

For Immediate Release Please

Flawed-in-Law:
**Legal Eagles' Review of Attorney Robert G. Sugarman's
Memo Supporting Westhampton Beach Eruv
Found it to be Selective, Misrepresentative, Unconstitutional**

1 WESTHAMPTON BEACH, Nov. 5 - Yeshiva University Constitutional scholar Marci A. Hamilton
2 and First Amendment attorney Bruce S. Rosen have found Robert G. Sugarman's October 19, 2008
3 memorandum to the Westhampton Village Trustees in support of The Hampton Synagogue's quest
4 to force an eruv encompassing one third of Westhampton Beach to be full of "selective citation and
5 misrepresentation of Supreme Court cases" in arguing that government must endorse and allow an
6 eruv boundary and zone.

7 In a rebuttal to the Sugarman October 19 memorandum submitted today (November 5) by
8 the Alliance for the Separation of Church and State for the Greater Westhampton Area (the Alliance),
9 Prof. Hamilton and Mr. Rosen point out that the legal argument made by Mr. Sugarman actually
10 "makes the constitutional case *against* the proclamation," and promotes the concept that government
11 must endorse one particular sect's interpretation of religious law and be party to drawing
12 geographical boundaries defined by religious identity, which is clearly unconstitutional.

13 The rebuttal shows how "Mr. Sugarman labors to give the impression that a
14 government-validated eruv does not draw the government into any dispute over theology or
15 ecclesiology" and that it is but "a benign 'accommodation' that does not draw government into any
16 religious dispute." This argument falls flat, as the rebuttal notes, because Jewish law is not
17 monolithic and there are controversies even among Orthodox Jewish sects regarding interpretation
18 of Jewish law.

19 "Only by mischaracterizing Supreme Court cases can the Sugarman memo reach the
20 conclusion that governmental issuance of an eruv proclamation, and creation of a designated
21 geographical zone according to religious identity, are permissible and constitutionally required," the
22 Alliance rebuttal states. For example, the rebuttal points out that when Mr. Sugarman discusses
23 Supreme Court rulings that he claims support government endorsement of the religious law regarding
24 an eruv, he fails acknowledge that "the religious entities prevailed only because the First Amendment
25 required that they be treated like other [non-religious] groups."

26 The rebuttal further states that the Sugarman memo tries to avoid the obvious: The Hampton
27 Synagogue's currently withdrawn petition would force the Village Trustees choose one interpretation
28 of Jewish law over another and participate in the affairs of a religious organization, which is
29 forbidden by the Establishment Clause of the United States Constitution.

30 "Upon reading the competing memorandums, even the average citizen must conclude that
31 if the synagogue resubmits its petition for an eruv, and approval by the Village Trustees is given, the
32 Village will cross the First Amendment's constitutional boundaries," said Mark Williams, President
33 of the Alliance.

34 Mr. Sugarman's claim that an eruv proclamation is constitutional because it is only
35 ceremonial is contradicted by the United States Supreme Court. Mr. Sugarman, the rebuttal declares,
36 ignored a very clear Supreme Court Decision, *County of Allegheny v. ACLU*, 492 U.S. 573 (1989),
37 a decision that Mr. Sugarman ignored.

38 Mr. Sugarman also insists that an eruv proclamation must be constitutional because eruvs
39 exist in other parts of the country. The rebuttal points out Supreme Court precedent (*County of*
40 *Allegheny*, 492 U.S. at 630) is clear and contrary: "No one acquires a vested or protected right in
41 violation of the Constitution by long use, even when that span of time covers our entire national
42 existence and indeed predates it."

43 **Background**

44 Last spring, The Hampton Synagogue submitted a petition requesting that a zone within the
45 Village of Westhampton Beach be demarcated by an eruv boundary.

46 Mr. Sugarman's October 19 memorandum was a reply to a legal memorandum submitted by
47 the Alliance to the Westhampton Beach Village Trustees on October 6. That memorandum, prepared
48 by Prof. Hamilton and Mr. Rosen, demonstrated that not only is the Village under no legal
49 obligation to approve a petition for an eruv encompassing one third of Westhampton Beach, but that
50 in doing so the Village would violate the Establishment Clause of the United States Constitution, as
51 it would validate and endorse Jewish law.

52 The Alliance's October 6 memorandum, the first full constitutional review of the eruv issue
53 on record, also found that government approval of an eruv would be an endorsement of an "action
54 that encourages a particular religious group to occupy a certain portion of the Village."

55 The synagogue's petition, which is currently withdrawn but may be re-submitted at any time,

56 did not ask the Village merely to accommodate religion by mitigating the effect of civil (secular) law,
57 but instead asked the Village to carry out Jewish (religious) law.

58 The Alliance was formed last summer for the purpose of securing the core First Amendment
59 principles of religious tolerance, religious diversity, and the separation of church and state in
60 Westhampton Beach. "Civil law cannot be made subservient to, or asked to carry out, any one
61 group's religious law," the Alliance has stated.

62 Marci A. Hamilton holds the Paul R. Verkuil Chair in Public Law at the Benjamin N.
63 Cardozo School of Law, Yeshiva University. She is one of the country's leading church/state
64 scholars. Before joining the faculty at Cardozo Law School, she clerked for Associate Justice Sandra
65 Day O'Connor. She is the author of *God vs. the Gavel: Religion and the Rule of Law* (Cambridge
66 University Press 2005, 2007).

67 Bruce S. Rosen is a practicing lawyer with McCusker Anselmi Rosen & Carvelli with offices
68 in Florham Park and Toms River, N.J. and Manhattan. A former journalist, he specializes in First
69 Amendment and media law and is an adjunct professor at Rutgers Law School-Newark. He is AV
70 rated in Martindale-Hubell and listed in Best Lawyers in America and as a "Super Lawyer" by
71 Lawandpolitics.com. He was special counsel to Tenafly, N.J. in the Tenafly Eruv Association case.

72 11/05/08

-30-

73 A PDF of Alliance's November 5 rebuttal memorandum to the Village Trustees or its original
74 October 6 memorandum is available by request. E-mail brucohen@pipeline.com