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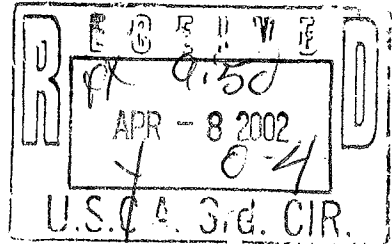
UNITED STATES COURT OF APPEALS

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01-3301
* * *

TENAFLY ERUV ASSOCIATION, INC.,
et al.

VS.

THE BOROUGH OF TENAFLY,
et al.



* * *

Oral argument taken in the
above-entitled matter, transcribed from tape, by
Christine L. Allmond, Court Reporter and Notary
Public in and for the Commonwealth of
Pennsylvania.

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COURT CRIER: This Court is now in

3

session.

4

JUDGE AMBRO: Okay. Mr. Sugarman.

5

UNIDENTIFIED SPEAKER: Did you

6

announce the case?

7

JUDGE AMBRO: Pardon?

8

UNIDENTIFIED SPEAKER: Did you

9

announce the case?

10

JUDGE AMBRO: I'm sorry?

11

MR. SUGARMAN: May it please the

12

Court, good morning, I'm Robert Sugarman.

13

We represent the Tenafly Eruv Association

14

with respect to the Eruv application. I

15

will address the Free Exercise and Fair

16

Housing arguments. Mr. Lewin will also

17

speak to the Free Exercise, but also

18

viewpoint discrimination. I would like to

19

save three minutes of my time, and he would

20

like to save two minutes of his time.

21

JUDGE AMBRO: Very well.

22

Rebuttal.

23

MR. SUGARMAN: Your Honor, as we

24

prepared for this argument, we realized, and

1 we apologize for this, that we have
2 misstated the standard of review. This
3 Court in Swineford vs. Snyder, County of
4 Pennsylvania, stated that because it's a
5 constitutional case, this Court is required
6 to "exercise independent appellate review of
7 the record; thus, we do not defer to the
8 District Court's factual findings."

9 Your Honor, the District Court's
10 decision is inconsistent with one decision
11 of the Supreme Court of the United States
12 and two decisions of this Court, and I'd
13 like to go through them briefly.

14 First, Brown against the Borough
15 of Mahaffey in this Court, there the Court
16 found that the Borough's actions in locking
17 the gate that provided access to a revival
18 meeting, quote, Intentionally discriminated
19 against plaintiff's religious exercise. It
20 said further that since such actions "A
21 fortiori serve no legitimate purpose, no
22 balancing test (ph) was necessary."

23 JUDGE AMBRO: If we could start
24 just back to the question that was asked

1 JUDGE AMBRO: Okay. That's fine.

2 MR. SUGARMAN: However, as we
3 said, in terms of symbolic speech, just so
4 everyone understands what a lechi is, this
5 is a lechi (indicating). The placement of
6 the lechis on the pole qua placement doesn't
7 form the basis of the Borough's objection,
8 because you can't tell when you look at the
9 pole whether this rubber strip is a lechis
10 or it is a covering for a Verizon
11 groundwire.

12 JUDGE ROTH: Could -- could a
13 lechis be simply put over a groundwire
14 covering and sort of kill two birds with one
15 stone?

16 MR. SUGARMAN: I don't know the
17 answer to that question. But there are 180
18 lechis and there are tops, telephone poles,
19 in Tenafly and --

20 JUDGE ROTH: Every pole has a
21 groundwire, doesn't it?

22 MR. SUGARMAN: I can't say every,
23 but there are -- there are certain
24 (inaudible). And when you put up a lechi

1 and look at it, you don't know whether it is
2 a groundwire or a lechi. But in terms of
3 symbolic speech, Your Honor, that produced
4 the reaction of the Borough council which
5 leads us to this room. And that wasn't
6 because there was another rubber strip on --
7 on the pole, that was because it was speech.
8 It was -- it was saying to the Borough
9 council, it was saying to the Orthodox Jews
10 in Tenafly, Orthodox Jews can carry here.
11 And so we're not getting into the details
12 Your Honor wants, but Mr. Lewin will
13 address these issues more fully.

14 JUDGE AMBRO: That's -- that's
15 fine.

16 MR. SUGARMAN: That's where we
17 were -- where we see it coming out. Back to
18 Brown. What the Borough of Tenafly did in
19 this case is exactly what the Borough of
20 Mahaffey did in that case with
21 discrimination against religious exercise by
22 denying the Eruv application. The District
23 Court in a sense sought to distinguish Brown
24 on the grounds that the Borough was simply

1 enforcing a pre-existing neutral, generally
2 applicable rule, and there are two problems
3 with that. First, it doesn't answer Brown,
4 there's no distinction, because Brown talks
5 about whether there was intentional
6 discrimination against religious exercise.
7 Second, despite its words, Ordinance 691 was
8 never interpreted or enforced as a
9 prohibition general, neutral, generally
10 applicable prohibition against putting
11 anything on the pole. As to the first
12 attempt at a distinction, the record is
13 replete with evidence that the Borough
14 intentionally discriminated against
15 plaintiff to practice their religion.
16 Without an Eruv, Mrs. Gotlieb who has young
17 children, and Mr. Brenner who is
18 handicapped, can't go to synagogue on the
19 Sabbath and Yom Kippur. If attending a
20 revival meeting was a religious exercise,
21 surely going to synagogue on the Sabbath and
22 Yom Kippur are religious exercise, and the
23 District Court acknowledged --

24

JUDGE AMBRO: But I think what

1 menorah in a public park. The Borough has
2 Santa Claus (sic) in Borough Hall sitting in
3 the Mayor's chair.

4 JUDGE ROTH: But -- but can we
5 look at that general activity, or are we
6 required to look at the telephone poles
7 themselves?

8 MR. SUGARMAN: Well, for the
9 purposes of the Judge Ambro's question, Your
10 Honor, I think you can look at general
11 activities because the premise of the
12 question is, was this truly a concern. Were
13 the members of the council truly concerned
14 about Establishment Clause violations, or
15 was that an afterthought masking the real
16 concern, which is all this over record,
17 which is, we don't want Orthodox Jews in our
18 town. And the fact that the council in a
19 number of instances has permitted activity,
20 which -- which in my view, is much, much
21 more of an Establishment Clause problem than
22 rubber strips on poles, which are
23 indistinguishable from Verizon's rubber
24 strips, proves, in my judgment, that this

1 Establishment Clause rationale was not the
2 real rationale. So, that's the answer that
3 I would give --

4 JUDGE AMBRO: But wasn't the
5 rationale given by various council members
6 before the vote was taken?

7 MR. SUGARMAN: The only council
8 member who spoke before the vote was taken
9 was Councilman Sullivan. The rest of the
10 council did not speak. Indeed, they were
11 instructed not to speak because it was to be
12 a listening and information session to which
13 they didn't respond.

14 JUDGE AMBRO: At all the meetings?

15 MR. SUGARMAN: Every single
16 meeting.

17 JUDGE AMBRO: Okay.

18 MR. SUGARMAN: Councilman Sullivan
19 went off and he -- so, the first time that
20 there was any rationalization for the
21 Borough's position was when two, three
22 months later the affidavits were submitted
23 and I was (inaudible), and then there was
24 the Establishment Clause concern raised.

1 And it just seems to me that if
2 you look at what this Borough has done time
3 and time again, you have to agree, I submit,
4 that that's not the reason, and that to say
5 that it's an Establishment Clause violation
6 is an afterthought, is a pretext. And what
7 the Borough was doing was on that grounds
8 was intentionally discriminating against the
9 exercise of religion by Orthodox Jews.

10 Now, there are two arguments that
11 are made -- other arguments that are made
12 with respect to that. One is, there's no
13 interference with religion because an Eruv
14 was not necessary. But the Supreme Court in
15 a number of cases and this Court in the
16 DeHart vs. Hern decision, en Banc held that
17 it's not the province of the government or
18 the courts to be making judgments as to
19 whether the beliefs are do -- correct or
20 central to the religion.

21 The only inquiry that this Court
22 permits are -- is whether the plaintiff
23 sincerely believes in the religious belief.
24 And here there is absolutely nothing in the

1 record that indicates that there's not a
2 sincere belief.

3 And the second argument is that
4 the plaintiff must show animus. And I
5 submit, Your Honor, that on this ground you
6 do not need to show animus. I submit to
7 Your Honors when you review the record, you
8 will find animus all over the place,
9 starting from the first meeting at which Mr.
10 Lipson and members of council talked about
11 all sorts of Orthodox Jews coming in, small
12 churches springing up, and then later a
13 community within the community, the ghetto,
14 stopping traffic on the Sabbath, throwing
15 stones at cars, ruining the schools, ruining
16 the businesses, it's there. But with
17 respect to Brown, it's not required. What
18 Brown requires is the intentional
19 discrimination, and I submit that is the
20 case here.

21 The second case is a Supreme Court
22 case, which I call Hialeah. And in that
23 case the Court observed that the record
24 quote, "Compelled the conclusion that

1 suppression of a central element of the
2 Santeria Worship service was the object of
3 the ordinance." Here, the suppression of
4 plaintiff's ability wholly and freely to
5 practice their religion was the object of
6 the councils' action.

7 JUDGE AMBRO: But -- but as you
8 call it Hialeah, there was -- it seemed to
9 be clear to everyone that they were focusing
10 in every which way they gave an exception,
11 to make sure that the only party that would
12 be covered was the Santeria Group.

13 MR. SUGARMAN: Well -- and Your
14 Honor, if you look at the history of the way
15 the Borough has treated the poles and the
16 right-of-way, because that's what you're
17 talking about in terms of the ordinance --

18 JUDGE ROTH: Is it the
19 right-of-way or is it the poles?

20 MR. SUGARMAN: It depends on the
21 argument, Your Honor. With respect to
22 whether there was just a general prohibition
23 or a specific targeting in this case, you
24 must look at what -- how the Borough has

1 previously interpreted Ordinance 691. And
2 691 applies to both the poles and the
3 right-of-way. And so with respect to that,
4 you've got the radio transmitters, you've
5 got the church signs in the right-of-way,
6 you've got the holiday decorations and
7 you've got the orange ribbons. And one of
8 the things I submit to Your Honors is the
9 district judge had more than enough evidence
10 on the orange ribbons. They were there,
11 they were put up in connection with the
12 school issue, and they were there for a long
13 time and the council didn't do anything
14 about it. So, I think when you translate
15 that into Hialeah, you can draw the same
16 conclusion.

