

IN THE
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

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.

**On Appeal from the United States District Court
for the Eastern District of Pennsylvania**

**BRIEF OF *AMICUS CURIAE*
THE AMERICAN JEWISH CONGRESS**

In Support of Plaintiffs/Appellees, Congregation
Kol Ami and Rabbi Elliot Holin, for Affirmance

Of Counsel:

MARC D. STERN
AMERICAN JEWISH CONGRESS
15 EAST 84TH STREET
NEW YORK, N.Y. 10028

RONALD A. KRAUSS
CAMPBELL CAMPBELL EDWARDS & CONROY
1265 DRUMMERS LANE, SUITE 200
WAYNE, PA 19087
610-964-6397
Attorneys for *Amicus Curiae*
The American Jewish Congress

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Corporate Disclosure Statement and
Statement of Financial Interest

No. 01-3077

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

Instructions

Pursuant to Rule 26.1, Federal Rules of Appellate Procedure any non-governmental corporate party to a proceeding before this Court must file a statement identifying all of its parent corporations and listing any publicly held company that owns 10% or more of the party's stock.

Third Circuit LAR 26.1(b) requires that every party to an appeal must identify on the Corporate Disclosure Statement required by Rule 26.1, Federal Rules of Appellate Procedure, every publicly owned corporation not a party to the appeal, if any, that has a financial interest in the outcome of the litigation and the nature of that interest. This information need be provided only if a party has something to report under that section of the LAR.

In all bankruptcy appeals counsel for the debtor or trustee of the bankruptcy estate shall provide a list identifying: 1) the debtor if not named in the caption; 2) the members of the creditors' committee or the top 20 unsecured creditors; and, 3) any entity not named in the caption which is an active participant in the bankruptcy proceedings. If the debtor or the bankruptcy estate is not a party to the proceedings before this Court, the appellant must file this list. LAR 26.1(c).

The purpose of collecting the information in the Corporation Disclosure and Financial Interest Statements is to provide the judges with information about any conflicts of interest which would prevent them from hearing the case.

The completed Corporate Disclosure Statement and Statement of Financial Interest Form must, if required, must be filed upon the filing of a motion, response, petition or answer in this Court, or upon the filing of the party's principal brief, whichever occurs first. An original and three copies must be filed. A copy of the statement must also be included in the party's principal brief before the table of contents regardless of whether the statement has previously been filed. Rule 26.1(b) and (c), Federal Rules of Appellate Procedure.

If additional space is needed, please attach a new page.

(Page 1 of 2)

Pursuant to Rule 26.1, 29(c) and Third Circuit LAR 26.1, American Jewish Congress
makes the following disclosure: (Name of Amicus)

1) For non-governmental corporate parties please list all parent corporations:

None.

2) For non-governmental corporate parties please list all publicly held companies that hold 10% or more of the party's stock:

None.

3) If there is a publicly held corporation which is not a party to the proceeding before this Court but which has as a financial interest in the outcome of the proceeding, please identify all such parties and specify the nature of the financial interest or interests:

None.

4) In all bankruptcy appeals counsel for the debtor or trustee of the bankruptcy estate must list: 1) the debtor, if not identified in the case caption; 2) the members of the creditors' committee or the top 20 unsecured creditors; and, 3) any entity not named in the caption which is active participant in the bankruptcy proceeding. If the debtor or trustee is not participating in the appeal, this information must be provided by appellant.

N/A.

Dated: April 26, 2002

(Signature of Counsel for Amicus)

Ronald A. Krauss, Esquire
Counsel for Amicus, American Jewish Congress

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INTEREST OF THE *AMICUS*

The American Jewish Congress is an organization of American Jews founded in 1918 to protect the civil, political, economic and religious rights of American Jews and all Americans. It is committed to the preservation of the great freedoms secured by the Constitution, especially the rights secured by the Establishment and Free Exercise Clauses of the First Amendment. To further these ends, AJCongress has filed briefs *amicus curiae* in numerous cases in state and federal courts in which the meaning of the religion clauses has been at issue.

