No. 01-3301(cmh)

IN THE
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

TENAFLY ERUV ASSOCIATION, INC., CHAIM BOOK, YOSIFA BOOK, STEPHANIE DARDICK GOTTLIEB and STEPHEN BRENNER,

Plaintiffs-Appellants,

v.

THE BOROUGH OF TENAFLY, ANN MOSCOVITZ, individually and in her official capacity as Mayor of Borough of Tenafly, CHARLES LIPSON, MARTHA B. KERGE, RICHARD WILSON, ARTHUR PECK, JOHN T. SULLIVAN, each individually and in their official capacities as Council Members of the Borough of Tenafly,

Defendants-Appellees.

On Appeal from the United States District Court for the District of New Jersey

REPLY MEMORANDUM IN SUPPORT OF MOTION FOR INJUNCTION PENDING APPEAL

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1. Tenafly now contends, for the first time in this litigation, that permitting the *lechis* for an eruv to remain on utility poles in the Borough would violate the Establishment Clause. That was, of course, *not* what the District Judge held. Indeed, during his statement denying relief pending appeal, the District Judge said, "I think I made it clear in the opinion -- and certainly the

parties have made it clear -- that this is not an establishment clause case. The opinion is not addressed to the establishment clause." Transcript of August 20, 2001 (Ex. 3 to our Motion), p. 12.

Notwithstanding that clear disclaimer by the District Judge, Tenafly now asserts in this Court that "the District Court here expressly held that it would have been a violation of the Establishment Clause to grant Appellant's request to erect the eruv" (Opposition, p. 11, original emphasis). Tenafly defends the decision below exclusively on the ground that permitting the eruv would be "preferential access" to a forum that would violate the First Amendment (Opposition, p. 12). In fact, access to the utility poles was not "preferential" for the eruv because it was made available to telephone and cable companies, to lost-dog notices, to yellow ribbons, to holiday displays and to other posters. The only denial was for the displays of those who considered plastic strips as having religious significance.

2. Tenafly disingenuously confuses conduct by the government with conduct that the government only licenses or permits. It says (Opposition, p. 16) that the plastic strips attached to utility poles by Verizon constitute *municipally* erected displays. But Ordinance 1127, which Tenafly cites and appends to its Memorandum, does not declare that the Borough of Tenafly itself erects and maintains utility poles, or affixes strips to those poles. The Ordinance grants "permission and consent . . . to New Jersey Bell Telephone Company, its successors and assigns" to erect and maintain poles and to affix strips. When Verizon erects and maintains a pole and Cablevision affixes a strip, it is not the Borough of Tenafly that is erecting and maintaining the poles or affixing the strip. If Verizon and Cablevision -- private companies authorized by

Tenafly -- do not disrupt public peace and order by maintaining poles with plastic strips, why is the Tenafly Eruv Association denied the same privilege?

For the reasons stated in our Initial Memorandum and in this Reply, an injunction pending appeal should be granted.

Respectfully submitted,

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September 7, 2001

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CERTIFICATE OF SERVICE

I hereby certify that a true and complete copy of the foregoing Motion for Injunction Pending Appeal was served this 7th day of September, 2001, upon the following by Federal Express:

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September 7, 2001