

THE SUPREME COURT
OF THE UNITED STATES

No. 2005-328

The City of Knerr, the State of Olympus and
Samantha Sommerman, Parks Director, Petitioners

v.

Reverend William DeNolf, Respondent

On Writ of Certiorari to the
United States Circuit Court of Appeals
Fourteenth Circuit

ORDER OF THE COURT ON SUBMISSION

The petition for writ of certiorari to the United States Court of Appeals for the Fourteenth Circuit is granted for consideration of the following questions presented:

IT IS THEREFORE ORDERED that counsel appear before the Supreme Court to present oral argument on the following issues:

(1) Whether granting the permit would create a violation of the establishment clause of the First Amendment to the United States Constitution;

and,

(2) Whether the denial of the permit was a violation of the free speech and free exercise clauses of the First Amendment to the United States Constitution

INTRODUCTION

This case is on writ of certiorari to the United States Court of Appeals for the Fourteenth Circuit. This Court granted certiorari in order to resolve the issues raised below concerning the constitutionality of denying a permit to Reverend Denolf and the First Baltic Christian Church to use Jones Park. The parties stipulated the facts.

Reverend Denolf individually and on behalf of the members of his congregation, the First Baltic Christian Church, sought a permit from the City of Knerr to use Jones Park in order to perform the Church's annual Passion play. Reverend Denolf is the author, director and star of the play, which was created to reenact the crucifixion of Jesus Christ. Members of the First Baltic Christian Church take various parts in the performance as well. This play originated with Reverend Denolf and, through the years, it has attracted great interest among members of the community. Because of the crowds, the church facilities have become inadequate for hosting the celebration. Accordingly, Reverend Denolf and First Baltic applied for permission to use the city park.

While the superintendent of parks originally granted the permit, the City Council subsequently rescinded the approval due to the potential implication of the establishment clause. The City Council postponed its denial of the permit for several months. This delay caused a reactionary politicization of the church-state issue throughout the community, resulting in prejudice against the Baltic faith and the members of Reverend Denolf's congregation, and against Reverend Denolf in particular.

Reverend Denolf filed suit claiming that the City's action in refusing the permit constituted a violation of his right to free speech and free exercise of religion. The district court found that granting the permit would violate the establishment clause. The court of appeals, however, found the substantial interest in preserving Reverend Denolf's free speech and free exercise rights to be more compelling than the minimal entanglement of church and state that could develop if the park was used for this purpose.

REVEREND WILLIAM DENOLF	§	U.S. DISTRICT COURT
	§	
Plaintiff	§	
	§	MIDDLE DISTRICT OF OLYMPUS
	§	
against	§	C-19876
	§	
THE CITY OF KNERR,	§	
STATE OF OLYMPUS,		
Samantha Sommerman Parks Director	§	
Defendant		

OPINION

Lyons, J:

In this action, Reverend William Denolf, pastor of First Baltic Christian Church (FBC), challenges the City of Knerr's refusal to approve his and FBC's application for a permit to use Jones Park, alleging that the city's denial of the application to display a cross on its Easter holidays was a violation of the First Amendment right to free speech and free exercise of religion.

The Court's jurisdiction rests on 28 U.S.C. § § 1331 and 1343(3). Trial was held before the Court on March 24, 2005, without a jury. The Court took the case under consideration and makes the following findings of fact and conclusions of law.

FINDINGS OF FACT

The Court makes the following findings of fact, to which the parties have stipulated.

1. Plaintiff, the Reverend William Denolf, is pastor of the First Baltic Christian Church, founded by him in 1980. First Baltic Christian Church is an Eastern-European Christian fellowship. As such, it follows basically the same traditionally religious understandings of the Western Christian faith. FBC follows a different religious calendar than the one recognized by most Western religions, but it is undisputed that the FBC calendar is part of the deep-seated beliefs of FBC members.

2. Defendant, City of Knerr, is a municipal corporation located in the County of Burrows, State of Olympus. Knerr's governing body is known as the City Council of Knerr ("the Council") and is elected under a non-partisan political system. The Council governs the affairs of Knerr's 20,000 religiously diverse residents. Samantha Sommerman is the Director of Parks. The Director of Parks is an executive officer of the City who supervises park activities.

