

FREEDOM FROM RELIGION *foundation*

P.O. BOX 750 · MADISON, WI 53701 · (608) 256-8900 · WWW.FFRF.ORG

August 2, 2017

SENT VIA EMAIL ONLY

JLMinichett@aol.com, RogerDeBerardine@usrtoday.org, sdimartino@usrtoday.org,
jflorio@usrtoday.org, jondit@optonline.net, vdurante@usrtoday.org, thafner@usrtoday.org

The Honorable Joanne L. Minichetti
Upper Saddle River Borough Council

Re: Religious Display on Government Property

Dear Mayor Minichetti and Councilors:

I am writing on behalf of the Freedom From Religion Foundation (“FFRF”) to express support for the Borough of Upper Saddle River’s order to remove eruv markers from public property. FFRF is a nationwide nonprofit organization with over 29,000 members across the country, including more than 550 in New Jersey. FFRF’s purpose is to protect the constitutional separation between church and state.

A concerned resident of Upper Saddle River informs us that PVC piping has been attached to utility poles within the Borough as part of the creation of an eruv, a perimeter used to signify where observant Jews can perform otherwise forbidden activities like carrying objects on the Sabbath. In addition to violating the Borough’s ordinances, allowing religious displays to be affixed to public property is unconstitutional.

The Jewish Encyclopedia notes the rationale for designating these religious areas with an eruv: “According to the traditional interpretation of [Exodus 16:29],¹ it is forbidden to remove on the Sabbath things from an enclosed space which is private property to an open space which is public property. Likewise it is prohibited to transport objects a distance of more than four cubits within an open space. The only space in which it is allowed to remove things freely is an enclosed space which is the property of an individual.”² Eruvin extend the “property of an individual” to the eruv boundaries, thus enabling Orthodox Jews to break the rule laid out in Exodus 16:29 without fear of divine retribution.

In other words, eruvim are designated specifically so that a certain religious sect can avoid adhering to their own onerous rules. Eruvin do not seek to alleviate a government-imposed burden; they seek to alleviate a self-imposed religious burden. It is not the government’s responsibility to accommodate a self-imposed burden on religious belief.

The religious significance of eruvim is unambiguous and indisputable. They are objects which are significant only to some Jews as a means to obey religious laws that have no bearing on non-adherents. They have no meaning except as a visual, public communication of a purely religious concept for religious believers of a single faith. The Borough cannot allow such permanent religious

¹ “See! The Lord has given you the sabbath, therefore on the sixth day he gives you food for two days; each of you stay where you are; do not leave your place on the seventh day.”

² <http://www.jewishencyclopedia.com/articles/5841-erub>

displays to be erected on public land. Other permanent religious displays have long been struck down by federal courts as violations of the Establishment Clause. *See, e.g., Trunk v. San Diego*, 629 F.3d 1099 (9th Cir. 2011), *cert. denied*, 132 S.Ct. 2535 (2012); *Buono v. Norton*, 371 F.3d 543, 550 (9th Cir. 2004); *Carpenter v. City and County of San Diego*, 93 F.3d 627,632 (9th Cir. 1996); *Friedman v. Bd. of County Comm'rs*, 781 F.2d 777, 778 (10th Cir. 1985) (en banc); *ACLU v. Rabun County Chamber of Commerce*, 698 F.2d 1098, 1111 (11th Cir. 1983); *ACLU v. Eckels*, 589 F. Supp. 222, 241 (S.D. Tex. 1984). While these cases involved the display of crosses, the display of any religion's tokens on government property would also violate the Establishment Clause.

Previous cases addressing eruv do not require towns to allow them. When the Third Circuit Court of Appeals, which has jurisdiction over New Jersey, addressed eruv, it held that while it was discriminatory to remove eruv markers from utility poles while letting other illegally-affixed items remain, the ordinance prohibiting such postings was "neutral and generally applicable on its face," so "if the Borough had enforced it uniformly...the plaintiffs' claim [that the Free Exercise Clause required the Borough to let them put up the eruv] would accordingly fail." *Tenaflly Eruv Ass'n, Inc. v. Borough of Tenaflly*, 309 F.3d 144, 167 (3d Cir. 2002).

Allowing Orthodox Jews to permanently demarcate large areas of public property as a private Jewish household that is "property" of the Orthodox Jewish community forces those of other faiths and no faith to live within an Orthodox Jewish religious enclosure, including members of other Jewish denominations who are offended by the Orthodox Jewish elevation of legalistic constructs over what they believe to be the true spiritual values of Judaism. *See E. End Eruv Ass'n, Inc. v. Vill. of Westhampton Beach*, 828 F. Supp. 2d 526, 542 n.1 (E.D.N.Y. 2011) (association of non-Orthodox Jews sought to intervene as defendant in case in which Orthodox Jews challenged removal of eruv markers); *Central Conference of Am. Rabbis Responsa – 178, Eruv* (1983) ("Certainly we, as Reform Jews, who are interested in the spirit of the law, would reject this kind of legal fiction for the observance of the *shabbat*."), available at <https://ccarnet.org/responsa/carr-268-269/>. This is precisely the kind of divisive religious argument in which our government cannot take sides.

Allowing an eruv to be established and maintained publicly designates the enclosed area as affiliated with Orthodox Judaism. It imposes Orthodox Judaism on members of the public by surrounding their community with the physical indicia of a religion they do not practice. "[T]he preservation and transmission of religious beliefs and worship is a responsibility and a choice committed to the private sphere." *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 310 (2000) (quoting *Lee v. Weisman*, 505 U.S. 577, 589 (1992)). Allowing one religion to put up religious symbols on public property unconstitutionally "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." *Lynch v. Donnelly*, 465 U.S. 668, 688 (1984) (O'Connor, J., concurring).

We therefore support the Borough of Upper Saddle River's direction to remove these illegal religious symbols from public land. Thank you for your time and attention to this matter.

Sincerely,



Madeline Ziegler
Staff Attorney