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October 6, 2008

Via Email and Overnight Mail

Mayor Conrad Teller
Ms. Toni-Jo Birk, Trustee
Mr. James Kametler, Trustee
Ms. Joan Levan, Trustee
Mr. Hank Tucker, Trustee
c/o Hermon J. Bishop, Esq.
Village Attorney
Village of Westhampton Beach
110 Mill Road
Westhampton, NY 11978

Re: Petition for Westhampton Beach Eruv

Dear Honorable Mayor and Trustees:

This Letter Memorandum is submitted by the Alliance for the Separation of Church and State for the Greater Westhampton Area (the "Alliance") to explain the constitutional barriers to approval of the Petition of The Hampton Synagogue dated March 7, 2008 (the "Petition"; "Synagogue"). The Petition, in substance, requests the Board to approve and validate the establishment of a geographically-defined area surrounded by an eruv boundary within the Village of Westhampton Beach ("WHB" or "the Village"). The establishment of this geographic area was needed, the Petition states, because Jewish Law prohibits pushing and carrying on the Sabbath and certain Holy Days without government approval of such demarcation.

Although the Petition was withdrawn from consideration by the Village Board of Trustees (“the Trustees”), it has been suggested by the Synagogue that it may be re-filed at any time (see p. 8, below).

The Alliance is a secular, not-for-profit corporation, registered with the New York Department of State. Its members and supporters are residents of Westhampton Beach and surrounding communities. The goal of the Alliance is to preserve and protect the rights and religious freedom of all religious individuals and groups, as well as the non-religious, by advocating adherence to the First Amendment of the United States Constitution, and the underlying principles of tolerance, diversity, and the separation of church and state.

Background

The Petition On or about March 7, 2008 the Synagogue submitted the Petition to the Trustees of the Village of Westhampton (“Trustees”). The Petition states in part that the Synagogue “require(s) a boundary for the purpose of carrying and pushing on the Sabbath and other Jewish holidays”; requests the Village to delineate certain roads as “boundaries in the Village...and the land within the designated roads shall be claimed by the Village as granting the Congregation of The Hampton Synagogue property rights for the said purposes of carrying and pushing...”; and specifies the streets that would serve as the boundaries of the eruv.

The boundaries of the proposed eruv would encompass one square mile of the 2.9 square miles that constitute the entire Village, or one-third of the Village. Individuals

affiliated with the Synagogue have publicly declared an intention to subsequently expand the eruv.

The Proposed Eruv The Petition states that the eruv is “for the purpose of carrying and pushing,” which is otherwise forbidden on the Orthodox Jewish Sabbath and certain Holy Days.¹ Subsequent to its filing, Rabbi Marc Schneier, spiritual leader of the Synagogue, stated that “(T)he building of the eruv is really about some young mothers in my congregation who want to wheel their babies to Synagogue on Saturday” (*Eruv Plans Cause Anti-Semitism Accusations to Fly Around Hamptons*, YESHIVA WORLD NEWS, May 10, 2008, <http://www.theyeshivaworld.com/article.php?s=schneier>). The Petition and Rabbi Schneier describe an eruv in the narrowest possible terms, thereby laying the groundwork for the argument that Village approval of the eruv would represent only a slight and insignificant “accommodation.” This is a mischaracterization of the religious meaning and nature of the geographically-defined district that would be enclosed by an eruv boundary and a minimalization of the actual and intended scope of the Petition.

While the purpose of an eruv long ago may have been primarily to accommodate religious practice in societies that do not observe the separation of church and state, its primary purpose – and demonstrated effect-- in recent years in the United States has been to advance the interests of a single religious group. The eruv is the primary tool for establishing new geographically defined Orthodox Jewish enclaves, and facilitating the

¹ The Orthodox Jewish community is divided on the appropriateness of an eruv. Some believe it is an inappropriate exemption from the Jewish law forbidding pushing and carrying, while others, as in this instance, believe it is an appropriate exemption from Jewish law.

growth and consolidation of existing enclaves. Typically, the eruv boundary carves out an enclosed area within a residential neighborhood. Because it eliminates the prohibitions of Jewish law on pushing and carrying on the Sabbath and certain Holy Days, the eruv makes the enclosed area a place that is more attractive and convenient for Orthodox families as compared to areas outside of it. As stated by one Jewish commentator:

The eruv is one of the most brilliant devices for social engineering ever invented. . . .What the eruv really does is define community. Like the laws of Shabbat that prohibit driving and riding, the eruv forces observant Jews to live within close proximity to their synagogues and to each other.