3. Among the properties under the jurisdiction, management and control of the City and its Council are the parks, including Jones Park, and other public facilities located in Knerr. Samantha Sommerman, the City Parks Director, acting with the authority of the City, has promulgated rules and regulations governing parks and recreational facilities that have been in effect in Knerr since 1970. These rules state that any group desiring to use a park or other public facility should apply to the superintendent of parks and recreation for a permit. All permits so granted come up for review by the Council at the next monthly meeting. The agenda for such meetings is published in advance. A City rule states that "no person shall interfere with, take, or use any of the property of the City without the consent of the Council."

4. In the past few years, the City has rented the park to motivational speakers, theater company Shakespeare performers, and the Young Men's Christian Association (YMCA) for recreational athletic activities and children's events - such as an Easter egg hunt. The City maintains a sign on the park grounds that says "Welcome to the City of Knerr, Jones Park." The charge to use Jones Park is \$500.00 per day, which FBC will pay if granted a permit.

5. Since 1995, FBC has hosted celebrations of several holidays during the course of any given year. The church's observance of the religious holiday known as Easter has been widely noted in the community. For the past ten years, FBC, under the leadership of Reverend Denolf, has held symbolic reenactments of the crucifixion of Jesus. Reverend Denolf is a full-time minister for FBC. The church's Passion play has a young man carry a cross from the back of the church property to the front, where the

cross remains until the following Sunday. Each year the ceremony has grown in size. Many in attendance are not members of FBC. In 2004, the crowds at the ceremony grew to such a size that the front yard of the church was unable to accommodate the entire assembly. When the Board of Deacons at FBC next convened, a decision was made to apply for permission to hold next year's ceremony at Jones Park the Friday before Easter Sunday. The cross that would be erected during the ceremony would remain planted in the park grounds for the next three days before being removed. Neither permanent nor temporary damage is done to the park during the celebration. The only visible mark left by the placement of the cross would be a six-inch hole in the ground, which FBC would fill at their expense. No other secular or religious symbols are used during the play, other than the performers' costumes.

6. On July 5, 2004, FBC and Reverend Denolf applied for permission with Director Sommerman to hold their 2005 Easter ceremony at Jones Park from Friday, March 29th through Sunday, March 31st, 2005. This observation is based on FBC's religious calendar. The application was submitted to the superintendent of parks and recreation, pursuant to the rules and regulations for the City of Knerr. On July 30th, 2004, Director Sommerman granted FBC permission to hold its observance of Easter in Jones Park as requested.

7. At the Council's next regular meeting on August 14th, 2004, the Greater Knerr Church Association (GKCA), a private unincorporated association of Catholic and Protestant churches in Knerr, protested Sommerman awarding the permit to the FBC. GKCA argued that because FBC's celebration was not being held on dates that Easter is traditionally observed by western religions, it would be confusing to local children and damaging to the community as a whole. Other testimonies were given by residents who believed that permitting this ceremony to take place would not violate the separation of church and state, and would in no way be damaging to the general populace. The Greater Business Merchant's Association (GBMA) testified that allowing FBC's performance to take place in Jones Park

one week prior to the traditionally observed Easter Sunday would be good for business because it would, as it had in the past, spark earlier Easter season sales. The meeting adjourned after several hours of hotly contested debate. The Council postponed a vote in order to take under advisement FBC's application and the testimonies presented at the meeting. It is inherently evident from these testimonies that the community of Knerr was greatly divided on the issue of FBC's application.

8. Between August 14th and the Council-member elections to be held in November, the issue continued to divide the local political community. In fact, during debates and interviews held with the candidates for City Council and Mayor, one of the questions most often asked was a candidate's position on FBC's application. In November, elections were held for all six positions on the Council, as well as for the office of Mayor of the City of Knerr. The Mayor and three Council members were elected based on their anti-FBC stance, while another three Council members were elected for their support of FBC.

9. On November 8, 2004, the Council and Mayor of Knerr, by a vote of 4-3, denied FBC's application for permission to use Jones Park from March 29th – March 31st, 2005, for its annual Easter holiday observance. The three anti-FBC candidates elected to the Council voted against the application, the three new pro-FBC Council members voted for it, and the Mayor broke the tie. The Council informed Sommerman of its decision to deny the application and instructed her to notify FBC, as well as to deny all future Easter applications by FBC or any other church group. Sommerman complied with the Council's wishes. In so finding, the Council stated that, due to the nature of the planned activity, granting the permit would appear to be advancing a religion.

