

No. 13-4267

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**IN THE UNITED STATES COURT OF APPEALS  
FOR THE THIRD CIRCUIT**

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AL-FALAH CENTER, TAREK ABDELKADER, TASSER  
ABDELKADER, ZAHID CHUGHTAI, BABAR FAROOQI, NABEELA  
FAROOQI, AYESHA KHAN, OMAR MOHAMMEDI, AMINA  
MOHAMMEDI, and SARAH WALLIS,  
*Plaintiffs-Appellees,*

v.

TOWNSHIP OF BRIDGEWATER, TOWNSHIP OF BRIDGEWATER  
PLANNING BOARD, TOWNSHIP COUNCIL OF BRIDGEWATER,  
*Defendants-Appellants*

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**BRIEF OF AMICI CURIAE MUSLIM ADVOCATES, THE  
NATIONAL COUNCIL OF THE CHURCHES OF CHRIST IN THE  
USA, THE NATIONAL COUNCIL OF JEWISH WOMEN, THE  
OFFICE OF CHRISTIAN UNITY AND INTERRELIGIOUS  
RELATIONSHIP OF THE UNITED METHODIST CHURCH, AND  
THE SIKH COALITION IN SUPPORT OF PLAINTIFFS-  
APPELLEES**

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**CORPORATE DISCLOSURE STATEMENT**

Pursuant to Federal Rules of Appellate Procedure 26.1 & 29(c)(1) and Third Circuit Local Appellate Rule 26.1.1, *amici curiae* Muslim Advocates, the National Council of the Churches in Christ in the USA, the National Council of Jewish Women, the Office of Christian Unity and Interreligious Relationship of the United Methodist Church, and the Sikh Coalition state the following:

- (1) They have no parent corporations;
- (2) There are no publicly held corporations that own 10% or more of their stock;
- (3) They are not aware of any publicly held corporations not a party to this proceeding with a financial interest in its outcome.

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**STATEMENT OF INTEREST OF AMICI CURIAE**

Muslim Advocates, a national legal advocacy and educational organization formed in 2005, works on the frontlines of civil rights to guarantee freedom and justice for Americans of all faiths. Muslim Advocates advances these objectives through litigation and other legal advocacy, policy engagement, and civic education, and by serving as a legal resource for the American Muslim community, promoting the full and meaningful participation of Muslims in American public life. The issues at stake in this case directly relate to Muslim Advocates' work fighting institutional discrimination against the American Muslim community.

The National Council of the Churches of Christ in the USA ("the NCC") is a community of communions called by Christ to visible unity and sent forth in Spirit to promote God's Justice, peace and the healing of the world. Founded in 1950, the NCC has been the leading force for shared ecumenical witness among Christians in the United States. The NCC's 37 member communions—from a wide spectrum of Protestant, Anglican, Orthodox, Evangelical, historic African American and Living Peace Churches—includes 45 million people. The issues in this case relate to the NCC's strong history in interfaith relationships, as well as to its history in

upholding religious liberty for all faiths, speaking out against religious animus, and seeking justice and peace for all.

The National Council of Jewish Women (“NCJW”) is a grassroots organization of 90,000 volunteers and advocates who turn progressive ideals into action. Inspired by Jewish values, NCJW strives for social justice by improving the quality of life for women, children, and families and by safeguarding individual rights and freedoms. NCJW’s Resolutions state that “a democratic society and its people must value diversity and promote mutual understanding and respect for all.” Consistent with its Resolutions, NCJW joins this brief.

The Office of Christian Unity and Interreligious Relationships of the United Methodist Church is responsible for giving leadership to the United Methodist Church in its quest for unity and for the development of relationships with other churches, ecumenical organizations and religious faith communities. The United Methodist Church is a community of faith in the Methodist tradition, organized on four continents, which has a long history of concern for social justice. Its Social Principles “. . . are a prayerful and thoughtful effort on the part of the General Conference to speak to the human issues in the contemporary world from a sound biblical and theological foundation as historically demonstrated in United Methodist

traditions.” (See Preface, Social Principles, 2012 Book of Discipline.) “We urge policies and practices that ensure the right of every religious group to exercise its faith free from legal, political, or economic restriction . . . We assert the right of all religions and their adherents to freedom from legal, economic and social discrimination.” (Social Principles, 2012 Book of Discipline, paragraph 162.B.) The Office of Christian Unity and Interreligious Relationships joins this brief as part of its responsibility to “deepen and expand the ecumenical and interreligious ministries of the United Methodist Church.” (2012 Book of Discipline, paragraph 437.)

The Sikh Coalition is a community-based organization that works towards the realization of civil and human rights for all people. The Sikh Coalition pursues its mission by providing direct legal services to persons whose civil or human rights are violated; advocating for law and policies that are respectful of fundamental rights; promoting appreciation for diversity through education; and fostering civic engagement in order to promote local community empowerment. The issues at stake in this case directly relate to the Sikh Coalition’s work to ensure faith communities may enjoy religious freedom, including the ability to found or improve houses of worship free of unlawful discrimination.

The *amici curiae*, faith and civic advocacy groups that work to serve members of minority religious communities and bridge interfaith understanding, have a keen interest in helping support American Muslims and other faith groups freely exercise their religious beliefs—without unlawful and capricious interference from governmental institutions. In particular, the *amici* seek to ensure the proper enforcement of the Religious Land Use and Institutionalized Persons Act (“RLUIPA”), 42 U.S.C. § 2000cc, *et seq.* The *amici* have encountered minority faith groups facing local government and residential opposition to their plans to build houses of worship. In many of these cases explicit animus is directed at the religious communities themselves. Often, pretextual reasons—traffic, noise, or water use issues—are offered to justify local governments’ denial of zoning permits.

