

# OFFICIAL TRANSCRIPT PROCEEDINGS BEFORE

THE SUPREME COURT OF THE UNITED STATES

**DKT/CASE NO.** 82-1256

**TITLE** DENNIS LYNCH, ETC., ET AL., Petitioners v.  
DANIEL DONNELLY, ET AL.

**PLACE** Washington, D. C.

**DATE** October 4, 1983

**PAGES** 1 thru 49



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1                   IN THE SUPREME COURT OF THE UNITED STATES  
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3 DENNIS LYNCH, ETC., ET AL.,                   :  
4                   Petitioners,                   :  
5                   v.                   :     No. 82-1256  
6 DANIEL DONNELLY, ET AL.                   :  
7 - - - - -x  
8                   Washington, D.C.  
9                   Tuesday, October 4, 1983  
10                  The above-entitled matter came on for oral  
11 argument before the Supreme Court of the United States  
12 at 10:03 o'clock a.m.  
13 APPEARANCES:  
14 WILLIAM F. MC MAHON, ESQ., Providence, Rhode Island; on  
15     behalf of the Petitioners.  
16 REX E. LEE, ESQ., Solicitor General of the United States,  
17     Department of Justice, Washington, D.C.; on behalf of  
18     the United States as amicus curiae.  
19 AMATO A. DE LUCA, ESQ., Warwick, Rhode Island; on behalf  
20     of the Respondents.  
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1                                P R O C E E D I N G S

2                        CHIEF JUSTICE BURGER: We will hear arguments  
3 this morning in Dennis Lynch against Donnelly.

4                        Mr. McMahon, you may proceed whenever you are  
5 ready.

6                        ORAL ARGUMENT OF WILLIAM F. MC MAHON, ESQUIRE,  
7                                ON BEHALF OF THE PETITIONERS

8                        MR. MC MAHON: Thank you, Mr. Chief Justice,  
9 and may it please the Court.

10                      The issue in this case is whether the  
11 establishment clause prohibits a municipality from  
12 including a creche in a traditional and dominantly  
13 secular Christmas celebration. The city of Pawtucket,  
14 Rhode Island, has for over 40 years sponsored an annual  
15 Christmas celebration. It consists of parties,  
16 Christmas carols, the lighting and decoration of public  
17 buildings, and a display situated on the grounds of a  
18 museum in the center of the commercial area of the  
19 city. The display, which is laid out over 40,000 square  
20 feet, consists of a wishing well, colored lights, a  
21 40-foot high lighted spruce tree, figures of Santa  
22 Claus, a live Santa Claus, and various figures of stars  
23 and bells and lights and a large Season's Greetings, 48  
24 feet long and lighted.

25                      Included in this display, covering



1 approximately 140 square feet out of the total 40,000  
2 square foot area, is a creche.

3 QUESTION: Has the creche been there for 40  
4 years, used every year for 40 years? Does the record  
5 show that?

6 MR. MC MAHON: Yes, Justice, but the display  
7 has not been in that location for those 40 years. It  
8 has been in this location since 1973.

9 QUESTION: But a creche has been used for 40  
10 years? The record shows that?

11 MR. MC MAHON: That is correct, Justice.

12 The creche consists of a small stable and  
13 approximately 15 figures ranging in height from one foot  
14 to five feet.

15 The District Court has permanently enjoined  
16 the city from continuing its practice of including the  
17 creche in its Christmas celebration. It did so by  
18 applying the three-part test set forth by this Court in  
19 Lemon against Kurtzman, concluding that the city's  
20 sponsorship of the creche violated each portion of that  
21 test.

22 The Court of Appeals, by divided vote,  
23 affirmed, agreeing with the District Court as to the  
24 first two parts of the Lemon test, but further  
25 invalidating the city's sponsorship of the creche under

1 the strict scrutiny analysis applied by this Court in  
2 Larson against Valente.

3 It is the position of the city before this  
4 Court that the public recognition of the nativity scene  
5 in the American Christmas is not a promotion of  
6 religion, but really is an acknowledgement of the  
7 religious heritage of the American Christmas. In order  
8 to determine whether government --

9 QUESTION: I am just curious as to one fact.  
10 Was a stay order issued in this case, or an injunction?

11 MR. MC MAHON: A permanent injunction was  
12 issued, yes, Justice.

13 QUESTION: And it is still in effect?

14 MR. MC MAHON: That is correct, Justice.

15 QUESTION: So that in -- This concerned 1980,  
16 didn't it?

17 MR. MC MAHON: That is correct.

18 QUESTION: So that in 1981 and 1982 you had no  
19 creche?

20 MR. MC MAHON: The city has not sponsored a  
21 creche. The city transferred the creche to a private  
22 group under a conditional agreement dependent upon the  
23 injunction in this case, and if the injunction in this  
24 case were to be dissolved, then the city would reacquire  
25 the creche. The private group has changed the location

1 of the creche, but it is in the same area, but the city  
2 is enjoined from the practice of continuing it, and I  
3 might note that the record indicates that the particular  
4 creche in question had a useful life which was close to  
5 expiring and would probably have to be replaced in any  
6 event.

7           QUESTION: Has it been on public property in  
8 the last two years?

9           MR. MC MAHON: This has not been on public  
10 property, Chief Justice, since 1973. The property in  
11 question is owned by the Slater Mill Museum Corporation,  
12 which operates the -- has restored the old Samuel Slater  
13 cotton mill and operates it as a national museum.

14           It is submitted that in order to --

15           QUESTION: Then the city sponsored creche from  
16 1973 up until 1980 was basically not on city property,  
17 but the exhibits were put together by the city?

18           MR. MC MAHON: And owned by the city, Justice.

19           QUESTION: And owned by the city.

20           MR. MC MAHON: Yes. But in 1981 and 1982,  
21 only the secular portions of the display have been owned  
22 and maintained by the city. The city has had nothing  
23 whatever to do with the creche since this injunction was  
24 issued, and in fact the creche, while still in the same  
25 general area, has been moved.



1           It is submitted by the city that the  
2 distinction between the promotion of religion and the  
3 recognition of religion must be determined by examining  
4 the context in which the religious element is  
5 presented. We respectfully submit that in this context  
6 the city is celebrating a legitimate national holiday  
7 and not promoting religious dogma.

8           Furthermore, we will contend that the Lemon  
9 test was inappropriately applied by the courts below  
10 because it was applied only to the creche, as though it  
11 existed in a vacuum, and it will be our submission that  
12 the appropriate focus for the Lemon test should be to  
13 the entire government activity and not really to the  
14 religious element contained within it.

15           This Court has frequently recognized that the  
16 traditions of the American people are saturated with  
17 religious influences. As recently as the end of the  
18 last term, in *Marsh v. Chambers*, this Court  
19 sustained legislative prayer and legislative  
20 chaplaincies, noting that they have been imbedded in our  
21 traditions since the adoption of the First Amendment.

