IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

TENAFLY ERUZ ASSOCIATION, INC. CHAIM BOOK, YOSIFA BOOK, STEPHANIE DARDIK GOTLIEB, 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.

Case No. 01-3301

District Court No.: 00-6051 (WGB)

Sat Below: Hon. William G. Bassler, U.S.D.J.

DEFENDANTS-APPELLEES' PETITION FOR REHEARING AND REHEARING EN BANC

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L.A.R. 35.1 Statement for Rehearing En Banc

The undersigned counsel express a belief, based on a reasoned and studied professional judgment, that the panel decision is contrary to decisions of the U.S. Court of Appeals for the Third Circuit and U.S. Supreme Court, and that consideration by the full court is necessary to secure and maintain uniformity of decisions in this Court and the Supreme Court in the cases referred to below.

Preliminary Statement

This matter involves whether a municipality can be compelled to permit a permanent *eruv* on utility poles in its right of way as a religious accommodation. In finding that a municipality can be so required, the panel decision in this case distorted the free exercise decisions of the U.S. Supreme Court in *Employment Division v. Smith*, 494 U.S. 872 (1990), and *Church of the Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520 (1993), and of this Court in *Fraternal Order of Police v. City of Newark ("FOP")*, 170 F.3d 359 (3d Cir. 1999); and it squarely contradicts this Court's well developed selective enforcement jurisprudence in such cases as *Cole v. Flick*, 758 F.2d 124, 130-31 (3d Cir. 1985) (Becker, J.), and *Dreibelbis v. Marks*, 742 F.2d 792, 794 (3d Cir. 1984). The end result is a novel constitutional rule of extraordinary impracticality: if a municipality permits isolated instances of imperfect enforcement of an ordinance to occur, then the Constitution, according to the panel, guarantees a constitutional exemption to any person who violates the ordinance and who can assert a religious motivation for his conduct. The panel's exceptionally expansive reading of the Free Exercise Clause, creating mandatory exemptions for expressly unlawful conduct, violates binding Supreme Court precedent. It also violates this Court's repeated holdings that isolated instances merely tending to indicate that a directive was not uniformly enforced *cannot* give rise to a selective enforcement claim by a party claiming an exemption from a neutral rule on the basis of religious motivation. *Dreibelbis*, 742 F.2d at 794.

Logical extension of the panel's reasoning could cause havoc in municipalities. For example, if a town should fail to ticket illegally parked cars, it would become constitutionally impermissible for the town ever to ticket cars parked illegally by

worshipers at churches or synagogues; in the case of Tenafly itself, utility poles will soon be fair game for the posting of all manner of materials related to religious practice. This cannot be the result the panel intended.

There is no dispute that Tenafly Ordinance 691 ("Ordinance 691" or "691"), which prohibits placing signs, advertisements, or other matter on utility poles, is both neutral and generally applicable, providing for no exceptions. By lifting out of context and magnifying isolated instances of incomplete enforcement of 691 -- occasional lost dog signs, illegally affixed street numbers, and temporary seasonal decorations -- the panel found that the Borough of Tenafly unconstitutionally applied 691 when plaintiffs-appellants sought an exemption from the express statutory language. In doing so, the panel ignored extensive record references supporting the Borough's enforcement; mischaracterized testimony and the District Court's finding as to "orange ribbons" allegedly tied to the poles; and in contravention of circuit precedent, it imported into this case an equal protection-selective enforcement element that was never pled while simultaneously ignoring the burdens of proof required by this circuit for such a claim.

Argument

In *Smith*, the Supreme Court stated clearly that where a neutral and generally applicable statute incidentally burdens religious exercise, there is no entitlement to a statutory exemption, and no requirement of heightened scrutiny. Strict scrutiny would apply only where there was "individualized governmental assessment of the reasons for the relevant conduct." *Smith*, 494 U.S. at 884. In *Lukumi*, the Supreme Court held that a city ordinance that was drafted with the "object" of "suppression of the central element of the Santeria worship service," 508 U.S. at 535, failed the test of statutory neutrality or

general applicability. The fact that the ordinance defined "unnecessary" killing to exclude "almost all killings of animals except for religious sacrifice," said the Court, "suffices" to demonstrate "our conclusion that Santeria alone was the exclusive legislative concern." *Id.* at 536-37. There was no discussion of differential or incomplete enforcement in the decision. Similarly, in *FOP*, *supra*, this circuit held that a Newark ordinance that prohibited the wearing of beards by police, but expressly provided for medical exceptions, must be read to permit exceptions for Muslim officers who wished to wear beards. The decision relied exclusively upon the medical exemption embodied within the text of the ordinance.