The *amici* draw on their expertise and years of experience grappling with religious discrimination to contextualize the events in Bridgewater, New Jersey, within the larger framework of recent mosque opposition.

### **SUMMARY OF ARGUMENT**

In the years since the tragic events of September 11, 2001, there has been a documented increase in animus directed at American Muslims—

including an increase in reports of hate crimes, employment discrimination, and even public officials openly voicing anti-Muslim sentiments.

Notably, this recent trend of anti-Muslim hate has also manifested itself in myriad examples of local governments abusing their zoning authority to prevent Muslim community groups from establishing houses of worship or otherwise being able to freely exercise their religious beliefs.

Zoning permit denials do not occur in a vacuum. They are often a function of sustained and widespread anti-Muslim animus. Several cases brought under RLUIPA highlight the explicit anti-Muslim sentiments underlying many permit denials.

In addition to these examples of naked animus against the Muslim community, there are also various cases in which animus lies beneath the surface and pretextual reasons are offered to justify a Muslim group's zoning denial. Sometimes, for example, local governments will deny a mosque (or Islamic school) a permit because of spurious traffic flow or noise issues.

In the case at hand, the Al-Falah Center ("Al-Falah") appeared to be on track to receive a permit to transform an abandoned banquet hall into a mosque. Following the organized efforts of an anti-Muslim group, however, hundreds of hostile community members attended a public meeting on Al-

Falah's application to voice their anti-Muslim views and opposition to the mosque.

The Defendant-Appellants ("the Township") decided to give sanction to these sentiments, altering a zoning ordinance *post-facto* in order to deny Al-Falah a space for its mosque. The Township attempted to justify its actions because of concerns about traffic congestion, but as the Plaintiffs-Appellees have made clear, no traffic data support this argument.

To be fully understood, it is essential that Al-Falah's experience be considered in the larger context of animus-based mosque opposition cases.<sup>1</sup> Put another way, this is the latest in a long line of cases in which Muslim

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<sup>1</sup> Note, that while RLUIPA does not necessarily require plaintiffs to establish broad discriminatory intent in order to assert a viable claim, there is a "Nondiscrimination" provision in the statute (42 U.S.C. § 2000cc(2)(b)). Claims, however, are more commonly brought under two other sections: (1) the "Substantial Burdens" provision (42 U.S.C. § 2000cc(a)), which proscribes local governments from substantially burdening religious exercise absent a compelling government interest; and (2) the "Equal Terms" provision (42 U.S.C. § 2000cc(b)(1)), which prohibits a local government from imposing "a land-use regulation in a manner that treats a religious assembly or institution on less than equal terms with a nonreligious assembly or institution." See Douglas Laycock & Luke Goodrich, *RLUIPA: Necessary, Modest and Unenforced*, 39 FORDHAM URBAN L.J. 1021, 1023 (addressing the dominance of Substantial Burdens and Equal Terms litigation); see also Eric Treene, *RLUIPA and Mosques: Enforcing a Fundamental Right in Challenging Times*, 10 FIRST AMENDMENT L. REV. 330, 358 (discussing the absence of any cases ruling on a claim brought under the Nondiscrimination provision of RLUIPA). That said, in this case Al-Falah did assert a claim under the Nondiscrimination provision. See Complaint at 26-27.

groups attempting to build even a modest house of worship face broad community and institutional resistance simply because they are Muslim.

### ARGUMENT

#### **I. POST-SEPTEMBER 11, 2001, THERE HAS BEEN A MARKED INCREASE IN ANIMUS AGAINST AMERICAN MUSLIMS**

Since the September 11, 2001 attacks there has been a marked increase in anti-Muslim bigotry. While in the months immediately after the attacks, only 17% of Americans stated that they had a “unfavorable” view of Islam,<sup>2</sup> a November 2010 survey on American values conducted by the Public Religion Research Institute found that now 45% of Americans believe the values of Islam are at odds with the American way of life.<sup>3</sup> Another study reports that 53% of Americans say their opinion of Islam is either “not too favorable” (22%) or “not favorable at all” (31%).<sup>4</sup> Some 43% of Americans openly admit to feeling “a little” prejudice toward

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<sup>2</sup> PEW RESEARCH CENTER FOR PEOPLE & THE PRESS, *Post September 11 Attitudes*, Dec. 6, 2001, available at <http://www.people-press.org/2001/12/06/post-september-11-attitudes/>.

<sup>3</sup> PUBLIC RELIGION RESEARCH INSTITUTE, *Old Alignment, Emerging Fault Lines: Religion in the 2010 Election and Beyond* 17 (2010), available at <http://publicreligion.org/site/wp-content/uploads/2011/06/2010-Post-election-American-Values-Survey-Report.pdf>.

<sup>4</sup> See MUSLIM ADVOCATES, *Losing Liberty: The State of Freedom Ten years after the Patriot Act* 21 (2011), available at [http://d3n8a8pro7vhmx.cloudfront.net/muslimadvocates/pages/47/attachments/original/Losing\\_Liberty\\_The\\_State\\_of\\_Freedom\\_10\\_Years\\_After\\_the\\_Patriot\\_Act.pdf?1330650785](http://d3n8a8pro7vhmx.cloudfront.net/muslimadvocates/pages/47/attachments/original/Losing_Liberty_The_State_of_Freedom_10_Years_After_the_Patriot_Act.pdf?1330650785).



