

No. 01-3301

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

TENAFLY ERUV ASSOCIATION, INC.,
CHAIM BOOK, YOSIFA BOOK, STEPHANIE
DARDICK GOTTLIEB and STEPHEN BRENNER,

Plaintiffs-Appellants,

v.

THE BOROUGH OF TENAFLY, ANN
MOSCOVITZ, individually and in her official
capacity as Mayor of Borough of Tenafly,
CHARLES LIPSON, MARTHA B. KERGE,
RICHARD WILSON, ARTHUR PECK, JOHN T.
SULLIVAN, each individually and in their official
capacities as Council Members of the Borough of
Tenafly,

Defendants-Appellees.

On Appeal from the United States District Court
for the District of New Jersey

BRIEF OF AMICUS CURIAE

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IN SUPPORT OF PLAINTIFFS-APPELLANTS

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INTEREST OF THE AMICUS CURIAE

Agudath Israel of America, founded in 1922, is a national grassroots Orthodox Jewish organization, with constituents and affiliated chapters all across the United States. We have a long history of presenting amicus curiae briefs in cases affecting religious liberty in general, and the rights of Orthodox Jews in particular. The decision of this Court will likely have a direct and substantial impact on our constituents, in Tenafly and beyond, and we respectfully offer our perspective as a deeply concerned friend of the court.

At stake in this case is not merely the narrow question of whether Tenafly is free to refuse a community group's request for permission to construct an *eruv* – important as that issue itself surely is – but also whether a municipality is free to exercise its decision-making authority in a manner designed to discourage Orthodox Jews from living in the municipality. Such anti-Orthodox design was clearly present in this case, as elaborated in Point I of our argument below. But it has also clearly been present in many other suburban settings across the United States, as entrenched, fearful communities seek to create or implement local laws as a means of keeping Orthodox Jews from moving into their neighborhoods.

The phenomenon was described three years ago by Bruce Shoulson, a prominent New Jersey attorney, in testimony before the House Judiciary Committee's Subcommittee on the Constitution:

“I have presented some three dozen or more applications [for zoning variances] on behalf of religious institutions, particularly Orthodox Jewish congregations . . . in certain North Jersey communities[,]where the difficulty in obtaining approvals for new synagogues . . . has discouraged people desirous of moving from New York City to a more suburban environment. . .

“I close with three examples from my personal experience which I believe illustrate what we are often dealing with. One, during a hearing on an application for an Orthodox Jewish institution, an objector stood and turned to the people in the audience wearing skull caps and said, ‘Hitler should have killed more of you.’ Two, one community, in an effort to head off a zoning battle over the conversion to an ultra-Orthodox synagogue . . . which had previously been used by a house of worship, instituted eminent domain proceedings with respect to the subject property on the suddenly conveniently discovered grounds that that specific property was needed for a new municipal complex. Ten years after the Orthodox group sold rather than engage in protracted litigation over the condemnation, there was still no new municipal complex located on the site. Three, a governing body in a small New Jersey town, considering an approval which would have had the potential of leading to the growth of its Orthodox Jewish population, made it known that it was interested in testimony as to the effect on other communities of substantial Orthodox Jewish populations.” *Religious Liberty Protection Act of 1998: Hearings on H.R. 4019 Before the Subcomm. on the Constitution of the House Comm. on the Judiciary*, 105th Cong., 2nd Sess., at 360-363 (1998).

The problems and attitudes encountered by Mr. Shoulson are by no means limited to New Jersey. Following are several examples that illustrate this disturbing national trend:

- The Village of Airmont, New York was incorporated in 1991, and shortly thereafter promulgated zoning ordinances that prohibited houses of worship in private homes – a step taken with the clear purpose of making it difficult for Orthodox Jews to reside in the community. “The only reason

we formed this village,” stated one of the defendants in *LeBlanc-Sternberg v. Fletcher*, 67 F.3d 412 (2nd Cir. 1995), “is to keep those Jews from Williamsburg [an Orthodox community in Brooklyn, New York] out of here.” The Second Circuit concluded in its ruling that the evidence “supported a finding that the impetus [behind the formation of the Village] was . . . animosity toward Orthodox Jews as a group.” 67 F.3d at 431.

