SUPREME COURT: CHURCH-STATE CASES, OCTOBER 1983 TERM

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ISSUE DEFINITION

The Supreme Court, in its 1983-84 term, has to date agreed to review one case that involves issues arising under either the establishment or the free exercise of religion clause of the First Amendment. The case concerns the constitutionality of a municipality sponsoring and paying for a Christmas display in a downtown park which included a nativity scene as a central part.

In addition, the Court has denied review in twelve cases raising establishment or free exercise issues and has made no decision whether to review seven other cases raising such issues.

BACKGROUND

PENDING CASES GRANTED REVIEW

Lynch v. Donnelly, 525 F.Supp. 1150 (D.R.I. 1981), aff'd, 691 F.2d 1029 (1st Cir. 1982), cert. gr., 103 S.Ct. 1766 (4-18-83) (No. 82-1256): At issue in this case is whether a city's ownership and erection of a nativity scene as part of its annual outdoor Christmas display violates the establishment of religion clause of the First Amendment. Each year for 40 years the city of Pawtucket, Rhode Island, constructed a Christmas display in a downtown park. Included in the display were a "talking" wishing well, a Santa's House (with a live Santa), a small village, a grouping of caroler/musician figures, and a life-sized nativity scene. The nativity scene was purchased with city money and was maintained and erected each year by city workers.

Upon suit both a Federal district court and, on appeal, the United States Court of Appeals for the First Circuit held the inclusion of the nativity scene to be unconstitutional. Analyzing the matter under the tripartite test of purpose, primary effect, and entanglement, the trial court found the evidence not to support the city's claims that Christmas had become a wholly secular holiday and that the creche had lost its religious significance. The court rejected as well the city's arguments that inclusion of the creche simply served the secular purpose of drawing shoppers to the downtown area or, alternatively, that it was merely an example of how Americans celebrated Christmas. "Christmas," the court found, "remains a major spiritual feast day for most sects of Christians" and the creche retains a "fundamentally religious significance." While government may constitutionally involve itself with activities having a religious aspect under certain circumstances, the court found, the purpose of including a nativity scene in the Christmas display in this case was "to express the City's approval and endorsement of the religious message that the symbol conveys." Similarly, the court held, the primary effect of including the nativity scene was to give the "appearance of an official imprimatur on the religious message of the creche and on Christian beliefs, thereby aiding the Christian religion and violating the City's constitutional duty to maintain a neutral position vis a vis Christians, non-Christians, and non-believers." On the entanglement issue, the court found no administrative entanglement to be created by the city's inclusion of the creche, but it did find that political division along religious lines had been precipitated: "...the atmosphere has been a horrifying one of anger, hostility, name calling, and political maneuvering, all prompted by the fact that someone had questioned the City's ownership and

display of a religious symbol." The court noted that such political division was not itself sufficient to invalidate the city's action, but said it was a "warning signal" of a possible establishment clause violation. For all these reasons, the court held the city's sponsorship of the nativity scene to be unconstitutional.

The appellate court affirmed, 2-1, but used a different framework of analysis. Instead of the tripartite test used by the trial court, the appellate court employed a strict scrutiny analysis, meaning that the city's sponsorship of the nativity scene could pass constitutional muster only if shown to serve a compelling governmental interest and if "closely fitted" to furthering that interest. The appellate court said the latter test was mandated by the Supreme Court's decision in Larson v. Valente, 456 U.S. 228 (1982), for use in cases such as this one which involved governmental acts that discriminated among religions. On the constitutional issue, the appellate court found the trial court's findings regarding the purpose of including the creche conclusive: "If one is unable to demonstrate any legitimate purpose or interest, it is hardly necessary to inquire whether a compelling purpose or interest can be shown." The dissenting judge argued that Christmas and all of its symbols, including the creche, have become part of our national life and culture and that including the creche as part of a display of items associated with Christmas does nothing more than announce that the holiday is at hand.

After granting the United States permission to argue the case on the side of the municipality, the Court heard oral argument on Oct. 4, 1983.

PENDING CASES ON WHICH DECISION TO REVIEW HAS NOT YET BEEN MADE

Board of School Commissioners of Mobile County, Alabama v. Jaffree, 705 F.2d 1526 (11th Cir.), pet. for cert. filed, 52 U.S.L.W. 3441 (11-14-83): Lower court held unconstitutional teachers' practices, which had been condoned by school board, of leading students in prayer during school day.

Clifford v. Grutka, 445 N.E.2d 1015 (Ind. Ct. App., 3d Dist.), pet. for cert. filed, 52 U.S.L.W. 3399 (11-1-83) (No. 83-736): Appellate court held that First Amendment did not preclude trial court from adjudicating bishop's claim that trust established for the perpetual care of the parish cemetery should be dissolved and the funds turned over to the parish.

Duro v. District Attorney, Second Judicial District of North Carolina, 712 F.2d 96 (4th Cir.), pet. for cert. filed, 52 U.S.L.W. 3387 (10-12-83) (No. 83-719): Lower court held that free exercise clause did not bar the state from prosecuting a Pentecostal parent who refused to send his children to public or private school for violating compulsory education statute, notwithstanding that refusal was based on parent's personal religious beliefs.

Hopi Indian Tribe v. Block, 708 F.2d 875 (D.C. Cir.), pet. for cert. filed, 52 U.S.L.W. 3310 (10-7-83) (No. 83-589): Lower court held that Indians' free exercise of religion rights would not be disrupted by recreational development of national forest lands that Indians used for certain religious practices.

Navajo Medicinemen's Association v. Block, 708 F.2d 735 (D.C. Cir.), pet. for cert. filed, 52 U.S.L.W. 3344 (10-21-83) (No. 83-669): Lower court held that Indians' free exercise rights were not violated by Forest Service's

authorization of operation and expansion of ski resort at site sacred to Navajo and Hopi Indians.

