

CASE NO. 06-2355

**IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT**

PAUL F. WEINBAUM and MARTIN J. BOYD,

Plaintiffs-Appellants,

vs.

CITY OF LAS CRUCES, et al.,

Defendants-Appellees.

On Appeal from the United States District Court
for the District of New Mexico
The Honorable Robert C. Brack, District Judge
D.C. No. CIV 05-996 RB/LAM

APPELLEES' RESPONSE BRIEF

Respectfully submitted,

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ORAL ARGUMENT IS NOT REQUESTED

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PRIOR OR RELATED APPEAL

None.

STATEMENT OF THE FACTS

Las Cruces, the second largest city in the State of New Mexico, was founded as a village in 1849. Aplt. App. p. 23. The most reliable and widely held theory concerning the origin of the name of the town is that Las Cruces – Spanish for “the crosses” – described groups of crosses placed on graves and the sites of massacres that occurred in the area between 1712 and 1840. Aplt. App. pp. 20-23, 152. The City is – and has been since the 1800s - nicknamed “The City of the Crosses”. Aplt. App. pp. 152, 173.

The City has used three crosses as part of its logo or symbol since at least 1941, when it appeared on letterhead used by the City to document a lease. Aplt. App. p. 24. The letterhead showed a group of three crosses; the one in the middle larger and higher than the others, with the motto “The City of the Crosses.” Aplt. App. pp. 24, 38.

In 1940, New Mexico celebrated the 400th anniversary of the Coronado expedition to the region. Aplt. App. p. 23. As part of the commemoration, Las Cruces held several fiestas over the summer. Aplt. App. p. 23. During this time, St. Genevieve’s Church, El Paso Electric Company, and the Las Cruces Chamber of Commerce collaborated on erecting three crosses made out of telephone poles. Aplt. App. p. 24. Sometime in the late 1960s, the three crosses

were moved across Main Street to their present location. Aplt. App. p. 24. During the time of the celebration of the Coronado expedition, there were speeches, which included references to the deaths of people in expeditions, and the fact that crosses had been erected in their memory. Aplt. App. p. 23-24. The speeches also made reference to Hitler's invasion of France, and the ensuing war in Europe. Aplt. App. p. 24.

Dr. Jon Hunner, a professor of history, was appointed by the Trial Court pursuant to Rule 706 of the Federal Rules of Civil Procedure. Dr. Hunner explained that the celebration in the summer of 1940 and the erection of the three crosses was not only a religious event, but was also a historic event and, in reaction to the war in Europe, a patriotic event. Aplt. App. p. 24.

Las Cruces incorporated as a City in 1946. Aplt. App. p. 23. That same year, then Mayor Sam Klein – who was Jewish – requested that the City Clerk order a new seal. The new seal, designed by the City Attorney, showed three crosses. Aplt. App. pp. 24, 119.

In 1949, Las Cruces celebrated its centennial. Aplt. App. p. 25. The cover of a publication concerning the centennial included three crosses hovering over a depiction of the city skyline against the backdrop of the Organ Mountains, which lie just to the east of Las Cruces. Aplt. App. pp. 25, 38. The cover also included a

flying missile, Tortugas Peak (a nearby peak), a plowed field, a conquistador carrying a flag, three friars bearing a cross, a Native American on horseback brandishing a rifle, a farmer wielding a hoe, and a graduate holding a diploma. Aplt. App. p. 38.

Beginning in the 1950s, three interlocking crosses appeared on the sides of police cars. Aplt. App. p. 25. Beginning with the 1963-64 Annual Report, the City's Annual Report included various images reflecting City services and a symbol of three crosses surrounded by a sunburst. Aplt. App. p. 25. By 1969, three crosses were placed on the outside of City Hall. Aplt. App. p. 100. Subdivision maps dating back to 1972 showed three crosses in a sunburst, rising over the Organ Mountains. Aplt. App. p. 104.

Raymond Garcia, a lieutenant with the Las Cruces Fire Department who previously worked as purchasing clerk for the City, explained that he was asked to update the sculpture that included the three crosses, a yucca plant, a roadrunner, and the Organ Mountains. Aplt. App. p. 26. He redesigned the sculpture to incorporate the three crosses and then added a flaming circle as a tribute to the Johnny Cash song "Ring of Fire." Aplt. App. p. 26. Mr. Garcia explained that he was a former "long-haired, no-religion, Black Sabbath music lover" and testified

that he had absolutely no intention to endorse religion when he redesigned the sculpture. Aplt. App. p. 26.

