**UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT**

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**No. 01-3077**

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**CONGREGATION KOL AMI and RABBI ELLIOT HOLIN,**

**Plaintiffs/Appellees,**

**v.**

**ABINGTON TOWNSHIP, BOARD OF COMMISSIONERS OF ABINGTON TOWNSHIP, THE ZONING HEARING BOARD OF ABINGTON TOWNSHIP, and LAWRENCE T. MATTEO, JR., in his official capacity as Director of Code Enforcement of Abington Township,**

**Defendants/Appellants.**

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**On Appeal from the United States District Court for the Eastern District of Pennsylvania**
**No. 01-CV-1919**
**Honorable Clarence C. Newcomer, S.J.**

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# BRIEF OF AMICI CURIAE THE AMERICAN CIVIL LIBERTIES UNION OF PENNSYLVANIA AND THE AMERICAN JEWISH COMMITTEE IN SUPPORT OF APPELLEES AND IN FAVOR OF AFFIRMANCE

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## TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ........................................................................... iii

I. STATEMENT OF INTEREST OF AMICI CURIAE ..................................1

II. FACTUAL BACKGROUND......................................................................2

III. ARGUMENT.............................................................................................4

A. Under the Rational Basis Test the Township's Zoning Board's Decision Regarding Kol Ami Violated the Equal Protection Clause. ..........................................................................................5

1. The Rational Basis Test Requires That the Court Determine Only Whether the Distinction Between the Prohibited and Permitted Uses Is Justifiable. ............................7

2. Abington Township's Attempt to Distinguish City of Cleburne Rests on an Inaccurate Reading of the Supreme Court's Opinion.......................................................................8

3. The District Court Applied the Rational Basis Test Appropriately and Correctly Concluded That Abington Township's Actions Violated Kol Ami's Right to Equal Protection. .......................................................................11

B. Because the Equal Protection Clause Requires that Similarly Situated Entities Be Treated Alike, Requiring Abington Township to Permit Kol Ami to Apply for a Special Exception Was the Appropriate Remedy. ..........................................................13

C. Granting Kol Ami Relief Under the Equal Protection Clause Does Not Offend the Establishment Clause......................................14

IV. CONCLUSION........................................................................................20

CERTIFICATE OF BAR MEMBERSHIP..........................................................21

CERTIFICATE OF COMPLIANCE...................................................................22

CERTIFICATE OF SERVICE ........................................................................23

## TABLE OF AUTHORITIES

### CASES

ACLU v. City of Philadelphia,
No 96-6045 (E.D. Pa. 1996) .......................................................................1

Bannum v. City of Louisville,
958 F.2d 1354 (6th Cir. 1992) ..........................................................6, 7, 10

Boyajian v. Gatzunis,
212 F.3d 1 (1st Cir. 2000)........................................................................ 17, 18

Christian Gospel Church v. City of San Francisco,
896 F.2d 1221 (9th Cir. 1990) ...........................................................................13

Church of Jesus Christ of Latter Day Saints v. Amos,
483 U.S. 327 (1987)...........................................................................................18

City of Cleburne v. Cleburne Living Center, Inc.,
473 U.S. 432 (1985)........................................................................... *passim*

Congregation Kol Ami v. Abington Township,
161 F. Supp. 2d 432 (E.D. Pa. 2001).................................................... *passim*

Congregation Kol Ami v. Abington Township,
2001 U.S. Dist. LEXIS 10224 (E.D. Pa. July 20, 2001) ...............................2

Cornerstone Bible Church v. City of Hastings,
948 F.2d 464 (8th Cir. 1991) ......................................................................7, 12

Cornwell v. Hamilton,
80 F. Supp. 2d 1101 (S.D. Cal. 1999) ..........................................................10

County of Allegheny v. ACLU,
492 U.S. 573 (1989) ..........................................................................1, 17

Gregoire v. Centennial School District,
907 F.2d 1366 (3d Cir. 1990) ......................................................................16

Hancock Indus. v. Schaffer,
811 F.2d 235 (3d Cir. 1987) .......................................................................... 10

Lamb's Chapel v. Center Moriches Union Free School District,
508 U.S. 384 (1993) ...........................................................................................17

Lemon v. Kurtzman,
403 U.S. 602 (1971) ..........................................................................1, 14, 18

Lynch v. Donnelley,
465 U.S. 668 (1984) ..............................................................................15, 16