22           With respect to holidays, the Thanksgiving  
23 tradition also goes back to the First Congress, which  
24 requested President Washington to declare a day of  
25 national prayer and thanksgiving. In *McGowan v. Board of*

1 Maryland, this Court held that the recognition of Sunday  
2 as a day of rest was a legitimate public activity  
3 notwithstanding the fact that in so doing, it was aiding  
4 religions who attract worshippers on that day and who in  
5 fact receive some substantial portion of their financial  
6 support on that day.

7           QUESTION: Mr. McMahon, is there anything we  
8 can refer to to let us know how long it has been the  
9 practice in this country for public bodies to have  
10 nativity scenes displayed? Is there anything you can  
11 cite to us in that regard?

12           MR. MC MAHON: Specifically, I cannot,  
13 Justice. The recognition of Christmas began in the  
14 middle part of the last century. 1936 -- 1836 was the  
15 first recognition of the legal holiday. In Rhode Island  
16 it was 1852. It became a federally recognized holiday  
17 in 1870, and it was during that period that nearly all  
18 the states adopted Christmas a legal holiday, but  
19 specifically with respect to the use of the nativity  
20 scene, we have been unable to locate that data.

21           The creche is a symbol of Christmas which has  
22 been used by the American people together with stars and  
23 bells and Santa Claus and reindeer. It has its origin --

24           QUESTION: Haven't you noticed a lot of  
25 Christmas celebrations without creches?

1           MR. MC MAHON: That is correct, Justice.

2           QUESTION: You keep saying they all go along  
3 together.

4           MR. MC MAHON: Well, of course, any symbol of  
5 Christmas may be used alone.

6           QUESTION: But this case is not aimed at all  
7 of the decorations, right?

8           MR. MC MAHON: That is correct, Justice.

9           QUESTION: This case is aimed at one item.

10          MR. MC MAHON: That is correct.

11          QUESTION: Well, why don't we talk about that  
12 one item without all of the others?

13          MR. MC MAHON: Because that one item cannot be  
14 properly evaluated in terms of what it is doing without  
15 relating it to the overall celebration of which it is a  
16 part. The creche --

17          QUESTION: Mr. McMahon, do you think that for  
18 -- a city could display a nativity scene alone without  
19 other displays such as Santa Claus and Christmas trees  
20 and so forth?

21          MR. MC MAHON: Well, obviously, Justice, that  
22 would be --

23          QUESTION: In your view?

24          MR. MC MAHON: That would obviously be less  
25 secular than the record shown in this case. However,



1 the most important part of the context, we would submit,  
2 is Christmas itself, and any symbol of Christmas,  
3 including the creche, is a symbol of what is a national  
4 secular holiday.

5 A lone figure with Santa Claus does not  
6 represent one isolated item of Christmas. It represents  
7 the entire Christmas holiday for what it is. We  
8 respectfully submit that the District Court was in error  
9 in stating that the portions of the holiday celebration  
10 could be dissected. They are intergrated. They become  
11 merged over the years, through the uses of the people.

12 QUESTION: Mr. McMahon, what is your answer to  
13 Justice C'Connor's question, supposing there was nothing  
14 but a creche?

15 MR. MC MAHON: My answer is, it would still be  
16 permissible, Justice, as a symbol of Christmas.

17 QUESTION: So then we can ignore the remainder  
18 of the exhibit.

19 MR. MC MAHON: No, Justice. I think that in  
20 this case it is so clearly secular that the question as  
21 to -- the lone question is not presented on this  
22 record. However, were it presented, we would submit  
23 that it remains a legitimate symbol of Christmas. In  
24 this case, however, it is so overwhelmed by secular  
25 symbolism that the question presented by Justice

1 O'Connor is not before the Court.

2           The Christmas holiday, although it clearly has  
3 its origin in Christmas observance, is a secular folk  
4 festival. The nativity scene is interwoven into the  
5 American celebration, but the American celebration is a  
6 combination of feasting and fraternizing and music and  
7 art and various types of socializing, and the religious  
8 portion of Christmas is simply one component of it, and  
9 it is a component that recognizes its religious  
10 heritage.

11           QUESTION: Mr. McMahon, could the city display  
12 a cross for the celebration of Easter under your view?.

13           MR. MC MAHON: Justice, I think that, first of  
14 all, Easter is not a recognized public holiday, and the  
15 association of a cross with a specifically religious  
16 holiday might well implicate the promotion of religion.  
17 I would point out, however, that even that is probably  
18 less religious than the Thanksgiving Day established by  
19 President Washington's proclamation in 1789, but I would  
20 say that absent that historical base, the cross  
21 specifically at Easter might well be a promotion.

22           However, I would point out that again it is a  
23 matter of context, because in the American cemetery in  
24 Normandy, for example, there are -- it is filled with  
25 crosses and stars of David and other symbols. The same

1 is true in Hawaii on the beaches. In many Memorial Day  
2 ceremonies the cross and the star of David and other  
3 religious symbols are employed.

4           So, we would submit that in the context which  
5 your question poses, Justice, it might well be a  
6 promotion, but nevertheless the cross and the star of  
7 David have legitimate secular uses depending on the  
8 context. We, of course, concede that there are contexts  
9 in which the creche itself used as a -- in a religious  
10 exercise, obviously in a church, the creche could be a  
11 -- its religious meaning could be isolated and  
12 accentuated. It is the context which determines --

13           QUESTION: What meaning does the creche have  
14 other than religion?

15           MR. MC MAHON: It is a symbol of Christmas,  
16 Justice. It is a symbol of Christmas as the other  
17 secular symbols are.

18           QUESTION: Recognized by all religions?

19           MR. MC MAHON: No, but Christmas --

20           QUESTION: I didn't think it was.

21           MR. MC MAHON: Christmas itself --

22           QUESTION: It is one religion, isn't it?

23           MR. MC MAHON: Christmas itself is, Justice,  
24 yes.

25           QUESTION: Christmas itself?



1           MR. MC MAHON: The holiday of Christmas is a  
2 denominational holiday. Sunday is a denominational  
3 day. The recognition of Sunday in McGowan against  
4 Maryland was not inhibited by the fact that Sunday is a  
5 religious day only for certain denominations, and it is  
6 a benefit only to --

7           QUESTION: You mean the other denominations  
8 other than Christians don't give presents, drink liquor,  
9 and have a ball on Christmas?

