

**IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT**

NO. 02-1765

**FREETHOUGHT SOCIETY OF GREATER PHILADELPHIA
and SALLY FLYNN**

v.

**CHESTER COUNTY, COLIN A. HANNA, KAREN L. MARTYNICK
and ANDREW E. DINNIMAN**

Appellants

**BRIEF OF THE COMMONWEALTH OF PENNSYLVANIA
AS *AMICUS CURIAE***

**On Appeal from the Order Filed March 6, 2002,
in the United States District Court for the Eastern District
of Pennsylvania, Docketed at No. 01-5244.**

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**STATEMENT OF INTEREST OF THE
COMMONWEALTH OF PENNSYLVANIA**

The district court in this case concluded that a plaque of the Ten Commandments given to the County of Chester in 1920 by a group of citizens and since then displayed on the wall of the County Courthouse must be removed because its religious content offends another group of citizens and violates the First Amendment's "establishment clause." The Commonwealth of Pennsylvania, a sovereign state, has an interest in the proper scope of the establishment clause.

Throughout the Commonwealth are public buildings, state and local, many of which are decorated by paintings and sculptures or by monuments, some longstanding and of historical significance which depict secular themes with religious overtones reflecting the history and tradition of the United States of America and the Commonwealth of Pennsylvania. The Commonwealth has an interest in preserving its public buildings intact, within the bounds of the Constitution.

STATEMENT OF THE ISSUE

Whether in preserving undisturbed a plaque of the Ten Commandments placed on the wall of its courthouse in 1920 by a group of citizens, Chester County is endorsing religion so as to violate the Establishment Clause.

SUMMARY OF ARGUMENT

The district court ought to have concluded that Chester County's preservation of a plaque of the Ten Commandments, placed on an exterior wall of the county courthouse in 1920, did not violate the establishment clause. Neither the physical context of the display of the plaque, now adjacent to an unused door of the courthouse and partially obscured by columns, nor the temporal context of the more than eighty years since its placement, suggest that Chester County is through it endorsing religion. The County has done nothing to draw attention to the plaque, or celebrate its placement, and the County's actions are most naturally construed as historical preservation.

ARGUMENT

At issue here is whether Chester County's preservation of a plaque containing a version of the Ten Commandments, placed by a citizen group on an outside wall of the courthouse in 1920, violates the establishment clause.

To answer this question, Chester County first proposes a test, drawn from well established principles, for addressing establishment clause challenges to historical monuments and artifacts. The county's test would accord historical monuments a presumption of constitutionality, so long as they have some secular purpose and are not accompanied by current governmental conduct that impermissibly endorses religion. The County's test is not made from whole cloth, but is woven from longstanding precedents addressing the establishment clause. It also meshes well with the Supreme Court's well-recognized endorsement test for evaluating public displays against establishment clause challenges, and can be thought of as a restatement of that test, accounting for historical as well as physical context of a display.

First, the test the county advocates appropriately acknowledges, as has the Court, the “unbroken history of acknowledgment by all three branches of government of the role of religion in American life from at least 1789.” *Lynch v. Donnelly*, 465 U.S. 668, 674 (1984) (opinion of the Court). In *Lynch*, the Court went on to detail the many public expressions of our religious heritage, both historical and current. The Court began by noting the celebration of Thanksgiving as a religious holiday “in the early colonial period,” its proclamation by Washington and his

successors as a day of national celebration, “with all its religious overtones,” and its eventual designation by Congress as a national holiday. The Court observed that “that holiday has not lost its theme of expressing thanks for Divine aid any more than has Christmas lost its religious significance.” *Id.* at 675. In addition, the Court referred to the designation and observance of Thanksgiving and Christmas as national holidays; our national motto, “In God We Trust,” on our currency; the language “One Nation Under God,” in the pledge of allegiance to the flag; the public funding of art galleries that exhibit “masterpieces with religious messages,” and the representation of Moses with the Ten Commandments in the Supreme Court's own courtroom. *Id.* at 676-677. If historical monuments and artifacts are not recognized as part of this continuum, it will be too easy for individuals who say they are offended by a monument or a painting to persuade a court to require that historical artwork in public buildings be papered over or monuments covered, destroyed or moved, a result at odds with common sense and the admonition that government may not constitutionally be *hostile* to religion, but must remain neutral. *County of Allegheny v. ACLU*, 492 U.S. 573, 623 (1989) (O'Connor, J., concurring) (“The Court has avoided drawing lines which entirely sweep away all government recognition and acknowledgment of the role of religion in the lives of our citizens for to do so would exhibit not neutrality but hostility to religion.”).

