IN THE
SUPREME COURT OF THE UNITED STATES
SITTING IN DAVIS
October Term, 1992

NO. WW92-260701

Holy Fundamentalist Church,

Petitioner,

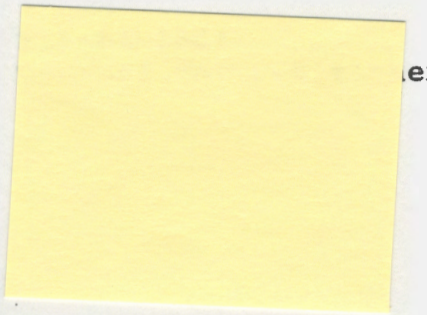
v.

City of Danburg,

Respondent.

ON APPEAL FROM THE FIFTEENTH CIRCUIT
COURT OF APPEALS- DAVIS

BRIEF FOR PETITIONER



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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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STATEMENT OF THE CASE

The City of Danburg has a centrally located ten-acre park. This city park is often used as a recreation area and public forum. Guidelines for the use of the park are laid out in Danburg City Ordinance Sec. 4786-1:

> "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 ordinance, a twenty-five dollar fee is to accompany the application to cover any electricity, water and clean-up expenses.

In 1987, the Danburg Jewish Community Center (JCC) secured a ten-day permit for the construction, removal and eight day display of a twenty-two foot menorah in City Park in celebration of Chanukah. The presence of this religious symbol on city property has been an annual occurrence since 1987. Every year, this religious symbol is constructed directly beside the city library with both the menorah and the library facing a heavily traveled street. The unattended menorah and the city library stand together without any other displays in their immediate area.

During the very first year that this twenty-two foot menorah was displayed on public property, concerned citizens complained that they did not appreciate the city's preference of the Jewish religion over their own faiths. In response to the community

outpouring of displeasure, the city attempted to rectify the situation by asking the JCC to place a sign on the menorah indicating JCC's participation in its presence. In the years following 1987, a two foot by one foot sign has been placed beside the menorah, which proclaims, "In Celebration of Chanukah, the Danburg Jewish Community Center Has Placed This Menorah For the Enjoyment of All."

Under 42 United States Code section 1983, the Holy Fundamentalist Church sought an injunction against the city for its participation in the placement of this menorah considering it as a violation of the Establishment Clause of the First Amendment. The District Court granted the injunction. The Court of Appeals reversed the District Court's decision. This court granted certiorari.

SUMMARY OF THE ARGUMENT

The Appellate Court erred in holding that the City of Danburg did not violate the Establishment Clause by issuing a permit to the Jewish Community Center (JCC). Since the display of the menorah is considered "speech," its placement would ordinarily be protected by the First Amendment. However, since its placement is in violation of the Establishment Clause, the menorah as it stands is unconstitutional.

The appropriate test to apply when testing an action under the Establishment Clause is the Lemon test. In order for an action to be considered constitutional under this test, it must satisfy all three prongs of the test. The first prong of the test is arguably satisfied because the statute appears to have a secular purpose. There is also no indication of governmental entanglement with religion thus satisfying the third prong of the test.

The placement of the menorah, however, does not satisfy the second prong of the Lemon test. The placement of the menorah, the contents of the sign accompanying it, and a lack of distractions all contribute to a perception of governmental endorsement of the Jewish faith. Ownership and control of the menorah are irrelevant when determining how an average passerby perceives it.

City Park is indeed a public forum. The Constitution assures the right to freedom of speech. Access to the park cannot be denied absent a compelling reason. Violation of the Establishment Clause is a compelling reason.

The City of Danburg violated the Constitution by issuing a permit to the Jewish Community Center. Therefore, the menorah must not be allowed to stand.

ARGUMENT

I. THE APPELLATE COURT ERRED IN HOLDING THAT THE CITY OF DANBURG DID NOT VIOLATE THE ESTABLISHMENT CLAUSE BY ISSUING A PERMIT TO THE JEWISH COMMUNITY CENTER.

The First Amendment of the Constitution of the United States says, "Congress shall make no law respecting an establishment of religion." This Establishment Clause of the First Amendment, made applicable to the states via the Fourteenth Amendment is often cited to disallow governmental endorsement of religion.