Midnight Sessions, Ltd. v. City of Philadelphia,
945 F.2d 667 (3d Cir. 1991) .............................................................................5

Nectow v. Cambridge,
277 U.S. 183 (1928) ...........................................................................................6

Reed v. Reed,
404 U.S. 71 (1971) .............................................................................................5

Romer v. Evans,
517 U.S. 620 (1996) ...........................................................................................6

Rosenberger v. University of Virginia,
515 U.S. 819 (1995) ..........................................................................16, 17

Sameric Corp. v. City of Philadelphia,
142 F.3d 582 (3d Cir. 1998) ........................................................................... 6

Schweiker v. Wilson,
450 U.S. 221 (1981) ...........................................................................................5

Schumacher v. Nix,
965 F.2d 1262 (3d Cir. 1992) ..............................................................5, 10, 11

Shapiro v. Thompson,
394 U.S. 618 (1969) ...........................................................................................6

Silberman v. Biderman,
735 F. Supp. 1138 (E.D.N.Y. 1990) ....................10

Wallace v. Jaffree,
472 U.S. 38 (1985) ....................16

Westside Bd. of Education v. Mergens,
496 U.S. 226 (1990).................... 16

Widmar v. Vincent,
454 U.S. 263 (1981) ....................16

Wilson v. Tinicum Township,
1993 U.S. Dist. LEXIS 9971 (E.D. Pa. July 20, 1992) .................... 1

**STATUTES**

Religious Land Use and Institutionalized Persons Act of 2000,
42 U.S.C.A. § 2000cc, *et. seq* .................... 18

State RFRAs and Land Use Regulation,
32 U.C. Davis L. Rev. 755 (1999) ....................18

## I. STATEMENT OF INTEREST OF AMICI CURIAE

The American Civil Liberties Union ("ACLU") is a nationwide nonprofit, nonpartisan organization with nearly 300,000 members dedicated to the principles of liberty and equality embodied in the Bill of Rights including equal protection, the freedom of religion, and the separation of church and state. The ACLU of Pennsylvania is one of the ACLU's state affiliates, and represents the 10,000 members of the ACLU who reside in the Commonwealth. The ACLU of Pennsylvania has participated in numerous establishment clause and equal protection cases, including Lemon v. Kurtzman, 403 U.S. 602 (1971), County of Allegheny v. ACLU, 492 U.S. 573 (1989), ACLU v. City of Philadelphia, No 96-6045 (E.D. Pa. 1996); Wilson v. Tinicum Township, No. 92-6617, 1993 U.S. Dist. LEXIS 9971 (E.D. Pa. July 20, 1992).

The American Jewish Committee ("AJC"), a national organization of approximately 110,000 members and supporters, was founded in 1906 to protect the civil liberties and religious rights of Jews. Over the years, AJC has maintained a consistent campaign against unjustly restrictive local zoning policies that prevent the establishment of religious assemblies and houses of worship in residential areas or otherwise make it impossible for religious groups to practice their faiths.

The ACLU of Pennsylvania and AJC believe they can offer this Court the perspective of national organizations dedicated to safeguarding equal protection and the freedom of religion, as well as the separation of church and state.

The ACLU of Pennsylvania and AJC have filed a Motion for Leave of Court to File an Amici Curiae Brief.

## II. FACTUAL BACKGROUND[1]

In 1999, Congregation Kol Ami ("Kol Ami" or the "Congregation") entered into an agreement to purchase a 10.9 acre parcel of property located at 1908 Robert Road in Abington Township, Pennsylvania (the "Property") from the Sisters of the Holy Family of Nazareth (the "Sisters"). From 1957 to 1995, the Property was used by the Sisters as a convent and place of worship. Thereafter, the Sisters leased the Property to the Greek Orthodox Monastery of the Preservation of Our Lord for similar purposes. Kol Ami seeks to use the Property to conduct religious exercises, operate a Hebrew School, and house its administrative offices.

In 1978, Abington Township enacted a zoning ordinance. Under the ordinance, the Sisters' convent was located in a V-residential district. The 1978 ordinance permitted administrative buildings, public libraries and recreation areas

[1] Amici take their account of the fact from the opinions of the district court. See Congregation Kol Ami v. Abington Township, 161 F. Supp. 2d 432 (E.D. Pa. 2001); Congregation Kol Ami v. Abington Township, 2001 U.S. Dist. LEXIS 10224 (E.D. Pa. July 20, 2001).

to locate in V-residential districts as of right. Religious institutions, including churches, rectories, parish houses, convents and monasteries, were permitted to locate in V-residential districts by special exception, as were several other uses. In 1990, Abington Township amended its zoning ordinance. After these amendments, the zoning ordinance permitted only single-family homes in V-residential districts as of right. The amendments also eliminated all uses previously permitted by special exception, including religious institutions.