As an organization representing a religious minority, AJCongress is concerned that government not exercise its power arbitrarily to suppress religion. In particular, AJCongress seeks to ensure that government not burden or prohibit religious practices or houses of worship unless it can demonstrate justifications sufficiently important to outweigh the interest in religious liberty.

Rabbi Elliot Holin, a plaintiff in this action, is a vice-president of the Pennsylvania Region of the American Jewish Congress.

* * * * *

Appellants did not consent to the filing of this brief. Accordingly, *Amicus* submits this brief on motion for leave to file, filed contemporaneously with this brief.

STATEMENT OF THE CASE

Amicus adopts the Counterstatement of the Case of Plaintiffs/Appellees Congregation Kol Ami and Rabbi Elliot Holin (collectively, “Congregation”).

* * * * *

Amicus also respectfully directs the Court’s attention to two additional points that may assist the Court in deciding this appeal.

First, the Township’s brief inaccurately states the relief it seeks. The “precise relief” that the Township sets forth in its Conclusion —as FED.R. APP. P. 28(a)(10) requires of appellants —is for this Court to “reverse the *summary judgment* entered below and remand this case for further proceedings.”¹ But the motion that the District Court granted below was the Congregation’s motion for *partial* summary judgment.² This inaccuracy is more than just technical error.

This Court should be aware that the Congregation’s Complaint includes numerous claims besides those addressed in the District Court’s July 11, 2001 Order. If this Court affirms, then most of those claims will be obviated.³ However, if this Court were to order a remand, the Congregation could seek full

¹ Twp. Br. at 3 (emphasis added).

² July 11, 2001 Order, J.A. 3910a-3921a

³ See Complaint, J.A. 1a-29a.

adjudication of its other claims —some of which may involve genuine issues of material fact requiring further discovery —at trial, including:

- ▶ Whether the Ordinance, either on its face or as applied, fails strict scrutiny under any of several asserted constitutional and statutory provisions;
- ▶ Whether the Ordinance violates any provision of the Religion Land Use and Institutionalized Persons Act of 2000;⁴
- ▶ Whether the Zoning Hearing Board’s initial determination under the Ordinance was arbitrary or capricious or not supported by substantial evidence, in violation of the Pennsylvania Municipalities Planning Code.⁵

Second, after a hearing in August 2001, the Township granted the special exception that the Congregation seeks, and on grounds that effectively concede the merits of the Congregation’s request.⁶ That decision would therefore seriously undermine —if not directly defeat —the merits of any future effort the Township might take to revoke the special exemption the Township has already granted. In that connection, AJCongress supports the Congregation’s pending motion in this Court to dismiss this appeal for mootness, for the reasons that the Congregation sets forth.

⁴ 42 U.S.C. § 2000cc *et seq.*

⁵ 53 P.S. §§ 11001-A through 11006-A.

⁶ J.A. 3894a-3909a.

COUNTER STATEMENT OF FACTS

Amicus adopts the Counterstatement of the Facts of Plaintiffs/ Appellees.

SUMMARY OF THE ARGUMENT

Prohibiting any new house of worship in residentially-zoned areas, the Township has overstepped the bounds of its police power to regulate land use. The Township singles out houses of worship for a blanket ban, while permitting non-religious groups with similar land usage and neighborhood impacts to locate in residential areas. That prohibition, which arbitrarily favors non-religious land use, is an abuse of the Township's authority, and a repudiation of its duty to promote the general welfare. Because this blanket ban lacks any rational relation to a legitimate state interest, the Township's zoning ordinance violates the Due Process and Equal Protection Clauses of the Fourteenth Amendment.

In addition, contrary to the Township's contention, there is no Establishment Clause issue in this appeal. The Township's zoning prohibition burdens the Congregation's free exercise of religion. For the Township to lift that burden by according the Congregation the same right to a special exemption that similar secular groups enjoy would not represent an unconstitutional establishment of religion.

ARGUMENT

I. INTRODUCTION

Stated bluntly, the Township's zoning ordinance is hostile to religion.