In Lemon v. Kurtzman, 403 U.S. 602 (1971), the court said that when dealing with both the church and state, "[t]he objective is to prevent, as far as possible, the intrusion of either into the precincts of the other." Id. at 614. Of course, we know that a total separation is impossible because states have responsibilities such as inspecting buildings and religious organizations are not excluded from this type of exposure to the state. However, our Constitution disallows relationships in which a state's involvement with a religious organization is too intimate.

The JCC has placed the menorah in City Park for the celebration of Chanukah. A menorah "is a religious symbol: it serves to commemorate the miracle of the oil as described in the Talmud." County of Allegheny v. ACLU, 492 U.S. 573, 613 (1989).

Given the manner in which it was displayed, a reasonable passerby would perceive the menorah as being endorsed by the City. This display is unconstitutional because it is in violation of the Establishment Clause of the First Amendment.

A. THE MENORAH CAN BE CONSIDERED SPEECH FOR THE PURPOSES OF THE FIRST AND FOURTEENTH AMENDMENTS. HOWEVER, THIS SPEECH IS DENIED IF THERE IS A VIOLATION OF THE ESTABLISHMENT CLAUSE OF THE CONSTITUTION.

In Spence v. Washington, 418 U.S. 405 (1974), the court held that displaying an upside down United States flag in an apartment window with a peace symbol taped thereto fell within the scope of the First Amendment as "speech." The court said, "[i]n many of their uses flags are a form of symbolism comprising a 'primitive but effective way of communicating ideas...,' and 'a short cut from mind to mind.'" 418 U.S. at 410. (quoting Board of Education v. Barnette, 319 U.S. 624, 632 (1943)). Given the manner in which this flag was displayed, it is quite reasonable to conclude that an idea was being conveyed and this conveyance of an idea constituting speech.

In reaching this conclusion, many factors were considered. The court said that "the nature of appellate activity, combined with the factual context and environment in which it was undertaken, lead to the conclusion that he engaged in a form of protected expression." Spence, 418 U.S. at 409-10. In our case at hand, the JCC has placed a menorah on public property. As

previously pointed out, the menorah is obviously a religious symbol. However, we know from the Spence court that the context in which it was displayed is an important consideration. As previously noted, City Park is a public forum. It is safe to say that the menorah was conveying an idea. Given the fact that public forums are often arenas for public expression, it is reasonable to consider the menorah in this case as "speech" in terms of the First and Fourteenth Amendments.

Since the menorah can be characterized as "speech," one might argue that it must be allowed to remain in the park because of the freedom of speech requirement of the First Amendment. After all, the First Amendment prohibits "abridging the freedom of speech." However, the First Amendment of the Constitution of the United States specifically says "Congress shall make no law respecting an establishment of religion." At the appellate level, the court stated, "[i]n allowing a public forum of exchange, the City of Danburg has placed itself in the precarious position of either 1) possibly violating a group's Constitutional rights to free speech or 2) possibly violating the Establishment Clause of the Constitution." Danburg v. Holy Fundamentalist Church, 1 F.3d 1, 1-2 (15th Cir. 1992). In reconciling these two principals, the appellate court said that in regard to the exercise of free speech, "[t]he government cannot deny access to a forum traditionally open to all groups, absent a compelling reason." Id. at 8. In the case at hand, violation of the Establishment Clause is compelling enough to deny a permit.

B. THE PLACEMENT OF THE MENORAH DIRECTLY VIOLATES THE LEMON TEST. THIS RENDERS ITS PLACEMENT UNCONSTITUTIONAL.

When challenging an action based upon the Establishment Clause, one must consider the recognized three-pronged test from Lemon v. Kurtzman, 403 U.S. 602 (1971). Applying the Lemon test to the current case, in order for the menorah to be consistent with the Establishment Clause, the statute must have a secular purpose, its principal or primary effect must not advance or inhibit religion, and it must not foster an excessive entanglement between the government and religion. 403 U.S. at 612-13. If one of these three prongs is not satisfied, the placement of the menorah on public property is unconstitutional.

1. THE GOVERNMENT'S ACTION APPEARS TO HAVE A SECULAR PURPOSE THUS SATISFYING THE FIRST PRONG OF THE LEMON TEST.

Under Lemon's first prong, the question is whether the placement of the menorah was intended by the government to convey a message of endorsement of the Jewish faith or disapproval of other faiths. It appears that "[t]he 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." Danburg, 1 F.3d at 6. The existence of this secular purpose appears to satisfy the first prong of the Lemon test.

