

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

AMERICAN CIVIL LIBERTIES UNION OF
NEW JERSEY, on behalf of its Members,
ELEANOR MILLER and RANDY MILLER,

Plaintiffs,

v.

TOWNSHIP OF WALL,

Defendant.

Civil Action No. 99-CV-751 (AMW)
Judge Alfred M. Wolin

**DEFENDANT'S MEMORANDUM OF LAW IN OPPOSITION TO PLAINTIFFS'
APPLICATION FOR A TRO AND/OR PRELIMINARY INJUNCTION**

Plaintiffs have applied for emergency injunctive relief against Wall Township's December Holiday display containing a creche and a menorah. The Third Circuit earlier this year upheld a display containing a creche, menorah, tree, secular symbols, and sign celebrating culture and diversity, indicating that the display and a menorah in front of Jersey City's city Hall. Plaintiffs' case against Wall Township's display of a similar creche, menorah, tree and sign celebrating culture, heritage and freedom boils down to is this: Jersey City accompanied its display with a plastic Santa, a plastic Frosty, a sled, and put some Kwanza symbols on its Christmas tree, whereas Wall Township only accompanied these items with four large candy cane banners, a menorah banner, poinsettias, a sign saying "Merry Christmas" and "Happy Hanukkah", and inside the front door a sign saying "Happy Holidays" and covered with cut-outs of candles, snowflakes, and Christmas ornaments. This is not the stuff of which emergencies are made.

BACKGROUND

Plaintiffs filed suit February 17, 1999 challenging the constitutionality of the holiday display that had been erected by the Township of Wall in previous Decembers.

At the end of November, 1999, the Township put up this year's holiday display. The display consists of the following: in the area outside the entrance to the municipal building, there is a menorah, a creche, four large banners with candy canes on them, a lighted Christmas tree, two large poinsettias; and a sign, next to the creche, stating "Through this and other displays and events through the year, Wall Township is pleased to celebrate our American cultural traditions, as well as our legacy of diversity and freedom," and a sign directly underneath that sign stating "Merry Christmas" and "Happy Hanukkah." Declaration of Michael D. Fitzgerald ¶¶ 3-4; Declaration of Joseph Verruni ¶ 5. Contrary to the claim of the Plaintiffs, this sign is clearly visible from the pathway. Verruni Decl. ¶ 6; Declaration of Joanne Redmond ¶ 3. In fact, it can be read from 45 feet away, while the path is only 15 feet from the sign. Verruni Decl. ¶ 6 Inside the outer glass doors of the entrance to the municipal building there is a banner depicting a menorah. Inside the next set of doors, in the lobby of the municipal building, there is a sign stating "Happy Holidays" along with paper cut-outs of candles, snowflakes, and tree ornaments. Fitzgerald Decl. ¶ 4; Verruni Decl. ¶ 5.

Wall Township has long celebrated various cultural events and holidays throughout the year in an around its municipal building. Fitzgerald Decl. ¶ 2. A wide variety of displays, events, and celebrations were held in 1999, ranging from an Octoberfest for seniors with decorations for National German-American Heritage Month, a Memorial Day ceremony and wreath laying, a Valentines Day card decorating contest and decorations in the municipal building, signs for Passover and Easter, along with an Easter Egg Hunt, a visit from the Easter

Bunny, and seasonal decorations. Verruni Decl. ¶ 2. (See *id.* for a more complete, but not exhaustive, list of activities and displays throughout the year.)

Beginning with the Township's commemoration of Battle of Monmouth/Molly Pitcher Day in June, all displays, signs, and events were accompanied by the sign stating "Through this and other displays and events through the year, Wall Township is pleased to celebrate our American cultural traditions, as well as our legacy of diversity and freedom." Verruni Decl. ¶ 3.

Plaintiffs became aware of the holiday display no later than December 2. Plaintiff's Second Affidavit of Randy Miller ¶ 1. On December 21, almost three weeks later, and only a few business days before the displays would come down in the normal course of events, Plaintiffs filed for a TRO and/or preliminary injunction to have the creche and menorah removed.

