

FIRST AMENDMENT—FREEDOM OF RELIGION—ESTABLISHMENT CLAUSE—HOLIDAY DISPLAY ERECTED AND MAINTAINED BY A GOVERNMENTAL ENTITY THAT CONTAINS BOTH RELIGIOUS AND SECULAR SYMBOLS AND IS LOCATED ON PUBLIC PROPERTY DOES NOT VIOLATE THE ESTABLISHMENT CLAUSE WHEN THE INTENT IS TO CELEBRATE CULTURAL AND ETHNIC DIVERSITY—*American Civil Liberties Union of New Jersey v. Schundler*, 168 F.3d 92 (3d Cir. 1999).

The Third Circuit Court of Appeals recently held that a holiday display erected and maintained by the City of Jersey City, New Jersey, which contained a crèche, a menorah, plastic statues of Santa Clause and Frosty the Snowman, a Christmas tree, and a sign stating that the display was part of an ongoing effort to celebrate the ethnic and cultural diversity of the community, did not violate the Establishment Clause of the Constitution. *See American Civil Liberties Union of New Jersey v. Schundler*, 168 F.3d 92 (3d Cir. 1999). The court determined that the City's intent was not to promote a particular religion, but instead, was to celebrate a nationally recognized holiday. *See id.* The court found that the inclusion of traditional secular symbols alongside established religious symbols was sufficient to establish a secular purpose for the erection and maintenance of the holiday display. *See id.* With this decision, the appellate court reinforced the Supreme Court's findings in *Lynch v. Donnelly*, 465 U.S. 668 (1985) and *County of Allegheny v. ACLU, Greater Pittsburgh Chapter*, 492 U.S. 573 (1989), which together held that the primary test for determining the constitutionality of a holiday display is whether the total display communicates an approval or endorsement of religion. *See id.* at 97. In this respect, the majority of the Third Circuit has incorporated the combined holdings of these two decisions and has clarified and refined the standard for examining holiday displays alleged to violate the Establishment Clause.

For thirty years, until 1995, the City of Jersey City (hereinafter the "City") celebrated the winter holiday season by erecting and maintaining a display in front of City Hall. *See id.* at 95. This display traditionally included a crèche, or manger scene depicting the birth of Christ, and a menorah. *See id.* Also included in the display was a Christmas tree. *See id.* In 1994, the American Civil Liberties Union (hereinafter the "ACLU") sent a letter to City officials and requested that they stop putting up this display, which included religious symbols, on public property. *See id.* Instead of removing the display, the City responded by placing a sign next to the display stating that the intent of the display was to "celebrate the diverse cultural and ethnic heritages of its peoples." *Id.* The City maintained that the display was just one of several acts performed throughout the year as part of an ongoing celebration and recognition of the many ethnic groups located within the City. *See id.*

In December of 1994, the ACLU filed a complaint, in state court, against the City, alleging that the display violated both federal and state constitutions.

See id. The action was removed to the district court, which held that the City's display was in violation of the Establishment Clause of the federal Constitution as well as the parallel provision found in the state Constitution. *See id.* at 96. The district court issued a permanent injunction that prohibited the City from placing the original display or any similar display on any property owned, maintained, or controlled by the City. *See id.* The City stated that it would appeal the decision of the district court, but in the meantime, it erected a display that was similar to the original one but with some noticeable changes. *See id.* These changes included the addition of a plastic figure of Santa Claus and Frosty the Snowman as well as Kwanzaa symbols. *See id.*

The ACLU filed a motion in the district court to have the City held in contempt of the injunction order. *See id.* The district court dismissed the contempt motion and instead ruled that the addition of the secular symbols served to bring the display within the confines of the constitutional limitations. *See id.* The district court concluded that the additions and modifications "have sufficiently demystified the holy, . . . have sufficiently desanctified sacred symbols, and . . . have sufficiently deconsecrated the sacred to escape the confines of the injunctive order in this case." *Id.*