As the District Court found below, the Township prohibits houses of worship in residential areas, while it permits land uses with the same neighborhood impacts (e.g., traffic, noise, light) by non-religious groups.⁷ So, for example, the Township permits a golf pro shop to locate in a residential area while it refuses to even consider the same request to locate a house of worship.⁸ The District Court, applying the Supreme Court's equal protection analysis that invalidated a similarly arbitrary zoning ordinance in City of Cleburne v. Cleburne Living Ctr.,⁹ held that the Township's disparate treatment of religious groups served no legitimate governmental purpose, and therefore violated the Equal Protection Clause.

AJCongress supports the District Court's decision, and urges affirmance on the grounds that the District Court articulated. AJCongress also supports the arguments for affirming the District Court's decision in the Congregations's

⁷ J.A. 3919a-3920a; 3929a.

⁸ J.A. 3920a.

⁹ 473 U.S. 432 (1985).

brief, which is sufficiently thorough that further discussion would not assist the Court.

But as the Congregation's brief points out, the Township's brief raises issues other than those that the District Court addressed. In the event that this Court chooses to reach beyond the narrow issues that the District Court addressed, this brief will seek to clarify two different but related issues that concern the protection of religious freedom.

First, this brief will argue that a blanket exclusion of all houses of worship from residential areas is contrary to the general welfare of the community, and thus is *per se* unreasonable, lacking any rational relation to a legitimate state interest. Consequently, the Township's zoning ordinance violates the Due Process and Equal Protection Clauses of the Fourteenth Amendment.

Second, this brief will argue that the Establishment Clause is not an impediment to the relief that the Congregation seeks. If the Township were to allow the Congregation to apply for a special exemption to locate its house of worship in a residential-zoned area, that action would merely be accommodating religious practice, not "establishing" religion. Such governmental accommodation of a burdened free exercise of religion does not violate the Establishment Clause.

II. THE TOWNSHIP’S TOTAL EXCLUSION OF HOUSES OF WORSHIP FROM RESIDENTIAL AREAS IS UNCONSTITUTIONAL BECAUSE IT LACKS ANY RATIONAL RELATION TO A LEGITIMATE STATE INTEREST.

A. The Due Process and Equal Protection Clauses of the Fourteenth Amendment Require that Zoning Ordinances Promote the General Welfare

Since the first legal challenge to a zoning ordinance reached the Supreme Court in 1926, in Euclid v. Ambler Realty Co.,¹⁰ the Supreme Court has consistently applied the same standard for determining “the line which separates the [constitutionally] legitimate from the illegitimate assumption of power.”¹¹ That standard requires that the government assert its power to deny a particular use of property only when such use will cause “injury, inconvenience or annoyance to the community, the district or any person.”¹²

When the Court in Euclid upheld the challenged zoning ordinance, it did so fully mindful that zoning laws arose as a specific response to a changing society:

Until recent years, urban life was comparatively simple; but with the great increase and concentration of population, problems have developed, and constantly are developing, which require, and will

¹⁰ 272 U.S. 365 (1926).

¹¹ Id. at 387.

¹² Village of Belle Terre v. Boraas, 416 U.S. 1, 6 (1974) (quoting Seattle Trust Co. v. Roberge, 278 U.S. 116, 122 (1928)).

continue to require, additional restrictions in respect of the use and occupation of private lands in urban communities.¹³

The Court was well aware that since colonial times, even before the original States adopted the Constitution, a landowner had a common law right to decide how best to use his property, a right limited ordinarily only by restrictive covenants or the law of nuisance.¹⁴ Thus, any new governmental limitation on land use, such as the zoning ordinances, would require a compelling and substantive justification.

The Court found justification for this new governmental assertion of power in “some aspect of the police power, asserted for the public welfare.”¹⁵ But the Court also emphasized the constitutional limitations of such government power, as where the zoning ordinance is “clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals or general welfare.”¹⁶

¹³ Euclid, 272 U.S. at 386-87.

