MENORAH IN CITY PARK: UNCONSTITUTIONAL EXCEPTION TO BAN ON PRIVATE PARK DISPLAYS

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As illustrated by the case described herein, *American Jewish Congress v. City of Beverly Hills*, it is unconstitutional for government to provide preferential treatment to a particular sectarian religious group in allowing private displays in parks. While a city may constitutionally ban all unattended private displays in its parks, it cannot grant an exception to one group on an *ad hoc* case by case basis. On the contrary, if a city wishes to permit some private unattended displays in its parks, it must do so pursuant to valid time, place, and manner regulations. Accordingly, a city may not have a general policy banning unattended private displays, and then choose one religious group and permit it to erect a display while denying all other groups permission to erect displays. In determining the constitutionality of park permits, the federal court will require objective, content neutral standards which guide the licensing official and eliminate the potential for censorship of protected speech.

ESTABLISHMENT CLAUSE VIOLATION?

In the case of *American Jewish Congress v. City of Beverly Hills*, 90 F.3d 379 (9th Cir. 1996), plaintiffs challenged the constitutionality of the defendant City's permitting the erection of a 27-foot menorah in a public park near City Hall during the holiday season. The facts of the case were as follows:

> Since 1986, Beverly Hills has allowed Chabad of California, Inc. (Chabad) to erect a menorah in Beverly Gardens Park for approximately two weeks each year during the Chanukah season. The menorah is 27 feet tall and 24 feet wide, and weighs 5,500 pounds. It is bolted to a permanent, concrete foundation that the City allowed Chabad to install in the park; Chabad covers the foundation with sod during the rest of the year. Each branch of the menorah is topped with a small electric light lit at night in accord with Jewish custom. The menorah was designed by Yaacov Agam, a well-known artist. The City does not fund the menorah or Chabad.
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> Beverly Gardens Park is a twenty-block-long public park that cuts through the City on an east-west axis. The park is bordered on its south side by Santa Monica Boulevard, a four-lane arterial. The menorah sits on a block of the park bordered on the east by Crescent Drive and on the west by Canon Drive. Directly across Santa Monica Boulevard from the menorah is a building that formerly housed the U.S. Post Office and

> has been vacant since the early stages of this litigation. City Hall is one block up and one block over from the menorah, about 450 feet distant. The Beverly Hills Civic Center is located on the side of City Hall facing away from the menorah.
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> The City traditionally puts up a holiday display of its own, composed of two 35-foot live spruce trees strung with colored lights, and a 60-foot gold-foil "Season's Greetings" sign. This display is located one block west of the menorah, two blocks away from City Hall.
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> During Chanukah, Chabad organizes ceremonies centered around the menorah. Chabad terms these ceremonies "parties," but they involve the ritual lighting of the electric "candles" and the speaking and singing of traditional Jewish prayers. Members of the City Council (which is also the body that approves the menorah's permit) have participated in these ceremonies each year, and some of them have served as "master of ceremonies." Local celebrities, of which Beverly Hills has no shortage, also attend. The current mayor was present on at least one occasion. In contrast, the former mayor of Beverly Hills was strongly opposed to the ceremonies, which he called "distinctly religious."
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> The City has a general policy of not permitting its citizens to erect large unattended objects on public property. It has made an exception for Chabad's display of a menorah during Chanukah. The City has a "Special Events Permit" application procedure and a form agreement titled "Holiday Installation of Religious Objects on City Property." Chabad has successfully applied for a special events permit and has signed a "Holiday Installation" agreement each year. At least since 1986, the City has not granted a permit for a large unattended object to any individual or organization other than Chabad. In 1989, the City denied two permit requests from individuals: one for a "winter solstice" display, and one for a Latin cross. The winter solstice display application began, "I note that once again the City of Beverly Hills will permit the display of a Jewish menorah, in observation of Chanukah. I hereby apply for equal time and space . . ." The City claimed that both applications were simply protests against the menorah, and that it denied them because neither provided sufficient detail concerning their proposed display.