On appeal of the original district court decision, the appellate court affirmed the lower court's ruling that the original holiday display was unconstitutional. *See id.* The appellate court rejected the City's argument that the original display was part of an ongoing celebration of ethnic and cultural diversity. *See id.* As part of its reasoning, the appellate court stated that the endorsement of religion was a violation of the Establishment Clause of the Constitution, that an uninformed observer would not realize that the holiday display was just one aspect of the City's cultural celebrations, and that the celebration of religion was a "quintessential example of government entanglement with religion." *Id.* With regard to the modified display, which the district court had found constitutional, the panel noted that the district court's analysis of the modified display was incorrect and without precedential support. *See id.* The appellate court explained that the determination of whether the display was constitutionally valid should not have been based on whether other secular symbols served to "demystify" or "desanctify" the religious symbols present. *See id.* The appellate court, therefore, remanded the case to the district court to conduct a proper analysis on the modified display. *See id.* While remanding the question, however, the appellate court expressed its view, in dicta, over the skepticism it had concerning the constitutionality of the modified display. *See id.*

On remand, the district court granted summary judgment in favor of the ACLU, held that the modified display, similar to the original display, violated the Establishment Clause of the Constitution, and issued a permanent injunction against the city prohibiting them from erecting this or similar displays on public property. *See id.* at 97. The City filed an appeal to the Third Circuit Court of Appeals. *See id.* The appellate court, in turn, reversed. *See id.*

Writing for the majority, Judge Alito first addressed the denial of the City's motion for Rule 60(b)(5) relief. *See id.* To be entitled to such relief, the court reminded that a party was required to show that there has been a significant change in either the factual conditions upon which the judgment was based or the law. *See id.* The appellate court took notice of the City's argument that the Supreme Court's decision in *Agostini v. Felton*, 521 U.S. 203 (1997) undermined the basis for the original appellate court decision in this matter. *See id.* The appellate court recognized that the City had specifically asserted that the entanglement prong of the *Lemon* test was the motivating factor for the appellate court's decision to hold the first display unconstitutional. *See id.* The appellate court acknowledged the City's contention that the holding in *Agostini* merged the separate prongs of the Establishment Clause test announced in *Lemon v. Kurtzman*, 403 U.S. 602 (1971) to determine the constitutionality of governmental action involving religion. *See id.* The appellate court recounted that the traditional test required an examination of whether the governmental action being challenged had a secular motive, whether the effect of that action was to promote or inhibit religion, and whether the action created an excessive entanglement for the government in religion. *See id.* The appellate court then considered whether the ruling in *Agostini* effectively eliminated the entanglement prong of the test, thus changing the law, as the City argued, and entitling the City to Rule 60(b)(5) relief. *See id.*

The appellate court ruled against the City on the issue of Rule 60(b)(5) relief. *See id.* The appellate court interpreted the holding in *Agostini* as making the existence of governmental entanglement alone an insufficient basis for declaring something unconstitutional, but did not agree that entanglement consideration had been omitted entirely. *See id.* On the contrary, the appellate court opined that the question of entanglement was still very much a part of Establishment Clause analysis. *See id.* The appellate court agreed that the prior panel's extensive analysis of the entanglement issue was no longer warranted, but was careful to note that the original display was found unconstitutional chiefly because it "communicated an endorsement of Christianity and Judaism" and not merely because of excessive governmental entanglement. *Id.* at 98. Reasoning that the law had not significantly changed, the majority decided that Rule 60(b)(5) relief was not warranted. *See id.*

