

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PHILIP K. PAULSON)	U.S. Court of Appeals No. 00-55406
)	District Court No. CV-89-00820-GT
Plaintiff-Appellant,)	
)	
v.)	
)	
CITY OF SAN DIEGO,)	
)	
Defendant-Appellee.)	
)	

On Appeal from the Order of the
District Court for the Southern District of California
Honorable Gordon Thompson, Judge Presiding

AMICUS CURIAE
AMERICAN CIVIL RIGHTS UNION
IN SUPPORT OF APPELLEE CITY OF SAN DIEGO
SEEKING AFFIRMANCE OF THE RULING OF THE DISTRICT COURT

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INTEREST OF AMICUS CURIAE

The American Civil Rights Union (ACRU) is a non-partisan legal policy organization dedicated to defending all the rights enumerated in the Bill of Rights and the 14th Amendment, not just those that might be politically correct for a time or fit a particular ideology. Those setting the organization's policy as members of the Policy Board are former U.S. Attorney General Edwin Meese, former Federal Appeals Court Judge Robert Bork, former Reagan White House Policy Advisor Robert Carleson, who also serves as the organization's chairman, former Director of the U.S. Commission on Civil Rights Linda Chavez, former Assistant Attorney General for Civil Rights William Bradford Reynolds, former Harvard University Professor James Q. Wilson, former Ambassador to Costa Rica Curtin Winsor, Jr., former Editor-in-Chief of the Reader's Digest and former Director of the USIA Kenneth Y. Tomlinson, and nationally syndicated columnist Joseph Perkins.

This is precisely the sort of case that is of interest to the ACRU, because we are concerned about a misapplication of the Constitution's Establishment Clause that may suppress religious expression and symbolism, particularly as conducted by private individuals and organizations.

This brief is filed under Fed.R.App.P. 29 and is accompanied by a motion for leave to file because consent to file was denied by appellant on the grounds that he will not consent to any *amicus* brief supporting the appellee. This brief has been prepared and submitted in accordance with the policies of the ACRU Board of Directors.

CORPORATE DISCLOSURE STATEMENT

The ACRU is a nonprofit 501(c)(3) corporation with no parent corporation and no stock of any kind.

ARGUMENT

I. The Sale of Public Lands to Private Interests in this Case Cannot Possibly Constitute an Establishment of Religion

The establishments of religion that were familiar to the framers of the Constitution were highly coercive. Typically, the law required that citizens make regular payments to support the established church, profess allegiance to its doctrines, and attend its ceremonies. Those who resisted these requirements were often beaten, jailed, hanged or burned at the stake. In one instance, King Henry VIII had three Catholics who objected to his Anglican establishment burned at the stake along with three protestants who held that the Anglicans did not go far enough in rejecting Catholic practices. Will and Ariel Durant, The Story of Western Civilization 572 (1957).

Queen Elizabeth banned Catholic worship outright, and even executed many Catholic priests. *Id.* at 597. The Spanish Inquisition is reknowned for its torture and execution of dissenters from that country's established Catholic church. Even the Massachusetts Bay Colony in 1641 prescribed the death penalty for having or worshipping "any other god, but the lord god", for being a witch, or for blaspheming or cursing "the name of god, the father, Sonne, or Holie Ghost." The Body of Liberties of the Massachusetts Collonie in New England, in P. Kurland, ed. 5 The Founder's Constitution 47 (1987).

Of course, the Establishment Clause today prohibits more than these ancient coercive practices. Nevertheless, this historical perspective helps to illuminate how far off the track we have come in entertaining today the suggestion that a sale of public land to the highest bidder in a public auction somehow constitutes an establishment of religion.

The sale cannot constitute an establishment of religion under either the U.S. or California Constitutions. The sale was open to everyone, those of all faiths or no faith, at a public auction. The land was sold to the highest bidder, who voluntarily purchased the property with privately raised funds. The sale terms expressly did not require the buyer to maintain the cross or any other religious symbol. While the land was required to be used for a veterans memorial, as it has been apparently for most of the last 100 years, the buyer was free to erect a totally secular memorial on the site. Lastly, the transaction simply had the effect of removing the San Diego city government (the “City”) from any direct support or sponsorship of the cross, and the maintenance of that symbol on public property.

On these terms, the sale was more than neutral in regard to religion. It actually withdrew public support for a religious symbol. Clearly, such a transaction did not prefer one religion over another, or religion in general over no religion.