ARGUMENT

I. **PLAINTIFFS' REQUESTED RELIEF IS BARRED BY THE DOCTRINE OF LACHES**

The doctrine of laches prevents equitable relief when there is "(1) lack of diligence by party against whom the defense is asserted and (2) prejudice to the party asserting the defense." *U.S. v. Koreh*, 59 F.3d 431, 445 (3d Cir. 1995). Laches can bar constitutional claims. *Soules v. Kauaians for Nukolii Campaign Comm.*, 849 F.2d 1176, 1181-82 (9th Cir. 1988) (laches barred equal protection claim). The party asserting the defense of laches has the burden of establishing the elements of the defense. *Koreh*, 59 F.3d at 445-46.

Plaintiffs' eleventh-hour motion for injunctive relief exhibits a clear lack of diligence on their part. In their Complaint filed February 17, 1999, Plaintiffs did not seek any preliminary injunctive relief. The Court's decision denying Defendant's Motion to Dismiss was filed

October 6, 1999. Plaintiff Randy Miller had known about the Township’s practice of displaying a nativity scene since at least 1998, and viewed the current display on December 2, 1999. *See* Miller Decl. ¶ 1. Nevertheless, Plaintiffs waited until 4 days before Christmas to file this emergency motion. Federal Rule of Civil Procedure 65(b) allows for a TRO when the movant shows that “immediate and irreparable injury, loss, or damage will result to the applicant before the adverse party or that party’s attorney can be heard in opposition.” Clearly Plaintiffs have had ample opportunity to request such relief from the Court, with full notice to, and participation of, Defendant in a preliminary injunction hearing. Laches bar these delaying tactics which are meant to force a decision from the Court a couple of days before the Christmas long weekend . *See Southside Fair Housing Committee v. City of New York*, 928 F.2d 1336, 1355 (2d Cir. 1991) (laches barred injunctive relief in Establishment Clause case).

The Township is prejudiced by Plaintiffs’ delay. If this Court grants a temporary restraining order, such an order is ordinarily not immediately appealable. *In re Assets of Martin*, 1 F.3d 1351, 1355 n.4 (3d Cir. 1993) (citing *United States v. Spectro Foods Corp.*, 544 F.2d 1175, 1179 (3d Cir. 1976). If a TRO is issued the day before Christmas Eve, the absolute earliest a preliminary injunction hearing could be scheduled would be four business day before the display would come down anyway after the New Year. And there will be little chance prior to Christmas to adjust the display to comply with any Court ruling except by hastily dismantling it. Thus the Township would be deprived of its ability to celebrate the cultural significance of the holidays solely because of Plaintiffs’ extraordinary and unexplained delay in seeking a TRO.

II PLAINTIFFS DO NOT MEET THE STANDARD FOR INJUNCTIVE RELIEF

A. Since the Township’s display is constitutional, Plaintiffs are not likely to succeed

on the merits.

- i. The display is similar to the displays in Lynch and Allegheny and therefore should be upheld.*

In *ACLU-NJ v. Schundler*, 168 F.3d 92 (3d Cir. 1999) (*Schundler II*), the Third Circuit upheld a holiday display containing a creche and a menorah that was substantially similar to the display at issue here.

The display upheld in *Schundler II* was composed of a creche with a manger and figures of “Mary, Joseph, the Baby Jesus, and the Three Wise Men” “on the right side of City Hall” and a menorah “displayed during Chanukah on the left side of city Hall”; a thirteen foot Christmas tree that also contained some Kwanza symbols, a 4 foot tall plastic Santa Claus, a 3'10" plastic Frosty the Snowman, and a four-foot tall sled. The display also contained two signs, each 2 feet by 3 feet, stating “Through this display and others throughout the year, the City of Jersey City is pleased to celebrate the diverse cultures and heritages of its peoples.” 168 F.3d at 95-96.

The Wall Township display contains a similar creche¹ on the right side of the municipal building, a menorah on the left side, four large red banners with candy canes, a 14 to 16 foot high tree of approximately the same size as that in Jersey City with holiday lights,² stone urns

¹Plaintiffs emphasize that the angel at the top of the creche has a banner that was originally engraved with “Gloria in Excelsis Deo.” Plaintiffs’ Brief at page 0. But this so-called banner is a tiny strip of wood that is part of this little angel and any writing on it cannot be made out by someone observing the display from the walkway. See Verruni Decl. Exhibit B. In fact, it is remarkable that Plaintiffs, who could not see the one inch letters on the Wall Township sign that can be easily read by others, Verruni Decl. ¶ 6, can make out these tiny carvings.