The appellate court next turned to the question of whether the modified display was constitutional. *See id.* First, the appellate court recited the prior rulings on the modified display issued by the district court, which had found the display constitutional, and the first appellate panel, which had found that the district court had made an error and remanded the question. *See id.* The appellate court noted that while remanding the question, the first appellate panel expressed, in dicta, serious doubts as to whether the modified display would pass constitutional muster. *See id.* It was this dicta, according to the majority, that served as the basis for the district court to later declare that the

modified display was also unconstitutional. *See id.* The majority explained that since the first panel's statements were merely dicta, and thus not binding, the district court was not bound by those statements and thus was not obligated to find the modified display unconstitutional. *See id.* Quite the contrary, the majority stated that the district court was specifically charged with making a determination based on a proper analysis of the question. *See id.* at 99. Finding that the first appellate panel intentionally did not rule on the modified display, the appellate majority determined that it was entirely within its power to decide the issue of the constitutionality of the modified display. *See id.*

First, the appellate court discussed two significant Supreme Court rulings, which similarly addressed the issue of holiday displays and governmental action. *See id.* Recounting the factual similarities of *Lynch v. Donnelly*, the appellate majority explained how the holiday display in that case was found constitutional. *See id.* at 99-100. The appellate court observed that the Supreme Court analyzed the display under the *Lemon* test and found that the display had a secular purpose, did not have a primary purpose of advancing or inhibiting religion, and did not create any excessive entanglement between church and state. *See id.* at 100. Further, the majority recognized that Justice O'Connor, in a concurring opinion, opined that the central issue was whether the state had endorsed a particular religion's beliefs and whether the state actor intended to send a religious message. *See id.* at 100-01 (citing *Lynch v. Donnelly*, 465 U.S. 668, 691 (1984) (O'Connor, J., concurring)).

Next, the appellate court examined the Supreme Court's holding in *County of Allegheny v. ACLU, Greater Pittsburgh Chapter*. *See id.* The Third Circuit remarked that the Court had found that in *Allegheny*, like *Lynch*, the holiday displays contained both religious symbols, including a crèche, and non-religious symbols. *See id.* The court of appeals noted that the Court, in an opinion by Justice Blackmun, struck down the first *Allegheny* display as violating the Establishment Clause. *See id.* The majority recounted how the Court had distinguished this first display from the one in *Lynch* by the types of symbols contained in each. *See id.* Quoting Justice Blackmun, the court concluded that "government may celebrate Christmas in some manner and form, but not in a way that endorses Christian doctrine." *Id.* at 102 (quoting *County of Allegheny v. ACLU*, 492 U.S. 573, 599 (1989)).

Continuing to discuss the *Allegheny* decision, the appellate court noted that the Supreme Court upheld the second display, which was similarly located on public property but contained non-religious and religious holiday symbols, as constitutional. *See id.* The appellate court concluded its discussion of *Allegheny* with the Supreme Court's conclusion that a reasonable person viewing the holiday display, which contained a crèche, a menorah, and various secular symbols, would more likely come away with the impression that the city was trying to celebrate the winter holiday season and promote cultural diversity, rather than trying to impose or encourage acceptance of religion beliefs. *See*

id. at 103.

Using these two cases as a backdrop, the Third Circuit analyzed whether the display under scrutiny in this case was constitutionally valid. *See id.* The court quickly determined that the location of the display in *Lynch* did not appear crucial to the final outcome. *See id.* at 104. Next, the court determined that there were no significant differences, for purposes of constitutional analysis, between the display in *Lynch* and the display in this case. *See id.* Addressing the dissent's contention that the actions of the City in this case must be taken into account, the majority concluded that the addition of the secular symbols was merely "a ploy designed to permit continued display of the religious symbols." *Id.* at 105. The court flatly rejected this argument stating that a prior violation of the Establishment Clause, followed by an attempt to correct that violation, was not sufficient to prove the existence of bad faith on the part of a state actor. *See id.*

Finally, the Third Circuit majority compared the display at issue in this case with the display upheld in *Allegheny*. *See id.* at 106. The court commented on how both displays contained both religious and non-religious symbols, while discounting the suggestion that a menorah, found in the *Allegheny* display, was less likely to create Establishment Clause concerns than a crèche. *See id.* Turning to the location of the displays, the majority found significant the fact that the constitutional display in *Allegheny* was located on public property. *See id.* The majority inferred that the mere location of a display, which contains religious symbols, on public property does not, by itself, create a basis for declaring that display unconstitutional. *See id.* The appellate court accepted the City's argument that the intent was to continually celebrate the ethnic and cultural diversity of its citizens, and therefore declared that the history 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 106-07 (quoting *Allegheny County*, 492 U.S. at 630 (O'Connor, J., concurring)).