17 The first time that there's
18 anything in the record as to the Borough's
19 denial of the right of somebody to use poles
20 was in this case. And that never happened
21 before. And so --

22 JUDGE AMBRO: There was some
23 mention of a regionalization of a school
24 district vote or something like that, that

1 Roth's question as to what the relevant
2 forum is. Let's assume for the moment it's
3 just the poles. What actually was put on
4 poles by anyone else that was permitted by
5 the Borough? The poles.

6 MR. SUGARMAN: The poles? The
7 radio transmitters that were put there by
8 Metrocom. The holiday decorations that were
9 put there by the Chamber of Commerce were
10 put there every year --

11 JUDGE ROTH: Would it make a
12 difference whether it's something that's put
13 there permanently or something that's put
14 there for two months?

15 MR. SUGARMAN: I submit, Your
16 Honor, it's doesn't. It's a meaningless
17 distinction, sure, these are there all the
18 time, just like the lines and wires are
19 there all the time. But the question is in
20 terms of -- of what's the message. It seems
21 to me that in terms of Establishment Clause,
22 the creche and menorah are there for six
23 weeks. But they -- they convey a much, much
24 more significant message than rubber strips

1 on the poles. So, it's the message, it's
2 the endorsements that is -- is -- is the
3 test. Whether something is there all the
4 time -- if it was a cross or a menorah, it
5 might make a difference. But -- but in this
6 case, I don't think that it makes a
7 difference at all.

8 JUDGE ROTH: The proclamation
9 establishing the area was passed by the
10 county council and not by the township --

11 MR. SUGARMAN: It was issued by
12 the County Executive.

13 JUDGE ROTH: Right. And -- and
14 there is case law permitting this, but this
15 Court has never reviewed whether a
16 government body issuing such a proclamation
17 is running up against the Establishment
18 Clause or not. Can we decide the second
19 step of putting up the lechis if we haven't
20 looked at the first step of the proclamation
21 in the first place.

22 MR. SUGARMAN: Your Honor, I
23 hesitate to say you can't do anything you
24 want, but --

1 JUDGE ROTH: Do you have certain
2 restraints?

3 MR. SUGARMAN: But it was -- it
4 was never issued -- it was never argued that
5 this was inappropriate. The borough's
6 lawyer on day one said it wasn't an issue.
7 When the ACLU came in below and attempted to
8 make it an issue, I asked Judge Bassler, is
9 it going to be an issue, because if it is
10 going to be an issue, we'd like an
11 opportunity to brief it. And he said, it's
12 never been raised, it's not been an issue,
13 move on from there. The only way it becomes
14 an issue is in the way that Judge Ambro's
15 question suggests, which is as a
16 rationalization for the activity.

17 I want to just briefly talk about
18 the Fraternal Order case, which is a case
19 that the district judge never mentioned.
20 And it's a case in which this Court
21 invalidated a no beard rule enforced against
22 Muslims who refused to shave for religious
23 reasons, and did that because Newark had
24 made an exception for a medical reason.

1 And this Court, citing Hialeah,
2 said, "In circumstances in which
3 individualized exemptions from a general
4 requirement are available, the government
5 may not refuse to extend that system to
6 cases of religious hardship without
7 compelling reason". So, that's exactly what
8 happened here. There were many exemptions.
9 I've gone through the exceptions with you I
10 have not proven (ph). And the government
11 can't, because it devalues religion, in the
12 words of this Court and the Supreme Court of
13 the United States, make an exception and
14 deny a Eruv when it has permitted other
15 secular uses.

16 Finally --

17 JUDGE AMBRO: Could I just pick up
18 on one of Judge Roth's questions, the last
19 question to you, because I think it may be
20 important on this. If in New York City you
21 have a group of -- a Pentecostal group, and
22 they come in and they want to have a
23 Pentecostal zone, and they want on telephone
24 poles little branches or twigs put on there

1 to -- for a demarcation area. And would
2 that be -- if that were granted -- I'm
3 sorry, if they did that, and they were
4 prohibited, would that be a violation of the
5 Establishment Clause?

6 MR. SUGARMAN: I think it would be
7 dependent on -- on all the circumstances. I
8 think it depends on what's put on poles.
9 What -- if it's -- if it's a general law
10 that says nothing is on poles and it's
11 strictly enforced, it might not be or it
12 might be depending on the motivation. It's
13 a different case, and I think it's got to be
14 viewed on the -- on the facts that -- that
15 surround that case.

16 JUDGE AMBRO: But now more to her
17 question, if the Pentecostal group asked New
18 York for a proclamation that this certain
19 area is a Pentecostal zone, would that be a
20 violation of the Establishment Clause?

21 MR. SUGARMAN: If it's like the
22 proclamation in this case, I would say no.
23 Because the proclamation in this case is
24 very, very clear and limiting. It limits

1 the grant, quote, unquote, which is really a
2 license, to use this area for one purpose
3 and one purpose alone, and that is to carry.
4 So, the town in not renting anything lock,
5 stock and barrel, it is licensing a group to
6 use it for a particular purpose. And it
7 goes on to say very, very, very clearly that
8 it gives no one any rights with respect to
9 any other purpose, it doesn't deprive
10 anybody of any rights. And, indeed, at
11 least two of the members of the council when
12 they testified, one said they don't even
13 know where it is. And, two, that -- the
14 fact that the Eruvs do not -- it was then, I
15 guess, ten months -- didn't change in any
16 way, shape or form the existence, the
17 rights, the obligations, the freedoms of
18 anybody else in the town.

19 JUDGE AMBRO: But the Eruv here,
20 you did in effect have a, maybe you call it
21 a fictional renting, from the county
22 executive of the county, did you not?

23 MR. SUGARMAN: The fictional
24 licensing of the right to do something

1 within this area.

2 JUDGE AMBRO: For a dollar or
3 whatever it was?

4 MR. SUGARMAN: For a dollar --
5 and, Your Honor, I think that's the
6 distinction, because there was -- there was
7 a lot of angst about "we are renting our
8 town to this group". That's not what the
9 proclamation says. The proclamation says in
10 effect -- it uses the word "rental", but
11 it's only for the purpose of carrying, and
12 it doesn't affect anybody else's rights in
13 any way, shape or form.

14 JUDGE AMBRO: But not before us is
15 the county executives granting of the
16 proclamation allowing the Eruv. But if it
17 were not the county executives but the
18 Borough itself that gave that proclamation,
19 wouldn't the issue be more troubling for
20 purposes of the Establishment Clause?

21 MR. SUGARMAN: I don't think so,
22 Your Honor, because I think the
23 Establishment Clause deals with the
24 government and the -- whether the actions of

1 government --

2 JUDGE AMBRO: But the government
3 here refused to act. In my case, the
4 hypothetical, the government is acting.

5 MR. SUGARMAN: Right. But, but --
6 the county acted. So, your question is, is
7 would it be different if the Borough acted
8 in the Establishment Clause, and I don't
9 think it would be, because it's still a
10 question and it gets back to endorsements.

11 JUDGE AMBRO: So, therefore,
12 should we assume for purposes of this appeal
13 that the proclamation of the county is in
14 effect deemed to be the proclamation of the
15 Borough?

16 MR. SUGARMAN: I don't think you
17 need to assume it one way or the other. I
18 think -- the requirement, as I understand
19 it, Your Honor, is that a proclamation needs
20 to be issued by a public official whose
21 jurisdiction includes the area in which the
22 Eruv is to be put up.

23 JUDGE ROTH: So, it could be the
24 Governor of New Jersey or the President of

1 the United States?

2 MR. SUGARMAN: Certainly the
3 Governor of New Jersey. I don't know if the
4 federal would have a problem with the
5 President of the United States. But clearly
6 it could be the Governor of New Jersey.
7 So -- but I think that, again, this has
8 never been an issue that -- that anybody has
9 raised. The only issue that has ever been
10 raised in this case is with respect to the
11 lechi. And at the 11th hour, the Borough
12 discovered 691 and used it to -- in this
13 case.

14 JUDGE ROTH: Let me -- let me ask
15 you a follow-up question on that. If --
16 if -- a hypothetical, if the granting of the
17 proclamation did violate the Establishment
18 Clause, and the granting the proclamation by
19 the county, in viewing free speech in
20 establishing the Eruv, if the free speech is
21 in furtherance of the violation of the
22 Establishment Clause, does that -- should
23 that affect our consideration of the lechi
24 and the free speech implications there?

1 MR. SUGARMAN: I would answer that
2 by referring to Justice Thomas' comment in
3 the Good News case, which was a viewpoint
4 discrimination case in which the court
5 upheld the program in the elementary
6 schools. And there was an Establishment
7 Clause argument made, and he remarked
8 that -- and I don't remember the exact
9 words -- but the basic thrust was that if --
10 if -- the Establishment Clause argument does
11 not overrule a free speech argument, and I
12 would say that that's exactly the way it
13 ought to be in Free Exercise cases, same
14 amendment. And if the Establishment Clause
15 concerns can't trump a viewpoint
16 discrimination claim under the free speech
17 prong of the First Amendment, then it can't
18 trump a Free Exercise claim under the same
19 amendment. Our FHA argument is -- is very
20 simple --

21 JUDGE AMBRO: I think we -- I
22 think we have your brief on that matter.

23 MR. SUGARMAN: Appreciate your --

24 JUDGE AMBRO: Why don't we move

1 on. Do you have questions on -- do you have
2 questions? Okay. Very well.