Abington Township's zoning ordinance was amended again in 1996. Under the 1996 ordinance, the district in which the Property is located was re-designated an R-1 residential district. This ordinance permits a number of uses to locate in R-1 residential districts by special exception, including municipal complexes, such as administration buildings, police barracks and libraries; outdoor recreation facilities, such as country clubs, club houses, pro shops, and snack bars; utility facilities, such as train stations and bus shelters; and riding academies.

In January 2000, Kol Ami initiated proceedings before Abington Township's Zoning Hearing Board (the "Board") asking the Board to either (1) permit Kol Ami to continue the Sisters' non-conforming use of the property as a house of worship; (2) grant Kol Ami a special exception; or (3) approve a variance for Kol Ami. On March 20, 2001, the Board issued an opinion denying all three of Kol Ami's requests. Specifically, the Board held that Kol Ami's proposed use of

the Property differed from the Sisters' past non-conforming use, and that Kol Ami should not receive a variance because its use of the property would cause traffic, noise and neighborhood disruptions. The Board did not address whether Kol Ami met the requirements for a special exception. Rather, it noted only that religious institutions were not included among the uses permitted to apply for a special exception.

## III. ARGUMENT

The issue presented in this appeal is whether the Abington Township zoning ordinance violates the equal protection clause as applied to Kol Ami. Equal protection mandates that no governmental action shall "deny to any person within its jurisdiction the equal protection of the laws." United States Constitution, Amend XIV. This clause is "essentially a direction that all persons similarly situated should be treated alike." City of Cleburne v. Cleburne Living Center, Inc., 473 U.S. 432, 439 (1985).

Here, the district court found that Kol Ami was treated differently from other similarly situated entities and that this disparate treatment was not justified by any legitimate rationale. Congregation Kol Ami v. Abington Township, 161 F. Supp. 2d 432, 437 (E.D. Pa. 2001). Specifically, the district court found that because other entities that are permitted to seek special exception status in R-1 residential districts have the same secondary effects on the neighborhood as Kol Ami, the

Congregation should also be permitted to seek a special exception. Id. The district court's holding was correct on the law, supported by the record and should not be overturned. We respectfully urge this Court to affirm the district court's opinion on the same narrow grounds selected by that court.

### A. Under the Rational Basis Test the Township's Zoning Board's Decision Regarding Kol Ami Violated the Equal Protection Clause.

Under the rational basis test, a law will be upheld if it is "rationally related to a legitimate state interest." City of Cleburne, 473 U.S. at 440. Although legislatures are accorded substantial deference, leading to a presumption of constitutionality for validly enacted laws, the rational basis test is "not a toothless" inquiry. Schweiker v. Wilson, 450 U.S. 221, 234 (1981). Federal courts will not uphold an arbitrary law, or one containing an irrational distinction. Id.; see also Schumacher v. Nix, 965 F.2d 1262, 1269 (3d Cir. 1992) ("A classification 'must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike.'") [quoting Reed v. Reed, 404 U.S. 71, 76 (1971)]. In this way, the rational basis test continues protects citizens from government action based on "mere speculation, prejudice, self-interest, or ignorance." Midnight Sessions, Ltd. v. City of Philadelphia, 945 F.2d 667, 685 (3d Cir. 1991).

Laws are found not to be rationally related to a legitimate state interest if the plaintiff shows that: (1) the interest invoked is either not legitimate or not plausible; or (2) the distinction utilized is not relevant to the legitimate objective. See City of Cleburne, 473 U.S. at 440, 446; Sameric Corp. v. City of Philadelphia, 142 F.3d 582, 595 (3d Cir. 1998). On this basis, federal judges have invalidated legislation furthering illegitimate purposes, such as harming "a politically unpopular group" or favoring prior residents. Romer v. Evans, 517 U.S. 620, 634 (1996); see also Shapiro v. Thompson, 394 U.S. 618 (1969). Additionally, where laws irrationally distinguish between similarly situated groups, courts have held them to violate the equal protection clause. See, e.g., City of Cleburne, 473 U.S. at 449-50. In the zoning context, courts have repeatedly declared governmental actions unconstitutional when they fail the rational basis test by drawing distinctions between similarly situated groups. Id.; Nectow v. Cambridge, 277 U.S. 183, 188-89 (1928); Bannum v. City of Louisville, 958 F.2d 1354, 1360-61 (6th Cir. 1992) (striking down law distinguishing between group homes for social rehabilitation programs and other group homes as not rationally related to a legitimate governmental interest).

