

No. 18-17046

In the
United States Court of Appeals
for the Ninth Circuit

LIONS CLUB OF ALBANY, CALIFORNIA,

Plaintiff-Counter-Defendant-Appellee,

v.

CITY OF ALBANY; ROCHELLE NASON,

Defendants-Counter-Claimants-Appellants,

v.

THE ALBANY LIONS CLUB FOUNDATION,

Counter-Defendant-Appellee.

Appeal from the United States District Court
for the Northern District of California, San Francisco, No. 3:17-cv-05236-WHA.
The Honorable **William Alsup**, Judge Presiding.

**MOTION FOR LEAVE TO FILE BRIEF OF *AMICUS CURIAE* REVEREND
KEVIN OMI IN SUPPORT OF APPELLANTS AND FOR REVERSAL**

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Under Federal Rule of Appellate Procedure 29(a)(3), Reverend Kevin Omi respectfully requests leave to file the accompanying brief of *amicus curiae*. This motion and accompanying brief are timely filed under Federal Rule of Appellate Procedure 29(a)(6) because they are filed within seven (7) days of the Appellants' principal brief. Under Ninth Circuit Rule 29-3, Reverend Omi states that he attempted to obtain the parties' consent to this filing by sending inquiries to counsel of record for each party by e-mail. Appellants City of Albany and Mayor Nason consented. Appellee Albany Lions Club Foundation has not consented as of this filing.

The Movant's Interest

Under Rule 29(a)(3)(A), Reverend Omi explains his interest as *amicus curiae*. Between 2012 and 2018, Reverend Omi was a resident of Albany, California and served as senior minister of Sycamore Congregational Church United Church of Christ (UCC) in El Cerrito, California. Reverend Omi lived one mile from Albany Hill Park, the site of the disputed cross underlying the present appeal.

Reverend Omi currently serves Skyland Community Church in Los Gatos, California as their Interim Senior Minister. Reverend Omi was ordained into the UCC and serves on the Board of Directors. Reverend Omi's statements, opinions and arguments in the brief are his own, not those of the congregations he has served or his denomination.

Reasons for Filing

Under Rule 29(a)(3)(B), Reverend Omi explains the reason why his *amicus curiae* brief is desirable and why the matters asserted are relevant to the disposition of the case.

The underlying appeal concerns whether an easement for the maintenance of a Latin cross on public land should be upheld (*i.e.*, considered valid and enforceable). Respectfully, the Court will benefit from the perspective of an ordained clergy of a Christian faith. Reverend Omi's respect for the empty cross as a powerful symbol of love, justice and hope does not cloud his awareness that its presence on public land may send messages contrary to his understanding of the teachings of Jesus.

As more fully explained in the accompanying brief, Reverend Omi supports removal of the cross, with minimum burden on those serving the public to remove it. The easement creates such a burden. Reverend Omi's brief presents the perspective of a clergy who believes that establishment of no official religion is the surest way to ensure freedom for every religion. And Reverend Omi presents a cogent explanation for *why* the disputed cross on public land potentially becomes a symbol of exclusion, or worse. Though Appellants ably present their reasoning about how the easement in question fails to comply with the laws, Reverend Omi refers back to the Supreme Court's line of racially restrictive covenant cases to explain

why making it difficult to remove from public land any symbol of faith confounds our nation's ideals of diversity and inclusion.

Dated: February 1, 2019

/s/ Robert P. Greenspoon

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CERTIFICATE OF COMPLIANCE

This motion complies with the type-volume limitation of Fed.R.App.P. 27(d)(2)(A) because this motion contains 464 words, excluding the parts of the motion exempted by Fed.R.App.P. 27(a)(2)(B), 32(f) and 9th Circuit R. 27-1(1)(d).

In addition, this motion complies with the typeface requirements of Fed.R.App.P. 32(a)(5) and the type style requirements of Fed.R.App.P. 32(a)(6) because this motion has been prepared in a proportionately spaced typeface using Microsoft Word 2003, typeface of 14 points and type style of Times New Roman.

Dated: February 1, 2019

/s/ Robert P. Greenspoon _____

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the Motion for Leave to File Brief of *Amicus Curiae* Reverend Kevin Omi in Support of Appellants and for Reversal with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on February 1, 2019.

I certify that the participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

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**STATEMENT OF INTEREST OF *AMICUS*
CURIAE AND SOURCE OF AUTHORITY TO FILE¹**

Reverend Kevin Omi submits this brief as *amicus curiae*. Between 2012 and 2018, Reverend Omi was a resident of Albany, California and served as senior minister of Sycamore Congregational Church United Church of Christ (UCC) in El Cerrito, California. Reverend Omi lived one mile from Albany Hill Park, the site of the disputed cross.

Reverend Omi currently serves Skyland Community Church in Los Gatos, California as their Interim Senior Minister. Reverend Omi was ordained into the UCC and serves on the Board of Directors. Reverend Omi's statements, opinions and arguments in this brief are his own, not those of the congregations he has served or his denomination.

Reverend Omi sought consent of the parties to file under FRAP 29 and 9th Circuit Rule 29-3. Appellants City of Albany and Mayor Nason gave consent; Appellee Lion's Club did not. A motion for leave accompanies this brief.

Though the brief is authored with the aid of counsel, Reverend Omi wishes to present his Argument in his own voice.

