IN THE

SUPREME COURT OF THE UNITED STATES

SITTING IN DAVIS

NO. WW92-260701

Holy Fundamentalist Church,

Petitioner,

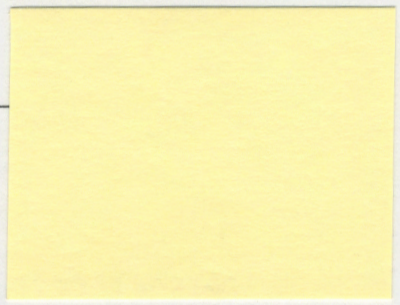
v.

City of Danburg,

Respondent.

ON APPEAL FROM THE FIFTEENTH CIRCUIT
COURT OF APPEALS- DAVIS

BRIEF FOR RESPONDENT



Counsel for Petitioner

QUESTION PRESENTED

I. Whether the Appellate Court Erred 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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STATEMENT OF THE CASE

Since 1987, Danburg City (the City) has granted a permit to the Danburg Jewish Community Center ("JCC") to place a twenty-two foot Menorah at City Park during the eight days of Chanukah each year. The permit is valid for approximately ten days in order to cover the eight-day display, plus construction and removal time. JCC is responsible for the erection and maintenance of the display. During the eight days of Chanukah, the menorah stands unattended, with no other displays near it. It is lighted by electricity twenty-four hours a day. The electricity bill is paid by the City, but it is conceded that the permit fee covers this bill. At the City's request, JCC includes a two foot by one foot sign to the left of the menorah, which states, "In Celebration of Chanukah, the Danburg Jewish Community Center Has Placed This Menorah For the Enjoyment of All."

Every year, the menorah is placed on the southern edge of City Park, directly beside the City Library. The menorah and the library face a heavily traveled street. The property of the Holy Fundamentalist Church, plaintiff, is located directly across the street.

City Park is a centrally located, ten acre plot of land. It is the only public park in Danburg other than Court Park, which is public land surrounded by the city's primary government buildings such as the courthouse, police station, and City-County Building. City Park adjoins two government buildings, the post office and the department of motor vehicles, on its northernmost

side, and the public library and the Board of Education Building on its southern side.

City Park is typically used for recreation. There is a pond, a playground, and several paths for bikers and walkers. There are also shelters which groups can use for picnics or parties. The city has treated the park as a traditional public forum, allowing many forms of speech and assemblage such as demonstrations, rallies, protests, displays, and exhibits by different organizations. Previous activities include: a concert by a group called "The Village People"; a "Dunk Your City-Councilman Contest" sponsored by the city to raise money for downtown renovations; and several "Teen Dances." A group of local citizens was permitted to tie yellow ribbons around trees in City Park in support of American troops fighting in the Persian Gulf War. Recently, an independent presidential candidate gave a speech in City Park to thank volunteers for their support.

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.

Under City ordinance § 4780-4, a "duly submitted application" includes a $25 permit fee, which is intended to cover any clean-up, water, and electricity expenses.

The Holy Fundamentalist Church brought suit for an injunction under 42 United States Code section 1983 due to what it perceived as unconstitutional behavior by the city. The Holy Fundamentalist Church claims that the menorah display on public property violates the Establishment Clause of the First Amendment. The District Court decided that the City had violated the Establishment Clause by issuing the permit, and granted an injunction. The City appealed and the Appellate Court reversed. This Court granted certiorari.

SUMMARY OF THE ARGUMENT

The Appellate Court was correct in holding that the City did not violate the Establishment Clause by allowing the JCC to display a menorah on public property. The three-pronged Lemon test is the proper test for determining whether a government practice is violative of the Establishment Clause. The Lemon test was satisfied because the permit which allowed the menorah to be erected (1) had a secular purpose, (2) did not have the primary or principle effect of advancing religion, and (3) did not foster excessive government entanglement with religion; thus City of Danburg did not violate the Establishment Clause.

The City of Danburg's permit policy does not fail the coercion test because the government has not coerced citizens to participate in religious activity, has not in fact established a state religion or religious faith, nor does it tend to do so.

The City of Danburg is required to issue the permit to JCC because City Park is a traditional public forum and the religious message of the menorah is protected by the First Amendment's freedom of speech guarantee. A content-based restriction of speech in a public forum such as City Park is not permissible unless it is based on a compelling interest and is narrowly tailored to achieve its ends. Even if the Establishment Clause is violated, the City of Danburg must issue the permit, but may provide content based restrictions on the display.