2. THERE IS NOT ANY INDICATION OF EXCESSIVE ENTANGLEMENT BETWEEN THE GOVERNMENT AND RELIGION THUS SATISFYING THE THIRD PRONG OF THE LEMON TEST.

Under a third prong analysis, "[i]n order to determine whether the government entanglement with religion is excessive, we must examine the character and purposes of the institutions that are benefitted, the nature of the aid that the State provides, and the resulting relationship between the government and the religious authority." Lemon, 403 U.S. at 615. However, in this case, it might be difficult to show that this construction of a menorah fosters an excessive government entanglement with the Jewish faith. After all, the government granted a permit but did not help in the physical construction of the menorah. Showing government entanglement here is unlikely.

3. THE APPELLATE COURT ERRED IN HOLDING THAT THE SECOND PRONG OF THE LEMON TEST WAS SATISFIED. THE PLACEMENT OF THE MENORAH FOSTERS PERCEPTIONS THAT DIRECTLY VIOLATE THE SECOND PRONG OF THE LEMON TEST THUS RENDERING ITS PLACEMENT UNCONSTITUTIONAL.

Satisfaction of the second prong of the Lemon Test depends upon whether or not the principal or primary effect of the placement of the menorah is to advance or inhibit religion.

> "Whether the key word is 'endorsement,' 'favoritism,' or 'promotion,' the essential principle remains the same. The Establishment Clause, at the very least, prohibits government from appearing to take a position on questions of

religious belief." Allegheny, 492 U.S. at 493-94.

In the case at hand, the government has facilitated the construction of a menorah on public property. Many factors involving the placement of the menorah cultivate perceptions of the government's endorsement of the Jewish faith.

i. THE PHYSICAL PLACEMENT OF THE MENORAH AND A LACK OF DISTRACTIONS FOSTER PERCEPTIONS OF GOVERNMENTAL ENDORSEMENT.

In determining how the menorah is perceived, its physical placement is critical. In the case at hand, the menorah has been placed directly beside the city library. Both the menorah and the library are together visible from a busy street. There are no other holiday decorations or symbols around the menorah to detract from its religious message.

In Allegheny, the court held unconstitutional the placement of a nativity scene based upon the setting. A lone creche was placed upon the staircase of a courthouse. This placement of the creche was held to be unconstitutional because, "[n]o viewer could reasonably think that it occupies this location without the support and approval of the government." Id. at 599-600.

In Allegheny, the religious symbol (the creche) associated with the government building was held to be unconstitutional since the overall perception of the building and the symbol together conveyed a message of government approval. In our current situation, the menorah was not on the steps of the city library, but the effect was the same. Like the creche in Allegheny, the

menorah in this case cannot help but be directly associated with the government. Both the creche on the stairs and the menorah directly beside the government building convey a message of cooperation. In both cases, the religious symbols are physically situated in a manner such that a reasonable viewer would perceive the symbols and the buildings together as an expression of co-existence and mutual acceptance.

In addition, both the creche in Allegheny and the menorah in our current situation stand alone. Their messages are not encumbered by other symbols or decorations in the immediate area that could lessen the intensity of their statements.

In Allegheny, there was also a menorah at issue. A menorah was situated directly next to a Christmas tree with a sign saluting liberty. Id. at 614. The court held that this menorah, unlike the creche, was consistent with the Establishment Clause. However, the creche was alone and had nothing surrounding it whereas the menorah was situated next to a Christmas tree that clearly impacted how it was perceived. In regard to the items surrounding the menorah (the tree and the sign), the court said the items were "obviously relevant in determining the effect of the menorah's display." Id. at 614. Items in the immediate vicinity of a religious symbol obviously must be considered in evaluating to what extent the items impact the message of the symbol. When, however, there is nothing surrounding a religious symbol, there is nothing to lessen the impact of its message. Without anything detracting from its impact, a symbol's message can reach the recipient unencumbered.