¹⁴ See Euclid, 272 U.S. at 387-88; Moore v. East Cleveland, 431 U.S. 494, 513 (1977) (Stevens, J., concurring).

¹⁵ Euclid, 272 U.S. at 387.

¹⁶ Id. at 395. See also Lawton v. Steele, 152 U.S. 133, 137 (1894) (“To justify the State in . . . interposing its authority in behalf of the public, it must appear, first, that the interests of the public . . . require such interference; and, second, that the

Two years later, the Supreme Court applied the Euclid principles in Nectow v. City of Cambridge¹⁷ and Seattle Title Trust Co. v. Roberge.¹⁸ In both cases, the Court struck down zoning ordinances as violations of the Due Process Clause. In Nectow, the Court held that the ordinance had “no foundation in reason” and was “a mere arbitrary or irrational exercise of power having no substantial relation to the public health, the public morals, the public safety or the public welfare in its proper sense.”¹⁹ And in Seattle Title, the Court reasoned that “[l]egislatures may not, under the guise of the police power, impose restrictions that are unnecessary and unreasonable upon the use of private property or the pursuit of useful activities.”²⁰

Having articulated the general guideline that a zoning ordinance is unconstitutional unless it is reasonable, and has a substantial, rational relation to the public health, safety, morals or general welfare of the community, the

means are reasonably necessary for the accomplishment of the purpose, and not unduly oppressive upon individuals.”)

¹⁷ 277 U.S. 183 (1928).

¹⁸ 278 U.S. 116 (1928).

¹⁹ 277 U.S. at 187-88.

²⁰ 278 U.S. at 121.

Supreme Court abandoned the field of zoning cases for almost 40 years.²¹ And it was not until the 1983 decision of the Sixth Circuit Court of Appeals in Lakewood, Ohio Congregation of Jehovah's Witnesses v. City of Lakewood²² that the lower federal courts entered the zoning ordinance/religion arena. But during that hiatus, the state courts picked up where the Supreme Court left off.

B. The Township's Zoning Ordinance Banning All Houses of Worship from Residential Areas Does Not Promote the General Welfare

As the American population continued to increase and became even more concentrated in urban areas, zoning ordinances became ubiquitous. And, inevitably, zoning conflicts involving houses of worship arose.²³ The state courts assumed the laboring oar in developing case law concerning the validity of zoning ordinances, and in particular, the validity of zoning ordinances involving houses of worship.

²¹ See Goldblatt v. Hempstead, 369 U.S. 590 (1962) (upholding zoning ordinance as valid exercise of police power).

²² 699 F.2d 303 (6th Cir. 1983).

²³ See R. Storzer & A. Picarello, Jr., The Religious Land Use and Institutionalized Persons Act of 2000: A Constitutional Response to Unconstitutional Zoning Practices, 9 GEO. MASON L. REV. 929, 932 (2001).

Almost uniformly, the state courts held that houses of worship situated in residential areas contributed materially to the general welfare.²⁴ These courts struck down zoning ordinances banning houses of worship in residential areas — such as the Township’s ordinance here — as unreasonable, and with “no reasonable relationship to the public health, safety, morals or general welfare”²⁵ States that followed this “majority rule”²⁶ include, for example:

<i>Colorado</i>	<u>Bethlehem Evangelical Lutheran Church v. City of Lakewood</u> (recognizing that “the law provides preferential treatment for churches”) ²⁷
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²⁴ 2 A. RATHKOPF & D. RATHKOPF, THE LAW OF ZONING AND PLANNING § 20.01[2][a] at 20-3 (4th ed. 1985) (“The majority view is that facilities for religious of educational uses are, by their very nature, clearly in furtherance of the public morals and general welfare and may not be excluded from a residence district in which location of such use is sought”); K. H. YOUNG, ANDERSON’S AMERICAN LAW OF ZONING § 12.22 at 578 (4th ed. 1996) (“[A]n ordinance which excluded [religious] uses from residential zones does not further the public health, safety, morals or general welfare [because] religious uses contribute to the general welfare of the community.”)