Besides making good sense as a practical matter, the County's historical monument test fits well within the Supreme Court's establishment clause jurisprudence

on public displays. Those cases, which the County has discussed at length, and which we discuss in more detail below, hold that context is most important in judging the constitutionality of religious objects which are components of public holiday displays. A creche and menorah may be undeniably religious symbols, for example, but their public display does not violate the establishment clause so long as, taken in the context of the season and the overall display, a reasonable observer would not perceive an endorsement of religion by the government. In the case of historical monuments and artifacts, the history and the passage of time, as well as the government's treatment of the monument, is as important a factor to be considered in setting the context of the challenged object as is the physical characteristics of the display. If many years have passed, as in this case, and the government's role has been entirely passive, consisting in all that time of no more than preservation, this should argue powerfully that there is no present "endorsement" of religion, and it is to the endorsement test that we now turn.

The Court Should Have Applied the Endorsement Test

The district court went wrong in several critical ways. First, it applied the strict *Lemon v. Kurtzman*, 403 U.S. 602 (1971) test when it should have used the modified version of *Lemon*, used by the Court in *Lynch v. Donnelly*, 465 U.S. 668 (1984) and *County of Allegheny v. ACLU*, 492 U.S. 573 (1989) in evaluating public displays that have been challenged as violating the establishment clause. Having

begun by applying a stricter test than was warranted, the district court then made it nearly impossible to pass by focusing almost exclusively on the object challenged -- here a plaque of a text of the Ten Commandments, in order to determine the display's purpose and effect. Not surprisingly, the Ten Commandment plaque failed the test. Had the district court applied the “endorsement test” approved in *Lynch* and *Allegheny County*, it should have concluded that the plaque had a secular purpose. In addition, the district court took too narrow a view of the context of the plaque, and accounted not at all for the fact that it had been placed more than eighty years ago.

1. In *Lemon v. Kurtzman*, 403 U.S. 602 (1971), the Supreme Court evaluated the constitutionality of state statutes that provided monetary incentives to private school teachers. In analyzing the statutes under the establishment clause, the court set out a three pronged test for determining whether state laws violate the Clause. The court described the test: “[f]irst, the statute must have a secular purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion, [and] finally, the statute must not foster ‘an excessive government entanglement with religion.’” *Id.* at 6112-13 (citations omitted).

Although the *Lemon* test has never been explicitly overruled or abandoned, it has been modified, and the modified version of the test, articulated in cases involving holiday displays, is the version the district court should have used. In *Lynch v. Donnelly*, *supra*, the Court applied the *Lemon* test to a Christmas display, put up by the City of Pawtucket, which included a creche as well as non-religious items

such as Santa Claus, reindeer, candy striped poles, a teddy bear, and a banner reading Seasons Greetings.” Applying *Lemon*, the Court in *Lynch* found the display constitutional because it discerned a secular purpose in the context of the holiday season. The Court said that any advancement of religion or entanglement was minimal and constitutionally acceptable. More significant than the result, perhaps, was Justice O'Connor's concurrence, in which she advanced for the first time her view that the appropriate test in analyzing displays was whether they endorsed religion. As she saw it, “the central issue in the case is whether Pawtucket has endorsed Christianity in its display of the creche.” *Id.* at 690. Justice O'Connor viewed the purpose and effect prong of *Lemon* as “represent[ing] these two aspects of the meaning of the city's action.” *Id.* She wrote:

Although the religious and indeed sectarian significance of the creche . . . is not neutralized by the setting, 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 a religious painting, negates any message of endorsement of that content. The display celebrates a public holiday, and no one contends that declaration of that holiday is understood to be an endorsement of religion. The holiday itself has a very strong secular components and traditions. Government celebration of the holiday, which is extremely common, generally is not understood to endorse the religious content of

the holiday, just as government celebration of Thanksgiving is not so understood. The creche is a traditional symbol of the holiday that is very commonly displayed along with purely secular symbols, as it was in Pawtucket.

Id. at 692. The Court endorsed Justice O'Connor's endorsement test in *County of Allegheny v. ACLU*. In that case, the Court considered the constitutionality of two holiday displays, approving one and invalidating the other, in each case not by reason by any single component, but on account of the overall context. The Court said that a Christmas creche that stood by itself on the grand staircase of a county courthouse was invalid because it conveyed a message of endorsement of Christianity. Justice Blackman, in an opinion joined by four other Justices, distinguished *Lynch*:

In sum, *Lynch* teaches that government may celebrate Christmas in some manner and form, but not in a way that endorses Christian doctrine. Here, Allegheny County has transgressed this line. It has chosen to celebrate Christmas in a way that has the effect of endorsing a patently Christian message: Glory to God for the birth of Jesus Christ. Under *Lynch*, and the rest of our cases, nothing more is required to demonstrate a violation of the Establishment Clause. The display of the creche in this context, therefore, must be permanently enjoined.