The American Jewish Congress alleged that "the City's policy and practice of permitting unattended displays of large objects on public property, pursuant to which Chabad was granted permission to erect the menorah, is unconstitutional." Specifically, the American Jewish Congress alleged that "the City's action in permitting Chabad's menorah violated the Establishment Clause of the United States Constitution."

The district court granted summary judgment in favor of the City. In so doing, the federal district court required “the City either to place the menorah in closer proximity to a Christmas tree or to put up a Christmas tree near the menorah.” In addition, the district court prohibited "any religious ceremonies, including, but not limited to, prayers, blessings, singing or rituals, of any type or nature at the site of the display." Accordingly, the City put Christmas decorations and lights on an 80-foot spruce tree standing 82 feet from the menorah. In addition, pursuant to the district court’s instructions, Chabad erected a sign next to the menorah which read as follows:

> THIS MENORAH IS SPONSORED BY CHABAD OF CALIFORNIA. IT IS NOT SPONSORED OR FUNDED BY THE CITY OF BEVERLY HILLS.

The American Jewish Congress appealed. On appeal, the American Jewish Congress claimed that “the City's permitting scheme violated its right to be free from governmental establishment of religion.” Specifically, the American Jewish Congress contended that “the primary effect of the City's permitting practice and policy is not to grant equal access to all speakers, but rather to endorse one particular religious speaker.” Accordingly, the American Jewish Congress contended that “the City permitted Chabad to erect its menorah pursuant to such an unconstitutional policy.”

STANDARDLESS DISCRETION TO IGNORE POLICY?

The issue before the federal appeals court was, therefore, whether “the City's action in permitting Chabad's menorah violates the Establishment Clause of the United States Constitution.” Specifically, the American Jewish Congress contended on appeal that “the City forbids the erection of large unattended displays on public property and then vests standardless discretion in its officials to grant exceptions to the rule, enabling the City to favor certain religious expression over other expression.”

As described by the federal appeals court, “[t]he First Amendment to the United States Constitution, applicable to the states through the Fourteenth Amendment, provides that "Congress shall make no law respecting an establishment of religion":

> The United States Supreme Court has interpreted the Establishment Clause to mean that government may not promote or affiliate itself with any religious doctrine or organization, may not discriminate among persons on the basis of their religious beliefs and practices, may not delegate a governmental power to a religious institution, and may not involve itself too deeply in such an institution's affairs. At core is the prohibition against governmental endorsement of religion, precluding government from conveying or attempting to convey a message that religion or a particular religious belief is favored or

> preferred...
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> It is axiomatic that the Establishment Clause bars the government from giving sectarian religious groups preferential access to public property... Of course, giving sectarian religious speech preferential access to a forum close to the seat of government (or anywhere else for that matter) would violate the Establishment Clause (as well as the Free Speech Clause, since it would involve content discrimination)..

Applying these principles to the facts of the case, the federal appeals court found that the City had given a sectarian religious group (Chabad) preferential access to public property in violation of the Establishment Clause. Moreover, the federal appeals court found Beverly Hills' permitting process had “no clear standards for allowing private unattended displays in its parks and thus allows for arbitrary application”:

> The City bans private unattended displays but permits its officials to make exceptions in their discretion. There are no guidelines, written or otherwise, as to when an exception may be made. Applicants are not informed of what requirements they must meet in order to erect a display. When asked whether there was a uniform procedure for approving requests for unattended displays or whether it was done on a case by case basis, the Director of the City's Public Services Department, responded "case by case. Usually an application form is used, but there are exceptions. There is no uniform method.
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> When asked whether there was a specific time frame in which the City required applicants for use of public park land to submit an application, the Director responded, "I don't know of a time frame that has been established," although subsequently the City instituted a one-month requirement. Nor is there a time frame within which the City must respond to a permit application.
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> Nor is it clear where the decision-making authority is vested. The winter solstice application was denied by the City Attorney, whereas Chabad's and the Latin cross applications were decided by "consensus" of the City Council members. A councilmember gave a presentation describing the relative merits of the applications and the Council simply voted whether to allow each display.

Having determined “the City's permitting policy allows for arbitrary application,” the federal appeals court concluded that this policy was “not a valid time, place, and manner regulation.”