Muslims, more than twice the percentage of people who say the same about Christians, Jews, or Buddhists.<sup>5</sup>

Unsurprisingly, this societal trend has led to an increase in anti-Muslim incidents—in particular, hate crimes, reports of employment discrimination, anti-Muslim statements by public officials, and, as with the Al-Falah case, zoning ordinances precluding the construction or expansion of mosques.

**a. Anti-Muslim Hate Crimes Are on the Rise**

Violent hate crimes against American Muslims have increased dramatically in the last several years. In the immediate wake of the September 11, 2001 attacks there were widespread reports in the media of American Muslims and those perceived to be Muslim being subjected to violent hate crimes. Seeking “revenge for 9/11,” an Arizona man murdered Balbir Singh Modi, a Sikh American whom he mistakenly thought was Muslim;<sup>6</sup> a Texas man murdered Waqar Hassan, a recently arrived Pakistani

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<sup>5</sup> *Ibid.*

<sup>6</sup> Gabriel Elizondo, *No Bitterness 10 Years after Sikh Killing over 9/11*, AL-JAZEERA, Sept. 6, 2011, available at <http://blogs.aljazeera.com/blog/americas/no-bitterness-10-years-after-sikh-killing-over-911>.

immigrant, as well as Vasudev Patel, an Indian-American he thought to be Muslim, and shot and wounded Rais Bhuyan, a Bangladeshi-American.<sup>7</sup>

According to the FBI, there were 28 hate crimes targeting American Muslims in 2000, but 481 in 2001.<sup>8</sup> By the end of 2001, in fact, American Muslims shifted from being the second-*least* targeted religious group in the United States to the second-*most* targeted<sup>9</sup>—this despite the fact that they represent less than 1% (0.8%) of the country’s population.<sup>10</sup>

The wave of anti-Muslim hate crimes has continued in the years since 2001.<sup>11</sup> Between 2001 and 2009, the FBI reports that there were 1,552 incidents of hate crimes based on “anti-Islamic” bias, resulting in 1,785 separate offenses.<sup>12</sup> In one of the most striking examples of this crime wave, in August 2012, a white supremacist opened fire on worshipers at a Sikh

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<sup>7</sup> Bill Mears, *Texas Man Executed for Post-9/11 Murder*, CNN, July 20, 2011, *available at* <http://www.cnn.com/2011/CRIME/07/20/texas.execution/>.

<sup>8</sup> See FEDERAL BUREAU OF INVESTIGATION, HATE CRIME STATISTICS 7 (2000), *available at* <http://fbi.gov/about-us/cjis/ucr/hate-crime/2000>; FEDERAL BUREAU OF INVESTIGATION, HATE CRIME STATISTICS 9 (2001), *available at* <http://fbi.gov/about-us/cjis/ucr/hate-crime/2001>.

<sup>9</sup> Compare HATE CRIME STATISTICS (2000), *supra* note 8, at 9 with HATE CRIME STATISTICS (2001), *supra* note 8, at 9.

<sup>10</sup> PEW RESEARCH CENTER, *Mapping the Global Muslim Population: A Report on the Size and Distribution of the World’s Muslim Population* 24 (2009), *available at* <http://www.pewforum.org/files/2009/10/Muslimpopulation.pdf>.

<sup>11</sup> See generally *Losing Liberty*, *supra* note 4, at 26-29.

<sup>12</sup> *Id.* at 28.

gurdwara in Oak Creek, Wisconsin, killing six people in an attack many believe was motivated by anti-Muslim animus.<sup>13</sup>

Increasing violence against American Muslims is the most troubling example of larger societal intolerance of Muslims, but it is only one of the ways in which anti-Muslim animus has presented itself.

**b. Since September 11, 2001, There Has Been a Dramatic Rise in Equal Employment Opportunity Commission (EEOC) Cases Brought by American Muslims**

In the years since September 11, 2001, there has been a pronounced increase in employment discrimination against American Muslims. While, as stated, American Muslims represent less than 1% country's population, as of 2012, a full 20% of religious discrimination cases filed in the EEOC involved claims of discrimination against American Muslims.<sup>14</sup> American Muslims report a variety of incidents in the workplace, ranging from co-workers calling them "terrorist[s]" or "Osama" to employers "barring them from wearing head scarves or taking prayer breaks."<sup>15</sup>

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<sup>13</sup> Steven Yaccino, Michael Schwartz, & Marc Santora, *Gunman Kills 6 at Sikh Temple Near Milwaukee*, N. Y. TIMES, Aug. 6, 2012, available at [http://www.nytimes.com/2012/08/06/us/shooting-reported-at-temple-in-wisconsin.html?pagewanted=all&\\_r=0](http://www.nytimes.com/2012/08/06/us/shooting-reported-at-temple-in-wisconsin.html?pagewanted=all&_r=0).

<sup>14</sup> See U.S. EQUAL EMPLOYMENT OPPORTUNITY COMM'N, *Religion-Based Charges Filed from 10/01/2000 through 9/30/2011*, available at [http://www.eeoc.gov/eeoc/events/9-11-11\\_religion\\_charges.cfm](http://www.eeoc.gov/eeoc/events/9-11-11_religion_charges.cfm).