A. Silow-Carroll, *A tie that Binds — and Separates*, NEW JERSEY JEWISH NEWS, Nov. 16, 2006, <http://www.njjewishnews.com/njfn.com/111606/edcolATieThatBinds.html>

Statements from other Jewish sources echo this broader, more modern purpose and effect of the eruv, particularly as it applies to younger Jewish Orthodox families:

Salberg Park [Colorado] is the heart of the eruv, the place where the 60-person congregation gathers to mark the Sabbath, said Rabbi Gavriel Goldfelder. He also expects the eruv to draw more Orthodox Jews to the city (Boulder, CO). ‘A young, orthodox Jewish family would never move here without an eruv,’ he said. ‘It’s amazing how fast the word is spreading’”

Amy Bounds, *Completion of Eruv Cause for Celebration*, DAILY CAMERA, Sept 8, 2008, <http://dailycamera.com/news/2008/sep/08/completion-of-eruv-cause-for-celebration-eruv/>

An eruv “would attract the young modern Orthodox families back to the Lower East Side and bring about a renaissance...For a new modern Orthodox community to grow, an eruv is now key

Marvin Greisman, *Wiring Debate Has Nothing to Do with Cable or Net*, 76 THE VILLAGER 23, Oct. 25-31, 2006, http://www.thevillager.com/villager_182/wiringdebatehasnothing.html

An eruv signifies that (within) this area is a community of people who consider themselves to belong to the same private domain...The existence of an eruv is essentially an affirmation of the existence of a Jewish (Orthodox) community.

Adi Wyner, *What's the Point of an Eruv?*, THE PHILADELPHIA JEWISH VOICE, Sept., 2006, <http://www.pjvoice.com/v15/15703eruv.html>

The eruv “will prove essential in helping to attract young families to Sunnyside. It’s an important part of our future planning, and our attempts to reinvigorate the community and encourage young Orthodox families to join us.”

Rabbi Yonah Levant, Young Israel of Sunnyside. Quoted in John Lauinger, *Synagogue's Fishing Line Helps Lure Orthodox Jews*, NY DAILY NEWS, Sept. 16, 2007, http://www.nydailynews.com/ny_local/queens/2007/09/13/2007-09-13_synagogues_fishing_line_helps_lure_ortho.html

An eruv attracts families who plan to have children and want to build a responsible life for themselves in a comfortable community.

Yaakov Watkins [Executive Director, East Denver Eruv Committee] *The Who, What, When, Where, Why and How of Eruv*, available at <http://denvereruv.org/explain.html>

There is no constitutional barrier to Orthodox Jewish groups working privately to make their communities more attractive to fellow believers. That is part and parcel of the free market in religious belief and denominational choice that undergirds the United States constitutional design. That is what the Satmar Hasidim in *Kiryas Joel* had legally accomplished before they obtained state approval of a school district drawn solely according to religious identity. However, while religious groups may take actions such as these, no *government*, can take such steps. It is unconstitutional for the government to “gerrymander” neighborhoods in a way that endorses the presence of a singular religious

group or discourages the presence of other religious believers. *Board of Education of Kiryas Joel Village School District v. Grumet*, 512 U.S. 687, 729 (1994) (Kennedy, J., concurring); *Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327, 334 (1987) (forbidding government “sponsorship” of religion); or provides such a “significant symbolic benefit to religion.” *Larkin v. Grendel’s Den*, 459 U.S. 116, 125-26 (1982). Even when the religious group is relatively small, the constitutional defect is present. *Kiryas Joel*, 512 U.S. at 705 (“Here the benefit flows only to a single sect, but aiding this single, small religious group causes no less a constitutional problem than would follow from aiding a sect with more members or religion as a whole.”).

It is essential for the Trustees to take the eruv’s nature, inherent purpose, and proven effect into account as it considers the Petition’s invitation to cross the constitutional barriers that secure, for all Villagers, religious freedom, tolerance, diversity, and the separation of church and state.