²Contrary to Plaintiffs’ contention in their brief at page 4, this tree is taller than the tree displayed last year, and twice as broad. Verruni Decl. ¶ 8.

containing poinsettias,³ a banner with a menorah on it, a sign inside the front door saying “Happy Holidays” and decorated with paper cut-outs of snowflakes, candles, and Christmas tree ornaments. The display also contains a sign next to the creche, with Happy Hanukkah and Merry Christmas, over which is a permanent sign with a message similar to that in Jersey City’s sign “Through this and other displays and events through the year, Wall Township is pleased to celebrate our American cultural traditions, as well as our legacy of diversity and freedom.”⁴

The *Schundler II* Court upheld the Jersey City display after comparing it to those in *Lynch v. Donnelly*, 465 U.S. 668 (1984), and *Allegheny County v. ACLU*, 492 U.S. 573 (1989). First comparing the display to that in *Lynch*, the Court observed that “Both included one or more religious symbols owned by the city (in *Lynch*, a creche; in Jersey City, a creche and a menorah), as well as a variety of secular ones. Both included one or more secular signs or banners (in *Lynch*, a banner proclaiming “Seasons Greetings”; in Jersey City, two signs that read: ‘Through this display and others throughout the year, the City of Jersey City is pleased to celebrate the diverse cultural and ethnic heritages of its peoples.’ Accordingly, *Lynch* appears to support the constitutionality of the modified Jersey City display unless some constitutionally significant distinction can be shown.” 168 F.3d at 104. The Court then rejected several distinctions raised by the Plaintiffs and the dissent: The fact that the creche was in front of City Hall in Jersey City, *id.* (and see *id.* at 106, discussing *Allegheny*); an argument that the creche and menorah were

³Defendants note that the poinsettias originally placed in the urns for this years display disappeared some time during December, but have been replaced. Verruni Decl. ¶ 7.

⁴Contrary to the claim of the Plaintiffs, the sign is easily visible to person standing on the pathway and observing the display. See Redmond Decl. ¶ 3. Indeed, the sign can be read at approximately 45 feet, while the pathway closest to the sign is only 15 feet away. Verruni Decl. ¶ 6.

separate focal points from the secular symbols; the fact Jersey City had fewer secular symbols than did Pawtucket Rhode Island in *Lynch*; and the fact that the display was modified in response to the District Court striking down a prior display without the Frosty, Santa, sled, and some Kwanza symbols added to the Christmas tree.

The *Schundler II* Court then compared Jersey City's display to *Allegheny*. The Court quickly dismissed the notion that the Jersey City display bore any resemblance to the lone creche on the Grand Staircase of the County Courthouse in Allegheny:

The display contained no secular symbols, and the display did not communicate to a reasonable observer the sort of secular message that is needed to pass Establishment Clause scrutiny, *e.g.*, acknowledgment of "the cultural diversity of our country" and support for "tolerance of different choices in matters of religious belief or nonbelief by recognizing that the winter holiday season is celebrated in diverse ways by our citizens." *Allegheny County*, 492 U.S. at 636, 109 S. Ct. 3086 (O'Connor, J., concurring). The modified Jersey City display expressly conveyed this very message by means of its sign and implicitly conveyed the same message through its diverse nonverbal elements. Thus, the unconstitutional display on the Grand Staircase of the Allegheny County Courthouse is readily distinguishable from the modified Jersey City display.

168 F.3d at 105-106.

Turning to the display outside the County Courthouse in *Allegheny*, consisting of a menorah, a lighted tree, and a sign saluting liberty, the *Schundler II* Court determined that the Jersey City display of the menorah, creche, tree, sign, Frosty, Santa, and sled was constitutional: "Reasonably viewed, none of these displays conveyed a message of government endorsement of Christianity, Judaism, or of religion in generally but instead 'sent a message of pluralism and freedom to choose one's own beliefs.'" *Id.* at 107.

