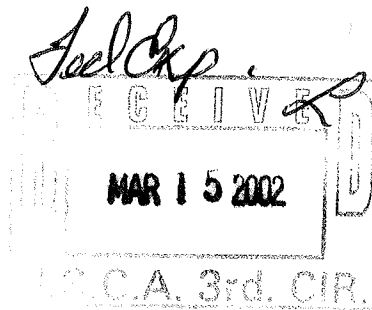


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March 14, 2002

Honorable Marcia M. Waldron
Office of the Clerk
United States Court of Appeals
for the Third Circuit
21400 United States Courthouse
601 Market Street
Philadelphia, PA 19106-1790

Re: *Tenafly Eruv Association, Inc. v. The Borough of Tenafly*,
No. 01-3301 -- Listed: Thursday, March 21, 2002

Dear Ms. Waldron:

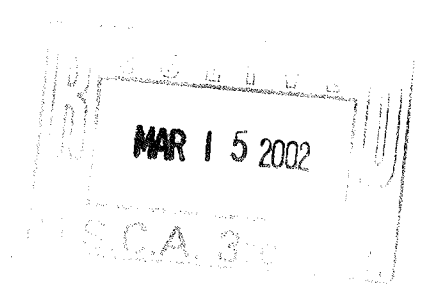
This letter brief responds to your invitation of March 8, 2002, on behalf of the Court for the parties to "comment on whether the District Court properly classified the lechis as symbolic speech under the First Amendment" with specific reference to "the likelihood of audience understanding prong." The lechis plainly qualify under precedents of the Supreme Court and lower federal courts as symbolic speech.

Speech need not be heard by everyone or understood similarly by everyone to be protected by the First Amendment. In *Spence v. Washington*, 418 U.S. 405 (1974), the defendant hung an American flag upside-down and superimposed a peace symbol over it. To many observers, this display of the flag was puzzling; the Court acknowledged that it "might be interpreted as nothing more than bizarre behavior." 418 U.S. 410. The defendant testified that it was intended "as a protest against the invasion of Cambodia and the killings at Kent State University." 418 U.S. at 408. But that message was not clearly and unambiguously articulated by the symbolism of the upside-down flag bearing a peace symbol.

A range of conduct that might not initially be thought "expressive" has been found to be symbolic speech protected by the First Amendment. For example, "begging is speech entitled to First Amendment protection." *Smith v. City of Fort Lauderdale, Fla.*, 177 F.3d 954, 956 (11th Cir. 1999), cert. denied, 528 U.S. 966 (2000), citing *Loper v. New York City Police Dept.*, 999 F.2d 699, 704 (2d Cir. 1993). Even the erection of tables from which t-shirts are to be sold has

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been held by some federal courts to be constitutionally protected expressive activity. Compare *One World One Family Now v. City of Miami Beach*, 175 F.3d 1282, 1285-1286 (11th Cir. 1999), with *International Caucus of Labor Committees v. City of Chicago*, 816 F.2d 337, 339 (7th Cir. 1987).

In the present case, 183 additional plastic strips, which constituted “lechis” for an eruv, were attached to Tenaflly’s utility poles. These plastic strips communicated a religious message to the Orthodox Jewish residents of Tenaflly (“you may carry your prayer-books and wheel your strollers to the synagogue on the Sabbath”) and a different message to the non-Jewish or non-Sabbath-observing residents of Tenaflly (“Tenaflly welcomes to its midst Sabbath-observing Jews who cannot carry on Saturdays without an eruv”). We acknowledge that these messages were understood by less than all of Tenaflly’s residents, and that not all the residents saw the lechis or heard any message whatever. But differences of understanding and the failure to reach the entire audience did not diminish the communicative quality of the “lechis.”