3 MR. LEWIN: May it please the
4 Court, just to respond to the -- Judge
5 Roth's --

6 JUDGE AMBRO: Put your name on the
7 record, please.

8 MR. LEWIN: I'm sorry. My name is
9 Nathan Lewin, and I represent the individual
10 appellants, Book, Book and Brenner. In
11 answer to Judge Roth's question, which I
12 think Judge Ambro picked up as well, the
13 connection, the relation between the
14 declaration by the county executive and
15 these particular plastic strips is purely a
16 matter of Jewish Law. It's only because
17 Jewish Law says there has to be some
18 declaration by the county, and as well as a
19 matter of Jewish Law there have to be these
20 lechi. If the declaration were challenged,
21 the county executive would be a defendant in
22 the case and it would be defended. Or if,
23 as Judge Ambro says, if Tenafly had granted
24 a declaration, it would defend, presumably,

1 the declaration. Therefore, we submit that
2 the declaration was no part of this case,
3 and it would be, we submit, totally beyond
4 the Court's jurisdiction to be considering
5 that. Totally different circumstances would
6 be at issue. That was involved in a
7 litigation in Long Branch involving the
8 Establishment Clause issue, and it was
9 determined that there was no violation of
10 the Establishment Clause by granting such a
11 declaration. But it's totally different
12 parties, a totally different issue and
13 related only because of Jewish Law, which is
14 not a subject appropriately for this Court.

15 Now, our basic, our first
16 argument -- I will get to the symbolic
17 speech in a minute -- but our first argument
18 depends not at all of these strips being
19 speech of any kind. At pages 19 and 20 of
20 our brief, we have color photographs that
21 demonstrate that the identical strips are
22 used, are permitted by Tenafly for
23 Cablevision or for telephone service.

24 In answer to your question, Judge

1 Roth, the strips under Jewish Law have to be
2 directly under the wires and, therefore, it
3 can't just be any strips that are on the
4 utility pole that could be used as the
5 lechi. They have to be put up and so set up
6 that they would be under -- precisely
7 under -- the wires, and Cablevision does
8 that.

9 Now, the question, we submit --
10 and we think that it's really obvious from
11 the record, without disputing the intent of
12 the council members at all, that what has
13 happened here is Tenafly has said this
14 conduct, assume it's conduct, of putting
15 plastic strips on utility poles is perfectly
16 all right with us, if you want cable
17 service, if you want telephone service, or
18 if somebody wants to put it up for some
19 other reason, that's never come up, nobody's
20 made an issue. But the reason that it's no
21 good in this case is because you put it up
22 for a religious purpose.

23 And we submit that when a
24 government says conduct is permissible for

1 reasons other than religious reasons, but we
2 will prohibit it because it has a religious
3 impact, that violates the Hialeah or the
4 Lukumi Babalu Aye case, because that is
5 targeting religion. And the point we make
6 is that in the Hialeah case there was
7 conduct which, quite frankly, in earlier
8 opinions, in the Smith case, Justice Scalia,
9 in his opinion, referred derogatorily to
10 this animal sacrifice case, and said, look,
11 this is the extreme kind of case where maybe
12 somebody would be arguing that there should
13 be a religious exemption, and the inference
14 was that it was pretty ridiculous.
15 Nonetheless, when the case came to the
16 Supreme Court, the determination was made
17 that even with regard to animal sacrifices,
18 if it were permitted for reasons other than
19 religious reasons, and prohibited only
20 because the Santerians were engaged in it
21 and it's religious, that would violate the
22 Constitution.

23 JUDGE AMBRO: Well, I think -- I
24 think your co-counsel covered the selective

1 enforcement.

2 MR. LEWIN: Right. So, we submit
3 that this issue plainly determines this case
4 before we even reach symbolic speech. And
5 Judge Ambro asked, "Well, could Tenafly say
6 we don't want to be involved with a possible
7 violation of the Establishment Clause, and,
8 therefore, we will not allow this because it
9 might violate the Establishment Clause."
10 And our point is that if that were a
11 justification, then a line of Supreme Court
12 decisions, starting with the Lamb's Chapel
13 decision, going through Rosenberger and
14 going all the way through down to the Good
15 News case, would have come out the other
16 way. Because in each one of those cases,
17 the local government body was saying, we
18 don't want to allow a religious group to use
19 it because we fear that there will be an
20 Establishment Clause violation.

21 JUDGE NYGAARD: Mr. Lewin, if the
22 judgment of the court were to be that this
23 is not a voice matter, if you will, but is a
24 structural matter, if you will, putting up a

1 neutral appearing structure --

2 JUDGE AMBRO: Or in other words,
3 just merely functional.

4 JUDGE NYGAARD: Functional. Tell
5 me then how your request for a -- not a TRO,
6 you're at the preliminary injunction
7 stage -- tell me then how your case for a
8 preliminary injunction would come out in
9 your vision, shall we say?

10 MR. LEWIN: We think we'd be
11 entitled to a preliminary injunction because
12 what the record shows indisputably is that
13 Tenafly has singled out religion --
14 religious conduct, assuming it's
15 functional -- and, again, our argument which
16 I hope to get to in a minute, is that is
17 speech. But assuming it's purely functional
18 and not expressive, that this is the same as
19 if Tenafly had said, "Ten men can get
20 together on the streets of Tenafly, of
21 course they can, but if they are there for a
22 religious purpose because they want to pray
23 together in a Jewish service, it's
24 prohibited." Or if they had said, "You can

1 park in the Tenafly parking lots, but you
2 can't park if you're going to a religious
3 service." Or if they had said, "Our police
4 officers wear caps, and they should wear
5 caps, but if they wear a cap because they're
6 Orthodox Jewish, and Orthodox Jews wear caps
7 as a matter of religious conviction, they
8 may not do so." That's focusing on conduct,
9 but singling out religious conduct,
10 religiously motivated conduct. And that's
11 what's impermissible here. You can't single
12 out religiously motivated conduct and say
13 we'll permit it -- permit the same conduct
14 when it's secular, when it's done to give
15 the people in Tenafly cable programs or
16 telephone service, but we won't permit it if
17 you do the very same thing because it has
18 religious significance to you.

19 And in answer to Judge Ambro's
20 question, I think if the Pentecostals had
21 said in New York, we want to put up a twig
22 on the poles, then if there are signs and
23 other things on the poles which are
24 permitted, of course they have a right to do

1 so. Because private people have a right to
2 express themselves, if this is expression,
3 or have a right to engage in conduct that
4 may not be targeted because it is religious.

5 If there's anything that's clear
6 from this record, it is that nobody in
7 Tenafly objects to plastic strips. They
8 object to plastic strips when they have
9 religious significance. Every member of the
10 Borough council said that this Eruv, with
11 its religious significance, creates problems.
12 That's what's impermissible. You can't say
13 conduct is all right but impermissible when
14 it's religiously motivated.

15 Now, we think it is symbolic
16 speech because if one looks at what it means
17 both to Orthodox residents and to the rest
18 of the Tenafly community, it communicates a
19 message. If it didn't communicate a
20 message, there would not have been a public
21 outcry at all these meetings. Obviously, it
22 communicated a message regarding the
23 Orthodox Jewish community in Tenafly. And
24 under the Hurley case and the Troster case,

1 if there's anything -- I think that's what
2 this Court is saying in Troster, after
3 Hurley, is, that any restrictive view we
4 took previously about the need having --

5 JUDGE AMBRO: How particular the
6 message is.

7 MR. LEWIN: -- particularized
8 communication is wrong. The Supreme Court
9 has said in Hurley, "No, you don't need that
10 particularized communication. If you are
11 very constantly delivering some kind of a
12 message that you may think about or other
13 people may believe in, that's all right."

14 JUDGE AMBRO: But the question is
15 in Troster, did Troster eliminate intent of
16 the person conveying the message to convey,
17 in that case, the general -- let's say,
18 general message? In other words, is the
19 intent element that was evident in Spence,
20 did Troster view the Hurley court as having
21 taken that away?

22 MR. LEWIN: I think -- I think
23 what Troster said is that we will view
24 broadly any kind of possible symbolic speech

1 and say that if you communicate the
2 message --

3 JUDGE AMBRO: It looked -- clearly
4 Troster looked at it from the viewpoint of
5 the receiver.

6 JUDGE NYGAARD: Correct.

7 JUDGE AMBRO: But perhaps in
8 answering to the higher authority, in this
9 case, the Supreme Court, did Hurley do
10 anything other than deal with the
11 particularized nature of the prior holding
12 in Spence?

13 MR. LEWIN: Well, I think what
14 Hurley said is you don't closely examine
15 what the narrow message is that the person
16 who's speaking intends to convey. And if,
17 in fact, there is a message that is brought
18 out -- and this appears in public, you've
19 got plastic strips in public, they're not
20 being concealed, clearly they communicate to
21 the Orthodox residents who ought to know
22 what are there and see them on the pole,
23 that they may carry on the Sabbath. They
24 communicate to the rest of the Tenafly

1 community either tolerance or a reason to be
2 intolerant.

3 JUDGE AMBRO: Let me -- let me
4 tell you why I'm coming where I'm coming
5 from. My question is ultimately, is intent
6 still part of the -- the test? I realize
7 that the awareness of the communication by
8 the receiver is part of the test. If
9 intent -- well, let's start off with that,
10 is intent part of the test?

11 MR. LEWIN: I think intent -- for
12 this case, I would acknowledge that intent
13 is part of the test. And I think there is
14 an intent.

15 JUDGE AMBRO: Then -- then the
16 problem that I have is it appears from all
17 of the evidence that I could see in the
18 record, including the affidavit of Rabbi
19 Schachter, that the lechis were being put up
20 for a functional purpose. And they're
21 saying that these aren't really religious.
22 And so it looks as if -- if you look just at
23 the record, that there is no indication on
24 the record that there was an intent to

1 convey a message of religious significance,
2 albeit, there are those who are informed,
3 who understand when they see the lechis
4 perhaps orally or perhaps by seeing them,
5 I'm not sure from the record, that there is
6 an area of demarcation so that they can push
7 and carry things on the Sabbath and on Yom
8 Kippur.

9 MR. LEWIN: Judge Ambro, the two
10 are not mutually exclusive. I represented
11 the case for the menorah in the Allegheny
12 case in the Supreme Court. A large menorah
13 was put up, and it was lit every night, it
14 had a very functional purpose.

