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The Eruv: An Accommodation of Free Exercise for Orthodox Jews or an Establishment of Religion?

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INTRODUCTION

Orthodox Jews have a religious prohibition in which they are unable to carry items on the Sabbath on public property. They are only able to do so in their homes or closed off curtilages of their private property. An eruv, however, allows people to carry items, walk with their home keys in their pockets and push baby strollers on public property on the Sabbath.[1] An eruv is a wired string that is a symbolic enclosure that combines all spaces as one space, and therefore extends the laws of private domain into the public.[2] The term eruv means mixture, which mixes the public and private areas for purposes of access to carrying items. As a result, living in areas in which an eruv exists is a major benefit to Orthodox Jews, as simple tasks, such as walking to Synagogue on the Sabbath, becomes much easier.[3] Additionally, Orthodox Jews prefer to live in areas in which an eruv is already in existence, or in a place where an eruv could be constructed. According to Orthodox Jewish law, sizes of towns, villages, and cities matter, as an eruv cannot be placed where there is an area or road that has more than 600,000 people traveling in a street per day.[4] Most areas do not have this concern, but this is why picking certain areas to live in may entail more than just the price of real estate.

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[1] 3 SHLOMO GANZFRIED, KITZUR SHULCHAN ARUCH 331 (Eliyahu Meir Klugman & Yosaif Asher Weiss eds. & trans., Mesorah Publ'ns 2009) (1864).
[2] Charlotte Elisheva Fonrobert, *Installations of Jewish Law in Public Urban Space: An American Eruv Controversy*, 90 CHI.-KENT L. REV. 63, 74 (2015) (detailing the history of the eruv, the controversy behind the opposition of having one, especially in the Hamptons, and the arguments made in favor of allowing an eruv).
[3] Orthodox Jews are always able to walk on public property on the Sabbath without an eruv, as long as they are not carrying items. This includes walking to Synagogue. The circumstances are much more difficult in those cases without an eruv, but it is permissible.
[4] RASHI on TALMUD BAVLI, ERUVIN 59a–b (Hersh Goldwurm, ed., Yisroel Reisman & Michoel Weiner trans., Mesorah Publ'ns 2006) (n.d.).

While the eruv is very thin, and frankly very hard to see unless you are looking for it, it has caused some issues in different communities. Being that the eruv is placed on public property, people who oppose this believe it is a religious symbol that is being unconstitutionally endorsed, or like other religious signs, should not be on public roads.[5] Furthermore, many people believe that if they allow an eruv to be constructed, more Orthodox Jews will move into the area, and thus will "change" the community.

While people in certain communities may try to make an Establishment Clause claim, I argue that denying and removing an eruv is a free exercise violation. The Establishment Clause argument only obscures the real issue: the denial of the eruv as a way of excluding Orthodox Jews from an area. In Section I, I will discuss the Free Exercise Clause. Section II will present the Establishment Clause. Following that, Section III will address the lower court's rulings. Section IV will be the analysis under the framework of both the Free Exercise Clause and the Establishment Clause. Finally, Section V will be the conclusion.

I. FREE EXERCISE CLAUSE

In certain areas, Orthodox Jews are barred from creating an eruv using the same resources other local residents are able to use. In *Tenafly Eruv Ass'n, Inc. v. Borough of Tenafly*, the Orthodox Jews wanted to create an eruv by attaching them to the utility poles.[6] The local government did not allow this, citing that it had a sign ordinance, which prevented people from using the utility poles.[7] However, other residents of the town had used the poles, and the sign

[5] Fonrobert, *supra* note 2, at 64.
[6] 309 F.3d 144, 152 (3d Cir. 2002).
[7] *Id.* at 154.

ordinance was never enforced against those residents.[8] This government action amounts to discrimination, as it burdens the Orthodox community by targeting it.

A. Discriminatory Denial of an Eruv

1. Target/suppress Orthodox Jewish communities

There have been numerous cases where religious groups have been discriminated against, primarily by being targeted and unfairly burdened, as they were unable to perform their religious duties. The Supreme Court has typically ruled that a law which is not neutral nor generally applicable, and substantially burdens a religious group, violates the free exercise of religion. In the case of *Fowler v. State of R.I.*, there was a city ordinance that did not allow religious or political meetings in any public park.[9] Fowler, a Jehovah's Witness minister, gave a talk in the park, titled "The Pathway to Peace".[10] Fowler was arrested and fined under the city ordinance.[11] However, the Assistant Attorney General admitted that this ordinance did not prevent church services in the park, and that Catholics could hold mass in the parks without violating this ordinance.[12] This admission showcased how Jehovah's Witnesses' services were treated differently than those of other religious sects.[13] The Supreme Court held that the city ordinance targeted Fowler, since it was only cited out of dislike and discrimination for a religious group, and it was a free exercise violation.[14]

The most important case regarding religious discrimination is *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*.[15] There were plans to build a church and other religious

[8] *Id.* at 151.
[9] 345 U.S. 67 (1953).
[10] *Id.* at 68.
[11] *Id.*
[12] *Id.* at 69.
[13] *Id.*
[14] *Id.*
[15] 508 U.S. 520 (1993).