### 1. The Rational Basis Test Requires That the Court Determine Only Whether the Distinction Between the Prohibited and Permitted Uses Is Justifiable.

In City of Cleburne, the seminal case in this area, the Supreme Court evaluated a zoning ordinance that required a group home for individuals with mental retardation to obtain a special exception before locating in a certain district. 473 U.S. at 436-37. Under Cleburne's zoning ordinance, other multi-unit dwellings and group homes, including sorority and fraternity houses, nursing homes and apartment buildings, were permitted to locate in the same district as of right. See id., 473 U.S. at 447. The Court's rational basis inquiry focused exclusively on whether the group home "would threaten legitimate interests of the city in a way that [these] other permitted uses . . . would not." Id. at 448; see also Bannum, 958 F.2d at 1360 (holding that where the "zoning regulations impose differing requirements on those who would operate [half-way houses] as opposed to similar group home uses, the question [presented] is whether that different treatment as applied to [plaintiff] is a rational means to accomplish a legitimate end"); Cornerstone Bible Church v. City of Hastings, 948 F.2d 464, 471 n.12 (8th Cir. 1991) ("For equal protection analysis the relevant inquiry is whether allowing one [type] of entity but excluding another is rational in light of the purposes of the ordinance.")

Comparing the impact of the proposed use with the impact of those uses permitted by the ordinance, the Supreme Court in City of Cleburne held that the asserted governmental interests did not justify the city's distinctions. See City of Cleburne, 473 U.S. at 448-450. In reaching this conclusion, the Court examined each interest asserted by the government as justifying its disparate treatment of the proposed use and examined how the same justification applied to other permitted uses to determine whether the distinction was reasonably related to the asserted interest. Id. The Court found that some of the rationales, including preventing such a home from locating in a flood plain and concerns about the number of people who would occupy it, applied equally to both the home for individuals with mental retardation and the types of group homes permitted to locate in the area as of right. Id. at 449-50. The other rationales were found to be based on irrational assumptions and concerns about individuals with mental retardation. Id. For these reasons, the Court concluded that the distinction created by the law could not be upheld.

### 2. Abington Township's Attempt to Distinguish City of Cleburne Rests on an Inaccurate Reading of the Supreme Court's Opinion.

The Township, seeking to distinguish City of Cleburne, asserts that the Supreme Court's opinion rested solely upon a finding of invidious discrimination in that instance. Brief of Appellants, at 36-37. Claiming that there is no evidence

of discriminatory animus against Kol Ami or religious institutions, the Township asserts that the heightened scrutiny of City of Cleburne is wholly inapplicable to this case. Brief of Appellants, at 36-40. The Township misunderstands City of Cleburne.

First, in City of Cleburne, the Court specifically declined to hold that individuals with mental retardation are a quasi-suspect classification calling for a heightened standard of judicial scrutiny. See City of Cleburne, 473 U.S. at 442-447. Therefore the governmental action at issue was subject only to rational basis scrutiny. Id. The Township's assertion that the Supreme Court utilized a heightened standard of review in City of Cleburne is patently erroneous.

Second, the Township misapprehends the requirements established by City of Cleburne for demonstrating a violation of the equal protection clause under the rational basis test. Under City of Cleburne, a plaintiff must show that the distinction made by the law is patently irrational. See City of Cleburne, 473 U.S. at 446-47. To the extent a showing of animus is required, this requirement is met by the plaintiff's demonstration that no rational basis could exist for the distinction. Id. at 446-450.

The Supreme Court's analysis in City of Cleburne focused not on whether the City's zoning decision was motivated by animus, but on whether the ends sought and the means utilized were rational. See City of Cleburne, 473 U.S. at 449

("The question is whether it is rational to treat the [plaintiff] differently."). After finding no rational basis for the distinction made by Cleburne's zoning ordinance, the Court concluded that the distinction was motivated by animus. Id. at 449-50. The Supreme Court based this conclusion on the irrationality of the distinction drawn, not a finding of the lower court or evidence of animus in the record. Id.