<sup>15</sup> See Laura W. Murphy & Michael Macleod Ball, *Written Statement of American Civil Liberties Union*, Senate Judiciary Subcommittee on the

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**c. Numerous Public Officials Have Made Explicitly Anti-Muslim Comments in Recent Years**

One of the most striking examples of growing societal tolerance of anti-Muslim hate can be seen in the dramatic rise of outrageously bigoted anti-Muslim statements from public officials.<sup>16</sup> In 2011, for instance, U.S. Representative Peter King of New York, chair of the House Homeland Security Committee, launched a series of hearings on the “radicalization” of the American Muslim community, refusing to expand the hearings to cover other non-Muslim-affiliated forms of domestic terrorism, despite the fact that these other forms constituted over 90% of the terrorist acts committed on American soil between 1980 and 2005.<sup>17</sup> In the process of scheduling these hearings, Representative King suggested that Muslims are somehow uniquely prone to violence.<sup>18</sup>

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Constitution, Civil Rights and Human Rights 5, Mar. 29, 2011, *available at* [http://www.aclu.org/files/assets/March\\_2011\\_Hearing\\_on\\_Muslim\\_Civil\\_Rights\\_Statement.pdf](http://www.aclu.org/files/assets/March_2011_Hearing_on_Muslim_Civil_Rights_Statement.pdf).

<sup>16</sup> See generally *Losing Liberty*, *supra* note 4, at 24-25.

<sup>17</sup> *Non-Muslims Carried Out More than 90% of All Terrorist Attacks on U.S. Soil*, WASHINGTON POST BLOG, May 1, 2013, *available at* <http://www.washingtonsblog.com/2013/05/muslims-only-carried-out-2-5-percent-of-terrorist-attacks-on-u-s-soil-between-1970-and-2012.html>.

<sup>18</sup> Jordy Yager, *Lawmaker Announces Second Hearing into Muslim-American Radicalization*, THE HILL, June 9, 2011, *available at* <http://thehill.com/homenews/house/165697-lawmaker-announces-second-muslim-radicalization-hearing->.

Just months later, in the summer of 2012, U.S. Representatives Michele Bachmann of Minnesota, Trent Franks of Arizona, Louie Gohmert of Texas, Thomas Rooney of Florida, and Lynn Westmoreland of Georgia, requested that the U.S. Departments of State, Homeland Security, Defense and Justice investigate the influence of Egypt's Muslim Brotherhood on their internal policies and on the activities of American Muslims employed within those departments and agencies.<sup>19</sup> In other words, these members of Congress were suggesting that a foreign, Muslim-identifying political party had somehow infiltrated major portions of the American government, and that American Muslims employed within particular high-profile departments and agencies were carrying out this foreign political party's subversive agenda. These Representatives offered no evidence in support of their theories.

Public officials have also weighed in specifically on the construction of mosques. In September 2007, for instance, Representative King stated in an interview that "there are too many mosques in this country,"<sup>20</sup>—no

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<sup>19</sup> Lauren Fox, *Michele Bachmann Sticks to Accusations About Muslim Brotherhood*, U.S. NEWS & WORLD REPORT, July 19, 2011, available at <http://www.usnews.com/news/articles/2012/07/19/michele-bachmann-sticks-to-accusations-about-muslim-brotherhood>.

<sup>20</sup> *Representative Peter King: There Are "Too Many Mosques,"* POLITICO, Sept. 19, 2007, available at

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doubt a surprise to the many Muslim communities that have struggled to find safe and permanent spaces in which to worship. In 2010, at the height of the public outcry against Park51, the proposed multi-use Muslim community center in Lower Manhattan,<sup>21</sup> former Speaker of the House of Representatives Newt Gingrich of Georgia opined that locating such a facility two blocks from the site of the September 11, 2001 attacks would symbolize Muslim “triumphalism” and was akin to “putting a Nazi sign next to the Holocaust Museum . . . It’s profoundly and terribly wrong.”<sup>22</sup> Putting aside his preposterous claim that the American Muslim attendees of this Islamic Center and the perpetrators of the attacks on the World Trade Center share a common “Nazi”-like cause, former Speaker Gingrich also failed to place any value on the fact that the community center would reaffirm the country’s commitment to freedom of religious observance. In this way,

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[http://www.politico.com/blogs/thecrypt/0907/Rep\\_King\\_There\\_are\\_too\\_many\\_mosques\\_in\\_this\\_country\\_.html](http://www.politico.com/blogs/thecrypt/0907/Rep_King_There_are_too_many_mosques_in_this_country_.html) (note Rep. King later attempted to withdraw the comment).

<sup>21</sup> See generally *Anti-Park51 Protest Featuring Right-Wing Media Loaded with Anti-Muslim Hate*, MEDIA MATTERS FOR AMERICA, Sept. 13, 2010, available at <http://mediamatters.org/research/2010/09/13/anti-park51-protest-featuring-right-wing-media/170549>.

<sup>22</sup> Edward Wyatt, *Three Republicans Criticize Obama’s Endorsement of Mosque*, N. Y. TIMES, Aug. 14, 2010, available at <http://www.nytimes.com/2010/08/15/us/politics/15reaction.html>.

Park51 would be a testament to common *American* values as much as it would be anything else.