- In Beachwood, Ohio, the Planning and Zoning Commission voted in 1997 to prevent the town’s Orthodox residents from constructing several religious buildings. One of the opponents of the construction explained: “When the Orthodox began moving onto Taylor Road, the non-Orthodox felt they were being pushed out . . . You didn’t want Beachwood to be a ghetto.” Freedman, *The Jewish Tipping*, New York Times Magazine, August 13, 2000. As one reporter summarized the dispute: “At the crux of the animosity was resistance by longtime secular residents to a perceived onslaught of Orthodox families about to move in and take over their upscale neighborhood – reconfiguring houses for their large families, destroying quality public schools and introducing a brand of Judaism they had little affinity for.” Hirsch, *Love Thy Neighbor*, Baltimore Jewish Times, February 12, 2001.

- In Hancock Park, California, zoning officials denied an effort by Orthodox Jews, including elderly and handicapped individuals unable to walk to the closest synagogue, to meet to pray in a private home on the Sabbath. ““Our right to pray in our neighborhood has been, at best, ignored, or probably more accurately, trampled upon,’ [the local rabbi] said, adding that he believes the primary reason the residents’ group is opposing the shul so strongly is their concern that it will attract more Orthodox Jews to the neighborhood.” Feldman, *Fighting Exclusion*, The Jewish Journal of Greater Los Angeles, April 13, 2001.

- In New Rochelle, New York, an attempt by the Young Israel synagogue to seek a zoning variance to expand encountered municipal opposition that was widely seen as an effort to keep the local Orthodox community from growing: ““There are a lot of sentiments against Orthodox Jews that lie just below the surface,’ said Rabbi Reuven Fink.” *G-d, Caesar and Zoning*, New York Times, August 27, 2000.

- “First they come here with a yeshiva, then they follow with a shul, and then the migration starts.” Wendy Jupiter, resident of the Village of Hewlett Bay Park, New York, explaining her opposition to the purchase of a local private school building by the (Orthodox) Hebrew Academy of Long

Beach. *Village May Buy Property Where Yeshiva is Planned*, New York Times, July 1, 1992.

- “The motivation of some people is that they do not want the ultra-orthodox or the Hasidim to move in.” Town Supervisor Herbert Reisman of Ramapo, New York. *Orthodox Jews Battle Neighbors in a Zoning War*, New York Times, June 3, 1991.

As an organization that receives complaints from Orthodox Jews whose attempts to move into suburban communities and establish synagogues and other communal institutions – including an *eruv* – are all-too-often rebuffed by local officials acting under color of law, we can confirm the observation that “similar confrontations are occurring across the country as the Orthodox climb the economic ladder and settle in affluent suburbs.” Hirsch, *Love Thy Neighbor*, Baltimore Jewish Times, February 12, 2001. Indeed, the antagonism sometimes encountered by Orthodox Jews as the Orthodox community grows and young families seek to move to the suburbs prompted (Orthodox) Professor Aaron Twerski of Brooklyn Law School to observe that “we are the new ‘niggers’.” Zwiebel, *Foiling the Master Plan*, Jewish Observer, November 1995.

Agudath Israel of America supports and embraces the legal arguments advanced by plaintiffs and the other amici groups seeking reversal of the decision

below. The main purpose of this independent amicus presentation is to give the Court a sense of the extremely troubling broader national pattern of which this case is a part. The Court now has the opportunity to confront the reality of suburban anti-Orthodox paranoia head-on, and to deliver the unambiguous message that religious groups, no less than racial groups, are entitled to the protection of the law when communities seek to exclude them.

The parties to this case, through their respective counsel, have consented to the filing of this brief.

ARGUMENT

I.

THE ERUV WAS REJECTED BECAUSE OF ANTI-ORTHODOX PARANOIA AND PREJUDICE THAT JUSTIFY A FINDING OF INTENTIONAL DISCRIMINATION

In those communities where there has been opposition to the creation of an *eruv*, or to the building or expansion of Orthodox synagogues, the opposition is often couched in soothing terms that emit no stench of religious bigotry.

Sometimes, though, the mask drops, and it becomes clear that all of the high-minded rhetoric about such matters as the sanctity of the Establishment Clause and the need to avoid strife and preserve unity in the community is grounded in an irrational but palpable fear of an influx of Orthodox Jews into the community.

Tenafly is a paradigm example. As the record makes clear, both proponents and opponents of the *eruv* understood that the existence of an *eruv* would attract Orthodox Jews to Tenafly, whereas the lack of an *eruv* would prevent many families from even considering relocating into the Borough. And, as the record further makes clear, it was precisely the fear that Orthodox Jews would find Tenafly an attractive community in which to reside that led to the rejection of the *eruv*.