We also know from Lynch v. Donnelly, 465 U.S. 668 (1984) that a factor in determining the impact of the setting in which a religious symbol rests is the objects that surround the symbol. The Lynch court dealt with a creche in the city park that was part of a large display. There were many elements in the display including a Santa Claus with reindeer, a clown, an elephant, a teddy bear and hundreds of lights. Lynch, 465 U.S. at 671. The court held that "there is insufficient evidence to establish that the inclusion of the creche is a purposeful or surreptitious effort to express some kind of subtle governmental advocacy of a particular religious message." (emphasis added). Id. at 671. The court allowed the creche to stand. The court did not refer to the "placement" of the creche but the inclusion of the creche directly acknowledging its surroundings. The court was obviously very aware of the fact that the creche was just playing a part in a very encompassing display. The massive display surrounding the creche lessened its impact. This greatly diminished the chances of the display being perceived as endorsed by the government.

In our current case, the menorah was placed directly next to the city library with nothing else around it to detract from its religious impact. We know from previous authority that physical placement and surroundings of a religious symbol are crucial in determining how a symbol is perceived. The placement of the menorah in this case points directly to governmental endorsement. If there were significant distractions surrounding the menorah, perhaps the perception would be different. But as the menorah

stands, the unencumbered display of its religious significance shines true. It conveys a very blatant message of governmental endorsement. This is unconstitutional.

ii. **THE SIGN NEXT TO THE MENORAH ENHANCES THE PERCEPTION OF GOVERNMENTAL ENDORSEMENT.**

Included in the critical setting of a religious symbol are any signs pertaining to the significance of the symbol. In the case at hand, there was originally not a sign accompanying the menorah. However, in response to complaints, the city had the JCC place a sign next to the menorah in an attempt to alleviate the concerns. The sign read, "In Celebration of Chanukah, the Danburg Jewish Community Center Has Placed This Menorah For the Enjoyment of All." If this menorah is for the "Celebration of Chanukah" and the Enjoyment of All," this poses a serious concern because not all people celebrate Chanukah. We know from School Dist. of Grand Rapids v. Ball, 473 U.S. 373 (1985) that in determining how a government action is perceived, one must inquire whether the action is "likely to be perceived by adherents of the controlling denominations as an endorsement, and by the nonadherents as a disapproval, of their individual religious choices." Id. at 390. This sign accompanying the menorah could not help but be viewed by Jewish individuals (adherents) as endorsement and encouragement of their faith. But for those that do not celebrate Chanukah (nonadherents), this encouragement to celebrate and endorsement of the Jewish faith has understandably been perceived as a disapproval

of their religious beliefs.

Past courts can help show how signs effect the way in which religious symbols are perceived. Allegheny gives us two examples. The creche in Allegheny had a sign reading "Gloria in Excelsis Deo" which means "Glory to God in the Highest." 492 U.S. at 580. The court in its analysis of this phrase said that "[t]his praise of God in Christian terms is indisputably religious." Id. at 598. The court held the creche to be unconstitutional.

On the other hand, the menorah in the Allegheny case was allowed to stand. The sign accompanying the menorah merely saluted liberty. Its message contained nothing of a religious nature. In Lynch, another case in which a religious symbol was allowed to stand, the display included a banner with the broad message of "Seasons Greetings." 465 U.S. at 671. In these cases, neither of these religious symbols that were held to be constitutional had a sign making any reference to a specific religious faith. One can plainly see that the general messages (saluting liberty and expressing "Seasons Greetings") of the symbols held to be constitutional are a far cry from the specifically religious messages proclaiming "Glory to God in the Highest" and encouraging the "Celebration of Chanukah."

In Kaplan v. City of Burlington, 891 F.2d 1024 (2d Cir. 1989), a menorah erected in a city park (with other facts very similar to the case at hand) was held by the Second Circuit of the United States Court of Appeals to be unconstitutional because it was in violation of the Establishment Clause. The menorah was accompanied

by a sign that was even less threatening than the sign accompanying the menorah in our current scenario. In Kaplan, the sign read "Happy Chanukah" and "Sponsored by: Lubavitch of Vermont." Id. at 1026. Unlike our case at hand, the sign in Kaplan made no inference encouraging all people to celebrate Chanukah. Yet the menorah was still held to be in violation of the Establishment Clause. If a menorah with a less threatening sign was held to be unconstitutional, a menorah with a firm endorsement of a specific religious faith would be in even more serious violation of the Establishment Clause.

