

IN THE
SUPREME COURT OF THE UNITED STATES
SITTING IN DAVIS

Supreme Court No. WW92-260701

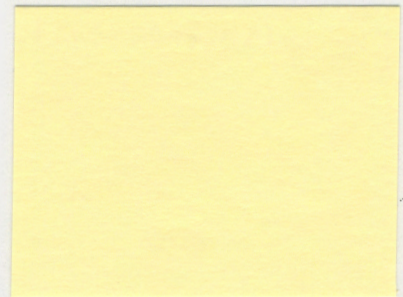
HOLY FUNDAMENTALIST CHURCH,
Petitioner,

v.

CITY OF DANBURG,
Respondent.

On Appeal from the Fifteenth Circuit Court
of Appeals - Davis

BRIEF FOR RESPONDENT



QUESTION PRESENTED

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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BRIEF FOR RESPONDENT

(595-05-9167)

STATEMENT OF THE CASE

City Park is a public park that is a centrally located, ten acre plot of land in the city of Danburg. It adjoins two government buildings on its northernmost side and two government buildings on the south. It is typically used for recreation, with a pond, a playground, and several paths for bikers and walkers.

City Park is a recognized public forum. Many organizations have used the park for demonstrations, rallies, protests, displays and exhibits. Previous activities include: a Pro-Choice rally; a two-day sculpture exhibit; a Fourth of July concert; a city sponsored fund raiser; and several dances. Other private activities in City Park occurring after this action was initiated include: local citizens tying yellow ribbons around City Park trees in support of American troops in the Persian Gulf and an independent presidential candidate speech. Additionally, Danburg City ordinance § 4786-1 designates City Park as a public forum by providing:

...the City Commissioner may issue to any person, organization, association,...or...group of any type, a permit to use and occupy any portion of...City Park, for the purpose of making or presenting any program, public address, exhibit or display, or for any...purpose...

Under City Ordinance § 4780-4, the city requires a twenty-five dollar permit fee, which covers any clean-up, water, and electricity expenses.

Each year since 1987, the Danburg Jewish Community Center ("JCC") has requested and been granted such a permit from Danburg ("the City"). The JCC annually requests a ten-day permit to

display a twenty-two foot menorah during the eight days of Chanukah, with two days allotted for construction and removal. Each year since 1987, the menorah has been placed on the southern edge of City Park beside the City Library. To the left of the menorah is a two foot by one foot sign which states, "In Celebration of Chanukah, the Danburg Jewish Community Center Has Placed this Menorah For the Enjoyment of All."

The Holy Fundamentalist Church brought suit for an injunction under 42 United States Code § 1983, claiming that the menorah display on public property violates the Establishment Clause of the First Amendment. The District Court granted the injunction, and the Circuit Court of Appeals reversed. Petitioner now appeals.

SUMMARY OF THE ARGUMENT

This case presents a novel issue-- whether religious speech in a public forum violates the Establishment Clause. In striking a balance between the sensitive areas of Free Speech and the Establishment Clause, application of the heightened scrutiny of the Lemon test as refined by the endorsement test seems inappropriately harsh and inconsistent with the Court's past concerns on protecting speech. Because the Court has refused to be confined to any single test in determining Establishment Clause questions, the facts of this case appropriately call for consideration of less strict Establishment Clause analysis, such as the coercion test or a lower level scrutiny test.

Historical interpretation of the Establishment Clause provides

that it was established to prevent governmental coercion of religious orthodoxy and financial support through taxation or threat of penalty. As such, government may not coerce anyone to support or participate in any religion, and it may not give direct benefits to religion in such a degree that it in fact establishes a state religion. By merely allowing the JCC access to City Park, as all its citizens are equally entitled to, the City is merely accommodating Judaism, which is constitutionally permissible. The City is in no way coercing any of its citizens to practice Judaism, and it is in no way giving such benefits to Judaism that it establishes it as a state religion, a religion, or tends to do so.