Scott v. Rosenberg, 702 F.2d 1263 (9th Cir.), pet. for cert. filed, 52 U.S.L.W. 3190 and 3294 (9-1-83 and 10-11-83) (Nos. 83-373 and 83-570): Lower court held public interest in prevention of fraud to outweigh minister's free exercise claims in FCC investigation of church's TV and radio stations for fraudulent solicitations of funds and dismissed his suit for damages and injunctive relief.

Wallace v. Jaffree, 705 F.2d 1526 (11th Cir.), pet. for cert. filed, 52 U.S.L.W. 3441 (11-14-83)(No. 83-812): Lower court held unconstitutional as establishments of religion two State statutes, one of which prescribed a particular prayer to be recited by teachers and students at the beginning of each school day, the second of which prescribed a moment of silence for purposes of "meditation or voluntary prayer." The Justice Department has filed an amicus brief in partial support of the petition for certiorari asking that the Court review the constitutionality of the silent meditation statute.

CASES DENIED REVIEW

Avitzur v. Avitzur, 58 N.Y.S. 2d 108 (Ct. App.) cert. den., 52 U.S.L.W. 3262 (10-3-83) (No. 82-1854): State court held the First Amendment not to bar trial court from adjudicating case in which the plaintiff sought a court order compelling her former spouse to appear before a Jewish ecclesiastical court so that she could obtain a religious divorce (a "Get").

Chevren v. Bechtel, Inc., 455 N.Y.S. 2d 1015 (S.Ct. App. Div.), cert. den., 52 U.S.W. 3263 (10-3-83) (No. 82-2141): State court held Jewish woman's employment discrimination suit alleging that she had been discharged for disclosing employer's cooperation with Arab boycott of firms with Jewish employees to be time-barred when suit was not brought until four years after dismissal.

Church of Christ of Collinsville, Okla. v. Graham, Civil No. Ct-81-729 (Okla. Dist. Ct., Oct. 15, 1983), cert. den. 52 U.S.L.W. 3262 (10-3-83) (No. 82-1950): State court held the First Amendment not to bar it from adjudicating former member's suit against church for invasion of privacy in church disciplinary proceeding.

City of Evanston v. Lubavitch Chabad House of Illinois, Inc., 112 Ill. App. 3d 233 (1st Dist. 1982), cert. den., 52 U.S.L.W. 3415 (11-28-83) (No. 83-325): State court held municipality's denial of special use permit to Jewish organization to use house in residential district for religious purposes not to violate free exercise clause.

Crow v. Bullet, Civil No. 82-1852 (8th Cir. May 10, 1983), cert. den., 52 U.S.L.W. 3370 (11-7-83) (No. 83-434): Lower court held state regulation of Indian religious ceremonies and construction of public recreational facilities and roads in state park claimed to be traditional Indian ceremonial site not to violate Indians' free exercise rights.

Frame v. South Bend Community School Corporation, Civil No. 82-1383 (7th Cir., Nov. 30, 1982), cert. den., 52 U.S.L.W. 3262 (10-3-83) No. 82-1713): Lower court held that school district's failure to provide free bus transportation to parochial school students did not violate either the free

exercise or equal protection clauses but that trial court should have abstained in favor of state court proceedings on interpretation of state law issues.

International Society for Krishna Consciousness v. Marsland, 657 P. 2d 1035 (Haw.), appeal dism'd for want of a substantial federal question, 52 U.S.L.W. 3260 (10-3-83) (No. 82-2070): State court upheld zoning standard limiting use of structure as residence to no more than five unrelated persons despite claim that structure also was used as a church.

Lakewood, Ohio, Congregation of Jehovah's Witnesses, Inc. v. City of Lakewood, Ohio, 699 F.2d 303 (6th Cir. 1982), cert. den., 52 U.S.L.W. 3262 (10-3-83) (No. 82-1769): Lower court held that city's zoning ordinance excluding churches from single-family residential districts which comprised 90% of the city did not violate the church's free exercise rights.

Larsen v. Kirkham, Civil No. 80-2152 (10th Cir, Dec. 20, 1982), cert. den., 52 U.S.L.W. 3265 (10-3-83) (No. 83-92): Lower court found no establishment clause violation in exemption of religious educational institutions from state and federal law prohibitions of religious discrimination in employment.

Members of the Jamestown School Committee v. Schmidt, 699 F.2d 1 (1st Cir. 1983), cert. den., 52 U.S.L.W. 3265 (10-3-83) (No. 83-158): Lower court upheld Rhode Island statute subsidizing bus transportation for both public and private school students up to 15 miles beyond public school district boundaries so long as distance and cost of transportation provided to public and private school students remained "roughly proportional."

New Mexico v. Burciaga, Civil No. 83-1414 (10th Cir. Apr. 8, 1983) (order denying writ of prohibition), cert. den., 52 U.S.L.W. 3386 (11-14-83) (No. 83-9): Lower court denied state a writ of prohibition against federal district court decree in Duffy v. Las Cruces Public Schools, 557 F.Supp. 1013 (D. N.Mex.), appeal pending sub nom., Walsh v. Duffy, No. 83- (10th Cir., Mar. 14, 1983), which held unconstitutional a state statute permitting local school boards to have a period of silence at the beginning of each school day for "contemplation, meditation, or prayer."

Solon Baptist Temple, Inc. v. City of Solon, Civ. No. 44425 (Ohio Ct. App., 8th Dist.), cert. den., 52 U.S.L.W. 3265 (10-3-83) (No. 83-44): State court dismissed church's claim that city officials violated the free exercise clause by disapproving the church's building plans and ordering the church to correct numerous building and fire code violations.