Courts following City of Cleburne have read it to require only a finding of irrationality, not of animus. See Hancock Indus. v. Schaffer, 811 F.2d 235, 237 (3d Cir. 1987) (In general, a rational basis inquiry does not require the court "to inquire into the subjective motives of the decision makers" since it is constitutionally irrelevant whether the reasons for the state action "in fact underlay the [governmental policy or rule or decision]."); see also Bannum, 958 F.2d at 1360-61 (finding irrationality of the zoning law as applied sufficient to violate equal protection); Cornwell v. Hamilton, 80 F. Supp. 2d 1101, 1005-06 (S.D. Cal. 1999) ("The question is: given the State's inherent leeway, has the State regulated in a rational manner?"); Silberman v. Biderman, 735 F. Supp. 1138, 1145 (E.D.N.Y. 1990) (noting that courts strike down laws for failing the rational basis test "where [there is a] lack of a rational relationship between the legislative classification and the purported legislative goal."). Indeed, courts, including this Court, routinely reaffirm that the touchstone of the rational basis analysis is arbitrariness. See Schumacher v. Nix, 965 F.2d 1262, 1269 (3d Cir. 1992) ("A

classification must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike.").

Thus, under City of Cleburne, if a plaintiff demonstrates that the distinction created by the zoning ordinance between his or her use and other permitted uses is arbitrary as applied, and that no rational basis for the distinction can be offered, the plaintiff has met his or her burden under the rational basis test, and the law should be found to violate the equal protection clause as applied to that plaintiff.

#### 3. The District Court Applied the Rational Basis Test Appropriately and Correctly Concluded That Abington Township's Actions Violated Kol Ami's Right to Equal Protection.

Abington Township's zoning ordinance permits certain entities to locate in R-1 residential districts by special exception, but prohibits religious institutions, like Kol Ami, from even seeking special exception status in the same districts. This Court must determine whether this distinction is rational as applied to Kol Ami by deciding whether Kol Ami threatens Abington Township's legitimate governmental interests in a manner distinguishable from the those uses permitted by special exception under the Township's zoning ordinance. See City of Cleburne, 473 U.S. at 446-47, 449-50; Schumacher, 965 F.2d at 1269.

Abington Township has asserted that several interests are served by prohibiting Kol Ami from using the Property in the manner requested.

Specifically, the Township asserted its interest in preventing increases in traffic, light pollution and noise in the neighborhood.

The district court found that Abington Township's interest in avoiding these problems would be similarly implicated by many of the entities permitted to locate in the R-1 residential districts by special exception, including libraries, train stations, club houses and country clubs. Congregation Kol Ami, 161 F. Supp. 2d at 437. The external effects of these uses, like the use sought by Kol Ami, include substantial impacts on noise, traffic and light pollution. Id. ("[D]efendants' traffic, noise and light concerns also exist for the uses currently allowed to request a special exception."). Therefore, the uses permissible by special exception are indistinguishable from Kol Ami's proposed use, making Kol Ami and these entities similarly situated. Id.; see also Cornerstone Bible Church, 948 F.2d at 471 (For the purpose of a rational basis inquiry, "[a]ny differentiation must be relevant to the objectives the City is attempting to achieve through its ordinance."). "There can be no rational reason to allow a train station, bus shelter, municipal administration building, police barrack, library, snack bar, pro shop, club house, country club or other similar use to request a special exception . . . but not Kol Ami." Congregation Kol Ami, 161 F. Supp. 2d at 437. Nevertheless, Abington Township's zoning ordinance permits these entities to seek a special exemption, while irrationally denying Kol Ami the same opportunity. Id.

Because both the prohibited use, that of Kol Ami, as well as the permitted uses, such as libraries, country clubs and riding academies, impact the neighborhood in substantially similar ways, the concerns related to these impacts cannot represent a rational basis for distinguishing between them. Id. Therefore the ordinance is underinclusive as applied to Kol Ami, and the district court was correct in holding that the ordinance violates Kol Ami's equal protection rights.

### B. Because the Equal Protection Clause Requires that Similarly Situated Entities Be Treated Alike, Requiring Abington Township to Permit Kol Ami to Apply for a Special Exception Was the Appropriate Remedy.