The panel here deviated from this line of cases by stating that if Ordinance 691 had been enforced "*uniformly*, *Smith* would control and the plaintiffs' claim would accordingly fail." Slip op. at 28 (emphasis added). Thus, if enforcement falls short of uniformity, the ordinance must somehow mandate an exemption for religiously motivated conduct. The panel offered no further explanation for this non sequitur -- *but its entire decision rested upon it.* It does not follow from *Smith, Lukumi*, or *FOP* that incomplete or non-uniform enforcement of a neutral and generally applicable ordinance would mandate constitutional exemptions to that ordinance for unlawful conduct that happens to have a religious basis. To the contrary, *all* of those cases focused on the language, structure, and intention of statutes. All three held expressly that neutral and generally applicable statutes may incidentally burden religion without creating any mandatory exemption for religious exercise. None of the cases even suggested that incomplete enforcement of a statute would create some new constitutional right to be exempt from a neutral, generally applicable statute. And this court held in *Dreibelbis* and *Cole* that non-

uniform enforcement *does not* suffice to make out a religious exemption from a neutral rule -- a holding contradicted by the panel's conclusion that non-uniform enforcement here did mandate such an exemption.

A. The Panel Decision Violates Precedent

1. Smith: The rule that non-uniform enforcement mandates a constitutional exemption for religious conduct would effectively gut the ruling in *Smith,* which extended an Oregon anti-drug law to prohibit American Indians ingesting peyote under the auspices of their religious tradition. But based upon the panel's reasoning, had there been isolated instances of the state incompletely or non-uniformly enforcing its drug laws -- for example by occasionally declining to prosecute first-time offenders or persons using medicinal marijuana -- then it would have created a constitutional exemption from the anti-drug law for the Indian peyote users.

As this court has noted in the selective-prosecution context, it is exceedingly common, and indeed a constant and unavoidable feature of our legal system, for the law to be incompletely enforced. No law can be enforced all the time, because many instances of law breaking go undetected. Even where illegal conduct is detected, every law involves some discretion in its enforcement. *See Gov't of Virgin Islands v. David,* 741 F.2d 653, 655 (3d Cir. 1984), citing *Oyler v. Boles*, 368 U.S. 448, 456 (1961).

Because few, if any, laws are enforced "uniformly," it would follow on the panel's reasoning that almost every law is subject to a mandatory constitutional exemption for religiously motivated conduct. But of course that was the state of the law that *Smith* clearly altered. *Smith* was intended to *remove* the strict scrutiny model from free exercise analysis where a statute was of general and neutral applicability; it made the

statute the touchstone of free exercise analysis precisely to avoid subjecting every statute to strict scrutiny where a religious exemption was sought. The novel rule announced by the panel subverts *Smith*, and indeed seeks to overturn it *sub rosa*, by reintroducing strict scrutiny analysis where ever enforcement is less than "uniform" -- which is to say, almost always.

2. **Lukumi**: The decision also deviates from the holding of *Lukumi*. The panel found that "the borough's selective, discretionary *application* of ordinance 691," slip op. at 29 (emphasis added), had the effect of judging the plaintiffs' reasons for their illegal conduct "to be of lesser import than nonreligious reasons," slip op. at 29 (quoting *Lukumi*, 508 U.S. at 537), and therefore "singled out" religiously motivated conduct for discriminatory treatment. Slip op. at 29. *Lukumi* used this language of "singling out" and discriminatory weighing of religious motivation to describe enactments that were themselves designed to single out religious conduct for particular discrimination. Lukumi used this language to prove that the *ordinances* in question were specifically targeted at Santeria worship and therefore were neither neutral nor generally applicable.

Although *Lukumi* said that "the effect of a law in its real operation is strong evidence of its object," 508 U.S. at 535, the *"application"* of the *Lukumi* ordinance in 1999 can tell us nothing about the object of a Tenafly's neutral, generally applicable ordinance, adopted in 1954. *Lukumi* demonstrates the unconstitutionality of enacting a religiously discriminatory statute; it says nothing whatever about selective enforcement requiring an exemption from a law that was enacted with a perfectly neutral object. *Lukumi* therefore cannot support a holding that, in the absence of intentional discrimination, mere instances of non-enforcement create such an exemption.