In fact, the transaction follows a precedent established by the framers themselves, during the Washington Administration. In 1796, at the behest of President Washington, Congress granted 4,000 acres around each of three Indian towns to “the society of the United States Brethren for Propagating the Gospel Among the Heathen.” R. Cord, Separation of Church and State, Historical Fact and Current Fiction 53 (1982). Clearly, the framers did not see this transaction as an establishment of religion violating the First Amendment which they had adopted less than 10 years before.

We must recognize as well that the establishment clauses in both the U.S. and California Constitutions were not meant to ban all religious expression or symbolism from the public square, or to suppress private religious expression or symbolism. The framers themselves routinely engaged in public acts of religious expression, even while serving in public office.

Indeed, on the very day after the House in the First Congress adopted the Establishment Clause, it adopted the following resolution:

That a joint committee of both Houses be directed to wait upon the President of the United States to request that he would recommend to the people of the United States a day of public thanksgiving and prayer, to be observed by acknowledging with grateful hearts, the many signal favors of Almighty God, especially by affording them an opportunity to establish a Constitution of government for their safety and happiness.

J.M. O’Neill, Religion and Education Under the Constitution 116 (1949).

Washington complied, issuing a proclamation which said in part:

Whereas it is the duty of all nations to acknowledge the providence of Almighty God, to obey his will, to be grateful for His benefits, and humbly to implore His protection and favor;

....

Now, therefore, I do recommend and assign Thursday, the 26th day of November next, to be devoted by the people of these States to the service of that great and glorious Being who is the beneficent author of all the good that was, that is, or that will be; that we may then all unite in rendering unto Him our sincere and humble thanks for His kind care and protection of the people of this country previous to their becoming a nation;....

And also that we may then unite in most humbly offering our prayers and supplications to the great Lord and Ruler of Nations, and beseech Him to pardon our national and other transgressions;....

George Washington, Proclamation: A National Thanksgiving, Oct. 3, 1789, in Kurland, *supra*, at 94.

Washington issued another such proclamation of thanksgiving, and this early tradition was followed by President John Adams, who issued two such proclamations, and President Madison, who issued four. R. Cord, *supra*, at 53. This tradition has continued throughout virtually every Presidency to this day. A. Stokes, Church and State in the United States 180-193 (1950); *Lynch v. Donnelly*, 465 U.S. 668, 675n.2 (1984).

George Washington, in his first inaugural address, also invoked God, “that Almighty Being”, and “the Great Author of every public and private good.” G. Washington, First Inaugural Address, in 1 Messages and Papers

of the Presidents 44 (J. Richardson ed. 1897). Washington's inaugural was concluded with the new President and both Houses of Congress attending a religious service conducted by the first Episcopal bishop of New York at St. Paul's Chapel in New York City, in accordance with a joint Congressional resolution providing for the service. A. Stokes and L. Pfeffer, Church and State in the United States 87 (rev. 1st ed. 1964).

The Declaration of Independence itself, penned by Jefferson, appealed “to the Supreme Judge of the world,” and to “the law of nature and of nature's God.” It also proclaimed that all individuals “are endowed by their creator with certain inalienable rights,” and relied on “the protection of Divine Providence.”

The constitutions of at least 45 of the 50 states, and the Commonwealth of Puerto Rico, similarly express gratitude to, or otherwise make reference to, a deity or Supreme Being. For example, the Constitution of the State of Rhode Island states,

We, the people of the State of Rhode Island...grateful to Almighty God for the civil and religious liberty which He hath so long permitted us to enjoy, and looking to Him for a blessing upon our endeavors to secure and to transmit the same, unimpaired, to succeeding generations, do ordain and establish this Constitution of government.

Moreover, in 1785, while Governor of Virginia, James Madison introduced and won passage of the Bill for Establishing Religious Freedom,

which had been authored by Thomas Jefferson. At the same time, Madison also introduced another Jefferson bill – A Bill for Approving Days of Public Fasting and Thanksgiving. Note, Jefferson and the Church-State Wall: A Historical Examination of the Man and the Metaphor, BYU Law Review 645, 657 (1978); R. Cord, *supra*, at 219-221; J. Whitehead, The Rights of Religious Persons in Public Education 41 (1991).

Plaintiff's argument in this case in fact threatens private religious expression and symbolism. Plaintiff insists repeatedly that the sight of the cross from the remaining public park land deprives all non-Christians of beneficial use of the park. Appellant's Opening Brief at 6, 20, 21, 23-24.