Village Trustees Meeting to Discuss the Petition Subsequent to submission of the Petition, the Trustees held one working session and two public meetings at which the eruv was discussed at length. There are no minutes of the working session, but the minutes of the public meetings – on April 3 and May 1 – are publicly available. See <http://www.westhamptonbeach.org/archives/2008/trustees-board-meeting-minutes/april-2008-trustees-board-meeting-minutes.pdf>, and <http://www.westhamptonbeach.org/archives/2008/trustees-board-meeting-minutes/may-2008-trustees-board-meeting-minutes.pdf>

- At the April 3 meeting, the attorney for the Synagogue, Richard Haefeli, stated: “In order to establish [the eruv], since it is on the public property, we need the authorization from the local municipality, in this case the Village.” Minutes, April 3, p. 14. Later, he stated: “All it does is designate a boundary and because it is on public property, you need the approval of the local municipality.” *Id.*, p. 18. The Village Attorney, Hermon Bishop, concurred with Mr. Haefeli’s interpretation of Jewish law: “Under Judaic law, as he (Mr. Bishop) understands it...for the last 2000 years they have required proclamations from the governmental entity that has jurisdiction over that area to give a proclamation that an eruv is permitted. That is under Judaic law, not under state law.” Minutes, April 3, p. 16.
- At the May 1 meeting, Mr. Haefeli attested that Sam Nussbaum, Executive Director of the Synagogue, had repeatedly asserted that the eruv was going to be expanded. Minutes, p. 21. He provided no information as to whether the Synagogue would seek the Trustees’ approval for such expansion; what the expanded boundaries might be; or whether expansion would require installation of additional poles and wires.
- At the same meeting, and without prior notice that action by the Trustees’ on the eruv would be sought, Mr. Haefeli requested the Trustees to “consider adopting the proclamation tonight so that this is over and done with.” Minutes, May 1, p.14. The request for a vote to approve the Petition was defeated, (just barely) in part because Village residents had been promised an opportunity to participate in a public meeting on the issue scheduled for May 28. *Ibid.*, pp. 22-24.

Synagogue Efforts to Obtain a Proclamation If the Board were to approve the Petition, Judaic law requires the civil government to issue a “Proclamation” that, *inter alia*, permits believers to push and carry on the Sabbath and certain Holy Days and “rents” the area within the eruv for a specified period (e.g., 30 years) for a nominal amount (e.g., \$1.00).

On May 23, five days before the public hearing on the eruv, Rabbi Schneier informed the Board that the Synagogue was suspending its Petition, citing the controversy in the Village engendered by the proposed eruv. He made clear, however, that “in the fall, we will revisit this issue and anticipate with great confidence, that the eruv will be erected in the near future.” Letter from Rabbi Marc Schneier to Mayor Conrad Teller, Village of Westhampton Beach Board of Trustees, and Members of the Westhampton Beach Community (May 23, 2008). Rabbi Schneier has made it plain in subsequent public statements that he would press ahead with the eruv application.

Fearing the Village would not readily provide an “Eruv Proclamation,” required by religious law, the Synagogue attempted to persuade Suffolk County Executive Steven Levy to issue it. On August 13, at an “Eruv Informational Meeting” at the Synagogue, Rabbi Schneier, in answer to a direct question, confirmed his contact with Mr. Levy, who has since stated that he would not intervene in the matter.

At the same time, Rabbi Schneier avoided disclosing whether he had attempted to have the proclamation issued by Governor Paterson, and made no promises that he would cease searching for government officials other than the Village Trustees to issue the Proclamation. The Alliance remains concerned that Rabbi Schneier may seek to

have the proclamation issued by Governor Paterson, or by Attorney General Cuomo, who stated publicly less than 3 weeks ago that he is aware of the WHB eruv controversy; “It’s a situation we’re monitoring.” Lisa Finn, *Attorney General Reaches Out to East End*, THE INDEPENDENT, Sept. 17, 2008, available at http://www.indyeastend.com/Articles-i-2008-09-17-80501.113117_Attorney_General_Cuomo_Reaches_Out_to_East_End.html

During the past few months, the leadership of the Synagogue has moved away from the position its attorney expounded at the April 3 Board meeting that: “. . .we need the approval of the local municipality, in this case the Village.” Minutes, April 3, p. 14. It now appears their position is that any official who has the authority to “open and close roads” (e.g., the Chief of Police) has the authority – according to Judaic law - to issue a proclamation, binding on the Village, that would approve construction of the eruv, endorse an exemption to Jewish law, and “rent” the public rights-of-way encompassed by the eruv boundary for 30 years or more for the purpose of permitting pushing and carrying within the geographically-designated area.