ARGUMENT

I. THE APPELLATE COURT CORRECTLY HELD THAT THE CITY DID NOT VIOLATE THE ESTABLISHMENT CLAUSE BY ALLOWING JCC TO DISPLAY A MENORAH ON PUBLIC PROPERTY.

The First Amendment, in pertinent part, states: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech. . . ." U.S. Const. Amend. I.[1]

The Supreme Court recently summarized the law relating to the Establishment Clause:

> [The] government may not promote or affiliate itself with any religious doctrine or organization, may not discriminate among persons on the basis of their religious beliefs and practices, may not delegate a governmental power to a religious institution, and may not involve itself too deeply in such an institution's affairs. County of Allegheny v. ACLU of Greater Pittsburg, 492 U.S. 573, 590-591 (1989) [FN3].

The Supreme Court continues to recognize the three-pronged Lemon test as determinative of whether or not a particular practice is violative of the Establishment Clause. Id. The City's issuance of a permit to the JCC satisfies the Lemon test and is not violative of the Establishment Clause, thus the display of the menorah must be allowed.

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[1] The Establishment Clause has long been held applicable to the States. See Wallace v. Jaffree, 472 U.S. 38, 42 n. 10, 48-55 (1985).

A. The Appellate Court Correctly Applied the Tripartite Lemon Test to Determine that the Issuance of the Permit to JCC by the City did not Violate the Establishment Clause.

In Lemon v. Kurtzman, 403 U.S. 602 (1971), this Court stated that in order to be constitutional, the challenged governmental action first must have a secular legislative purpose; second, its primary or principle effect must not be to advance or inhibit religion; and third, it must not foster excessive governmental entanglement with religion. Id. at 612-613.

1. The City or Danburg's permit policy has a secular purpose which satisfies the first prong of the Lemon Test.

The Appellate Court correctly recognized that the City's policy of treating the JCC the same as all other groups who apply for the permit serves a secular purpose. The existence of a broad class of people who enjoy the incidental benefits of government action is an important index of secular effect. See Mueller v. Allen, 463 U.S 388 (1983) (holding broad spectrum of groups which enjoyed incidental benefits of statute making tax deduction available to all parents, including those whose children attended private religious schools, were an important index of secular effect.) The City of Danburg has provided a forum which is neutrally available to a broad class of speakers. It is clear that the City issues permits to a broad range of organizations, groups, and persons, regardless of the message conveyed through their use of the Park. The variety of groups which have enjoyed the use of City park demonstrate a high degree of secular effect.

In Lynch v. Donnelly, 465 U.S. 668 (1984) the secular purpose prong of the Lemon test was satisfied by a public display of a creche in the context of the Christmas season. The Court found a secular purpose in the display sponsored by the city because it celebrated a holiday and depicted the historical origins of the holiday. Id. at 681. It is unnecessary to find a secular purpose in the Menorah display since the City is not the sponsor of the display. The city's policy of issuing permits to any group who applies satisfies the secular purpose prong. However, the menorah in this case does have the secular purpose of depicting the historical origins of the Jewish holiday. Chanukah is recognized as part of the public holiday season which occurs in December and includes the celebration of Christmas and the new year. "Celebration of public holidays, which have cultural significance even if they also have religious aspects, is a legitimate secular purpose." Id. at 691 (O'Connor, J., concurring).

2. The City of Danburg's permit policy satisfies the third prong of the Lemon test since there is no excessive government entanglement with religion.

The permit ordinance avoids entangling the government with religion because there is no decision to be made involving which groups may use the Park. The City does not exercise any authority to limit or define the use of City Park by groups which apply for permits. The City has no direct connection with the menorah display. The City has nothing to do with the contents, storing, or building of the display. The City pays the electric

bill for the park, but the permit fee paid by JCC covers the cost of electricity used to light the menorah. The display is put on exclusively by JCC. By allowing the display, the City neither favors nor disfavors religious speech, it merely indicates that religious groups will be treated no differently than other groups. Thus the City avoids entanglement with religion.

3. The second prong of the Lemon test is satisfied because the principle or primary effect of the issuance of the permit to JCC does not inhibit or advance religion.

The principle or primary effect of the City's issuance of a permit to the JCC does not inhibit or advance religion. The principle or primary effect prong of the Lemon test is satisfied if it can be determined that allowing the menorah display does not constitute an endorsement or disapproval of religion by the government in the eyes of the reasonable observer. Lynch, 465 U.S. at 691 (O'Connor, J. concurring) (refining primary effect prong of Lemon test by concentrating on governmental endorsement or disapproval of religion). The Court has made it clear that, when evaluating the effect of government conduct under the Establishment Clause, it must be ascertained whether "the challenged governmental action is sufficiently likely to be perceived by adherents of the controlling dominations as an endorsement, and by the nonadherents as disapproval, of their individual religious choices." Allegheny, 492 U.S. at 597 (Opinion of Blackmun, J.) (quoting School Dist. of Grand Rapids v. Ball, 473 U.S. 373, 390 (1985)).