3. **FOP:** This Court found that the *statute* in *FOP* (not its enforcement as in this case), provided for "individualized exemptions from a general requirement." 170 F.3d at 364 (citing *Lukumi*, 508 U.S. at 537-38). It was the presence of the medical exemption written into the ordinance, nothing more, and nothing less, that subjected the ordinance to heightened scrutiny, pursuant to a category carved out by the *Smith* decision itself, see *Smith*, 494 U.S. at 484 ("where the State has in place a system of individual exemptions, it may not refuse to extend that system to cases of religious hardship without compelling reason"). This limitation, by its language, is limited to "a system of individual exemptions." But there was no such system of exemptions in ordinance 691. The panel substituted its theory of non-uniform enforcement for the express constitutional requirement of individualized exemptions.

The fundamental difference between individualized exemptions and non-uniform enforcement is of crucial importance. Only a small number of statutes create systems of individualized exemptions. *But nearly all statutes may be incompletely or non-uniformly enforced.* If it were the case that every incompletely enforced statute were to be treated as if it created a system of individualized exemptions, then *Smith*, and indeed *FOP*, decided under it, would have no meaning.

4. **Selective Enforcement:** The panel re-examined the evidence found by the district court, purporting to discover non-uniform enforcement and a consequent free exercise violation. This approach essentially re-reads this case in terms of selective enforcement -- a claim that was never advanced. The introduction of selective enforcement concepts violates circuit precedent in two ways. First, this court has repeatedly held that it is "reversible error" for a court to consider the issue of selective

enforcement "[a]bsent allegations" of such a violation. *David*, 741 F.2d at 656; *Dreibelbis*, 742 F.2d at 794. The reason is that, in order to meet the "heavy burden" of a selective enforcement claim, *Cole*, 758 F.2d at 130, this circuit requires both a threshold finding of discrimination, *United States v. Torquato,* 602 F. 2d 564, 569 (3d Cir. 1979), and a subsequent evidentiary hearing at which the movant must bear the burden of proving both that persons similarly situated have not been prosecuted and that the prosecution was based on an unjustifiable standard or designed to prevent his exercise of a fundamental right. *Id.*; *United States v. Schoolcraft*, 879 F.2d 64, 68 (3d Cir. 1989). Here, selective enforcement was neither pled nor was the burden placed on plaintiffs-appellants to make the two required showings.

Second, this court has long held that the "heavy burden" is not carried by a person seeking a religious exemption from a neutral law, even when supported by "affidavits . . . tending to indicate that the directive *was not uniformly enforced*," *Dreibelbis*, 742 F.2d at 794 (emphasis added). In another case involving a request for a religious exemption from a neutral rule requiring prisoner hair cuts, this court held expressly that "the viability of the [state's] justification [for its regulation] is not undermined by the fact that a few inmates have not had their hair cut . . . or have been able to grow long hair while in prison, by resistance, stealth, or even through institutional negligence or incompetence." *Cole*, 758 F.2d at 130. These cases thus explicitly hold that non-uniform enforcement does not make out a case for a religious exemption from a neutral law, even where incompetence or institutional negligence were the causes. Nevertheless, the panel held that mere non-uniform enforcement sufficed to make a selective enforcement finding without any finding of intentional discrimination.

5. Impracticality: If a constitutionally mandated exemption for religiously motivated conduct existed every time it were possible to show isolated instances of non-enforcement of criminal or civil ordinances, the results would be anomalous and highly destabilizing to the rule of law. A ubiquitous example would be failure to "uniformly" enforce parking ordinances, which could then render the ordinance itself inapplicable to parking for churches and synagogues, even if the ordinance were neutral and generally applicable. In the context of the criminal law, to which this decision extends insofar as it purports to be an interpretation of *Smith*, the consequences would be potentially far more disruptive. Drug users who could assert the religious motivation for their illegal conduct would be entitled to a constitutionally mandated exemption if it could be shown that prosecutorial discretion had been exercised in making decisions about whom to prosecute and under what charges.

