

13-1668-CV

**UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT**

AMERICAN ATHEISTS, INC., DENNIS HORVITZ,
KENNETH BRONSTEIN, JANE EVERHART,

Plaintiffs-Appellants,

MARK PANZARINO,

Plaintiff,

v.

PORT AUTHORITY OF NEW YORK AND NEW JERSEY, WORLD TRADE CENTER
MEMORIAL FOUNDATION/NATIONAL SEPTEMBER 11 MEMORIAL AND MUSEUM,

Defendants-Appellees,

(caption continued inside cover)

**ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK**

**AMICUS CURIAE BRIEF OF THE AMERICAN CENTER FOR LAW AND JUSTICE
AND THE COMMITTEE TO PROTECT THE GROUND ZERO CROSS IN SUPPORT
OF DEFENDANTS-APPELLEES AND AFFIRMANCE OF THE DECISION BELOW**

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STATE OF NEW JERSEY, GOVERNOR CHRIS CHRISTIE, SILVERSTEIN PROPERTIES,
INC., LOWER MANHATTAN DEVELOPMENT CORPORATION, CHURCH OF THE
HOLY NAME OF JESUS, BRIAN JORDAN, WORLD TRADE CENTER PROPERTIES,
LLC,

Defendants.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, Amicus, the American Center for Law and Justice, by and through its undersigned counsel, hereby certifies that it has no parent corporation and that no publicly held corporation owns 10% or more of its stock.

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INTEREST OF AMICI¹ AND SUMMARY OF ARGUMENT

The American Center for Law and Justice (ACLJ) is an organization dedicated to the defense of constitutional liberties secured by law. ACLJ attorneys have argued numerous cases before the Supreme Court of the United States and participated as amicus curiae in a number of significant cases involving both the Free Speech and Establishment Clauses of the First Amendment, including, most notably, *Pleasant Grove City v. Sumnum*, 555 U.S. 460 (2009). The Committee to Protect the Ground Zero Cross consists of more than 231,000 Americans who seek to preserve history and honor the actual experience of survivors and First Responders at Ground Zero.

Plaintiffs-Appellants' lawsuit represents a dangerous and unprecedented attempt to literally rewrite history and cleanse the record of a historically significant artifact. In the days and weeks following the September 11, 2001 terrorist attacks, the challenged World Trade Center Cross (the "Cross") had a widely documented and positive effect on the First Responders at the Ground Zero site. As the district court correctly held, it is entirely appropriate and lawful for the

¹ No party's counsel in this case authored this brief in whole or in part. No party or party's counsel contributed any money intended to fund preparing or submitting this brief. No person, other than *amici*, their members, or their counsel contributed money that was intended to fund preparing or submitting this brief. Because all parties did not consent to the filing of this brief, *amici* have filed this brief along with a motion for leave to file, pursuant to Fed. R. App. P. 29(a).

curators of a museum to acknowledge the Cross's actual, historic role by placing it in the September 11 Memorial Museum.

The Supreme Court of the United States has directly addressed the constitutionality of religiously themed museum exhibits and has clearly held that such exhibits are within the realm of appropriate government speech. *See Pleasant Grove City v. Summum*, 555 U.S. 460 (2009).

In fact, the constitutionality of religious displays in museums has long been presumed by the Court. While it would be impossible to list all religiously-themed exhibits, notable examples are not hard to find. The Library of Congress contains the Lincoln Bible, which President Barack Obama used to take the Oath of Office.²

Other historical artifacts, such as the full text of the Star Spangled Banner and Martin Luther King's "Letter From a Birmingham Jail," either declare national allegiance to God or contain explicitly religious arguments.³

Similarly, the Cross is an historical artifact of the September 11 attacks, it had significance to many First Responders and others at Ground Zero, and

² News Release, *President-Elect Obama To Take Oath of Office on Lincoln-Inaugural Bible from Library of Congress*, Library of Congress (Dec. 23, 2008), available at <http://www.loc.gov/today/pr/2008/08-236.html>.