The endorsement test must consider the context of the

particular challenged practice. "Every government practice must be judged in its unique circumstances to determine whether it constitutes an endorsement or disapproval or religion." Lynch, 465 U.S. at 694 (1984) (O'Connor, J., concurring). See also Allegheny, 492 U.S. at 625 (O'Connor, J., concurring in part and concurring in the judgment).

In Lynch, this Court held that the City of Pawtuckets's inclusion of a nativity scene in a seasonal holiday display did not violate the Establishment Clause. The nativity scene was not more beneficial to, nor more an endorsement of religion than practices found constitutional in other cases. Id. at 681. (citing Board of Educ. v. Allen, 392 U.S. 236 (1968) (holding that expenditures of large sums of money for textbooks supplied throughout country to students attending church-sponsored schools does not violate the Establishment Clause) and Everson v. Bd. of Educ., 330 U.S. 1 (1947) (holding expenditure of public funds for transportation of students to church sponsored schools does not violate Establishment Clause.))

Noting the religious and sectarian significance of the creche, Justice O'Connor found that "the overall holiday setting changes what viewers may fairly understand to be the purpose of the display- as a typical museum setting, though not neutralizing the religious content of religious paintings, negates any message of endorsement of that content." Lynch, 465 U.S. at 692 (O'Connor, J., concurring). The significance of the holiday season was correctly noted in McCreary v. Stone, 739 F.2d 716 (2d

Cir. 1984), aff'd by an equally divided court sub. nom. Board of Trustees of Village of Scarsdale v. McCreary, 471 U.S. 83 (1985) (upholding constitutionality of creche displayed during traditional holiday season).

Chanukah is the celebration of a Jewish holiday which occurs during the celebration of the traditional public Christmas holiday. During the month of December, all aspects of life are affected by the holiday season. It is a time of year recognized as the season of giving, a tradition which the celebration of Chanukah also recognizes during its eight day celebration. Because the menorah display is erected during this holiday season, it becomes part of the overall holiday setting which tempers the religious significance of the menorah display. If the City allowed the menorah to be erected permanently, or during a different season, the display might assume connotations of government endorsement of religion because the display could not be attributed to the holiday season. However, the City has only issued a ten-day permit to the JCC so that their display may coincide with the celebration of Chanakuh during the traditional holiday season which also celebrates Christmas and the New Year.

The Court's holding in Allegheny supports the constitutionality of the Menorah display at issue here. The Court issued five separate opinions, joined in whole or in part by various members of the Court. Justices Blackmun and O'Connor found that the physical context of the display was most significant; the display of the creche standing in the courthouse

was improper, but the display of the menorah outside a government building a block away beside a Christmas tree and a sign saluting liberty was not. 492 U.S. 573 In Allegheny, the private religious display of the creche in the courthouse, the seat of the government, was violative of the Establishment Clause because the setting of the display presented connotations of government involvement. Such a display could be perceived as an endorsement of religion by an objective observer. However, where the private display is far removed from the seat of government, it is less likely that there will be any inference of government involvement. Here, the menorah is displayed by JCC in a public park which is completely removed from the seat of government.

Justice O'Connor's concurring opinion in Wallace v. Jaffree, 472 U.S. 38 (1985) provides that government endorsement depends on the views of an objective observer acquainted with the history, language, and implementation of the government practice in question. Here, the menorah is displayed by JCC in a public park which is completely removed from the seat of government. Court Park is Danburg's public park which is surrounded by the city's primary government buildings such as the courthouse, police station, and the city-county building. However, there are only four minor government buildings adjoining City Park, and these are not associated with the seat of government.[2] Thus the objective observer is not likely to misconstrue government

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[2] The Post Office and Division of Motor Vehicles are on City Park's northernmost side; the Public Library and the Board of Education Building adjoin the southern side.

involvement with displays or activities occurring in City Park.