10          MR. MC MAHON: That is because it is secular,  
11 Justice, yes. That is because --

12          QUESTION: Well, now, a minute ago you said it  
13 was religious. Now you say it is secular.

14          MR. MC MAHON: No, Justice, it is a dominantly  
15 secular holiday in its contemporary celebration. It has  
16 religious roots and some religious components. The  
17 religious components are part and parcel of the --

18          QUESTION: My question is, according to your  
19 argument, is it religious or secular?

20          MR. MC MAHON: The holiday, Justice, or the  
21 creche?

22          QUESTION: Either.

23          MR. MC MAHON: The holiday is a dominantly  
24 secular holiday with a religious origin and some  
25 religious component. The creche is a dual symbol. It is

1 a religious symbol and it is also a holiday symbol.  
2 Which meaning predominates depends upon the setting. In  
3 a setting where the religiousity is promoted, then the  
4 religious meaning of the symbol dominates. In a  
5 setting --

6 QUESTION: It is part religious.

7 MR. MC MAHON: Oh, certainly.

8 QUESTION: According to you. Isn't it?

9 MR. MC MAHON: Certainly, Justice. As is  
10 Christmas.

11 QUESTION: And the state is giving money to a  
12 religion?

13 MR. MC MAHON: The state is celebrating the  
14 traditions of the American people, Justice.

15 QUESTION: Are they religious?

16 MR. MC MAHON: Well --

17 QUESTION: They are giving money to  
18 celebrating a religious event.

19 MR. MC MAHON: Well, perhaps in the same way  
20 that the practice of paid chaplaincies is giving money  
21 to subsidize that particular religious activity.  
22 However, we would say it is not the subsidization of  
23 religion, but it is the subsidization of a secular  
24 national folk festival which contains a religious  
25 element.

1           It is -- We respectfully submit that in  
2 applying the Lemon test, it is necessary to determine  
3 first what is the government doing. It is our position  
4 in this case that the government is not promoting  
5 religion. The government is celebrating Christmas. And  
6 in applying the Lemon test to the record in this case,  
7 it is necessary to examine the entire government  
8 activity and to determine the function which the creche  
9 plays in that entire celebration.

10           QUESTION: Do you concede the applicability of  
11 the Lemon test here?

12           MR. MC MAHON: Well, we don't think it's  
13 necessary, Justice, but we feel that we have  
14 demonstrated in our brief that the creche in this case  
15 satisfies the Lemon test because of its secular content,  
16 but no, we feel that the principles themselves are  
17 sufficient to validate this practice. Under McGowan,  
18 under Marsh, we feel that -- and the principles in the  
19 other cases enunciated by this Court we feel are more  
20 than sufficient to sustain the activity in this case.

21           QUESTION: But as I remember, the Lemon test  
22 was not applied in Marsh, very vigorously, anyway --

23           MR. MC MAHON: That is correct, Your Honor --

24           QUESTION: -- particularly as a historical  
25 approach anyway.



1           MR. MC MAHON: -- because presumably this  
2 Court felt that the historical evidence rendered it  
3 unnecessary. I would like to reserve the balance of my  
4 time for rebuttal.

5           CHIEF JUSTICE BURGER: Very well.

6           Mr. Solicitor General.

7           ORAL ARGUMENT OF REX E. LEE, ESQUIRE,

8           ON BEHALF OF THE UNITED STATES

9           AS AMICUS CURIAE

10          MR. LEE: Mr. Chief Justice, and may it please  
11 the Court, I would like to emphasize just briefly two  
12 characteristics of Pawtucket's creche that in our view  
13 make it a constitutionally permissible governmental  
14 acknowledgement of an important part of the American  
15 culture and heritage.

16          The first of these characteristics is that  
17 this symbol is part of a larger package. It is not an  
18 end in and of itself. Everyone in this case accepts the  
19 premise that the celebration of Christmas as a national  
20 holiday is not an establishment of religion. It follows  
21 in our view that a non-coercive acknowledgement of this  
22 undisputed fact -- that one of the constituent elements  
23 of this recognized holiday is religious -- is similarly  
24 constitutional.

25          If it is permissible for Congress to make

1 Christmas a national holiday, then it is permissible for  
2 Pawtucket to announce the onset of the holiday, and  
3 similarly to announce that one of the constituent  
4 elements of that holiday is religious.

5 Christmas in this country in 1983 means many  
6 things. For the non-religious as well as for the  
7 religious, it is the most joyous of our holidays.  
8 Regardless of one's religious beliefs, Christmas is a  
9 time of homecoming. It is a time for family and  
10 friends, for gifts and parties. It is also a time of  
11 good will, and of concern for the needs of our fellow  
12 human beings.

13 It is an eclectic holiday, and it has its  
14 symbols. One of those symbols is the creche, which is a  
15 reminder that of all the sources from which the American  
16 Christmas has grown over the years, one of them is  
17 religious. Neither in the Christmas context nor any  
18 other does the First Amendment require that we exclude  
19 enriching and important aspects of our history and our  
20 traditions as illegitimate and therefore as  
21 non-existent.

22 It was not by governmental decree that  
23 Christmas acquired its religious aspect. That came  
24 about as a matter of undeniable historical fact, and to  
25 deny its existence, to exclude it from our national

1 consciousness is nothing less, I submit, than  
2 intellectual and historical dishonesty. It is cultural  
3 censorship, if you will, which is a First Amendment  
4 concern, but not because the First Amendment requires it.

5           Every single argument raised by the lower  
6 courts and by respondents against the creche are equally  
7 applicable to Christmas itself. If Christmas can  
8 survive the First Amendment, as every party to this case  
9 concedes that it can, then so can an acknowledgement of  
10 the fact, the undisputed fact, that religion is one of  
11 its ancestors. The in-between position, which would  
12 keep Christmas as a national holiday but force a  
13 pretention that it is something other than what it is  
14 will not withstand analysis.

15           QUESTION: What test in your view should the  
16 Court apply, Mr. Lee, in testing these things?

17           MR. LEE: We submit, Justice O'Connor, that  
18 the test that ought to be applied is one that is  
19 narrowly tailored to the particular First Amendment  
20 concerns of religious symbols. You could use the  
21 three-part test, and we agree with Mr. McMahon --

22           QUESTION: Do you think that the three-part  
23 test would perhaps better describe most of the Court's  
24 cases if we read the purpose and effect together rather  
25 than purpose or effect?

1           MR. LEE: I do. I think if you are going to  
2 keep that test it would be better to do it that way, and  
3 indeed, I am somewhat sympathetic with the three-part  
4 test, because in attempting to articulate one of my own,  
5 very often you do come back to these two concerns of  
6 purpose and effect.

7           Nevertheless, I simply submit that if you will  
8 take a sample of the efforts of other courts, state and  
9 federal, that have grappled with this issue of religious  
10 symbols and the First Amendment in the context of such  
11 things as the national motto and the pledge of  
12 allegiance and the creche and a number of other things,  
13 the madonna on the seal, you come away, I submit, with  
14 the unmistakable conclusion that we have really lost  
15 sight of what the ultimate First Amendment inquiry is  
16 and that these three tests themselves have become the  
17 ultimate inquiry, and the reason is that they impart a  
18 kind of an artificial objectivity, and to use Justice  
19 Powell's language, analytical tidiness that in fact is  
20 non-existent, and they give the impression of having  
21 really accomplished the purpose without our ever  
22 examining what the true First Amendment values are.