The court below, convinced though it was “that the Borough council did not act out of some deep-seated anti-Semitism or hatred for religion in general,”

nonetheless acknowledged that “the Borough Council also weighed some improvident and constitutionally impermissible factors when making their ultimate decision.” 155 F. Supp. 2d at 191. This states the situation rather mildly. As plaintiffs’ briefs amply demonstrate, the record is replete with statements – both by Borough residents and government officials – that evince a strong sense of animosity toward Orthodox Jews.

Bigots of all stripes thrive on the use of ugly stereotypes that attempt to impute to an entire community the purported misdeeds of some of its individual members. Demonization through stereotyping plays a major role here as well. Most notable in this regard are the comments offered by one of the members of the Council at the Borough Council Work Session of July 8, 1999 – the first public forum in Tenafly to consider the issue of the *eruv*:

“I’m serious. We can’t be flippant. This is a very serious concern...[a]nd it’s a concern that I have... that’s expressed from, by a lot of people about a change in the community. And it’s true, it does become a change in the community. It’s become a change in every community where an ultra-orthodox group has come in. They’ve willed the change. They’ve willed a change in the state of Israel. They’ve willed it so much so that they’ve stoned cars that drive down the streets on the Sabbath. Ultra-Orthodox.” 155 F.Supp. 3d at 153-54.

(The court below, 155 F. Supp. 2d at 153 n.8, expressed its belief that it was Councilman Charles Lipson who offered these soothing words. If so, one gains special insight into the subsequent sworn affidavit submitted by this champion of inter-group harmony, in which he explained that “the main reason I voted against allowing an *eruv* to be established on public property is that I believe it will be disruptive. I am very upset at the comments made by orthodox Jews against those of us who do not agree with them. I think the tone of the attack on Tenafly in the papers filed by the TEAI shows that I am right in thinking that an *eruv* leads to anger and strife within a town.” 155 F.Supp. 2d at 184.)

Mayor Ann Moscovitz, too, courageous though she surely was in “refus[ing] to succumb to pressure to accommodate her fellow Jews on the basis of religion alone,” 155 F. Supp. 2d at 168, apparently trotted out the same image of stone-throwing, street-blocking, Sabbath-avenging Orthodox Jews in explaining to a rabbi from neighboring Englewood and the director of the Jewish Community Relations Council why she was concerned about an *eruv* in Tenafly. 155 F. Supp. 2d at 156.

With the Visigoths thus poised to storm the barricades, the *eruv* – an unobtrusive, “virtually invisible boundary line indistinguishable from the utility poles and telephone wires in the area,” *Smith v. County Board No. 14*, 128 Misc. 2d 944, 948 (Queens Co. 1984), whose sole impact is to allow Orthodox Jews to

carry on the Sabbath – assumed ominous proportions in the eyes of the Councilmembers and many Tenafly residents. The true character of what had first appeared to Mayor Moscovitz as “an innocuous thing,” 155 F. Supp. 2d at 150, soon became apparent as the Orthodox threat was exposed. Permitting the *eruv* would destroy Tenafly’s public school system, close its shopping malls on Saturdays, put the butchers at Grand Union out of business, lead to the establishment of many small synagogues and stores that cater to Orthodox Jews, turn all of the *eruv*-enclosed area into a private Orthodox ghetto, give non-Orthodox Jews an inferiority complex and impose Orthodox Judaism on all of Tenafly’s residents.

We recognize, of course, that anti-Orthodox paranoia may not have been the sole basis for opposition to the *eruv*. But it surely played a major role. Accordingly, this must be treated as a case of intentional religious discrimination. As the Supreme Court has stated in a different legal (but similar sociological) context, its holding in *Washington v. Davis* 426 U.S. 229 (1976), that the equal protection clause is violated only by a showing of intentional discrimination, “does not require a plaintiff to prove that the challenged action rested solely on racially discriminatory purposes. Rarely can it be said that a legislature or administrative body operating under a broad mandate made a decision motivated solely by a single concern, or even that a particular purpose was the ‘dominant’ or ‘primary’

one.” *Village of Arlington Heights v. Metropolitan Development Housing Corp.*, 429 U.S. 252, 265 (1977).