The impracticality of the panel's decision flowed from the panel's misunderstanding of the relationship between the isolated instances of incomplete enforcement that it claimed to have identified and the rejection of plaintiffs-appellants' formal application for a statutory exemption in this case. In none of the handful of instances on which the panel relied did a party approach the borough formally to ask that the ordinance not be applied to their otherwise unlawful conduct. No one asked permission to nail house number signs to utility poles: the numbers were nailed in isolated instances in violation of the ordinance, and the ordinance was imperfectly enforced with respect to them. One or two privately erected directional signs were not realized to have been on municipal property -- and indeed there was confusion in the record as to which, if any, of the signs were in fact on borough property. The orange

ribbons -- about whose existence the District Court found there was insufficient evidence in the record to reach *any* conclusion -- were apparently tied sporadically to trees in an act of civil disobedience. Finally, the seasonal greenery that hangs from the borough's utility poles in winter were not understood by the borough to be in violation of the statute. [1] While not explicit in the record, further proofs would show it was the borough

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[1] Underlying the panel's misinterpretation of the law is its significant misreading of the record to support its findings: *ORANGE RIBBONS*: The Panel erroneously stated that the District Court deemed the ribbons "irrelevant to the constitutional analysis"; the District Court, actually found insufficient evidence to make a determination concerning orange ribbons, which at some point in the past were tied around trees *and* utility poles in Tenafly to symbolize community solidarity against regionalization of the school system. *Tenafly Eruv Ass'n v. Borough of Tenafly*, 155 F. Supp.2d 142, 177 n.19 (2001) ("[The Court] has not been made aware of how prevalent these ribbons were, where exactly they had been located, how long they remained in place, whether the Borough Council was aware of them, or what efforts (if any) were made to remove them."). The Panel's reference to "ample evidence" is simply unsupported by the record. The "fact" that the ribbons were displayed for "a lengthy period of time," was in counsel's question, and not in the mayor's answer. A 594-595. The statement that the ribbons were on "every pole in town for what I think was several years," was the unsworn statement of a Tenafly resident at a council meeting. There is *no other testimony* in the record regarding the orange ribbons. *SEASONAL GREENERY*: These temporary, non-denominational, non-religious seasonal decorations are erected by the town and paid for by the Tenafly Chamber of Commerce. SA 2. The purpose is to promote the shopping atmosphere. Id. *DIRECTIONAL SIGNS:* Local churches have put two directional signs on the Borough's right of way within which telephone poles are located. A 973-974. While the Borough gave its tacit consent because they served the purpose of providing directions to motorists, 155 F. Supp.2d at 170, 174, once the Borough realized that the signs included religious symbols, it asked the churches to remove any religious symbols from the signs. A 980-985. No present Tenafly official was aware of any authorization by the Borough for these directional signs. The authorization for the signs ultimately erected by the Greek Orthodox Church, granted in 1996, provided that permission was revocable upon 30 days notice. A 1048-49. It was authored by the late borough administrator, Robert Miller, who died several years ago. *HOUSE NUMBERS:* Over the course of months of fact-finding and hearings, plaintiffs were able to produce only *four isolated instances* of house numbers affixed to poles; *two* lost pet signs, and two signs for the same "office for rent." The Panel ignored testimony by defendants that the Borough vigorously enforces this ordinance. SA 1-2. Moreover, there were several duplicate "violations," in the record that may have contributed to the panel's conclusion. Note that House number #13 is depicted at A 162, A939 and A 945; #228 is depicted at A163; #280 is depicted at A 164 and #200 is depicted at A 943 and A 947, A 423-424.

itself that hung them. Cf. SA 2; Ordinance 691, (barring any "person" from placing matter on poles, which can not apply to the borough itself using its own poles).

It is a very different thing for there to be *de minimis* violations of a town ordinance than for the town formally to tell a group of citizens that they may violate the ordinance with impunity. Indeed, as the district court found, but the panel failed to acknowledge in its discussion of the issue, it is black-letter law that providing preferential treatment of religious groups violates the Establishment Clause. See *Bd. Of Educ. Kiryas Joel Sch. Dist. v. Grument*, 512 U.S. 687 (1994); *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753 (1995). For the borough to grant a special statutory exemption for religious conduct would therefore have violated the Establishment Clause.