If the Court rejects this historical interpretation, it should lessen the degree of Establishment Clause scrutiny in the context of religious speech in a public forum. This is proper because the City is positioned so that if it disallows the display it risks violating Free Speech and if it allows the display it risks violating the Establishment Clause. A past case that deals with religious speech in an open forum at a public university strongly suggests that a lesser degree of scrutiny is appropriate in this context. By broadening the scope of the Court's inquiry into what the endorsement test's reasonable observer has knowledge of with respect to the forum in question, it becomes obvious that the City is only accommodating Judaism in the instant case. The observer who expects speech in a public forum for communication purposes cannot reasonably suspect the same speech as City endorsement.

Even if the Court is compelled to apply the heightened

scrutiny of the Lemon test as refined by the endorsement, the facts of the instant case provide that the City did not violate the Establishment Clause. Because the facts and issue of the instant case are novel and Establishment Clause inquiry is fact specific, adjustments remain in applying the second prong of this test. The Court must resolve the meaning of "the context of the display." Relevant cases suggest that this meaning must be broad; therefore, as the context in which the reasonable observer must see the menorah expands to include the public forum and the holiday season, the less likely this observer will see the City as endorsing Judaism.

ARGUMENT

I. **THOUGH THE APPELLATE COURT CORRECTLY HELD THAT THE CITY OF DANBURG DID NOT VIOLATE THE ESTABLISHMENT CLAUSE, THE INSTANT CASE MERITS THE APPLICATION OF A LESS STRINGENT ESTABLISHMENT CLAUSE TEST**

The City is positioned so that if it disallows the display it risks violating Free Speech and if it allows the display it risks violating the Establishment Clause. The facts of this case force a delicate balance between these two important limits on state power. In applying the Establishment clause, the Court has "repeatedly emphasized [its] unwillingness to be confined to any single test...." Lynch v. Donnelly, 465 U.S. 668, 679 (1984). Thus, in striking the delicate balance that these facts require, the Court should consider: the coercion test, forum analysis, and the Lemon test as refined by the endorsement test.

II. HISTORICAL INTERPRETATION OF THE ESTABLISHMENT CLAUSE MERITS APPLICATION OF THE COERCION TEST

Historically, the Establishment Clause was established to prevent governmental coercion of religious orthodoxy and financial support through taxation or threat of penalty. Lee v. Weisman, 112 S.Ct. 2649, 2683 (1992) (Scalia, J., dissenting) (three justices joining). Any expansion of this definition should not be adopted because it would invalidate longstanding traditions of our cultural heritage. Id. at 2678-79; See also Lynch, 465 U.S. at 680 (holding that, because Congresses and Presidents have historically taken note of the religious event of Christmas, evidence of the inclusion of a creche in a government Christmas display, without more, is insufficient to prove establishment of religion). Accordingly, even though the Establishment Clause provides that, "Congress shall make no law respecting an establishment of religion...", U.S. Const. Amend. I., it "affirmatively mandates, accommodation, not merely, tolerance, of all religions and forbids hostility toward any." 465 U.S. at 672.

To accurately observe this border between accommodation and establishment, the "coercion" test prescribes:

government may not coerce anyone to support or participate in any religion or its exercise; and it may not...give direct benefits to religion in such a degree that it in fact establishes a state religion, a religious faith, or tends to do so.

Allegheny County v. Greater Pittsburgh ACLU, 492 U.S. 573, 658 (1989) (Kennedy, J., concurring in judgement in part and dissenting in part) (quoting Lynch v. Donnelly, 465 U.S. 668, 678 (1984)).

