IN THE SUPREME COURT OF THE UNITED STATES

SITTING IN DAVIS

HOLY FUNDAMENTALIST CHURCH,
Petitioner

v.

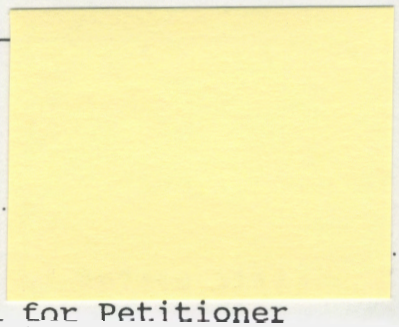
CITY OF DANBURG,
Respondent

Supreme Court No. WW92-2670701

On Appeal from the Fifteenth Circuit Court of Appeals

Lewis Hall

Brief for Petitioner



Counsel for Petitioner

Question Presented

I. Did the Appellate Court err in Holding that the City of Danburg did not violate the Establishment Clause by allowing the Jewish Community Center to Display a menorah on public property?

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IN THE SUPREME COURT OF THE UNITED STATES

SITTING IN DAVIS

Supreme Court No. WW92-260701

Holy Fundamentalist Church,
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On Appeal from the Fifteenth Circuit Court of Appeals - Davis

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BRIEF FOR THE PETITIONER

067-60-5189

Statement of the Case

The Holy Fundamentalist Church (Petitioner) filed suit in United States District Court for the District of Davis to obtain an injunction against the City of Danburg (Respondent). Holy Fundamentalist Church v. City of Danburg, 1 F.Supp.2d 1 (D. Danburg 1992). Petitioner sought to enjoin the issuance of a permit to the Jewish Community Center (JCC) that would have allowed the Center to erect a twenty-two foot menorah in Danburg's City Park.

Every year since 1987, JCC has celebrated Chanukah by displaying a twenty-two foot menorah beside the public library in City Park, directly across the street from the Holy Fundamentalist Church. The menorah is unattended, and is not surrounded by any other displays that might diminish its religious message. Id. Some concerned citizens had complained to the city about the display prior the filing of this suit by Petitioner. Id.

City Park, one of two public parks in Danburg, adjoins two government buildings on its northern side--the Post Office and the Department of Motor Vehicles--and two government buildings on its southern side--the public library and the Board of Education Building. The Park is recognized as a public forum, having been used by a number of organizations on a variety of different occasions ranging from a pro-choice rally to a Fourth of July concert.

Danburg City Ordinance § 4786-1 provides guidelines for the

use of Danburg's public parks:

> Upon a duly submitted application, the City Commissioner may issue to any person, organization, association, club, society or other group of any type, a permit to use and occupy any portion of Court Park or City Park, for the purpose of making or presenting any program, public address, exhibit or display, or for any other organized or semi-organized purpose whatever.

City Ordinance § 4780-4 requires that a "duly submitted application" must include a $25 permit fee to cover the cost of water, electricity, and cleanup.

JCC obtained such a permit in 1987, allowing display of the menorah for eight days (plus two additional days for construction and removal time). JCC has sought and been granted renewal of this permit every year since 1987. During the eight days of Chanukah, JCC's menorah stands unattended, as the only holiday display in City Park.

During the first display of the menorah in 1987, several concerned citizens complained that the menorah's presence beside a city building seemed to indicate a preference by the City for Judaism over their own faiths. In response, the City requested that JCC place a sign on the menorah, explaining that JCC was responsible for its construction and maintenance. Every year since 1987 JCC has placed a two foot by one foot sign to the left of the menorah, stating "In Celebration of Chanukah, the Danburg Jewish Community Center Has Placed this Menorah for the Enjoyment of All."