While appellant offers no clear evidence to prove that non-Christians are not using the park because of the cross, there is a far more troubling issue. For the same argument would apply to any private religious expression or symbolism visible to the public.

Suppose a large church across the street from the park erected a huge cross dominating the view from the park? Suppose a church across the street from a public school erected a large cross clearly visible from the school? Suppose every Sunday dozens of Christian proselytizers prowled through the park wearing large crosses on their shirts?

The principle advanced by plaintiff in this Court would require the prohibition of all this private religious expression and symbolism. For such expression and symbolism would deprive non-Christians of beneficial use of the park to the same extent as the current cross, or communicate a religious message seen by public school children. Indeed, by plaintiff's loose analysis, there would be government involvement in this expression merely through the zoning allowing the churches to be built, or by providing roads and sidewalks for the proselytizers to get to the park.

Of course, this would be wrong, because the Establishment Clause in either the Federal or California constitutions was not meant to be an instrument of suppression of private religious expression or symbolism.

II. Plaintiff's Objections to the Sale Do Not Turn It into an Establishment of Religion

Plaintiff complains that the sale of the land was subject to a use restriction requiring the property to be used only for maintenance of a veterans memorial. Appellant's Opening Brief at 9-13. This restriction was allegedly part of a plot to assure that the sale was made to the Mt. Soledad Memorial Association ("Association"), the private association dedicated to maintaining the cross.

Again, we are very far from any true notion of an establishment of religion. The City is perfectly free to designate a veterans memorial, or to sell land at public auction under condition that it be used by the winning private bidder as a veterans memorial. The sale conditions expressly stated that the winning bidder did not have to maintain the cross, and could adopt instead a wholly secular memorial. Any secular veterans group or patriot could have bid on the land and chosen such a secular memorial. Two non-religious groups in fact did bid.

Under these circumstances, such a use restriction cannot turn the sale into an establishment of religion. The sale on these terms was religiously neutral. In completing such a sale to the highest bidder, the city did not prefer one religion over another or religion in general.

Plaintiff cites *Hampton v. Jacksonville*, 304 F.2d 320 (5th Cir), *cert. denied* 371 U.S. 911 (1962) to the contrary. In that case, a city sold a public segregated golf course to a private entity with a deed restricting future use to “golf course purposes”. The court held that the use restriction perpetuated the city’s former unconstitutional conduct in operating the facility.

But in that case it was not the city’s ownership of the property per se that was the problem, but the city’s conduct in operating the property as a segregated golf course. In selling the property with a golf course use

restriction to a party it knew would continue segregation, it was perpetuating its own objectionable, unconstitutional conduct.

In the present case, it is precisely the city's ownership and support of the cross that is the problem, not the maintenance of the cross per se. By selling the property including the cross to a private owner, the city here has eliminated the constitutional problem in its entirety. Contrary to plaintiff's apparent view, a church or other private group maintaining a large cross on its property is not analogous to a segregated golf course, or a segregated school as in the other two cases plaintiff cites on this point. *Wright v. Brighton*, 441 F.2d 447 (5th Cir.) *cert. denied*, 404 U.S. 915 (1971); *United States v. Mississippi*, 499 F.2d 890 (5th Cir. 1974). Such segregation is invidious conduct raising the constitutional policy concerns. Maintaining a cross on private property, by contrast, is not invidious conduct, but, in fact, constitutionally protected activity.

Plaintiff also complains that the City stated it would qualify purchasers on the basis of their experience in maintaining a memorial. Appellant's Opening Brief at 13-14. This, the plaintiff argues, unnecessarily and unfairly favored the Association, which built and has maintained the cross since 1954.

But if the City is going to sell the property for use as a veterans memorial, then it surely can and should consider whether the buyer is capable of performing that role. This, too, is a religiously neutral qualification. In any event, however, this argument is moot, since the Association was the highest bidder, so the qualification does not appear to have made any difference.

Finally, the plaintiff complains that the City reserved in the bid request the right to accept or reject any bid for any reason in its complete discretion. Appellant's Opening Brief at 14-17. But as the Court below recognized, all bid requests sent out by the City contain this same language for liability reasons. Moreover, since again the Association was the highest bidder, this argument is moot in any event. It does not appear to have made any difference in the sale of the property.

