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OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE
THE SUPREME COURT
OF THE
UNITED STATES

COUNTY OF ALLEGHENY, ET AL., Petitioners V.
AMERICAN CIVIL LIBERTIES UNION GREATER PITTSBURGH
CHAPTER, ET AL.;
CHABAD, Petitioner V. AMERICAN CIVIL LIBERTIES
UNION GREATER PITTSBURGH CHAPTER, ET AL.; and
CITY OF PITTSBURGH, Petitioner V. AMERICAN CIVIL
LIBERTIES UNION GREATER PITTSBURGH CHAPTER, ET AL.

CAPTION:

CASE NO: 87-2050; 88-90; 88-96

PLACE: WASHINGTON, D.C.

DATE: February 22, 1989

PAGES: 1 - 56

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1 IN THE SUPREME COURT OF THE UNITED STATES

2 -----x
3 COUNTY OF ALLEGHENY, ET AL., :
4 Petitioners :
5 V. : No. 87-2050
6 AMERICAN CIVIL LIBERTIES UNION :
7 GREATER PITTSBURGH CHAPTER, :
8 ET AL.; :
9 -----x

10 CHABAD, :
11 Petitioner :
12 V. : No. 88-90
13 AMERICAN CIVIL LIBERTIES UNION :
14 GREATER PITTSBURGH CHAPTER, :
15 ET AL.; and :
16 -----x

17 CITY OF PITTSBURGH, :
18 Petitioner :
19 V. : No. 88-96
20 AMERICAN CIVIL LIBERTIES UNION :
21 GREATER PITTSBURGH CHAPTER, :
22 ET AL. :
23 -----x

24 Washington, D.C.

25 Wednesday, February 22, 1989

1 The above-entitled matter came on for oral
2 argument before the Supreme Court of the United States
3 at 10:12 a.m.

4 APPEARANCES:

5 PETER BUSCEMI, Washington, D.C.; on behalf of
6 Petitioners in Nos. 87-2050 and 88-96.

7 NATHAN LEWIN, Washington, D.C.; on behalf of Petitioner
8 in No. 88-90.

9 ROSLYN M. LITMAN, Pittsburgh, Pennsylvania; on behalf of
10 Respondents.

C O N T E N T S

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ORAL ARGUMENT OF

PAGE

PETER BUSCEMI, ESQ.

On behalf of Petitioners County of
Allegheny, et al., and City of
Pittsburgh, et al.

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NATHAN LEWIN, ESQ.

On behalf of Petitioner Chabad

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ROSLYN M. LITMAN, ESQ.

On behalf of Respondents

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REBUTIAL ARGUMENT OF

PETER BUSCEMI, ESQ.

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P R O C E E D I N G S

(10:12 a.m.)

CHIEF JUSTICE REHNQUIST: We'll hear argument now in No. 87-2050, County of Allegheny v. American Civil Liberties Union and related cases. Mr. Buscemi, you may proceed whenever you're ready.

ORAL ARGUMENT OF PETER BUSCEMI ON BEHALF OF PETITIONERS COUNTY OF ALLEGHENY, ET AL., AND CITY OF PITTSBURGH, ET AL.

MR. BUSCEMI: Thank you. Mr. Chief Justice, and may it please the Court:

Five years ago this Court decided a case called Lynch against Donnelly. In that case the Court upheld a Christmas display in Pawtucket, Rhode Island against a First Amendment challenge. The display contained a rather large nativity scene with figures as big as five-feet tall.

The City of Pawtucket owned the display, erected it, and maintained it each year as part of a display in the vicinity of the City Hall and a private park near the downtown shopping center.

QUESTION: So, it was on private property?

MR. BUSCEMI: Yes, Your Honor. The mayor himself participated in the lighting of the display each year, and a ceremony to which people were invited -- the

1 public was invited. And the city's involvement in the
2 display was never challenged. Indeed, that was the
3 reason that the case came before this Court in the first
4 place. Had there been no city involvement, of course,
5 there would have been no constitutional issue presented
6 in Lynch at all.

7 The Court rejected the Establishment Clause
8 challenge in Lynch and held that the display did not
9 compel or seek to compel adherence to any religious
10 belief and did not violate the Establishment Clause.

11 The way in which the Court put the issue to be
12 decided in Lynch is significant for today's case. The
13 Court said that the issue for decision in Lynch was
14 whether the Establishment Clause prohibits a
15 municipality from including a creche or nativity scene
16 in its annual Christmas display. That is how the Court
17 began its opinion.

18 In the five years since Lynch was decided,
19 three federal courts of appeals have considered
20 Establishment Clause challenges to Christmas displays in
21 various cities around the country, including Pittsburgh,
22 Chicago, and Birmingham, Michigan.

23 QUESTION: And we had a Scarsdale, New York
24 case.

25 MR. BUSCEMI: Yes, Your Honor. That was

1 affirmed by an equally divided court. And, in any
2 event, the Scarsdale case was slightly different, as you
3 may remember, because it involved a request by a group
4 to put a display in a park. It was not a city display
5 that was challenged after it was erected, as was the
6 case in the Chicago case, the Birmingham case, and the
7 case that's here today, the Pittsburgh case.

8 This case is here on certiorari to the Third
9 Circuit and it involves displays in the Allegheny County
10 Courthouse and in the City-County Building which is
11 directly across the street from the Allegheny County
12 Courthouse in downtown Pittsburgh.

13 The Allegheny County Courthouse display
14 consists of a nativity scene which is surrounded by
15 Christmas trees, poinsettia plants, wreaths on the
16 windows behind the staircase, and is used as the site
17 for a choral program that takes place throughout the
18 Christmas season each year.

19 QUESTION: What was it that surrounded the
20 creche in the Pawtucket case?

21 MR. BUSCEMI: Well, the creche in the Pawtucket
22 case was surrounded by a variety of things, including a
23 jumbo candy-cane, a talking wishing well, some reindeer,
24 a Santa Claus, a sleigh and a variety of Christmas
25 symbols.

1 QUESTION: And did the court find that that had
2 some significance for the Establishment Claim?

3 MR. BUSCEMI: Well, that's a matter of dispute
4 In the case, Your Honor. As I read the Court's opinion,
5 the Court did not very heavily stress the additional
6 items that were included in a display. The opinion for
7 the Court --

8 QUESTION: None of those things that you've
9 listed were -- surrounded the creche in this case.

10 MR. BUSCEMI: All right. That's correct, Your
11 Honor. The -- the staircase on which the nativity scene
12 was displayed in this case was decorated with Christmas
13 trees, poinsettia plants and wreaths. There were other
14 decorations elsewhere in the building, not immediately
15 on the staircase. The staircase was also used as the
16 site for the choir programs that took place every day
17 during the Christmas season during the noon hour.

18 In addition, the bottom of the staircase, which
19 is on the second floor of the county courthouse, opens
20 into an area called the Gallery/Forum area which the
21 Court can see in the pictures that are reproduced in the
22 Joint exhibit volume. That Gallery/Forum area is an
23 area that's used to display a variety of artwork
24 throughout the year. It's not any kind of an integral
25 part of the Christmas display.

1 In any event, as far as we are concerned, the
2 opinion in Lynch does not stress the additional secular
3 elements in the Christmas display. They are listed at
4 the beginning of the Court's opinion, but very little,
5 if any, of the Court's opinion puts any emphasis on them
6 as a key factor in the Court's decision.