Petitioner brought suit for an injunction under 42 U.S.C. § 1983, claiming that display of the menorah on public property

violates the Establishment Clause of the First Amendment. The District Court for the District of Davis granted the injunction, holding that the display did, indeed, violate the Establishment Clause. Id. at 7. The Fifteenth Circuit Court of Appeals reversed the District Court, concluding that the City did not violate the Establishment Clause by issuing a permit to JCC. City of Danburg v. Holy Fundamentalist Church, 1 F.3d 1, 10 (15th Cir. 1992).

Summary of the Argument

Maintenance of the display of the menorah in City Park violates the Establishment Clause of the First Amendment. Applying the test first enumerated by the Supreme Court in Lemon v. Kurtzman, 403 U.S. 602, 612-13 (1971), and developed in a number of Establishment Clause cases since then, see, County of Allegheny v. Greater Pittsburgh A.C.L.U., 492 U.S. 573 (1989); Lynch v. Donnelly, 465 U.S. 668 (1984), it must be concluded that display of a large, unattended menorah on public property, absent surrounding displays that might diminish its religious impact, constitutes an impermissible endorsement of religion by the state, and hence, violates the Establishment Clause of the First Amendment.

Respondent has argued, and the Court of Appeals has concluded, that refusal to grant a permit to JCC allowing display of the menorah in City Park constitutes a content-based exclusion

of protected "speech"[1] from a traditional public forum. Accordingly, the Court of Appeals held that the City must demonstrate that its regulation of JCC's display "is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end." Widmar v. Vincent, 454 U.S. 263, 270 (1981). The compelling state interest in the case at hand is Petitioner's interest in complying with the requirements of the Establishment Clause of the First Amendment. Id. at 271.

In addition, Petitioner has tailored its regulation as narrowly as possible, given the circumstances, and accordingly, has satisfied the appropriate standard of review. As a result, Petitioner's content-based exclusion of JCC's symbolic speech from a public forum is, in this particular instance, constitutionally permissible.

Argument

I. THE COURT OF APPEALS ERRED IN HOLDING THAT DISPLAY OF A MENORAH IN CITY PARK DID NOT VIOLATE THE ESTABLISHMENT CLAUSE.

A. Permitting display of the menorah in City Park constitutes an impermissible governmental endorsement of religion and hence, violates the Establishment Clause of the First Amendment.

The First Amendment to the United States Constitution states that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." U.S. CONST.

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[1] See Spence v. Washington, 418 U.S. 405, 410 (1974); West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 632 (1943).

amend. I. The Supreme Court has analyzed recent Establishment Clause cases in terms of a three-part test that was first enumerated in Lemon v. Kurtzman. In order to maintain the display of the menorah in the case at hand without offending the Establishment Clause, it must be established that: (1) it [maintenance of the menorah in City Park] has a secular purpose; (2) its principal or primary effect is not to advance or inhibit religion; and (3) it does not foster excessive governmental entanglement with religion. Lemon v. Kurtzman, 403 U.S. at 612-13. If any one of the three prongs is not satisfied, maintenance of the menorah must yield to the requirements of the Establishment Clause. Stone v. Graham, 449 U.S. 39, 40-41 (1980).

Both the District Court and the Appellate Court have concluded, to a greater or lesser extent, that the first prong of the Lemon test is satisfied in this instance. The District Court concluded that "the menorah arguably furthers the secular purpose of promoting seasonal community, peace and harmony." 1 F.Supp.2d at 3. Wouldn't such a sense of "seasonal community, peace and harmony" be more successfully fostered by a more inclusive holiday display? Indeed, the District Court's characterization of its assertion as "arguabl[e]", and its subsequent conclusion that the first prong of the Lemon test "**might** [then] be satisfied," Id. (emphasis added) betrays the weakness of the argument.

In asserting that "the city has a secular purpose in

treating the JCC and the menorah display the same as all other groups who apply for a permit," 1 F.3d at 6, the Court of Appeals offers little more than a truism in defense of the City's decision permitting display of the menorah. If the City does, in fact, have a secular purpose in permitting the display of the menorah, it seems yet to have effectively conveyed that purpose.