³ *See, e.g.*, The Star-Spangled Banner: The Flag That Inspired the National Anthem, The Smithsonian, americanhistory.si.edu/starspangledbanner/the-lyrics.aspx (last visited Nov. 12, 2013); Through Feb. 28: Exhibit Marks Anniversary of Martin Luther King Jr. Day, The UDaily (Jan. 14, 2011, 2:24 PM), www.udel.edu/udaily/2011/jan/MartinLutherKingAnniversary011411.html (last visited November 13, 2013).

historical artifacts – even religious artifacts – have long been placed in America’s public museums without doing violence to the Constitution. Any ruling to the contrary would lead to absurd results.

Offended observers (even observers whose offense is so great that they claim physical illness) cannot be permitted to rewrite history or constitutional precedent. Acknowledging history does not establish a religion, and Plaintiffs-Appellants’ lawsuit is without merit. The United States District Court for the Southern District of New York agreed, and this Court should affirm that decision.

ARGUMENT

I. THE DISTRICT COURT CORRECTLY CONCLUDED THAT THE DECISION BY THE MUSEUM TO DISPLAY THE GROUND ZERO CROSS IS A PERMISSIBLE EXERCISE OF GOVERNMENT SPEECH.

While *amici* concur with the Defendants-Appellees’ position that the September 11 Memorial Museum is an “independent non-profit corporation” and not a state actor, it is critical to note that display of the Cross is lawful regardless of the private or public status of the Museum. Even if inclusion of the Cross in the Museum constitutes state action, the district court correctly held that displaying the Cross is a permissible exercise of government speech. *See American Atheists, Inc. v. Port Authority of NY and NJ*, 936 F. Supp. 2d 321, 339 n.19 (S.D.N.Y. 2013).

The September 11 Memorial Museum’s decision to display the Cross is – at its heart – an exercise of the Museum’s own academic freedom, designed to

educate present and future generations about one of the darkest days in American history. The museum has the liberty to select exhibits that advance its educational mission, and that liberty includes selecting even historical exhibits with religious significance. The district court agreed, holding, “The Museum’s purpose is to tell the history surrounding September 11, and the cross [...] helps tell part of that history.” *Id.* at 339.

The district court correctly recognized the direct application of *Pleasant Grove City v. Summum*, 555 U.S. 460 (2009), to the instant case. In *Summum*, the city’s “Pioneer Park,” located in the heart of its Historic District, contained 15 permanent displays (11 donated by private individuals), including the city’s first fire department, a granary, a September 11 monument, and a privately donated Ten Commandments monument. *Id.* at 464-65. Summum, a religious society, repeatedly wrote the city requesting permission to erect its own monument in the park. *Id.* at 465. The proposed monument contained the “Seven Aphorisms of SUMMUM.” *Id.* (caps in original). The city denied permission, explaining that it only accepted monuments that directly related to the history of Pleasant Grove or were donated by groups with longstanding ties to the Pleasant Grove Community. Summum sued. *Id.*

The Court ruled unanimously for the city. First, the Court held that the monuments represented “government speech” and that a government entity has a

right to “speak for itself.” *Id.* at 467-68 (quoting *Board of Regents of Univ. of Wis. System v. Southworth*, 529 U.S. 217, 229 (2000)). “[I]t is entitled to say what it wishes,” *id.* (quoting *Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U.S. 819, 833 (1995)), “and to select the views that it wants to express.” *Id.* (citing *Rust v. Sullivan*, 500 U.S. 173, 194 (1991) and *Nat’l Endowment for Arts v. Finley*, 524 U.S. 569, 598 (1998) (Scalia, J., concurring in judgment) (“It is the very business of government to favor and disfavor points of view”)).