Before concluding, the appellate court found it necessary to discuss some of the dissent's points as well as the dicta from the prior appellate panel. *See id.* The majority did not agree with the dissent's attempt to distinguish the display in this case from the display in *Lynch* based on the relative size of the religious symbols versus the size of the non-religious symbols. *See id.* Additionally, the majority reemphasized that, contrary to the dissent's argument, the location of the display on public, as opposed to private, property does not by itself create a constitutional controversy. *See id.* Similarly, the majority stated that the mere fact that the state actor used public funds to finance the construction and maintenance of the display by itself does not raise constitutional issues. *See id.* Next, the majority denounced the dissent's implication that a display that contained both a menorah and a crèche could not be constitutionally valid because the menorah's religious significance is emphasized. *See id.* The majority in-

stead declared that both symbols, under a combination of the holdings from *Lynch* and *Allegheny*, were equal and that the display of either or both was not per se unconstitutional. *See id.* at 107-08.

Finally, the appellate court expressed its disagreement with the dicta set forth in the prior appellate panel's holding. *See id.* at 108. The court's chief criticism was the panel's suggestion that the display of the crèche, but not the menorah, was not compatible with the Establishment Clause. *See id.* Again pointing to the holdings in *Lynch* and *Allegheny*, the court submitted that both symbols were equivalent religious symbols, thus both were constitutionally valid. *See id.* Further, the court disagreed with the notion that the display in *Lynch* was upheld because there was no indication of government involvement. *See id.* The court noted that it was likely that most casual observers would have been unaware that the park was privately owned. *See id.* Accordingly, the appellate court remanded the case back to the district court with instructions to grant summary judgement to the City. *See id.* at 109.

The dissent, written by Circuit Judge Nygaard, delineated several reasons for opposing the majority decision. *See id.* at 109 (Nygaard, J., dissenting). First, the dissent was of the opinion that the real issue in this case was whether or not the addition of the secular symbols to the original display was sufficient to change the context of the message being conveyed by the display. *See id.* Secondly, the dissent also examined the applicable case law proffered by the majority and came to the conclusion that the display was a violation of the Establishment Clause. *See id.*

Upon further review of the Supreme Court's holding in *Lynch*, the dissent believed that several aspects of the display in this case were distinguishable. *See id.* at 109-10 (Nygaard, J., dissenting). First, the dissent stressed that the display in *Lynch* contained a "superabundance" of secular symbols which clearly diverted, or at least significantly reduced, the focus on the religious symbols. *See id.* at 110 (Nygaard, J., dissenting). The dissent theorized that in *Lynch*, the sheer number and size of the secular symbols outweighed any perception of an endorsement of religion resulting from the inclusion of the crèche. *See id.* In contrast, the dissent judged the same number and size of the secular symbols as compared to the religious symbols in the current display and concluded that an endorsement of religion was clearly in evidence. *See id.*

Turning next to the holding in *Allegheny*, the dissent was concerned that the appellate majority in this case too quickly and too conveniently ignored the substance, as well as the location, of the display as compared to the display upheld in *Allegheny*. *See id.* at 111 (Nygaard, J., dissenting). The dissent declared that the mere placement of religious symbols on public property, along with the funding and maintenance of that display, by a state actor should at least be recognized as a potential conflict between the constitutionally mandated separation of church and state. *See id.* Additionally, the dissent did not find that the display was part of an ongoing celebration of ethnic and cultural diver-

sity to be persuasive. *See id.* at 112 (Nygaard, J., dissenting). Finding the “casual observer” argument unpersuasive, the dissent argued that an observer would conclude the City, by placing a crèche and menorah on public property, was undoubtedly celebrating Christmas and Hanukkah (two religious holidays), would reasonably be aware that no other displays had been erected on public property to celebrate other religions, would realize that this display lasted longer than other displays, and would also likely remember that the City had been erecting such a display for over thirty years. *See id.* at 112-13 (Nygaard, J., dissenting).