III. The Sale of the Land in this Case Did Not Violate the Establishment Clause Under the Well-Established Lemon Test

The standard test for determining violations of the Establishment Clause was set out by the U.S. Supreme Court in *Lemon v. Kurtzman* 403 U.S. 602 (1973). Under that test, state action does not violate the Establishment Clause if (1) it has a secular legislative purpose (2) its

principle or primary effect neither advances nor inhibits religion and (3) it does not foster an excessive government entanglement with religion.¹

The City's purpose in selling the property was transparently to comply with the establishment clauses in both the U.S. and California constitutions. Plainly, it would not have sold the property if not for the prior litigation in this case determining that public ownership of the land displaying the cross was unconstitutional. In the course of this litigation, both the plaintiff and this Court have suggested that selling the property to a private owner would cure the constitutional violation. So the City did so. Taking such action to cure an establishment clause violation is a secular purpose satisfying the *Lemon* test.

Seen in this context, the plaintiff's suggestion that the City's purpose was to save the cross is a rhetorical mischaracterization. The cross is not the City's to save, particularly now after the sale. Through the sale, the City

¹ Plaintiff argues that because the sale to the Association "evinces an actual denominational preference, it is subject to strict scrutiny....The City, therefore, must demonstrate that the transfer was justified by a compelling state interest and was narrowly tailored to promote it. Appellant's Opening Brief at 21. But the entire argument above shows that the transaction here does not evince an actual denominational preference. As has been demonstrated over and over, the sale was neutral in regard to religion. The land was sold to the highest bidder at a public auction with no requirement that the buyer keep the cross. As a result, the transaction merely treated religious actors on the same terms as everyone else. Consequently, based on

simply removed itself from the issue. Rather than saving the cross, the sale terms permitted the buyer to eliminate the cross. It was the Association that saved the cross, not the City. The reason the City conducted the sale was plainly to comply with establishment clause requirements, and this, therefore, was its obvious purpose.

The effect of the sale is to remove the city from any sponsorship or direct involvement with the cross. This cannot be construed as a principal or primary effect of advancing, or inhibiting, religion. The fact that the property was sold to an Association that is committed to maintaining the cross does not make the primary effect to advance religion either. The establishment clause does not prevent governments from selling property at open auction to religious groups or individuals that plan to use the property for religious expression or symbolism. Such a sale is again neutral in regard to religion, as it treats religious actors on the same terms as everyone else.

Finally, directly contrary to plaintiff's suggestion, the sale transaction reduces rather than enhances government entanglement with religion. The sale again removes the City from any direct support or sponsorship of the cross. The plaintiff incredibly argues that City maintenance of the roads and trails that provide access to the cross is government entanglement with

the Supreme Court's precedents, the standard *Lemon* test determines the

religion. But all churchgoers use government roads, subways, buses, and bridges to go to church. That has never been considered government entanglement with religion, or an establishment of religion. That is again merely treating religious actors on the same terms as everyone else.

A visitor to Arlington National Cemetery will see row after row of crosses, as well as a number of stars of David, and perhaps other religious symbols. We urge the Court to reject the extremist arguments of plaintiff and his allies that would effectively hold this most sacred and cherished memorial to our nation's fallen heroes to be an unconstitutional establishment of religion. And if that public memorial is constitutional, then a city sale by public auction of land bearing a large cross to a private association who was the highest bidder is surely not an establishment clause violation either.

CONCLUSION

For all of the reasons stated above, this Court should dismiss the appeal and affirm the decision of the court below.

constitutionality of the transaction under the Establishment Clause.

Certificate of Compliance Pursuant to Fed.R.App.P. 32(a)(7)(C) and Circuit
Rule 32-1 in Case No. 00-55406

I certify that pursuant to Fed.R.App.P. 29(d) and Ninth Circuit Rule 32-1 the attached *amicus* is proportionally spaced, has a typeface of 14 points or more, and in the relevant sections contains 2,810 words. The brief is also less than 13 pages, in the relevant sections, and, in its entirety, complies with Fed.R.App.P. 32(a)(1)(5).

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Certificate of Service

I hereby certify that I have this 20th day of November, 2000, mailed 2 copies of the foregoing brief to James E. McElroy, 625 Broadway, Suite 1400, San Diego, CA 92101, Attorney for Appellant Philip K. Paulson, and 2 copies to Charles V. Berwanger, Higgs, Fletcher and Mack, 2600 First National Bank Building, 401 West "A" Street, San Diego, CA 92101-7913.

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