The equal protection clause requires that the Congregation be treated the same as other entities that may seek to use the property for another use with comparable impacts on the neighborhood. See City of Cleburne, 473 U.S. at 439 (holding that equal protection clause is "essentially a direction that all persons similarly situated should be treated alike"). Here, the zoning ordinance violated Kol Ami's equal protection rights by prohibiting it from seeking to locate within the R-1 residential district, while permitting other similarly situated uses to seek special exceptions. The appropriate remedy for this violation is to place Kol Ami on equal footing with these other entities and permit it to seek a special exception. Cf. Christian Gospel Church v. City of San Francisco, 896 F.2d 1221, 1226 (9th Cir. 1990) (holding that there was no equal protection violation where church was treated like all other places of public assembly - all such places were required to

obtain conditional use permits before establishment in certain neighborhoods.). To go further and order the Township to grant Kol Ami a special exception, might inequitably favor Kol Ami.

Accordingly, Kol Ami must be permitted to apply for a special exception, and Abington Township must have (and, in fact, has now had) the opportunity to evaluate this application under the standards and procedure used for all such requests. This is precisely the remedy ordered by the district court, and its ruling should be upheld.

### C. Granting Kol Ami Relief Under the Equal Protection Clause Does Not Offend the Establishment Clause.

The establishment clause prohibits government from making a law "respecting the establishment of religion." United States Constitution, Amend. I. To analyze whether a governmental action establishes religion and therefore contravenes the First Amendment, a court must determine: (1) whether the primary effect of the law is to advance religion; (2) whether the primary purpose of the law is to advance religion; and (3) whether the law causes undue entanglement of religious and state entities. See Lemon v. Kurtzman, 403 U.S. 602, 612-13 (1971).

Abington Township asserts that the district court's order requiring it to permit Kol Ami to apply for a special exception contravenes the establishment clause by establishing a preference for religious land use over secular land uses.

The Township argues that the "District Court's . . . opinions transform a neutral zoning scheme into a regime to advance religion." Brief of Appellants, at 54.

The first prong of the Lemon test requires this Court to determine whether ordering Abington Township to permit Kol Ami to apply for a special exception has the primary purpose of endorsing religion. See Lynch v. Donnelley, 465 U.S. 668, 690 (1984). The district court's ruling does not have the primary purpose of endorsing religion. Contrary to the Township's assertion, the ruling does not establish a preference for religious land use, but rather requires that religious entities seeking to use land be treated the same as secular organizations seeking uses that have similar effects on the neighborhood. See Congregation Kol Ami, 161 F. Supp. 2d at 437 (holding that Kol Ami must be given the same consideration for a special exception as secular entities including country clubs, libraries and riding academies); see also Section II(B), supra. The district court's ruling does not require Abington Township to ignore the secondary effects of a religious institution's land use, but rather requires that such effects be given the same consideration as they would if attributable to a secular use. See id.

The district court's neutral treatment of Kol Ami, a religious group, cannot be viewed as having the impermissible endorsement of religion as its primary purpose. "Where groups seeking access [to a zoning district] are treated equally, the message communicated 'is one of neutrality rather than endorsement.'"

Gregoire v. Centennial School District, 907 F.2d 1366, 1380 (3d Cir. 1990) (quoting Westside Bd. of Education v. Mergens, 496 U.S. 226, 248 (1990)).

Nor can the district court's neutral treatment of Kol Ami be viewed as having the primary effect of advancing religion. The effect prong of the Lemon test "asks whether, irrespective of the actual purpose, the practice under review in fact conveys a message of endorsement or disapproval." Lynch, 465 U.S. at 690. Here, because the ruling requires Abington Township to treat Kol Ami in the same manner as similar non-religious institutions, the decision cannot be viewed as an impermissible endorsement of religion.

> A central lesson of [the Supreme Court's] decisions is that a significant factor in upholding governmental programs in the face of Establishment Clause attack is their neutrality towards religion . . . [This] guarantee of neutrality is respected, not offended, when the government, following neutral criteria and evenhanded policies, extends benefits to recipients whose ideologies and viewpoints, including religious ones, are broad and diverse.

Rosenberger v. University of Virginia, 515 U.S. 819, 839 (1995); Wallace v. Jaffree, 472 U.S. 38, 60 (1985) (interpreting the establishment clause to require government to "pursue a course of complete neutrality toward religion"); Widmar v. Vincent, 454 U.S. 263, 273-274 (1981).