¹ *Amicus curiae* states under FRAP 29(a)(4)(E) that no party's counsel authored this brief in whole or in part, no party or party counsel contributed money that was intended to fund preparing or submitting the brief, and no person other than *amicus curiae* or its counsel contributed money that was intended to fund preparing or submitting the brief.

SUMMARY OF THE ARGUMENT

I embrace the foundational principle of our nation that states establishment of no official religion is the surest way to ensure freedom for every religion. When the good people running a city try sincerely to comply with this maxim, let no unreasonable barrier (financial or legal) stand in their way. I applaud the City's and the Mayor's efforts to handle the difficult matter of the Albany Hill Park cross, and urge this Court to remove unneeded obstacles (such as the Lions Club easement).

ARGUMENT

Every Sunday morning at Sycamore, our worship services began with these words: "No matter who you are, or where you are on life's journey, *you* are welcome here." I honor the benevolent work of the Lion's Club, and hope that all parties will be able reach an understanding. I belong to the United Church Christ (UCC), a progressive Protestant denomination. We work with ecumenical and interfaith partners to create a more just world for all people. I believe we can live out this mission without having a cross in a public space.

I submit this argument as an ordained minister and follower of Jesus who lived in Albany for several years and loved my diverse community. I believe the empty cross can be a powerful symbol of love, justice, and hope.

On Christmas Day Christians celebrate the birth of Jesus, born into poverty, and whose message of love for all people changed the world. If there is ever a time to focus on the cross, it is during Holy Week and Easter Sunday. On Easter Sunday, Jesus transcended death. And he transcended those who wished to stop his work for justice, peace and love—especially those different from him.

I both *cherish* my faith *and* I recognize that as an Albany resident, I lived in a wonderfully diverse community. I believe it is critical that we work *together* to create a just world for all. Each person should bring the *best* of their faith traditions and love of all Creation to this work. That is why I joined others in advocating for affordable housing a few years ago. Together we celebrated the extensive changes that were made in our zoning code. For me, this was an opportunity to live out my faith.

The cross is a powerful symbol—one that has positive and life-transforming connotations for many Christians. Sadly, for some members of the public, some of the Christian voices heard the most often are ones that would limit some people's rights, privilege Christianity, or embrace the politics of exclusion. These positions are inconsistent with my understanding of the teachings of Jesus. Symbols are powerful. That is why we must be careful where, when and how they are used.

The symbol of the cross, especially one shining at night, can evoke profound feelings of discomfort or even fear because of some of the ways crosses have been used as symbols of domination in the past. I find especially poignant to consider what feelings a lighted nighttime cross might evoke for some African Americans. The cross can be a symbol of exclusion, or worse. I believe that no member of the Lions Club intends the Albany Hill Park cross to make such statements, but our American history cannot be ignored.

In the 1940's and 1950's, courageous advocates and jurists stopped governmental enforcement of racial restrictive covenants in residential housing. *See Barrows v. Jackson*, 346 U.S. 249 (1953) (racial covenants not enforceable to collect money damages after their breach); *Shelley v. Kraemer*, 334 U.S. 1 (1948) (racial covenants not enforceable to eject non-whites). Congress in 1968 passed the Fair Housing Act, 42 U.S.C. § 3601 *et seq.*, to extend the *Shelley / Barrows* protections to prohibit religious restrictive covenants. *See* 42 U.S.C. § 3604(b). Fortunately for all, what had been courageous then is mainstream now. No one would now reasonably contend the vitality of any real estate transaction that perpetuates the violation of someone else's rights under the U.S. Constitution or otherwise.

Just so here. Though I do not weigh in on the legality of when real estate servitudes are valid or enforceable, I do recognize that Albany and its Mayor face significant financial obstacles to complying with the U.S. Constitution if the Lions Club (and district court) position were correct. To forbid judicial enforcement of racially restrictive covenants has served the same laudable cause as would forbidding judicial enforcement of an easement for maintaining a religious symbol on public land.

For me, the connection to our history of racially restrictive covenants is real. As a child of a Japanese American father (and decorated WW-2 veteran) and Caucasian mother, I remember the pain in my mother's voice when she described having to go door-to-door in San Francisco to obtain permission from their white neighbors to rent an apartment for their biracial family. Being a victim of racial discrimination is part of my heritage as well. Had the Supreme Court in *Barrows* upheld financial barriers that dissuaded enlightened homeowners from breaking their illegal covenants, we would perpetuate my family's painful experience for the next generation. But *Barrows* did not, and we are a better country for it. Just the same, no good reason exists to impose similar financial barriers on Albany and its Mayor. The Court should let them break their easement without financial consequence.

Irrespective of the complex legal issues involved, to have a cross, or hypothetically, a symbol of any other faith tradition, shining on what is viewed as public land, does not serve anyone. A cross, no matter how beautiful, cannot engage in meaningful conversation. Only *people*, working for the common good, can do so through talking together and working to make a better world for all. For these reasons, I support removal of the cross, with minimum burden on those serving the public to remove it.

CONCLUSION

For the foregoing reasons, I support Albany and Mayor Nason in their appeal. I urge the Court to grant them the relief they request.

Respectfully submitted,

/s/ Robert P. Greenspoon

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**UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT
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