Bobby De La Rosa, who was employed in the City's drafting department in the early 1970s, designed a symbol of three crosses in a Zia symbol that is used on both sides of police cars. Aplt. App. p. 25. He explained that the current symbol, three interlocking crosses surround by a sunburst, "just evolved" from the three crosses in a sunburst design. Aplt. App. p. 25. After winning an in-house design competition, Mr. De La Rosa created the current Symbol. He said that "at no time did religion enter into the concept of the logo ... [t]here was never any discussion of religion at all." Aplt. App. p. 25.

The current Symbol was adopted by the City Council in 1974 or 1975. Aplt. App. p. 26. According to Dr. Hunner, the court appointed Rule 706 expert charged with investigating the history of the Symbol for the court, there is no evidence to suggest that the City contemplated a religious meaning with respect to the use of the Symbol in particular or the use of three crosses in general. Aplt. App. p. 119.

The Symbol appears in a number of applications throughout the City, including on public monuments, signs, flags, parks, official uniforms, and official vehicles. Aplt. App. pp. 287-289. City police officers wear a patch that includes a modified version of the Symbol; the entire patch is 4.5 inches high and the crosses

on the patch are less than one-half an inch high. Aplt. App. pp. 161-162. A modified version of the Symbol appears on the sides of City police cars; the crosses in that application are two inches high. Aplt. App. pp. 161-162.

The City is not alone in using three crosses to identify itself with Las Cruces. The annual yearbook of Las Cruces High School, beginning as long ago as 1919, was named “The Crosses.” Aplt. App. p. 27. In the 1950s, a major social dance in Las Cruces was called “The Crosses.” Aplt. App. p. 27. The Las Cruces Chamber of Commerce has used three crosses in its logo since 1970. In the Greater Las Cruces City Directory of 1970, the Chamber of Commerce wrote: “Historical culture, climate, and economy are three significant strengths of Las Cruces. ... Recognizing these strengths and the pride of Las Cruces citizens in them, the Chamber of Commerce has adopted a new symbol.” The symbol contained three crosses. The Chamber of Commerce explained: “The three crosses were joined at the ends of the transverse bars and at the top of the uprights to combine forever the three cultures basic to the area – Indian, Latin, and Anglo.” Aplt. App. p. 27.

A number of businesses use three crosses in their logo and in their advertising. Aplt. App. p. 27. The affidavits from the business owners uniformly state that they do not use three crosses to reflect any religious preference, but solely to identify themselves with Las Cruces, a use which they consider obvious

because of the name of the town. Aplt. App. pp. 124-148. Three crosses have a long history in Las Cruces as sculptures or as architectural details, both in public and private venues. Aplt. App. p. 27.

In 2005, the Dex Directory for Las Cruces (the local telephone book) had a photograph on the cover that showed three crosses. The area distribution manager for Dex Media explained that Dex wanted a representative photograph for the cover. Various Dex managers were consulted, the local sales manager for Dex was consulted, and Internet research was done regarding the community and the history of Las Cruces. The photograph of the three crosses was selected because the three crosses were viewed as the “brand” or “symbol” of Las Cruces, because the three crosses are a historical symbol of Las Cruces, and because “Las Cruces” means “the crosses” in Spanish. Aplt. App. pp. 121-122.

SUMMARY OF THE ARGUMENTS

The fact that the City employs three crosses in its Symbol is not inherently unconstitutional. A City may make use of images that have a religious connotation as long as the primary or principal effect is not to endorse religion.

Las Cruces is Spanish for “the crosses.” The City is nicknamed “The City of the Crosses”. It takes its name and its nickname from the fact that the City was founded near a burial site where the graves were marked with crosses. The uses of

crosses in the City's Symbol, therefore, is not to promote Christianity, but is instead to graphically and symbolically reflect the name, the nickname, and the history of the City of Las Cruces.

A reasonable observer – someone aware of the history and context of the community and of the Symbol – would realize that the three crosses used in the logo are not to promote or endorse Christianity, but are a reflection of the history, the heritage, and name of the city.