7 What is a key factor in the Court's decision
8 and what applies equally here is the context of the
9 holiday season. The nativity scene here, just like the
10 nativity scene in Lynch, was not erected in the
11 abstract. It was erected as part of a holiday
12 celebration that was sponsored by the County of
13 Allegheny and then the separate display on the
14 City-County Building --

15 QUESTION: Counsel --

16 MR. BUSCEMI: -- sponsored by the city.

17 QUESTION: -- would you think that the context
18 of the Christmas season would justify holding a
19 religious service in the City-County Building? For
20 example, a Catholic mass or a similar service, at
21 Christmas time?

22 MR. BUSCEMI: Well, Your Honor, that question
23 was raised during the oral argument in Lynch, and I
24 think I'll answer it the same way as the Solicitor
25 General answered it on that occasion. I think that

1 probably tests the limit of the Court's decision in
2 Lynch, but I would say that would be appropriate as long
3 as it were a noncoercive ceremony. That is, it did not
4 involve any compulsion and it did not involve anything
5 more than a de minimus expenditure of public funds.

6 We think -- our first submission to the Court
7 about the legality of both the nativity scene and the
8 other display is that they are passive displays. The
9 Court mentioned in Lynch twice that they were -- that
10 the display in that case was a passive symbol of the
11 holiday. And we think that that in and of itself is
12 ground for sustaining the displays in this case.

13 I might add, just so that the facts are clear,
14 the second display is in the front of the City-County
15 Building. It consists of a 45 foot Christmas tree.
16 There is an 18 foot menorah attached to the pillar next
17 to the Christmas tree. And there are -- there is a sign
18 from the mayor of the City of Pittsburgh, the text of
19 which is reprinted in the briefs -- talks about a salute
20 to liberty and a reminder that the festive lights --
21 that the festive lights remind us that we are the
22 keepers of the flame of liberty and our legacy of
23 freedom.

24 QUESTION: Do you think the message conveyed by
25 a display may be different when the symbol is located in

1 a city hall or a courthouse instead of a park in a
2 commercial district, a private park?

3 MR. BUSCEMI: Your Honor, we don't think so.
4 At least, not in this case. And the reason is that the
5 city's involvement with the display in Lynch was
6 absolutely clear as well. That was how the case came to
7 this Court. Moreover, at the very beginning of the
8 Court's opinion in Lynch, the Court noted that the kind
9 of display that the Court was addressing in Lynch was of
10 the kind that was frequently displayed on public grounds
11 throughout the United States.

12 And, in fact, I think there's a very strong
13 argument that the display on the steps of the second
14 floor of the county courthouse, a display which the
15 record shows was not even seen by 90 to 95 percent of
16 the people who enter the courthouse, is far less
17 prominent and far less likely to convey any message of
18 government approval than is the display in Pawtucket,
19 which was erected and maintained by the city and which
20 was illuminated by the city in a ceremony to which the
21 public was invited.

22 QUESTION: Are all symbols passive? Would a
23 cross be passive? Or a swastika, which brings forth
24 powerful emotions?

25 MR. BUSCEMI: Yes. I think the symbol itself

1 is a passive device. Now, there are cases that you may
2 be aware of from the lower federal courts involving
3 enormous crosses that were illuminated either on a
4 hillside or the side of a very prominent building and
5 that were found to be violations of the Establishment
6 Clause because of the dominance of the symbol over the
7 community and the inability to avoid the symbol and the
8 fact that it looked as if the city were endorsing this
9 as a symbol for the entire community.

10 That is far from the case here. As far as the
11 passive-active dichotomy, I think my answer to your
12 question is yes, they would be passive symbols. We have
13 outlined in our briefs that the evil that was addressed
14 by the Establishment Clause initially was the evil of
15 government coercion. Either government coercion of
16 adherence to particular religious beliefs or government
17 use of public funds to establish and support a church.

18 In the absence of those -- of either of those
19 things, we -- I think we have to recognize that we're on
20 the periphery of what the framers sought to address in
21 the Establishment Clause in the first place.

22 Now, Justice O'Connor's concurring opinion in
23 Lynch suggested a somewhat broader focus on the concept
24 of endorsement. And, of course, endorsement or the
25 persuasive value of government action, doesn't

1 necessarily involve coercion. If the mayor, for
2 example, were to announce that he thought it would be a
3 good idea if the city adopted Judaism as its official
4 religion, that might not involve any coercion but it
5 might nevertheless constitute the kind of endorsement
6 that Justice O'Connor's concurring opinion suggested
7 would be inappropriate.

8 QUESTION: Am I saying your name right?

9 MR. BUSCEMI: Buscemi.

10 QUESTION: Buscemi. What does the city do for
11 Moslems? I don't know what an equivalently important
12 celebration for Moslems would be. Ramadan, I don't
13 think they celebrate Ramadan. It's a penitential
14 season. But --

15 MR. BUSCEMI: I'm not aware that --

16 QUESTION: -- pick a Moslem holiday. What if
17 it were shown that the city here did not put up a
18 similar display for the Moslem holiday?

19 MR. BUSCEMI: I'm not aware that the city does
20 put up a similar display for any holiday. One of the
21 named Respondents in this case is a Moslem, Mr.
22 Tunador. He testified at the hearing in this case that
23 the Moslem faith does not use outward symbols, and,
24 indeed, regards them as improper.

25 QUESTION: Uh-huh.

1 MR. BUSCEMI: So, just to answer your specific
2 question --

3 QUESTION: Well, pick another faith. Or make
4 up one. You, you see my point. In, in order to avoid
5 endorsing or appearing to favor one sect of religion
6 over another, which I think the Constitution does not
7 permit, does the city have to do this for every group?

8 MR. BUSCEMI: The key point in the Lynch case
9 and the key point in my answer to your question would be
10 the Christmas holiday season itself. That is, the
11 distinction that I would make between this case and the
12 case that you pose is that Christmas has already been
13 recognized as a national and a state holiday. Christmas
14 -- and that is, in fact, the central thrust of the
15 Court's opinion in Lynch.

16 Christmas, with its name, derived from Christ,
17 and Christ's mass, has been recognized as a holiday,
18 it's celebrated, the public employees are paid for not
19 -- even though they don't work on that day. And the
20 recognition of the historical origins of the holiday was
21 seen by the Court in Lynch as having, at least in part,
22 a secular purpose.

23 QUESTION: Well, that explains the creche but
24 not the menorah.

25 MR. BUSCEMI: The menorah, I think, Your Honor,

1 is part and parcel of the holiday season, as it is
2 celebrated by the residents of Pittsburgh. And that,
3 indeed, is what was said by the district court in this
4 case, and it was also what was testified to by the
5 witnesses called by Petitioners in the case.

6 The Chanukah holiday occurs on calendar at
7 approximately the time of Christmas. The menorah was
8 designed to -- for the purposes set forth in the mayor's
9 message, to remind the people in Pittsburgh of the light
10 of liberty and our legacy of freedom, and there was a
11 secular component to that symbol.

12 QUESTION: Do the creche and menorah have to be
13 about the same size? What if you have an enormous
14 creche and a little tiny menorah, or an enormous menorah
15 and a little tiny creche?

16 MR. BUSCEMI: Well, in fact, in this particular
17 case we had a menorah next to a Christmas tree without a
18 nativity scene, and then a nativity scene on the
19 staircase indoors without a menorah at all. So, I would
20 not draw any conclusions based necessarily on the size
21 of the figures. In fact --

22 QUESTION: Well, what if --

23 MR. BUSCEMI: -- as I said --

24 QUESTION: -- the menorah were there without a
25 Christmas tree next to it? Just standing alone. And it

1 relates to a religious holiday, not a public holiday?

2 MR. BUSCEMI: Well, Your Honor, I would say
3 that that would also be permissible. I don't think that
4 the Christmas tree is necessary to the constitutionality
5 of the display. And I don't think that the Court's
6 decision in Lynch suggests that, that it would be.