institutions in Hialeah.[16] Residents of the city voiced very hostile opinions about a Santeria church, and the religion as a whole.[17] As a result, the city created ordinances that prohibited religious animal sacrifices, and animals used for sacrificial purposes.[18] Exceptions to the ordinances were made, but these exceptions made the prohibition under the ordinances apply almost exclusively to the church.[19] This would make it impossible for the church and religious members to practice their religion in Hialeah. There would be no possibility to both live in Hialeah and follow their religion. Being that the ordinances and exceptions discriminated against the church, strict scrutiny is applied. The ordinances failed strict scrutiny as they are not narrowly tailored and do not have general applicability.[20] The Court held that the city ordinance which prohibited the religious animal sacrifices violated their free exercise.[21] The ordinance by the city specifically targeted their religion.[22] Similarly, in *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*, a cake shop owner and devout Christian refused to make a cake for a same-sex wedding.[23] His refusal stemmed from his religious beliefs which opposed same-sex marriage.[24] The Colorado Civil Rights Commission, which the couple filed a charge with, concluded that this refusal violated the Colorado Anti-Discrimination Act by discriminating on the basis of sexual orientation .[25] However, the Court ruled that the Commission did not act in a neutral manner toward the cake shop owner, and their hostility for religion was a violation of his free exercise.[26]

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[16] *Id.* at 525–26.
[17] *Id.*
[18] *Id.* at 526–27.
[19] *Id.* at 528.
[20] *Id.* at 522.
[21] *Id.* at 524.
[22] *Id.* at 535.
[23] 138 S. Ct. 1719, 1723 (2018).
[24] *Id.*
[25] *Id.*
[26] *Id.* at 1731–32.

Like *Lukumi*, other cases were concerned with religious groups being able to practice their faith where they chose. In *Wisconsin v. Yoder*, the state law required children to attend school until the age of 16.[27] Amish children though are taken out of school after the eighth grade.[28] The government did not realize that this effect will cause forced migration, since Amish communities would no longer be able to live in Wisconsin.[29] They would be unable to live and practice their religion in the same place.[30] "[A] very real threat of undermining the Amish community and religious practice as they exist today; they must either abandon belief and be assimilated into society at large, or be forced to migrate to some other and more tolerant region."[31] The Amish were given an exemption under the Free Exercise Clause to prevent this situation from happening.

All these cases have similarities to the eruv. Similar to *Fowler*, Orthodox Jews are targeted, and therefore the denial of an eruv is a free exercise violation. As seen from *Lukumi*, if the city ordinance were upheld, the members of the church would have to move and find a new place to live. Likewise, members of the Orthodox Jewish communities would have much more difficulty living in places where an eruv is prohibited, and would therefore have to move to a different location. As a result, this is in violation of *Lukumi*. Parallel to *Masterpiece Cakeshop*, a city ordinance that disallows an eruv is not done in a neutral manner, as it shows hostility towards Orthodox Jews' religious ways. Especially the size and placement of an eruv, which is hardly seen, showcases that people who oppose it, do not oppose the string on a utility pole, but the Orthodox Jews who use it. Comparable to *Yoder*, Orthodox Jews would likely have a forced

[27] 406 U.S. 205 (1972).
[28] *Id.*
[29] *Id.* at 218.
[30] *Id.*
[31] *Id.*

migration from places if an eruv was not allowed. Orthodox Jews can still practice their religion even if there is no eruv, however, the burden would be substantial and people would likely move away. From all these cases, any city ordinance that prohibits the installation of an eruv violates the Free Exercise Clause.

2. Exclusions of Orthodox Jewish Communities from General Benefit Programs

The Supreme Court has also found discrimination in situations where religious groups are excluded from a general benefit program. For instance, in *Trinity Lutheran Church of Columbia, Inc. v. Comer*, the grant program that prevented the church from receiving the benefit, was a free exercise violation, because it discriminated against the religious organization based on religion.[32] Grants were given to schools and daycare centers to refurbish their playgrounds.[33] These grants had come from public funds.[34] However, not everyone qualified to receive the grant money to resurface their playgrounds. "The department had a strict and express policy of denying grants to any applicant owned or controlled by a church, sect, or other religious entity."[35] The Court ruled that disqualifying a group because it was a religious institution, regardless that it did not do this based on a specific religion, but the mere fact that it was a religious group, is expressly discriminatory.[36]

In *Espinoza v. Montana Department of Revenue*, the "no-aid" provision in Montana's Constitution said that the state program, which helps with tuition assistance for parents that send their children to private schools, could not use this money for a religious school.[37] The Court

[32] 137 S. Ct. 2012, 2015 (2017).
[33] *Id.* at 2014.
[34] *Id.*
[35] *Id*.
[36] *Id.* at 2015.
[37] 140 S. Ct. 2246, 2249 (2020).

held that Montana's "no-aid" provision discriminated against religious schools and the families who enrolled in religious schools.[38] Building upon *Trinity Lutheran*, the Court held that this exclusion based on religious status was a free exercise violation.[39]

With the eruv, allowing anyone to use utility poles for signs, advertisements, and other items, but prohibiting Orthodox Jews from attaching a string for a religious purpose, is discriminating based on religion. This religious discrimination is similar to *Trinity Lutheran*. Additionally, the Orthodox Jewish community is similar to the families in *Espinoza* who send their children to religious schools, as they cannot enjoy a benefit that is afforded to all, simply on the basis of religion. Like *Espinoza*, the opponents of the eruv violate the Free Exercise Clause.

B. Heightened Protections for the Hybrid of Religion and Association

The eruv is not just a small function of Orthodox Jewish life, but an essential need. It is critical in ensuring community life and associational freedoms. Without it, families with young children cannot take part in gatherings, as there is no way they could leave their homes as a family without having to carry items (i.e., baby strollers). This also applies to adults in wheelchairs and walkers, as they too would be considered carrying items in the public domain. Therefore, this forces individuals to remain locked indoors for the entirety of the Sabbath. Furthermore, the adults that can only travel with a wheelchair or walker cannot even attend Synagogue on the Sabbath, a fundamental aspect of their religion. This causes the Orthodox community to suffer a substantial burden. In the case of *Empl. Div., Dept. of Human Resources of Oregon v. Smith*, it was established that neutral laws of general applicability are subject only

[38] *Id*.
[39] *Id.*

to rational basis review, and not strict scrutiny, regardless of the burden on religion.[40] However, one of the exceptions to this is when the burden affects not only religion but another constitutional right, like association.[41] This creates the hybrid situation. *Smith* makes clear that such hybrid situations invoke strict scrutiny.

