not demonstrate that any court or enforcement agency has proffered a "limiting construction" of Ordinance 11-03, and the Ordinance is simple and unambiguous, so there is no "limiting construction" to which the Ordinance is fairly susceptible.

Nor can Defendants claim that the enforcement of Ordinance 11-03 will be subject to some "narrowing practice" that could cure its infirmities. For a "narrowing practice" to save a facially invalid statute, the practice must be binding on the enforcement authorities; a mere discretionary pattern of non-enforcement will not suffice. *See Conchatta Inc. v. Miller*, 458 F.3d 258, 265 (3d Cir. 2006). Here, there has been no such binding practice. The ZBA has not had any

proceeding in which it has been asked to grant relief from the road access provision of Ordinance 11-03. Moreover, there is substantial doubt that any such practice could take root in a way that would be binding on the ZBA if Al Falah applied for a variance, especially in light of the Township Council's actions directed at the very use that Al Falah would be submitting to the ZBA. See pp. 3-8, above.

D. Even If Ordinance 11-03 Were Lawful Under New Jersey Law, That Would Not Make Defendants' Actions Constitutional or Compliant with RLUIPA

Plaintiffs have demonstrated that Ordinance 11-03 is arbitrary and capricious in violation of the MLUL. *See, e.g.*, *Riya Finnegan LLC v. Twp. Council of S. Brunswick*, 197 N.J. 184, 193, 962 A.2d 484, 490 (2008); Pltf. 5/24/11 Mem. (Doc. 7-1) 22-26; Pltf. 10/12 Mem. (Doc. 79-1) 55-56; Pltf. 10/22 Mem. (Doc. 82) 46-48. However, even if the enactment of Ordinance 11-03 did comply with the MLUL, that would not be a defense to Plaintiffs' RLUIPA and constitutional claims. *See* Pltf. 10/22 Mem. (Doc. 82) 10-14.

Defendants misconstrue the significance of the "time of decision" rule here. Plaintiffs do not challenge the "time of decision" rule or ask this Court to invalidate it. Def. 10/22 Mem. (Doc. 80) 23-25. The rule is relevant because Defendants' haste to enact Ordinance 11-03 while the rule was in effect provides circumstantial evidence of discriminatory intent. *See* Pltf. 10/12 Mem. (Doc. 79-1)

6-37; Pltf. 56.1 Supp. Statement (Doc. 82-1) at ¶ 1.37. When Defendants decided in January 2011 to prevent Al Falah from converting the Redwood Inn into a mosque, it was the imminent expiration of the "time of decision" rule that prompted the Township to enact Ordinance 11-03 with unusual haste. Norgalis Tr. 35:19-36:3, 66:22-67:23, 75:2-4. As Plaintiffs' opening memorandum demonstrates, what should have been a deliberate and thoughtful process was accomplished with extreme haste so as to make certain that the new ordinance would apply to its primary target—Al Falah's mosque—and accommodate the strident anti-Muslim animus that Al Falah's application triggered. Pltf. 10/12 Mem. (Doc. 79-1) 6-37.

E. Ordinance 11-03 Violates RLUIPA's Equal Terms Provision

Defendants contend that the secular comparators Plaintiffs rely on to show less than equal treatment—the Township's own municipal facilities (public libraries, town meeting halls, swimming pools, and other sports facilities)—"are not subject to the Township's zoning ordinances." Def. 10/12 Mem. (Doc. 77) 32.

Defendants' statement is factually incorrect. Bridgewater has subjected its municipal facilities to its zoning laws as it clearly has the power to do. Al Falah's property is located in Bridgewater's R-50 zone. Bridgewater Municipal Code § 126-305 provides that, "municipal buildings, parks, playgrounds or other municipal facilities … deemed necessary and appropriate by the governing body"

are "permitted uses" within that zone. Chow Supp. Dec. Ex. O. Houses of worship are not "permitted uses" in the R-50 zone; they are "conditional uses" that are subject to various conditions including the road access requirements established by Ordinance 11-03. *Id.* In other words, Bridgewater has subjected houses of worship in the R-50 zone to the significant condition of road access that municipal facilities do not have to meet. This less than equal treatment of similarly situated secular and religious uses is repeated in other residential zones in Bridgewater—*e.g.*, R-40, R-20, and R-10. Chow Supp. Dec. Ex. U.