7 It's really the same point that was made by
8 Judge Weis in his dissent in this case in response to
9 the majority's attempted distinction of Lynch on the two
10 bases that, one, there was an unadorned nativity scene,
11 which was factually incorrect. But even if it had been
12 factually correct, I don't think that Lynch's emphasis
13 on the holiday season would be negated even if it were
14 unadorned. And, secondly, it's the city hall location,
15 which Judge Weis also addressed in his dissent.

16 So, I don't think anything would change. But I
17 think that the presence of the Christmas tree emphasizes
18 the overall holiday setting which the Court found so
19 important in Lynch.

20 QUESTION: Did any of the Plaintiffs in this
21 case challenge the Christmas tree by itself?

22 MR. BUSCEMI: No, sir. There was no challenge
23 to the Christmas tree, no challenge to the choral
24 program of Christmas carols, no challenge to any of the
25 other decorations in the county courthouse. And that

1 was made explicit on several occasions during the
2 hearing.

3 If the Court please, I would appreciate the
4 opportunity to save the remainder of my time for
5 rebuttal.

6 QUESTION: Very well, Mr. Buscemi. Mr. Lewin.

7 ORAL ARGUMENT OF NATHAN LEWIN

8 ON BEHALF OF OF PETITIONER CHABAD

9 MR. LEWIN: Mr. Chief Justice and may it please
10 the Court:

11 The irony of this case insofar as it applies to
12 the menorah is that an apparently successful effort on
13 the part of the City of Pittsburgh to demonstrate to its
14 population neutrality with regard to all religions by
15 displaying a symbol which is religious as well as
16 nonreligious to the Jewish community is being attacked
17 as violating the Establishment Clause.

18 The holiday season that is involved here is, of
19 course, a season which is recognized throughout the
20 United States, and throughout the world indeed, but
21 principally because its focus is a day that has become a
22 secular holiday but has very substantial religious
23 overtones to the majority population in this country.

24 It is not from the vantage point of the Jewish
25 faith a time of a principal holiday that Jews

1 celebrate. It happens to be a time when there is also a
2 minor Jewish festival, which is the Festival of Chanukah.

3 And, therefore, to demonstrate to the citizens
4 of Pittsburgh its respect for minority faiths, the city
5 erected immediately adjacent to a very large Christmas
6 tree -- and we have a photograph at page 4 of our
7 petition of the scene -- a 45-foot high Christmas tree.
8 Immediately adjacent to that, an 18-foot high menorah.
9 And we submit that, given the context, that is a
10 perfectly appropriate and permissible educational effort
11 on the part of the state.

12 This Court has said repeatedly ever since its
13 opinion in Abington and Schempp that even actions,
14 things that are not passive, but things such as bible
15 readings, that are done for instructional purposes for
16 religion generally are permissible. And we submit that
17 taken in proper context what this menorah does at a time
18 of a major Christian holiday is it advises the citizenry
19 that there are other faiths that celebrate at that very
20 same time --

21 QUESTION: Mr. Lewin --

22 MR. LEWIN: -- their own holidays.

23 QUESTION: Mr. Lewin, do you think the city had
24 a duty to put up the menorah if there had been a request
25 for or having already decided to display the creche?

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MR. LEWIN: That's our --

QUESTION: A constitutional duty?

MR. LEWIN: We argue alternatively, Justice Stevens, that under Larson and Valente there is a basis for such an argument. We are not presented with that, of course, in this case. But we think that given the overwhelming Christian nature of an exhibit such as either a creche or a Christmas tree, if a Jewish group, or indeed any other group, were to approach --

QUESTION: Well, that's the --

MR. LEWIN: -- were to approach the --

QUESTION: -- next question I was going to ask.

MR. LEWIN: -- city and it were possible --

QUESTION: If then you have two religions represented, would you have a constitutional obligation to satisfy the request of a third or fourth and a fifth that might have different -- pagan symbols or whatever they might be?

MR. LEWIN: We think that a city that has a place, such as the steps of city hall, or something, where it could put other symbols, should not discriminate among religions and should --

QUESTION: The how large --

MR. LEWIN: -- In fact --

QUESTION: -- how large --

1 MR. LEWIN: -- put other symbols there as well.

2 QUESTION: How large must the religious group
3 be to be entitled to that kind of representation?

4 MR. LEWIN: Well, frankly, I think a religious
5 group that is a bona fide religious group. It needn't
6 be very large. It may say, at that time, "we would like
7 to have some indication of our faith," at that time.

8 QUESTION: I suppose three or four persons who
9 sincerely believed in the particular faith would be
10 sufficient.

11 MR. LEWIN: Well, again --

12 QUESTION: Well, why not?

13 MR. LEWIN: -- I think it's --

14 QUESTION: Why not?

15 MR. LEWIN: It's --

16 QUESTION: Is this a majority rule kind of
17 thing?

18 MR. LEWIN: No, I don't -- It's not a majority
19 rule, Justice Stevens. But I think it -- It's really a
20 question -- I think an impracticality --

21 QUESTION: I mean, there can be a very large
22 religion from, you know, another country where they have
23 only three or four representatives in Pittsburgh, but
24 they may feel just as deeply about it.

25 MR. LEWIN: And I think that for -- indeed, if,

1 for example, the City of Pittsburgh had a public forum
2 which was open to religious faiths to conduct meetings
3 on, it would be guided by the same the standard.

4 QUESTION: Well, has it not adopted a public
5 forum? Isn't that what it's done?

6 MR. LEWIN: Well, in this case the evidence,
7 frankly, doesn't support the public forum position
8 because there was no effort made at the trial level to
9 demonstrate that the steps of City Hall were a public
10 forum. We were denied leave to intervene at that stage
11 of the case and no party made that -- made that showing.

12 However, it would be precisely the McCreary
13 case, Your Honor. If in fact there is a public forum
14 and there is a bona fide group and the group says,
15 "Look, we should be entitled to some representation," I
16 think given limitations on time, place and manner, which
17 this Court has regularly applied in these situations, I
18 think a state has an obligation not to discriminate
19 among religious faiths. But, of course, again, --

20 QUESTION: How about a menorah for a very small
21 group? Is -- I mean, they'd all be the same size or --

22 MR. LEWIN: No, they need not be the same size,
23 Justice Scalia. They -- again, I think a rule of reason
24 applies. If you've got a limited space and there are
25 groups that want to have some display at that time, to

1 show respect for that group I think the city does have
2 an obligation not to convey to its population there's
3 only one faith in this country and that faith is the
4 Christian faith that celebrates Christmas as a religious
5 holiday.

6 And that's really what is done at Christmas
7 time in terms of minorities. The minorities, whether
8 they are the Jewish minority, or the Moslem minority
9 that celebrate their principal holidays at other times,
10 are surrounded in our society by many, many symbols that
11 indicate the majority faith.

12 And the problems with regard to endorsement --
13 I think that Justice Brennan pointed out in his dissent
14 in Lynch and Donnelly -- apply when you have a symbol of
15 a majority faith because that appears to be the state
16 endorsing it.

17 But there could be no realistic appraisal on
18 the part of anybody who saw that menorah standing next
19 to the Christmas tree that Pittsburgh, which is not more
20 than 10 percent Jewish population, is encouraging its
21 citizens to become Jewish and is endorsing the Jewish
22 faith. That's a totally unrealistic appraisal of what
23 that menorah is, even if the menorah is a religious
24 symbol. Because all that it is, in that context, is
25 educational.

1 And to answer Justice O'Connor's question as it
2 might apply to a Jewish ceremony, if there were a Jewish
3 ceremony -- and, again, this case does not involve a
4 ceremony surrounding the menorah -- but if there were a
5 Jewish ceremony, we submit in the context of the holiday
6 season and the display it would be an educational or
7 instructional ceremony.