Given the critical role the eruv plays in allowing community life and the freedom of association, prohibitions on the eruv will be subject to strict scrutiny review by a court. The prohibition of an eruv substantially burdens the Orthodox Jewish community. Furthermore, there is no compelling government interest, as installing an eruv does not establish a religion. Lastly, banning an eruv, which creates severe obstacles for Orthodox Jews from partaking in essential religious functions, is not the least restrictive means by the government. All these reasons show the government cannot justify the substantial burden they create. Therefore, this violates the Free Exercise Clause.

II. ESTABLISHMENT CLAUSE

Even if a local town allows for an eruv to be constructed, there are times where residents who oppose an eruv sue the town, claiming the eruv violates the Establishment Clause. In *American Civil Liberties Union of New Jersey v. City of Long Branch*, the ACLU argued that the creation of an eruv violated the Establishment Clause.[42] The court used the *Lemon* Test, and determined that allowing an eruv does not violate the Establishment Clause.[43]

A. Eruv: Not a "Religious Symbol" under Case Law

1. Religious symbols placed on public property to send a message.

[40] 494 U.S. 872 (1990).
[41] *Id.* at 882.
[42] 670 F. Supp. 1293,1294 (D.N.J. 1987).
[43] *Id.* at 1297.

The Supreme Court announced the Establishment Clause test in *Lemon v. Kurtzman*, which set out three requirements as to whether the Establishment Clause was violated: 1) there must be a secular purpose, 2) it may not advance any religion, and 3) it cannot result in excessive government entanglement with religion.[44] This is known as the *Lemon* Test. Justice O'Connor modified the *Lemon* Test in her concurring opinion in *Lynch v. Donnelly* by creating the Endorsement Test.[45] Under this test, the purpose and effect prongs of the *Lemon* Test (prongs one and two) are seen from an endorsement perspective.[46] With the purpose prong, "it is whether the government intends to convey a messages of endorsement or disapproval of religion."[47] For the effect prong, it is whether the government "has the effect of communicating a message of government endorsement or disapproval of religion."[48] Both of these tests have been used by the Court. In *County of Allegheny v. ACLU*, a menorah was put on display outside a courthouse, alongside a Christmas tree and a sign saluting liberty.[49] The menorah in the display was held constitutional because its religious meaning was put in a larger context of holidays and religious diversity.[50] Under the endorsement test, it was determined that a reasonable observer would not look at the menorah and think that the government was endorsing Judaism, but rather that the government was recognizing holidays and religious liberty.[51]

The Court has applied these tests where religious symbols on public property have been challenged. In *McCreary County v. American Civil Liberties Union of Kentucky*, the county put up a frame of the Ten Commandments in the courthouse.[52] After the ACLU filed suit citing a

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[44] 403 U.S. 602, 612-13 (1971).
[45] 465 U.S. 668, 687, 691 (1984) (O'Connor, J., concurring).
[46] *Id.* at 690-91.
[47] *Id.*
[48] *Id.*
[49] County of Allegheny v. Am. Civ. Liberties Union Greater Pittsburgh Chapter, 492 U.S. 573 (1989).
[50] *Id.* at 576.
[51] *Id.* at 620.
[52] 545 U.S. 844, 851 (2005).

violation of the Establishment Clause, the county twice added additional historical non-religious documents, surrounding the Ten Commandments.[53] The Court said that the government violated the Establishment Clause, as these framed displays had a religious purpose, and it had favored a religious purpose over a secular purpose.[54] That same year in *Van Orden v. Perry*, a monolith with the Ten Commandments was placed on the Texas State Capitol grounds.[55] There was a challenge that this violated the Establishment Clause.[56] However, the Court ruled that the display of the religiously-themed monolith on the capitol grounds did not violate the Establishment Clause.[57] This case differed from *McCreary*, as the group who donated the monolith did have religious ties, but was more concerned with guiding morality and stopping "juvenile delinquency".[58] Additionally, the placement of the monolith showed nothing sacred about it.[59] On the other hand, the county in *McCreary* had deep religious objectives, and the placement of the frame in the courthouse was a governmental effort to promote religion.[60] The Court also mentioned the placement of the monument in *Van Orden* was not very noticeable, especially compared to other cases.[61] Additionally, it was also important that the monument was one of 17 monuments and 21 historical markers on the grounds of the state capital and no one had noticed or been concerned about it until one person complained.[62] Therefore, the Court allowed the religious symbol on public property.[63]

[53] *Id.* at 852–53
[54] *Id.* at 862–63, 881.
[55] 545 U.S. 677, 681 (2005).
[56] *Id.* at 682.
[57] *Id.* at 692.
[58] *Id.* at 701 (Breyer, J., concurring).
[59] *Id.*
[60] *Id.* at 703.
[61] *Id.* at 691
[62] *Id.*
[63] *Id.*