Next, the *Summum* Court found that governments have long practiced selectivity in receiving and displaying public monuments:

City parks--from those in small towns, like Pioneer Park in Pleasant Grove City, to those in major metropolises, like Central Park in New York City--commonly play an important role in defining the identity that a city projects to its own residents and to the outside world. Accordingly, cities and other jurisdictions take some care in accepting donated monuments. Government decisionmakers select the monuments that portray what they view as appropriate for the place in question, taking into account such content-based factors as esthetics, history, and local culture.

Id. at 472. In other words, the decision to receive one permanent monument or display does not bind a state actor to receive all submitted monuments or displays.

Critically, the Court also found that it is not always possible to “identify a single ‘message’ that is conveyed by an object or structure, and consequently, the thoughts or sentiments expressed by a government entity that accepts and displays such an object may be quite different from those of either its creator or its donor.”

Id. at 476. The Court then pointedly approved religious displays in museums and noted their applicability to the case:

Museum collections illustrate this phenomenon. Museums display works of art that express many different sentiments, and the significance of a donated work of art to its creator or donor may differ markedly from a museum's reasons for accepting and displaying the work. For example, a painting of a religious scene may have been commissioned and painted to express religious thoughts and feelings. Even if the painting is donated to the museum by a patron who shares those thoughts and feelings, it does not follow that the museum, by displaying the painting, intends to convey or is perceived as conveying the same "message."

Id. at 476 n. 5. In other words, while a religious object may hold undeniable religious meaning to a patron or donor, the museum can display that object for markedly different reasons -- including its artistic or historic significance. For example, the Library of Congress can display the Lincoln Bible for its historic significance even if some visitors may be religiously inspired by the continued presence of the Holy Bible in America's quadrennial transitions of power.

The court below recognized the fundamental similarities between *Summum's* case against Pleasant Grove and the Plaintiffs-Appellants' claims in this case. Like in *Summum*, Plaintiffs-Appellants have based their claims in large part on the Defendants-Appellees' refusal to allow Plaintiffs-Appellants to erect a monument in a public place. Much like the plaintiff in *Summum* demanded that either all religious symbols be allowed or all be removed, Plaintiffs-Appellants in

this case have demanded either removal of the Cross or permission to supplement it with other religious (or anti-religious) symbols. *See* 936 F. Supp. 2d at 339 n.19.

Yet the Court in *Sumnum* clearly indicated that accepting one monument or artifact does not create a government obligation to accept all monuments or artifacts. Relying directly on the *Sumnum* decision, the district court correctly held that the Museum’s decision “refus[ing] to include a symbol that represents atheists who helped in the rescue and relief effort . . . is government speech,” and “Defendants have the ‘freedom to express [their] views when [they] receive assistance from private sources for the purpose of delivering a government-controlled message.’” *Id.* (quoting *Sumnum*, 555 U.S. at 468).

II. THE DISTRICT COURT CORRECTLY CONCLUDED THAT A MUSEUM EXHIBIT THAT CONTAINS AN ARTIFACT OF A RELIGIOUS NATURE DOES NOT CONSTITUTE A VIOLATION OF THE ESTABLISHMENT CLAUSE.

Plaintiffs-Appellants have placed great emphasis on the religious meaning of the Cross. Yet the *Sumnum* Court explicitly stated that the meaning patrons ascribe to museum exhibits cannot be imputed to the exhibitor. This language not only applies to any free speech claims in the case (as it did in *Sumnum*), it also reflects standard Establishment Clause doctrine. *See, e.g., Lynch v. Donnelly*, 465 U.S. 668, 683 (1984) (“display of the creche is no more an advancement or endorsement of religion than the Congressional and Executive recognition of the origins of the Holiday itself as ‘Christ’s Mass,’ or the *exhibition of literally*

hundreds of religious paintings in governmentally supported museums.” (emphasis added)); *Allegheny v. ACLU*, 492 U.S. 573, 595 (1989) (“[A] typical museum setting, though not neutralizing the religious content of a religious painting, *negates any message of endorsement of that content.*” (emphasis added) (quoting *Lynch*, 465 U.S. at 692 (O’Connor, concurring))).

