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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 firm and Prof. Marci A. Hamilton represent the Alliance for the Separation of Church and State for the Greater Westhampton Area. This letter is in response to the letter from Robert G. Sugarman arguing in favor of the Hampton Synagogue's Petition. Letter Memorandum from Robert G. Sugarman, dated October 19, 2008, submitted in response to the Memorandum dated October 6, 2008 from the Alliance for the Separation of Church and State for the Greater Westhampton Area (on file with author) (hereinafter "Sugarman Memo" or "the Memo").

The Sugarman Memo uses selective citation and misrepresentation of Supreme Court cases to argue that the Constitution permits and would even require the Village of Westhampton Beach to approve both a proclamation and a geographically defined boundary and zone specific to one religious congregation. Mr. Sugarman's reasoning should not be taken as a sound guide to the law in this arena.

Apparently without understanding the import of its statements, the Sugarman Memo actually makes the constitutional case *against* the proclamation. According to Mr. Sugarman, "under Jewish law . . . there must be a proclamation delineating and 'renting' the area for use as an eruv from a public official whose jurisdiction includes the area in which the eruv is to be constructed." Memo at 3. In other words, the proclamation is mandated by religious law, exists for the purpose of drawing

geographical boundaries defined by religious identity, and co-opts the government to issue an opinion on religious law. No case exists that upholds this sort of involvement by government in religious observance, including those cases that have acknowledged or upheld the presence of the physical boundary by itself. See *ACLU of N.J. v. City of Long Branch*, 670 F. Supp. 1293 (D.N.J. 1987), *Smith v. Community Board No. 14*, 491 N.Y.S.2d 584 (N.Y. Spec. Term 1985), and *Tenafly Eruv Ass'n, Inc. v. Borough of Tenafly*, 309 F.3d 144 (3d Cir. 2002). Moreover, none of the cases touted by Mr. Sugarman address either the constitutionality of the proclamation itself or the theory advanced by the Memo that a governmental entity has an affirmative constitutional obligation to provide such a religious proclamation.

The creation of the religious zone, and its validation by civil authority, is solely dictated by Jewish law, and it lifts a burden imposed only by Jewish law. The civil law, in contrast, is the only proper jurisdiction of civil government, which in no way prevents the members of the Hampton Synagogue congregation from pushing or carrying on the Sabbath. Although the Memo tries to avoid the obvious, the simple fact remains that the Petition would have the Village “participate in the affairs of [a] religious organization[],” which is forbidden by the Establishment Clause. *Everson v. Board of Ed. of Ewing*, 330 U.S. 1, 16 (1947). See also *Lemon v. Kurtzman*, 403 U.S. 602 (1971) (holding that purpose and effect of benefiting religion, as well as government entanglement with religion, are constitutionally forbidden).

It is understandable why the Sugarman Memo tries to avoid the obvious. It is black letter law that no government may take a position on religious law or theology, especially when there is a dispute over its meaning among adherents. See *Serbian Orthodox Diocese v. Milivojevich*, 426 U.S. 696 (1976). Mr. Sugarman labors to give the impression that a government-validated eruv does not draw the government into any dispute over theology or ecclesiology. According to him, an eruv is but a benign “accommodation” that does not draw government into any religious dispute. His reasoning proceeds as though “Jewish law” is a monolithic, uncontested code. This is simply not true. There are active controversies between sects of Orthodox Jews over whether eruvim are permitted by Jewish law. Some believe that an eruv does not alleviate the burdens imposed by Jewish law, but rather leads believers to violate Jewish law. The government has no business taking a position on either side of the eruv controversy, and there is no creative interpretation of an eruv proclamation that solves its inherent endorsement of one set of theological beliefs.

Mr. Sugarman attempts to make the proclamation appear constitutional by minimizing its significance as merely “ceremonial.” Yet, the Supreme Court itself has said, in a case the Memo ignores, that a religious proclamation by a government entity can indeed be unconstitutional. When it invalidated a religious proclamation that was part of a holiday display, the Supreme Court in *County of Allegheny v. ACLU*, 492 U.S. 573 (1989), stated that “not all proclamations of Christian faith located on government property are permitted by the Establishment Clause just because they occur during the Christmas holiday season . . . [a]nd once the judgment has been made that a particular proclamation of Christian belief, when disseminated from a particular location on government property, has the effect of demonstrating the government's endorsement of Christian faith, then it necessarily follows that the practice must be enjoined to protect the constitutional rights of those

citizens who follow some other creed than Christianity.” *Id.* at 612. This principle applies whether the religion being promoted is Christian, Jewish, or otherwise.