It would make no difference, however, if Bridgewater's municipal facilities were not subject to its own zoning ordinance for the reason that the zoning ordinance made no reference to them or for some other reason. It would still be true that these secular uses were treated better than religious uses. And it would still be true that insofar as "neighborhood character" is concerned there would be no reason to treat the religious uses differently from the secular uses. Any other result would eviscerate RLUIPA's equal terms provision. If Defendants' argument were accepted, it would open a loophole for local governments to evade Congress's intent. If two land uses are comparable, there could be no more obvious way to treat one of them on less than equal terms than the other than by enacting a system of regulation that regulates the religious use but by silence does not regulate the secular use.

F. Ordinance 11-03 Violates RLUIPA's Unreasonable Limitations Provision

Plaintiffs have demonstrated that Ordinance 11-03 violates RLUIPA's prohibition of "unreasonable limitations" on religious use because it eliminated more than 75% of the previously available roadway frontage in the Township as possible locations for a house of worship and there is no available, affordable site that has not been so eliminated. Pltf. 10/12 Mem. (Doc. 79-1) 54; Pltf. 10/22 Mem. (Doc. 82) 43-44.

Defendants respond by again arguing that Ordinance 11-03 did not prohibit a mosque at the Redwood Inn because a variance from the ZBA might permit one. Def. 10/22 Mem. (Doc. 80) 33. This argument is without merit because, as stated at pages 3-8 above, any application by Al Falah for a variance would be futile.

Plaintiffs cited in support of this claim the Seventh Circuit's statement that what is reasonable must be decided "in light of all the facts, including the actual availability of land and the economics of religious organizations." *Vision Church v. Village of Long Grove*, 468 F.3d 975, 990 (7th Cir. 2006) (quoting 146 Cong. Rec. E1563 (daily ed. Sept. 22, 2000) (statement of Rep. Canady)). Defendants do not dispute that statement, but argue that the facts in *Vision Church*, where the plaintiff sought and was denied a "special use permit" to build a church, somehow show that Al Falah should be required to seek a variance just as the *Vision Church* plaintiff sought a special use permit. The two situations are not comparable. The

village in *Vision Church* permitted churches anywhere. A special use permit was available as long as the applicant met certain conditions, including a size limit of 55,000 square feet. Vision Church filed an application for a building of 99,000 square feet. Its application was denied, so it sued, claiming (unsuccessfully) that the denial violated RLUIPA. *Vision Church*, 468 F.3d at 984, 986, 990-91. There was no contention that the special use permit requirement had been established with a discriminatory purpose in order to block the plaintiff's proposed use. Nor did the special use permit procedure require the *Vision Church* plaintiff to show that the presence of a church at its site "would not impair the intent and the purpose of the zone plan" as New Jersey law requires for a variance.

II. IF RELIEF IS DENIED, PLAINTIFFS WILL CONTINUE TO SUFFER IRREPARABLE INJURY, AND BOTH THE BALANCE OF HARDSHIPS AND THE PUBLIC INTEREST FAVOR GRANTING RELIEF

The injury Ordinance 11-03 inflicts on Plaintiffs falls within two categories of injury long recognized as presumptively irreparable—(1) abridgement of the right to free exercise of religion[6], and (2) restraint on the use of inherently unique real property.[7] Congress enacted RLUIPA to provide redress where these two

[6] *See, e.g., Elrod v. Burns*, 427 U.S. 347, 373 (1976); *Doe v. Indian River Sch. Dist.*, 653 F.3d 256, 283 n.14 (3d Cir. 2011); 11A Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, *Federal Practice and Procedure* § 2948.1 (2d ed. 1995).

[7] *See, e.g., Third Church of Christ, Scientist, of N.Y.C. v. City of New York*, 617 F. Supp. 2d 201, 215 (S.D.N.Y. 2008), *aff'd*, 626 F.3d 667 (2d Cir. 2010); *Minard Run Oil Co. v. U.S. Forest Serv.*, 670 F.3d 236, 256 (3d Cir. 2011); *In re Bella*

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types of injury coalesce—where land use restrictions are employed to discriminate against or substantially burden religious practice. Thus, where a plaintiff demonstrates a likelihood of success on a RLUIPA claim, irreparable injury is presumed.[8] Defendants cite no contrary authority but instead repeat their argument, refuted elsewhere, that Al Falah should have sought a variance, so that any injury is self-inflicted and not irreparable. Def. 10/22 Mem. (Doc. 80) 42, see refutation at pp. 3-8, above, and Pltf. 10/22 Mem. (Doc. 82) 23-28. Defendants also argue that preliminary injunctive relief is not appropriate here because even if such relief is granted and the application is remanded to the Planning Board which approves Al Falah's application, objectors may sue to challenge that approval, creating additional delay. Def. 10/22 Mem. (Doc. 80) 42-43. This has no bearing on whether Plaintiffs are being irreparably injured or are entitled to relief now.