This case is for all practical purposes identical to the Jersey City display upheld in *Schundler II*. As in Jersey City, there is a menorah on the left side of the plaza in front of the government building, and a creche on the right. There is a decorated tree near the creche.

Where Jersey City had a small plastic Santa, a small plastic Frosty, and a sled, Wall Township has four large red banners around the plaza, poinsettias, a large menorah banner, as well as paper cut-outs of candles, snowflakes, and ornaments on a Happy Holidays sign inside the front door of the building. And, as in Jersey City, there is a sign that alerts visitors to the site that these displays are not intended to indicate any advocacy of Judaism or Christianity, but rather are examples of the celebrations of culture, heritage and freedom held throughout the year:

“Through this and other displays and events through the year, Wall Township is pleased to celebrate our American cultural traditions, as well as our legacy of diversity and freedom.” This, like the sign accomplishes the same goal—putting the display in its proper context—as the accompanying the tree and menorah in *Allegheny*: “During this holiday season, the city of Pittsburgh salutes liberty. Let these festive lights remind us that we are keepers of the flame of liberty and our legacy of freedom.” *Allegheny* at 582.

The reasonable observer viewing the Township of Wall’s display, like the reasonable observer in *Schundler II*, *Allegheny*, or *Lynch*, would thus see not an unconstitutional establishment of religion by the government, but rather a cultural display that recognizes the multi-faceted cultural celebrations engaged in in December by citizens of Wall and other communities.

Because the facts of this case are so similar to *Schundler II*, this Court need look no further for guidance on how to apply *Lynch* and *Allegheny* to these facts. However, the decisions of other circuits regarding similar displays are instructive.

In *Elewski v. City of Syracuse*, 123 F.3d 51 (2d Cir. 1997), *cert. denied*, 118 S. Ct. 1186

(1998),⁵ the Second Circuit upheld Syracuse's display of a large creche at the base of a decorated evergreen tree and surrounded by sawhorse barricades with red lettering reading "Special Events," "Roy Bernardi, Mayor" and "DPW." The Court found that the creche did not endorse religion because, at a park 300 feet from the creche, the city erected a snowman, a reindeer, twelve wire bells and another lighted evergreen, along with a privately-erected menorah. The Court held that a reasonable observer would perceive not an endorsement of religion but "a celebration of the diversity of the holiday season, including traditional religious and secular symbols of that season." *Id.* at 55.

Similarly, the Sixth Circuit in *Doe v. City of Clawson*, 915 F.2d 244 (6th Cir. 1990), upheld, using the endorsement test, a display at the entrance to a city hall consisting of a creche accompanied by four decorated evergreen trees, two gift packages, a Santa figure, a "Noel" sign, and colorful roping. *Mather v. Village of Mundelein*, 864 F.2d 1291 (7th Cir. 1989), *reh'g denied*, 869 F.2d 356 (upholding a creche in front of village hall accompanied by various secular seasonal symbols added when concerns of the creche's propriety were raised), is also instructive. Following *Lynch*, the *Mather* Court upheld the display, holding that "[t]he point of Lynch . . . is that the context—the context of the ensemble, and more important the context of the secular holiday the government observes—is the controlling consideration." *Id.* at 1293. *See also King v. Village of Waunakee*, 517 N.W.2d 671 (Wis. 1994) (upholding villages display of creche, Christmas trees, a light-draped flagpole, and a sign reading in part "Whatever your religion or beliefs, enjoy the holidays").

⁵Interestingly, the Plaintiffs cite an older case from the Second Circuit, *Kaplan v. City of Burlington*, 891 F.2d 1024 (2d Cir. 1989), but neglect to cite *Elewski*, which is much closer factually to Wall Township.

- ii. *The reasonable, informed observer, deemed aware of the various activities held at the municipal complex during the year, would not perceive an endorsement of Judaism and Christianity in the December display.*

Context, however, is not merely spacial. It is also temporal. Wall Township has long celebrated a variety of holidays throughout the year through erecting displays and sponsoring various activities. Since Battle of Monmouth/Molly Pitcher Day in June 1999, all displays are accompanied by the same sign that accompanies the creche. Verruni Decl. ¶ 3. Under Third Circuit precedent, the reasonable observer of the December display should be deemed aware of these activities. These various holiday displays and celebrations thus reinforce the message sent by the December displays that it is a celebration of culture, heritage, and freedom.