Courts have also found that sectarian symbols like a cross on public property can be constitutional. Fourteen years later, in the case of *American Legion v. American Humanist Assoc.*, a claim was brought that a cross on public land, which was erected as a monument 89 years prior, violated the Establishment Clause.[64] The Court, however, disagreed.[65] While it is a cross, which is a religious symbol, in this instance it took on a secular meaning, as its point was to commemorate those lost in World War I.[66] "[W]hen time's passage imbues a religiously expressive monument, symbol, or practice with this kind of familiarity and historical significance, removing it may no longer appear neutral, especially to the local community for which it has taken on particular meaning."[67] The Court went further into speaking about its historical significance, and its symbolic stature. Therefore, it did not violate the Establishment Clause. In agreement with the Court's position on religious symbols, in *American Atheists, Inc. v. Port Authority of New York and New Jersey*, the organization brought an Establishment Clause claim against the Port Authority and the National September 11 Memorial and Museum Foundation, when they included a steel cross from the debris of the World Trade Center.[68] The steel cross was erected by volunteers a few weeks after the attack on September 11, 2001.[69] The Port Authority retrieved the steel cross for the museum.[70] American Atheists claimed that this steel cross violated the Establishment Clause, as there was no "accompanying atheist recognition plaque".[71] The court held that this did not violate the Establishment Clause, as the display of the cross was actually a secular purpose.[72] The cross was not an endorsement of religion, and its

[64] 139 S. Ct. 2067, 2074 (2019).
[65] *Id.* at 2090
[66] *Id.*
[67] *Id.* at 2084.
[68] 760 F.3d 227, 232 (2d Cir. 2014).
[69] *Id.* at 234.
[70] *Id.*
[71] *Id.* at 245.
[72] *Id.* at 239–40.

purpose was to remember the history of the terrorist attacks.[73] While a cross is generally a religious symbol, this steel cross is a symbol of hope and healing.[74] Therefore, the Establishment Clause claim was denied, and affirmed by this court.

The Court has moved away from both the *Lemon* Test and Endorsement Test,[75] especially in their opinions in *Van Orden* and *American Legion*. In these two cases, the majority opinion noted that the *Lemon* Test was used on an inconsistent basis, and therefore, there was no reason to use the test.[76] Additionally, in *American Legion*, it was noted that since the memorials were erected so long ago, there was no way to know the original purpose of it, and therefore, the *Lemon* Test should be avoided.[77]

All four of these cases were about religious symbols that were donated by people to the town. They were all intended to send a message; the message of holiday celebration, of reverence for religious text, of community ethics, and of honoring those who had died. The eruv, however, is different from these cases. While the eruv is a religious symbol, it is not a discernable symbol, it is not intended to send a message and it is not intended for all to see with ease. When looking at an eruv, most people who are unfamiliar with the concept would not make a correlation as to what it is. It is a thin string that is on a utility pole. The string used is the same string that any person can purchase for their own personal use. Furthermore, it is not erected for any symbolic purpose. Its purpose is to create a boundary for Orthodox Jews to be allowed to carry items in public. This does not send any messages to the public at large, as it only allows

[73] *Id.* at 243–44.
[74] *Id.*
[75] Shira J. Schlaff, *Using an Eruv to Untangle the Boundaries of the Supreme Court's Religion-Clause Jurisprudence*, 5 U. PA. J. CONST. L. 831 (2003) (noting the lack of a consistent test used, and why there is a need for a predictable test to look at for the Establishment Clause).
[76] Am. Legion v. Am. Humanist Assn., 139 S. Ct. 2067, 2080–82 (2019); Van Orden v. Perry, 545 U.S. 677, 686 (2005).
[77] *Am. Legion*, 139 S. Ct. at 2080-82.

Orthodox Jews to walk freely as all others are able to do. As to the placement of the eruv, it is not intended for people to see (with ease, at least). It is placed high up on utility poles, and once a week an inspector goes up and checks the eruv to make sure there is no damage to it. Members of the Orthodox community assume the eruv is up, unless otherwise notified that there has been significant damage to the eruv. It is not placed in a position for all people on a highway to see. Being that it is so thin in nature, and the placement is very high up, people generally will not notice it, unless they are actively looking for it. That is why these cases do have some similarities to the eruv, but they are completely different in most ways.

B. Even if a religious symbol, no Establishment Clause Violation

If an eruv happens to be considered a religious symbol on public property, it is not a concern, as it meets the *Lemon* Test by satisfying the three prongs, and it meets the Endorsement Test. Erecting an eruv has a secular purpose to enable people to walk outside their property in order to associate with others. It does not advance any religion and there is no excessive government entanglement. Furthermore, erecting an eruv does not convey a message of endorsement or disapproval of religion from the government. Additionally, as seen from both *Van Orden* and *American Legion*, a religious symbol, such as the eruv, can still have secular and/or civic meaning. All it does is allow Orthodox Jews living in a certain geographic area the ability to move freely in the public domain on the Sabbath, while carrying an item or pushing a stroller/wheelchair.

1. Proper Accommodations

While the concern of the Establishment Clause is the endorsement or sponsorship of a religion, there is an acceptable measure that allows an "accommodation" to a religious group or

institution in certain instances. In fact, there are currently over 2,000 exceptions; some are just based on religion, while others are religion and more.[78] Most accommodations do not violate the Establishment Clause. In the case of *Corporation of Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*, defendant Mayson was fired by a religious organization for a non-religious job position on the basis of his religion.[79] Mayson claimed that the Title VII exemption, which allowed the religious employer to fire him, violated the Establishment Clause.[80] The Court ruled that the exemption did not violate the Establishment Clause.[81] The accommodation allows religious organizations to hire people of their own faith.[82] It had a secular legislative purpose, and did not advance a religion, nor did it create church-state entanglement.