8 If Jews are permitted even on the steps of city
9 hall to light a menorah in that context, it's not the
10 state encouraging people to light menorahs, it's the
11 state saying to the citizens of Pittsburgh, "Look at
12 this object. To a minority faith, which are not
13 second-class citizens in the United States, that is a
14 respected tradition. And we want you to learn about
15 that tradition."

16 And that's really all that Pittsburgh has done
17 in this context.

18 QUESTION: Well, Mr. Lewin, why wouldn't the
19 city have to open up its steps on another holiday for
20 another religious faith?

21 MR. LEWIN: That's -- I submit, Justice White,
22 that -- that's a much more difficult question than when
23 it is already opening it up to the majority faith. In
24 other words, if --

25 QUESTION: Well, I know, but if a religion says

1 we have no business -- we haven't any interest in
2 putting our symbol up there at Christmas time. That is
3 -- we don't celebrate at Christmas time. We celebrate
4 some other time. And the city should show its -- show
5 that it isn't discriminating or endorsing a particular
6 religion on another day.

7 MR. LEWIN: Quite frankly, Justice White, if --
8 If there were a, a public forum that was opened up to
9 Christian ceremonies at Christmas time, then I think it
10 would be appropriate to say to a minority faith, "At the
11 time of your religious holiday that public forum should
12 be available as well."

13 And we submit that there are cases, certainly,
14 that this Court has decided that have said that you
15 can't discriminate against religion. And consequently,
16 the Court has held that public forums have to be open
17 for religious meetings, if they are open for
18 nonreligious meetings. And, and we submit that if there
19 were a public forum, if there were evidence that this
20 was a public forum, then if there were a Christian
21 ceremony conducted on the public forum, there should be
22 a Jewish or a Moslem ceremony if there is an application
23 for them. And I think that's --

24 QUESTION: Well, doesn't it have --

25 MR. LEWIN: -- an answer to Justice Scalia.

1 QUESTION: Doesn't it have to be a public
2 forum? Otherwise, the city is saying, "This is not a
3 public forum. We've got a perfect right to confine this
4 -- the use of these steps to one religion."

5 MR. LEWIN: No, I don't think --

6 QUESTION: The majority religion.

7 MR. LEWIN: I think if there is an area that is
8 not thrown open to public meetings and, therefore, there
9 is no evidence that it is a public forum --

10 QUESTION: Well, here's steps that are thrown
11 open to religious symbols by a majority faith.

12 MR. LEWIN: If the steps are thrown open to
13 religious symbols by a majority faith, then I think that
14 they are a public forum as to which a minority faith may
15 say, "We should also be entitled to have our religious
16 symbol on those steps."

17 QUESTION: So, it has to be a public forum for
18 this purpose?

19 MR. LEWIN: Yes.

20 QUESTION: For that purpose only.

21 MR. LEWIN: Yes, I agree. It would have to be
22 a public forum.

23 QUESTION: Is it not correct that the whole
24 premise of your argument is that the creche itself
25 conveys a religious message?

1 MR. LEWIN: The creche conveys a religious
2 message. We believe the Christmas tree contains an
3 element of a religious message. And the menorah is --
4 conveys a religious message although we -- there is
5 evidence in the record that the menorah has significance
6 other than religious significance as well.

7 QUESTION: Are you defending Lynch?

8 MR. LEWIN: Of course we're -- yes, we stand --

9 QUESTION: All right.

10 MR. LEWIN: -- firmly behind Lynch. We think,
11 though, in this case this goes far beyond Lynch. In
12 other words, we think in this case even the dissenters
13 in Lynch should recognize that the menorah in terms of
14 its instructional value is permissible in this context.

15 QUESTION: Thank you, Mr. Lewin. Mrs. Litman,
16 we'll hear now from you.

17 ORAL ARGUMENT OF ROSLYN M. LITMAN

18 ON BEHALF OF RESPONDENTS

19 MRS. LITMAN: Mr. Chief Justice, and may it
20 please the Court:

21 The issue posed -- the question posed in this
22 case is whether the Establishment Clause limits at all
23 the government's display of religious symbols during not
24 only Christmas day but during the period, in this case,
25 45 days, including, preceding, and following Christmas.

1 Now, the view taken by the Petitioners, the
2 City and County, apparently is that somehow by reason of
3 the fact that Congress has recognized that December 25th
4 is a federal holiday, and because presidents have made
5 proclamations, and the state has recognized it as a
6 state holiday, that somehow that action trumps the
7 Establishment Clause.

8 We don't think there is any necessity for this
9 Court to take that view. We don't think this Court said
10 that in Lynch, and it is perfectly appropriate to view
11 those recognitions of Christmas as a holiday in terms of
12 the states being allowed to celebrate its secular
13 aspects, but not in terms of, as counsel for the county
14 has argued, having a mass in the courthouse, having
15 symbols in the courthouse.

16 I think it's important for this Court to
17 understand that there are two displays here. Justice
18 Stevens, in terms of your question about does the creche
19 require the menorah, the Court should understand that
20 the creche stands alone. It is in the courthouse, and
21 it is in the most prominent and most public place in the
22 courthouse. Let me dispel the impression that counsel
23 gave when he suggested that the record shows that only
24 -- that 90 to 95 percent of the people don't see it.
25 That was never found as a fact in this case nor could it

1 have been because it was so inherently incredible. That
2 same witness testified at page 158 of the record that
3 that is the most beautiful and most public place in the
4 courthouse. And, the Third Circuit found specifically
5 that it was in a public place where people would see it.

6 The second display is the display involving the
7 menorah. That is in another building by another
8 governmental body. The creche is the county, the
9 menorah is by the City of Pittsburgh -- and that menorah
10 is not on the steps of, but on the face of the building
11 itself.

12 QUESTION: And it is with the Christmas tree?

13 MRS. LITMAN: That is exactly correct, Justice
14 Rehnquist.

15 Now, we take from Lynch that the key question
16 in evaluating governmental displays is whether the
17 display amounts to government endorsement of religion,
18 of a -- of a particular -- or of a particular religious
19 message. That is to say, does the display send a
20 message to non-adherents that they are outsiders, not
21 full members of the political community, and the
22 accompanying message to adherents, that they are
23 insiders, favored members of the political community?

24 This Court in Lynch held that a nativity scene
25 did not do that. These displays do, and they do so for

1 reasons that are constitutionally important and
2 meaningful. And I'd like to just briefly identify three
3 of those. First --

4 QUESTION: Well, the -- the two displays are,
5 are somewhat different, aren't they, Mrs. Litman?

6 MRS. LITMAN: They are totally different
7 displays, Justice Blackmun.

8 QUESTION: But you take the position that
9 you're supporting both of them in your position?

10 MRS. LITMAN: We take the same position as to
11 both of them. That is, that both of them violate the
12 Establishment Clause.

13 QUESTION: From your point of view, the county
14 one is easier, isn't it?

15 MRS. LITMAN: Well, Justice Blackmun, I think
16 that the county one could be considered to be an easier
17 one in one sense. That is to say that the display of
18 the nativity scene here -- and there have been a lot of
19 words said by counsel and in the briefs as to what that
20 display conveys.

21 But we produce that at pages 3 to 8 of the
22 joint exhibit volume, and I think page 7 particularly
23 reflects the nativity scene as -- as it was so that you
24 can see with your own eyes of the impression conveyed by
25 the nativity scene and see whether indeed you feel that

1 the message attested to by the law clerk whose judge's
2 chambers were in that building who had to pass that
3 nativity scene many times a day and had to make his way
4 past it because it takes up over half of the staircase
5 of the main landing -- when he said that looking at that
6 scene it evoked in him a memory of when his people -- in
7 the middle ages when his people were persecuted and
8 forced to live in ghettos.