It is, of course, the second prong of the Lemon test over which most of the battles in Establishment Clause cases have been fought.[2] The effect prong has recently been augmented by Justice O'Connor's "endorsement test". Allegheny, 492 U.S. at 597. In Lynch v. Donnelly, 465 U.S. 669 (1984), Justice O'Connor first posited the "endorsement of religion" standard:

> What is crucial is that a government practice not have the effect of communicating a message of government endorsement or disapproval of religion. It is only practices having that effect, whether intentionally or unintentionally, that make religion relevant, in reality or public perception, to status in the political community.

Id. at 692.

In incorporating the endorsement test into the second prong of the Lemon test, the Court has held that "[t]he Establishment Clause, at the very least, prohibits government from appearing to take a position on questions of religious belief or from 'making adherence to a religion relevant in any way to a person's standing in the political community.'" Allegheny, 492 U.S. at 593-94 (quoting Lynch 465 U.S. at 687).

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[2] Neal R. Feigenson, "Political and Governmental Endorsement of Religion: An Alternative to Current Establishment Clause Doctrine," 40 DePaul L. Rev. 53, 57 (1990).

Applying this test to the facts at issue here, it is clear that Respondent, in sanctioning display of the menorah in City Park, "at the very least" appears to have taken a position regarding Chanukah. And, given the circumstances in which the menorah is displayed (i.e. standing alone on city property, surrounded only by city buildings) it seems reasonable to characterize that position as an "endorsement" of Judaism, and hence, to a greater or lesser extent, a "disapproval" of other faiths. Indeed, several concerned citizens have complained that the menorah's presence beside a city building seemed to indicate preference by the City for the Jewish religion over their own faiths. Discounting the perspective of those espousing a particular faith, display of a menorah on city property, from the perspective of someone without any religious beliefs, seems quite clearly to indicate endorsement of the concept of religion generally, and, hence, disapproval of those not espousing a particular faith, thus "mak[ing] religion relevant . . . to status in the community." Id. Display of the menorah in City Park thus violates the second prong of the Lemon test, and hence, cannot be maintained without violating the Establishment Clause.

B. Continued display of the menorah in City Park, absent any other displays that might act to diminish its religious impact, violates the Establishment Clause.

In Lynch v. Donnelly, 465 U.S. 668 (1984), the Court held that the City of Pawtucket, Rhode Island did not violate the Establishment Clause by including a city-owned creche, or

nativity scene, in a Christmas holiday display at a privately owned park in the heart of the city. 465 U.S. at 671. The display included "a Santa Claus house, reindeer pulling Santa's sleigh, candy-striped poles, a Christmas tree, carolers, cut-out figures representing such characters as a clown, an elephant, and a teddy bear, hundreds of colored lights, a large banner that read[] 'Seasons Greetings' and the creche at issue here." Id. A majority of the Court held that the display did not violate the Establishment Clause, concluding that inclusion of a single religious symbol (the creche) among the numerous and varied secular items in the display did not so taint the entire display as to violate the Constitution. Id. at 686.

In the case at hand, however, there is nothing to diminish the religious impact of the menorah on display in City Park. That the sign disclaiming city sponsorship of the display is dwarfed by the menorah (the sign measures one foot by two feet, the menorah stands twenty-two feet tall), so as to make it effectively invisible to those viewing it from a distance, only partially accounts for its failure to adequately diminish the religious effect of the display. The sign states "In Celebration of Chanukah, the Danburg Jewish Community Center Has Placed this Menorah for the Enjoyment of All." Enjoyment of the menorah "in celebration of Chanukah" necessarily implies some recognition and appreciation of the display's inherent religious message, and does little to assuage the impression that the city, simply by permitting the display, has approved the promotion of that

message.