Id. at 601-602. Justice O'Connor wrote a separate concurrence emphasizing that because the creche stood alone, it “had the unconstitutional effect of conveying a government endorsement of Christianity.” 492 U.S. at 627 (O'Connor, J., concurring).

The Court in *Allegheny County* approved a second display in what this Court in *ACLU v. Schundler*, 168 F.3d 92 (3d Cir. 1999), has termed a “splintered majority.” The Court in *Schundler* identified the critical opinion in determining the

holding as Justice O'Connor's, "the opinion that supports the majority position on the narrowest grounds." *Id.* at 103. Analyzing the constitutionality of a display consisting of a Christmas tree, a menorah, and a sign saluting liberty, Justice O'Connor viewed "the relevant question for Establishment Clause purposes" as "whether the City of Pittsburgh's display of the menorah, the religious symbol of a religious holiday, next to a Christmas tree and a sign saluting liberty sen[t] a message of government endorsement of Judaism or whether it sen[t] a message of pluralism and freedom to choose one's own beliefs." *Id.* at 634. She concluded that display, by combining secular and religious holiday components, "did not endorse Judaism or religion in general, but rather conveyed a message of pluralism and freedom of belief during the holiday season." *Id.* at 635.

Applying *Allegheny County* and *Lynch* in *Schundler*, a majority of a panel of this Court approved a holiday holding display in front of the Jersey City city hall that included a creche, menorah, and Christmas tree as well as figures of Santa Clause and Frosty the Snowman, a sled, Kwanza symbols on the tree, and two signs proclaiming "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." The Court found that the holiday display, as modified from a prior display that has been found unconstitutional, "indistinguishable in any constitutionally significant respect" from those upheld in *Lynch* and *County of Allegheny*, 168 F.3d at 95. In the course of its decision, the majority was at pains to reject the suggestion made *in dicta*

by a prior panel that “Government display of a creche [unlike a menorah] cannot convey a meaning separate than the very act it is meant to portray. A creche depicts the birth of Christ, the event that lies at the foundation of Christianity” and for that reason amounted to an unconstitutional endorsement of Christianity if presented as a focal point of a public holiday display. The Court in *Schundler* rejected this notion, stating that the Court in *Lynch* and *Allegheny County* drew no distinction between religious symbols based on the “degree” of the religious message conveyed, and that a creche and a menorah were accepted by the Court as equivalent. *Id.* at 108.

What can be drawn from all of this is that in evaluating the constitutionality of public displays, whether government has improperly endorsed religion is not determined by simply looking at a given object and deciding whether or not it is “religious,” but by looking at the overall context of the display to determine what message the government is sending by it. In this respect, the district court seems to have gotten its role fundamentally wrong.

2. The district court plainly thought that the text of the plaque alone, which consisted of an unnumbered version of the Ten Commandments and Matthew 22:37, effectively doomed its display on the courthouse wall. The district court stated that the “best place to discern” the purpose of the plaque was from its text, observed that the text's “first 270 words are exclusively religious,” and concluding that “[D]iscerning the ‘purpose’ from the face of the table, no less than 241 words are explicitly religious, while only 84 could be fairly regarded as conveying a secular, moral message.” A13.

The district court went on to say that “Chester County's history of receiving this plaque demonstrates that it was abandoning neutrality and acting with the intent of promoting a particular point of view in religious matters when it accepted the gift in 1920.” A16. (Internal quotations and citations omitted). The district court discounted evidence tending to show that the display of the plaque had a secular purpose, stating that the evidence “cannot negate the plain words of the tablet, which, by a ratio of almost three to one convey a religious message,” and the fact that “the County has done nothing since 1920 to change the prominence or uniqueness of this large religious plaque on the High Street facade.” A18. The district court concluded that the plaque failed the first prong of the *Lemon* test because its purpose was “primarily religious and only incidentally secular.” With respect to *Lemon's* second prong, or “effect” test, the district court found dispositive the fact that the plaque “hangs by itself.”

The Supreme Court's approach and the approach of this Court, however, are not so strict, and are more tolerant of public sponsorship of displays that have religious as well as secular messages. Focusing exclusively on the religious component of any activity would invariably lead to its invalidation under the establishment clause, but this is not how the Court has handled challenges to public displays on establishment clause grounds. As we have explained, the Court has approved public displays that have components like a creche and menorah, that are undeniably religious and has not required that the public displays be wholly secular, only that they not be “motivated wholly by religious considerations.” *Lynch v.*

Donnelly, 465 U.S. at 680. Further, the court is “normally deferential” to articulations of a secular purpose” so long as they are “sincere and not a sham.” *Edwards v. Aquillard*, 482 U.S. 578, 586-87 (1987).