The Allegheny and McCreary decisions recognize the constitutionality of the displays at issue even though they are located on public property. There is no differentiation based on the fact that the display in Lynch was located on private rather than public property. Thus the conclusion that the mere location of a religious symbol on public property indicates government endorsement of religion is not supported by any of this Court's decisions. The Court has always considered "all of the circumstances of a particular relationship" when examining the constitutionality of a particular practice. Lemon, 403 U.S. at 614. Although the menorah display is located on public property, it is not located at the seat of government. The petitioners argue that some observers may conclude that the City has endorsed the Jewish faith by allowing the JCC to erect its display, however, the Court has made it clear that a law that confers an indirect, remote, or incidental benefit upon religion is not constitutionally invalid for that reason alone. Lynch 465 U.S. at 688. The City of Danburg's permit ordinance might benefit any religious organization which chooses to take advantage of it. However, the permit policy merely imparts an indirect or incidental benefit to religion which is constitutional.

B. Under the standards of the Coercion Test, the City of Danburg's permit policy does not violate the Establishment Clause.

The permit ordinance satisfies the standards of the coercion test, a more narrow interpretation of the Establishment Clause

which has been favored by the Supreme Court in recent decisions.

The Lemon test should be abandoned in favor of the coercion test, which specifically states that even government endorsement of religion does not violate the Establishment Clause unless the government coerces citizens to participate in religion or "give[s] direct benefits to religion to such a degree that it in fact establishes a state religion or tends to do so." Board of Educ. v. Mergens, 496 U.S. 226, 260-262 (1990) (Kennedy, J. joined by Scalia, J., concurring in part and concurring in the judgment).

The more permissive coercion standard should be the applicable test because it is limited to preventing government establishment of religion, which is precisely what the Establishment Clause is designed to preclude. In Allegheny four members of the Court (Chief Justice Rehnquist and Justices White, Scalia, and Kennedy) would allow the display of a religious symbol as long as it was not construed as "an effort to proselytize," Id. at 3139; neither the display of the creche or the menorah was such an effort and therefore were not unconstitutional and should have been allowed.

In Lee v. Weisman, __ U.S. __, 112 S.Ct. 2649 (1992) the Court did not apply the Lemon test. The Court found that conducting formal religious observance at graduation conflicts with rules pertaining to prayer exercises. The State's involvement in school prayers violated the Establishment Clause. The Court recognized the coercion test, stating that "Government

may not coerce anyone to support or participate in religion or its exercise, or otherwise act in a way which establishes a [state] religion or its exercise, or otherwise act in a way which 'establishes a religious faith or tends to do so.'" Id. at 2644, citing Lynch, supra at 678. Under the coercion test, "the city of Danburg certainly did not coerce participation in Judaism or establish it as a state religion." Danburg v. Holy Fundamentalist Church, 1 F.3d 1, FN 1 (15th Cir. 1992)

II. THE CITY OF DANBURG IS REQUIRED TO ISSUE THE PERMIT TO JCC BECAUSE CITY PARK IS A TRADITIONAL PUBLIC FORUM

As Justice Brennan noted, "The Establishment Clause. . . may not be used as a sword to justify repression of religion or its adherents from any aspect of public life." McDaniel v. Paty, 435 U.S. 618, 641 (1978) (Brennan, J., concurring) (footnote omitted).

A. The First Amendment does not permit discrimination against private speech in a traditional public forum based on the religious content of the speech.

The First Amendment forbids discrimination against private speech in a traditional public forum based on the religious content of the speech. JCC's display of the menorah in City Park equals constitutionally protected "speech" even though it is expressed through a symbol rather than words. See Spence v. Washington, 418 U.S. 405, 410 (1974); see also West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 632 (1943).

JCC's use of a religious symbol does not effect the right to free speech. There can be no distinction between religious and non-religious expression for purposes of protection under the

First Amendment; religious speech and association receive full protection. Widmar, 454 U.S. at 269.

The Court has recognized a clear distinction between private and public religious speech. The Mergens Court recognized a "crucial difference between *government* speech endorsing religion, which the Establishment Clause prevents, and *private* speech endorsing religion, which the Free Speech and Exercises protect." Mergens, 496 U.S. at 251 (O'Connor, J.) (plurality opinion) (emphasis in original). In that case, it was thought that secondary school students were mature enough and likely to understand that a school does not endorse or support religious speech through its policy of permitting student speech on a nondiscriminatory basis. Id.

Although not all private religious speech is allowed under the Establishment Clause, the speech must be clearly supported by a special government practice in order to violate it. Any evaluation of government support of a religious practice must consider the fact that City Park is a traditional public forum. The Appellate Court correctly noted that because City Park is a traditional public forum and JCC is venturing to express its views at this forum, JCC deserves the most stringent protection of its rights to speak in that forum. The Supreme Court has recognized that "quintessential public forums 'have immemorially been held in trust for the use of the public and time out of mind, have been used for the purposes of assembly, communicating thoughts between citizens, and discussing public questions.'"