The Sugarman memo also makes the misguided argument that an eruv proclamation must be constitutional because there are many eruv boundaries and zones in place in other jurisdictions. This contention conveniently glosses over the fact that no court has ever said as much and ignores entrenched Supreme Court precedent, which states: “‘No one acquires a vested or protected right in violation of the Constitution by long use, even when that span of time covers our entire national existence and indeed predates it.’” *County of Allegheny*, 492 U.S. at 630 (quoting *Walz v. Tax Comm'n of New York City*, 397 U.S. 664, 678 (1970)). The Establishment Clause has required the invalidation of practices entrenched much longer than the eruvim to which Mr. Sugarman refers, including public school prayer, *Engel v. Vitale*, 370 U.S. 421 (1962), the posting of the Ten Commandments in courthouses, *McCreary County v. ACLU*, 545 U.S. 844 (2005), and holiday displays that send a message of government endorsement of a single religious tradition. *County of Allegheny v. ACLU*, 492 U.S. 573 (1989). See also *Lee v. Weisman*, 505 U.S. 577 (1992) (prohibition of clergy-led prayer at high school graduation ceremony); *Wallace v. Jaffree*, 472 U.S. 38 (1985) (prohibition of silent school prayer). The presence of eruvim elsewhere is testimony to a lack of relevant case law, but it offers no assurance of constitutionality.

Only by mischaracterizing U.S. Supreme Court cases can the Sugarman Memo reach the conclusion that governmental issuance of an eruv proclamation, and creation of a designated geographical zone according to religious identity, are permissible and even constitutionally mandated. On page 6, the Memo provides a list of cases that supposedly permit government endorsement like that sought in the proclamation. In fact, none of these examples involve government endorsement of a single religious organization’s beliefs or practices. Rather, in each case where the Court found in favor of the religious entity, no single religious organization was singled out for favorable treatment.

To the contrary, the religious entities in these cases prevailed only because the First Amendment required that they be treated like other groups. *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002) (upholding school voucher program because it involved “true choice” between public, private, and religious schools); *Good News Club v. Milford Central School*, 533 U.S. 98 (2001) (allowing evangelical group to use public school facilities permitted to other groups); *Capitol Square Review and Advisory Bd. v. Pinette*, 515 U.S. 753 (1995) (permitting erection of cross on statehouse grounds, which were public forum and, therefore, open to all speech); *Lamb's Chapel v. Center Moriches Union Free School District*, 508 U.S. 384 (1993) (permitting showing of religious film about family after school hours where other views on family were permitted to be shown as well); see also *Lynch v. Donnelly*, 465 U.S. 668 (1984) (upholding crèche display because it was in the context of larger, secular holiday display). Like the crèche held unconstitutional in *County of Allegheny v. ACLU*, 492 U.S. 573, 574 (1989), the eruv proclamation requires government entanglement with a single religious entity and set of beliefs; there is no context that could broaden the government’s purpose beyond endorsement of that particular religious entity’s beliefs and practices. Thus, there is no basis for arguing that the First Amendment mandates Village issuance of the proclamation or approval of the creation of a geographically defined zone defined according to religious law. The invocation of accommodation doctrine under the Free Exercise Clause by the Sugarman Memo is a futile attempt to

fit a square peg into a round hole. As explained in the Alliance's previous memorandum, *Employment Div. v. Smith*, 494 U.S. 872, 890 (1990), makes clear that accommodation of religious conduct is not mandatory, but rather permissible. Moreover, that reasoning is only relevant when civil law substantially burdens religious conduct. The truth is that no civil law forces any member of the Hampton Synagogue congregation to choose between obeying the civil law and following religious belief. The choice here is imposed by a private entity -- not the government -- which makes the First Amendment utterly irrelevant. It is essential to remember that the First Amendment, which begins "*Congress shall make no law. . .*" is only relevant to government action. U.S. Const., Am. I (emphasis added).

With respect to the physical aspect of the boundary itself, the neutral, generally applicable Village ordinances governing the posting of objects on public utility poles may be applied to religious groups. *Smith*, 494 U.S. at 884-85. Yet, regardless of the general applicability of the Village ordinances or the constitutionality of the physical boundary, the proclamation remains constitutionally infirm.

Some have tried to justify an eruv proclamation, physical boundary, and designated zone by analogizing them to municipal services benefiting religious entities, including police protection, street and sidewalk repair, traffic direction, and the installation of street lights and signs. The analogy does not work, though. The government need not take a stand on religious law or carry it out in order to provide these services. Indeed, the government does not even need to know what a congregation believes when these standard municipal functions are delivered. The same services would be provided just as readily for little league baseball games, political gatherings, and movie theaters. They are examples that show equal treatment of religious entities with all other entities, not special treatment for a single religious organization, its beliefs, or its practices.

The Alliance agrees fully with the Sugarman Memo's statement that "appeals to fear and prejudice have no place in the consideration of the important constitutional issues facing the Trustees." Sugarman Memo at 9. That is precisely why the Alliance's position is based on a plain reading of the Supreme Court's Establishment Clause jurisprudence, rather than on an appeal to emotion.

Finally, in light of the Memo's implicit suggestion that the Village go forward with the Petition regardless of constitutional doctrine in order to avoid a lawsuit, the Village should understand the ramifications of choosing to implement the Petition. If the Village violates its residents' constitutional rights by endorsing and validating religious law, beliefs, and practices and choosing sides in a debate over religious theology, the Village would be liable for attorneys fees and damages. The only means of avoiding such fees is to obey the Constitution's dictates.

November 5, 2008


For the reasons presented here and all of the reasons previously presented in the Alliance's memo of October 6, 2008, the Alliance urges the Trustees to follow the dictates of the First Amendment's Establishment Clause and deny the Petition.

Respectfully submitted,

Alliance for the Separation of Church and State for the
Greater Westhampton Area

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