More to the point, expressions of bigotry have a ripple effect, extending beyond the headlines in the next day's newspaper. For instance, in 2012, then-Representative Joe Walsh of Illinois, said, “. . . There is a radical strain of Islam in this country—it's not just over there—trying to kill Americans every week. It is a real threat, and it is a threat that is much more at home now than it was after 9/11.”<sup>23</sup> A few days later, in Morton Grove, Illinois, a town a few miles from the where then-Representative Walsh made his comments and the site of a disputed proposed mosque,<sup>24</sup> a man fired air rifle shots at a different mosque in the community.<sup>25</sup> Two days after that,

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<sup>23</sup> Rebecca Leber, *GOP Rep. Joe Walsh: Muslims Are 'Trying To Kill Americans Every Week,'* THINKPROGRESS, Aug. 13, 2012, available at <http://thinkprogress.org/justice/2012/08/13/679561/gop-rep-joe-walsh-muslims-are-trying-to-kill-americans-every-week/#>.

<sup>24</sup> See U.S. DEP'T OF JUSTICE, RELIGIOUS FREEDOM IN FOCUS (Nov./Dec. 2004), available at [http://www.justice.gov/crt/spec\\_topics/religiousdiscrimination/newsletter/focus\\_8.htm](http://www.justice.gov/crt/spec_topics/religiousdiscrimination/newsletter/focus_8.htm) (discussing issuance of a zoning permit to the Muslim Community Center in the Village of Morton Grove, following several mediations).

<sup>25</sup> *David Conrad Charged With Firing Shots At Chicago-Area Mosque,* HUFFINGTON POST, Aug. 12, 2012, available at [http://www.huffingtonpost.com/2012/08/12/david-conrad-charged-with\\_n\\_1770314.html](http://www.huffingtonpost.com/2012/08/12/david-conrad-charged-with_n_1770314.html).

someone threw an improvised explosive device at a Muslim school in Lombard, Illinois, a city in then-Representative Walsh's district.<sup>26</sup>

## II. ANTI-MUSLIM ANIMUS AND THE RECENT HISTORY OF MOSQUE OPPOSITIONS

Anti-Muslim hate—and fear of Muslims—has also fed the growing resistance to mosques, both in the court of public opinion<sup>27</sup> and in the context of RLUIPA cases specifically. In fact, in 2010, U.S. Attorney General Eric Holder called anti-Muslim hate “the civil rights issue of our time.”<sup>28</sup>

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<sup>26</sup> Edward McLelland, *Quinn Calls Walsh “Worst Congressman in America,”* NBC CHICAGO, Aug. 15, 2012, available at <http://www.nbcchicago.com/blogs/ward-room/Quinn-Calls-Walsh-Worst-Congressman-in-America-166282386.html>.

<sup>27</sup> See, e.g., Treene, *supra* note 1, at 348 (“A November of 2010 USA Networks poll found that 38% of respondents would oppose a mosque in their neighborhood, compared to the 34% who would oppose a Scientology center, 24% who would oppose a Mormon temple, 13% who would oppose a synagogue, and 8% who would oppose a church.”) (citing *United or Divided: Americans’ Attitude on Unity, Divisions, and Discrimination in the USA*, PUBLIC OPINION STRATEGIES AND HART RESEARCH ASSOCIATES 3 (2010)); ACLU, *Map—Nationwide Anti-Muslim Activity*, available at <http://www.aclu.org/maps/map-nationwide-anti-mosque-activity> (documenting 60 examples of anti-mosque incidents between 2007-2012); PEW RESEARCH CENTER’S FORUM ON RELIGION & PUBLIC LIFE, *Controversies Over Mosques and Islamic Centers Across the U.S.*, Sept. 27, 2012, available at <http://features.pewforum.org/muslim/2012Mosque-Map.pdf> (documenting 53 examples of “mosques and Islamic centers that have encountered community resistance” between 2009-2012, including Al-Falah).

<sup>28</sup> *Protecting the Civil Rights of American Muslims: Hearing Before the U.S. Senate Judiciary Subcommittee on the Constitution, Civil Rights and Human Rights*, 112th Cong. 8 (2011) (statement of Farhana Khera, Executive Director, Muslim Advocates).



**a. Recent RLUIPA Litigation Highlights Anti-Muslim Animus**

In the context of RLUIPA, mosque zoning denials are often rooted in anti-Muslim animus. As stated previously, American Muslims make up less than 1% of the country's population.<sup>29</sup> However, of the 51 RLUIPA land-use investigations the U.S. Department of Justice ("Justice Department") initiated in the first decade since the statute passed, a full 14% involved mosques or other Muslim-community-associated structures.<sup>30</sup> Recent figures suggest this number has grown dramatically since 2010. Writing in 2012, Eric Treene, Special Counsel for the Justice Department's Civil Rights Division, stated that the Justice Department "has opened twenty-seven RLUIPA matters involving mosques and Muslim schools since RLUIPA passed. Of these, *seventeen have been opened since May of 2010.*"<sup>31</sup> In other words, organized efforts at local levels to undermine the spirit and letter of RLUIPA and to stop a minority faith from being able to build or expand its worship facilities have been so egregious that they have captured the attention of the nation's top law enforcement agency—and, increasingly,

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<sup>29</sup> PEW RESEARCH CENTER, *supra* note 10, at 24.

<sup>30</sup> U.S. DEP'T OF JUSTICE, REPORT ON THE TENTH ANNIVERSARY OF THE RELIGIOUS LAND USE AND INSTITUTIONALIZED PERSONS ACT 6 (2010), *available at* [http://www.justice.gov/crt/publications/post911/post911summit\\_report\\_2012-04.pdf](http://www.justice.gov/crt/publications/post911/post911summit_report_2012-04.pdf) (hereafter "DOJ RLUIPA Anniversary Report").