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Vista Assocs., No. 07-18134, 2007 WL 4555891, at *10 (Bankr. D.N.J. Dec. 18, 2007).

[8] *See, e.g., Opulent Life Church v. City of Holly Springs*, No. 12-60052, 2012 WL 4458234, at *12 (5th Cir. Sept. 27, 2012) ("[the presumption of irreparable harm] applies with equal force to the violation of RLUIPA rights because RLUIPA enforces First Amendment freedoms, and the statute requires courts to construe it broadly to protect religious exercise") (citation omitted); *United States v. Rutherford Cnty., Tenn.*, 2012 WL 2930076, *1 (M.D. Tenn. July, 18, 2012) (same); *Rocky Mountain Christian Church v. Bd. of Cnty. Comm'rs of Boulder Cnty.*, 612 F. Supp. 2d 1157, 1160 (D. Colo. 2009) (same); *Reaching Hearts Int'l, Inc. v. Prince George's Cnty.*, 584 F. Supp. 2d 766, 795 (D. Md. 2008), *aff'd*, 368 F. App'x 370 (4th Cir. 2010) (same); *see also, e.g., Forum for Academic & Institutional Rights v. Rumsfeld*, 390 F.3d 219, 246 (3d Cir. 2004) ("By establishing a likelihood on the success on the merits of its … claim based on a First Amendment violation, [plaintiff] has necessarily satisfied the second element: irreparable harm.") (citation omitted); *Democratic-Republican Org. of N.J. v. Guadagno*, 2012 WL 4863045, at *4 (D.N.J. Oct. 11, 2012) (Wolfson, J).

Problems that may or may not arise after that relief is granted are for another day.

As for balance of hardships, Defendants do not dispute that a preliminary injunction will inflict no hardship on them. Nor do they deny that Plaintiffs sustain hardship from being unable to use their property; they just repeat their (incorrect) assertion that Plaintiffs' harm is their own fault because they did not file a futile application for a variance.

As for the public interest, Defendants assert that the public interest lies in local control of zoning decisions. But Congress has decided that local control shall be overridden where a RLUIPA violation is established. Moreover, Defendants' arguments concerning the "time of decision" rule ignore that New Jersey has decided that the rule no longer serves the public interest and should be superseded by a more equitable "time of application" rule. N.J. STAT. ANN. § 40:55D-10.5. Insofar as injunction sought here will require Bridgewater to follow the "time of application" rule that is now New Jersey law, it will serve the public interest as New Jersey currently defines it.

CONCLUSION

Plaintiffs' motion should be granted. The Court should enter a preliminary injunction (1) declaring Ordinance 11-03 void and enjoining its enforcement, and (2) directing the Planning Board to resume consideration of the Application for use of the Redwood Inn without consideration of the invalid Ordinance.

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Respectfully submitted,

ARCHER & GREINER, P.C.
Christopher R. Gibson
James M. Graziano
One Centennial Square
33 East Euclid Avenue
Haddonfield, NJ 08033
(856) 354 3077

ARNOLD & PORTER LLP
Peter L. Zimroth
Bruce R. Kelly
Kerry A. Dziubek
(admitted *pro hac vice*)
399 Park Avenue
New York, NY 10022
(212) 715 1000
Fax No.: (212) 715-1399

ASIAN AMERICAN LEGAL DEFENSE AND EDUCATION FUND
Kenneth Kimerling (admitted *pro hac vice*)
Bethany Li (of counsel)
99 Hudson St., 12th Fl.
New York, NY 10013

By: /S/Christopher R. Gibson
Christopher R. Gibson

Attorneys for Plaintiffs

Of Counsel:

Faiza Patel
The Brennan Center for Justice
161 Sixth Avenue
New York, NY 10013
(646) 292-8310

Rachel Levinson-Waldman
Brennan Center for Justice at NYU Law School
1730 M Street NW, Suite 413
Washington, D.C. 20036
(202) 249-7193