These cases, taken together, indicate that museums have a great degree of discretion when adding objects to their collection, even when those objects are religious. In many ways, a museum’s educational mission is analogous to a university’s, and at least one federal circuit court has explicitly upheld the right of a public university to display religiously-themed art as part of a campus-wide display. *See O’Connor v. Washburn Univ.*, 416 F.3d 1216 (10th Cir. 2005).

In *Washburn*, the university displayed an unflattering bronze sculpture of a Roman Catholic bishop. *Id.* at 1119. Called “Holier Than Thou,” the statue offended a number of Catholic students, and a group of students filed suit, claiming that the statue’s alleged anti-Catholic message violated the Establishment Clause. *Id.* at 1120. The university justified the statue’s presence on campus as part of its effort to engage students “intellectually and emotionally” and sought to turn the controversy into a “positive educational experience” through seminars and discussions. *Id.*

In rejecting the plaintiffs’ Establishment Clause claim, the circuit court found that “Holier Than Thou’s campus display was similar to a ‘typical museum setting’ that, ‘though not neutralizing the religious content of a religious [work of art], negates any message of endorsement of that content.’” *Id.* at 1228, (quoting *Lynch*, 465 U.S. at 692 (O’Connor, J., concurring)). The court held that “[a] state is not prohibited from displaying art that may contain religious or anti-religious symbols in a museum setting.” *Id.* (citing *Lynch*, 465 U.S. at 676-77, 677 n.4). Furthermore, a “reasonable observer aware that the statue was part of an outdoor art exhibit would not believe the university endorsed the message of any particular piece of art within the exhibit.” *Id.*

At the trial court level, the City of New York is in fact no stranger to disputes involving museum displays. In *Brooklyn Inst. of Arts & Sciences. v. City of N.Y.*, 64 F. Supp. 2d 184, 205 (E.D.N.Y. 1999), the court grappled with the meaning of a portrait of the Virgin Mary covered in elephant dung, concluding, “No objective observer could conclude that the . . . showing of the work of an individual artist which is viewed by some as sacrilegious constitutes endorsement of anti-religious views by the City or the Mayor.”

Similarly, the district court here correctly held that “the acknowledgment that many rescuers and volunteers found solstice [sic] in the cross is not endorsement of their religion,” 936 F. Supp. 2d at 336, and “simply because people

did in fact worship in front of the cross does not make its display an endorsement of Christianity.” *Id.* Moreover, the lower court rightly emphasized, “there will be numerous secular artifacts around the cross, as well [as] symbol steel with depictions of a Star of David, a Maltese cross, the Twin Towers, and the Manhattan skyline.” *Id.* at 337.

Because these additional items “will reinforce to the reasonable observer that they are perceiving a historical depiction of some people’s reaction to finding the cross at Ground Zero,” *id.*, no reasonable observer could look at the inclusion of the cross and believe that the government was “establishing” the Christian religion. Simply put, the fact that “one object, which is one component of a secular exhibition, is religious does not engender endorsement.” *Id.* To hold otherwise would place in jeopardy every historical religious artifact in every government museum in the nation. The Cross has actual historic significance – a fact that even the Plaintiffs-Appellants acknowledge in their Complaint by citing independent news articles about its existence and role in the aftermath of September 11. *See* First Amended Compl. at ¶ 23 n. 1. To hold that a museum cannot acknowledge history is to destroy the very purpose of a museum.

CONCLUSION

A museum has the freedom to display religiously-themed artifacts of historical or artistic significance without running afoul of the Constitution. The

court below acknowledged this freedom in granting Defendants-Appellee's
Motions for Summary Judgment, and this Court should affirm that decision.

Dated: November 15, 2013

Respectfully submitted,

/s/ Jay Alan Sekulow

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