Signs accompanying religious symbols are by no means the sole factor in determining how a symbol is perceived. However, they certainly take part in conveying the overall message of the display, particularly when the signs convey an imposing religious message suggesting governmental support of a specific religious faith.

iii. OWNERSHIP OF THE MENORAH IS IRRELEVANT WHEN DETERMINING PUBLIC PERCEPTIONS.

The previous court distinguished Lynch from our current case because Lynch is about a display that is publicly owned and financed unlike the privately controlled menorah as we have here. The court said it makes sense to require distractions from a publicly owned display in order to diminish the message that a lone religious symbol can convey on behalf of the city. The court said that the menorah in this case is different because there is a sign

exonerating the city from any connection with it and "there is not need to diminish the message when the city is not sending the message." Danburg, 1 F.3d at 9.

First of all, as was earlier pointed out, a sign encouraging individuals to celebrate Chanukah does not exonerate the city from any connection with the symbol. Secondly, the city is the party sending the message.

It must be remembered that the key to the second prong of the Lemon test is the perception. That is, how a reasonable passerby would view the symbol. Specifics such as the owners, maintainers or supporters of the menorah are irrelevant to the passerby. They have nothing what-so-ever to do with how a reasonable person passing by the city property would perceive the symbol. Since the owner has no impact on how the symbol is perceived, ownership of the symbol is totally irrelevant.

C. CITY PARK IS A PUBLIC FORUM. ACCESS TO THE PARK CANNOT BE DENIED WITHOUT A COMPELLING REASON. VIOLATION OF THE ESTABLISHMENT CLAUSE IS A COMPELLING REASON FOR DENYING ACCESS.

In considering the principal or primary effect of the display, the appellate court stressed the importance that City Park is a traditional public forum. The court said that the fact that the park is a public forum plays a paramount role in analyzing how a reasonable observer would view the menorah. The court sites Widmar v. Vincent, 454 U.S. 263 (1981) in which the Supreme Court held that a state university cannot deny a student group access to its

public forum facilities simply because the students desire to use the facilities for religious purposes. In its analysis, the court correctly held that "[t]he principal effect of allowing religious groups to make use of the facilities did not advance religion." Danburg, 1 F.3d at 7.

In our case at hand, City Park is a public forum. It is not contested that a reasonable passerby would consider it any different. The appellate court was absolutely correct in stating that "[t]he government cannot deny access to a forum traditionally open to all groups, absent a compelling reason." Id. at 8. However, in our case at hand, violation of the Establishment clause is a very compelling reason.

There is quite a difference between the government allowing access to a public forum and the government approving of an arrangement cultivating the strong perception of governmental endorsement of a particular religious faith. In Widmar, the students were merely seeking access to a public forum in order to gather for organizational related activities. The organization "held its on-campus meetings in classrooms and in the student center." Widmar, 454 U.S. at 265 n.2 (1981). Allowing students access to a classroom is far from the equivalent of facilitating the construction of a twenty-two foot menorah directly beside a city building on a heavily traveled street. This is particularly true in the context of public perceptions. One outcome is students interacting in a classroom in one of the many buildings of a state university and the other results in a massive visible religious

display in the City Park of a community.

The appellate court expressed concern that the First Amendment "does not permit discrimination against speech in a traditional public forum based on the religious content of the speech." Danburg, 1 F.3d at 8. The court cites McCreary v. Stone, 739 F.2d 716 (2d Cir. 1984), aff'd by an equally divided Court sub nom. Board of Trustees of Scarsdale v. McCreary, 471 U.S. 83 (1985) which is a case in which a creche was allowed to be displayed on public property. However, the court in McCreary was very careful to limit its findings by saying, "establishment clause cases should be evaluated according to the particular facts... we take care to emphasize the narrowness of our ruling." Id. at 730.

It might be argued that the essence of a public forum demands a constitutional right to symbolic expression (or "speech"). If the presence of a public forum automatically gave religious groups an unrestricted green light on activity, the Establishment Clause would have no meaning. Common sense leads one to the conclusion that at some point, the Establishment clause must step in to keep church and state separate. In our current case, that point has been reached. The menorah must not be allowed to stand due to its violation of the Establishment Clause of the First Amendment.

CONCLUSION

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

Respectfully submitted,

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515-84-0354

Counsel for Petitioner