

ACLU v. Schundler

Jersey City mayor Bret Schundler retained us to defend an ACLU challenge to that city's displays of a menorah and a crèche on City Hall grounds during the holiday season after receiving a memorandum prepared by The Becket Fund and sent to 400 mayors across the country describing our policy of representing, free of charge, any city that was sued for displaying such traditional religious seasonal presentations. Jersey City sought to display a menorah, a creche, a Christmas tree, and a sign stating that this display was part of the broader celebration of diversity by the City held throughout the year. In Jersey City, there are City-sponsored celebrations ranging from Ramadan Remembrance Day, Hindu and Buddhist parades, an African-American art festival, and scores of other parades, festivals, proclamations and displays celebrating the varied cultures and ethnicities of the community.

On November 28, 1995, 931 F. Supp. 1180, the U.S. District Court in Newark ruled that the menorah, tree, creche and sign were unconstitutional. However, it held that the display was constitutional if it included a Santa Claus, a sleigh, and a snowman.

In its opinion, the District Court noted that there were no secular symbols in Jersey City, as there had been in *Lynch v. Donnelly*, a 1984 Supreme Court decision that upheld a creche in a park in Pawtucket, Rhode Island. Mayor Schundler resolved to appeal this decision, believing that his display of a menorah, a creche, a tree and a sign celebrating diversity was similar to, and in fact more diverse than, a display in Pittsburgh of a menorah, christmas tree, and sign saluting freedom and pluralism that was upheld by the 1989 Supreme Court decision in *County of Allegheny v. ACLU*. Mayor Schundler believed that the city's display, like that in *Allegheny*, did not constitute government advancement of Christianity and Judaism, but, like the display in *Allegheny*, celebrated diversity.

As we prepared our appeal and the 1995 winter holidays approached, Mayor Schundler erected a display designed to comply with the District Court opinion, adding a Santa with sleigh and a snowman near the creche, and putting several Kwanza symbols on the evergreen tree. The ACLU moved for a Temporary Restraining Order against the revised display. This time, however, the District Court found in favor of the city, holding that the secular symbols had "neutralized" the religious nature of the creche and menorah.

Both sides appealed the rulings to the [United States Court of Appeals for the Third Circuit](#). On January 13, 1997, the Court of Appeals held that the original creche/menorah/sign display was unconstitutional. However, the Court of Appeals declined to decide the issue of the revised display. Instead, the court held that the district court had erred on focusing on whether the secular symbols "neutralized" the creche and menorah. The court remanded this part of the case to the district court to determine if a reasonable observer, viewing the entire revised display, would see an endorsement of religion or whether they would see a permissible celebration of culture and diversity. See The Becket Fund's [press release](#) regarding this decision or read the [Court's opinion](#).

The Becket Fund petitioned the Supreme Court for their review of the Court of Appeals' decision, which denied review and allowed the case to return to the District Court.

On remand, the United States District Court for the District of New Jersey ruled on December 1, 1997 changed its view on the revised display, this time holding that it, too was unconstitutional. He barred the City from erecting the modified display or any substantially similar display. See The Becket Fund's [Press Release](#) on this matter. Thus in December 1997 and 1998, instead of the holiday display, the City displayed the sign at right unveiled at a Preservation of Religious Liberty Rally on December 17, 1997. Mayor Schundler has expressed his interest in pursuing the case to the Supreme Court if necessary in order to vindicate the right of Jersey City's citizens to live in a city which does not exclude religious people from full participation in public life.

The Third Circuit Court of Appeals ruled that the modified display was constitutional on February 16, 1999.

On February 16, 1999, the Third Circuit Court of Appeals reversed the District Court and ruled that the Jersey City revised display was constitutional. The Court first held that Jersey City's display was similar to the display found constitutional in *Lynch*: both had explanatory signs and secular symbols. The Court saw "no reasonable basis for distinguishing the . . . display from the display upheld in *Lynch*." It likewise found important factual similarities between the display and the Menorah display upheld in *Allegheny*, which consisted of a menorah, a Christmas tree, and a sign saluting liberty and diversity on the lawn of a county courthouse. The Court also specifically rejected the argument advanced by the ACLU that a creche may never be displayed under any circumstances in front of a seat of government: "[T]he location of the Jersey City display on public property in front of City Hall does not in itself provide a valid basis for holding the display to be unconstitutional."

The Court of Appeals recognized that Jersey City's display did not advance religion, but rather celebrated the city's diversity:

In sum, we are unable to perceive any meaningful constitutional distinction between the display at issue here and those that the Supreme Court upheld in *Lynch* and *Allegheny County*. Reasonably viewed, none of these displays conveyed a message of government endorsement of Christianity, Judaism, or of religion in general but instead "sent a message of pluralism and freedom to choose one's own beliefs." *Allegheny County*, 492 U.S. at 633 (O'Connor, J., concurring). If we follow *Lynch* and *Allegheny County*, we have no alternative but to reverse the permanent injunction insofar as it enjoins Jersey City from erecting the modified display "or any substantially similar scene or display in the vicinity of the entrance to the City of Jersey City's City Hall." Indeed, even if we were persuaded that the modified display itself was unconstitutional, we could not possibly approve an injunction against "any substantially similar scene or display." Both the Pawtucket display and the display in front of the City-County Building in Pittsburgh were, at the least, "substantially similar" to the modified

Jersey City display, and consequently the District Court's injunction has the obviously improper effect of enjoining displays that are identical to ones that have passed the Supreme Court's scrutiny.