The Third Circuit, en banc, held in *American Civil Liberties Union of New Jersey v. Black Horse Pike Regional Bd. of Ed.*, 84 F.3d 1471 (3d Cir. 1996), that in determining whether a government practice endorses religion, a court must “determine whether, *under the totality of the circumstances*, the challenged practice conveys a message favoring or disfavoring religion.” *Id.* at 1486 (emphasis added). The Court explicitly embraced the view of Justice O’Connor—expressed both in her opinion in *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753 (1995), writing for herself and Justices Souter and Breyer, and her concurrence in *Allegheny*—that a court must look to whether a “reasonable observer” looking at the total context of a particular government practice, including its “history and ubiquity,” would see a government endorsement of religion. *Id.* The Court held that “In any such inquiry, ‘the “history and ubiquity” of a practice is relevant because it provides part of the context in which a reasonable observer evaluates whether a challenged governmental practice conveys a message of endorsement of religion.’” 84 F.3d at 1486 (quoting *Allegheny*, 492 U.S. at 630 (O’Connor, J.,

concurring)). Thus, in *Black Horse Pike*, the Court held that a reasonable observer of a graduation prayer led and composed by students would be presumed to know of the school's "longstanding tradition" of having clergy-led prayer, and would thus see an endorsement of religion in this overall context. 84 F.3d at 1487.

Plaintiffs argue that “a reasonable observer cannot be presumed to be aware of the various religious and cultural celebrations that may take place throughout the year in Wall Township,” Plaintiffs’ Memo. at 10, citing to *ACLU-NJ v. Schundler*, 104 F.3d 1435, 1447 (3d Cir. 1997) (*Schundler I*). But in *Schundler II*, the Court observed that the en banc decision of *Black Horse Pike* takes precedence over the panel decision in *Schundler I*:

Moreover, although this factor is not necessary to our decision, we are convinced that, in evaluating the message conveyed by the modified Jersey City display to a reasonable observer, the general scope of Jersey City’s practice regarding diverse cultural displays and celebrations should be considered. In our en banc decision in *ACLU of N.J. v. Black Horse Pike Reg’l Bd. of Ed.*, 84 F.3d 1471 (3d Cir. 1996), we held that, in determining whether a government practice endorses religion, “the “history and ubiquity” of a practice is relevant because it provides part of the context in which a reasonable observer evaluates whether a challenged governmental practice conveys a message of endorsement of religion.” *Id.* at 1486 (quoting *Allegheny County*, 492 U.S. at 630).

168 F.3d at 106-107. The *Schundler II* Court noted that to the extent that *Schundler I* “conflicted with our prior en banc decision in *Black Horse Pike*, the prior en banc decision must of course take precedence.” *Id.* at 107.

As in *Schundler II*, the Township has always had either an ad hoc or formal policy of “sponsoring a broad variety of displays, celebrations and events.” Fitzgerald Decl. ¶¶ 2-3. Clearly these other celebrations recognizing a broad variety of cultures is relevant to the context with which a reasonable observer is presumed to be familiar. And the sign accompanying the December display draws the attention of the reasonable observer to this policy.

Other circuit courts have followed a similar approach to this court in *Black Horse Pike*. See *Bauchman v. West High School*, 132 F.3d 542, 555-56 (10th Cir. 1997), *cert. denied*, 118 S. Ct. 2370 (1998) (upholding public school choir's singing of religious music under endorsement test, holding that the test "is an objective inquiry, not an inquiry into whether particular individuals might be offended by the content or location of the Choir's performance, or consider such performances to endorse religion."); *Alvarado v. City of San Jose*, 94 F.3d 1223, 1232 (9th Cir. 1996) (upholding municipal statue of Aztec deity Quetzalcoatl) (the "hypothetical observer [is] informed as well as reasonable; we assume that he or she is familiar with the history of the government practice at issue.") (quotations, citation omitted); *Chabad-Lubavitch v. Miller*, 5 F.3d 1383, 1392 (11th Cir. 1993) (upholding private menorah display in State Capitol rotunda ("In the mind's eye, the reasonable observer sees the menorah display as but one of a long series that has taken place since the [forum] was opened") (brackets in original); *Creator v. Town of Trumbull*, 68 F.3d 59, 61 (2^d Cir. 1995) (private crèche in public forum in front of town hall; remanding for factual determination, stating "because the outcome of *Capitol Square* turned on the factors articulated by Justices O'Connor and Souter, we believe that the lower courts must be guided by their concurring opinions. . . . Justice O'Connor rejected the dissenting view of Justice Stevens that the test should focus on a casual observer and emphasized that *the relevant person "must be deemed aware of the history and context of the community and forum in which the religious display appears."*) (quoting *Capitol Square*, 115 S. Ct. at 2455 (O'Connor, J., concurring in part and concurring in the judgment)) (emphasis added).