²⁵ ARDEN H. RATHKOPF & DAREN A. RATHKOPF, THE LAW OF ZONING AND PLANNING 20-24 (4th ed. 1975).

²⁶ Church of Jesus Christ of Latter Day Saints v. Jefferson County, 741 F. Supp. 1522, 1534 (N.D. Ala. 1990).

²⁷ 626 P.2d 668, 674 (Colo. 1981).

<u>Georgia</u>	<u>Rogers v. Mayor & Alderman</u> (favoring religious purposes in zoning) ²⁸
<u>Hawaii</u>	<u>State v. Maxwell</u> (recognizing that “the wide majority of courts hold that religious uses may not be excluded from residential districts) ²⁹
<u>Illinois</u>	<u>O’Brien v. City of Chicago</u> (“We do not believe it is a proper function of government to interfere in the name of the public to exclude churches from residential districts for the purpose of securing to adjacent landowners the benefits of exclusive residential restrictions.”) ³⁰
<u>Indiana</u>	<u>Board of Zoning Appeals v. Schulte</u> , (“The law is well settled that the building of a church may not be prohibited in a residential district.”) ³¹
<u>Missouri</u>	<u>Chaminade Coll. Preparatory v. City of Creve Coeur</u> (noting the usual and customary location of churches in residential areas.) ³²
<u>New Jersey</u>	<u>Kali Bari Temple v. Readington Bd. of Adjustment</u> (“It has been held that church use is inherently beneficial.”) ³³

²⁸ 137 S.E.2d 668, 671 (Ga. Ct. App. 1964).

²⁹ 617 P.2d 816, 820 (Haw. 1980).

³⁰ 333 N.E.2d 731, 735 (Ill. App. Ct. 1975).

³¹ 172 N.E.2d 39, 44 (Ind. 1961).

³² 956 S.W.2d 440, 441-42 (Mo. Ct. App. 1997).

³³ 638 A.2d 839, 844 (N.J. Super. Ct. App. Div. 1994).

<u>New York</u>	<u>Cornell Univ. v. Bagnardi</u> (Because of the inherently beneficial nature of churches . . . to the public, we held that the total exclusion of such institutions serves no end that is reasonably related to the morals, health, welfare and safety of the community.’) ³⁴
<u>Ohio</u>	<u>State ex rel. Synod of Ohio of United Lutheran Church v. Joseph</u> ³⁵ (“We do not believe it is a proper function of government to interfere in the name of the public to exclude churches from residential districts for the purpose of securing to adjacent landowners the benefits of exclusive residential restrictions.”)
<u>Pennsylvania</u>	<u>Jehovah’s Witnesses Appeal</u> (noting that if ordinance prohibited churches in residential neighborhoods “we would give great consideration to the question of striking it down as unreasonable and arbitrary.”) ³⁶
<u>Texas</u>	<u>Congregation Committee v. City Council of Haltom City</u> (“a city cannot legally exclude a church from a residential district by a zoning ordinance.”) ³⁷
<u>Wisconsin</u>	<u>State ex rel. Lake Drive Baptist Church v. Vill. of Bayside Bd. of Trustee</u> (The church in our society has long been identified with family and residential life. Churches traditionally have been and should be located in that part of the community where people live. They should be easily and conveniently located to the home.) ³⁸

³⁴ 503 N.E.2d 509, 515 (N. Y. 1986).

³⁵ 39 N.E.2d 515, 524 (Ohio App. 1982).

³⁶ 130 A.2d 240, 243 (Pa. Super. Ct. 1957).

³⁷ 287 S.W.2d 700, 704 (Tex. 1956).

³⁸ 108 N.W.2d 288, 295-96 (Wis. 1961).