23           And for that reason, we submit that a test, if  
24 you want to put it in terms of purpose and effect, fine,  
25 but that it ought to concentrate on such things as a



1 recognition first that it is a symbol, and starting from  
2 that premise, ask yourselves what it is a symbol of, and  
3 is it legitimately adjunct to something else, rather  
4 than being, is it promotional or is it merely  
5 commemorative.

6           And the final question that I would ask is, is  
7 it coercive? Now, with respect to the creche, I submit  
8 that of all of the possible symbols that government  
9 might have selected or that might be used by government,  
10 the least potential for coerciveness, or that there is  
11 none that has less potential for coercion than does the  
12 symbol. I like the use of, say, an anthem, or an oath  
13 of office, or a pledge of allegiance whose  
14 religion-acknowledging words, the individual must either  
15 affirmatively state or be noticed for declining to do  
16 so. The presence of an outdoor creche leaves the  
17 individual completely free to react to it however he or  
18 she pleases without anyone else knowing what that  
19 reaction is.

20           Now, it is true that the primary issues  
21 presented by the creche are -- we pigeonhole them, we  
22 categorize them as establishment clause issues. But  
23 this Court's decisions make it very clear that in  
24 deciding establishment issues, free exercised values are  
25 nevertheless very relevant and should not be ignored.

1           The creche is one that is --

2           QUESTION: Mr. Solicitor General --

3           MR. LEE: Excuse me.

4           QUESTION: May I ask you one question?

5           MR. LEE: Yes.

6           QUESTION: The two elements of your test, as I

7 understand it, are the absence of coercion, the fact

8 that it is a recognized symbol, and it is part of a

9 larger package.

10          MR. LEE: That is correct.

11          QUESTION: Well, for many people, going to

12 church or saying prayers and attending religious

13 ceremonies are also part of the Christmas tradition.

14 Would you apply your test to say an overt prayer is a

15 very small part of the total display, or saying mass in

16 the square, something like that?

17          MR. LEE: Where it is governmentally

18 sponsored?

19          QUESTION: Governmentally sponsored, but part

20 of a much larger display, and only totally voluntary and

21 non-coercive, and just as part of the symbols that many

22 of us respect very deeply.

23          MR. LEE: That is a hypothetical that is much

24 harder than this one. It is one that tests the outer

25 limits of my theory, but I would answer it yes.

1 QUESTION: That would be permissible?

2 MR. LEE: In my view, yes.

3 QUESTION: When Congress authorizes the  
4 payment of something like \$30,000 a year, I think, for  
5 the chaplain in the House and the chaplain in the  
6 Senate, is that symbolic or is it substantive?

7 MR. LEE: Well, it is certainly less symbolic  
8 than is this case. Now, in that case, Marsh versus  
9 Chambers, which we of course supported with an amicus  
10 brief, there was an additional concern, which was mainly  
11 historical, and the Court reached the right result in  
12 that case relying on historical considerations, and I  
13 might point out in that respect that in Marsh versus  
14 Chambers, the Court very properly did not apply the  
15 three-way test. It could have done so, and I submit that  
16 the reason that that approach was sound was simply that  
17 the three-part test is just not all that helpful in  
18 deciding the constitutionality of chaplains' prayers,  
19 and the same is true here.

20 QUESTION: Well, I suppose there, though,  
21 there was rather clear evidence of the intent of the  
22 framers of the First Amendment.

23 MR. LEE: That's correct.

24 QUESTION: Do we have that kind of evidence  
25 here with respect to display of a nativity scene?

1 MR. LEE: Not with that degree of specificity,  
2 Justice O'Connor.

3 Let me just submit finally that to the extent  
4 the First Amendment is involved in this case at all, it  
5 favors Pawtucket's right to continue to do what it has  
6 done for almost half a century. No one in this case is  
7 contending that Christmas itself must be disestablished  
8 as a national holiday, and neither is anyone denying  
9 that one of the elements of this holiday is religious.

10 The First Amendment not only does not require,  
11 it would, I submit, be positively offended by a ruling  
12 that would say to the city of Pawtucket, yes, you may  
13 announce Christmas in every respect except for one. The  
14 one thing you may not announce is that Christmas has  
15 anything to do with the birth of Christ. That would  
16 make the acceptability of the announcement turn on its  
17 content, more specifically on its lack of religious  
18 content, in clear violation of First Amendment  
19 principles.

20 For these reasons, we submit that the judgment  
21 of the lower court should be reversed. Unless the Court  
22 has further questions, I have nothing.

23 CHIEF JUSTICE BURGER: Mr. DeLuca?

24 ORAL ARGUMENT OF AMATO A. DE LUCA, ESQUIRE  
25 ON BEHALF OF THE RESPONDENTS



1           MR. DE LUCA: Mr. Chief Justice, and may it  
2 please the Court, with the possible exception of the  
3 cross, the nativity scene is one of the most powerful  
4 religious symbols in this country, and most certainly  
5 one of the most powerful Christian religious symbols in  
6 this country. It is, as all of the parties agree and  
7 acknowledge, the biblical account of the birth of  
8 Christ, the Christian Messiah, the Redeemer, according  
9 to the gospels of Matthew and Luke as contained in the  
10 New Testament.

11           Pawtucket's purchase, the maintenance, and the  
12 erection of the fundamental Christian symbol involves  
13 government in religion to a profound and substantial  
14 degree. It has aligned itself with a universally  
15 recognized religious symbol and belief. I would like to  
16 bring to the Court's attention that although the  
17 religious symbol, the creche, is contained in a display  
18 that is on private property -- it is owned by the Slater  
19 Museum Historical Society -- it is adjacent to the City  
20 Hall. City Hall is approximately 100 feet away from  
21 this area.

22           Also, the creche and the display itself is --  
23 there is a ceremony that is held by the mayor of the  
24 city of Pawtucket each year, a lighting ceremony, which  
25 announces the commencement of the display in the Hodgson

1 Park area. The music that is played at the display is  
2 the same music that is also played inside of City Hall,  
3 and all of the festivities that take place at the  
4 display and at City Hall are paid for and sponsored by  
5 the city of Pawtucket.

6 QUESTION: Well, Mr. DeLuca, you say that  
7 although the property, the real property, I take it, on  
8 which the creche is located is private, it is only -- it  
9 adjacent to city property. Now, if the city did not own  
10 the creche itself, so that everything that was  
11 contributed to the display, including the creche, were  
12 privately owned, it wouldn't violate the First  
13 Amendment, the fact that it was right next door to the  
14 City Hall, would it?

15 MR. DE LUCA: Well, I think that in the -- I  
16 think that in understanding that the city owns all of  
17 the symbols and all of the artifacts that are contained  
18 in this display, and assuming that that -- the creche  
19 were purchased and paid for privately without any other  
20 explanation that it is private, then I think it would  
21 still violate the establishment clause for the First  
22 Amendment, because there is no indication to anyone  
23 looking at that that the display or the creche is not  
24 part of the broader display which is put up and  
25 sponsored by the city.