In the instant case, the City passively accommodates its

citizens by allowing them equal access to a public park to exercise speech. In fact, petitioners concede that City Park is a traditional public forum. Holy Fundamentalist Church v. Danburg, 1 F.3d 1, 3 (15th Cir. 1992). Therefore, the City is not coercing support or participation in the Jewish religion by allowing a menorah to be displayed its public park, it is merely accommodating its citizens. "[S]peech is not coercive; the listener may do as he likes." Lee v. Weisman, 112 S.Ct. 2649, 2684 (1992) (Scalia, J., dissenting).

Secondly, the only benefit the JCC derives from the City is that the City has granted it a permit to display a menorah in City Park during Chanukah. The City is only responsible for minor things covered by the twenty-five dollar permit fee. Therefore, the City is not giving such direct benefits to JCC or the Jewish faith that it established a religion or tended to do so. See Lynch, 465 U.S. 668 (holding that whatever benefit one or all religions received from a government-owned creche being displayed on private property, it was indirect, remote, and incidental).

The instant case is clearly distinct from Justice Kennedy's example of a case in which the use of passive symbols to acknowledge religious holidays might fail the "coercion" test. Allegheny, 492 U.S. at 665 n.3 (Kennedy, J., concurring in judgement in part and dissenting in part). Justice Kennedy explained that "if a city chose to recognize, through religious displays, every significant [Jewish] holiday while ignoring the holidays of all other faiths," the argument that the city has

violated the Establishment Clause is more likely to prevail. Id. But in the instant case, even assuming that a menorah is strictly a religious symbol, the City has issued a permit to display the menorah for only one Jewish holiday. Also, there is no evidence that it has ignored or denied a permit to any other religious group. Hence, the City's action satisfies the coercion test.

Justice Scalia's dissent in Lee v. Weisman, 112 S.Ct. 2649 (1992) (Scalia, J., dissenting) (three justices joining), supports the application of the coercion test or, at the very least, militates toward lessening the degree of scrutiny with which the Court has recently determined Establishment Clause questions.

III. THE FACTS OF THE INSTANT CASE MERIT A LESSER DEGREE OF SCRUTINY THAN THE LEMON TEST AS REFINED BY THE ENDORSEMENT TEST

If the Court fails to apply the coercion test, the facts of this case warrant lessening the degree of Establishment Clause scrutiny. Otherwise, the Court's pitting of free speech high-level scrutiny against Establishment Clause high-level scrutiny risks yielding the absolutist view rejected in Lynch. See Lynch, 465 U.S. at 678 (rejecting mechanical invalidation of all governmental conduct that confers benefits or special recognition to religion in general or to one faith, in favor of our national traditions of diversity and pluralism).

Speech, including religious speech, is protected by the free speech component of the First Amendment which applies to the states via the Fourteenth Amendment. Widmar v. Vincent, 454 U.S. 263, 269

(1981). In the instant case, the JCC's placing of a menorah in City Park is constitutionally protected speech. See Spence v. Washington, 418 U.S. 405, 410 (1974); See also West Virginia Bd. of Ed. v. Barnette, 319 U.S. 624, 632 (1943). In determining to what extent government can limit speech to be exercised on government property, the Court has adopted "forum analysis." Cornelius v. NAACP Legal Defense and Educational Fund, Inc., 473 U.S. 788, 799 (1985). Where, in the Court's analysis, a public forum exists, the government may not impose any content-based speech regulation unless it is necessary to serve a compelling state interest and narrowly drawn to achieve that end. Cornelius, 473 U.S. at 800; Widmar, 454 U.S. at 270. A public forum is public land designated by the government or traditionally used by its citizens for "assembly, communication of thoughts between citizens, and discussing public questions."¹ Hague v. CIO, 307 U.S. 496 (1939). Thus, content-based regulation of speech in a public forum is subject to high-level scrutiny, as opposed to limits on speech in non-public forums where government may regulate speech if the regulation is reasonable. Cornelius, 473 U.S. at 800.