In *Walz v. Tax Commission of City of New York*, it was ruled that a property tax exemption, in which the property was used only for a religious purpose, did not violate the Establishment Clause.[83] In the Court's reasoning, they said the purpose of the tax exemption is not to advance or hinder a religion, nor sponsor or show hostility towards it.[84] Also, it has not singled out one religion, but has granted all exemptions to all religions and to other non-profits if they met certain criteria.[85] The legislative purpose behind the exemption was not to establish, sponsor or support a religion.[86]

As seen from these two cases, an accommodation to a religion is not in fact an establishment of a religion. The Title VII exemption in *Amos* showcased that religious groups are

[78] James E. Ryan, *Smith and the Religious Freedom Restoration Act: An Iconoclastic Assessment*, 78 VA. L. REV. 1407, 1445 (1992)
[79] 483 U.S. 327, 330 (1987).
[80] *Id.* at 331.
[81] *Id.* at 339.
[82] *Id.* at 337.
[83] 397 U.S. 664 (1970).
[84] *Id.* at 672.
[85] *Id.* at 672-73.
[86] *Id.* at 674.

allowed to practice their religion by hiring people who have the same belief and agree with its mission. This shows that the accommodation must be tied to promoting free exercise. Furthermore, *Walz* is in part about promoting diversity of groups in society. Allowing Orthodox Jews to erect an eruv accomplishes both the promotion of free exercise, and the ability to have more diverse groups in a community.

Accommodations that allow the religious person unlimited discretion are more likely to violate the Establishment Clause. In *Estate of Thornton v. Caldor, Inc.*, an employee refused to work on Sundays, as it was the day he observed his Sabbath.[87] The state law allowed employees to designate their Sabbath day, on which they would never work, without any regard to the employer, business needs, union contracts, or other employees.[88] As a result of his refusal, he was demoted to a lower store position.[89] He claimed his demotion was in violation of a state law that barred employers for mandating employees to work on their Sabbath.[90] The Court ruled that such a state law violated the Establishment Clause, as it gave a major preference to members of a religion over an employer, which was unlimited and at the discretion of the religious individual.[91] However, *Thornton* is very different than the issue of the eruv, as *Thornton* set the outer boundary of the doctrine, and the eruv accommodations are well within the boundary. Therefore, by allowing Orthodox Jewish to erect an eruv, this is just an accommodation, not an establishment.

2. No Proselytization, No Exclusivity

[87] 472 U.S. 703 (1985).
[88] *Id.* at 706.
[89] *Id.*
[90] *Id.* at 707.
[91] *Id.* at 709–10.

The case law allows very explicitly that religious items be placed permanently on public property as long as it is inclusive and nondiscriminatory, and does not proselytize. The eruv meets those requirements.

As seen in *American Legion*, the military used crosses as a symbolic honor.[92] It did not discriminate against anyone, and anyone who was buried in that cemetery was honored with a cross or a Star of David.[93] Similarly, in *Town of Greece, N.Y. v. Galloway*, the Court found a prayer rotation at town council meetings not to be discriminatory.[94] The monthly board meetings held in the town would always begin with a prayer.[95] There were all various types of clergymen of different religions that would conduct the prayer.[96] Even a person of no faith was able to lead the prayer.[97] From 1999 to 2007, the monthly board meetings were all opened by Christian ministers.[98] A claim was brought claiming this violated the Establishment Clause, saying that Christian prayers were favored over any other kinds of religious and nonsectarian groups.[99] The Court held that this did not violate the Establishment Clause, as this practice of legislative prayer had existed since the drafting of the Constitution.[100] "[L]egislative prayer lends gravity to public business, reminds lawmakers to transcend petty differences in pursuit of a higher purpose, and expresses a common aspiration to a just and peaceful society."[101] Furthermore, "the Court has considered this symbolic expression to be a 'tolerable acknowledgement of beliefs widely

[92] Am. Legion v. Am. Humanist Assn., 139 S. Ct. 2074 (2019).
[93] *Id.* at 2075.
[94] 572 U.S. 565 (2014).
[95] *Id.*
[96] *Id.* at 571.
[97] *Id.*
[98] *Id.*
[99] *Id.* at 572.
[100] *Id.* at 575.
[101] *Id.*

held' rather than a first, treacherous step towards establishment of a state church."[102] As long as the prayer was not an attempt to convert anyone's religion or beliefs, it was constitutional.

Since the eruv is open and nondiscriminatory, as anyone who chooses can partake in it, and it does not try to proselytize anyone, it does not violate the Establishment Clause. Therefore, it should be allowed to be permanently placed on public property, as the case law dictates.

III. LOWER COURTS

There are two cases highlighted in which the Orthodox Jewish residents wanted to install an eruv in their community, but the local governments did not allow it, so the Orthodox residents brought a claim that this was a free exercise violation. In *Tenafly Eruv Ass'n, Inc. v. Borough of Tenafly*, the Orthodox Jews of Tenafly, New Jersey, wanted to put up an eruv in their community.[103] They planned to put the eruv wires attaching them to the utility poles.[104] They wanted to attach "lechis", which are "thin black strips made of the same hard plastic material as, and nearly identical to, the coverings on ordinary ground wires—vertically along utility poles".[105] There was a local rule, Ordinance 691, which said as follows: "No person shall place any sign or advertisement, or other matter upon any pole, tree, curbstone, sidewalk or elsewhere, in any public street or public place, excepting such as may be authorized by this or any other ordinance of the Borough."[106] This applied to both secular and religious items. However, many people had placed things on trees and public spaces, and the borough had never enforced Ordinance 691.[107] The Orthodox community attached the lechis to the phone company wires,

[102] *Id.*
[103] 309 F.3d 144 (3d Cir. 2002).
[104] *Id.* at 152.
[105] *Id.*
[106] *Id.* at 151.
[107] *Id.* at 151–52.