Perry Educ. Ass'n. v. Perry Local Educator's Ass'n, 460 U.S. 37, 45 (1983) (quoting Hague v. CIO, 307 U.S. 496, 515 (1939)). Both parties concede that City Park is a traditional public forum.

In Widmar, the Court held that a state university that makes its facilities available to student groups cannot close those facilities to student religious groups which desire to use the facilities for religious worship and religious discussions. The Court held that the school had established an open forum and in order for the school to deny access to this forum based on religious content of the student group, the school must prove that the denial served a compelling state interest. 454 U.S. 263, 270.

Since the school could not show that the Establishment Clause would be violated by permitting the group to use the facilities, there was no compelling interest. The policy of permitting the religious groups to use the facilities did not inhibit or advance religion. The Court distinguished speech which was allowed and speech which was endorsed, stating that "[A]n open forum in a public university does not confer any imprimatur of state approval of religious sects or practices. . . such a policy would no more commit the University. . . to religious goals. . . than it is now committed to the goals of the Student's for a Democratic Society, the Young Socialist Alliance, or any other group eligible to use its facilities." 454 U.S. at 274 (citation and footnote omitted). Furthermore, "the forum is available to a broad class of nonreligious as well as religious

speakers. See also Mergens, 496 U.S. 226 (1990) (upholding the Equal Access Act which requires schools to give student religious groups the same access to facilities as other non-curriculum related student groups.)

McCreary v. Stone, 739 F.2d 716 (2d Cir. 1984), aff'd by an equally divided court sub. nom. Board of Trustees of Village of Scarsdale v. McCreary, 471 U.S. 83 (1985) governs the facts presented here. In that case, city official refused to permit a private display of a creche in a public park. The District Court upheld this refusal based on the Establishment Clause. The Second Circuit reversed, holding that the First Amendment forbids discrimination against private speech in a traditional public forum based on the religious content of the speech, thus the city was required to permit the private display of the creche.

Similarly, the City of Danburg's permit policy entitles all citizens equal access to City Park and allows private speech on a nondiscriminatory basis. The principles established in Widmar, McCreary, and Mergens applies since a public forum is involved. The government cannot deny access to a traditional public forum absent a compelling reason. There is no Establishment Clause violation. "[A]ny inference of government endorsement of religion is precluded by the unrestricted opportunity for other groups to use the forum." Danburg, 1 F.3d at 8. Since the Establishment Clause is not violated, there is no compelling reason to deny a permit to JCC. Indeed, if the City refused to permit religious groups use a forum open to others, then it would demonstrate

hostility rather than neutrality toward religion.

In Allegheny, a privately sponsored creche display violated the Establishment Clause. However, Allegheny County had granted the private group a special privilege by allowing it to place its creche on the grand staircase of the county courthouse. This case is easily distinguished because the courthouse was not a traditional public forum. 492 U.S. at 600 [FN 50]. Furthermore, the county associated itself with the creche display through press releases. Id. City Park is a forum which is available to every group. The City of Danburg has not granted any special privileges to the JCC, nor has it associated itself with the menorah display. The City asked the JCC to provide a disclaimer every year following the first display. Since then, the menorah display has included a sign which specifically states "In Celebration of Chanukah, the Danburg Jewish Community Center Has Placed This Menorah For the Enjoyment of All." Thus the reasonable observer who reads the sign knows that the City is not responsible for the display. The JCC display is clearly private religious speech in a traditional public forum which is protected by the First Amendment. The City is required to permit the display of the private menorah.

B. Even if the Court finds the menorah display violates the Establishment Clause, the violation does not serve as the compelling interest to justify an injunction.

The government may not exclude speech from a traditional public forum unless "its regulation is necessary to serve a compelling state interest and. . . is narrowly drawn to achieve

that end." Perry, 460 U.S. at 46. JCC deserves the most stringent protection of its right to speak in a public forum. Thus the City of Danburg can impose time, place, and manner restrictions on groups wishing to use the park, but cannot place content restrictions on the use of the park. Widmar, 454 U.S. at 270. Cornelius v. NAACP Legal Defense and Educational Fund, Inc., 473 U.S. 788, 800 (1985). Even if the violation of the Establishment Clause serves as the compelling interest for a content restriction, an injunction would not withstand constitutional scrutiny because it is not narrowly drawn to achieve that end. Thus the City may limit the duration of the display or require a larger disclaimer sign, but it must issue the permit to JCC to display the menorah.

CONCLUSION

For the reasons set forth above, I respectfully request this Court to uphold the ruling of the Appellate Court.

Respectfully submitted,

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223-13-7103

Counsel for Respondent