<sup>31</sup> Treene, *supra* note 1, at 332 (emphasis added).

that agency has had to intervene. In a number of these cases, there have been extensively documented allegations of naked animus against the local Muslim community.

In one such case, *United States v. City of Lilburn, Ga.*,<sup>32</sup> which was settled by consent decree in 2011,<sup>33</sup> there were allegations in the Complaint that “City residents . . . communicated their hostility to the Islamic Center’s plans for the mosque by making discriminatory comments to City officials, by sending letters and other communications to City officials expressing hostility to the Islamic Center, and by taking other actions displaying their hostility to the Islamic Center,” as well as allegations that “[c]ity officials . . . made hostile remarks about Muslims and members of the Islamic Center.”<sup>34</sup>

In *United States v. Henrico*,<sup>35</sup> which was also resolved by consent order in 2011,<sup>36</sup> there were similar allegations to those in *Lilburn*: “County residents communicated . . . their hostility to the Mosque’s plan to obtain

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<sup>32</sup> No. 1:11-cv-02871-JOF (N.D. Ga. Aug. 26, 2011).

<sup>33</sup> Consent decree, *id.*, available at <http://www.justice.gov/crt/about/hce/documents/lilburnsettle.pdf>.

<sup>34</sup> Complaint, *supra* note 32, available at <http://www.justice.gov/crt/about/hce/documents/lilburncomp.pdf>; see also Treene, *supra* note 1, at 349 (discussing *Lilburn* Complaint).

<sup>35</sup> No 3:11-cv-583-HEH (E.D. Va. Sept. 6, 2011).

<sup>36</sup> Consent Decree, *id.*, available at <http://www.justice.gov/crt/about/hce/documents/henricosettle.pdf>.

rezoning by making comments and sending communications to County officials expressing hostility to the Mosque . . . .”<sup>37</sup> County officials, in turn, made “derogatory and discriminatory statements” about the proposed mosque.<sup>38</sup>

The circumstances surrounding the RLUIPA cases brought by Muslim community groups, and in which the Justice Department has filed an *amicus* brief, are consistent with those in *Lilburn* and *Henrico*. For instance, there were substantial allegations of anti-Muslim animus in *Albanian Associated Fund v. Twp. of Wayne*,<sup>39</sup> a case in which a New Jersey township delayed a proposed mosque’s application for a zoning permit for over three years before eventually trying to seize the property at issue through an exercise of eminent domain.<sup>40</sup> According to the Justice Department’s *amicus* brief, a group of neighbors “attended every Planning Board hearing relating to the Mosque’s application and made known its hostility to the Mosque and to Moslem [sic] prayer rituals and religious practices.”<sup>41</sup>

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<sup>37</sup> Complaint at 4, *supra* note 35, at 4, available at <http://www.justice.gov/crt/about/hce/documents/henicocomp.pdf>.

<sup>38</sup> *Id.* at 4-5.

<sup>39</sup> No. 06-CV-3217 (PGS), 2007 WL 2904194 (D.N.J. Oct. 1, 2007).

<sup>40</sup> *Id.* at \*3; DOJ RLUIPA Anniversary Report, *supra* note 30, at 9.

<sup>41</sup> Brief for the United States as *Amicus Curiae* in Opposition to Defendants’ Motion for Summary Judgment, *Albanian Associated Fund*,

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Perhaps the most egregious example of pure anti-Muslim animus in the mosque zoning context began in Murfreesboro, Tennessee in 2010. Staunchly opposed to a local Muslim community group's proposed development of a mosque, a group of residents brought suit seeking to enjoin its construction,<sup>42</sup> arguing, among other things, that Islam may not be a First Amendment protected religious belief.<sup>43</sup> As Special Counsel Treene documents, the proposed mosque "met with vociferous community opposition, including the spray-painting of 'not welcome' on a construction sign, the destruction of a second sign, a firebombing of construction equipment at the site, and . . . a bomb threat."<sup>44</sup> During one hearing in the case, an attorney for the plaintiffs said of the Murfreesboro Muslim community, "these are the same people who flew jets into the World Trade Center on 9/11."<sup>45</sup> The Justice Department filed an *amicus* brief in

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*supra* note 39, at 22, available at

[http://www.justice.gov/crt/about/hce/documents/albanian\\_brief.pdf](http://www.justice.gov/crt/about/hce/documents/albanian_brief.pdf).

<sup>42</sup> *Estes v. Rutherford County Reg'l Planning Comm'n*, No. 10CV-1443 (Ch. Ct. for Rutherford County Oct 18, 2010).

<sup>43</sup> Brief for the United States as Amicus Curiae, *id.*, ("DOJ *Amicus* Brief in *Estes*"), at 2, available at [http://www.justice.gov/crt/spec\\_topics/religiousdiscrimination/rutherford\\_amicus\\_brief.pdf](http://www.justice.gov/crt/spec_topics/religiousdiscrimination/rutherford_amicus_brief.pdf).

<sup>44</sup> Treene, *supra* note 1, at 350.

<sup>45</sup> Rachel Slajda, *TN Mosque Trial Continues: 'Your Honor, This Is A Circus,'* TALKING POINTS MEMO, Oct. 21, 2010, available at <http://talkingpointsmemo.com/muckraker/tn-mosque-trial-continues-your-honor-this-is-a-circus>.

opposition to the plaintiffs' claims,<sup>46</sup> and the Court eventually dismissed the suit.