1           QUESTION: Would you regard the prayer that I  
2 spoke of to your friend in the House or the Senate or in  
3 any state legislature as purely symbolic, or is it a  
4 matter of substance?

5           MR. DE LUCA: I think that prayer is purely  
6 symbolic, and I think this Court made that observation  
7 in Marsh versus Chambers, in conjunction with relying on  
8 the unique history that this Court found to be  
9 applicable to the prayer in Nebraska and generally in  
10 legislatures and in Congress.

11          QUESTION: Now, is it purely symbolic in your  
12 view when the chaplain gets up and asks for divine  
13 guidance on the members of the legislative body? Is  
14 that your view, that it is purely symbolic?

15          MR. DE LUCA: Yes, it is, Mr. Chief Justice.  
16 I believe that when the chaplain begins his invocation,  
17 I think it serves two purposes. One, it gets the  
18 attention of the individuals who are presumably  
19 beginning the session, and two, it is simply a  
20 formalized way of commencing the session, asking people  
21 to meditate, to begin to experience and indeed  
22 appreciate the seriousness with which they must approach  
23 the business that is going to be before them today as  
24 Congressmen and Congresswomen, and I think that is the  
25 primary purpose of that kind of invocation in that

1 setting.

2 QUESTION: It has nothing to do with any  
3 religious faith, in your view?

4 MR. DE LUCA: Well, it most certainly is an  
5 acknowledgement of a religious faith. I have to admit  
6 that, Mr. Chief Justice. However, there is a big  
7 difference between an acknowledgement of religion  
8 without actually sponsoring a religious point of view as  
9 opposed to in this particular case, where we are not  
10 only acknowledging religion, but we are acknowledging a  
11 particular form of religion, notably Christianity.

12 I do not think anyone can argue that the  
13 nativity scene does not depict the historical birth of  
14 Christ. We all acknowledge that Christ was born  
15 approximately 2,000 years ago. What the nativity scene  
16 does, it acknowledges the divinity of Christ. It  
17 acknowledges that the Christian Messiah has come, and  
18 that in conjunction with Easter, I think, in biblical  
19 terms anyway, is indicative of and personifies precisely  
20 what Christians believe, to the exclusion of course, of  
21 all the non-believers and those individuals who do not  
22 have Christian philosophy or religion.

23 Approximately one week after this suit was  
24 filed, there was a press conference held at -- in the  
25 display, in front of the nativity scene. A podium was



1 erected specifically for the purpose of holding this  
2 press conference. The press conference was called by  
3 the mayor of the city of Pawtucket, Mr. Lynch. At that  
4 press conference, Mr. Lynch made it clear, and present,  
5 of course, were the media. There were a group of school  
6 children that came down from a nearby public school  
7 along with their teacher, and a variety of other  
8 individuals who had stopped to listen to the mayor give  
9 his -- or begin his press conference. This was at 1:30  
10 in the afternoon.

11 At that press conference, he avowed publicly  
12 and was reportedly widely in the media, in the newspaper  
13 and on television, that he was going to fight the  
14 American Civil Liberties Union in order to keep Christ  
15 in Christmas. The purpose of the mayor's statement and  
16 its effect was clearly religious and clearly Christian,  
17 and the message was heard and was echoed by the many  
18 letters which are part of the record in this case, by  
19 the many letters both from people in Pawtucket, outside  
20 of Pawtucket, and from --

21 QUESTION: Well, that was basically the  
22 mayor's reaction to something that your clients had  
23 done, I take it. Is there any reason to think the mayor  
24 would have done that had not he been challenged -- had  
25 not the city been challenged in its creche display?

1           MR. DE LUCA: Well, he may not have done that  
2 if it hadn't been challenged, if the suit had not been  
3 filed, but I think it is indicative of the purpose and  
4 effect of the erection of that display, of the creche.  
5 The fact that he believes that the creche should be  
6 continued as part of the display because what we are  
7 trying to do and what we will be doing is to fight the  
8 American Civil Liberties Union and all of the  
9 non-believers and athiests to keep Christ in Christmas,  
10 that goes -- I'm sorry.

11           QUESTION: Well, do you say that when the  
12 mayor said he was going to "fight the American Civil  
13 Liberties Union," he was -- you suggest he was declaring  
14 war on non-believers and athiests. I don't think of the  
15 American Civil Liberties Union as necessarily standing  
16 for non-believers and athiests.

17           MR. DE LUCA: I am not suggesting that. What  
18 I am suggesting is that when the mayor took the -- when  
19 the mayor as the mayor of the city of Pawtucket, as the  
20 elected official of all of the people of the city of  
21 Pawtucket, believers and non-believers, Christians and  
22 non-Christians, stood before the nativity scene in an  
23 orchestrated press conference to announce that he was  
24 going to fight to keep Christ in Christmas, I think that  
25 the effect -- it can be fairly inferred that the effect

1 of that press conference was to suggest that what we are  
2 trying to do, that is, what the people who brought this  
3 suit are trying to do is take a religious symbol away  
4 from the majority of the people who happen to believe  
5 that Christmas is for Christ, and anyone who is against  
6 that is against what the majority of the citizens of  
7 Pawtucket believe.

8 I don't believe that he was engaging -- or  
9 announcing that he was engaging in warfare, but I do  
10 believe that he announced --

11 QUESTION: Don't you think an opinion can be  
12 written upholding you side without mentioning the  
13 mayor?

14 MR. DE LUCA: Do I think -- Yes, I do, Mr.  
15 Justice Marshall.

16 QUESTION: Well, why are you staying on it so  
17 long?

18 MR. DE LUCA: I brought the mayor's press  
19 conference to your attention because I thought it was --  
20 had some probative value, but I would also like to  
21 suggest that in spite of the mayor's publicly avowed  
22 purpose of the creche in the Christmas display --

23 QUESTION: Well, excuse me for even mentioning  
24 it.

25 MR. DE LUCA: The city at the trial offered

1 three other reasons for the inclusion of the nativity  
2 scene in the annual Christmas display. The first was  
3 economic. The second was cultural and traditional, and  
4 the third was aesthetic. The District Court, since  
5 there was no evidence offered as to the aesthetic value  
6 of the creche, made a finding that there was obviously  
7 no evidence to support that position.

8           He went on to address the issues -- the  
9 reasons of economic, cultural, and traditional. The  
10 District Court found in applying the secular purpose  
11 test that the city's own witnesses -- they had two  
12 witnesses, two merchants testify, and they admitted that  
13 the deletion of the creche from the display itself would  
14 have no economic impact on the downtown area, the  
15 commercial -- the commercial area of Pawtucket.

16           One of the reasons, obviously, that the city  
17 gave for including the creche was because it attracted  
18 shoppers. These individuals readily admitted that that  
19 was not the case.