In addition, some federal courts have also noted the beneficial nature of houses of worship. Recently, in In Re: Four Three Oh,³⁹ on appeal in this Court, the parties involved in a dispute concerning a land use variance in New Jersey stipulated that the applicant's proposed use of the property for a Hindu temple was "inherently beneficial."⁴⁰ Similarly, the First Circuit Court of Appeals, in Boyajian v. Gatzunis⁴¹ quoted with approval the statement that "religious and educational institutions are, by their very nature, beneficial to the public welfare."⁴²

The judgment that these courts reached, that houses of worship located in residential areas provide a general benefit to the public, now has support in the empirical research of social scientists. For example, the University of Pennsylvania's Center for Research on Religion and Urban Civil Society has sponsored or published numerous empirical studies demonstrating that, for example:

³⁹ 256 F.3d 107 (3d Cir. 2001).

⁴⁰ Id. at 113.

⁴¹ 212 F.3d 1 (1st Cir. 2000).

⁴² Id. at 9.

- ▶ “[C]hurch attendance has a significant impact” on lowering criminal activity and other socially deviant behavior;⁴³
- ▶ Religiosity and attendance at religious services has a “significant inverse effect” on “adolescent deviance, especially drug use.”⁴⁴
- ▶ Religiosity has a “negative direct effect” on juvenile delinquency;⁴⁵
- ▶ “Religious involvement” counteracts the “detrimental effects of neighborhood disorder on youth behavior.”⁴⁶

This social science research substantiates with hard data the societal truth that the state courts recognized as the basis for their decisions: “[T]he inherently beneficial nature of [houses of worship] . . . to the public.”⁴⁷ And, logically, this

⁴³ B. Johnson, et al., Escaping From the Crime of Inner Cities: Church Attendance and Religious Salience Among Disadvantaged Youth, 17 JUSTICE QUARTERLY 386 (2000).

⁴⁴ S. Jang et al., Neighborhood Disorder, Individual Religiosity, and Adolescent Use of Illicit Drugs: A Test of Multilevel Hypotheses, 39 CRIMINOLOGY 116 (2001).

⁴⁵ B. Johnson et al., Does Adolescent Religious Commitment Matter? A Reexamination of the Effects of Religiosity on Delinquency, 38 JOURNAL OF RESEARCH IN CRIME & DELINQUENCY 38 (2001).

⁴⁶ B. Johnson et al., The ‘Invisible Institution’ and Black Youth Crime: The Church as an Agency of Local Social Control, 29 JOURNAL OF YOUTH AND ADOLESCENCE 492 (2000).

⁴⁷ Cornell Univ. v. Bagnardi, 503 N.E.2d 509, 514 (N.Y. 1986).

research substantiates the converse: Banning all houses of worship from residential areas undermines the general welfare.

In contrast, some courts in recent years have accorded less deference to the beneficial nature of houses of worship. For example, the Ninth Circuit Court of Appeals in Christian Gospel Church v. San Francisco⁴⁸ upheld a zoning ordinance that excluded houses of worship from residential areas. But in that case, unlike here, the ordinance permitted the church to apply for a conditional use permit and to present evidence that its use would meet objective, neutral criteria. So the court upheld the ordinance as rationally based, and the denial reasonable, based on record evidence that permitting use by this church would “bring traffic and noise problems to an otherwise quiet neighborhood.”⁴⁹ Here — at least prior to the August 15, 2001 hearing — the Congregation did not have the opportunity to present such evidence.

Denying the Congregation and other religious groups the opportunity to demonstrate that locating a house of worship in a residential area would not create any problems for the current residents is arbitrary and irrational. The

⁴⁸ 896 F.2d 1221 (9th Cir. 1990).

⁴⁹ Id. at 1224-25.

Township's blanket exclusion presumes that a particular house of worship will create problems based solely on speculation. But this Court held in Midnight Sessions v. City of Philadelphia⁵⁰ that government action based on "speculation, prejudice, self-interest or ignorance is arbitrary and irrational," and therefore unconstitutional.⁵¹

The Township's effort to exclude all houses of worship from residential areas is arbitrary, irrational and demonstrably inimical to the general welfare. To defend its exclusionary ordinance, the Township must argue that houses of worship endanger the public health, safety or welfare of the community. The Township has not done so, nor could it. The Township's ordinance therefore lacks the rational basis that Euclid requires to constitute a legitimate exercise of the police power. Accordingly, the Township's ordinance fails to pass constitutional muster under the Fourteenth Amendment.

