



December 13, 2018

Secretary of State Jesse White


Sent Via Fed-Ex

Re: First Amendment principles governing holiday displays at the Capitol

Dear Secretary White,

Our understanding is that, in the Illinois Capitol rotunda this month, numerous privately-owned statues, monuments, and other unattended items will be displayed, such as a Nativity scene, a menorah, a statement from the Freedom From Religion Foundation mocking religion, and a Satanic “Snaketivity” consisting of an arm holding an apple with a snake coiled around it.

According to various public statements and a sign displayed at the Capitol, there is a belief that the State of Illinois is required, under the First Amendment to the U.S. Constitution, to create a public forum to allow anyone and everyone who so desires to display unattended monuments, statues, and other items inside the Capitol during the holiday season.

As explained herein, the government is *not* required to open up a forum for the display of numerous unattended statues, monuments, or other privately-owned items. Rather, the government may decide to *speak for itself, selecting and using its own displays*—including seasonal holiday displays—and, in so doing, has substantial discretion to decide what to include in, or exclude from, such displays.

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 freedoms of speech and religion.¹ This letter is sent on behalf of over 14,000 individuals who signed an ACLJ petition in support of this letter within the past 24 hours, including over 2,500 Illinois residents.

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).

Statement of Law

Under the First Amendment to the U.S. 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.

Under *Summum* and other First Amendment precedent, governmental bodies that desire to have a seasonal display of statues, exhibits, etc. on public property, but do not want to open up a wide-ranging forum for the display of any and every conceivable monument or item, have another option: the government *may speak for itself*, creating or selecting a holiday display of its own choosing, so long as it does so in a manner that complies with the First Amendment's Establishment Clause.

In *Lynch v. Donnelly*, 465 U.S. 668 (1984), the Supreme Court held that the Establishment Clause did not prohibit the city of Pawtucket, R.I. from including a nativity scene in its annual Christmas display. *Id.* at 687. The city's nativity scene included "the Infant Jesus, Mary and Joseph, angels, shepherds, kings, and animals, all ranging in height from 5" to 5'." *Id.* at 671. The Christmas display also included, "among other things, a Santa Claus house, reindeer pulling Santa's sleigh, candy-striped poles, a Christmas tree, carolers, cutout figures representing such characters as a clown, an elephant, and a teddy bear, hundreds of colored lights, [and] a large banner that reads 'SEASONS GREETINGS.'" *Id.*

The Court rejected the proposition that the Establishment Clause requires a "complete separation of church and state." *Id.* at 673. To the contrary, the Establishment Clause "affirmatively mandates accommodation, not merely tolerance, of all religions, and forbids hostility toward any." *Id.* The Court also observed that

[t]here is an unbroken history of official acknowledgment by all three branches of government of the role of religion in American life from at least 1789. . . .

Our history is replete with official references to the value and invocation of Divine guidance in deliberations and pronouncements of the Founding Fathers and contemporary leaders. . . .

Executive Orders and other official announcements of Presidents and of the Congress have proclaimed both Christmas and Thanksgiving National Holidays in religious terms.

Id. at 674-76.

The Court held that the lower courts 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.

The Court concluded by stating that

[t]he display engenders a friendly community spirit of goodwill in keeping with the season. The creche may well have special meaning to those whose faith includes the celebration of religious Masses, but none who sense the origins of the Christmas celebration would fail to be aware of its religious implications. . . .

It would be ironic . . . if the inclusion of a single symbol of a particular historic religious event, as part of a celebration acknowledged in the Western World for 20 centuries, and in this country by the people, by the Executive Branch, by the Congress, and the courts for 2 centuries, would so “taint” the city’s exhibit as to render it violative of the Establishment Clause.

Id. at 685-86.²

Similarly, in *County of Allegheny v. ACLU*, 492 U.S. 573 (1989), the Court upheld a holiday display outside of a public office building that included a 45-foot Christmas tree, an 18-foot 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 (Blackmun, 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.”).

Decisions from the U.S. Court of Appeals for the Seventh Circuit (applicable to Illinois and a few other states) have similarly recognized that the government may prohibit all unattended private displays inside government buildings. *Grossbaum v. Indianapolis-Marion Cnty. Bldg. Auth.*, 100 F.3d 1287, 1299 (7th Cir. 1996); *Lubavitch Chabad House, Inc. v. City of Chicago*, 917 F.2d 341 (7th Cir. 1990). Additionally, in *Mather v. Village of Mundelein*, 864 F.2d 1291 (7th Cir.

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).

1989), the court upheld a village's holiday display that included a nativity scene, lighted trees, a banner, a Santa Claus and sleigh, carolers, snowmen, carriage lights, wreaths, and two soldiers in the shape of nutcrackers; *cf. Freedom from Religion Foundation, Inc. v. City of Warren*, 707 F.3d 686, 696-98 (6th Cir. 2013) (rejecting a challenge to a city's holiday display that included, among other things, a nativity scene, a lighted tree, reindeer, snowmen, a mailbox for Santa, wrapped gift boxes, candy canes, and a "Winter Welcome" sign, and noting that the city *was not obligated* to incorporate a devil into its display).

Conclusion

Governmental bodies have substantial leeway to create or select their 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 that this letter is of use to you as the State of Illinois makes decisions concerning how the Capitol rotunda is used to celebrate the holiday season.

Sincerely,

AMERICAN CENTER FOR LAW AND JUSTICE



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