ARGUMENT

I. THE FACT THAT THE CITY USES A SYMBOL THAT CONTAINS A SYMBOL FREQUENTLY USED TO REPRESENT CHRISTIANITY IS NOT DISPOSITIVE

There is no question that crosses are frequently used as a symbol for Christianity. The First Amendment, however, does not forbid a city from using imagery that has a religious connection; it forbids a city from promoting or advancing a particular religion.¹ As noted by Justice Breyer:

¹ From at least 1789, there has been an unbroken history of official acknowledgment by all three branches of government of religion's role in American life. Lynch v. Donnelly, 465 U.S. 668, 674 (1984). For example, representations of the Ten Commandments appear throughout the United States Supreme Court and its grounds, as well as the Nation's Capital. Moreover, the Supreme Court's opinions, like its building, have recognized the role that religion plays in America's heritage. *See, e.g., McGowan v. Maryland*, 366 U.S. 420, 442 (1961).

[T]he Establishment Clause does not compel the government to purge from the public sphere all that in any way partakes of the religious [s]uch absolutism is not only inconsistent with our national traditions ... but would also tend to promote the kind of social conflict the Establishment Clause seeks to avoid.

Van Orden v. Perry, 545 U.S. 677, 699 (2005) (Breyer, J., concurring in the judgment).

There are a number of decisions from the Supreme Court and from the various circuits that have held constitutional the use of religious imagery or religious phrases. *See, e.g., Van Orden*, 545 U.S. at 692 (holding that the display of the Ten Commandments did not violate the First Amendment); Lynch v. Donnelly, 465 U.S. 668 (1984) (holding a government's display of the crèche was constitutional); Gaylor v. United States, 74 F.3d 214, 217 (10th Cir. 1996) (holding the use of the phrase "In God we trust" on money was not unconstitutional); O'Connor v. Washburn University, 416 F.3d 1216 (10th Cir. 2005) (holding that a university's display of a religious statute was not unconstitutional); Bauchman v. West High School, 132 F.3d 542 (10th Cir. 1997) (holding that a public high school's performance of religious music at churches was not unconstitutional).

These courts have consistently found that the mere presence of religious imagery is not dispositive. The Constitution does not require that every government sanctioned activity be unrelated to anything that has a religious

connection. *See Bauchman*, 132 F.3d at 554. Instead, the question is whether the government has endorsed a particular religion. *Lynch*, 465 U.S. at 671.

The question, therefore, is not whether the crosses used in the City's Symbol could have a religious connotation; the question is whether by using the crosses in its Symbol, the City improperly promotes or advances religion.

II. THE SYMBOL USED BY THE CITY DOES NOT HAVE AS ITS PRINCIPAL OR PRIMARY EFFECT THE ADVANCEMENT OF RELIGION

The crosses employed by the City in its Symbol reflect the name of the City; Las Cruces is Spanish for "the crosses". It graphically depicts the name of the town, the nickname of the town ("The City of the Crosses"), and the history of the town (founded near a gravesite marked with crosses). Given the circumstances, the use of crosses does not have the effect of advancing religion. Instead, as the Rule 706 expert explained, the primary effect of the Symbol is to promote history and heritage. *Aplt. App.* pp. 36-37.

A. THE EFFECT OF THE SYMBOL SHOULD BE GAUGED FROM THE VANTAGE POINT OF SOMEONE THAT IS AWARE OF THE HISTORY AND CONTEXT OF THE CITY AND THE SYMBOL

Whether the Symbol has the principal or primary effect of advancing religion should not be gauged from the vantage point of any particular person. *Bauchman*, 132 F.3d at 555; *Green v. Bd. of County Comm'rs*, 450 F. Supp. 2d

1273, 1294 (E.D. Okla. 2006). Instead, the principal or primary effect should be gauged from the vantage point of the hypothetical “reasonable observer”. This Court expanded on the importance of the reasonable observer standard in Gaylor v. United States, 74 F.3d 214 (10th Cir. 1996):

The application of the reasonable observer standard helps explain why we reject the Foundation’s insistence upon further fact finding at the trial level, including the introduction of expert testimony and polling data. We need not engage in such empirical investigation because “we do not ask whether there is any person who could find an endorsement of religion, whether some people may be offended by the display, or whether some reasonable person might think [the State] endorses religion.” Id. (O’Connor, J., concurring) (quoting Americans United for Separation of Church and State v. Grand Rapids, 980 F.2d 1538, 1544 (6th Cir. 1992) (en banc)) (emphasis and brackets in original). “The endorsement inquiry is not about the perceptions of particular individuals or saving isolated non-adherents from the discomfort of viewing symbols of faith to which they do not subscribe.” Id. (O’Connor, J., concurring). It is instead an objective inquiry that this court is fully equipped to conduct with the facts at hand.