We also recognize that some of the most egregious expressions of anti-Orthodoxy came from residents of Tenafly, not the Councilmembers themselves. But it is also true, as it was in *United States v. Yonkers Board of Education*, 837 F. 2d 1181 (2d Cir. 1987), that “[t]he record amply supports the finding that many City officials were leaders, not mere puppets, of their constituencies.” 837 F. 2d at 1223. Moreover, “[e]ven assuming, contrary to the findings and record in the present case, that the actions of the municipal officials are only responsive rather than leading the fight against desegregation, we conclude that the Equal Protection Clause does not permit such actions where racial animus is a significant factor in the community position to which the city is responding.” 837 F. 2d at 1224.

A determination that Tenafly’s refusal to permit an *eruv* was the product of intentional discrimination enhances plaintiffs’ free exercise claims immeasurably. As more fully developed in plaintiffs’ briefs, *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993), demonstrates that where government makes a decision or takes an action that is designed to inhibit religion, the full protection of the free exercise clause obtains. And, as this Court held in *Brown v. Borough of Mahaffey*, 35 F. 3d 846 (3d Cir. 1994), where there is intentional discrimination against religion, there is no need to demonstrate the “substantiality”

of the free exercise burden imposed by the governmental action; “[b]ecause government actions intentionally discriminating against religious exercise *a fortiori* serve no legitimate purpose, no balancing test is necessary to cabin religious exercise in deference to such actions.” 35 F. 3d at 850.

Stated simply, Tenafly acted as it did because of its concern about the potential influx of Orthodox Jews. That concern amounts to intentional religious discrimination which *a fortiori*, as in *Brown*, serves no legitimate purpose.

II.

THE DISTRICT COURT ERRED IN HOLDING THAT PLAINTIFFS' CLAIMS LACK MERIT UNDER THE FAIR HOUSING ACT

The Fair Housing Act (“FHA”), 42 U.S.C. §3600 et seq., makes it unlawful to “refuse to sell or rent . . . or otherwise make unavailable or deny, a dwelling to any person because of race, color, religion, sex, familial status, or national origin.” 42 U.S.C. §3604 (a). In *LeBlanc-Sternberg v. Fletcher*, 67 F.3d 412 (2nd Cir. 1995), the Second Circuit applied this section of the FHA to a zoning ordinance that prohibited the use of homes as synagogues. The Second Circuit held that this was a violation of the FHA, in that it had the effect of “otherwise mak[ing] unavailable” housing in the Village of Airmont, New York.

The court below rejected plaintiffs’ argument that *LeBlanc-Sternberg* supported their contention that Orthodox Jews have standing to bring an FHA claim when a discriminatory municipal decision has a chilling effect on their desire to move into a community. The court below was wrong: *LeBlanc-Sternberg* is directly on point.

In *LeBlanc-Sternberg v. Fletcher*, as in *Tenaflly*, the defendants sought to prevent an influx of Orthodox Jews into their community. By restricting the ability of clergy to use their homes as synagogues, the Village of Airmont sought to prevent Orthodox Jews – who are religiously prohibited from driving on the

Sabbath and who therefore need to live within walking distance from their houses of worship – from purchasing homes in the Village. The court below interpreted the finding in *LeBlanc-Sternberg* to be based on the *direct* denial of housing, “since Plaintiffs could no longer construct the homes they desired (i.e. those with synagogues).” Based on this understanding of *LeBlanc-Sternberg*, the court below distinguished *Tenaflly* because here, “the absence of an *eruv* merely impacts on the *desirability* of housing in Tenaflly [emphasis in original].” Even though the court below recognized that the absence of an *eruv* would adversely affect Orthodox Jews, it concluded that this does not make housing in Tenaflly “less available or more difficult to obtain” and thus ruled that no FHA claim can proceed. 155 F. Supp. 2d at 188-89.

But the issue in *LeBlanc-Sternberg* was not the *direct* denial of housing but a policy of Airmont that had the *effect* of making housing in Airmont less desirable to Orthodox Jews. The FHA was applicable not solely because clergy could not operate synagogues out of their homes (as the court below suggests), but because the absence of such home synagogues would curtail the ability of Orthodox Jews to worship with a congregation. This, in turn, would have the effect of making housing in Airmont less desirable to all Orthodox Jews.