The context of a religious holiday display was also dispositive of the "endorsement" issue in another recent Supreme Court case involving a menorah and a creche. County of Allegheny v. A.C.L.U. of Pittsburgh, 492 U.S. 573, involved two annual holiday displays in Pittsburgh. The first consisted of a creche display inside the courthouse, which was sponsored each year by a Roman Catholic church. The other involved an elaborate holiday display outside the city-county building. The second display featured a forty-five foot Christmas tree, fully decorated and lighted, and an eighteen-foot tall menorah to celebrate Chanukah. 492 U.S. at 580.

The creche, representing the New Testament account of the birth of Jesus, was not surrounded by any other holiday display, and bore a plaque stating: "This display donated by the Holy Name Society." Id. A majority of the Court concluded that the creche display inside the courthouse violated the Establishment Clause, noting that "unlike in Lynch, nothing in the context of the display detracts from the creche's religious message." Id. at 598.

The Court also concluded that:

> [t]he fact that the creche bears a sign disclosing its ownership by a Roman Catholic organization does not alter this conclusion. On the contrary, the sign simply demonstrates that the government is endorsing the religious message of that organization, rather than communicating a message of its own. But the Establishment Clause . . . also prohibits the government's support and promotion of religious communication by religious organizations. See e.g. Texas Monthly, Inc. v. Bullock, 489 U.S. 1 (1989) . . .

> Thus, by prohibiting government endorsement of religion, the Establishment Clause prohibits precisely what occurred here: the government's lending its support to the communication of a religious organization's religious message.

492 U.S. at 600-601.

The sign on the display ruled unconstitutional in Allegheny (citing the sponsor of the display) is, effectively, identical to the sign in the case at hand (noting that the menorah has been "placed by the Jewish Community Center"). The Court's decision regarding the creche in Allegheny placed great weight on the fact that the sign in that instance "demonstrate[d] that the government [was] endorsing the religious message of that organization." Id. It seems reasonable, and indeed necessary, to conclude that the sign in the case at issue here, so similar to the one in Allegheny, also indicates such an "endorsement" by the City, and hence, that it must be held to violate the Establishment Clause.

With regard to the display of the menorah in Allegheny, the Court noted that it presented a "closer constitutional question." Id. at 613, but ultimately concluded that the display was permissible. That the menorah was only one part of a display that included a Christmas tree and a sign declaring the city's seasonal "salute to liberty" was dispositive for the Court. Id. Just as in Lynch, the Court recognized that government involvement in display of a religious symbol is permissible so long as the religious impact of the symbol is diminished by the surrounding secular display. In the case at hand, however, there

are no secular symbols to diminish the religious impact of the menorah, or its sign encouraging the appreciation and celebration of Chanukah. Accordingly, under the contextual analysis employed by the Court in Lynch and Allegheny, continued display of the menorah in City Park, absent any other displays that might act to diminish its religious impact, violates the Establishment Clause.

C. The McCreary case, cited by the Court of Appeals, is factually distinguishable from the case at bar, and hence, is not dispositive of the issues in this case.

The Court of Appeals cites McCreary v. Stone, 739 F.2d 716 (2d Cir. 1984), aff'd by an equally divided Court sub nom. Bd. of Trustees of Scarsdale v. McCreary, 471 U.S. 83 (1985), as "directly on point," 1 F.3d at 8, and, presumably, of substantial weight in the analysis of the case at hand. McCreary was decided in the wake of the Supreme Court's decision in Lynch, but before the Court's decision in Allegheny. In McCreary, the Second Circuit concluded that, as in Lynch, the Establishment Clause would not be offended by granting permission to a religious organization to display a creche in a public park during the Christmas holiday season. McCreary, 739 F.2d at 730.