15 JUDGE AMBRO: Uh-hum.

16 MR. LEWIN: Prayers are said
17 around it, blessings are said, the candles
18 are lit. At the same time, it conveys a
19 message. Nobody questions --

20 JUDGE AMBRO: But -- but in those
21 cases it was very clear from, at least
22 reading them, that it was put on the record
23 that a religious -- a message of religious
24 significance was conveyed by putting up the

1 menorah.

2 MR. LEWIN: And in this case, the
3 lechis convey a message of religious
4 significance to the people who know what
5 lechis are, and, obviously, from the
6 reaction of Tenafly, the existence of the
7 lechis conveys a message of religious
8 importance to the Orthodox community to the
9 other residents of Tenafly who may be for or
10 against --

11 JUDGE AMBRO: But it -- but it
12 seemed that the intent was there, that
13 the -- the -- and, again, it was the
14 strategy of how you approached the Borough
15 council to underplay the fact, perhaps, not
16 to play much at all, the religious
17 significance of the lechis, but rather to say
18 that they are just strips, just exactly as
19 Mr. Sugarman did. These are just strips and
20 they can house a number of things. And
21 there was -- the record appears incomplete
22 if intent is a requirement still existing
23 from Spence.

24 MR. LEWIN: Well, with all

1 the back of his pants, and the Supreme Court
2 said, you know, what does that mean, a
3 little flag on the seat of your pants. And
4 yet it can be understood by people maybe as
5 meaning disrespect to the flag. So, the
6 point is, whatever you do, if you do it in
7 public and it communicates in some way, I
8 don't think that you have to put on the
9 record "I'm intending to communicate". I
10 think the fact is it communicates.

11 Now, I don't know even know
12 whether in the Hurley case -- whether there
13 was trial evidence in the Hurley case that
14 said that the people who were parading were
15 trying to communicate a particular message
16 or some message. They were parading.

17 JUDGE ROTH: There have been Eruvs
18 a lot longer than there have been telephone
19 poles, right?

20 MR. LEWIN: Pardon?

21 JUDGE ROTH: There have been Eruvs
22 a lot longer than there have been telephone
23 poles?

24 MR. LEWIN: There have been Eruvs

1 much longer --

2 JUDGE ROTH: For 2,000 years. And
3 they were first established by putting poles
4 up and stringing a line. So that the lechi
5 is not the functional pole, but it is the
6 symbol of the pole and it communicates the
7 pole. And it seems to me that if -- if we
8 were considering the telephone pole, the
9 functional argument might be more telling
10 than it is today when the lechis does not
11 serve the function of holding the wires that
12 symbolizes the existence of the pole. Does
13 that -- is that --

14 MR. LEWIN: Well, I think it is
15 true that as a matter of both the Jewish Law
16 and otherwise, the lechi represents a pole
17 that would be going up to the telephone
18 line, which is precisely why I said that it
19 has to be immediately under the telephone
20 wire as a matter of Jewish Law, because it
21 replaces the pole that would be used prior
22 to the time that there were telephone poles.
23 And once telephone poles came into
24 existence, the rabbis determined that if you

1 did this on a telephone pole under an
2 existing wire, you were satisfying the
3 Jewish Law requirement. But you're right,
4 to the residents of Tenafly, it is
5 symbolic -- to the Orthodox residents -- of
6 a pole which is a portion of, as it were, a
7 doorway, which is really the rabbinical
8 requirement, that if you had like a doorway
9 with a -- with a top, a lintel and two --
10 two sides of the door.

11 I would like to address --

12 JUDGE NYGAARD: Yeah, you have
13 some full rebuttal. We suffered here with a
14 lot of questions. Were you able to make the
15 points that you wanted to make when you came
16 up here today?

17 MR. LEWIN: Well --

18 JUDGE NYGAARD: I mean, we sort of
19 had you all over the board.

20 MR. LEWIN: I guess -- I guess
21 Judge Nygaard that I'm accustomed frequently
22 to having my time used up with questions.
23 The point on the symbolic speech really is,
24 and I think this is the main point I would

1 like to make on that, is that as this Court
2 said in the Gregoire case -- in quoting
3 really from legislative history and the
4 Supreme Court -- the important thing is what
5 the municipality does, not what it says.

6 And here, with all respect, Judge
7 Ambro, the Mayor was entirely clear, and we
8 have quoted the full colloquy at page nine
9 of our brief, Mayor Moscovitz said -- and it
10 wasn't disputed -- they permit these poles
11 to have orange ribbons tied around them for
12 a public demonstration with regard to public
13 school regionalization -- (end of side one
14 of first tape).

15 (Beginning of side two of first
16 tape). Had Tenafly said, "Well, we believe
17 that utility poles should have a total of
18 2,000 plastic strips and not more than that,
19 because we think that's too many plastic
20 strips within the municipality", I think
21 that might very well be permissible. They
22 can say here's the total number of plastic
23 strips we allow as an objective matter,
24 because we think it's unaesthetic to have

1 more plastic strips. But if there's
2 anything you may not consider, it is the
3 religious impact of these plastic strips,
4 because that is constitutionally
5 impermissible.

6 JUDGE AMBRO: And what if one of
7 the council members says to you, Mr. Lewin,
8 my concern is, I don't want us to be on the
9 front pages of the paper as violating the
10 Establishment Clause? Can you give me a
11 legal opinion that if we vote in favor of
12 this that we will not be violating the
13 Establishment Clause, what would you say?

14 MR. LEWIN: I'd say absolutely,
15 I'll sign it today. I can write up that
16 letter in a paragraph. Judge Thompson in
17 the District Court of New Jersey so held and
18 she was right, because there's nothing by
19 permitting -- by simply permitting private
20 and privately financed, at no expense to the
21 government, displays of the very same thing
22 that you have for cable and for telephone on
23 the wires, you're not violating the
24 Establishment Clause. You're simply

1 allowing a private party to engage in
2 conduct that that private party is doing for
3 religious purposes, which conduct is not
4 anti-social, is not harmful, doesn't hurt
5 anybody and is perfectly innocuous.

6 JUDGE AMBRO: Assume counsel says
7 differently, assume counsel says this is a
8 tough issue on the Establishment Clause and
9 I don't think I can give you that opinion
10 because I'm not completely sure how it will
11 come out. What do you do as a council
12 member then?

13 MR. LEWIN: I tell the council
14 members to vote without considering the
15 religious impact. And, you know, if we're
16 taken to court, we're taken to court and
17 we'll defend it. I mean, we'll do exactly
18 what the City of Long Branch did in the case
19 that the ACLU brought against the City of
20 Long Branch, what Belle Harbur did in the
21 case that was brought against the Belle
22 Harbur Eruv, both of them fought the case.
23 We will defend it, that's all. But don't
24 vote against it, because if you're voting

1 against it on account of its religious
2 content, you are, one, discriminating
3 against religious practice, and, two,
4 suppressing religious speech. And I think
5 it is religious speech. And, three,
6 prohibiting something because of a fear that
7 it may violate the Establishment Clause.
8 The Supreme Court has said time and again
9 that that's not a ground for prohibiting
10 something. Only if it is, indeed,
11 absolutely a violation of the Establishment
12 Clause, may it be determined not to do it.

13 JUDGE AMBRO: Okay. Thank you.

14 JUDGE ROTH: Mr. Lewin, let me
15 add, many years ago when my daughter was in
16 college, she worked one summer for Mintz,
17 Levin, Cohen, Ferris, Glovsky and Popeo, and
18 one of her jobs was answering the telephone.
19 And by the end of the summer her triumph was
20 being able to say the firm name when she
21 answered the phone without stuttering.

22 MR. LEWIN: Well, I can tell Your
23 Honor, I've been with the firm now a year,
24 it took me six months to remember all those

1 names. And I said -- I said to the managers
2 of the firm, I said they are very modern in
3 various ways, but in this age where all firm
4 names are being compressed down to one or
5 two names, I think they're really very
6 backward.

7 JUDGE ROTH: As a result of the
8 experience, my daughter went to medical
9 school.

10 JUDGE AMBRO: You know your
11 comment is not going to help you at
12 compensation time.

13 MR. FELDMAN: May it please the
14 Court, my name is Noah Feldman, and I appear
15 on behalf of the Borough of Tenafly and the
16 Tenafly council members as individuals.

17 If I may, Your Honors, I would
18 like to begin by addressing the free speech
19 issue.

20 JUDGE AMBRO: Can I just ask you
21 just a preliminary question, why was the
22 issue not vetted before the judge alone, the
23 free speech issue?

24 MR. FELDMAN: Your Honor, our

1 counsel, including myself, represented to
2 the judge, that in our view the rubber
3 strips constituted conduct rather than
4 speech. The District Court was not
5 receptive to that argument. So we preserved
6 the point for appeal.

7 JUDGE AMBRO: But your briefing on
8 appeal initially didn't really get into it
9 until you were asked for supplemental
10 briefing. Why?

11 MR. FELDMAN: That's true, Your
12 Honor. To be entirely candid, having won
13 the war, we decided not to fight that
14 particular battle. The District Court did
15 correctly find that if speech were an issue,
16 the Borough had not violated anyone's free
17 speech rights in this case.

18 JUDGE AMBRO: Okay.

19 MR. FELDMAN: Your Honor, to
20 address Judge Roth's question about whether
21 the rubber strips symbolize the pole, I
22 think, Judge Roth, in Jewish Law, in fact, I
23 think the record reflects this, it's not
24 that the rubber strips symbolize a doorway,

1 they are a doorway. In fact, the rubber
2 strips themselves constitute the doorway.
3 That's why, Your Honor, if the rubber strips
4 aren't there or if they don't go all the way
5 up to the very top of the pole, there's no
6 basis to say legally under Jewish Law it's a
7 valid Eruv. So, Your Honor, I think it's
8 appropriate to say, as Judge Ambro mentioned
9 a bit earlier, that under Jewish Law even,
10 and that means in both intended
11 communication and reception by any of those
12 people who might by some special ability be
13 able to identify which rubber strips are the
14 Eruv, the strips are simply functional.
15 They are functional under Jewish Law, and
16 they are -- that is the only basis for which
17 they were requested. And they are so
18 represented in the record. So, with respect
19 to that point, I think it's possible to say
20 that the strips themselves should be
21 considered to be purely functional and,
22 therefore, be considered conduct.