Put bluntly, the panel's opinion eviscerates *Smith* by creating a new, practically unmanageable constitutional requirement of "uniform" enforcement of statutes and ordinances. It is notable that the panel did not say, as it would have done in a selective enforcement case, that the ordinance was somehow systematically enforced only against religious conduct. The panel did *not* find that the ordinance was not enforced -- merely that it was not enforced in the isolated instances just mentioned. Moreover, even if the panel found eight arguable instances of non-enforcement (see fn.1 and unsworn anecdotal evidence regarding the orange ribbons), the panel's conclusions would be contrary to circuit precedent: as this Court stated in *Cole*, 758 F.2d at 130, "three arguable exceptions to a rule applicable to 1500 inmates does not amount to inconsistent enforcement." The case against any conclusion of non-uniform or inconsistent enforcement is far more powerful in Tenafly, which has 4.4 square miles, *thousands* of utility poles, scores of streets, and 14,000 residents. The few isolated instances noted by the Court therefore

cannot prove selective enforcement as a matter of law.

Not surprisingly, the District Court found, with respect to all of the factual instances in question, that they represented *de minimis* instances of incomplete enforcement. In its eagerness to get around *Smith, Lukumi*, and this Court's binding precedent in *FOP* and its selective enforcement cases, the panel re-examined the record and reinvented these isolated instances as a basis for a mandatory exemption. The panel thus asserted that the persons against whom the statute had been incompletely enforced were "effectively exempt" from the ordinance, slip op. at 32. But failure to enforce an ordinance against every imaginable violator does not create any "effective exemption": it is simply a garden-variety instance of an incompletely enforced municipal ordinance, not a basis for a constitutionally mandated exemption for religious conduct.

6. Substantial Burden Analysis: The panel also deviated from binding Supreme Court precedent in its application of strict scrutiny. It is well-established free exercise law, going back at least to *Sherbert v. Verner*, 374 U.S. 398 (1963), that a plaintiff must show that he or she is subject to a substantial burden on his or her religious exercise, after which the state must show a compelling interest in burdening that exercise. Smith did not alter that model, and indeed expressly preserved *Sherbert* for cases involving individualized exemptions. See *Smith*, 494 U.S. at 484. Rather, *Smith* made it harder to get to strict scrutiny analysis by holding that no such analysis was appropriate where the law was neutral and generally applicable. It was in this context that the *Smith* Court said, "courts must not presume to determine the place of a particular belief in a religion." *Id.* at 887 (quoted in slip op. at 32).

In other words, *Smith*'s criticism of inquiry into the centrality of a given religious

belief was in the service of concluding that courts should normally avoid the inquiry by respecting the neutral generally applicable statute and ignoring any incidental burden on religion. Not surprisingly, no fewer than nine other Courts of Appeal follow *Smith* by continuing to require a showing of a substantial burden on religious exercise before requiring a state to make out a compelling interest in that burden. See slip op. at 33 n.31 (citing opinions of other circuits).

The panel, however, quoted *Smith*'s warning against inquiry into religious centrality out of context to suggest that somehow *Smith* had weakened, rather than strengthened, the state's position relative to the party seeking a religious exemption. The panel then concluded that strict scrutiny may be applied without any inquiry into the substantiality of the burden; and it called for a compelling interest without the corresponding showing of substantial burden. Requiring compelling interest without a substantial burden is an innovation that no other court has introduced.

In support of this remarkable argument, the panel purported to rely on this Court's decision in *Brown v. Borough of Mahaffey*, 35 F.3d 846, 849-50 (3d Cir. 1994). In *Brown*, however, the issue was "whether the defendants intentionally impeded the plaintiffs' religious activity."" *Id.* at 849. The issue, in other words, had nothing to do with whether strict scrutiny applied. The only question before the *Brown* court was whether there had been intentional discrimination in violation of the Free Exercise Clause. But that was not the basis on which the panel decided here. Indeed, before the District Court, plaintiffs-appellants claimed precisely that there had been intentional discrimination of the sort that was alleged in *Brown*. But the District Court expressly *rejected* this contention, finding in no uncertain terms that there was no evidence of

discriminatory animus in the borough's decision not to grant an exemption to ordinance 691.

The panel did not revive or endorse plaintiffs-appellants' factual claim of intentional discrimination, but rather purported to decide this case under the *FOP* framework, which says nothing whatever about intentional discrimination. In *FOP*, this court held *not* that Newark intentionally discriminated against Muslim police officers, but that the structure of the municipal ordinance with its individualized exemptions was subject to heightened scrutiny under the old *Sherbert* test. So long as this decision is not about intentional discrimination, the binding Supreme Court precedent of *Sherbert* -- which *Smith* expressly declined to overrule in individualized exemptions cases -- requires inquiry into substantial burden. Nothing in *Smith* or *Lukumi* altered the law in such strict scrutiny cases. In *Lukumi*, unlike *FOP*, the statute itself was evidence of intentional discrimination against Santeria practitioners. This is why all of the other circuits that have reached the issue continue to maintain that strict scrutiny entails an inquiry into the substantiality of the burden to free exercise alleged: because binding Supreme Court precedent requires it.

