ACLJ
American Center
for Law & Justice

December 30, 2019

Gary L. Randall
Clerk of the House
Chair, Michigan State Capitol Commission
State Capitol, Room H-70
Lansing, Michigan 48909
[redacted]

Via Email and U.S. Mail

Re: First Amendment principles governing holiday displays on Capitol grounds

Dear Chairman Randall:

We understand that the State Capitol Commission, pursuant to its policy creating a public forum for the display of privately-owned exhibits, again has allowed a satanic group to erect a counter-monument (this time a "Yule Goat") in response to the nativity scene and menorah exhibit that were privately displayed on the Capitol grounds in December. In the past, satanic groups have been allowed to erect such counter-monuments as a "Snaketivity" display, featuring a red snake coiled around a black cross with a pentagram on it, and "The Star of Reconciliation," a statue featuring a demonic horned goat.

As we have noted before and as is discussed herein, the State of Michigan is *not* required to open up a forum for the display of privately-owned items. Rather, the State has substantial discretion to *speak for itself* and *select and use its own displays* on public property—including seasonal holiday displays—without opening up a wide-ranging forum for the display of any and every conceivable monument or item.

By way of introduction, 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 before the Supreme Court of the United States in a number of significant cases involving the

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freedoms of speech and religion.[1] We hope this letter is of use to you as the State Capitol Commission makes decisions concerning the future use of the Capitol grounds to celebrate the holiday season.

Statement of Law

Under the First Amendment to the United States Constitution, while governmental bodies *may choose* to create a public forum for private individuals and groups to express their personal viewpoints through the display of privately-owned monuments, statues, and exhibits on public property, they are *not required* to do so. This principle was recognized by the Supreme Court of the United States in *Pleasant Grove City v. Summum*, 555 U.S. 460 (2009). The Court unanimously held, in favor of the ACLJ's client, that when the government owns and displays a statue, monument, or memorial, it is engaging in government speech which does not trigger any First Amendment-based right of a private party to force the government to display any other monument. This holding makes perfect sense; if the law were otherwise, public land would become dumping grounds for a vast array of statues and monuments, including highly controversial, antagonistic, or offensive items.

With regard to holiday displays, in *Lynch v. Donnelly*, 465 U.S. 668 (1984), the Supreme Court held that the Establishment Clause did not prohibit the City of Pawtucket, Rhode Island, from including a nativity scene in its annual Christmas display. *Id.* at 687. The Court held that the lower courts had erred by viewing the nativity scene in isolation, rather than considering the broader context of the entire Christmas display. *Id.* at 679-80. The Court concluded that the city was not primarily motivated by a religious purpose; rather, there was a legitimate secular purpose for the display: "to celebrate the Holiday and to depict the origins of that Holiday." *Id.* at 680-81. "The city, like the Congresses and Presidents . . . has principally taken note of a significant historical religious event long celebrated in the Western World. The creche in the display depicts the historical origins of this traditional event long recognized as a National Holiday." *Id.* at 680. The Court also rejected the claim that the primary effect of the display was to advance religion; "[h]ere, whatever benefit there is to one faith or religion or to all religions, is indirect, remote, and incidental." *Id.* at 683. Additionally, the Court recognized that the city had not created an excessive entanglement of government with religion. *Id.* at 685.[2]

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[1] *See, e.g., Pleasant Grove v. Summum*, 555 U.S. 460 (2009) (holding that the government is not required to accept counter-monuments when it displays a war memorial or Ten Commandments monument); *McConnell v. FEC*, 540 U.S. 93 (2003) (holding that minors have First Amendment rights); *Lamb's Chapel v. Center Moriches Sch. Dist.*, 508 U.S. 384 (1993) (holding that denying a church access to public school premises to show a film series violated the First Amendment); *Bd. of Educ. v. Mergens*, 496 U.S. 226 (1990) (holding that allowing a student Bible club to meet on a public school's campus did not violate the Establishment Clause); *Bd. of Airport Comm'rs v. Jews for Jesus*, 482 U.S. 569 (1987) (striking down an airport's ban on First Amendment activities).

[2] *See also Town of Greece v. Galloway*, 572 U.S. 565 (2014) (affirming the principle, discussed in *Lynch*, that the Establishment Clause must be interpreted by reference to historical practices and understandings); *Van Orden v. Perry*, 545 U.S. 677 (2005) (state capitol display that included a Ten Commandments monument among numerous other monuments and historical markers was constitutional); *Am. Legion v. Am. Humanist Ass'n*, 139 S. Ct. 2067 (2019) (publicly owned and maintained memorial that includes a 32-foot tall Latin cross was constitutional).