10. The Council of Knerr refused FBC's request for a rehearing on the denial of the permit to use Jones Park for its Easter holiday. FBC's only recourse under the Knerr statute is an appeal to the courts.

11. On November 15, 2004, Rev. Denolf filed a complaint in this court, alleging that the City of Knerr's denial of a permit to use Jones Park was in violation of his and FBC's First Amendment rights, as applied to the states by the Fourteenth Amendment. In essence, Denolf's contention is that the City

of Knerr has abridged his rights to freedom of speech and free exercise of religion by this restrictive action. FBC has not joined the suit because some members of the Board of Deacons fear that the anti-Baltic sentiment in the community would worsen as a result of it.

12. The case came to trial before the Court on March 21, 2005. FBC proved conclusively that, although Jones Park has never been used in this particular manner before, it has on many occasions been used for various recreational public activities and holiday celebrations, such as Easter egg hunts sponsored by the YMCA.

13. It is an undisputed fact that the political divisiveness pervasive in the community over the question of the permit was caused by the superintendent's initial consent to FBC's application. The Council's subsequent denial of the permit served to intensify the conflict. Furthermore, the fact that the City Council election results were directly linked to the issue of the permit demonstrates that the resulting political divisiveness was actual and not merely potential.

14. Rev. Denolf seeks injunctive and declaratory relief. He asks this court to enjoin the City from enforcing its refusal to permit FBC the use of Jones Park for its observance of the next Easter holiday.

CONCLUSIONS OF LAW

The City was correct to deny the permit for this use of Jones Park. Granting the permit would have been a violation of the most imperative doctrine of the separation of church and state. The use of public facilities for religious purposes has long been held violative of the First Amendment. *See McCullom v. Board of Education* 333 U.S. 203 (1948), *Zorach v. Clausen* 343 U.S. 360 (1952). Extending the permit could not have passed the three-part test set out in *Lemon v. Kurtzman* 403 U.S. 602 (1971). The sole purpose of the observance is obviously religious, as is the principle or primary effect. More importantly, the extreme actual political divisiveness generated by the initial approval of the application for a permit amounted to excessive entanglement of government and religion.

Furthermore, the FBC's plans to plant a cross in government property can only mean a violation of the establishment clause. This Court concludes that the Council's denial of the permit was not only correct; it was the only constitutional course. Although FBC's desire to place the cross in the park stems from inveterate religious beliefs, FBC's purported right to free speech does not outweigh the City's compelling interest in preventing the further fracturing of the body politic along religious lines. Denolf misplaces reliance on *Lynch v. Donnelly* 465 U.S. 668 (1984). Unlike the case at hand, in *Lynch* political dissension was engendered by the lawsuit itself. Additionally, the Supreme Court's limitation in *Lynch* of the political divisiveness doctrine to parochial school aid cases applies to potential, not actual, divisiveness. The Supreme Court has not yet addressed the issue of actual political divisiveness.

The Court also emphasizes that, unlike the crèche in *Lynch*, the cross in this case would be a religious symbol on public, not private, property and would not be accompanied by secular symbols, such as Easter bunnies. *Lynch* did not validate a freestanding religious symbol on public property. See *Allegheny County v. ACLU* 492 U.S. 39 (1966).

This Court further concludes that it cannot dictate to the City what its purpose must be in the face of its undisputed disavowal of any interest in boosting Easter sales or any intention to provide the park as an open public forum for all purposes. Further, even if the park were an open forum, reasonable time, place, and manner regulations would still be allowable without any First Amendment implications. See *Adderley v. Florida* 385 U.S. 39 (1966), *Frisby v. Schultz* 487 U.S. 474 (1988). It should also be noted that the action to the City is a generally applicable law that would apply to all demonstrations of this sort. As such, even if it incidentally burdens religion, the law can withstand constitutional scrutiny. See *Employment Division v. Smith*, 494 U.S. 872 (1990). Finally, the legislative action taken here reaches "only action, not opinion" *Braunfeld v. Brown*, 366 U.S. 599 (1961). Accordingly, there is no interference with the religious expression of Reverend Denolf. See also, *United States v. O'Brien* 391 U.S. 367 (1968).