> A government regulation that allows arbitrary application is inherently inconsistent with a

> valid time, place, and manner regulation because such discretion has the potential for becoming a means of suppressing a particular point of view. In the Establishment Clause context, such a regulation also has the potential for impermissibly favoring a particular religious viewpoint.

In particular, the appeals court noted that “[t]he *ad hoc* and structureless nature of the City's permitting process leaves open the possibility of improper discrimination by the City”:

> [A] law or policy permitting communication in a certain manner for some but not for others raises the specter of content and viewpoint censorship. This danger is at its zenith when the determination of who may speak and who may not is left to the unbridled discretion of a government official. . . . [W]e have often and uniformly held that such statutes or policies impose censorship on the public or the press, and hence are unconstitutional, because without standards governing the exercise of discretion, a government official may decide who may speak and who may not based upon the content of the speech or viewpoint of the speaker.

Applying these principles to the circumstances of this case, the federal appeals court noted that “[t]he City in fact acknowledges that a primary reason the Latin cross application was denied was the Cross's religious nature.”

> The City Attorney testified that the City was concerned that allowing a cross would violate the Establishment Clause whereas allowing a menorah would not. At the City Council session, Councilmember Tanenbaum gave a presentation addressing Chabad and the Latin cross applicant's respective requests to erect displays, listing "several cases where the establishment clause was not violated by the placement of a menorah and not[ing] where the Supreme Court stated that the cross is a religious symbol."
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> The Council did not discuss the safety or feasibility of the proposed displays but only their religious content. "It was the consensus of Council to uphold the law as interpreted by the state and the federal Supreme Court to approve the placement of the menorah, but to turn down the application for the placement of the cross." Such a content-based distinction is impermissible.

SELECTIVE ENFORCEMENT FOR PROTEST SPEECH?

On appeal, the City had further argued that their denying “both the Latin Cross and winter solstice applications” were appropriate because these applications were "simply a form of citizen protest against the submission of the Chabad application for a permit to erect the menorah during the 1989 season."

The federal appeals court rejected this argument. “Even if true,” the federal appeals court found the City’s reasoning was “an impermissible basis for rejecting the applications.” As noted by the federal appeals court: “Protest speech is fully protected by the First Amendment.”

> Although the City's actions in ruling on Chabad's, the Latin cross, and the winter solstice applications provide strong evidence of favoritism toward Chabad, we need not determine the City's actual motivation in ruling on the applications or the extent to which its determinations were based on impermissible factors. At the very least, the record makes clear that the City's current *ad hoc* permitting system is standardless, thereby lending itself to abuse, and that appropriate standards must be developed if the City wishes to allow Chabad, or anyone else, to erect private unattended displays in its parks.

According to the appeals court, “[s]tandards provide the guideposts that check the licensor and allow courts quickly and easily to determine whether the licensor is discriminating against disfavored speech.”

> Without these guideposts, *post hoc* rationalizations by the licensing official and the use of shifting or illegitimate criteria are far too easy, making it difficult for courts to determine in any particular case whether the licensor is permitting favorable, and suppressing unfavorable, expression."

Applying this reasoning to the facts of the case, the federal appeals court found the City had “no standards by which it measures requests to allow structures to be erected in its parks by private individuals or groups, raising the spectre of selective enforcement on the basis of the content of speech.”

> Here, for example, the City contends that the winter solstice and Latin cross applications were denied because they were insufficiently specific. Since the City does not tell applicants what details they must specify, however, it can always justify an application's refusal by listing a missing detail, making it difficult for the court to determine whether the City is in fact favoring certain speech...
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> [The City] forbids the erection of large, unattended displays on public property and then vests unfettered discretion in its officials to grant exceptions to the rule. Permitting the erection of Chabad's menorah pursuant to this policy violates the Establishment Clause of the state and federal Constitutions.

The federal appeals court, therefore, reversed the district court's grant of summary judgment in favor of the City and remanded (i..e, sent back) this case for entry of judgment in favor of the American Jewish Congress. On remand, the district court would issue an injunction prohibiting the City from allowing

Chabad to erect their menorah in the public park in violation of the Establishment Clause.