Although the Fifteenth Circuit sought to use McCreary as a guide in deciding the case at bar (the Second Circuit's decision in McCreary was affirmed by the Supreme Court, albeit by an equally divided Court, and with no opinion as to the validity of the Second Circuit's reasoning), it is clearly distinguishable

from the case at issue here. Indeed, McCreary more closely resembles Lynch, and hence, militates against the conclusions of the Fifteenth Circuit. That is to say, the McCreary court noted that "the Christmas celebration in the Village is not significantly different than the Christmas celebration described in Lynch. In Scarsdale, the Village is decorated with many traditional symbols of Christmas. . . . and [is] the site of numerous Christmas decorations." Id. at 728. And while the McCreary court sought to downplay the significance of the context of the display in question, Id. the Supreme Court's decision in Allegheny quite clearly establishes the importance of context in deciding cases of this sort. Allegheny, 492 U.S. at 619. Accordingly, as McCreary involved display of a creche within the context of a larger, secular, holiday display, it is of little value in deciding the case at hand.

D. Complying with the requirements of the Establishment Clause constitutes a compelling state interest.

The Court of Appeals termed the controversy at issue here a governmental exclusion of an exercise of protected speech. 1 F.3d at 4-5. In so doing, it relied heavily upon two Supreme Court cases involving the use of public school and university facilities for meetings by religious groups: Bd. of Educ. of Westside Community Schools v. Mergens, 110 S.Ct. 2356 (1990); Widmar v. Vincent, 454 U.S. 263 (1981). Id. at 3-7. And while these cases do support the notion that content-based exclusion of

protected speech from a public forum may well be unconstitutional, they offer little to the analysis at hand because the facts and issues addressed in Mergens and Widmar differ significantly from the facts and issues that must be addressed here.

In Widmar, the Supreme Court held that a state university may not deny use of its facilities to a registered student group desiring to use them for religious worship and discussions. The Court found that university policy permitting use of facilities for other, nonreligious group meetings created a "generally open forum." Widmar, 454 U.S. at 267. The Court concluded that the use of a public forum for religious discussion is a form of speech and association that is protected by the First Amendment, and that denial of access to the public forum would require a showing that the denial served some compelling state interest. Id. at 269-70.

The Widmar Court agreed that the university's interest in preventing a violation of the Establishment Clause could rise to the level of a compelling state interest, but ultimately concluded that permitting the use of a university building for religious discussions by a religious group did not, in fact, violate the Establishment Clause. Concluding that the first and third prong of the Lemon test had been satisfied, the Court centered its analysis around the effect prong (i.e. the second prong) of the test. Two factors were held to be "especially relevant": (1) "[f]irst, an open forum in a public university

does not confer any imprimatur of State approval on religious sects or practices;" and (2) "the forum is available to a broad class of nonreligious as well as religious speakers." Id. at 274.

While Respondent may argue that the analysis employed in Widmar should be dispositive in the case at bar, the fundamental difference in the factual circumstances of the two cases precludes such a finding. Preeminent among these differences is the nature of the "speech" at issue. That is to say, in Widmar, the empty classrooms that remained after the religious meetings (and any attendant debate) had ended, contained no lingering symbols that might convey endorsement or sponsorship of religion by the university. Any religious impact of the meeting could clearly be attributed to the speakers, and not the university. That is clearly not the case here, where responsibility for the display in City Park of an unattended, solitary and semi-permanent menorah cannot be attributed to any speaker. Indeed, it seems quite reasonable that those unable to read the disclaimer sign (quite likely the vast majority of the those viewing the display) might well conclude that Danburg had, in fact, sponsored display of the menorah.

Bd. of Educ. of Westside Community Schools v. Mergens, 110 S.Ct. 2356 (1990) involved a public high school in Nebraska that made its facilities available to student religious organizations that met the definition of "noncurriculum related student groups" under the Equal Access Act, 20 U.S.C. §§ 4071-4074. The Court

held that the Act permits meetings of such groups on public school premises, concluding that Congress, by enacting the Equal Access Act, had extended the decision in Widmar to apply to public high schools. Id. at 2364.