Similarly, in applying the Establishment Clause, the Court has subjected suspect government official action to high-level scrutiny. See Allegheny, 492 U.S. at 594 (holding that the mere appearance that the government has taken a position on a religious issue is prohibited) (emphasis added). Yet, the precise question

¹ Whether a public forum be "traditional" or "designated," both stand on the same constitutional footing. Perry Local Educ. Ass'n v. Perry Local Educ. Ass'n, 460 U.S. 37, 45 (1983).

of religious speech in a public forum is novel. Allegheny, 492 U.S. 573, 599 n.50 (noting that its finding that a privately owned creche on non-public forum, public property violated the Establishment Clause did not raise the "public forum" issue). This precise issue was, however, decided in McCreary v. Stone, 739 F.2d 716 (2nd Cir. 1984)(holding that the First Amendment does not permit discrimination against private speech in a traditional public forum based on the religious content of the speech), aff'd by an equally divided Court sub nom. Board of Trustees of Scarsdale v. McCreary, 471 U.S. 83 (1985). Accordingly, in the context of public forum religious speech, lessening the degree of Establishment Clause scrutiny to compensate for the competing constitutional guarantee of Free Speech may be appropriate.

A. The appropriate test for the Court to apply in this novel and sensitive area is one of lesser scrutiny

Since Lynch, the Court appears to have increased the level of scrutiny in deciding Establishment Clause questions by applying the Lemon test as refined by the endorsement test. The result is that government violates the Establishment Clause if in the eyes of the reasonable observer the government appears to endorse a religion. Lynch, 465 U.S. at 691 (O'Connor, J., concurring). In the context of a public forum, however, this test is too strict and should be modified so that the reasonable observer be deemed with the ability to recognize a public forum and the things commonly found therein.

B. In applying the suggested test, there are three factors the Court must consider

In determining whether the reasonable observer would conclude

the government is endorsing religion, the Court must consider: 1) the type of forum in which the speech is exercised; 2) whether the reasonable observer would recognize this forum as that type of forum; and 3) the type of speech exercised in the subject forum in the past.

Applying these factors to the instant case, City Park is recognized as a public forum. Both parties concede that City Park is a traditional public forum, and the City has designated it as a public forum through Danburg City Ordinance § 4786-1. Any person or association may occupy City Park for the purpose of presenting any program, public address, exhibit or display with a permit secured from the City. Second, the reasonable observer would recognize City Park as a public forum. It is only one of two public parks in Danburg. It is a centrally located, ten acre plot of land and joins two government buildings at either end. It is used for public purposes, like recreation, and has a pond, a playground, and several paths for bikers and walkers. Thus, based on appearance alone, the reasonable observer is not likely to recognize City Park as private property. Furthermore, City Park is recognized as a public forum because of the various functions private organizations have exercised there. Third, past speech exercised in City Park has taken diverse forms. For example, it has been used for demonstrations, rallies, protests, displays, and exhibits. Previous activities include: a Pro-Choice rally, a holiday musical concert, a city sponsored fund-raiser contest, a political speech, and several dances. Considering the above three

factors, it is unreasonable for an observer to conclude that the City is endorsing Judaism.

C. A reasonable observer would expect diverse forms of speech in a public forum

If the reasonable observer expects speech for public forum or communication purposes, it seems unreasonable for this observer to conclude the speech is present for endorsement purposes. Of all forms of speech, religious speech is not so uncommon that the reasonable observer could not expect it to be included with the other forms of private speech exercised in City Park.

If however, under "the type of speech exercised in that forum in the past" factor, petitioners argue that religious speech was not expected in City Park because it had never been exercised prior to the JCC's display, a reasonable observer still could have concluded otherwise. Previous City Park speech included a Pro-Choice rally, which raises serious religious and moral issues, and other holiday celebrations. Therefore, it would be reasonable to expect religious speech tied to a religious holiday. In any event, the considered three factors weigh in favor of the reasonable conclusion that the City is accommodating Judaism, not endorsing it. As such, violation of the Establishment Clause does not serve as a compelling state interest with which the JCC's religious speech may be limited based on content.

