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March 14, 2002

Via Federal Express

Marcia A. Waldron, Clerk
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21400 United States Courthouse
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Philadelphia, PA 19106-1790

RE: Tenafly Eruv Ass'n, et al, Appellants v. The Borough of Tenafly, et al.; No. 01-3301

Dear Ms. Waldron:

This letter is in response to the March 8, 2002 letter from the Court advising the parties to comment on whether the District Court properly classified the rubber strips affixed to the Borough's utility poles as expressive speech, rather than conduct, under the First Amendment.

The Borough of Tenafly (hereinafter "the Borough") has steadfastly maintained that the religious accommodation Appellants seek from the Borough Council constitutes conduct, not expressive speech. See Tenafly Eruv Ass'n v. Borough of Tenafly, 155 F.Supp.2d 142, 173 (D.N.J.

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2001) (noting Borough's position). It remains the Borough's position that Appellants did not meet their burden of showing that the mere attachment of unobtrusive rubber strips, or *lechis*, to the Borough's utility poles, as required by Orthodox Jewish law to create an *eruv*, rises to the level of expressive communication necessary to qualify for the protection of the Free Speech Clause of the First Amendment.

Therefore, this Court should recognize that the District Court erred in finding that attaching the rubber strips constituted speech. Because Appellants' free-speech claims fail at the threshold level, this Court need not review the District Court's ultimate finding that the Borough did not violate Appellants' free-speech rights. The only issue that would then remain before the Court is whether the District Court committed clear error in finding that the Borough did not target Appellants for religious discrimination under the Free Exercise Clause, and whether the District Court's denial of the preliminary injunction was an abuse of discretion. For the reasons expressed in the Borough's briefs, no such clear error exists, and the decision below should be upheld as to its result.

I. The Standard for Determining Whether Conduct Rises to the Level of Expressive Speech

The legal standard for evaluating whether the rubber strips should be considered conduct or speech derives from *Spence v. Washington*, 418 U.S. 405, 410-11 (1974), which "has emerged as the primary guidepost in determining whether conduct having a communicative dimension is sufficiently expressive to qualify as speech." Pro v. Donatucci, 81 F.3d 1283, 1294 (3d Cir. 1996) (Roth, J. dissenting). In Spence, the Supreme Court considered what it called the "communicative connotations" of the conduct, Spence, 418 U.S. at 410; the "context" in which the conduct would take place, id.; the fact that the conduct entailed "an intent to convey a particularized

message," id. at 410-11; and the fact that "in the surrounding circumstances, the likelihood was great that the message would be understood by those who viewed it." Id. at 411.

In Steirer v. Bethlehem Area Sch. Dist., 987 F.2d 989 (3d Cir.), cert. denied, 510 U.S. 824 (1993), this Court announced a bright line rule for interpreting Spence. It held that under Spence, two conditions were required before conduct could rise to the level of communicative speech: (1) intent to convey a particularized message; and (2) a great likelihood that those who saw the message would understand the intended message. Indeed the Steirer court paraphrased Spence to make its point that both elements were required. It said: "Specifically, the actor must have '[a]n 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.'" Steirer, 987 F.2d at 995 (*citing* Spence, 418 U.S. at 410-11) (emphasis added).

After Steirer was decided, however, the Supreme Court decided Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, 515 U.S. 557 (1995). In Hurley, the Supreme Court said expressly that "a narrow, succinctly articulable message is not a condition of constitutional protection." 515 U.S. at 569. This formulation effectively overruled the requirement of intent to convey a particularized message, which was the first of the two prongs of the bright-line rule of Steirer.