As controlling precedent, however, Mergens suffers the same fate as Widmar. That is to say, its facts simply are not comparable to the facts at issue in the case at bar. The classrooms in the school in Nebraska were as devoid of religious symbolism after the meeting of the student religious group as were the classrooms in Widmar. The menorah remains alone, unadorned and unattended in City Park. Thus, two of the cases most heavily relied upon by the Court of Appeals in its decision cannot be deemed dispositive of the issues here.

E. Prohibiting display of the menorah in City Park is a remedy narrowly tailored to avoid violation of the Establishment Clause.

As the Supreme Court concluded in Widmar, in order to permit a content-based exclusion of protected speech from a public forum, it must be demonstrated that the exclusion "is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end." Widmar, 454 U.S. at 270. Having established that maintenance of the display of the menorah in the case at bar would violate the Establishment Clause, and hence, that the City has a compelling interest in avoiding such a violation, the analysis turns to the scope of the remedy.

It must first be recognized that excluding the display of the menorah from City Park merely reduces by one the number of possible sites at which JCC can erect its display. It is difficult to conceive of an alternate remedy that could be drawn more narrowly, while still achieving the City's goal of preventing a violation of the Establishment Clause.

Given the Court's decisions in Lynch and Allegheny, the religious impact of the menorah's display may well be sufficiently reduced by the creation of a more secular holiday display in City Park. The responsibility for creating such a display does not fall upon the City, however. Danburg's sole responsibility in this regard is limited to an evaluation of the applications for permits to use City Park.

F. Granting an absolute constitutional right to engage in expressive religious conduct in an open forum would so undermine the authority of the Establishment Clause as to render it moot.

The Appellate Court's decision in this matter seeks to preclude the City from refusing to allow display of the menorah on the grounds that such a refusal would impermissibly infringe the Freedom of Speech guaranteed by the First Amendment. 1 F.3d at 5. Such a decision would, however, effectively, "swallow up" the Establishment Clause, Kaplan v. City of Burlington, 891 F.2d 1024, 1029 (2d Cir. 1989), making it wholly irrelevant in cases involving exercise of religious expression in a public forum. And, indeed, the Supreme Court has recognized this possibility,

providing that "exclusion from a public forum based on the religious content of a group's intended speech," Widmar, 454 U.S. at 270, **can** be justified so long as the state can satisfy the appropriate standard of review. Id. at 269-70. Though the standard is justifiably strict, it has been met in the case at bar, and hence, maintenance of the display of the menorah must yield to requirements of the Establishment Clause.

G. The Lemon Test continues to be the standard by which Establishment Clause cases are to be judged.

The Court of Appeals seemed to suggest that the Lemon test will soon cease to be the proper means of analyzing cases of this sort, and that it should be replaced by a more narrow interpretation of the Establishment Clause. The new "coercion" test would hold that:

> even government "endorsement" of religion does not violate the Establishment Clause unless the government coerces citizens to participate in religious activity or "give[s] direct benefits to religion in such a degree that it in fact establishes a state religion, or religious faith, or tends to do so."

1 F.3d at 5 (quoting Bd. of Educ. of Westside Community Schools v. Mergens, 496 U.S. 226, 260-62 (1990) (Kennedy, J. joined by Scalia, J., concurring in part and concurring in the judgment).

Although application of such a "coercion" test may well permit the display of the menorah in City Park, that is not the issue in the case at bar. The Lemon test has long been the accepted means of analysis for Establishment Clause cases. Respect for this precedent, and for stare decisis, requires that it continue to be. Indeed, in the Court's most recent

Establishment Clause case, Lee v. Weisman, 112 S.Ct. 2649 (1992), Justice Kennedy explicitly refused to reevaluate the decision in Lemon. Id. at 2655.

Conclusion

For the reasons outlined above, Petitioner respectfully requests this Court to reverse the ruling of the Court of Appeals, and to find that the City of Danburg, by permitting display of JCC's menorah in City Park violated the Establishment Clause of the First Amendment, and that continued display of the menorah in City Park is unconstitutional.

Respectfully submitted,

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067-60-5189
Counsel for Petitioner