Governmental action that is neutral toward religious institutions may be viewed as impermissibly endorsing religion when the benefit provided involves

public funds because funding has been held to raise unique establishment clause concerns. See Rosenberger, 515 U.S. at 842-44 (It may be "extract[ed] from our decisions that we have recognized special Establishment Clause dangers where the government makes . . . money payments to sectarian institutions."). This case, however, does not require scrutiny beyond a demonstration of neutrality because the governmental action does not provide a direct financial benefit to a religious institution. Indeed, the district court's order does not require any benefit to be automatically conferred upon Kol Ami. Rather, Kol Ami must establish eligibility for a special exception under the same standards and in accordance with the same procedure required of every other applicant for a special exception. Under these circumstances, there is "no realistic danger that the community would think that the [government] was endorsing religion or any particular creed."[2] Lamb's Chapel v. Center Moriches Union Free School District, 508 U.S. 384, 395 (1993).

A "law that simply protects religious organizations from unfair treatment certainly cannot be impermissible as an unconstitutional endorsement of religious activity." Boyajian v. Gatzunis, 212 F.3d 1, 6 (1st Cir. 2000). Similarly, a ruling

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[2] This rationale would apply with equal force under the endorsement test articulated in County of Allegheny v. ACLU, 492 U.S. 573 (1989). Because Kol Ami was not provided a benefit greater than comparable secular institutions, the government's action cannot reasonably be viewed as conveying a "message that religion is 'favored,' 'preferred,' or 'promoted' over other beliefs." Id. at 593.

that protects a particular religious organization from unfair treatment does not endorse religion. While "it is possible for government to extend itself so far in preventing unfairness that is crosses the line from acceptable accommodation to impermissible favoritism," the narrowly-tailored remedy ordered by the district court insures that this line has not been crossed here.[3] Id.

The third and final prong of the Lemon test requires this Court to determine if the governmental action causes excessive entanglement between the governmental and religious entities. Lemon, 403 U.S. at 612-13. The Township acknowledges that providing Kol Ami with the opportunity to apply for a special exception does not cause excessive entanglement.

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[3] It is noteworthy, however, that, under certain circumstances, the government may go beyond neutrality to accommodate religious practice without violating the establishment clause. See also Church of Jesus Christ of Latter Day Saints v. Amos, 483 U.S. 327, 334-35 (1987). In Amos, the Supreme Court declined to invalidate a regulatory exemption applicable only to religious groups and held that the government may act "with the proper purpose of lifting a regulation that burdens the exercise of religion." Id. at 338. A recent increase in the use of zoning to prohibit religious institutions from gaining access to property warrants the consideration of such accommodations and exceptions. See Douglas Laycock, State RFRAs and Land Use Regulation, 32 U.C. Davis L. Rev. 755, 761-64, 774-75 (1999) (noting that religious institutions are facing increasing difficult in the land use context). Indeed, this increase in discrimination against religious institutions in the land use context has led both states and the federal government to statutorily guarantee accommodation in this area. See Religious Land Use and Institutionalized Persons Act of 2000, 42 U.S.C.A. § 2000cc, *et seq.* ; see also Boyajian v. Gatzunis, 212 F.3d 1, 6 (1st Cir. 2000) (upholding a Massachusetts law guaranteeing accommodation in the land use context).

Having passed all three prongs of the Lemon test, the district court's order does not violate the establishment clause and should be affirmed.

## IV. CONCLUSION

For the foregoing reasons, the decision of the district court granting partial summary judgment in favor of Kol Ami and ordering Abington Township to hold a hearing on the Congregation's special exception request should be affirmed.

Respectfully Submitted,

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Dated: April 26, 2002

## CERTIFICATE OF BAR MEMBERSHIP

STEFAN PRESSER certifies as follows:

1. I am a member in good standing of the bar of the United States Court of Appeals for the Third Circuit.

2. Pursuant to 28 U.S.C. § 1746, I certify under penalty of perjury that the foregoing is true and correct.

____________________________________

Stefan Presser, Esq.

Dated: April 26, 2002

## CERTIFICATE OF COMPLIANCE

Pursuant to Rule 32(a)(7)(C) of the Federal Rules of Appellate Procedure, I certify that, according to the word-count feature of the Microsoft Word 2000 word processing program, this brief contains 4,091 words and therefore is in compliance with this Court's type volume limitations for briefs of amici curiae.

________________________________

Stefan Presser, Esq.

Dated: April 26, 2002