20           Also, as it related to the cultural and  
21 traditional reasons advanced by the city, the District  
22 Court found that the primary purpose and effect of the  
23 nativity scene was to advance religion. Relying on the  
24 testimony and exhibits, the court found no evidentiary  
25 support for the cultural and traditional reasons



1 advanced by the city.

2           Indeed, the court found that the evidence  
3 supported a contrary conclusion. More particularly, the  
4 court made a finding that as far as cultural and  
5 traditional were concerned, the city made no attempt to  
6 disclaim the religious meaning of the creche, and in  
7 addition to that there was no evidence to support the  
8 allegation that it had been a tradition in Pawtucket to  
9 have this type of display or similar religious displays  
10 erected over the last 40, 50, or 60 years, or within the  
11 history of the city of Pawtucket.

12           QUESTION: You mean, you disagree that it had  
13 been displayed for 40 years?

14           MR. DE LUCA: I don't disagree that it has  
15 been displayed, Justice O'Connor, since 1973 in its  
16 present locale. I agree with that. What I am -- What I  
17 am suggesting to you is that there was no evidence --  
18 the city made the allegation that they were merely  
19 acknowledging a cultural and traditional aspect of the  
20 citizens of Pawtucket. This is the only holiday that  
21 the city of -- only religious holiday that the city of  
22 Pawtucket has acknowledged culturally or traditionally,  
23 and the District Court made that finding.

24           QUESTION: Several years ago, Mr. DeLuca,  
25 there was a ceremony held on the Mall, which is federal

1 property, of course. My recollection is from news  
2 accounts there were 200,000 or 300,000 people, in any  
3 event a great many people, and the ceremony was presided  
4 over by Pope John Paul II. Would you say that was a  
5 step toward or an establishment of religion violative of  
6 the religion clauses?

7 MR. DE LUCA: I believe that was on the Elipse  
8 across the street from the state -- in any event, it was  
9 on public property, and I believe -- it was my  
10 understanding, Mr. Chief Justice, that that property has  
11 been used traditionally or historically as a place where  
12 people can express their principles, beliefs, or  
13 non-beliefs, so that in that context I think that it was  
14 inappropriate to have a mass being said by the Pope,  
15 because I think that in a sense, that that was an  
16 establishment or sponsorship of religion, but at least  
17 the argument there that could be made is that it was a  
18 forum that was provided to all people, regardless of  
19 their beliefs, regardless of their principles, as  
20 opposed to a specific sponsorship of a religious symbol,  
21 as it is in this case.

22 QUESTION: Then you think it would be all  
23 right to put a creche over on the Mall?

24 MR. DE LUCA: No, I don't think it's all right  
25 to put a creche over on the Mall. I think what we have

1 to look at is --

2 QUESTION: Well, what's the difference?

3 MR. DE LUCA: The difference --

4 QUESTION: How do you distinguish a high mass  
5 from a creche?

6 MR. DE LUCA: Well, I think we have to look at  
7 the -- as the District Court did in this case, the  
8 factual setting. We have to go, as this Court must do  
9 if it is going to apply the Lemon versus Kurtzman test,  
10 is look at the factual setting, the circumstances  
11 surrounding the erection of the creche, the  
12 circumstances surrounding the Papal mass, or any other  
13 religious symbol that would be displayed or enacted,  
14 performed on public property. We just can't look at it  
15 in a vacuum and say that it is okay or it is not okay.  
16 We have to look at it more in terms of the circumstances  
17 evolving from the use of the mass or the symbol.

18 QUESTION: Well, there was a considerable  
19 involvement of government in that ceremony, hundreds of  
20 extra policemen on duty, streets closed for traffic  
21 control purposes, and all that sort of thing. That was  
22 a considerable governmental involvement, was it not?

23 MR. DE LUCA: Yes, it was, Mr. Chief Justice,  
24 and I think that I would argue respectfully that it  
25 could create or did create excessive government

1 entanglement insofar as the government's relationship  
2 with a religious group, most notably the Roman Catholic  
3 Church. But I think that the police -- and I may be  
4 incorrect in my assumptions, but I believe that the  
5 costs for the Papal mass, the erection of the altar and  
6 the podium and a variety of other costs that were  
7 incident to the mass was paid for by the Roman Catholic  
8 Diocese.

9           QUESTION: But not the thousands of dollars  
10 involved in the extra management problems, the policing,  
11 the traffic control?

12           MR. DE LUCA: That's correct. I think an  
13 argument can be made there also as it relates to the  
14 question of free exercise, accommodating the free  
15 exercise of religion, and of course this Court has noted  
16 on many occasions that there is sometimes a clash  
17 between free exercise and the establishment clause, and  
18 under the circumstances, it may be appropriate, under  
19 certain circumstances it may be appropriate for the  
20 establishment clause in certain situations to give way  
21 to the free exercise of religion so that people can  
22 practice their religion without interference from  
23 government.

24           QUESTION: Mr. DeLuca, do you think that any  
25 religious effect of the creche display in Pawtucket was



1 diminished by the fact that it included the display of a  
2 Christmas tree and a clown and a robot and reindeer and  
3 so forth?

4 MR. DE LUCA: Well, I think -- I have two  
5 answers to your question, Justice O'Connor. First, I  
6 think that the District -- and I -- not think, I know  
7 that the District Court made a finding of fact that the  
8 setting that the creche appeared in was supportive of  
9 its meaning.

10 There was testimony from a child -- not a  
11 child, a clinical psychologist by the name of Wurley who  
12 said that a display of this type which contains Disney  
13 characters, robots, Santa Claus, candy being given out  
14 to children, a talking wishing well, is magical. It is  
15 magical to children. It is designed, it is intended to  
16 attract children, and once the children are there, then  
17 of course as this witness testified it has a significant  
18 impact on that child, and if you are a non-Christian  
19 child looking at this display, and if you are a  
20 non-Christian child looking at the nativity scene  
21 contained in this display, realizing it is supported by  
22 the city of Pawtucket, government-supported, then it  
23 raises the question for the child and for that child's  
24 parents as to whether or not they are okay, because they  
25 are not part of the culture that is being represented.

1           It raises the question for the child as to  
2 whether or not they are normal because they are not part  
3 of or do not believe in the religious symbol that is  
4 being displayed in this display, and I don't think that  
5 the secular symbols take away from the religious meaning  
6 and the religious intent of the nativity scene, no more  
7 than the nativity scene infuses any one of those secular  
8 symbols, Santa Claus, the talking wishing well, or the  
9 reindeers, with a religious meaning of its own merely  
10 because the nativity scene is close to it by its  
11 proximity.

12           QUESTION: Well, the city then could not  
13 display religious paintings or artifacts in its museum  
14 under your theory.