It follows, therefore, that a decision under the individualized exemptions prong of *Smith* requires a threshold finding of a substantial burden to religious exercise before the state may be required to put forth a compelling interest. There was no such showing of substantiality in this case, nor could there have been. The reason is that plaintiffs-appellants never showed that the inability to erect an eruv substantially burdened their religious exercise. They claimed, rather, that Orthodox Jewish law prohibited them from carrying and pushing in the public domain on the Jewish Sabbath. Erecting the eruv,

plaintiffs-appellants said, would enable them to lift or circumvent this Jewish-law restriction and thereby attend synagogue more easily. Ordinance 691, then, did not bar or burden synagogue attendance. Instead, Orthodox Jewish law created the self-imposed burden on synagogue attendance, while Ordinance 691 accidentally stood in the way of the legal fiction created by Orthodox Jewish law to circumvent the burden created by the laws of the Sabbath. Plaintiffs-appellants did not show that Ordinance 691 amounted to a substantial burden on their religious exercise, nor did they present record evidence tending to support that claim. Their affidavits, rather, simply stated that Orthodox Jewish law burdened their synagogue attendance and that the eruv would lessen the burden.

7. **Establishment Clause Analysis:** Finally, as mentioned above, the panel blatantly ignored black-letter Establishment Clause doctrine in holding that the borough cannot legitimately have been motivated by seeking to avoid an Establishment Clause violation. The panel applied the so-called "endorsement test," but in so doing ignored a most basic tenet of that test, namely that taking preferential action on behalf of a religious group violates the Clause *per se*. See *Kiryas Joel*, *supra* (holding that a state legislature's enactment of a special school district to accommodate Orthodox Jewish group violated Establishment Clause); cf. *Capitol Sq.*, 515 U.S. at 766 ("Of course, giving sectarian religious speech preferential access to a forum . . . would violate the Establishment Clause."). It would certainly have amounted to preferential treatment of a particular religious group for the borough to have officially granted some sort of exemption from a neutral, generally applicable ordinance to a religious group. The only way to accommodate plaintiffs-appellants' request for a statutory exemption without violating the Clause would have been to abolish Ordinance 691 altogether, a legislative decision

that the borough was not required to make.

The panel's deviation from binding Supreme Court precedent regarding preferential treatment of religion resulted in a contorted Establishment Clause holding. The panel said that a reasonable, informed observer of the rubber-strip lechis would understand their "religious significance." Slip op. at 42. But such an observer "would also know that the borough was allowing the lechis to remain on the utility poles only because its selective application of Ordinance 691 renders removing the lechis a free exercise violation." *Id.* The notion that a reasonable observer could intuit this legal complexity is incredibly unlikely.[2] The reasonable observer described by the panel would not only need a law degree and advanced expertise in constitutional law, but must also have imagined the panel's extraordinary and novel deviation from Supreme Court precedent in order to reach the "reasonable" conclusion that the panel describes. A reasonable observer would instead have seen preferential access given to a religious group, in violation of the Establishment Clause.

Conclusion

For the reasons outlined above, appellees-respondents respectfully request that this panel reconsider its decision and that the entire court reconsider the panel's decision en banc.

Dated: November 6, 2002

Respectfully submitted,

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[2] Nor did the concurrence of Justice O'Connor cited by the panel suggest anything remotely analogous. Slip op. at 43 (citing *City of Allegheny v. ACLU*, 492 U.S. 573, 632 (1989) (O'Connor, J., concurring). Rather, Justice O'Connor simply observed that religious displays in a "public forum" -- like a public square -- cannot be misunderstood by a reasonable observer as endorsement. Justice O'Connor did not attribute arcane knowledge of questionable constitutional theorizing to her "reasonable observer."

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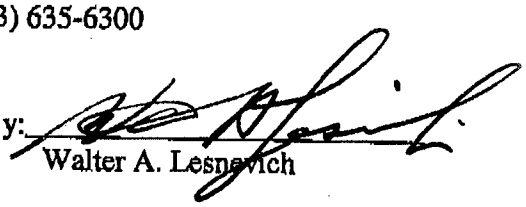
By: 
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