By its logic and language, the Hurley holding did not necessarily overrule the second prong of Steirer, namely the requirement of a great likelihood the message be understood by those who viewed it for conduct to rise to the level of protected speech. The Court in Hurley was silent on the question of the likelihood of viewers understanding the message associated with expressive conduct, because that issue did not arise in a case concerned with a St. Patrick's Day parade. The Steirer court's interpretation of Spence remained logically sound with respect to this second

requirement, even if the Supreme Court had clearly overruled the first prong. Nonetheless, in Troster v. Pennsylvania State Dept. of Corrections, 65 F.3d 1086 (3d Cir. 1995), a panel of this Court announced a reconsideration of both prongs of Steirer in the light of Hurley. The Troster panel noted that Spence "contained no language of necessity." Steirer, 65 F.3d at 1090 n.1. Accordingly, it stated that it "believe[d] that Steirer's restrictive test is no longer viable, and that the expressiveness of conduct should be gauged by the language that Spence explicitly articulated as a test." Id. at 1090. Applying Spence, the Court said, "is a fact-sensitive, context-dependent inquiry." Id.

As a threshold matter, it is worth noticing that there is some question about whether the Troster panel of the Third Circuit can overrule the Steiger court without en banc consideration of whether Hurley actually overruled the second prong of Steiger, namely the requirement of a great likelihood of viewers understanding the message. Internal Operating Procedures of the Third Circuit U.S. Court of Appeals at §9.1. If it were beyond the power of the Troster panel to do so, then the second Steiger prong would still be good law in the Third Circuit. If this second prong of Steiger were to be applied, it would be very easy indeed to conclude that the act of attaching rubber strips to the Borough's utility poles could not rise to the level of speech, since it cannot seriously be claimed that passersby will understand what, if anything, those poles are intended to communicate. Under the bright-line rule of Steiger, that would end the enquiry, and this Court could conclude that the rubber strips do not constitute speech. But there is no need for this Court to reach the delicate question of the relationship of the Troster panel to the Steiger court, because even under the standard established by Troster, the attaching of rubber strips cannot rise to the level of expressive conduct under the particular facts of this case.

Under Troster's interpretation of Spence, the crucial element of the test remains the communicative character of the conduct in question. Spence and Troster require a finding of "clear communicative content of a constitutional magnitude." Pro, 81 F.3d at 1294 (Roth, J., dissenting). Under Troster, the guiding elements of the enquiry are the ones mentioned in Spence: the "communicative connotations" of the conduct; the "context" in which the conduct would take place; whether the conduct entailed "an intent to convey a particularized message," and whether "in the surrounding circumstances, the likelihood was great that the message would be understood by those who viewed it." Spence, 418 U.S. at 410-11. None of these elements is absolutely necessary, but all are to be weighed as part of a process directed at discovering "the all-important communicative dimension." Pro, 81 F.3d at 1294 (Roth, J., dissenting).

II. Applying the Spence Standard to the Facts of this Case

Under Troster, "the burden of proof concerning this question" of whether particular conduct rises to the level of protected speech lies with the plaintiff. Troster, 65 F.3d at 1090. Appellants had the burden of bringing forth evidence proving the communicative dimension of their request for religious accommodation. But Appellants failed to meet this burden before the District Court. The only formal evidence that Appellants advanced to explain the meaning of the *eruv* was an affidavit of an acknowledged expert in Orthodox Jewish law, Rabbi Herschel J. Schachter. A.167-169 Nothing in this affidavit suggested that the *eruv* possessed any communicative dimensions whatever. Rabbi Schachter, whose carefully worded affidavit the Borough does not contest, explained that the *eruv* was part of a long-standing practice derived from the Talmud, and that it had the effect in Jewish law of delineating an area in which it would be permissible under Orthodox Jewish law to carry and push things on the Sabbath. Rabbi Schachter added that the effect of the *eruv* in Jewish law was to

enhance the religious practice of Appellants by enabling them to perform these otherwise prohibited actions on the Sabbath. Rabbi Schachter did not say, nor did any other evidentiary source suggest, that the intent or effect of the *eruv* was communicative or expressive in any sense.