15           MR. DE LUCA: No, that wouldn't be the case.  
16 I think that the primary purpose in displaying religious  
17 artifacts in a museum is to educate. The city in  
18 displaying artifacts which may include religious  
19 artifacts did not necessarily --

20           QUESTION: But according to you the effect  
21 would be the same, regardless of the purpose.

22           MR. DE LUCA: Well, but I think --

23           QUESTION: Children would come to the museum,  
24 and be somehow induced to think that the city was  
25 supporting the religious symbols that were displayed.

1           MR. DE LUCA: But the setting is completely  
2 different in a museum as it is from the display in  
3 Pawtucket. The display in Pawtucket is designed to  
4 attract children, to entice them, to make it appear with  
5 Disney characters --

6           QUESTION: Well, I suppose museums are  
7 developed to try to entice and attract visitors,  
8 including children.

9           MR. DE LUCA: Yes, but not in the same way.  
10 Museums are designed to educate children. The displays  
11 are designed to entertain children. At the same time as  
12 they are being entertained, they are also being exposed  
13 to a symbol that has very significant religious  
14 significance.

15           So I think there is a clear difference between  
16 the museum, just as this Court in Schemp made the  
17 distinction between having a -- Bible readings take  
18 place in the morning as opposed to utilizing the Bible  
19 as an educational tool.

20           Certainly the teacher could utilize the Bible  
21 to inculcate religion during the course of the day.  
22 However, in the setting that the Bible was utilized in  
23 Schemp, this Court made the finding that there was a  
24 violation of the establishment clause, and I think that  
25 it is analogous, that is, this -- our case is analogous

1 to that in terms of the setting that it is depicted in.

2           Realizing that this Court must apply the  
3 clearly erroneous standard to the District Court's  
4 findings, the city articulates two other arguments. One  
5 is contextural and one is historical, and I believe that  
6 I have touched on, in answering some of your questions,  
7 the argument that is made by the city as it relates to  
8 contextural. I would like to say that as it relates to  
9 the historical argument, Justice O'Connor presented a  
10 hypothetical to counsel which I think is very relevant  
11 to this case.

12           If in fact the citizens of the city of  
13 Pawtucket or the government of Pawtucket can erect a  
14 nativity scene as it has in this case, then in order to  
15 celebrate a religious -- or a holiday which they allege  
16 has become secularized, and because of the  
17 secularization of the holiday, a religious symbol is no  
18 longer religious, even though its origin is religious,  
19 then why cannot the city if at some point in time Easter  
20 is declared a national holiday, or before Easter, on  
21 Good Friday, when schools are let out, when businesses  
22 are closed, why would not the city be allowed to erect  
23 in a secular setting a cross or a crucifix? Why not  
24 display Easter bunnies and painted eggs and tulips,  
25 which are indicative or represent the secularization or



1 the secular side of Easter along with the erection of a  
2 crucifix, since the crucifix really is the reason that  
3 Easter is being celebrated?

4 And I think that that example or that  
5 hypothetical really presents to the Court some very,  
6 very difficult questions if it decides that the nativity  
7 scene should not be taken out of this display, because  
8 what will happen, the effect of this Court's decision  
9 will really be to open Pandora's box.

10 QUESTION: Do we know -- Do we know that the  
11 kind of display that you just suggested at Easter, on  
12 Good Friday, would not be permitted?

13 MR. DE LUCA: It would be my suggestion that  
14 it would not be permitted, that --

15 QUESTION: Has this Court ever --

16 MR. DE LUCA: No, that is why this case is  
17 here.

18 QUESTION: No, I am talking about Easter now.  
19 I am talking about your Easter analogy. We don't know  
20 whether that would or would not violate the religion  
21 clauses, do we, the establishment clause?

22 MR. DE LUCA: I wouldn't --

23 QUESTION: We don't know judicially.

24 MR. DE LUCA: Based upon -- The direct answer  
25 is no. Based upon the decisions that this Court has

1 rendered, my -- I would feel very strongly that such a  
2 display would be a violation of the First Amendment,  
3 just as the nativity scene is in this context. But it  
4 opens the door. It opens the door to a variety of  
5 problems for this Court, for the courts of this country,  
6 because if -- The simplest solution to this problem, and  
7 I am not by saying it is simple suggesting that it is  
8 insignificant, or that this case is insignificant, but  
9 the simplest solution to this problem is to say, enough,  
10 this is where we draw the line, because if the line  
11 isn't drawn here, then groups all over this country  
12 would have the right to come into government, to the  
13 executive branch of government and say, I want to  
14 celebrate my religious holiday, and I want you to  
15 financially support a symbol that I feel is significant  
16 to me in the celebration of my religious holiday.

17           And if that happens, then this Court and the  
18 courts in this country will be inundated with suits in  
19 order to determine whether there is a violation of the  
20 First Amendment.

21           QUESTION: But, Mr. DeLuca, isn't that problem  
22 also present in your position? Because we asked your  
23 opponent about, suppose there was nothing but a creche,  
24 and I'd like to ask you, supposing the creche was just  
25 one ornament on the Christmas tree and you could hardly

1 see it unless you looked very closely, would that be  
2 illegal?

3 MR. DE LUCA: If the creche is owned by the  
4 city of Pawtucket, yes, it would be illegal, because it  
5 is an acknowledgement of a religious symbol. It is an  
6 acknowledgement of a religious belief.

7 QUESTION: Well, if it is so -- if it is so  
8 obscure that very few of the visitors to the scene even  
9 see it, then how do you distinguish the museum case  
10 where you've got some religious paintings in the  
11 museum?

12 MR. DE LUCA: Well, I don't think the  
13 obscurity of the symbol has -- with all due respect, has  
14 anything to do with whether or not government is  
15 sponsoring or advancing religion.

16 QUESTION: What if they had three wise men and  
17 a star in one exhibit, say? Would that be enough?

18 MR. DE LUCA: As a -- with a --

19 QUESTION: You are going to have a line  
20 drawing problem no matter what you do.

21 MR. DE LUCA: I'm sorry.

22 QUESTION: What if you had an exhibit that had  
23 not the creche itself, but just three camels out in a  
24 desert and a star up in the sky?

25 MR. DE LUCA: Well, then what we need in order

1 to interpret those three symbols or four symbols, the  
2 three wise men and the star, is a key. There is a  
3 secondary meaning to those symbols. The star in and of  
4 itself has no religious significance whatsoever. In  
5 order for me to understand that that is a star --

6 QUESTION: Well, a lamb doesn't have any  
7 religious significance, and a barn doesn't. I mean, you  
8 can make the same argument about all the elements of the  
9 creche.

10 MR. DE LUCA: With the exception of the child,  
11 the baby Jesus in the manger, and the two -- and the  
12 Virgin Mary and St. Joseph.

13 QUESTION: Well, that could be any mother and  
14 father in that --

15 MR. DE LUCA: Well, it could be, but the  
16 difference between the nativity scene and separating  
17 each one of those symbols and -- is that in order to  
18 appreciate the religious significance of the star, for  
19 example, as I started to say, you need a key to unlock  
20 the religious significance of the star. It could mean  
21 a --

22 QUESTION: I think you need a key for the  
23 creche.

24 MR. DE LUCA: No --

25 QUESTION: I don't think every child who has



1 not been brought up in the Christian tradition would  
2 understand its meaning.