Later, however, the plaintiffs filed a second suit arguing that the county had failed to issue sufficient notice for the hearings on the mosque's application for a permit, thereby violating the state's open meeting laws.<sup>47</sup> Following a trial, the court found in the plaintiffs' favor, voiding the planning commission's approval of the proposed mosque site.<sup>48</sup> As a result, the Justice Department brought suit against the county in federal court, arguing that the court's order violated RLUIPA and thus should be enjoined.<sup>49</sup> The Federal Court granted the injunction,<sup>50</sup> finally allowing the Murfreesboro mosque to be completed and put into use.

**b. Recent RLUIPA Cases Reveal How Pretextual Reasons Can Mask Anti-Muslim Animus**

Of course, not all mosque zoning denial cases brought under RLUIPA contain allegations of explicit anti-Muslim animus. In some cases, community opposition groups and government officials do not voice open

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<sup>46</sup> See DOJ Amicus Brief in *Estes*, *supra* note 43.

<sup>47</sup> *Fisher v. Rutherford County Reg'l Planning Comm'n*, No. 10cv-1443 (Ch. Ct. for Rutherford County. June 1, 2012).

<sup>48</sup> *Ibid.*

<sup>49</sup> *United States v. Rutherford County*, 2012 WL 2930076 (M.D. Tenn. July 18, 2012).

<sup>50</sup> *Ibid.*

hostility to the local Muslim groups seeking to build a mosque or otherwise make their discriminatory intent known,<sup>51</sup> but these Muslim groups' permit applications are nevertheless denied on pretextual grounds—*e.g.*, supposed traffic issues not supported by data. In other cases, there are allegations of *both* naked animus *and* pretextual grounds underlying mosque permit denials.

In *United States v. City of Lomita*,<sup>52</sup> which was settled by agreed order<sup>53</sup> in 2013, the Justice Department brought a lawsuit against a California city that had denied a permit application from the Islamic Center

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<sup>51</sup> As discussed in note 1, *supra*, RLUIPA does not require discriminatory intent to be proved in order for a claim thereunder to be successful, which is why local governments who attempt to shroud their underlying animus in pretextual reasons are nonetheless subject to the statute. There are a number of cases that show how burdensome it would be, generally speaking, to require civil rights plaintiffs to show discriminatory intent. *See, e.g., U.S. Postal Serv. Bd. of Governors v. Aikens*, 460 U.S. 711, 716 (1983) (“All courts have recognized that the question facing triers of fact in discrimination cases is both sensitive and difficult. The prohibitions against discrimination contained in the Civil Rights Act of 1964 reflect an important national policy. There will seldom be “eyewitness” testimony as to the employer's mental processes.”); *Jackson v. Univ. of Pittsburgh*, 826 F.2d 230, 236 (3d Cir. 1987), *cert. denied*, 484 U.S. 1020 (1988) (“Discrimination victims often come to the legal process without witnesses and with little direct evidence indicating the precise nature of the wrongs they have suffered.”); *Aman v. Cort Furniture Rental Corp.*, 85 F.3d 1074, 1081–82 (3d Cir. 1996) (discussing the difficulty in proving discriminatory intent and the need for circumstantial evidence).

<sup>52</sup> No. 2:13-cv-00708-MMM-CW (C.D. Cal. Mar. 8, 2013).

<sup>53</sup> Agreed Order, *id.*, available at <http://www.justice.gov/crt/about/hce/documents/lomitasettle.pdf>.

of South Bay (“ICSB”). ICSB was seeking to tear down outdated structures on its property and build an entirely new multi-use facility, which would include a mosque, classrooms, washing facilities and a nursery.<sup>54</sup> There were no specific allegations in the Justice Department’s Complaint of anti-Muslim animus. However, according to a separate lawsuit brought by ICSB itself, the city discriminated against the group by pretext, following neighbors’ concerns that the proposed design would increase traffic.<sup>55</sup> The City’s own Public Safety Traffic Commission determined the proposed design would *improve*, not exacerbate, traffic and parking conditions.<sup>56</sup>

In another case, *Moxley v. Walkersville*,<sup>57</sup> a small Maryland community made up of the minority Ahmediyya Muslim sect sought a special use permit to construct a mosque in an agricultural zone. There was a stated exception in the town’s governing ordinance allowing for houses of worship to do so.<sup>58</sup> Ultimately, the town denied the group’s application, with the Board of Appeals citing a litany of reasons in support of its

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<sup>54</sup> Complaint, *supra* note 52, at 4-5, available at <http://www.justice.gov/crt/about/hce/documents/lomitacomp.pdf>.

<sup>55</sup> See Ruben Vives, *Complaint Filed over Lomita’s Denial of Bid for New Mosque*, LOS ANGELES TIMES, Mar. 21, 2012, available at <http://articles.latimes.com/2012/mar/22/local/la-me-lomita-mosque-20120322> (discussing ICSB’s lawsuit).

<sup>56</sup> Complaint, *supra* note 52, at 6.

<sup>57</sup> 601 F. Supp. 2d 648 (D. Md. 2009).