9 QUESTION: Unembellished by anything except
10 flowers?

11 MRS. LITMAN: Yes, Justice Blackmun, and I
12 think that it is significant that both Father Swiderski,
13 who testified saying that this profaned his symbol to
14 have it there between the signs of the county
15 commissioner here, the official signs, the controller
16 and the treasurer here, and the nativity scene, which he
17 testified was similar to the kinds one sees in a, in a
18 Catholic Church.

19 And Ellen Doyle, one of the Plaintiffs who is a
20 religious Catholic, said the scene was reminiscent of
21 the ones in a Catholic Church.

22 QUESTION: Mr. Lewin's point is that precisely
23 to eliminate any such misperception on the part of this
24 young man, it would be good to have a menorah there as
25 well.

1 MRS. LITMAN: Well, of course, Justice Scalia,
2 I would assume that perhaps Mr. Lewin would like a
3 menorah next to the nativity scene, although that --
4 that wasn't asked. And his point, yes, is that next to
5 the Christmas tree --

6 QUESTION: Uh-huh.

7 MRS. LITMAN: -- which is the premise of his
8 argument -- he says that the Christmas tree by itself
9 sends a religious message, and, therefore, that
10 necessitates that the city have the menorah as well.
11 That's for the second display.

12 But it's very important to recognize that what
13 we're talking about here is not any displays by Chabad,
14 the intervenor, not by the people -- no one exercising
15 -- free exercise rights. These displays, each of them,
16 is by the governmental body. They are gratuitous
17 displays of --

18 QUESTION: It was in Lynch --

19 MRS. LITMAN: -- selected --

20 QUESTION: It was in Lynch too, of course.

21 MRS. LITMAN: Yes. Yes. Lynch was, too. But
22 unlike Lynch, these displays are at government
23 headquarters where the presence of government is
24 pervasive and unmistakable. Not only that, the
25 buildings are courthouses much like this one where

1 certain classes of citizens are compelled to come, under
2 compulsion of law, and which constitutes buildings, we
3 would think that, irrespective of whether they bear a
4 sign such as this one does, "Equal Access Under Law,"
5 that every citizen should come to and does come to with
6 the expectation --

7 QUESTION: Well, where --

8 MRS. LITMAN: -- that he or she will be treated
9 equally irrespective of religion.

10 QUESTION: Where was it in Lynch?

11 MRS. LITMAN: In --

12 QUESTION: I had the impression it was in a
13 place that it would be even more difficult to avoid.

14 MRS. LITMAN: It -- it --

15 QUESTION: And it was clear that that was a
16 governmental display, wasn't it? You really want us to
17 make a distinction on the basis of whether, whether it's
18 in a -- on government property even though the display
19 is obviously a government display, is obviously in a
20 place where a lot of people have to see it?

21 MRS. LITMAN: Justice Scalia, I think that the,
22 the decision in this case should hinge on the
23 confluence, the combination of all three factors. And
24 that is to say whether here, in these buildings where
25 you have government engaged in -- what the court said in

1 Ball was a symbolic embrace between church and state
2 where you have the kind of fusion of church and state
3 that this Court has struck down in Larson. And where
4 you have symbols that are undilutedly, intensely
5 religious. That there is no question that these symbols
6 convey the prohibited message to, to outsiders, to
7 non-adherents, that they are outsiders in the political
8 --

9 QUESTION: Counsel, why did you drop any claim
10 about the carols that were sung?

11 MRS. LITMAN: I would like to, to address
12 that. Justice Marshall, with respect to the carols, let
13 me dispel the notion that's been created that somehow
14 these displays all hinge together on the carols.

15 This display, the creche where the carols were
16 sung, stands for 45 days. The carols are sung for less
17 than 24 hours of that entire period. During the
18 six-plus-week period, a less than three-week period is
19 devoted to carols, and it is only at the lunch hour
20 that, that anyone comes in.

21 Justice Marshall, we did not raise the carols
22 because what was -- that was not a part of the original
23 complaint. But the critical thing here is that the
24 nativity scene --

25 QUESTION: You don't think --

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MRS. LITMAN: -- stands --

QUESTION: -- the carols had any connection with religion?

MRS. LITMAN: I think -- I think they -- they very likely might, Justice Marshall.

QUESTION: Well, why did you drop it?

MRS. LITMAN: Oh, it wasn't dropped, Your Honor. It was not raised in this case, and we could not claim here that it had a relation because, indeed, it was not made part of the case. And the significant thing here is that the nativity scene and the menorah displays stand alone. They are 24-hour, round-the-clock displays.

QUESTION: Is that going to be the line? One line is this was on government-owned property as opposed to simply being obviously done by government in a place where all citizens have to see it. Now, the second line is 24 hours versus 40 days. Isn't it clear that if this is bad, that carols are bad, too?

I mean, assuming that it's -- that they're not Santa Claus carols. I mean, you're talking Silent Night and religious carols.

MRS. LITMAN: In this case not, Justice Scalia, because the -- well, in this case not so clear because the carols are done by outside groups. The nativity

1 scene, however, and the menorah displays are for those
2 respective governments, their pronouncements. It's
3 government speech that we're talking about with --

4 QUESTION: Mrs. Litman --

5 MRS. LITMAN: -- respect to the displays.

6 QUESTION: -- do you think that the city and
7 county government can open up a courthouse or other
8 public building to allow carolers to come in and sing at
9 holiday seasons, and presumably other groups as well, at
10 appropriate times?

11 MRS. LITMAN: Justice O'Connor, with respect to
12 that -- and, of course, that is not the question before
13 the Court -- I think that one could raise a question as
14 to the propriety of singing one religion's carols. But
15 we have not pressed that claim in this case.

16 QUESTION: So, you take the --

17 MRS. LITMAN: Nor is it --

18 QUESTION: -- position that a public building
19 cannot become a public forum, in effect?

20 MRS. LITMAN: This building -- neither the
21 courthouse -- certainly the courthouse is in no way a
22 public forum. And the City-County Building -- and we
23 have to be careful to distinguish. What we're talking
24 about are not the outside sidewalks or steps. We're
25 talking about the face of the building, such as this.

1 QUESTION: Well, you don't think --

2 MRS. LITMAN: We don't have a public --

3 QUESTION: -- that a public body can permit
4 groups to come in and sing religious songs?

5 MRS. LITMAN: I think -- I think a public body
6 could permit groups to come in, Justice O'Connor, and we
7 have not argued that they cannot. But in this case,
8 what we are presented with is whether a public body can
9 make pronouncements.

10 QUESTION: Yes, but we're talking about what
11 the Establishment Clause would permit under your theory.
12 And the next case is down the road.

13 MRS. LITMAN: With respect to displays where we
14 are -- where we are clearly, in, in this -- in this case
15 and in cases like it, in cases where you have the
16 displays, we are clearly focusing on government's
17 action. And we know that the Establishment Clause
18 traditionally has been -- has been held to be a
19 limitation on what government may pronounce.

20 QUESTION: Oh, if there was a sign on this
21 creche that said, "This creche was hand-painted and
22 donated and has been put here by the Knights of
23 Columbus," or the First Presbyterian Church, that would
24 be okay, then? It would be like the carols.