74 F.3d at 217. The individual perceptions of the Appellants, therefore, are irrelevant. Whether the reasonable observer would find that the principal or primary effect of the City’s use of the Symbol is the promotion of Christianity becomes a question of law. See Bauchman, 132 F.3d at 555.

This “reasonable observer” is not just anyone. This reasonable observer is assumed to be aware of the context and history of the community and of the forum.

Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290, 317 (2000); Utah Gospel Mission v. Salt Lake City Corp., 425 F.3d 1249, 1260 (10th Cir. 2005).

B. A REASONABLE OBSERVER, AWARE OF THE HISTORY AND CONTEXT OF THE CITY AND THE SYMBOL, WOULD NOT FIND THAT THE SYMBOL FAVORS CHRISTIANITY

The reasonable observer in this case would be aware that Las Cruces means “the crosses.” Aplt. App. pp. 20-23. The reasonable observer would be aware that the nickname of the town is “The City of the Crosses.” Aplt. App. pp. 152, 173. The reasonable observer would be aware that the City took its name from its history, and that it was founded near the site of graves that were marked with crosses. Aplt. App. pp. 20-23, 152. The reasonable observer would be aware that the City has used three crosses as a graphic reflection of the City since it was incorporated, more than 60 years before this action was brought. Aplt. App. pp. 23-27. The reasonable observer would be aware that the City formally adopted three crosses in its seal at the request of its Jewish mayor. Aplt. App. pp. 24, 119.

Given the history of the community, the obvious connection between the name, nickname, and history of the City and the crosses used to graphically represent the City, and given the circumstances under which the three crosses became part of the City’s symbol, a reasonable observer would not find that the

primary or principal effect of the Symbol is to promote Christianity but is, instead, to provide a recognizable graphic representation of the City.

C. PRIOR DECISIONS DEMONSTRATE THAT THE PRIMARY EFFECT OF THE CITY’S SYMBOL IS SECULAR

Cases involving the application of the reasonable observer standard to the particular facts of the case focus on whether the “history and context” of the community and action taken by the government show that the principal or primary purpose of the action at issue has a legitimate secular purpose. Invariably, those cases have held that governmental use of religious imagery or phrases are permitted when the imagery or phrase has a secular connection to the governmental entity, and the use is related to that connection, and is not used to promote the religion. For example, in Van Orden v. Perry, 545 U.S. 677, 699 (2005), the Court held constitutional the display of the Ten Commandments at the Texas state capitol. The Court noted that while the Ten Commandments clearly had religious significance, they also had historical significance, and their passive display did not violate the First Amendment.²

² The Van Orden case stands in sharp contrast to McCreary County v. American Civil Liberties Union, 545 U.S. 844 (2005), where the Court held the display of the Ten Commandments at local courthouse was unconstitutional. The difference in the two cases was that in Van Orden there was no evidence of an intent to advance religion, while in McCreary County the clear purpose of the display of the Ten Commandment was to advance religion.

The case of Murray v. City of Austin, 947 F.2d 147 (5th Cir. 1991), is instructive. The City of Austin adopted an insignia that had been the Coats of Arms of the Stephen F. Austin family, after whom the city was named. The original Coat of Arms, and hence the city's insignia, was a crest with three cross-crosslets and a wreath, supporting a Latin cross between two wings. The Fifth Circuit had no trouble at all in finding a secular purpose for the insignia: "Taken as a whole, the insignia has the principal or primary effect of identifying the city activity and property and promoting Austin's unique role and history." Similarly, the logo adopted by the City has two roles. First, it has the principal or primary effect of identifying City activity and property. Second, the particular logo adopted by the City evokes the name of the City, the City's nickname, and the unique history of the City.

In Gaylor v. United States, 74 F.3d 214 (10th Cir. 1996), this Court addressed the question whether the use of the phrase "In God we trust" printed on currency violated the First Amendment. The Court, citing to County of Allegheny v. American Civil Liberties Union, 492 U.S. 573, 625 (1989) (O'Connor, J., concurring), Lynch, 465 U.S. at 692-93 (1984) (O'Connor, J., concurring), and Lynch, 465 U.S. at 716-17 (Brennan, J., dissenting), stated the phrase clearly has a secular purpose (to symbolize the historical role of religion in our society, to

formalize our medium of exchange, and to foster patriotism), and that the motto symbolized the historical role of religion in our society. In the same fashion, the three crosses in the Symbol adopted by “The City of the Crosses” clearly has a secular purpose (to symbolically reflect the name of the City and to graphically represent the City’s historical origins) and serves to reflect the historical role that crosses had in the naming of the City.