3 MR. DE LUCA: No --

4 QUESTION: There is nothing self-explanatory  
5 about a creche to somebody, as Justice Stevens says, to  
6 someone who has never been exposed to the Christian  
7 religion.

8 MR. DE LUCA: Well, with all -- I would beg to  
9 differ, Mr. Justice Rehnquist. First of all, the record  
10 supports that there is something very different about  
11 the creche. The people who are contained in the creche,  
12 the symbols, the three wise men, the shepherds, are all  
13 kneeling in adoration of the child, and the District  
14 Court made those specific findings, that the creche --  
15 in looking at the creche you can have -- no other reason  
16 or interpretation could be gleaned from viewing the  
17 creche, that here is a religious symbol that -- and that  
18 is personified or represented by the adoration and the  
19 worshipful positions that are taken by the symbols in  
20 the display, so that the creche by itself, I think,  
21 would --

22 QUESTION: To say someone is on their knees  
23 certainly does not import an exclusively religious  
24 connotation. It could be a temporal scene. I mean,  
25 people are on their knees before kings, emperors --

1           MR. DE LUCA: Well, I think that the creche,  
2 and the creche in this case, and any creche that I have  
3 ever seen would lend credence to the position that it is  
4 not temporal but in fact worshipful, that the appearance  
5 of the figures in the display are in a worshipful  
6 position, and not simply kneeling down for convenience  
7 or for comfort. They are there to adore the Christian  
8 Messiah.

9           QUESTION: Well, that is probably true for  
10 anyone exposed to the Christian religion, but I think  
11 what Justice Stevens was trying to ask you and what I  
12 have been trying to ask you is for someone who has not  
13 been schooled in that religion.

14          MR. DE LUCA: For someone who knows nothing  
15 about Christianity? Then I -- if someone has absolutely  
16 no knowledge of the birth of Christ and of  
17 Christianity's beginnings, and looking at this  
18 particular display by themselves, I think that they  
19 could import or -- the display would import some  
20 religious or have some religious overtones.

21          QUESTION: Mr. DeLuca --

22          MR. DE LUCA: Yes?

23          QUESTION: -- would the display up on the  
24 frieze in this courtroom of the Ten Commandments be  
25 unconstitutional then, in your view?

1                   MR. DE LUCA: No, it would not be  
2 unconstitutional in my view. I believe that the Ten  
3 Commandments as contained in the frieze in this  
4 courtroom is not put there to advance religion. I  
5 believe that it, in conjunction with other aspects of  
6 the freeze, it is intended to suggest the beginnings of  
7 law, the codification of law and how it began.

8                   QUESTION: Well, that is the argument, of  
9 course, of the city, that the display of the nativity  
10 scene is there to explain the origins of the Christmas  
11 holiday observation.

12                  MR. DE LUCA: But I think that in this setting  
13 here in this courtroom, the Ten Commandments in and of  
14 themselves do not suggest or advance religion, nor would  
15 anyone suggest that the purpose of having the Ten  
16 Commandments in this courtroom is this Court's attempt to  
17 advance religion. Conversely, the Ten Commandments in  
18 Stone versus Graham, of course, was found to be a  
19 violation of the establishment clause because of its  
20 setting, and because of the use that it was being put to.

21                  This Court found, as you know, that the  
22 utilization of the Ten Commandments, even though the  
23 avowed purpose put in there by the school or by the  
24 state was merely to inculcate in children morals and a  
25 knowledge of the Ten Commandments, contained religious

1 references to God and "Thou shalt not have strange gods  
2 before me," and a variety of other religious references,  
3 and on that basis the Court found that there was a  
4 violation of the establishment clause.

5 I think that, as I said earlier, ultimately  
6 the courts will be asked to decide in each instance  
7 whether the erection of various religious symbols are  
8 permissible. An affirmance in this case will make clear  
9 to government, to people of this country of all  
10 religious persuasions, that sponsorship of religious  
11 symbols is not the business of government, and that  
12 government represents all people equally on the basis of  
13 their citizenship, and not on the basis of their  
14 religious affiliation.

15 Thank you.

16 CHIEF JUSTICE BURGER: Do you have anything  
17 further, Mr. McMahon? You have two minutes remaining.

18 ORAL ARGUMENT OF WILLIAM F. MC MAHON, ESQUIRE,  
19 ON BEHALF OF THE PETITIONERS - REBUTTAL

20 MR. MC MAHON: Thank you, Mr. Chief Justice.

21 It is respectfully submitted that just as  
22 common sense tells us that the Ten Commandment in the  
23 frieze of this courtroom is not promoting religion but  
24 is symbolizing law, so on the record in this case common  
25 sense will tell us that the city is celebrating



1 Christmas and not promoting religious dogma.

2           The respondents in oral argument here have  
3 stressed the circumstances surrounding the religious  
4 element as determinative of its constitutional effect.  
5 That, we would respectfully submit, is precisely what  
6 the courts below refused to do in this case. The  
7 District Court stated that the city was overemphasizing  
8 the importance of context in evaluating the  
9 constitutional import of a symbol, and we respectfully  
10 submit that as respondent's argument has demonstrated  
11 here today, it is impossible to overstate the importance  
12 of context, because context makes the symbol what it is.

13           In response to questions of the Chief Justice,  
14 I would submit that the legislative prayers, the public  
15 prayers of the first Congress and the Thanksgiving  
16 proclamation of George Washington in 1789 were anything  
17 but perfunctory, and they were in fact an  
18 acknowledgement of the religious content in American  
19 life in a very sincere and forthright manner.

20           The heart of the respondent's position in this  
21 case and the decisions below is that it is impermissible  
22 for government to keep Christ in Christmas. We would  
23 respectfully submit to this Court that it would be  
24 impermissible for government to put Christ in Christmas,  
25 it would be impermissible for government to take Christ

1 out of Christmas. The establishment clause requires  
2 strict neutrality. Christmas was put -- Christ was put  
3 in Christmas by the traditions of the American people.  
4 This Court may recognize them, and the government may  
5 recognize them in the decisions of this Court. Thank  
6 you.

7 CHIEF JUSTICE BURGER: Thank you, gentlemen.  
8 The case is submitted.

9 (Whereupon, at 11:01 a.m., the case in the  
10 above-entitled matter was submitted.)

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# CERTIFICATION

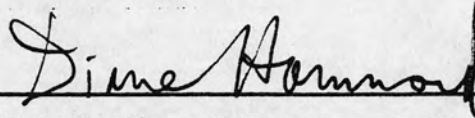
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DENNIS LYNCH, ETC., ET AL., Petitioners V. DANIEL DONNELLY, ET AL  
# 82-1256

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