I. Village Approval of an Eruv, with Its Accompanying Proclamation, Is a Government Act Carrying Out Jewish Law and Therefore in Violation of the Establishment Clause

A government-approved eruv violates the Establishment Clause prohibition on government “participat[ing] in the affairs of any religious organizations or groups and vice versa,” *Everson v. Board of Ed. of Ewing*, 330 U.S. 1, 16 (1947), and strikes at the heart of the Establishment Clause. The early American religious establishments in the states that preceded adoption of the Establishment Clause typically involved the

government acting in response to religious law or carrying out its requirements. *See generally* JOHN WITTE, JR., RELIGION AND THE AMERICAN CONSTITUTIONAL EXPERIMENT 21 (2000); JAY P. DOLAN, THE AMERICAN CATHOLIC EXPERIENCE: A HISTORY FROM COLONIAL TIMES TO THE PRESENT 75 (1992); Timothy L. Hall, *Roger Williams and the Foundations of Religious Liberty*, 71 B.U.L. REV. 455 (1991); LEONARD LEVY, THE ESTABLISHMENT CLAUSE 5 (2d Ed. 1994). The actions called for by the Petition are difficult to distinguish from these historic practices now forbidden by the Establishment Clause.

The government's role with respect to an eruv-created enclosure goes well beyond giving permission for the stringing of wires between, and the attachment of lechis to, public utility poles. It is important to note that civil law does not prevent the acts of carrying or pushing in residential neighborhoods on the Sabbath or certain Holy Days, or any day, for that matter. Only Jewish law imposes this proscription. The Petition and proclamation would lead the government to take actions dictated by religious law, to free Orthodox Jews from the religious prohibitions that forbid pushing and carrying. The government is being asked to carry out Jewish law – and Jewish law alone -- by declaring on behalf of the Synagogue congregation that the zone within the eruv is now appropriate for pushing and carrying. In other words, the Jewish law mandates that the civil, secular government “validate” or approve the religious symbol, law, and observance.

The eruv is not a mere accommodation whereby the government does no more than reduce or eliminate a legal burden imposed by civil, secular law. Rather, the religious doctrine directs the government to carry out the religious law, thereby striking at

the heart of the Establishment Clause, in particular, the rule against “*active involvement* of the sovereign in religious activity.” *Walz v. Tax Commission*, 397 U.S. 664, 668 (1970); *Lemon v. Kurtzman*, 403 U.S. 602, 612 (1971).

The most important previous case to address the request for an eruv simply did not address this constitutional defect, because the argument was never raised. *See, e.g., Tenafly Eruv Ass’n, Inc. v. Borough of Tenafly*, 309 F.3d 144, 153 (3d Cir. 2002) (stating “constitutionality of this action [government validation of the religious role of the eruv] is not challenged in this case”); Similarly, in both *Smith v. Community Board No. 14*, 128 Misc.2d 944, 491 N.Y.S.2d 584, 587 (1985), and *ACLU of N.J. v. City of Long Branch*, 670 F. Supp 1293, 1295-97 (D.N.J. 1987) the court found government approval of the physical construction of an eruv to be a legitimate accommodation of religion, but did not address the role government was being asked to take pursuant to Jewish law. In both cases, the courts were led to focus on the physical properties of the eruv boundary; and neither focused on the actions government was being asked to take carry out Jewish law.

II. Village Approval of an Eruv Boundary and Zone Violates the Principle of Neutrality

In *Board of Education of Kiryas Joel Village School District v. Grumet*, 512 U.S. 687 (1994), the government was at least able to characterize as “neutral” its ill-fated decision to draw a school district boundary according to religious identity. *Kiryas Joel*, 512 U.S. at 693. (Governor Cuomo said at the time that the bill was “a good faith effort to solve the unique problem” associated with providing special education services to handicapped children in the village). The same cannot be said for any government that

demarcates and validates an eruv. There is no secular facet to an eruv. It is created solely to remove a burden imposed by religious law and its intended effect is aimed solely at mitigating that religious law for sect-specific religious believers.