which would not be in clear sight.[108] When the borough found out about the lechis, they cited Ordinance 691 (possibly for the first time in its existence) and forced the cable company to remove the lechis.[109] Tenafly residents Chaim Book, Yosifa Book, Stephanie Dardick Gottlieb and Stephen Brenner formed the Tenafly Eruv Association.[110] They sued the Borough of Tenafly, Mayor of Tenafly Ann Moscovitz, and council members Charles Lipson, Martha Kerge, Richard Wilson, Arthur Peck and John Sullivan.[111] The Tenafly Eruv Association claimed that the defendants violated the First Amendment (along with the Fourteenth Amendment and the Fair Housing Act).[112] They argued that the borough violated their right to Free Exercise of Religion, and Free Expression, and they sought a preliminary injunction and a temporary restraining order to prevent the borough from taking away the established demarcations that had already been built.[113]

The district court denied the preliminary injunction and the temporary restraining order dissolved.[114] The court stated that they did not view the borough as being discriminatory, did not violate the free exercise rights, did not violate the FHA, and that utility poles were not public forums for speech.[115] The Eruv Association appealed this decision.[116] The Court of Appeals reversed the judgement.[117] The court said there was no FHA violation, and the residents were not able to state a claim of how creating an eruv was conduct that needed protection under the First Amendment.[118] However, the court went further and said that the borough selectively enforced

[108] *Id.* at 153.
[109] *Id.* at 154.
[110] *Id.* at 152.
[111] *Id.* at 154.
[112] *Id.*
[113] *Id.*
[114] *Id.* at 155.
[115] *Id.* at 155–56.
[116] *Id.* at 156.
[117] *Id.* at 178.
[118] *Id.*

Ordinance 691, and did so against the Orthodox Jews' religious beliefs, and as a result violated the Free Exercise Clause.[119] The Court invoked *Lukumi* as it is similar to the present case because the Tenafly Eruv Association was not asking for preferential treatment, but rather to not have the ordinance enforced, similar to how others were exempt from it.[120] As seen from *Lukumi*, "government cannot discriminate between religiously motivated conduct and comparable secularly motivated conduct in a manner that devalues religious reasons for acting."[121] It also addressed *Fowler*, and addressed the similarities to the present case. This case is similar to *Fowler* as the borough never enforced Ordinance 691 before, only against the Orthodox Jews, just like the ordinance in Fowler was selectively enforced against Jehovah's Witnesses, but exempted other religious groups.[122] The Court of Appeals granted the preliminary injunction from removing the lechis.[123] Another case also barred an eruv in a community, but this involved not only the Orthodox Jewish community against the local government, but it was also the Orthodox Jewish community against the Secular Jewish community.

In the first of multiple cases, *East End Eruv Association, Inc. v. Village of Westhampton Beach*, the Orthodox Jewish community in Westhampton Beach wanted to erect an eruv for the members of the community.[124] The eruv would create a boundary for Westhampton Beach, the Village of Quogue and Southampton.[125] "Westhampton Beach is an incorporated village located in Southampton…Quogue is an incorporated village located in Southampton."[126] The East End Eruv Association (EEEA) created a license agreement with utility companies.[127] This first

[119] *Id.*
[120] *Id.* at 169.
[121] *Id.*
[122] *Id.* at 167.
[123] *Id.* at 179.
[124] 828 F. Supp. 2d 526 (E.D.N.Y. 2011).
[125] *Id.* at 530.
[126] *Id.*
[127] *Id.* at 531.

agreement was made with Long Island Power Authority (LIPA), and the second with Verizon.[128] The agreements included that the lechis would be affixed to the utility poles.[129] Southampton opposed these agreements. "Southampton first learned of a potential eruv boundary within the unincorporated areas of Southampton when they received plaintiffs' motion, months after this action was commenced."[130] Furthermore, Southampton claimed that both agreements EEEA made should be terminated as EEEA did not apply for licenses with the utility companies in the proper amount of time.[131] However, the utility companies disputed this, as they claimed they did not issue licenses because Southampton stated it was not permitted.[132] In the event that EEEA can get an injunction, both utility companies are plaintiffs in a different action, claiming that the lechis should be allowed to be affixed to the utility poles, regardless of Southampton's approval.[133]

The main reason the local government of Southampton opposed an eruv was because they had a sign ordinance, which was to "promote the public health, safety and welfare through a comprehensive system of reasonable, effective, consistent, content-neutral, and nondiscriminatory sign standards and requirements."[134] They said that a lechi, which is part of an eruv, is a sign, and therefore should fall under the requirements of the sign ordinance.[135] Furthermore, they said that Orthodox Jewish people believe they can carry items in public when an eruv is erected, and therefore this sends a message.[136] The Southampton local government claimed they actively police the utility poles, and can remove any signs at any point, and that

[128] *Id.*
[129] *Id.*
[130] *Id.* at 530–31.
[131] *Id.* at 531.
[132] *Id.*
[133] *Id.* at 532.
[134] *Id.*
[135] *Id.* at 533.
[136] *Id.*

they did not selectively enforce the ordinance, but enforced it to a high standard.[137] In Westhampton, they did not believe an eruv is a sign.[138] However, for an eruv to be erected, Westhampton would need to approve it.[139] Finally, Quogue had strict rules about any banners, emblems, or signs attached to utility poles.[140] They also said that no permit was applied for, none was granted, and EEEA was unable to show selective enforcement of these rules.[141]