What is more, in support of their request for this religious accommodation, Appellants suggested before the Borough Council and the District Court that the *eruv* would be essentially invisible to the community. Counsel for Appellants addressing the District Court at A 383 ("When one looks at it or sees it, it doesn't have – it is not a religious symbol. Nothing religious about the wire."). Before filing this litigation claiming a violation of their free-speech rights, Appellants consistently denied that the *eruv* had a communicative dimension. In fact, in public statements made before the Borough Council in the various public hearings surrounding Appellants' application to the Borough for a religious accommodation, Appellants went out of their way to say that the *eruv* did not communicate any message at all, and would not be understood by any viewer in communicative terms. Appellant Chaim Book at the November 28, 2000 Borough Council Meeting, A 207, 213 ("The [lechis] are virtually invisible. If I showed you a telephone pole or utility pole here in town and I told you, take a look at this pole, there's a [lechi] on top of it, ladies and gentlemen, I will tell you it is very difficult to find. I, who know some of the poles have lechis, have a hard time recognizing the [lechi] on the pole by just looking at it." . . . "An *eruv* is not a religious symbol. An *Eruv* allows religious people to perform secular acts. . ."); Charles Chai Goldstein, Regional Director of the Anti-Defamation League, speaking on behalf of the *eruv* at the December 12, 2000 Council Meeting, A 273 ("The Court said that the boundary markers of an *Eruv* nor the *Eruv* itself have any religious significance. They are not objects of worship nor do they play any theological role in the observance of the Jewish Shabbat."). Other speakers remarked about the non-communicative nature of the *Eruv*. Appellant Stephanie Dardik Gotlieb speaking at the November 28, 2000 Borough Council Meeting A

215 (". . .And I'd like to say how impressed I am by the great lengths and expense that the Eruv Association has gone to insure that this *eruv* is absolutely invisible, even to those who strain to find it."); Rabbi Howard Jachter, speaking on behalf of TEAI at the December 12, 2000 Borough Council Meeting, A 265) ("Wire molding is not a religious item in Jewish Law. Jews do not consider wire molding holy. It is not a holy item, it is not a religious item. . . It's not obvious what it is.").[1]

Once they assumed the posture of litigation, however, for the first time Appellants argued that the eruv constituted expressive speech. One is tempted to say that Appellants should have been estopped from arguing that their conduct was expressive when they had already argued that it was invisible and non-expressive conduct. But even if they are not estopped, Appellants certainly do not offer sufficient evidence of an expressive dimension to meet their burden. They deny that their conduct had any "communicative connotations," Spence, 418 U.S. at 410. The "context" in which the conduct would take place, id., was, by evidence undisputed on both sides, the Borough's utility poles. It is undisputed that the rubber strips are indistinguishable from the rubber strips already used on the poles as insulation over existing wiring. Appellants maintained that the rubber strips lack "an intent to convey a particularized message," id. at 410-11. Rather, they said that the rubber strips and the eruv itself simply constitute a technical designation of boundaries under Orthodox Jewish law. Finally, Appellants introduced no evidence whatever tending to show that "in the surrounding circumstances, the likelihood was great that the message would be understood by those who viewed it," id. at 411. To the contrary, Appellants consistently argued that viewers would not even know that

[1] Beyond maintaining that the wires had no expressive value that casual viewers would understand, Appellants also did not maintain that the rubber strips communicated any message to members of their own community. Nor could they, since even those persons who rely on the eruv to carry and push objects on the Sabbath do not look at the *eruv* to determine that they can do so. Instead such persons rely on the knowledge communicated by individuals that the eruv exists and is intact—knowledge that is in no sense "communicated" by the rubber strips themselves.

the rubber strips were in place at all. From this analysis it follows that Appellants could not have met their burden of proving that their conduct was speech.