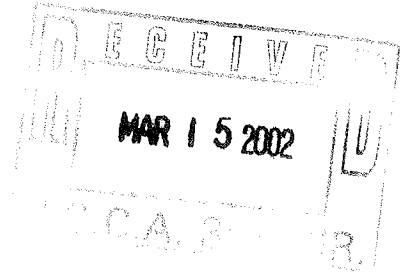
The paradigmatic modern symbolic-speech Supreme Court case was *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969), which concerned black armbands worn in an Iowa public high school. Only a few students in a total population of 18,000 wore the armbands, and it is not clear from the Court’s opinion that those who saw the five students who were disciplined for wearing the armbands (393 U.S. at 508) understood the message that the students intended to deliver. In the flag-burning cases, *Texas v. Johnson*, 491 U.S. 397 (1989), and *United States v. Eichman*, 496 U.S. 310 (1990), the Court assumed that flag-burning was “expressive conduct” without analyzing how the audience understood the defendants’ acts.

Indeed, in *Capitol Square Review and Advisory Board v. Pinette*, 515 U.S. 753 (1975), the Ku Klux Klan’s cross was treated as a religious symbol by a majority of the Court (515 U.S. at 757-770) but was viewed as a “nonreligious . . . symbol of hate” by Justice Thomas (515 U.S. at 770-773). No one disagreed, however, that the cross was an expressive symbol and that its display amounted to constitutionally protected symbolic speech.

A classic instance of symbolic speech that was understood by a very small portion of the audience as expression is the conduct of civil rights “sit-in demonstrators” at segregated lunch counters in the South. Justice Harlan said, in a famous concurring opinion in *Garner v. Louisiana*, 368 U.S. 157, 201-202 (1961) (citations omitted):

There was more to the conduct of those petitioners than a bare desire to remain at the “white” lunch counter and their refusal of a police request to move from the counter. We would surely have to be blind not to recognize that petitioners were sitting at these

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counters, where they knew they would not be served, in order to demonstrate that their race was being segregated in dining facilities in this part of the country.

Such a demonstration, in the circumstances of these two cases, is as much a part of the "free trade in ideas" as is verbal expression, more commonly thought of as "speech." It, like speech, appeals to good sense and to "the power of reason as applied through public discussion" just as much as, if not more than, a public oration delivered from a soapbox at a street corner. This Court has never limited the right to speak, a protected "liberty" under the Fourteenth Amendment, to mere verbal expression. If the act of displaying a red flag as a symbol of opposition to organized government is a liberty encompassed within free speech as protected by the Fourteenth Amendment, the act of sitting at a privately owned lunch counter with the consent of the owner, as a demonstration of opposition to enforced segregation, is surely within the same range of protections.

The affidavits and testimony of the Tenaflly Borough Council Members confirm that the lechis, as part of the total eruv, definitely communicated a message to them. *See* our Principal Brief, pp. 6-7. And the statements at the public hearings conducted on November 28 and December 12, 2000, prove that the presence of the "lechis" on the utility poles communicated a wide range of messages to the residents of Tenaflly. *See* Brief for Tenaflly Eruv Association, Inc., pp. 13-14. Hence the lechis were properly classified as symbolic speech by the District Court.

The fact that the lechis *also* served a functional purpose -- *i.e.*, they comprised part of the eruv -- did not diminish their expressive quality. In *Allegheny County v. Greater Pittsburgh ACLU*, 492 U.S. 573 (1989), the Supreme Court recognized that a Chanukah menorah that was part of Pittsburgh's December Holiday Display was an expressive symbol, even though the Court meticulously described how the menorah is an essential part of the religious observance of the Jewish holiday of Chanukah. 492 U.S. at 583-585. The same is true of the visible components of an eruv. They deliver messages to various members of the community by their symbolism even while serving a practical religious function.

In summary, the decided cases establish that a physical object displayed to the public constitutes "symbolic speech" if those who observe it can discern a message directed to them. This principle applies (1) even if the intended message is understood by few in the audience, (2) the symbol transmitting the message is not obvious to the entire public-at-large, (3) the symbol

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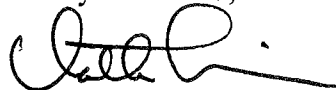
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conveys different messages to different people, and (4) the symbol serves a functional purpose as well as a symbolic role.

Respectfully submitted,



Nathan Lewin

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Yosifa Book, and Stephen Brenner*

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