The EEEA claimed that Southampton selectively enforces their sign ordinance, and that strict scrutiny should apply.[142] They produced six images of what they claimed are signs posted, and Southampton had not removed them.[143] Two of the signs were right beneath the utility wires, lower than where the eruv would be, and Southampton had not removed them.[144] With Westhampton, EEEA said that the town opposed an eruv, so Westhampton would never approve an application, even though they said a lechi is not a sign under their sign ordinance, and there were no set application guidelines EEEA was supposed to obey.[145] Lastly, EEEA argued that Quogue obstructed the eruv by claiming its village code applies to lechis being attached to utility poles, as these are encroachments.[146] EEEA stated these are not encroachments under the village code, and therefore, they do not have to apply for permits.[147] Additionally, EEEA stated that Quogue has selectively enforced these rules regarding attachments to utility poles.[148]

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[137] *Id.*
[138] *Id.* at 535.
[139] *Id.*
[140] *Id.*
[141] *Id.* at 536.
[142] *Id.* at 539.
[143] *Id.* at 534.
[144] *Id.*
[145] *Id.* at 535.
[146] *Id.*
[147] *Id.* at 536.
[148] *Id.*

In its decision, the District Court held that this action was not ripe against the Southampton defendants, as EEEA did not apply for permits for the eruv, and it was unable to show that this process was futile and incapable of producing a useful result.[149] Southampton had stated that the lechis were considered signs under the sign ordinance.[150] Also, the exact location of the boundaries for the eruv in all three locations still seemed uncertain.[151] The court continued and said that even if the action was ripe, the plaintiffs had been unable to show a strong chance of success on the claims they made.[152] Finally, the local governments had not interfered with the agreement between the EEEA and the utility companies.[153] This case was distinguished from *Tenafly*, as there was no evidence that the town strategically allowed exemptions except for the Orthodox Jews.[154]

Besides the local governments, the Secular Jewish members of Westhampton Beach came out against an eruv. They created a group, which "[i]t bears emphasizing that this group represents itself quite explicitly and strategically as Jewish".[155] They called themselves "Jewish People Opposed to the Eruv" (JPOE), also known as "Jewish People for the Betterment of Westhampton Beach".[156] They claimed their reason for the opposition to an eruv was that it violated the Establishment Clause.[157] They did not mention any anti-religion motives. However, this case caught the media by storm. Jon Stewart, then host of *The Daily Show* on Comedy Central, sent comedian Wyatt Cenac to interview residents and showcase it on the show.[158]

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[149] *Id.* at 537.
[150] *Id.*
[151] *Id.*
[152] *Id.* at 538.
[153] *Id.* at 541.
[154] *Id.* at 540.
[155] Fonrobert, *supra* note 2, at 68.
[156] *Id.* at 68.
[157] *Id*. at 69.
[158] Comedy Central, *The Thin Jew Line*, THE DAILY SHOW WITH JON STEWART (Mar. 23, 2011), http://www.cc.com/video-clips/1jsrl7/the-daily-show-with-jon-stewart-the-thin-jew-line.

Leading proponents against the eruv made it known that they viewed the Orthodox Jewish community as very closed-minded people, and did not want to attract more Orthodox Jews into their area, as they may "change the area".[159]

JPOE filed a motion to intervene in the case between the EEEA and the villages.[160] Their motion was denied.[161] They then sued the EEEA, Westhampton Beach, LIPA and Verizon, claiming that an eruv would be a violation of the Establishment Clause.[162] This too was dismissed, as they were unable to show how the municipalities did not represent their interests in the case.[163] On appeal, in *Jewish People for the Betterment of Westhampton Beach v. Village of Westhampton*, the Court of Appeals affirmed the decision against the JPOE.[164] JPOE had tried to argue that an eruv is something that will not go unnoticed, and "will be a constant and ever-present symbol, message and reminder to the community at large, that the secular public spaces of the Village have been transformed for religious use and identity."[165] They also said they will have to face this religious display on a daily basis.[166] The Court, however, determined that they were unable to state a claim for a violation of the Establishment Clause by the defendants, and were unable to show a lack of a secular purpose, as EEEA and LIPA had entered into an agreement with one another to attach the lechis to the utility poles.[167] The Court stated, "[n]eutral accommodation of religious practice qualifies as a secular purpose under *Lemon*."[168] The Court also cited *American Atheists* when discussing using the *Lemon* Test for JPOE's Establishment

[159] *Id.*
[160] E. End Eruv Assn., Inc. v. Village of Westhampton Beach, 828 F. Supp. 2d 526, 542 (E.D.N.Y. 2011).
[161] *Id.* at 542.
[162] Verizon New York Inc. v. Jewish People for Betterment of Westhampton Beach, 556 Fed. Appx. 50, 52 (2d Cir. 2014)
[163] *Id.* at 52.
[164] 2:12-CV-3760 (LDW), 2013 WL 11322083 (E.D.N.Y. May 21, 2013), aff'd, 778 F.3d 390 (2d Cir. 2015).
[165] *Id.* at 393.
[166] *Id.*
[167] *Id.* at 395.
[168] *Id.*

Clause claim.[169] Furthermore, in *American Civil Liberties Union of New Jersey v. City of Long Branch*, the court stated that if there is no evidence to show that an eruv was installed in a non-neutral way, allowing an organization to attach lechis to utility poles, it serves a secular purpose of accommodation.[170] In addition, the Court said that no person would look at the eruv and believe a religion is being endorsed.[171] Lastly, there was no issue of government entanglement with regard to religion.[172]

IV. ANALYSIS

As seen from the Constitutional framework, there is a balance that must be met between satisfying the Free Exercise Clause and not violating the Establishment Clause. The eruv fits this balance.