Next, the dissent theorized that the “casual observer” would also be likely or inclined to believe that the addition of the secular symbols this time would only be for the purpose of shielding the display from constitutional scrutiny. *See id.* at 113 (Nygaard, J., dissenting). Finally, the dissent commented on the lack of a definite standard by which to judge the constitutionality of such displays which are a potential violation of the Establishment Clause. *See id.* Commenting on the splintered majority decision in *Allegheny*, the dissent surmised that “[u]ntil the Supreme Court decides a case in which a majority opinion of the court utilizes a clear test to analyze a religious display, [the appellate courts] are left with fact-specific inquiries that focus on the size, shape, and inferential message delivered by the displays with religious elements” *Id.* The dissent lamented over Justice Kennedy’s fear in *Allegheny*, that such cases would continue to be decided by an excruciating examination of minor facts and the unbounded exercise of judicial intuition. *See id.*

Finally, the dissent expressed its anger and concern that the appellate majority had effectively overruled a prior decision on the same matter, with the same case. *See id.* The dissent voiced its concern that the majority’s reversal of a prior decision on the merits was a dangerous blow to the “consistency of the law and the legitimacy of [appellate court] jurisprudence.” *Id.* at 114 (Nygaard, J., dissenting). The dissent defended the decision of the district court judge on remand, whose decision was made based on his interpretations of the statements made by the appellate panel in an area of law filled with conjecture and uncertainty. *See id.*

In closing, the dissent summarized its objections by again stating that the essence of the issue in this case was whether the addition of secular symbols to a display that was found unconstitutional for conveying a religious message, was sufficient to bring the display within the boundaries set by the Establishment Clause. *See id.* The dissent concluded that this addition was insufficient to overcome the religious message being conveyed by the display. *See id.*

ANALYSIS

It is apparent, after reading both the majority and dissenting opinions, that the critical point of contention in this case was how and what to examine in or-

der to determine the constitutionality of a holiday display containing religious symbols and placed on public property. More specifically, how should a court determine whether a message is being conveyed? And if a message is being conveyed, what aspects of a display should a court examine to decide if that message is unconstitutional? The dissent accurately noted that the Supreme Court has failed to reach a clear cut majority decision on this matter. *See id.* at 113 (Nygaard, J., dissenting). However, after a careful reading of the decisions in *Lynch* and *Allegheny*, the majority's rationale seems to follow more closely with the spirit and intent of both holdings.

The majority correctly pointed out, and the dissent agreed, that the chief import of both the *Lynch* and *Allegheny* decisions is that the subject of court scrutiny should be the overall potential message being conveyed by the challenged display. Taking this assumption as correct, then it is the majority in this case who properly analyzed the totality of the display, not stumbling on location, composition, or cost. *See id.* at 105-06. By contrast, it was the dissent who became bogged down in the "minutiae" of measuring the size of the religious versus the non-religious symbols, comparing the quantities of each, and worrying about how much the City expended on the erection and maintenance of the display, even though the dissent recounted Justice Kennedy's warning about such things obscuring a true analysis. *See id.* at 113 (Nygaard, J., dissenting).

The majority reached its decision based on a complete examination of all aspects of the overall display and the potential message, if any, being conveyed. The majority sent a clear message that implies that the government should be allowed to celebrate the holidays traditionally celebrated by its citizens and should be allowed to do so in a comparable manner. So long as the traditional barriers created by the Constitution and the courts to prevent an excessive entanglement of church and state are maintained, there is no harm done when the government acknowledges, in some small way, an event which the vast majority of the world believes really happened.

Leonard Fondetto, III