25 MRS. LITMAN: I think not, Justice --

1 QUESTION: It wouldn't be the government doing
2 it. It would be the First Presbyterian Church doing it.

3 MRS. LITMAN: I think not, Justice Scalia. And
4 I think not for the reason given by Judge Flom in the
5 United Jewish Congress case versus Chicago, where there
6 were six disclaimers. That if you put a frankly -- an
7 intensely religious display --

8 QUESTION: Uh-huh.

9 MRS. LITMAN: -- In a building that is so
10 closely linked, that has this symbolic link with
11 government, you can't dispel the concept that government
12 is endorsing it. And let me say --

13 QUESTION: That's a very rational position
14 until you say that carols are okay.

15 MRS. LITMAN: Well, I don't -- I don't say that
16 the carols are okay if the government is doing that,
17 Justice Scalia.

18 QUESTION: No, the government isn't singing the
19 carols. It's letting groups come in to sing the
20 carols. Just as it's letting groups come in to put up
21 the creche.

22 MRS. LITMAN: If I have given you the
23 impression that I -- that I said carols are okay, I have
24 misled you.

25 QUESTION: Okay.

1 MRS. LITMAN: With respect to the sign,
2 Incidentally --

3 QUESTION: Mrs. Litman --

4 MRS. LITMAN: Yes, Justice Kennedy.

5 QUESTION: -- does the government have a duty
6 to accommodate religion?

7 MRS. LITMAN: I, I believe that it -- it does,
8 Justice Kennedy. But in this case one of the critical
9 factors is that we don't have accommodation. This is
10 not the case --

11 QUESTION: Well, I, I, I understand. But at
12 some point -- and that certainly precludes the
13 appearance of hostility to religion, does it not?

14 MRS. LITMAN: I, I think -- I think clearly
15 that it does.

16 QUESTION: Would you say that at some point a
17 -- an attempt by the government to purge religious
18 symbols from our life can constitute hostility to
19 religion? At some point.

20 MRS. LITMAN: Well, I have not actually thought
21 about the concept of having government purge it, but I
22 would think clearly it appears to me from your question
23 that, yes, there would be a point at which it would be
24 violating the free exercise rights we all have. The
25 critical --

1 QUESTION: So, if -- suppose that the
2 government officials at the Inauguration left during the
3 invocation that preceded the Presidential Inaugural.
4 There was an invocation before and an invocation after.
5 Should government officials have left?

6 MRS. LITMAN: I think not, Justice Kennedy,
7 because under the --

8 QUESTION: Or perhaps --

9 MRS. LITMAN: -- *McDaniel v. Paty* --

10 QUESTION: -- sat down while everybody else was
11 standing up?

12 MRS. LITMAN: Excuse me?

13 QUESTION: Or perhaps sat down while everybody
14 else was standing up?

15 MRS. LITMAN: I think not. I think that
16 government officials, as this Court has held in *McDaniel*
17 *v. Paty*, have free exercise rights as well.

18 QUESTION: Isn't the reason for that that if
19 you insisted on that action, it would show hostility to
20 religion?

21 MRS. LITMAN: Perhaps it would show that, but I
22 would premise my, my answer on the fact that government
23 officials, like others, as this Court has said, have
24 free exercise rights. While --

25 QUESTION: If we ban Christmas carols in all

1 public buildings, could that be interpreted reasonably
2 by some people as hostility to religion?

3 MRS. LITMAN: I think, Justice Kennedy, that
4 there comes a point at which this Court must say that
5 the Establishment Clause does prohibit government from
6 making certain religious pronouncements. That point is
7 not always easy to reach.

8 In this case it is because it is so far to
9 whatever the point should be. But, obviously, in cases
10 there are balances required between free exercise and
11 establishment.

12 What makes this case easy is there is no
13 tension between free exercise and establishment. In
14 this case, this is not accommodation. This is
15 promotion. This is not neutrality. This is
16 favoritism.

17 And to, and to address the, the question of
18 would the government have to put up a menorah of a
19 certain size, or the question of Justice Scalia of what
20 does the government do for Moslems, the answer is the
21 government does nothing for Moslems. And even the --
22 that is, the county, and the City of Pittsburgh doesn't
23 either. But the, the display of the City of Pittsburgh,
24 this frankly Judeo/Christian symbol, certainly conveys

25 --

1 QUESTION: Did Moslems request that something
2 be done for them?

3 MRS. LITMAN: No, they did not, Your Honor.
4 But, but that brings into -- into question the issue of
5 in order for a government to be neutral, as this Court
6 has insisted it must be, may it take the position that
7 it can sit back and wait for, for religions to ask?

8 QUESTION: Well, certainly one thing -- one way
9 it could justify doing that is, we were told by opposing
10 counsel that the Moslems simply do not want something
11 like that. So that perhaps if they don't ask, it means
12 they are not in the least bit desirous of having a
13 public display.

14 MRS. LITMAN: That might be the case, but, but
15 what the record showed in this case, what Malik Tunador
16 testified, was that in his religion personification of
17 the deity -- and he included Jesus Christ as one of the
18 figures that one should not profane -- that
19 personification by figures is a profanation of, of his
20 symbol.

21 But to, to focus, Mr. Chief Justice, on how
22 does a government treat religions equally the question
23 is -- and Chabad has suggested that they sit back and
24 wait to be asked -- and perhaps it would mean that they
25 don't want symbols. On the other hand --

1 QUESTION: I would -- I would suppose under
2 your theory it wouldn't make -- it wouldn't help -- It
3 wouldn't help the city much if it welcomed everybody on
4 the -- all religions on the front step. I would think
5 that would be favoring religion.

6 MRS. LITMAN: Here is the problem.

7 QUESTION: Isn't that -- Isn't that right?

8 MRS. LITMAN: I think as between the view of
9 favoring religion and non-religion, yes, that would be
10 correct.

11 QUESTION: You would still be here --

12 MRS. LITMAN: But here --

13 QUESTION: You would still be here even if the
14 Moslems requested and they were on the front steps and
15 everybody else was that wanted on.

16 MRS. LITMAN: Justice White, that would be the
17 case. However, in this case you have the added problem
18 that these displays are frankly denominational, frankly
19 non-neutral. They, they, they have the preferential
20 kind of treatment that this --

21 QUESTION: Well, if --

22 MRS. LITMAN: -- Court struck down.

23 QUESTION: -- there were ten different ones, I
24 suppose each one of them would be denominational.

25 MRS. LITMAN: Well, that, that, that might --

1 that is so. But the problem is that what we have here
2 is one that is frankly Christian and one that is -- if
3 we accept Mr. Lewin's argument that a Christmas tree
4 gives a Christian message. If we don't accept that,
5 then there's no reason, there is no basis to having a
6 menorah --

7 QUESTION: Do we have to decide that question
8 to decide this case, do you think?

9 MRS. LITMAN: We think, Justice O'Connor, that
10 to -- that to accept Mr. Lewin's position this Court is
11 compelled to decide that. I think absent that -- and we
12 don't think it is preserved for appeal -- but, absent
13 that as a basis, they certainly can't say that the
14 menorah celebrates Christmas. And their -- its whole
15 premise in being there is, they say, to counterbalance
16 what they say is the Christian message delivered by the
17 Christmas tree.

18 But the kind of preferential treatment you have
19 here is the kind this Court said it would not accept and
20 it struck down in Thornton v. Caldor. The, the kind of
21 neutrality that we don't have here is the kind of
22 neutrality this court insisted on in Larson.

23 And there is this problem, Mr. Chief Justice.
24 As you indicated in your dissent in Larson in dealing
25 with the Unification Church, what if the city gets a

1 request, if somebody gives them a picture of the
2 Reverend Moon. Now, do they have to put that up or will
3 the government then be involved in deciding is the
4 Unification Church a religion? And what do they do with
5 Scientology or, or, or with groups that have no
6 symbols. Or, of course, with --

7 QUESTION: I think it would -- It would have to
8 be a group that has a symbol that is related to the
9 celebration of the particular season that we said in
10 Lynch allowed the government to enter into this field in
11 a, in a special area where it can't normally do it.