III. PROVIDING HOUSES OF WORSHIP THE OPPORTUNITY TO LOCATE IN RESIDENTIAL AREAS IS A PERMISSIBLE ACCOMMODATION OF RELIGIOUS PRACTICE THAT DOES NOT VIOLATE THE ESTABLISHMENT CLAUSE.

⁵⁰ 945 F.2d 667 (3d Cir. 1991).

⁵¹ Id. at 685.

The Establishment Clause creates no impediment for the Township to permit the Congregation to apply for a special exemption to locate its house of worship in a residential-zoned area. The Supreme Court stated plainly in Texas Monthly, Inc. v. Bullock,⁵² that government action that accommodates burdened free exercise rights does not constitute a violation of the Establishment Clause.⁵³

There can be no question that the Township's zoning ordinance, by denying the Congregation a place of worship in residential areas, imposes a substantial burden on the Congregation's free exercise of religion, as several federal Courts of Appeal have acknowledged:

- ▶ Ehlers-Renzi v. Connelly School of the Holy Child ("And necessary to the fulfillment of this mission is the existence of facilities which Connelly School deems adequate to carry on its religious instruction");⁵⁴
- ▶ Boyajian v. Gatzunis ("[T]he state's decision to give religion an assist in the local land-use planning process is consistent with the Supreme Court's holding in Amos that legislation isolating religious groups for special treatment is permissible when done for the proper purpose of alleviating a burden on the exercise of religion");⁵⁵

⁵² 489 U.S. 1 (1989)

⁵³ Id. at 18 n.8

⁵⁴ 224 F.3d 283 (4th Cir. 2000).

⁵⁵ 212 F.3d 1, 8 (1st Cir. 2000)

- ▶ Cohen v. City of Des Plaines (“By exempting churches (which themselves do not require a special use permit to operate) from the special use requirement in the operation of nursery schools and day care centers, the city has removed a burden to the free exercise of religion.”).⁵⁶

In addition, there is no question that the Township’s zoning ordinance imposes a particular burden on Orthodox Jews. As the First Circuit Court of Appeals has pointed out:

proximity to their houses of worship is for some groups a significant component of their religious practice. Orthodox Jews, for example, believe they are prohibited by the Torah, the Jewish Bible, from using automobiles on their Sabbath. They therefore must live within walking distance of a synagogue.”⁵⁷

The Township’s zoning ordinance has the practical effect of not allowing Orthodox Jews to live in the same neighborhood as their Synagogue. For all practical purposes, then, the Township prohibits Orthodox Jews from living in residentially zoned areas.

Although the courts recognize that it is sometimes difficult to navigate a safe path between the “Scylla of what the Free Exercise Clause demands and the Charybdis of what the Establishment Clause forbids,”⁵⁸ this is not that difficult

⁵⁶ 8 F.3d 484, 492 (7th Cir. 1993)

⁵⁷ 212 F.3d at 10.

⁵⁸ Texas Monthly, Inc. v. Bullock, 489 U.S. 1, 42 (1989) (Scalia, J., dissenting) (quoting Thomas v. Review Bd. of Ind. Employment Security Div., 450 U.S. 707,

case. This case is “just one of a long line of cases in which . . . ‘the government may (and sometimes must) accommodate religious practices and . . . it may do so without violating the Establishment Clause.’”⁵⁹

Although the Religion Clauses require government neutrality regarding religion, they “do not require the government to be oblivious to impositions that legitimate exercises of state power may place on religious belief and practice.”⁶⁰ Rather, there is “ample room under the Establishment Clause for benevolent neutrality which will permit religious exercise to exist without sponsorship and without interference.”⁶¹ Indeed, “government may (and sometimes must) accommodate religious practices and . . . may do so without violating the

721 (1981) (Rehnquist, J., dissenting)).