23 JUDGE AMBRO: For those who are
24 informed, those who are part of the

1 community, do they not understand
2 effectively what's being said to them, which
3 is, that if an Eruv is here on the Sabbath
4 and Yom Kippur, you can push and carry
5 within these demarcated areas?

6 MR. FELDMAN: Your Honor, the Eruv
7 does not communicate that fact. The rubber
8 strips do not communicate that fact. It is
9 true, absolutely, as you say, Your Honor,
10 that to persons who respect the Eruv and
11 feel that the Eruv is necessary, that the
12 presence of the Eruv facilitates these
13 things. But the strips themselves don't
14 have a communicative dimension. In that
15 sense, they are fundamentally different than
16 the menorah that learned counsel mentioned.
17 Because the menorah has an expressive
18 purpose, even in Jewish Law, the publi --
19 the publication of the fact of the Hanukkah
20 season. Whereas, the Eruv has no such
21 communicative effect. Now you're getting
22 into the Jewish Law. So, Your Honor, the
23 citizens who are concerned about the Eruv,
24 care to know that the Eruv exists. But

1 there's no need for them to go out and see
2 it themselves, no need whatsoever. It's
3 sufficient for them to know that it exists.
4 It's a bit like the city limits of a town,
5 Your Honor, which similarly demarcate a
6 boundary. If I know that I'm in one town
7 and the speed limit in 30 miles an hour, and
8 the next town is 35, I don't need to see any
9 demarcation zones to exactly know which town
10 I'm in.

11 JUDGE AMBRO: But if you're an
12 Orthodox Jewish adherent, don't you have to
13 have the lechis in place in order to
14 complete the puzzle?

15 MR. FELDMAN: Yes, Your Honor,
16 they must be in place. But the fact that
17 they exist and must be in place does not
18 mean that they have a communicative
19 dimension. There are many, many objects
20 that have legal significance in any legal
21 system whose presence is necessary to
22 achieve some end, but which don't
23 communicate anything by virtue of that
24 presence. The city limit, again, is a good

1 example. The city limit is there and it has
2 legal effects, but one doesn't need to have
3 anything communicated to oneself by the
4 existence of the city limits. And that's
5 all that the rubber strips are, they
6 demarcate the boundaries of the area that's
7 enclosed by the Eruv.

8 JUDGE ROTH: But won't the Rabbi
9 at the beginning of the Sabbath check to
10 make sure that the Eruv is complete?

11 MR. FELDMAN: Yes, Your Honor.
12 One person -- although, I don't believe this
13 fact is reflected in the record, you're
14 absolutely correct, Your Honor -- that one
15 person or several people will be deputed to
16 go and make sure that the Eruv is in place.
17 But even that person, Your Honor, isn't
18 having something communicated to him by the
19 presence of the Eruv, he's simply observing
20 that the Eruv is, in fact, in place.

21 JUDGE ROTH: And if it isn't in
22 place, it will be repaired?

23 MR. FELDMAN: Absolutely.

24 JUDGE ROTH: Or it's not

1 effective?

2 MR. FELDMAN: Absolutely, Your
3 Honor. And, in fact, that person would then
4 go and communicate to the members of the
5 community, in that eventuality, that the
6 Eruv was not in place. Now, that act, Your
7 Honor, the act of the person who supervised
8 the Eruv, going and informing people, that
9 would certainly be protected by the free
10 speech clause. But notice, Your Honor,
11 that's entirely different than the existence
12 of the Eruv and the intact state of the
13 Eruv. It's as if one went to see whether
14 the new moon had risen. Whether the moon
15 rose or not is not a communicative action,
16 but it might have very great consequences
17 for someone within a religion.

18 JUDGE ROTH: But if the moon
19 doesn't rise, you can't make it rise. If
20 that Eruv is not intact, you can make it
21 intact.

22 MR. FELDMAN: Good question about
23 that, Your Honor. But I'm not sure that
24 that has significance for the question of

1 whether the action, whether it's the moon or
2 the intactness of the Eruv, had a
3 communicative dimension. The communicative
4 dimension isn't necessarily affected by
5 whether or not one can take some action to
6 repair it -- to repair the strips.

7 JUDGE AMBRO: On the symbolic
8 speech issue, why did you maintain in your
9 supplemental briefing that Troster overruled
10 the intent to communicate a particularized
11 message in Spence?

12 MR. FELDMAN: Well, Your Honor,
13 the best reading that I was able to give to
14 the language of the Troster Court in saying
15 that it had -- that it had reconsidered the
16 Steirer bright line rule, was that the
17 language of Hurley in which the Court said
18 that a particularized specific intent
19 message was not necessary, had altered
20 Steirer in some way. Otherwise, Your Honor,
21 it wasn't -- I wasn't able to understand how
22 it could be that one panel of the Third
23 Circuit could overrule an earlier panel of
24 the Third Circuit. There had to be an

1 intervening Supreme Court decision that
2 affected the meaning of that.

3 But, Your Honor, I took it to be
4 the case that there's a very real
5 possibility that even if the intent prong is
6 no longer required under Third Circuit
7 precedent, it's still one of the elements.
8 It's not possible, of course, for the Third
9 Circuit to overrule the Supreme Court of the
10 United States. The Spence test still
11 exists. It's just that only one of the
12 factors of the Spence test is now the
13 presence of intent to speak.

14 JUDGE AMBRO: In fact, if intent
15 is overruled or put into a lesser status by
16 Troster, and the focus is, as the Court
17 noted, quoting from Spence, that the
18 activity was sufficiently imbued with
19 elements of communication, so -- elements of
20 communication. It would seem that that
21 would help the Tenafly Eruv Association with
22 their argument, because clearly it is
23 understood by those who are informed, the
24 significance, indeed, the religious

1 significance, of the Eruv.

2 MR. FELDMAN: Well, Your Honor, I
3 agree that the test involves the elements of
4 the communication. But as this Court
5 stressed in Steirer and in Troster as well,
6 the communicative dimension has to adhere to
7 the object itself, rather than, as I was
8 suggesting a moment ago, rather than adhere
9 to the fact that some state of affairs
10 exists in the world. So, although I agree
11 with you that the communicative elements
12 must be present and that intent to
13 communicate is one of those -- the panoply
14 of elements that go in that test, that
15 doesn't mean, Your Honor, that the mere fact
16 of the existence of the Eruv as something
17 that matters to the members of the Eruv
18 Association suffices to render it protected
19 speech under the First Amendment.
20 Otherwise, every symbolic -- every action
21 that can be imbued with symbolism by a small
22 number of people would constitute symbolic
23 speech. And that surely is not the case.
24 Your Honor, the United States of America

1 fights wars, and those wars have great
2 symbolism in the minds of many citizens, but
3 that doesn't make those wars into actions
4 that are imbued with communicative
5 dimensions.

6 JUDGE AMBRO: Is there any
7 evidence in the record that if the lechis
8 were not understood to communicate lines of
9 demarcations for use on the Sabbath and Yom
10 Kippur?

11 MR. FELDMAN: Were not understood
12 to communicate?

13 JUDGE AMBRO: Were not understood.
14 The flip of what I asked your opponent.

15 MR. FELDMAN: Well, Your Honor,
16 there is evidence in the record from the
17 public presentations that were made by the
18 members of what may have been an incipient
19 Eruv Association to the Borough council, in
20 which people said these have -- the one line
21 was, "these wires are invisible", they were
22 speaking about the Eruv generally, but the
23 same can be said of the rubber strips which
24 themselves are invisible in the same sense.

1 There were further statements that these
2 have no specific meaning. These do not
3 communicate. As a result, I think it's
4 possible to infer from that, those
5 statements in the record, Your Honor,
6 including one or two statements by counsel,
7 that there was no intention to communicate
8 any information via the Eruv or the rubber
9 strips.

10 JUDGE AMBRO: But clearly it was
11 understood by those to whom the information
12 -- the receivers of the information, exactly
13 what you needed in order to have the
14 permission on the Sabbath and Yom Kippur to
15 push and carry.

16 MR. FELDMAN: I think, Your Honor,
17 that those who were concerned about the Eruv
18 certainly knew that these things had to be
19 present in order for them to be permitted to
20 carry and push. But that doesn't mean that
21 they felt that they had to have that
22 information communicated to them by these
23 very objects. These objects themselves
24 still lack the communicative dimension, even

1 though it was understood that the presence
2 of those might matter tremendously. I would
3 analogize once more to the moon, Your Honor,
4 one can imagine a religion that cares
5 particularly about the new moon rising at a
6 particular moment, and everyone would go
7 outside and look to see if the moon has
8 risen. And if it has, in fact, risen, then
9 certain consequences will follow, involving,
10 let's say, pushing and carrying. Right.
11 So, in that situation, Your Honor, the
12 moon's rising or falling is not itself
13 speech, it's not communicative -- doesn't
14 have a communicative dimension to it, even
15 though it symbolically happens for people,
16 even though its presence has consequences of
17 law.

18 Well, Your Honor, I will then
19 turn --

20 JUDGE AMBRO: I mean, the point on
21 symbolism, I believe it was quoted, if I'm
22 not mistaken, in the Troster case, going
23 back to the Supreme Court Case in '43 (sic),
24 that symbolism, whether you call it

1 primitive or not, is a highly effective
2 means of communication among humans. This
3 symbolism, does it -- why does it not
4 communicate exactly what was said by your
5 opponent, that within these lines, once the
6 Eruv is up, you can push and carry?

7 MR. FELDMAN: Your Honor, a symbol
8 is something which is both created with the
9 intent to be observed, that particular
10 symbol to be observed, and for those who
11 observe it to have a great likelihood, as
12 Spence said, of walking away with an
13 understanding of that message. I think the
14 Spence language you read is an attempt to
15 capture the essence of what symbolism
16 involves.

17 JUDGE AMBRO: But -- but isn't it
18 almost absolutely made clear that the Eruv
19 will be observed once -- once it is up, that
20 is why it's being asked for to begin with?

