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March 14, 2002

The Honorable Richard L. Nygaard, U.S.C.J.
The Honorable Jane R. Roth, U.S.C.J.
The Honorable Thomas L. Ambro, U.S.C.J.
c/o Office of the Clerk
United States Court of Appeals for the Third Circuit
21400 U.S. Courthouse
601 Market Street
Philadelphia, PA 19106-1790.

Tenafly Eruv Association v. Borough of Tenafly
No. 01-3301

May it Please the Court:

Amicus curiae American Civil Liberties Union of New Jersey ("ACLU-NJ") respectfully submits this letter brief in response to the Court's request that counsel address "whether the District Court properly classified the lechis as symbolic speech under the First Amendment."

Amicus ACLU-NJ believes that the District Court correctly characterized the lechi and the eruv as "symbolic speech" for purposes of the First Amendment. Although, as described in its principal brief, amicus believes that permanent symbolic religious displays on government property raise other constitutional issues under the Establishment Clause, it believes that the lechi are both intended to convey a message, i.e. portrayal of a symbolic boundary separating a private domain from a public domain for purposes of Jewish religious law, and are understood by the intended audience as communicating that message. Thus, the "activity was sufficiently imbued with elements of communication to fall within the scope of the First and Fourteenth Amendments" Spence v. Washington, 418 U.S. 405, 409-10 (1974).

The fact that the precise message underlying the lechi may not be understood by all casual passersby does not detract from its status as expression. As the Supreme Court has noted, "a narrow, succinctly articulable message is not a condition of constitutional protection." Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston, 515 U.S. 557, 569 (1995) (emphasis added). As the Court further observed: "if confined to expressions conveying a 'particularized message,' [the First Amendment] would never reach the unquestionably shielded

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painting of Jackson Pollock, music of Arnold Schoenberg, or Jabberwocky verse of Lewis Carroll." Id.

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Spence makes clear that the factors to be considered in determining whether an activity constitutes symbolic speech include "the nature of [the] activity, combined with the factual context and environment in which it was undertaken." Indeed, "the context may give meaning to the symbol." Spence, 418 U.S. at 410. Context is therefore a vital consideration in determining whether the lechi constitute symbolic speech in this case, just as it was essential in making the same determination in most of the other celebrated symbolic speech cases. Without a knowledge of context, the casual observer would not have understood that: (1) the black armbands worn by the students in Tinker v. Des Moines School District, 393 U.S. 503 (1969), were a protest against the Vietnam War; (2) the burning of the U.S. flag by the defendant in Texas v. Johnson, 491 U.S. 397 (1989), was a protest against the renomination of Ronald Reagan for President by the Republican National Convention; or (3) the display of the flag affixed with a peace symbol in Spence was a protest against then-recent actions in Cambodia and fatal events at Kent State University. Yet each of these activities was found unquestionably to constitute protected symbolic speech. So too, in this case, while the casual passerby uninformed about the factual and historical setting of the lechi may not understand their symbolic significance, the expressive nature of the eruv would be clearly communicated to anyone who was aware of that setting. For purposes of determining whether a symbol constitutes speech, therefore, the court must assume that the observer is aware of the surrounding context.

Furthermore, this Court has expressly rejected any requirement that, in order to constitute symbolic speech, the actor must have "an intent to convey a particularized message . . . and in the surrounding circumstances the likelihood [must be] great that the message would be understood by those who viewed it." Troster v. Pennsylvania Dep't of Corrections, 65 F.3d 1086, 1090 (1995) (holding that prior test of Steirer by Steirer v. Bethlehem Area Sch. Dist., 987 F.2d 989 (3d Cir. 1993) had been superseded by Supreme Court in Hurley). Thus, there is no quantitative requirement that the message be understood by all or even most of those who happen to view the symbol. In this case, it is more than sufficient that the message conveyed by the eruv was understood by its intended audience, i.e. members of the Orthodox Jewish community, for whom the lechi are laden with cultural, religious, and historical meaning.

For the foregoing reasons, amicus curiae ACLU-NJ submits that the lechi that constitute the eruv in the Borough of Tenafly constitute symbolic speech. While we consider the lechi to be symbolic speech, however, they are religious symbolic speech on non-forum public property, and therefore their display constitutes an Establishment Clause violation for the reasons set out in our initial brief. See Amicus ACLU-NJ's Initial Brief at 12-23. Thus, the judgment of the district court should be affirmed.

Respectfully submitted,



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cc: counsel (attached)

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