There was ample evidence before the district court that the motivations for displaying the plaque were at least in part secular, and the court was not free to ignore or minimize it. In the first place, although the plaque was given to the county by a religious organization, records of the speeches given at the dedication ceremony indicate a secular, as well as religious, purpose. Five of eight speakers were not religious leaders and the list of speakers included the President of West Chester Normal School, who spoke about the question of the Ten Commandments and morality. The district attorney accepted the plaque on behalf of the county and Judge Hause, a common pleas judge, spoke on jurisprudence and the Ten Commandments. A473-476. More importantly, two witnesses who are currently Chester County Commissioners and are responsible for preserving the plaque expressed their opinion that the display of the “Commandments” plaque serve a secular purpose. Andrew Dinniman, for example, testified that the Ten Commandments fit into the evolution of our system of law:

In many ways, the story of the Ten Commandments . . . is the story of people in the wilderness and coming out of the wilderness to find order, to find civilization through the law. . . . And I think that the Ten Commandments on the wall of the courthouse symbolizes civilization. Symbolizes the desire for order, symbolizes the desire for a just and orderly society. And symbolizes leaving the chaos of the Sinai.

* * *

It's probably one of the best known stories of our society, and it's used both religiously and secularly and in every conceivable part. It's a symbol of law. It's a symbol of order in our society.

N.T. 140-141.

In a similar vein, another Commissioner, Colin Hanna, testified that: I believe they [the Ten Commandments] have both a secular purpose and a religious origin. I don't think that the religious content of the Commandments can be or need be ignored or denied. But they clearly have a secular purpose.

They have a secular purpose which was clearly stated at the time they were dedicated and received by the county; and that secular purpose relates to the notion that these are laws posted on the outside of a building that is related to the legal system, and they are thus relevant.

N.T. 193.

Neither does the context of the plaque demonstrate an endorsement of religion. The test in this regard ought not to be about “saving isolated nonadherents from the discomfort of viewing symbols of a faith to which they do not subscribe.” *Capitol Square Review and Advisory Board v. Pinette*, 515 U.S. 753, 779 (1995) (O'Connor, J., concurring). The test is rather whether a reasonable observer, equipped with knowledge of the history of the display would perceive it to be an endorsement of religion. *County of Allegheny*, 492 U.S. at 630-31; *Capitol Square*, 515 U.S. at 780 (O'Connor, J., concurring) (reasonable observer “must be deemed aware of the history and context of the community and forum in which the religious display appears”). The main components of context in this case are the physical aspects of the display, and the

government activity concerning it, informed here by the passage of 82 years since its placement.

First and foremost, the plaque is displayed on the exterior wall of the courthouse. Without a doubt, the Ten Commandments have religious significance, but this context prevents it from being an endorsement of religion. It is not only a biblical text, but a statement of historical law displayed on the wall of a building in which laws are administered. In this context, its primary function is not an endorsement of religion, but of law. More than this, the context and history of the plaque suggests nothing so much as the preservation of an historic artifact. A reasonable observer familiar with the history of the courthouse in the community would conclude that the County has done nothing with the plaque except to preserve it. Two plaques near the Commandments plaque “highlight the historic nature of the Courthouse.” JA at A164-165, A242, A252, A578, and in the 82 years since it has been placed, the County has done nothing to celebrate the plaque or draw attention to it. The plaque is not prominently displayed, and is adjacent to an entrance to the courthouse which is now permanently closed, and a view of the plaque is partially obscured by large Corinthian columns in front of it. Judge Dalzell drew precisely the wrong conclusion from all of this. He said that the County effectively endorsed religion because it did nothing over time to diminish the prominence of the plaque. In fact, the passage of time has diminished the plaque's prominence, and the County's inaction, maintaining the plaque

where it was placed in 1920, shows if anything that it is preserving an historic artifact, not that it is endorsing religion.

CONCLUSION

Based on the foregoing, the judgment of the district court should be reversed.

Respectfully submitted,

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DATED: October 15, 2002

CERTIFICATE OF BAR MEMBERSHIP

I hereby certify that I am a member in good standing of the Bar of this
Court.

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CERTIFICATE OF SERVICE

AND NOW, this 15th day of October, 2002, I, **CALVIN R. KOONS**, Senior Deputy Attorney General, hereby certify that I this day served the foregoing **Brief of the Commonwealth of Pennsylvania as *Amicus Curiae***, by causing two copies of the same to be deposited in the Express Mail, overnight delivery service, in Harrisburg, Pennsylvania, addressed to the following:

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