21 MR. FELDMAN: Well, Your Honor,
22 the Eruv is being asked for not so that it
23 will be observed, but simply so that it will
24 be functionally present. And it is true, as

1 Your Honor's question has indicated, that
2 one person or one or two people on behalf of
3 a small community of people will have the
4 responsibility to go and make sure that it
5 is in place. But it will not communicate to
6 them at that moment. And that's why the
7 strips themselves lack a communicative
8 dimension.

9 JUDGE ROTH: But it will
10 communicate to them a private domain as
11 opposed to a public domain.

12 MR. FELDMAN: Your Honor, its
13 presence -- the presence of the Eruv in its
14 intact form will constitute the assessment
15 of the viewer as a matter of Jewish Law.
16 Proof, legal proof in the Jewish Law that
17 such a domain exists. But, Your Honor, that
18 is distinct from saying that it communicates
19 that message to them. It doesn't symbolize
20 anything like that to them, Your Honor. It
21 has an actual particular meaning within
22 Jewish Law. If it's present then the domain
23 is single. If it's not present then the
24 domain is not single. And that fact can be

1 ascertained from looking at it. Again, Your
2 Honor, I'm saying that it may, in fact, be
3 ascertained simply from observing that,
4 without that translating or transforming
5 those facts into things that have
6 communicative dimensions or elements.

7 Your Honor, really the core of
8 this case is the Free Exercise Clause. And,
9 Your Honor, the Free Exercise Clause is
10 written in terms of what the government may
11 not do to the individual, not in terms of
12 what the individual may extract from the
13 government. That much, Your Honor, is black
14 letter law. And I would submit to the Court
15 that counsel on the other side of this case
16 has not brought forward even one case from
17 any Court, either before Employment Division
18 against Smith or since the Employment
19 Division against Smith. No Court has held
20 that there is an affirmative duty placed
21 upon a legislative body to enact a new
22 statute or a new ordinance amending a
23 previous ordinance in order to permit a
24 group of people to enhance their religious

1 exercise by virtue of erecting a permanent
2 structure on government property. There's
3 no case for that proposition, Your Honor.
4 And there's a reason for that. The reason
5 is that this amounts to a request to make
6 religious accommodation a mandatory element
7 of our Free Exercise arrangement, when, in
8 fact, our Free Exercise and Establishment
9 Clause jurisprudence make that an optional
10 thing, a discretionary thing, well within
11 the legitimate concern of the legislature.

12 JUDGE AMBRO: Yes, but isn't it
13 true that all faith-based religions have
14 some type of limitations on behavior?

15 MR. FELDMAN: Certainly, Your
16 Honor.

17 JUDGE AMBRO: And this particular
18 one you are being asked to -- so, for you to
19 say that it's because it's self-imposed is
20 almost to denigrate one religion as opposed
21 to another.

22 MR. FELDMAN: Your Honor, with
23 great respect both to Your Honor and to
24 counsel on the other side, I don't think

1 that that's the case. I think that there's
2 a distinction, Your Honor, between a wall
3 that prohibits someone from performing some
4 action that they believe is content. As for
5 example, the government's action in the
6 Brown against Borough of Mahaffey case, in
7 which the Borough actually barred the gates
8 to a place of prayer, thereby impeding, to
9 use the language that the Brown Court used,
10 access to that form of worship, from a
11 situation in which anyone is permitted to
12 pray anywhere he or she wishes or to
13 congregate anywhere he or she wishes in the
14 of Village of Tenafly, but Orthodox Jewish
15 Law requires that certain persons only push
16 or carry on the Sabbath in the presence of
17 this Eruv.

18 Your Honor, there is a distinction
19 in law, in American Constitutional law,
20 between government action that prohibits
21 religious exercise, which is what's
22 contemplated by the Free Exercise Clause,
23 and government action that simply declines
24 to grant an accommodation that would enhance

1 sorry.

2 JUDGE NYGAARD: And if they were
3 to prevail, everything would just remain in
4 place. So, they're not asking for any more
5 from you, at least in this action, than
6 that, are they?

7 MR. FELDMAN: Your Honor, with
8 respect, I think that that's not perfectly
9 accurate, because there was an agreement
10 reached here between the Borough and the
11 appellants here to permit the Eruv to remain
12 in place pending the outcome of this
13 litigation. But nobody disputes, Your
14 Honor, as far as I know, that the Borough
15 has every right to remove any matter which
16 is affixed to the utility poles in the town
17 in violation of Ordinance 691. And --

18 JUDGE AMBRO: Did they --

19 MR. FELDMAN: I'm sorry.

20 JUDGE AMBRO: Go ahead, I'm sorry.
21 You want space and I'll ask it.

22 MR. FELDMAN: Well, just -- I was
23 just going to add, Your Honor, that nobody
24 has argued in this case, Your Honor, that

1 the wires and the rubber strips do not
2 constitute a violation of Ordinance 691.

3 JUDGE AMBRO: Did you remove or
4 make efforts to remove the orange ribbons?

5 MR. FELDMAN: Your Honor, the
6 record doesn't reflect an answer to that
7 question one way or another. And the
8 District Court itself said that it didn't
9 have sufficient evidence to determine either
10 whether the Borough was aware of the
11 presence of those ribbons or whether the
12 ribbons were permitted to remain in
13 contravention of the -- of the ordinance.

14 JUDGE ROTH: If it had been
15 inscribed upon the record books of Tenafly
16 that we, the town, refused to grant
17 permission to establish the Eruv because we
18 want to keep Orthodox Jews out of Tenafly,
19 would that be a violation of the Free
20 Exercise?

21 MR. FELDMAN: Well, Your Honor,
22 I'll begin by saying the almost formulaic
23 point here, which is that that's not been
24 the case before us --

1 JUDGE ROTH: I know. This is a
2 hypothetical and --

3 MR. FELDMAN: Well, Your Honor, I
4 would say that under currently existing Free
5 Exercise jurisprudence, it would not violate
6 the Free Exercise Clause of the Constitution
7 had the Borough even said that in those
8 terms. And let me say why, Your Honor, the
9 reason is that in the Church of Lukumi
10 Babalu Aye, which is the leading and only
11 Supreme Court decision on this -- on this
12 case, the Court went out of its way to
13 distinguish the Hialeah Ordinance from the
14 neutral and generally applicable law in
15 Smith. The Court said that unlike the
16 neutral and generally applicable law in
17 Smith, the Hialeah Ordinance was directed
18 specifically at prohibiting religious
19 exercise of the Santeria Practitioners. And
20 the Court strongly implied there and stated
21 expressly in Smith that where the law speaks
22 generally and neutrally as a pre-existing
23 law, there can be no obligation upon the
24 government to change that law, even -- even,

1 Your Honor, where there is a compelling
2 interest -- I'm sorry, even, Your Honor,
3 absent a compelling interest for the state
4 to have that law.

5 Your Honor, I would submit that if
6 the Borough council members somehow
7 counterfactually engaged in that sort of
8 consideration, it would be morally
9 troubling, Your Honor. And I certainly
10 would not like to see any legislative body
11 acting in that fashion. But, in fact, Your
12 Honor, it would not have been a violation of
13 the Free Exercise Clause. And the reason
14 is, again, that the Free Exercise Clause has
15 to do with what the state can do to the
16 individual. They must have taken an
17 affirmative action. The state has to take
18 an affirmative action to violate Free
19 Exercise. The language "Congress shall make
20 no law", you know, is applicable to the Free
21 Exercise Clause as well. And so in that
22 case, Your Honor, I would submit that there
23 would be no Free Exercise violation.

24 Your Honor, I'd like to, if I may,

1 just quickly point to the distinctions
2 between the cases that appellants have
3 proposed to make a point with respect to the
4 Free Exercise Clause and the law and the
5 facts in the case that we have before us.

6 In Brown, Your Honor, which my
7 opponents have emphasized today, there was
8 an act of intentional discrimination, there
9 was an affirmative act, it involved
10 intentional discrimination and it actually
11 blocked the gates that were not themselves
12 the gates of prayer, but the gates on the
13 way to the place of prayer. Your Honor,
14 here, there's been no intentional act at all
15 by the Borough council, so there's no
16 discrimination in that sense. There is no
17 intentional discrimination, and certainly
18 the record is replete with evidence to that
19 effect and evidence suggesting that the
20 primary concern of the Borough council
21 members is avoiding the Establishment Clause
22 violation. And last but not least, Your
23 Honor, there was no action that exhibited
24 any discriminatory animus towards the party.

1 Now, it's true, Your Honor, that
2 the language in Brown --

3 JUDGE AMBRO: But if -- if you are
4 an Orthodox Jew, don't you believe -- isn't
5 the message that the Borough communicates to
6 you that in effect you have blocked the
7 gates by not allowing the Eruv that they
8 have requested of you?

9 MR. FELDMAN: Your Honor, I think
10 it's entirely possible, and I say this with
11 great candor, that the subjective experience
12 of citizens who come to a legislative body,
13 seek in impassioned terms from them an
14 accommodation, and are not granted that
15 accommodation, may have the internal
16 experience of feeling that somehow they have
17 been denied access in some fashion. But,
18 Your Honor --

19 JUDGE AMBRO: Has the -- in the 48
20 years that you've had this ordinance in
21 place, other than with respect to this
22 instance, has it ever been used to preclude
23 someone from putting anything on telephone
24 poles?

1 MR. FELDMAN: Yes, Your Honor.
2 The record reflects clearly that -- and the
3 Borough Administrator so states within the
4 record -- that regularly the ordinance is
5 invoked to require the removal of everything
6 from "no trespassing" signs to garage sale
7 signs to house numbers. So, Your Honor --

8 JUDGE AMBRO: But the house
9 numbers are still there, are they not?

10 MR. FELDMAN: Your Honor, the
11 house numbers have been removed since the
12 beginning of this -- of this litigation
13 where they existed. But, in general, Your
14 Honor, those few examples of house numbers
15 simply suggest that some people flouted the
16 ordinance. Your Honor, the ordinance --

17 JUDGE ROTH: Well, doesn't it also
18 suggest that the ordinance simply wasn't
19 enforced?

20 MR. FELDMAN: I don't think so,
21 Your Honor. I don't think any more than in
22 a drug case that comes before Your Honors,
23 the fact that one or two persons were guilty
24 of -- were guilty of using drugs doesn't

1 suggest that under -- that mere fact doesn't
2 show an underenforcement of our drug laws,
3 Your Honor. Some -- there are -- it's
4 exactly analogous, there are some instances
5 of violation, but that doesn't mean there's
6 underenforcement. And, in fact, Your Honor,
7 even a law that has the effect of informing
8 the vast majority of citizens that they
9 ought not to break the law and does so, is
10 having an enormous effect in the world.