III. The Consequences of Appellants' Failure to Prove the Expressive Dimension of Their Conduct

Because Appellants fail to meet their burden of proving that their conduct possessed an expressive dimension sufficient to rise to the level of protected speech, the District Court erred in its application of the Spence standard so as to find that Appellants' speech merited protection under the Free Speech Clause. This Court should therefore hold that the Free Speech Clause is not implicated in this case at all. Removing Appellants' free-speech claims will allow the court to focus on the central question that this case has always posed: whether the Borough's decision not to grant Appellants' request for an accommodation of its religious conduct on Borough property somehow violated Appellants' rights under the Free Exercise Clause of the First Amendment. With respect to this question, the facts, as found by the District Court and supported by ample record evidence, are relatively simply and can be reduced to the following basic summary:

Appellants approached the Borough Council and sought, in expressly religious terms, an accommodation that they said would "enhance" their religious lives. See, e.g. A206. They wanted to place rubber strips on utility poles controlled by the Borough. The Borough had a neutral ordinance dating back to 1954 which banned putting anything on the poles. The Borough regularly enforced this ordinance. Members of the Borough Council were concerned that passing an ordinance permitting this religious use of the poles would accord preferential treatment to one religious group over others by allowing it permanent use of the utility poles for a religious purpose. The Council Members' lay understanding of the separation of church and

state suggested to them that preferential treatment for one religious group in particular would be constitutionally troubling. The Council Members intuitively realized that if they were to grant Appellants' request for a religious accommodation in use of the poles, they would have to grant other requests by other religious groups in the future. Subsidiarily, some Council Members expressed classic concerns about the religious use of public space: they worried that granting the accommodation might generate communal divisiveness. Exercising their legislative policymaking function, the Council decided not to grant Appellants' request.

Evaluating this set of facts under the Free Exercise Clause, without the confusion of free-speech issues, makes this case straightforward in legal terms as well. Appellants allege that the Borough violated their Free Exercise rights, which are delineated in Church of the Lukumi Babalu Aye v. City of Hialeah, 508 U.S. 520 (1993) and interpreted by this Circuit in Brown v. Borough of Mahaffey, 35 F.3d 846 (3d Cir. 1994) (interpreting Lukumi Babalu). Under Lukumi Babalu, Appellants had to show that the Borough intentionally targeted their religious exercise for discriminatory treatment, just as the City of Hialeah passed an ordinance outlawing ritual sacrifice practiced by the Santeria religion. But as the District Court found, no such facts existed here. The Borough did not target anyone or pass any new laws. It simply chose not to enact a new ordinance that would have amended the neutral sign ordinance in place for nearly fifty years. Under Brown, Appellants had to show that the Borough, acting out of animosity to their religious practice, intentionally impeded that practice, just as the Borough of Mahaffey locked the doors to a place of prayer. But the District Court found that no such facts existed here. It found "no evidence to support a conclusion that the Borough Council acted out of animosity" to Appellants, 155 F.Supp.2d at 182,

and no evidence that the Borough impeded Appellants' religious practice, id. at 181.[2] Therefore, Appellants' free exercise rights were not violated, and what appears to be a complex case can be resolved relatively simply.

There are several further points that would be clarified by the Court holding that free-speech issues do not arise in this case. The first is doctrinal: the Court will have no need to consider the line of cases that begins with Lamb's Chapel v. Center Moriches Union Free Sch. District, 508 U.S. 384 (1993) and extends through Rosenberger v. Rector and Visitors of University of Virginia, 515 U.S. 819 (1995) to Good News Club v. Milford Central School, 533 U.S. 98 (2001). All of these cases arise where the Free Speech Clause meets the Establishment Clause. In each of them, religious groups sought to speak in a limited public forum that had been opened to a wide range of non-religious speech. Once free speech is off the table in this case, those cases become irrelevant. Although the District Court was right to find that those cases properly do not apply here even if free-speech rights are implicated, it would certainly simplify this case to leave these cases to one side.

Furthermore, keeping free-speech issues out of the case will help to make clear that existing eruvs around the United States have nothing to fear from the Court's analysis here — an issue clearly important to some *amici curiae*. It should be evident that any municipality that grants permission for the erection of an *eruv* on its property may do so, so long as the municipality does not grant preferential treatment to any one religious group or organization, but permits any applicant comparable use of its municipal property. The reason for the Council Members' concern in this case was that Ordinance 691 expressly forbids use of the poles. Amending the ordinance led the council