In other words, the findings in *LeBlanc-Sternberg* are directly applicable to Tenaflly. The court below states that:

“even if the Tenafly *eruv* were dismantled tomorrow, *eruv*-observant Jews who presently live outside of Tenafly would be just as free to purchase homes in Tenafly as *eruv* observant Jews were to purchase homes in Tenafly prior to the *eruv*’s construction. While those *eruv*-observant Jews would admittedly be less inclined to move to Tenafly without an *eruv*, they would still be just as free to move to Tenafly if they wished.” 155 F. Supp. 2d at 189.

Yet there was similarly, as in this case, no allegation in *LeBlanc-Sternberg* that Orthodox Jews were not permitted to buy property or to live in Airmont.

Rather, as that decision states:

“The evidence showed that Orthodox Jews need to be able to worship in a group large enough to guarantee a minyan [quorum of 10 men] but close enough to home to allow them to walk to services on their Sabbath and holy days. That need appears to be unique to Orthodox and Hasidic Jews, as only these groups had applied to conduct services in their clergy’s homes . . . [T]he Village adopted a zoning code that was intended to, and would be interpreted to, curtail home synagogues, thereby deterring Orthodox Jews from purchasing homes in many Airmont neighborhoods . . .” 67 F. 3d at 429.

The Village of Airmont’s zoning regulations made it more difficult for Orthodox Jews to comply with their religious obligation of communal worship in close proximity to their homes, and therefore had the *effect* of excluding Orthodox Jews from the Village. On these grounds, the Second Circuit held that the District Court in *LeBlanc-Sternberg* erred in setting aside the jury’s verdict against the Village, because “the evidence was sufficient to establish that Airmont violated the private plaintiff’s rights under the Fair Housing Act.” 67 F.3d at 424.

The decision of the Borough Council of Tenafly to dismantle the *eruv* is thus, contrary to the assertion of the court below, virtually identical in its effect on housing for Orthodox Jews in the community as the discriminatory zoning ordinances enacted by the Village of Airmont. An Orthodox Jewish family *could* theoretically live in a community in which they would have to walk several miles on the Sabbath to communal religious services, but *LeBlanc-Sternberg* held that a community that did not allow synagogues in closer proximity could be held in violation of the FHA. Similarly, although an Orthodox Jewish family *could* theoretically live in a suburban community without an *eruv* in which the young children and their parents or other caretakers would not be able to attend communal religious services, a municipality's effort to making its housing less attractive to Orthodox families by refusing an *eruv* could also rise to the level of an FHA violation.

The law is clear that a plaintiff can establish illegal discrimination under the FHA by proving either disparate treatment or disparate impact. See, e.g., *United States v. Incorporated Village of Island Park*, 888 F. Supp. 419, 445 (E.D.N.Y. 1995); *Huntington Branch NAACP v. Town of Huntington*, 844 F.2d 926, 934 (2d Cir. 1988), *aff'd*, 488 U.S. 15 (1988). This court has held that proof of discriminatory *effect* alone would satisfy the *prima facie* burden for disparate impact claims under the FHA. *Resident Advisory Bd. v. Rizzo*, 564 F.2d 126, 148

(3rd Cir. 1977). The plaintiff's allegations are thus clearly sufficient to state a claim for relief under the FHA, especially given that the Supreme Court has called for a "generous construction" of the Act in light of its important purposes.

Trafficante v. Metropolitan Life Ins. Co., 409 U.S. 205, 211-212 (1972).

Here, though, as elaborated in Point I above, the actions taken by Tenaflly constitute intentional discrimination. That has FHA implications as well; as the Second Circuit in *LeBlanc-Sternberg* noted, "[i]f the motive is discriminatory, it is of no moment [under the FHA] that the complained-of conduct would be permissible if taken for nondiscriminatory reasons." 67 F. 3d at 425. Accordingly, even if Tenaflly's refusal to permit the *eruv* could be excused under the FHA had Tenaflly acted with non-discriminatory intent, the fact that discrimination was at the core of Tenaflly's action creates a basis for FHA liability.

CONCLUSION

For the reasons set forth in plaintiffs' briefs, as well as those articulated in this amicus curiae brief, the District Court's decision denying plaintiffs' request for a preliminary injunction should be reversed.

Dated: November 7, 2001
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Respectfully submitted,

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Pursuant to Fed. R. App. P. 32 (a)(7)(C), I hereby certify that this brief complies with the type-volume limitation of Fed. R. App. P. 29(d), as the word processing system has determined the word count total to be 3,806.

Dated: November 7, 2001
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MORDECHAI BISER

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