Similarly, in *County of Allegheny v. ACLU*, 492 U.S. 573 (1989), the Court upheld a holiday display outside a public office building that included a 45-foot tall Christmas tree, an 18-foot tall menorah, and a sign stating, "During this holiday season, the city of Pittsburgh salutes liberty. Let these festive lights remind us that we are the keepers of the flame of liberty and our legacy of freedom." *See id.* at 614-20 (Blackman, J., concurring in part) (noting that "government may celebrate Christmas as a secular holiday," and the overall display was a secular recognition of cultural diversity and different holiday traditions); *id.* at 633-35 (O'Connor, J., concurring in part) ("[T]he city intended to convey its own distinctive message of pluralism and freedom.").

Also, the United States Court of Appeals for the Sixth Circuit (whose decisions are binding in the federal courts of Michigan and a few other states) has applied these legal principles in several cases, including the analogous case of *Freedom from Religion Foundation, Inc. v. City of Warren*, 707 F.3d 686 (6th Cir. 2013). For several years, the City of Warren, Michigan, put a holiday display in the atrium of its civic center during the holiday season that included a nativity scene, a lighted tree, and a "Winter Welcome" sign, among other seasonal symbols. The Freedom From Religion Foundation sued after the city refused to remove the nativity scene or place an anti-religious sign in the atrium. *Id.* at 689. The Sixth Circuit rejected the Foundation's lawsuit, holding that

> [t]he nativity scene, when accompanied by this collection of secular and seasonal symbols, does not amount to an establishment of religion or for that matter an impermissible endorsement of it. [*County of Allegheny* and *Lynch*] . . . Because the display amounts to government speech and because the First Amendment does not prohibit a government from making content or viewpoint distinctions when it comes to its own speech, the City did not violate the Foundation's free-speech rights by refusing to add the Foundation's sign.

Id. at 690. Notably, the Sixth Circuit observed that the City of Warren *was not obligated* to include a satanic symbol in its holiday display:

> [T]he City maintained control over its seasonal message. It could choose to include a "Winter Welcome" sign. And it could choose to add a nativity scene (so long as it did not violate the Establishment Clause). It could choose to add an angel. *And it could choose to keep out a devil*. It could choose to add a Santa. And it could choose to deny a sign saying, "There is no Santa." It could choose to incorporate a message about Ramadan. And it could choose to deny a message disparaging any one religion or religion in general. . . . [T]he City of Warren could opt to have a holiday display without a Winter Solstice sign. . . .

Id. at 696-98 (emphasis added); *see also Doe v. City of Clawson*, 915 F.2d 244 (6th Cir. 1990); *Jocham v. Tuscola County*, 239 F. Supp. 2d 714, 719 (E.D. Mich. 2003).

Although the Sixth Circuit has recognized that governmental entities can run afoul of constitutional requirements by attempting to keep a forum for unattended items *partially open* for favored

speakers while excluding non-favored speakers, or by otherwise using forum-related decisions to censor unpopular, controversial, or offensive private speech,[3] such potential pitfalls can be avoided by simply and cleanly establishing that there will no longer be any forum for unattended private displays and that any future displays on the Capitol grounds will be selected or created by the government to convey the government's own secular viewpoints.

Conclusion

The State of Michigan has substantial leeway to create or select its own holiday displays without opening up a public forum for the display of numerous privately-selected monuments, statues, or other items. A government-selected display may include some elements that have religious origins or connotations (such as a nativity scene) so long as the primary purpose and principal effect of the overall display is secular.

We hope this letter is useful to the Commission going forward as it decides the use of the Capitol grounds to celebrate the holiday season.

Thank you for your consideration of this matter.

Very truly yours,

AMERICAN CENTER FOR LAW & JUSTICE

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[3] *Satawa v. Macomb County Rd. Comm'n*, 689 F.3d 506 (6th Cir. 2012); *Chabad of S. Ohio & Congregation Lubavitch v. City of Cincinnati*, 363 F.3d 427, 434-35 (6th Cir. 2004); *Congregation Lubavitch v. City of Cincinnati*, 997 F.2d 1160, 1166-67 (6th Cir. 1993).