[2] Appellants also cite Fraternal Order of Police v. City of Newark, 170 F.3d 359 (3d Cir. 1999), which is easily distinguished on both facts and law. There was no case-by-case consideration of particularized circumstances here as there was in Fraternal Order of Police, just a preexisting neutral law that Appellants wanted to amend as an accommodation to them.

members to be concerned about according preferential treatment to one religious group in particular. Although none were lawyers, the Council Members were certainly justified in their concern and probably correct, since the Supreme Court has held that according preferential treatment to one religious group would violate the Establishment Clause. See Bd. of Educ. of Kiryas Joel Village School Dist. v. Grumet, 512 U.S. 687 (1994). In any case, the law in the Establishment Clause area exhibits "much confusion and plenty of room for jurisprudential disagreement ... perhaps none of us is capable of accurately drawing [the] line given the state of the case-law." American Civil Liberties Union of New Jersey v. Schundler, 168 F.3d 92, 109 (Nygaard, J. dissenting). If this is true of the bench, the bar, and the academy, it is surely true of public servants who are not trained in the law.

In any case, there is no need for this Court to reach the Establishment Clause issue in this case, because the only issue before it is whether the Borough somehow violated Appellants' free-exercise rights under Lukumi Babalu, Brown, or Fraternal Order of Police. So long as the Council Members acted in good faith, as the District Court found that they did, there was no free-exercise violation, because there was no targeting or discrimination. The free-exercise context is unlike the context of the Lamb's Chapel line of cases. In those cases, the Free Speech Clause prohibits viewpoint discrimination, and as a result, the fact of opening government property to all kinds of speech as a limited public forum requires opening that property to religious groups unless there is an Establishment Clause violation. Under the free-exercise cases, the Borough is solely required to have not targeted Appellants' religious practice out of animus towards them. And that issue was clearly resolved by the District Court on a factual basis.

Finally, there is a further consequence that would emerge from a holding that free speech is not implicated here. The District Court found that the predominant motive of the Council Members was avoiding the preferential treatment of one religious group in particular. It also found

that a second, subsidiary motive was avoiding communal tension that might result from the foundation of a "community within a community." 155 F.Supp.2d at 182. The District Court said that this second, more minor motivation was "constitutionally impermissible." Id. at 183. But the District Court did not say what constitutional provision this subsidiary motive purportedly violated. This vague legal conclusion by the District Court only makes sense if understood in the context of the District Court's concern with viewpoint discrimination. The District Court seems to have believed that concern with the communal and political consequences of the *eruv* reflected impermissible viewpoint discrimination, even if that discrimination was of a minor scale. Certainly under the free-exercise doctrine there is nothing wrong with a legislative body considering the political consequences of a decision about the use of government property, unless that consideration amounts to discrimination against religious exercise. Indeed, a legislature's sworn duty to avoid violating the Establishment Clause all but requires that legislature to consider the political consequences that would follow from granting a religious accommodation. The legislature's consideration of political consequences is limited only by the requirement that it not engage in intentional discrimination targeted at a particular religious exercise. And the District Court made it very clear that there was no such discrimination on the facts here.

It follows that, once free speech is removed from the case, even the subsidiary motive that the District Court said was "constitutionally impermissible" actually does not violate any constitutional provisions. This point, too, simplifies the analysis of this case. Once it becomes clear that this case involves a challenge under the Free Exercise Clause to a government decision not grant an accommodation, then the case becomes largely a question of law. And the law on this point is well established. The Free Exercise Clause is written in terms of what the government cannot do to the

individual, not in terms of what the individual can extract from the government." Sherbert v. Verner, 374 U.S. 398, 412 (1963).

CONCLUSION

For the foregoing reasons, District Court improperly classified the *lechis* as symbolic speech under the First Amendment, and a proper classification by this Court would greatly streamline the analysis and confirm the District Court's result.

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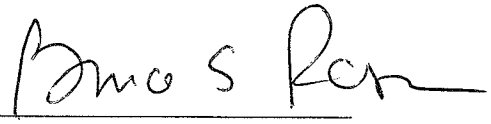
By: 
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CERTIFICATE OF SERVICE

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