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No. 01-3301

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

TENAFLY ERUV ASSOCIATION, INC.,
Chaim Book, Yosifa Book,
Stephanie Dardick Gottlieb, Stephen Brenner,
Plaintiffs-Appellants,

v.

THE BOROUGH OF TENAFLY, Ann Moscovitz,
individually and in her official capacity as Mayor of the
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.

Appeal from the United States District Court
for the District of New Jersey (D.C. Civil Action No. 00-cv-06051)

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* OF AMERICANS
UNITED FOR SEPARATION OF CHURCH AND STATE, IN SUPPORT OF
PANEL OR *EN BANC* REHEARING

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1. *Relief sought.* Americans United for Separation of Church and State (“Americans United”) hereby moves for leave to participate as an *amicus curiae* in any further proceedings in this case and to file the *amicus* brief submitted herewith. The brief is in support of panel or *en banc* rehearing.

2. *Background about the case.* The issue in this case is whether defendant-appellee Borough of Tenafly, New Jersey (“the Borough”) violated the First Amendment of the U.S. Constitution by requiring the removal of plastic strips called “lechis” from Borough utility poles. The lechis were affixed to the utility poles by (or under the direction of) the plaintiffs-appellants, who are Borough residents of the Orthodox Jewish faith, in order to create and demarcate the boundaries of an “eruv.” The plaintiffs’-appellants’ faith prohibits them from pushing or carrying objects outside their homes on the Sabbath or on Yom Kippur unless they are within the boundaries of an eruv.

The panel opinion held that the Borough, by requiring removal of the eruv, violated the rights of the plaintiffs-appellants under the Free Exercise Clause of the First Amendment, because the Borough has allowed other Borough residents to place other kinds of objects on the utility poles. The panel further held that the Borough would not have violated the Establishment Clause of the First Amendment by permitting the lechis to remain on the utility poles. On or about

November 7, 2002, the Borough filed a petition for rehearing and suggestion for rehearing *en banc*.

3. *Interest of amicus.* *Amicus* Americans United is a national, nonsectarian public interest organization based in Washington, D.C. that is committed to preserving the constitutional principles of religious freedom and separation of church and state. Since its founding in 1947, Americans United has participated as a party, counsel, or *amicus* in many of the leading church-state cases decided by the U.S. Supreme Court (most recently in *Zelman v. Simmons-Harris*, 122 S. Ct. 2460 (2002)) and by this Court (most recently in *C.H. ex rel. Z.H. v. Oliva*, 226 F.3d 198 (3d Cir. 2000)). Americans United is composed of more than 60,000 members nationwide, including thousands within the jurisdiction of this Court. Americans United is currently counsel in one Establishment Clause case that has been filed within the jurisdiction of the Third Circuit, which involves the display of religious symbols on government property (*Modrovich, et al. v. Allegheny County*, C.A. No. 01-0531 (W.D. Pa.)); and Americans United intends to soon file another Establishment Clause case within the jurisdiction of the Third Circuit, which involves public funding of a religious organization.

4. *Reasons why amicus brief is desirable, and why matters asserted therein are relevant.* The *amicus* brief discusses in detail two matters that support rehearing but are not discussed in the Borough's petition. First, the *amicus* brief


points out that the panel used the wrong legal test in deciding the Establishment Clause issue presented by this case. The panel stated that the Supreme Court no longer examines Establishment Clause questions under the test set forth in *Lemon v. Kurtzman*, 403 U.S. 602, 612 (1971), which asks whether a government action has the purpose or effect of advancing religion. Slip Op. at 40. According to the panel, the Establishment Clause now is ordinarily violated only where a reasonable observer would perceive a challenged government action as endorsing religion. *Id.* In fact, the Supreme Court has repeatedly reaffirmed the *Lemon* test over the last five years. Endorsing religion is merely one way in which the government can violate the *Lemon* test. Granting rehearing would allow the correct Establishment Clause test to be applied to the facts of this case and would prevent the panel's opinion from confusing district courts in future Establishment Clause cases.

Second, the panel ruled that the Free Exercise Clause is applicable where the government refuses to provide funding for religious conduct, and that a state's interest in imposing greater separation between religion and government than required by the Establishment Clause can never be a compelling interest that supersedes the Free Exercise Clause. *See* Slip Op. at 32, 37-38. These legal pronouncements cast doubt upon many constitutional, statutory, and regulatory provisions which limit government funding of religious institutions. These pronouncements are not only contrary to numerous authorities, but also need not be

made to decide this case. Granting rehearing would facilitate withdrawal of these pronouncements.

5. *Relevant rules.* The Advisory Committee Notes to the 1998 Amendments to Fed. R. App. P. 29 state, "A court may grant permission to file an amicus brief in a context in which a party does not file a 'principal brief'; for example, an amicus may be permitted to file in support of a party's petition for rehearing. In such instances the court will establish the filing time for the amicus." The *amicus* brief is being submitted to the Court within one week of the filing of the Borough's petition, which *amicus* believes to be a reasonable time.

5. *Conclusion.* For the foregoing reasons, *amicus* respectfully requests that this motion be granted.

By: 
Alex J. Luchenitser, Esq.

Date: November 12, 2002

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that one copy per counsel of this Motion for Leave to File Brief *Amicus Curiae* has been served by overnight delivery on counsel (listed below) for each party, that one copy per counsel of this Motion has been served by first-class U.S. mail on counsel (listed below) for each *amicus curiae*, and that an original and three copies of this Motion have been dispatched by overnight delivery to the Clerk of the United States Court of Appeals for the Third Circuit, on this 13th day of November, 2002.

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