There is not even the argument that it could be a permissible religious accommodation. Ordinarily, religious accommodation involves (1) a burden on religious conduct imposed by secular law on religious conduct and (2) governmental action that removes (or decreases) that burden through the creation of an exemption from secular law for religious actors. *Employment Div. v. Smith*, 494 U.S. at 890 (noting “that a number of States have made an exception to their drug laws for sacramental peyote use.”). In contrast, the eruv boundary and zone require government validation of a religious exemption to a religious law. The burden here – not being able to push or carry on the Sabbath and certain Holy Days -- is imposed by the religious law to which the religious group voluntarily subscribes. Petitioning the government to lift this self-imposed religious burden through proclamation is an invitation to impermissible government involvement in religion and impermissible entanglement in the religious beliefs and practices of a particular sect. *Lemon v Kurtzman*, 403 U.S. 602, 612 (1971); *Lee v Weisman*, 505 U.S. 577, 584-585 (1992)

A government-validated eruv is also akin to the law invalidated in *Larkin v. Grendel's Den, Inc.*, 459 U.S. 116, 127 (1982). The Supreme Court held in that case that Massachusetts violated the Establishment Clause by giving religious entities the power to prevent bars, restaurants, and other establishments located near their congregations from obtaining liquor licenses. In other words, government gave religious

groups the power to determine neighborhood composition. In the case of an eruv and its attendant proclamation, the government would be validating the decision by an Orthodox Jewish congregation to carve out a geographical area defined by the impact of religious law and first and foremost for its members. In *Larkin*, the religious congregation determined what bars and restaurants would be excluded from its neighborhood. In Westhampton Beach, the eruv enclosure would send a signal to Jewish Orthodox believers – and other residents -- that this portion of the Village is better suited for that particular religious group, in part because the government has carried out Jewish law, pursuant to their beliefs. Government validation of such “religious gerrymandering” would be a plain violation of the neutrality toward religion that the Trustees are required to maintain.

III. Village Approval of an Eruv Would Be Endorsement of an Identified Religious Enclave with Clear Geographical Boundaries

The Petition also ignores the effect of government endorsement of the eruv on other believers and nonbelievers. “Endorsement sends a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community. Disapproval sends the opposite message.” *Lynch v. Donnelly*, 465 U.S. 668, 688 (1984) (O’Connor, J., concurring)

An eruv, along with the proclamation, constitutes local government validation and endorsement of the religious meaning of the eruv – that there is a geographically identified enclave for a particular religious sect, as dictated by the

religious rules of that sect. This is simply because Jewish law mandates as much. An eruv has no secular meaning, in contrast to *Kiryas Joel*, where the government could claim a secular purpose in creating a school district. Simple logic would lead the reasonable observer of the eruv boundary and zone to conclude that the government has endorsed an action that encourages a particular religious group to occupy a certain portion of the Village. See generally *Lee v. Weisman*, 505 U.S. 577 (1992); *Lynch*, 465 U.S. at 688.

Moreover, the reasonable observer would also logically deduce that the government -- by endorsing an increase in the numbers of a particular religious sect to occupy a certain portion of the Village -- also would be endorsing the consequent departure from that zone of other religious and non-religious persons who do not share those beliefs. This is an end no government in the United States may pursue, and a result in which no government should allow itself to become involved. The Village may not pick and choose among religious entities, families, or individuals. *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 532 (1993) (“In our Establishment Clause cases we have often stated the principle that the First Amendment forbids an official purpose to disapprove of a particular religion or of religion in general”).

IV. There Is No Argument for a Government-Endorsed Eruv that Would Trump the Establishment Clause’s Prohibition

As discussed previously, governmental approval of an eruv is not simple, straightforward, or constitutional religious accommodation. Those seeking an eruv boundary and zone typically try to distract from the obvious Establishment Clause defects

by focusing government representatives and courts on the physical aspects – wires strung between, and lechis attached to, utility poles . They argue that the wires and lechis are “invisible” and, therefore, not only constitutionally permissible, but even required. Such reasoning misstates governing First Amendment doctrine and the nature of an eruv.

When the government institutes an eruv boundary and zone by validating its religious meaning through the accompanying proclamation, it is not engaging in accommodation as it has ever been understood before. Permissible legislative accommodation occurs when (1) there is a **secular law** burdening religious conduct and (2) the government takes the simple action of making the religious conduct legal by removing or tempering the **secular law** as it applies to religious conduct. To be sure, an eruv requires permission to attach objects to public utility poles and string wires between them, but, more importantly, it also requires government endorsement of its religious meaning in direct contravention of the Establishment Clause. **The government may not accommodate religious practice by violating the Establishment Clause.**

Setting aside the Establishment Clause defects for the moment, though, it is still clear that the Village is not required to accommodate the physical aspects of the eruv Petition. It is not constitutionally mandated, and calling it a “civil right” does not make it so.