11 Your Honor, Tenafly is -- is one
12 of those towns that carefully enforces all
13 of its zoning requirements. The town is
14 regularly cleansing, if you'll pardon the
15 expression, its public spaces in ways that
16 are designed to maintain uniformity and
17 visual beauty within the town.

18 JUDGE AMBRO: But there's no --
19 but there's no evidence that the orange
20 ribbons, there was any action to take them
21 down.

22 MR. FELDMAN: Your Honor --

23 JUDGE AMBRO: There was no
24 evidence until it was brought up that albeit

1 not on the poles, but the directional signs,
2 the churches with various -- maybe a cross
3 or whatever, those weren't taken down at
4 least as of the time of the opinion. So,
5 where is the -- the enforcement?

6 MR. FELDMAN: Your Honor, first of
7 all, the enforcement applies with respect to
8 things that are put specifically on the
9 utility poles -- having been specifically on
10 utility poles. And the Borough
11 administrator testified that those objects,
12 for example, street sign numbers, for
13 example, posters that people put up for lost
14 dogs and the like, have been removed
15 regularly and in enforcement of the
16 ordinance. The other act, Your Honor, with
17 respect to the orange -- the orange ribbons,
18 again, the District Court -- I would submit
19 to Your Honor that those ribbons aren't even
20 properly in the record before this Court,
21 because the District Court judge said that
22 there was not sufficient evidence before him
23 to conclude that even if those were up in
24 contravention of the Borough's ordinances or

1 if they remained in place in contravention
2 of the Borough's ordinances. And I think
3 that that's a -- that's a determination that
4 was based, Your Honor, on credibility. It's
5 a credibility determination based on
6 testimony in the record, testimony of the
7 Mayor. And it's entitled to the full weight
8 of respect and deference to this Court of
9 Courts even under the standard of review
10 proposed now by Appellants.

11 JUDGE AMBRO: Let me switch gears
12 with you for just a moment. If the lechis
13 were not permanent, but they were removable
14 and they were put up just before sundown on
15 the Sabbath and taken down the next evening
16 at sundown, would that affect your thinking
17 at all?

18 MR. FELDMAN: Well, that would be
19 a Solomonic resolution of the issue, Your
20 Honor. But I think that to be entirely --
21 to be entirely candid, it would not directly
22 affect the outcome of this case, because the
23 case would -- it might be the case that to
24 the extent that one were concerned about

1 Establishment Clause violations, that might
2 be one of the many factors, and as Your
3 Honors know, there are many, many complex
4 factors that go into deciding an
5 Establishment Clause case. And the duration
6 of their presence would, I don't doubt,
7 would be one of those factors --

8 JUDGE ROTH: What about in the
9 free speech where the -- the temporary
10 nature of the holiday symbols is claimed by
11 Tenafly to differentiate that situation from
12 a permanent fixture on the pole?

13 MR. FELDMAN: I think it does,
14 Your Honor. And I think that its temporary
15 duration would be an important element in a
16 distinction between the two. There are
17 other things that also distinguish the
18 holiday decorations, Your Honor. And most
19 specifically, and the District Court, in my
20 view, correctly held, that the symbols are
21 not speech at all. Those -- those
22 decorations are not speech at all.

23 JUDGE ROTH: But holiday means
24 holy day, so aren't you really evading the

1 true implication when you say a holiday
2 symbol is purely secular?

3 MR. FELDMAN: Well, Your Honor,
4 the District Court, I believe, referred to
5 them as seasonal decorations on some
6 occasions as well. I admit that seasonal
7 probably exists to the season, that's true.
8 But, Your Honor, it's -- it's the position
9 of the Borough, and I think it's the
10 position of common sense in this case as
11 well, that these decorations are simply
12 designed to spruce up the downtown area in
13 the most literal sense just before the -- in
14 the holiday season. And to, as a result,
15 encourage people to feel the sorts of
16 feeling that encourages them to go out and
17 buy things. And that's, you know, something
18 that -- that is well within the legitimate
19 purview of the Borough's objectives. If
20 it's any sort of speech, Your Honor, it
21 would be commercial speech.

22 Your Honor, I will move then to --
23 to the Fraternal Order of Police case, which
24 my opponents have also pressed upon the

1 Court. Your Honor, the Fraternal Order of
2 Police is decided under the standard of
3 Sherbert against Verner, as part of that
4 area that was carved out in Employment
5 Division against Smith and preserved, even
6 after Employment Division against Smith
7 adopted the neutral and generally applicable
8 rule model.

9 Now, Your Honor, under that
10 Sherbert principle, there must be a finding
11 of a substantial burden in order to bring
12 about the compelling interest test as it
13 existed --

14 JUDGE AMBRO: The Fraternal Order
15 said also you need an extraordinarily strong
16 interest to justify suppressing the free
17 exercise of one's religion.

18 MR. FELDMAN: It did, Your Honor.

19 JUDGE AMBRO: What is the
20 extraordinarily strong interest here?

21 MR. FELDMAN: Your Honor, if I
22 might -- might say, the Court, however, said
23 that that extraordinarily strong interest is
24 only triggered by compelling interest. And

1 I think that the Court intended to
2 paraphrase "compelling interest" by speaking
3 of the extraordinarily strong interest which
4 is only triggered once there has been a
5 finding of a substantial burden. And Your
6 Honor, there hasn't been a finding of
7 substantial burden in this case, nor could
8 there be. There could not be a finding of a
9 substantial burden in a situation in which
10 the only evidence presented by
11 Plaintiffs-Appellants was that the religious
12 accommodation would enhance their religious
13 observance.

14 JUDGE AMBRO: But isn't the
15 extraordinarily strong interest in this case
16 the fear of certain council members if,
17 indeed, not all council members, that this
18 would cause controversy?

19 MR. FELDMAN: I wouldn't even put
20 it precisely that way, Your Honor. I think
21 the extraordinarily strong interest that the
22 Borough had here was avoiding preferential
23 treatment of one religious group in
24 particular. And I think the Borough --

1 JUDGE AMBRO: And let's assume
2 they had an extremely sincere concern about
3 that, is that enough to give you the
4 compelling or extraordinarily strong
5 interest?

6 MR. FELDMAN: I think, Your Honor,
7 that it is indeed the case that a borough's
8 concern to avoid violating the Establishment
9 Clause by preferentially treating one
10 religious group in a particular way would
11 constitute a compelling interest under
12 existing law both of Free Exercise and
13 Establishment.

14 Now, Your Honor, it's certainly
15 the case that there might have been a way
16 for the Borough to accommodate religious
17 exercise here without violating the
18 Establishment Clause. The Borough has never
19 maintained in this case that it's an
20 absolute impossibility. But the way to do
21 it would have required opening up the
22 telephone poles, the utility poles, through
23 an amendment of the ordinance, in order to
24 permit any form of speech on the poles.

1 individualized exemption scheme of the kind
2 contemplated by the Supreme Court in
3 Employment Division against Smith --

4 JUDGE AMBRO: There is the
5 possibility contemplated by the ordinance
6 that in the future there may be things
7 affixed to the poles with the approval of
8 the Borough; is that correct?

9 MR. FELDMAN: Only if done, Your
10 Honor, in one of two ways, only if performed
11 either via separate ordinance, or
12 arguably -- and this is a --

13 JUDGE AMBRO: Understood.

14 MR. FELDMAN: -- or arguably by
15 the -- by the Borough itself. It's very
16 possible, Your Honor, that the language of
17 the ordinance doesn't specifically preclude
18 the Borough itself, because it speaks of "no
19 person". And one could argue that the
20 intent of such language couldn't possibly
21 have meant to include the Borough itself
22 from hanging -- hanging anything from its
23 poles. So, that's out of the question.

24 JUDGE AMBRO: What case would

1 there be -- my final question, what case
2 would there be that you know of that says
3 that a concern or indeed a fear that there
4 might be an Establishment Clause violation
5 rises to the level of a compelling interest
6 to preclude what was being done here?

7 MR. FELDMAN: Your Honor, I don't
8 know the specific case that holds that the
9 mere concern would constitute necessarily a
10 compelling interest. But it's entirely
11 possible -- indeed it is the -- and the
12 Supreme Court has held that the presence of
13 an Establishment Clause violation would
14 constitute such an interest. If I knew of a
15 specific case, Your Honor, I would certainly
16 provide it to the Court.

17 JUDGE ROTH: It would seem to me
18 the concern would, in essence, eviscerate
19 the Establishment Clause.

20 MR. FELDMAN: I think that's
21 exactly right, Your Honor. I think that
22 should the Courts have a view that it's
23 somehow impermissible for a legislative body
24 to ask itself the question when approached

1 by a religious group, requesting a
2 considerably religious accommodation, the
3 question, does this violate the
4 Establishment Clause, that would literally
5 eviscerate the clause, Your Honor. And I
6 believe that that's the effect of learned
7 counsel's arguments, that somehow it was
8 constitutionally impermissible for the
9 Borough council even to consider the
10 religious nature of the request in this
11 case, Your Honor. I mean, talk about Scylla
12 and Charybdis, on the one hand the party
13 wants to come forward and say, well, this is
14 a religious request, and if you deny this
15 religious request, you would have violated
16 the Free Exercise Clause of the
17 Constitution. On the other hand, you may
18 not even consider the fact that the request
19 that I just made was religious, because if
20 you even consider that, Your Honor, you
21 would have fallen afoul of the Establishment
22 Clause. Now, Your Honor, that can't be a
23 standard to which Borough councils across
24 the United States are going to be held. And

1 it certainly can't be a standard to which
2 this Borough council is held.

3 JUDGE AMBRO: I suggest we all go
4 to Messina and watch the new bridge being
5 built so we don't have the Scylla and
6 Charybdis problem.