12 MRS. LITMAN: Well, of course --

13 QUESTION: What's distinctive about the menorah
14 is the Jews celebrate the same season in a different
15 aspect. And if there was another group that celebrated
16 the same season, presumably -- if for some reason
17 Reverend Moon was celebrated at Christmas time, which
18 would seem unusual to me, I suppose you'd have to put
19 his picture up.

20 MRS. LITMAN: Justice Scalia, of course, the
21 Petitioners here urge that what justifies the --
22 ignoring the prohibitions of the Establishment Clause at
23 this time is that Petitioners say that Lynch said that
24 during this amorphously defined Christmas season,
25 however long that is, one can put up --

1 QUESTION: Forty-five days.

2 MRS. LITMAN: Well, 45 days here. But if
3 during this 45 days one can put up symbols related to
4 Christmas and then they get -- under that umbrella they
5 put in the menorah because it happens that the -- that
6 the Jewish religion has Chanukah at that time -- let me
7 point out, however -- and I think it's of critical
8 importance in deciding the case -- that this Court
9 understand that the impact of these symbol on religious
10 minorities in this country is very, very strong. The
11 feeling -- aside from Chabad, the Court will note that
12 not only the Jewish law clerk and the Jewish lawyers in
13 this case urged that these symbols not be permitted, but
14 with unanimity the, the, the majority of the Jewish
15 population in this country have filed briefs here urging
16 this Court --

17 QUESTION: Well, wasn't that true --

18 MRS. LITMAN: -- not to --

19 QUESTION: Wasn't that true curing Lynch, too?

20 MRS. LITMAN: It was true in Lynch. But the
21 significant thing here, Your honor, is that, I hope it
22 will underscore for the Court, that they would rather
23 not have -- and they asked this Court not to permit
24 government to endorse their symbol, the menorah, rather
25 than have to suffer it at the cost of having the --

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QUESTION: But that's --

MRS. LITMAN: -- Christian symbol, the creche --

QUESTION: -- apparently a disagreement among different sectors of the Jewish faith.

MRS. LITMAN: Well, I think not. Well, it, it, it may be. And this one sector of the Jewish faith doesn't -- although -- although until today they have never taken a view with respect to the creche. Their intervention here has been limited to the, the menorah. But the great majority -- and you have briefs as amici here from all over this, this country, the Jewish populations urging this court not to permit either of these displays. And knowing, with the history that they -- that they have had, with the many years of living under governments that used religious displays not to foster tolerance and love among religions but to foster intolerance and hatred and bigotry, and knowing that when, when their own religious --

QUESTION: Mrs. Litman, what do you do about Christmas?

MRS. LITMAN: Excuse --

QUESTION: What do you do about the federal government declaring Christmas to be a holiday?

MRS. LITMAN: I think that -- I think that --

QUESTION: Why is that not bad?

1 MRS. LITMAN: -- you say -- that is perfectly
2 fine, Justice Scalia. We would not object to December
3 25th. We think it is a, a, a valid holiday similar to
4 this Court's decision in McGowan where they said that
5 Sunday had secular reasons.

6 But we don't go on from there and embrace the
7 county's notion that somehow that validates or wipes out
8 the Establishment Clause for 45 days.

9 QUESTION: Well, isn't that because --

10 QUESTION: What if Congress next year declared
11 Good Friday to be a holiday in the Christian -- the
12 Friday before Easter?

13 MRS. LITMAN: If Congress did that, I think an
14 argument could be made, Justice Rehnquist, that perhaps
15 it was accommodating or recognizing that many people
16 take off on that day anyway. I don't think that that
17 hypothet is as clear as the -- as the case of Christmas,
18 which is celebrated clearly by the majority.

19 QUESTION: Well, isn't the reason for that --
20 It's because everyone knows that it's not an
21 endorsement? In your earlier answer to the Chief
22 Justice you said that other groups object to this
23 endorsement of religion. But that's the issue, isn't it?

24 MRS. LITMAN: Yes, of course, that's the issue,
25 Justice Kennedy. And the reason that it is an

1 endorsement here is because where it is. Each of these
2 governments has reached out to link arms with a
3 religion. They have accepted, they have embraced,
4 frankly evangelical symbols.

5 With respect to the nativity scene, this one
6 doesn't say, like the one in Lynch, "Season's Greetings"
7 or "Happy Holidays" or even "Merry Christmas." This one
8 says, "Glory in Excelsis Deo," a quotation from the
9 gospel of --

10 QUESTION: Well, would the message be different
11 if it said "Season's Greetings" and had a few reindeer
12 and candy canes around, and other displays, such as in
13 Lynch?

14 MRS. LITMAN: Justice O'Connor, that is
15 certainly something that the Court would, would have to
16 consider, although we would suggest that that kind of
17 scene would not be appropriate in a courthouse in any
18 event.

19 The, the easy part about this case is that
20 there --

21 QUESTION: The Constitution doesn't address --

22 MRS. LITMAN: -- are those symbols.

23 QUESTION: -- itself to what's appropriate. It
24 speaks in terms of the Establishment Clause and the Free
25 Exercise Clause.

1 MRS. LITMAN: I'm sorry. I didn't hear the
2 first word you --

3 QUESTION: So, is the message of endorsement
4 different if it's surrounded by these other objects?

5 MRS. LITMAN: I think that the message of
6 endorsement in this case, Justice O'Connor, comes about
7 from all three factors. Where the, the, the symbol is,
8 its, its identity, the, the imprimatur of the --

9 QUESTION: Yes, I asked you --

10 MRS. LITMAN: -- state is unconscionable.

11 QUESTION: -- if it would be different if it
12 were surrounded by the other things --

13 MRS. LITMAN: I think --

14 QUESTION: -- such as in Lynch.

15 MRS. LITMAN: I think -- I think that it would
16 not be permissible, but I think it would be a different
17 display. It would not have the --

18 QUESTION: Why? Because of its location? Is
19 that what it boils down to?

20 MRS. LITMAN: No. No. I think not, Justice
21 O'Connor. But I think when you have the candy canes and
22 the Santa Claus, one might more easily be able to say
23 they're not getting a religious message. Where you have
24 a nativity scene, as this one, or a, a menorah, where
25 none of those are there, then the, the religious message

1 is undispelled --

2 QUESTION: What about poinsettias and wreaths?
3 I don't think there were any poinsettias in Bethlehem.
4 Why isn't that like a candy cane?

5 MRS. LITMAN: Well --

6 QUESTION: Or a Christmas tree? Or -- or --

7 MRS. LITMAN: -- It's one of --

8 QUESTION: Or wreaths? I don't know that
9 that's -- Is that part of a secular or part of the
10 religious?

11 MRS. LITMAN: Well, I think in this case,
12 Justice Scalia, it's clearly part of the frame around
13 the, the nativity scene. And I think if you look at it,
14 you'd have to agree that it enhances and, and makes more
15 prominent the nativity scene.

16 QUESTION: I don't understand your endorsement
17 point, at least with respect to the Christmas tree and
18 the menorah. How could you possibly be endorsing either
19 Christianity or Judaism when you have symbols of
20 either? Now, I can understand how you might say you are
21 endorsing religiousness by acknowledging the
22 religiousness of the people, and this is a significant
23 religious holiday for, for both of these groups. But as
24 for endorsing one sector rather than another, how could
25 you possibly be?