D. Lessening Establishment Clause scrutiny in the public forum context finds support in *Widmar v. Vincent*

In *Widmar v. Vincent*, 454 U.S. 263 (1981), the Court applied a diluted Establishment Clause analysis. Corsac, Constitutional

Law--Does the "Wall" Between Church and State Command a Blanket Exclusion of Religious Speech in an Open Forum?, 64 TMLR 1125, _ _ (1991). The Court invalidated, on free speech grounds, a state university's regulation prohibiting students from using school facilities for religious worship and religious discussion. 454 U.S. at 267. Persuasive to the Court was that the university had "opened its doors," in policy and practice, for indiscriminate expressive activity by the public. Id. at 274. It found the public university campus to have many public forum characteristics. Id. at 267 n.5. In this context, the school could not show a compelling state interest as the Court decided that the Establishment Clause had not been violated. Id. at 274.

IV. EVEN APPLYING THE LEMON TEST AS REFINED BY THE ENDORSEMENT TEST THE CITY'S ACTION COMPLIED WITH THE ESTABLISHMENT CLAUSE

Even if the Court chooses to apply the Lemon test as refined by the endorsement test, it must find, as the appellate court correctly did, that the City's action did not violate the Establishment Clause.

Since Lynch v. Donnelly, 465 U.S. 666 (1984), the Court has applied the Lemon test as refined by the endorsement test in deciding Establishment Clause questions. In the context of the instant case, the Lemon test provides that the menorah may be maintained consistently with the Establishment Clause if: 1) it has a secular purpose; 2) its primary or principal 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. 602, 612-13 (1971). The endorsement test refines Lemon's "primary or principal effects" prong by asking whether the display is an "endorsement" of a religion in the eyes of the reasonable observer. Lynch, 465 U.S. at 691 (O'Connor, J., concurring).

"The first prong of the test is met as 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." Holy Fundamentalist Church v. Danburg, 1 F.3d 1, 6 (15th Cir. 1992). The Court has invalidated governmental action under this prong "only when it has concluded there was no question that the...activity was motivated wholly by religious considerations." Lynch, 465 U.S. at 679 (emphasis added). Clearly, the "no question" standard is not met in this case.

"The third prong of the test does not pose a problem as there is no meaningful government involvement in permitting the display." Danburg, 1 F.3d 1, 6. "The city does not erect, maintain, disassemble, or store the menorah." Id. The City is only responsible for any clean-up, water, and electricity expenses which petitioners concede are covered by the twenty-five dollar permit fee. As such, the City's involvement with the display is, at best, de minimis. See Lynch, 465 U.S. at 683 (holding no excessive government entanglement where the City made no expenditures for maintenance of the display and the value of tangible material contributions was de minimis).

A. The second prong as refined by the endorsement test is the decisive issue

In applying this prong in the past, the Court has placed great

importance on the display's "context." In Lynch, the Court considered whether a city-owned creche displayed on private property violated the Establishment Clause. The Court stated, "the focus of our inquiry must be on the creche in the context of the Christmas season." 465 U.S. at 679. In Allegheny, the Court considered whether a privately-owned creche displayed on non-public forum, public property violated the Establishment Clause. The Court again considered the context of the display stating, "the effect of a creche display turns on its setting." Allegheny, 492 U.S. at 573. However, the court actually applied a much more restrictive definition of "setting"-- the "particular physical setting" of the display. Id. at 599. Whatever the significance of this restrictive definitional application, it is not clearly controlling in the instant case. See Allegheny, 492 U.S. 573, 599 n.50 (noting that its holding the creche display violated the Establishment Clause did not raise the "public forum" issue). As such, the issue of religious speech in a public forum, pitting free speech against the establishment of religion, remains novel.