Neutral, generally applicable laws are subject to rational review. *See generally Employment Div. v. Smith*, 494 U.S. 872, 884-85 (1990). In this instance, the Village has been vigilant and consistent in enforcing its laws against posting signs on public utility

poles.² The situation is decidedly unlike Tenaflly, where, according to the Court, the local government failed to enforce its sign laws evenhandedly. *Tenaflly Eruv Ass'n, Inc. v. Borough of Tenaflly*, 309 F.3d 144, (3d Cir. 2002) (stating that "[w]e believe that the Borough's selective, discretionary application of Ordinance 691 against the *lechis* violates the neutrality principle of *Lukumi* and *Fraternal Order of Police* because it 'devalues' Orthodox Jewish reasons for posting items on utility poles by 'judging them to be of lesser import than nonreligious reasons,' and thus 'single[s] out' the plaintiffs' religiously motivated conduct for discriminatory treatment"). The Village's sign laws pass the relevant rational review test.

There has been discussion that the Petition must be considered under strict scrutiny, but that is a misreading of governing law. Strict scrutiny is only required if the law is structured to reach only a single religious group, *see, e.g., Lukumi*, 508 U.S. at 545; or when the government has a discriminatory purpose and employs a system of individualized exemptions, *see Employment Div. v. Smith*, 494 U.S. at 884; or when hybrid rights are at stake. *Id.* at 881-82.

None of these three exceptions to rational review apply in this instance. There is no argument that the sign law was enacted to affect only the group requesting the

² In the case of Westhampton Beach, the Building Department appears to have been diligent and evenhanded in enforcing the Village's comprehensive sign ordinance (Westhampton Beach Municipal Code; Chapter 197 (Zoning), Section 30(signs)). The Ordinance, which covers signs on public and private property provides, *inter alia*, that any sign (the definition of which includes "any material, structure or device") "painted, erected or affixed on a light or utility pole" is specifically prohibited" (sec. 197-30 D (8)) The Building Inspector and Code Enforcement Officer regularly inspect the utility poles within the Village limits. On the rare occasion when a sign may be temporarily posted on a pole, they remove it promptly without notice and without regard to the nature of the sign.

eruv, or that application of the sign law to the Petitioner would be discriminatory or subject to a system of individualized exemptions. The hybrid rights theory has been roundly criticized in the literature and cases. The Second Circuit has not embraced this theory to date: “We have held, by contrast, in the context of claims involving free exercise and free speech, that *Smith's* ‘language relating to hybrid claims is dicta and not binding on this court.’ We further stated that ‘we have not yet addressed generally whether hybrid claims require a greater governmental justification than each component of the hybrid claim taken separately’”) *Leebaert v. Harrington*, 332 F.3d 134, 143 (2d Cir. 2003) (quoting *Knight v. Conn. Dep't of Pub. Health*, 275 F.3d 156, 167 (2d Cir. 2001)).

In the unlikely event strict scrutiny were to be required, the local government would have to prove that it has a compelling interest in denying the eruv and that it has narrowly tailored the relevant law. As set forth in the “Purpose” section of 197-30 (see p. 16, *supra*), the Village has a range of compelling interests in a closely regulated sign ordinance in Westhampton Beach, applicable on both private and on public property. There is also a compelling interest in avoiding “state action in aid of segregation of this character.” *Kiryas Joel*, 512 U.S. at 711 (Kennedy, J., concurring).

There is no less restrictive means of regulating other than denial given that introduction of the eruv would fatally undermine the Village’s legitimate and compelling interests, which are intended to benefit and protect its residents and many visitors. A more permissive approach would open the door for the Synagogue and others to fill the utility poles with signs of every size, shape and description. Even more important, it

would also open the door to constitutional challenges under both the Free Speech and Free Exercise Clauses. There is no better support for this conclusion than the *Tenafly* decision itself, which found a constitutional violation because the local government had not enforced its signage laws in a neutral and generally applicable fashion. As stated previously, however, there is no warrant for elevating the level of scrutiny beyond rational review in this instance.

Ultimately, the accommodation argument is a red herring, because it deliberately ignores the eruv's broad purpose and intended effect, and its consequent violations of the Establishment Clause. It is black letter law that "accommodation is not a principle without limits." *Kiryas Joel*, 512 U.S. at 706. The Petition invites the Village to ignore the principle that "neutrality as among religions must be honored." *Kiryas Joel*, 512 U.S. at 707. For the foregoing reasons, the Alliance strongly urges the Village Trustees and Mayor to deny the Petition if it were to be re-filed. If approval were given to the eruv and its accompanying proclamation, the Village would cross the First Amendment's constitutional boundaries.

Respectfully submitted,

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