In short, both the physical and temporal context of Wall Township's display demonstrate to a reasonable observer that the Township's purpose is to celebrate cultural events--Christmas

and Hanukkah included--rather than to endorse religion. Plaintiffs have thus not shown any likelihood of success on the merits. Whether the display is viewed in its immediate physical context, or with the added context of the year-round displays and celebrations, under *Schundler II* and *Black Horse Pike*, the Wall Township display is constitutional.

B. All other equitable factors weigh against the granting of injunctive relief.

In such a constitutional case such as this, whether there is an irreparable injury depends initially upon whether there is a constitutional violation. See *Hsu v. Roslyn Union Free School Dist. No. 3*, 85 F.3d 839, 853-54 (2d Cir.), cert. denied, 519 U.S. 1040 (1996). For the reasons stated above, we do not believe Plaintiffs are likely to succeed in their Establishment Clause claim. Accordingly, there is no “harm” suffered by Plaintiffs at all, much less an “irreparable” one. See *Bacus v. Palo Verde Unified School Dist. Bd. of Educ.*, 11 F. Supp. 2d 1192, 1198 (C.D. Cal. 1998) (denying preliminary injunction against Board meeting invocation, stating “Although the loss of First Amendment freedoms, for even minimal periods of time, constitutes irreparable harm, *Elrod v. Burns*, 427 U.S. 347 (1976), this must be balanced with the reasonable likelihood of success on the merits. The less the likelihood of success on the merits, the greater irreparable harm is required.”). Plaintiffs’ argument on the merits, which amounts to a claim that a Frosty, Santa and sled and some Kwanza decorations are different in a constitutionally significant way from four candy cane banners, a menorah banner, poinsettias, a Merry Christmas and Happy Hanukkah sign, and a Happy Holiday sign covered with paper cut outs of candles, ornaments, and snowflakes, has little chance for success on the merits. Accordingly, their allegation of irreparable harm would have to be grave indeed.

It is not. Plaintiff has alleged no harm from the Township’s holiday displays other than a

“political and philosophical” disagreement. R. Miller Aff. ¶ 20; E. Miller Aff. ¶¶ 11, 13-14.

Viewing the displays is said to make Plaintiffs “feel less welcome in the community.” E. Miller Aff. ¶ 15. Obviously, Plaintiffs disagree with the legality of Christmas and Hanukkah displays. But Plaintiffs have waited until two days before the Township’s offices are to be closed for the Christmas holiday, and a few business days before the displays were to come down in the ordinary course of things. There is, therefore, very little to be gained by an eleventh hour injunction.

And while the granting of an injunction would do relatively little for Plaintiffs, it certainly would harm the Township, which has an interest in preserving its cultural events, and would harm the public by stirring up discord in the midst of the holidays. *See* Fitzgerald Decl. ¶ 2; *See also Grossbaum v. Indianapolis-Marion Cy. Bldg. Authority*, 909 F. Supp. 1187 (S.D. Ind. 1995), *aff’d*, 100 F.3d 1287 (7th Cir. 1996), *cert. denied*, 520 U.S. 1230 (1997) (denying a motion by plaintiff to force a change in a city’s religious display policy and acknowledging that “if an injunction is erroneously granted, the Building Authority is likely to be harmed in the loss of control over the government property it has a duty to manage.”).

CONCLUSION

For the foregoing reasons, the Plaintiff’s motion for a TRO and preliminary injunction should be denied.

Respectfully submitted,

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