JUDGMENT FOR DEFENDANT

March 28, 2005

Ann Lyons U.S. District Judge

APPENDIX B

REVEREND WILLIAM DENOLF,	§	UNITED STATES COURT
Appellant,	§	OF APPEALS FOR THE
	§	14 TH CIRCUIT
	§	
Against		
	§	05-2414
THE CITY OF KNERR,	§	
STATE OF OLYMPUS,		
Samantha Sommerman, Parks Director	§	
Defendant		
	§	

OPINION

Before Dewey, Cheatem, and Howe, Circuit Judges:

In November 2004, the Council for the City of Knerr (Council) rejected the First Baltic Christian Church's (FBC's) application for permission to use Jones Park for its annual Easter observance. Reverend William Denolf brought suit before the Federal District Court for the Middle District of Olympus. Reverend Denolf alleged that the Council's action, through its Director Samantha Sommerman, violated the First and Fourteenth Amendments. Denolf sought declaratory and injunctive relief.

In its judgment, the District Court held as follows:

1. The actions of the Council in denying FBC permission to use Jones Park for its Easter observance was not an unconstitutional abridgment of Denolf's First Amendment rights to freedom of speech and free exercise of religion; and
2. The City of Knerr was not enjoined from refusing to grant such a permit, based on the doctrine of separation of church and state. From the judgment, the Reverend William Denolf, plaintiff below, appeals to this Court. While we accept the facts as found by the District Court in its opinion below, we reverse that court's decision on all legal grounds.

I.

The First Amendment to the United States Constitution states in pertinent part “Congress shall make no law respecting an establishment of religion...” The First Amendment establishment clause is applicable to the states. *See Everson v. Board of Education* 330 U.S. 1 (1947). The Supreme Court has written that the establishment clause language in the First Amendment is not a precise, detailed provision in a legal code capable of ready application. The intended purpose of the establishment clause was to state an objective – not to write a statute. *Lynch v. Donnelly*, 465 U.S. 668 (1984). In this case, we are faced with the difficulty of reconciling establishment clause issues with free-speech issues; we are guided by the Supreme Court precedents of *Lynch* and *Widmar v. Vincent* 454 U.S. 263 (1981).

We are not as confident as the district court was that the *Lemon* test is applicable in this case. *See Lemon v. Kurtzman* 403 U.S. 602 (1981). The Supreme Court has chosen to apply that test only when it provided a useful analytical construct. In this case, the City of Knerr wholly declined to become involved with a religious organization. Therefore, the *Lemon* test serves little purpose. *See Larson v. Valente* 456 U.S. 228 (1992). The Council’s content-based denial of FBC’s permit to display a cross at Jones Park for the weekend prior to the traditional observance of Easter is the principal issue before us on appeal; the initial granting of the permit is not. The Supreme Court has not mandated the application of the *Lemon* test in the absence of alleged church-state intermingling. Even if the *Lemon* test were applied to the original grant of the permit, no violation of the establishment clause would appear. The Council contended that its denial of the permit was necessary to serve the compelling interest of maintaining separation of church and state, as required by the establishment clause. We agree that such an interest may be characterized as compelling in some circumstances, but an equal-access policy for the park would not violate the establishment clause. *Widmar v. Vincent, supra*, *West Side Community High School v. Mergens* 496 U.S. 226 (1990), *Lamb’s Chapel v. Center Moriches School District* 508 U.S. 384 (1993), *Rosenberger v. University of Virginia* 515 U.S. 819 (1995), *Good News Club v. Milford Central School* 533 U.S. 98 (2001).

We note that an open-forum policy would have a secular purpose and would avoid entanglement with religion. *See Capitol Square Review Board v. Pinette* 515 U.S. 753 (1995). The primary purpose and effect of conferring the permit would not be to advance religion but to respect and further freedom of expression – a constitutional right – as well as having the economic benefit of a longer Easter merchandizing season. An open forum in a public park does not confer any government imprimatur on religious sects of practices. Further, so long as the city treats all applicants the same, including religious groups, there would be no establishment clause violation. *See Locke v. Davey* 540 U.S. 712 (2004).

Moreover we disagree with the District Court’s interpretation of *Lynch*. The Supreme Court did not decide the Pawtucket case based upon the physical context within which the display of the crèche was situated; rather, the Court referred to “the crèche in the context of the Christmas season.” *Lynch, supra*. We conclude that the District Court erred in approving the City’s effort to forbid the use of this one passive symbol – the cross – at the very time people are taking note of the season with other Easter symbols.