1 MRS. LITMAN: We think what you're endorsing in
2 that case, Justice Scalia, is Judeo/Christian symbols
3 that totally ignore in an appalling lack of appreciation
4 for the Moslems, the Hindus, the Buddhists in the
5 population of Pittsburgh, the ever-increasing number of
6 Asian-Americans whom we are in the process of welcoming
7 to our country who don't adhere to the Judeo/Christian
8 symbols, but who are nevertheless part of what, what is,
9 we believe, embraced and protected by the prohibitions
10 of the Establishment Clause.

11 And, and we think that by -- by adhering to the
12 concept that government must remain neutral -- we have
13 managed -- this country has managed over the last 200
14 years to preserve a very important right that the
15 framers set for us when they -- when they wrote the
16 First Amendment. And to say, as counsel does, that we
17 can now kick over all of the jurisprudence of this Court
18 on the Establishment Clause, that suddenly we put in a
19 new provision talking about coercion -- and he, he
20 neglects to mention to the Court that the same kind of
21 indirect coercion is present here, as the Court found in
22 Engel -- but this court has never required coercion.

23 Their interpretation means that this Court
24 would say that the framers, in enacting the
25 Establishment Clause, enacted a total redundancy

1 because, of course, it would have no meaning.

2 QUESTION: Thank you, Mrs. Litman. Mr.
3 Buscemi, you have four minutes remaining.

4 REBUTTAL ARGUMENT OF PETER BUSCEMI ON BEHALF
5 OF PETITIONERS COUNTY OF ALLEGHENY
6 AND CITY OF PITTSBURGH

7 MR. BUSCEMI: Your Honor, thank you. The
8 position of the Respondents is basically inconsistent
9 with what this Court decided in Lynch. Virtually all of
10 the arguments that the Court has just heard would have
11 been equally applicable to the situation in Lynch, a
12 situation in which the Court ruled that the Christmas
13 display of the city was permissible.

14 As the Court said in that decision, the display
15 was no more an advancement or endorsement of religion
16 than the Christmas holiday itself.

17 QUESTION: I must say, counsel, that 45 days of
18 a display in a courthouse is a very substantial
19 commitment of a neutral form to an image that is
20 certainly conceded by all to be religious.

21 MR. BUSCEMI: Your Honor, I don't know
22 precisely how long the display in the Pawtucket case was
23 in the park, but I suspect that it was there throughout
24 the Christmas shopping season, because it was right near
25 the downtown shopping district. And the display there,

1 of course, took up far more space than the display here,
2 in a far more public place, a place seen by far many --
3 far more people than in this case.

4 QUESTION: Well, there was a lot more material
5 in it than here.

6 MR. BUSCEMI: Well, yes, there was, Your
7 Honor. But the nativity scene itself was far bigger
8 than the one here.

9 The simple point is that as this court said at
10 the very beginning of its decision in Lynch, there is an
11 affirmative -- the Constitution does not require a
12 complete separation of church and state, it
13 affirmatively mandates accommodation, not merely
14 tolerance, and forbids hostility toward any. Anything
15 less would require the callous indifference that this
16 Court has said it was never intended by the
17 Establishment Clause.

18 And the purging of religious symbols, the total
19 elimination of all recognition of religion in our
20 society from public buildings or other public grounds is
21 something that the Constitution has never required and
22 that this Court has never required.

23 As Judge Wells said at the conclusion of his
24 dissent, "Lynch advocated an approach of moderation,
25 understanding, and a sense of proportion in ruling on

1 displays commemorating the Christmas season. The
2 Establishment Clause -- such displays constitute simply
3 a tolerable acknowledgement of beliefs widely held among
4 people of this country. They pose no threat to
5 religious freedom, but their suppression forebodes
6 ominous consequences."

7 Your Honor, the Petitioners in this case
8 support those views and believe that the displays in
9 this case should be sustained for essentially the same
10 reasons that the displays in Lynch were --

11 QUESTION: Mr. Buscemi, can I interrupt?
12 You're really -- your position then is that basically
13 there is a judgment to be made that the extremes on
14 either side are really not -- not realistic
15 alternatives, that we have to make a judgment as to
16 whether the particular display in its particular setting
17 is too much of an endorsement of religion. Is that
18 right? That's what those words -- the message those
19 words gave me.

20 MR. BUSCEMI: Well --

21 QUESTION: Obviously, you're not going to say
22 you've got to take "In God We Trust" off the coins and
23 everything like that. Nobody would go that far. So,
24 somewhere along the line somebody has to make a judgment
25 in these difficult cases. Isn't that right?

1 MR. BUSCEMI: That's exactly right. And I
2 think, in fact, one of the characters --

3 QUESTION: And if there is some -- what seems
4 to be an arbitrary line is because somewhere you've got
5 to draw a line.

6 MR. BUSCEMI: It's precisely what the Court
7 said --

8 QUESTION: And it would not be ridiculous to
9 say --

10 MR. BUSCEMI: -- in Lynch.

11 QUESTION: -- the line is the difference
12 between a commercial display such as you had in Lynch,
13 and a noncommercial display such as you have here.
14 That's not a frivolous line, is it?

15 MR. BUSCEMI: Well, the question of whether the
16 display in Lynch was a commercial display I think would
17 raise a factual issue. I don't know that the display --

18 QUESTION: No, but there's all sorts of secular
19 aspects of that display that are not repeated in this
20 display.

21 MR. BUSCEMI: Well, that's true. That's --

22 QUESTION: And the location was dramatically
23 different, too.

24 MR. BUSCEMI: That's sort of the "two plastic
25 reindeer rule" of the "Saint Nicholas too" test and --

1 QUESTION: And what's so wrong -- why is that
2 any more arbitrary than any other line that you're going
3 to have to draw in this area?

4 MR. BUSCEMI: Well, it may --

5 QUESTION: You put a ridiculous name on it, but
6 nevertheless there is a difference, isn't there?

7 QUESTION: Well, it may not be more arbitrary,
8 but it seems to me that it does depart from the line
9 that this Court drew in Lynch, which was that the
10 critical consideration was the context of the holiday
11 setting, rather than the accompaniment of the nativity
12 scene by other secular symbols. Because, of course,
13 then the next question will be are two reindeer enough
14 or do you need eight?

15 QUESTION: Or, going in the other direction, is
16 it all right to say mass in the courtroom?

17 MR. BUSCEMI: Well, that's true.

18 QUESTION: You can go in either direction on
19 these things.

20 MR. BUSCEMI: At some point -- that's what the
21 Court said in Lynch. There's line-drawing and no per se
22 rule is possible.

23 QUESTION: Thank you, Mr. Buscemi.

24 MR. BUSCEMI: Thank you.

25 CHIEF JUSTICE REHNQUIST: The case is submitted.

1 (Whereupon, at 11:13 o'clock a.m., the case in
2 the above-entitled matter was submitted.)
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CERTIFICATION

Alderson Reporting Company, Inc., hereby certifies that the attached pages represents an accurate transcription of electronic sound recording of the oral argument before the

Supreme Court of The United States in the Matter of:

No. 87-2050 - COUNTY OF ALLEGHENY. ET AL., Petitioners V. AMERICAN CIVIL LIBERTIES UNION GREATER PITTSBURGH CHAPTER, ET AL.;

~~No. 88-90 - CHABAD, Petitioner V. AMERICAN CIVIL LIBERTIES UNION GREATER PITTSBURGH CHAPTER, ET AL.; and~~

~~No. 88-96 - CITY OF PITTSBURGH, Petitioner V. AMERICAN CIVIL LIBERTIES UNION GREATER PITTSBURGH CHAPTER, ET AL.~~

and that these attached pages constitutes the original transcript of the proceedings for the records of the court.

BY alan friedman

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