⁵⁹ Id. at 38 (Scalia, J., dissenting) (quoting Hobbie v. Unemployment Appeals Comm’n of Fla., 480 U.S. 136, 144-45 (1987)).

⁶⁰ Corporation of Presiding Bishop of Church of Jesus Christ of Latter-day Saints v. Amos, 483 U.S. 327, 334 (1987)

⁶¹ Walz v. Tax Comm’n, 397 U.S. 664, 673 (1970).

Establishment Clause."⁶² Requiring the Township to permit the Congregation to apply for a special exemption is just such a permissible accommodation.

⁶² Hobbie v. Unemployment Appeals Comm'n of Fla., 480 U.S. 136, 144-45 (1987). See also Laurence H. Tribe, AMERICAN CONSTITUTIONAL LAW § 14-14 at 1276 (2d ed. 1988) ("The first amendment does not require – indeed, it does not permit – government to be totally oblivious to religion. Government may sometimes accommodate religion; in some circumstances, it must do so. Thus the question is not whether government and religion will interact, but how.")

CONCLUSION

For all of the reasons set forth above, *Amicus Curiae* American Jewish Congress respectfully supports Plaintiffs/Appellees Congregation Kol Ami and Rabbi Elliot Holin in their request that this Court affirm the July 11, 2001, and July 20, 2001 Orders.

Respectfully submitted,

Of Counsel:

MARC D. STERN
AMERICAN JEWISH CONGRESS
15 EAST 84TH STREET
NEW YORK, N. Y. 10028

RONALD A. KRAUSS
CAMPBELL CAMPBELL EDWARDS & CONROY
1265 DRUMMERS LANE, SUITE 200
WAYNE, PA 19087
610-964-6397
Attorneys for *Amicus Curiae*
The American Jewish Congress

Dated: April 26, 2002

CERTIFICATE OF BAR MEMBERSHIP

The undersigned certify that they are members in good standing of the bar of this Court, and that they make this certification under penalty of perjury, pursuant to 28 U.S.C. § 1746.

RONALD A. KRAUSS

MARC D. STERN

Dated: April 26, 2002

CERTIFICATE OF COMPLIANCE UNDER FED.R. APP. P. 32

I hereby certify that the foregoing Brief of Amicus Curiae complies with the requirements of Fed.R. App. P. 32(a)(7)(B) and contains 3993 words according to the word count of the word processing system used to prepare the brief.

RONALD A. KRAUSS
Attorney for *Amicus Curiae*
The American Jewish Congress

CERTIFICATE OF SERVICE

I, Ronald A. Krauss, Esquire, certify that two true and correct copies of the attached Brief of *Amicus Curiae*, The American Jewish Congress, were caused to be served on the following counsel of record by first-class mail, postage prepaid, on April 26, 2002:

JONATHAN AUERBACH, ESQUIRE
BERGER & MONTAGUE, P.C.
1622 Locust Street
Philadelphia, PA 19103
(215) 875-3000

ANTHONY R. PICARELLO, ESQUIRE
THE BECKET FUND FOR RELIGIOUS LIBERTY
1350 Connecticut Ave. NW, Suite 605
Washington, D.C. 20036
(202) 955-0095

*Counsel for Appellees,
Congregation Kol Ami and Rabbi Elliot Holin*

HARRY G. MAHONEY, ESQUIRE
DEASEY MAHONEY & BENDER, LTD.
1800 John F. Kennedy Blvd.,
Suite 1300
Philadelphia, PA 19103-2978
(215) 587-9400

MARCI A. HAMILTON, ESQUIRE
36 Timber Knoll Drive
Washington Crossing, PA 18977
(215) 493-1973

*Counsel for Appellants,
Abington Township, Board of Commissioners of Abington
Township, The Zoning Hearing Board of Abington
Township and Lawrence T. Matteo, Jr., in his official
capacity of as Director of Code Enforcement of Abington
Township*

Ronald A. Krauss

Dated: April 26, 2002