<sup>58</sup> *Id.* at 653.

decision, including concerns about traffic flow, water usage, strained sewer facilities, and the impact on fire and rescue services.<sup>59</sup> All of these, however, appear to be pretextual grounds for denying the Muslim group's special exception permit. As Douglas Laycock of the University of Virginia Law School, a highly regarded religious freedom scholar, and Luke Goodrich of the Becket Fund for Religious Liberty observe, "During the same period . . . the zoning board approved a larger school on a smaller parcel in an agricultural area. The Board also permitted an annual carnival that was larger than the Muslim group's event [sic] just 200 yards from the Muslim group's property . . . .Was this a case of religious discrimination? We certainly think so . . . ." <sup>60</sup>

In addition, *Walkersville* contained underlying facts suggesting open animus against the Ahmediyya community: there were allegations that town commissioners plotted in secret with residents to bar the Ahmediyya group from developing the property,<sup>61</sup> and media coverage detailed anti-Muslim

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<sup>59</sup> *Id.* at 656.

<sup>60</sup> Laycock & Goodrich, *supra* note 1, at 1030-31.

<sup>61</sup> *Walkersville*, *supra* note 57, at 654, 663.



sentiments from town officials, including remarks falsely charging the Ahmediyya community with ties to the September 11, 2001 attacks.<sup>62</sup>

*Lilburn*, discussed in the preceding section, also involved a city's pretextual changes to its zoning laws in order to prevent mosque construction. An amendment to the governing zoning ordinance increased the minimum acreage requirement for houses of worship,<sup>63</sup> rendering the proposed mosque expansion impossible.<sup>64</sup> Notably, this was the second time the city had implemented an acreage requirement change to its zoning laws; in the previous instance, the change also prevented an Islamic center from locating in the city.<sup>65</sup>

**c. The Al-Falah Case is Entirely Consistent with the Recent History of Mosque Zoning Denial Cases under RLUIPA**

The allegations underlying the case at hand are strikingly similar to the allegations in the cases above. In denying the Township's Motion for Summary Judgment and issuing a Preliminary Injunction prohibiting the

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<sup>62</sup> *Id.* at 655 (“Muslims are a whole different culture from us, . . . . The situation with the Muslims is a touchy worldwide situation, so people are antsy over that”; “But for the most part people, I don't know if they're dramatically upset, but they are definitely concerned, I—like me, I am concerned myself, . . . I understand the world climate, I understand what's going on. I do remember . . . 9/11 very vividly so it's only that thing sticks in your mind . . . .”).

<sup>63</sup> Complaint, *Lilburn*, *supra* note 32, at 4-5.

<sup>64</sup> *Ibid.*

<sup>65</sup> *Ibid.*

enforcement of Ordinance 11-03, which rendered Al-Falah's proposed mosque invalid under the zoning laws, the District Court cited numerous allegations of anti-Muslim animus.<sup>66</sup> When supporters of Al-Falah spoke at a public hearing on the permit application for the mosque, some members of the audience said, "Get out of here," "Get out of Bridgewater," and "Go somewhere else."<sup>67</sup> Their organized approach to protesting Al-Falah's permit application and their use of blatantly anti-Muslim rhetoric is clearly reminiscent of the communities in *Lilburn* and *Henrico*.

There was also naked animus from one of the Township Council members herself, who insisted that the proposed mosque be built elsewhere and made clear that, even if the mosque application were granted, future requests for modifications would be "heavily scrutinized."<sup>68</sup>

Additionally, the District Court Order considered in great detail documented reports Al-Falah made about the proposed mosque's negligible impact on traffic, which suggested the Township's reliance on traffic issues

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<sup>66</sup> Memorandum Opinion (*i.e.*, Order appealed from; hereafter "the District Court Order") at 14.

<sup>67</sup> *Ibid.*

<sup>68</sup> *Ibid.*

and their attendant effect on neighborhood character were merely a pretextual justification for its passage of Ordinance 11-03.<sup>69</sup>

### CONCLUSION

In recent years, American Muslims have had to endure an increase in hate crimes, discrimination in the work place, bigotry from their own elected officials, and mosque zoning denials. Ultimately, the story of Al-Falah—deeply frustrating for the Plaintiffs-Appellees who have had to endure it for the last three years—is a sadly familiar one. Typically quiet zoning board meetings become staging grounds for vehement anti-Muslim protests. Even when these Muslim community groups are spared overt bias and hostility, their applications are denied on the basis of a suspect traffic study, or unsupported water or noise concerns.

While local governments may cite anodyne reasons for their zoning denials, *Lomita*, *Walkersville*, *Lilburn*, and the other cases discussed above make clear that mosque opposition cases cannot be viewed in isolation.

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<sup>69</sup> See, e.g., *id.* at 4-5, 9, 17-18.

It is essential, therefore, that when deciding on the Township's appeal, this Court consider Al-Falah in the larger context of how anti-Muslim bias is experienced and as the latest in a long line of animus-based mosque zoning denial cases.

Respectfully submitted,

                  /s/ Glenn Katon

Dated: February 27, 2014

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**CERTIFICATIONS UNDER FEDERAL AND LOCAL APPELLATE  
RULES**

I certify that the text of this brief, as electronically filed, is identical to the paper copies submitted to the Clerk of the Court.

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**CERTIFICATE OF BAR MEMBERSHIP**

I certify that I am a member in good standing of the Bar of the United States Court of Appeals for the Third Circuit.

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I certify that on this, the 27th day of February, 2014, I caused this brief to be filed electronically with the Clerk of the Court using the CM/ECF System, which will in turn send notices of the filing to the following registered CM/ECF users:

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I further certify that through my office I have made arrangements for the required number of bound copies of this brief to be sent to the Clerk of this Court. I have also emailed copies of the brief to the above-listed counsel for the Defendants-Appellants and for the Plaintiffs-Appellees.

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