7 MR. FELDMAN: Very wise, Your
8 Honor.

9 JUDGE NYGAARD: Thank you. Any
10 other questions? Thank you for your
11 argument. We'll turn now to the rebuttals.

12 MR. SUGARMAN: In terms of the
13 record on whether there was a message
14 communicated the position of the Tenafly
15 Eruv Association is that the lechis are not
16 a religious symbol, but they have religious
17 significance, that is the position taken,
18 and before the District Court, and the
19 religious significance is what conveys the
20 message in these cases.

21 JUDGE AMBRO: Might it not be
22 stronger to say there would bear a symbol?
23 Maybe we're just doing Bick and Stinney (ph)
24 inaudible) replay, but...

1 utility poles?" Answer: "I recall."

2 Question: "And those orange ribbons stayed

3 there for a lengthy period of time,

4 correct?" Answer: "Those were there during

5 that particular issue. They were temporary

6 and they were not -- they did not get a

7 permit for it." Question, "So nobody came

8 to the council?" Answer, "No." Question:

9 "And the council didn't say okay, and they

10 were put up and council didn't do anything

11 to take them down, correct?" Answer:

12 "That's correct."

13 Now, as far as the church signs,

14 the church signs were specifically approved,

15 one church sign, in any event, was

16 specifically approved by Borough council and

17 that is A1048.

18 JUDGE AMBRO: Although, that was

19 in a right-of-way, was it not?

20 MR. SUGARMAN: That's right. But

21 691, Your Honor, covers not only the poles,

22 but the right-of-way. So, we're talking

23 about 691 and the -- the enforcement of 691,

24 you can't only look to the poles because --

1 JUDGE AMBRO: But that -- but that
2 brings us back to the question that Judge
3 Roth asked way back when, which, what's the
4 relevant forum?

5 MR. SUGARMAN: Well, it depends on
6 the issue. And, again, if we're talking
7 about this -- this argument that there is
8 always control of the right-of-way and the
9 Borough administrator is saying we always
10 police it, and counsel saying, we have
11 strong policy. Well, you know, there's no
12 evidence in the record of ever enforcing
13 that policy, and -- evidence going to prove
14 that they allow it. The church sign with a
15 religious symbol, a cross, hangs on the
16 (inaudible).

17 Now, as far as Brown is concerned,
18 Your Honor, Brown not only barred the
19 access, it made more difficult the access.
20 And the state here did take action, the
21 Borough did take action, it said no -- it
22 never had said no, it had always said yes.

23 And as far as Hialeah is
24 concerned, Hialeah said you can't stop at

1 the words of the law, you've got to go
2 behind it and see what is really happening.
3 And what's really happening here is
4 intention to discriminate. There's no other
5 intention that is on this record. And,
6 again, I said it before, the Establishment
7 Clause argument was -- was an afterthought.

8 So, I think at bottom what we have
9 here is intentional discrimination against
10 the Free Exercise of religion in the form of
11 the Borough saying, no, you can't do this,
12 when the Borough has never said, ever, to
13 anyone else --

14 JUDGE ROTH: My question to Mr.
15 Feldman, very quickly, about if the Borough
16 had -- had gone on record to say that we are
17 denying permission to -- because of our
18 desire to keep Orthodox Jews out of Tenafly.
19 Do you agree with him that that does not
20 violate the Establishment -- the Free
21 Exercise Clause?

22 MR. SUGARMAN: No, I don't agree
23 with him. And the -- I think that's exactly
24 what the Borough is saying in this case.

1 And if you look at the record, despite what
2 they said about their Establishment Clause
3 concern, what is all over this record from
4 day one, when Mr. Lipson said at the working
5 session in July of '99, we'd be bringing
6 "those people", Orthodox Jews, ultra
7 Orthodox Jews, lots of churches springing up
8 all over, community within the community,
9 ghetto, they can move elsewhere, not here.
10 It just -- it's just all over the record.

11 There's one other point I'd like
12 to make, if I may. And that is with respect
13 to Mr. Feldman's argument that there was
14 must be a substantial burden. In Fraternal
15 Order, this Court went back to Hialeah and
16 used the words "religious hardship". So,
17 that's the language of the last Supreme
18 Court case on this issue. And the last case
19 in this subject. There's nothing in
20 Fraternal Order that I can see about
21 substantial burden. There's clearly a
22 religious hardship here. And there was no
23 proponent.

24 JUDGE AMBRO: Thank you.

1 MR. LEWIN: And again, Your Honor,
2 just to pick up on this last point that was
3 made about the hardship, the letter that Mr.
4 Book wrote initially to Mayor Moscovitz on
5 November 7th, 2000, which appears on page I
6 think it's page A20 to A22 of the Appendix,
7 speaks both of the establishment of the Eruv
8 being a physical demarcation, and it says
9 that "The impact of an Eruv on Jewish
10 communal life is tremendous and spans the
11 Jewish community from infants to seniors.
12 It opens the door for observing Jews of all
13 ages and abilities to obtain access to the
14 synagogue." So, there's no question that in
15 terms of what it means so far as the
16 Orthodox Jewish community is concerned, it
17 is a major factor and a major part of
18 observance and access to the synagogue, as
19 shown in the record. And I think that
20 letter, as well, indicates that the lechis,
21 discussing the lechis, that the lechis
22 really communicate that to the members of
23 the community.

24 JUDGE AMBRO: What happens today

1 with the lechis down, do -- is it just off
2 limits so that you -- there are a number of
3 people that cannot get to the synagogue
4 for -- for services?

5 MR. LEWIN: I'm sorry?

6 JUDGE AMBRO: Today with the
7 lechis down -- they are down, are they not?

8 MR. LEWIN: No, they're not down.

9 JUDGE AMBRO: They're not down,
10 they are still -- I'm sorry. I apologize.

11 MR. LEWIN: By agreement that
12 they're up and people get to the synagogue
13 because they continue to be up by order of
14 this Court.

15 JUDGE AMBRO: That's right.
16 You're right. I forgot.

17 MR. LEWIN: But the point --

18 JUDGE AMBRO: I had a senior
19 moment.

20 MR. LEWIN: There are only some of
21 us --

22 JUDGE AMBRO: It won't be the last
23 time either.

24 MR. LEWIN: -- over a certain age,

1 I think, that can make that claim. But Mr.
2 Feldman says, look, the community was asking
3 something affirmative of Tenafly. What they
4 were asking was simply that these lechis,
5 which were put up by Cablevision on
6 Verizon's poles with the permission and
7 authorization of Cablevision and Verizon,
8 not be taken down. Nobody came to Tenafly
9 and said, "We want you affirmatively to
10 create an Eruv for us." Just don't prevent
11 us from having an Eruv which Cablevision
12 puts up as a matter of public welfare in
13 various other communities throughout the
14 United States where Eruvs are prevalent.

15 The claim that there's a
16 difference between temporary and
17 permanent -- first of all, with regard to
18 lechis, obviously, would be an enormous
19 hardship to go and put them up every week or
20 expect Cablevision to put them up every
21 week, because they are the experts and they
22 go up on the poles. But beyond that, it
23 makes sense to distinguish between temporary
24 and permanent when one's talking about a

1 limited public forum, which has a limited
2 amount of space, and you don't want to say
3 in a public square that somebody can put up
4 a religious display for the entire year.
5 But these are telephone poles that are
6 otherwise empty. Nobody is saying this is
7 rationed space. And, therefore, the fact
8 that it is permanent makes really no
9 difference in terms of what the government
10 is doing. Simply because it is permitted to
11 stay on, as they might do with a public
12 announcement about religious services in a
13 church on a governmental bulletin board, for
14 example. If a private church puts up a
15 notice which is up all year, what difference
16 does it make if there's room on the public
17 bulletin board for it to be up all year.

18 And, finally, Mr. Feldman has
19 said, look, that you can't be saying that
20 Tenafly could not consider the religious
21 nature of this, because maybe it would
22 violate the Establishment Clause. Our
23 position is that if it violates the
24 Establishment Clause -- if in fact the

1 community had come to Tenafly and said we
2 want you to spend \$10,000 in putting up an
3 Eruv -- yes, that would violate the
4 Establishment Clause and, of course, this
5 particular attorney would say that it
6 violates the Establishment Clause and you
7 may not do it. But if it does not violate
8 the Establishment Clause, there is no case,
9 and I think Mr. Feldman would acknowledge
10 that. And I think the inference from this
11 entire line of Supreme Court cases is that
12 it is impermissible and, in fact, amounts to
13 a violation of the Free Exercise Clause to
14 say that our fear of the Establishment
15 Clause causes us to prevent what would
16 otherwise be a proper religious private
17 exercise. And that's what this case is all
18 about.

19 JUDGE NYGAARD: Thank you. We
20 thank counsel for excellent arguments in a
21 very interesting but difficult case. We
22 would request that when we recess you see
23 the court crier about having a -- having a
24 transcript of the arguments prepared, which

1 will assist us greatly in our deliberations.

2 With that, we will recess for the
3 day.

4 * * *

5 (Whereupon, the case was in recess.)

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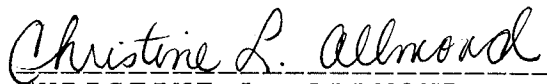
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C E R T I F I C A T I O N
* * *

I, Christine L. Allmond, Court Reporter and Notary Public in and for the Commonwealth of Pennsylvania, hereby certify that the foregoing is a true and accurate transcript of the tape recorded oral argument transcribed to the best of my abilities. I further certify that corrections, additions/deletions were made to said transcript upon the request of the attorneys involved in this action.

I certify that I am neither attorney nor counsel for, not related to nor employed by any of the parties to the action in which this oral argument was taken; and further that I am not a relative or employee of any attorney nor counsel employed in this action, nor am I financially interested in this case.



CHRISTINE L. ALLMOND
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CERTIFICATE OF SERVICE

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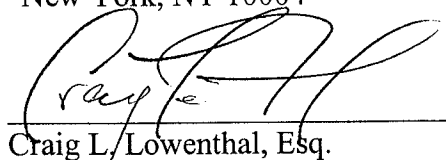
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