- B. Past relevant Court decisions suggest that a restrictive definition of "context" in applying the second prong would not be proper in the instant case

In Widmar v. Vincent, 454 U.S. 263 (1981), applying the Lemon test, the Court invalidated, on free speech grounds, a state university's regulation prohibiting students from using school facilities for religious worship and religious discussion. Id. at 267. The Court analyzed the religious speech in a broad context, looking at the type of forum. Id. at 276-77. It found the public

university to have "opened its doors" to indiscriminate expressive activity by the public. Id. at 274. As such, in light of this school policy and practice, allowing free speech would not impress the students as endorsement. Id. at 276. Similarly, in Bd. of Education v. Mergens, 496 U.S. 226 (1990), the Court, stressing the importance of the religious speech's context, upheld the constitutionality of the Equal Access Act of 1984. The act provides that federally-assisted high schools which choose to have a "limited open forum" for meetings of non-curriculum related groups must also grant religious groups equal access to that forum. 20 U.S.C. §§ 4071 (a), (b). Accordingly, it appears that limitations of religious speech in a public forum warrant the Court's application of a broad Lynch-type definition of "context." Thus, in the instant case, "context" should include the physical composition of the display, the holiday season, and the type of forum involved.

- C. Under the proposed less restrictive definition, the display's context in the instant case renders the reasonable observer's conclusion that the City has endorsed Judaism unlikely

First, the physical composition of the display is a privately owned twenty-two foot menorah with a two foot by one foot sign indicating that the JCC is solely responsible for the erection and maintenance of the display. Second, the menorah is displayed on public property for only ten days-- the eight consecutive days of Chanukah and two days for construction and removal. This holiday is celebrated during the winter holiday season, when holiday displays are generally expected on private or public property.

Third, the menorah is displayed in City Park, a recognized forum of public communication equally accessible to all. Therefore, a menorah located at this time and place seems a reasonable expectation, minimizing the possibility that the reasonable observer could confuse accommodation with endorsement.

Petitioners could argue, however, that, notwithstanding a reasonable observer's expectation of a religious display at this particular time and place, endorsement of religion is still suspected because of the menorah's proximity to the City Library. Several facts weaken this argument.

First, there is no evidence of the City permitting the celebration of any other Jewish holiday other than Chanukah. If the City were endorsing Judaism, it would seem logical that it would allow the celebration of more than one Jewish holiday.

Second, a menorah is exclusively associated with Chanukah and no other Jewish holiday. Moreover, the City is not allowing the display of a Star of David that could represent more than one holiday or Judaism generally.

Third, a menorah is not strictly a religious symbol. Allegheny, 492 U.S. at 573 (noting that just as some Americans celebrate Christmas without regard to its religious significance, some nonreligious American Jews celebrate Chanukah as an expression of ethnic identity rather than as a religious event).

Fourth, the disclaimer sign militates against the City's endorsement of Judaism by stating, "In Celebration of Chanukah, the Danburg Jewish Community Center Has Placed this Menorah For the

Enjoyment of All." The sign makes clear that the JCC, not the City, is responsible for the display. Furthermore, this language is not indisputably religious. Compare Allegheny 492 U.S. at 598 (relying in part on indisputably religious language, such as "Glory to God in the Highest!" located on a sign in a creche display, to hold that the display violated the Establishment Clause).

Finally, the menorah is not located "on the Grand Staircase, the 'main' and 'most beautiful part' of the building that is the seat of county government"--the location of the display that supported the Court's finding that Allegheny County had violated the Establishment Clause. 492 U.S. at 599. In the instant case, the menorah merely sits near the City Library which is not a primary government building.

Accordingly, the City's action complies with the Establishment Clause because the context of the menorah yields the reasonable observer unable to conclude that the display is an endorsement of Judaism. Therefore, there is no compelling state interest for which the JCC's religious speech can be limited on the basis of content.

CONCLUSION

For all of the foregoing reasons, the judgement of the Circuit Court should be affirmed.

Respectfully submitted,
Attorney for Respondent