The *Tenafly* case has a strong resemblance to *Lukumi* as the acts of the local government targets the Orthodox Jewish community. It also has similarities to *Yoder*, as the acts of the local governments could unknowingly cause a forced migration. This type of suppression is clearly discriminatory, and is in violation of the Free Exercise Clause. If this targeting of a religion was not deemed unconstitutional, what would stop every city in the country from adopting similar city ordinances, and therefore not permitting the members of a religion from living there? With *Tenafly*, the same question could be asked. While it is possible to live in a place where there is no eruv, it does make life much more difficult for the individuals, especially families with younger children who are not able to walk far distances. People will therefore generally not move into an area that does not have an eruv, or to a place where there is controversy

[169] *Id.*
[170] 670 F. Supp. 1293, 1295-96 (D.N.J. 1987).
[171] *Id.* at 1296.
[172] *Id.* at 1296-97.

surrounding the eruv. These kinds of state actions would not be generally applicable and facially neutral, but instead would be discriminatory. This means they would still be subject to strict scrutiny even under *Smith*. Besides for the substantial burden, there is no compelling government interest. The sign ordinance in *Tenafly* was not cited when people outside of the Orthodox community posted items considered signs. Not only was this discriminatory, it shows the sign ordinance was not really a government interest. Additionally, having an eruv does not establish a religion. Therefore, this clearly violates the Free Exercise Clause.

In *Tenafly*, the court looked at the sign ordinance, and the enforcement of it.[173] While the ordinance was neutral on its face, the selective enforcement of it was what violated the Free Exercise Clause.[174] The borough had turned a blind eye to many (if not all) instances when the sign ordinance was violated by residents of Tenafly.[175] It was when the Orthodox Jewish Community had placed wires attached to the utility poles, allowing them the freedom to practice their religion, the borough objected.[176] This selective enforcement was a clear violation of the Free Exercise Clause, as it excluded the Orthodox Jewish community from a general benefit program.[177] Every other resident could post things on the poles, except for the Orthodox. Additionally, there was no Establishment Clause concern that the borough needed to be concerned about. As a result, the eruv should remain intact.

With regard to *East End Eruv Ass'n* and *Jewish People for the Betterment of Westhampton Beach*, the JPOE tried to claim an Establishment Clause violation.[178] However, the Court ruled that they did not state a claim, as the EEEA and Verizon were not state actors.[179]

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[173] Tenafly Eruv Ass'n, Inc. v. Borough of Tenafly, 309 F.3d 144, 167 (3d Cir. 2002).
[174] *Id.* at 167-68
[175] *Id.*
[176] *Id.* at 168.
[177] *Id.* at 178.
[178] Jewish People for the Betterment of Westhampton Beach, 778 F.3d at 395.
[179] *Id.* at 395.

Therefore, there would be no establishment of a religion by a state actor.[180] Additionally, the Court cited the *Long Branch* opinion that every court that measured whether such acts by government violated the Establishment Clause agreed it did not.[181] "The city allowed the eruv to be created to enable observant Jews to engage in secular activities on the Sabbath. This action does not impose any religion on the other residents of [Long Branch]."[182] This is simply a result of it not being considered a religious symbol on public property to send a message, and even if people do view it as a religious symbol, it still does not violate the Establishment Clause as it would be considered an accommodation. Furthermore, since an eruv is open and nondiscriminatory, anyone can partake in it, and it does not try to proselytize anyone, it does not violate the Establishment Clause.

Lastly, in *Burwell v. Hobby Lobby Stores, Inc.*, Justice Ginsburg in her dissent brought up third-party harms.[183] Third-party harms refer to those who are harmed when a religious accommodation is made.[184] Communities do not feel hurt when they see (or more likely search to find) an eruv. For Orthodox Jews, this is an essential part of their religion. Orthodox Jews who cannot practice their religion as comfortably suffer the burden under strict scrutiny, and accommodating them by allowing an eruv does not cause some third-party harm. As seen from *Tenafly* and *Westhampton*, the lechis are connected to utility poles and cable wires. As most people do not stare at cable wires, most people would not even know the eruv was there, and therefore would likely not feel harm by an eruv.

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[180] *Id.*
[181] *Id.* at 396.
[182] *Id.*
[183] 573 U.S. 682, 739, 745 (2014) (Ginsburg, J., dissenting).
[184] *Id.* at 745.

V. CONCLUSION

While people in certain communities can make an argument that an eruv violates the Establishment Clause because it is seen as a religious symbol, I do not believe that argument can be founded. I believe the size of the symbol in question does in fact matter. An eruv is not easily visible, and one must look for it to see it. Furthermore, by having an eruv up, it is not viewed as an establishment of religion, but rather an accommodation made for the Orthodox Jewish community. It is similar in that instance to both *Lukumi* and *Yoder*, and the alternative of forced migration is not what the Court wants. Also, it is similar to *Trinity Lutheran* and *Espinoza* as the Orthodox Jews should be able to enjoy a benefit that is afforded to all. Thirdly, as Justice Ginsburg said in her dissent in *Hobby Lobby*, who is being hurt by this? While *Westhampton* may claim they are uncomfortable by seeing an eruv, it does not really affect them, and being uncomfortable is not anywhere near the type of harm Justice Ginsburg was talking about. When balancing the two sides of the argument of who is injured more by having the other's result, whether it would be Orthodox Jews not being able to move to certain areas, or people noticing another string connected to their cable wires, it would show the Orthodox Jewish community to be more hurt as a result of the other's decision. Lastly, I do think that anti-religion plays a role here. In *Tenafly*, the local ordinance was never cited before the borough used it to prevent the eruv. Similarly, in *Westhampton*, when people were interviewed and shown on *The Daily Show*, they made it known of their negative views of Orthodox Jews. It seems that while different communities can make an Establishment Clause argument, their true fear is the possibility of Orthodox Jews moving into their areas. For these reasons I do not believe this is an Establishment Clause issue, but rather a violation of the Orthodox Jews' free exercise.