In Marsh v. Chambers, 463 U.S. 783 (1983), the Court dealt with the question whether the practice followed by the Nebraska legislature of opening each session with a prayer by a state-employed clergyman violated the First Amendment. Although the sectarian aspects of the practice were patent, the Court found that the practice was constitutional because it was a historical practice, and because there was no evidence tending to show that “the prayer opportunity [was] exploited to proselytize or advance any one, or to disparage any other, faith or belief.” 463 U.S. at 794-795. Similarly, the use of crosses to represent Las Cruces is a longstanding practice. Moreover, there is no evidence that the Symbol has been exploited to proselytize or advance Christianity. *See, e.g.*, Aplt. App. pp. 160, 162, and 167.

D. THE CASES RELIED UPON BY APPELLANTS ARE DISTINGUISHED BY THE FACT THAT THE SYMBOL AT ISSUE IS REPRESENTATIVE OF THE CITY OF LAS CRUCES

Appellant cites to a handful of cases, including Robinson v. City of Edmond, 68 F.3d 1226 (10th Cir. 1995), Friedman v. Board of County Commissioners, 781 F.2d 777 (10th Cir. 1985), and Harris v. City of Zion, 927 F.2d 1401 (7th Cir. 1991). To be sure, all three of these cases involved logos or seals that were adopted by local governments that were held to violate the First Amendment. As noted in Section I, above, however, the mere fact that a seal has a religious symbol does not necessarily mean that it is unconstitutional. Each case must be looked at for its unique facts.

In the companion case (*Weinbaum v. Las Cruces Public Schools*), the trial court distinguished these cases quickly and simply:

Las Cruces' name distinguishes this case from a number of cases in which government seals or logos incorporating the Latin cross have been struck down as unconstitutional. *E.g.*, Robinson v. City of Edmond, 68 F.3d 1226 (10th Cir. 1995); Friedman, 781 F.2d 777 (10th Cir. 1985); Harris v. City of Zion, 927 F.2d 1401 (7th Cir. 1991); Webb v. City of Republic, 55 F. Supp. 2d 994 (W.D. Mo. 1999); American Civil Liberties Union of Ohio v. City of Stow, 29 F. Supp. 2d 845 (N.D. Ohio 1998). Unlike the instant matter, the local governing bodies in those cases necessarily made choices unrelated to the name of the entity itself in selecting symbols (or seals) to represent their city or county. In their decision-making, the governing bodies revealed attitudes and beliefs which impermissibly crossed the establishment line.

Weinbaum v. Las Cruces Public Schools, 465 F. Supp. 2d 1182, 1194 (D.N.M. 2006). The Trial Court's pointed analysis was wholly accurate; the cases relied upon by Appellants are distinguishable because (1) the governments in those cases had adopted religious symbols for the purpose of endorsing the religion and (2) in this case the City adopted the Symbol not because it wanted to endorse Christianity, but because of an obvious and palpable relation between the name of the City, the nickname of the City, and the history of the City. In the cases relied upon by Appellants, a reasonable observer would see the government's endorsement of religion, while in the present case a reasonable observer of the Symbol would understand that the crosses represent, symbolically, this uniquely named geopolitical subdivision rather than an endorsement of Christianity.

CONCLUSION

The Trial Court properly denied the Appellants' Motion for Summary Judgment and properly granted the City's Motion for Summary Judgment. The uncontradicted facts in this case establish that the City's Symbol does not have the principal or primary effect of endorsing Christianity. To the contrary, the principal or primary effect of the Symbol is to graphically represent the name of the City, the nickname of the City, and the historical origins of the City.

STATEMENT OF COUNSEL AS TO ORAL ARGUMENT

Counsel for City of Las Cruces does not believe that oral argument is necessary. While this case deals with an important issue, the facts and the law are straightforward. Oral argument would not advance the disposition of this case.

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By: /s/
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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Appellees' Response Brief was sent to the Office of the Clerk of the United States Court of Appeals for the Tenth Circuit via FedEx Priority Overnight, and a true and correct copy of the brief has been served on Appellants' counsel, Brett Duke, The Law Offices of Brett Duke, P.C., 4157 Rio Bravo, El Paso, TX 79902, via first-class U.S. Mail on this 4th day of April, 2007. This electronically filed document was also served on Appellants' counsel electronically at brettduke@brettduke.com.

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