We further conclude that the District Court erred in holding that the political divisiveness apparent in the City of Knerr amounted to excessive governmental entanglement with religion. The political divisiveness inquiry is only applicable where the dispute involves direct aid to church-sponsored or other religious institutions. *Lynch, supra*. At any rate, political divisiveness, standing alone, has never been found to be enough to cause a violation of the establishment clause. *Lynch*.

Finally, even if an establishment clause violation loomed large in this case, which we do not believe, the right of the members of the FBC to freedom of expression must be weighed against the interests of the City, as in *Bender v. Williamsport Area School Districts* 741 F.2d 538 (3rd Circuit 1985). Unlike *Williamsport*, however, in the present circumstances the right of the FBC members to free speech outweighs the City’s interest in political harmony and its interest in maintaining a wall between church and state. Most importantly, the government’s interest in *Williamsport* was with regard to a

school, not a public park. It has long been held that a park is a public forum and a city may not refuse to allow its use solely on religious grounds. See *Niemotko v. Maryland* 340 U.S. 268 (1950). Prior restraints in this context are presumptively invalid. *Shuttlesworth v. City of Birmingham* 394 U.S. 147 (1969). The city, in its rush to avoid controversy, has implemented a prior restraint on the religious speech of Reverend Denolf. The violation is clear. Accordingly, the order of the District Court is vacated.

August 12, 2005

Judge Dewey for the Court

APPENDIX C

THE SUPREME COURT OF THE
UNITED STATES

X

THE CITY OF KNERR, OF THE STATE OF OLYMPUS, and SAMANTHA SOMMERMAN,
Parks Director

Petitioners,

04-1234
ORDER

-against-

THE REVEREND WILLIAM DENOLF,
Respondent.

X

The petition for writ of certiorari is granted so that the court may hear and consider the issues raised by the record. It is further ordered that this case be set down for an expedited hearing in the October 2005 term of this court.

Gina McLeod, Clerk of the Court

DATED: November 1, 2005

TABLE OF CASES AND AUTHORITIES

- 1) *Adderly v. Florida* 385 U.S. 39 (1966)
- 2) *Allegheny County v. ACLU* 492 U.S. 573 (1989)
- 3) *Bender v. Williamsport Area School District*, 741 F.2d 538 (3d Cir. 1985)
- 4) *Braunfeld v. Brown* 366 U.S. 599 (1961)
- 5) *Capitol Square Review Board v. Pinette* 515 U.S. 753 (1995)
- 6) *Employment Division v. Smith* 494 U.S. 872 (1990)
- 7) *Everson v. Board of Education*, 330 U.S. 1 (1947)
- 8) *Frisby v. Schultz* 487 U.S. 474 (1988)
- 9) *Good News Club v. Milford Central School* 533 U.S. 98 (2001)
- 10) *Lamb's Chapel v. Center Moriches School District* 508 U.S. 384 (1993)
- 11) *Larson v. Valente* 456 U.S. 228 (1982)
- 12) *Lemon v. Kurtzman*, 403 U.S. 602 (1971)
- 13) *Locke v. Davey* 540 U.S. 712 (2004)
- 14) *Lynch v. Donnelly*, 465 U.S. 668 (1984)
- 15) *McColum v. Board of Education* 333 U.S. 203 (1948)
- 16) *Niemotko v. Maryland* 340 U.S. 268 (1950)
- 17) *Rosenberger v. University of Virginia* 515 U.S. 819 (1995)
- 18) *Shuttlesworth v. City of Birmingham* 394 U.S. 147 (1969)
- 19) *United States v. O'Brien* 391 U.S. 367 (1968)
- 20) *West Side Community High School v. Mergens* 496 U.S. 226 (1990)
- 21) *Widmar v. Vincent*, 454 U.S. 263 (1981)
- 22) *Zorach v. Clausen* 343 U.S. 360 (1952)

UNITED STATES CONSTITUTION FIRST AMENDMENT (1791)

Congress shall make no law respecting the establishment of religion, or prohibiting the free exercise thereof; or abridge the freedom of speech, or of the press; or the right of the people to peacefully assemble, and to petition the Government for a redress of grievances.