



December 13, 2018

Gary Randall
Clerk of the House
Chair, Michigan State Capitol Commission

Sent Via Fed-Ex



Re: First Amendment principles governing holiday displays on Capitol grounds

Dear Commission Chairman Randall,

Our understanding is that the State Capitol Commission's current policy and practice creates a public forum for the display of privately owned exhibits, displays, etc. on a rotating, first-come, first-served basis. Any approved exhibits may be displayed during the hours that the Capitol grounds are open for up to seven days per year, and must contain a disclaimer stating that the display is not owned, maintained, promoted, supported by or associated with the State of Michigan.

Under this policy, a nativity scene and a menorah exhibit have been displayed at the Capitol in the past and are scheduled again for display this month. In response, Satanist groups created counter-monuments for display at the Capitol, such as a "Snaketivity" exhibit that was displayed two years ago. A group has been approved to display a "Star of Reconciliation" statue later this month, which consists of a bust of a demonic horned goat with a star on its forehead.

The question has arisen whether the Commission (and other governmental bodies) are constitutionally obligated to create a public forum to allow some, or all, privately-owned seasonal displays on public property. 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 almost 2,800 Michigan residents.

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

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).

[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.

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).

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.”).

The U.S. Court of Appeals for the Sixth Circuit (whose decisions are binding in Michigan and a few other states) has applied these 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, reindeer, snowmen, ribbons, ornaments, wreaths, a mailbox for Santa, elves, wrapped gift boxes, nutcrackers, poinsettias, candy canes, and a “Winter Welcome” sign. 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 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.

Concerning the Establishment Clause, the Sixth Circuit stated:

[i]f the multi-purpose, multi-symbol Pawtucket and Allegheny County displays did not offend the Establishment Clause, then neither does the Warren display. . . . The key lesson of *Lynch* and *Allegheny County* is that a city does not run afoul of the Establishment Clause by including a creche in a holiday display that contains secular and religious symbols. Warren readily meets that test. . . .

[T]he Supreme Court has long permitted exhibits like the Warren holiday display, and the Establishment Clause does not convert these displays into a seasonal public forum, requiring governments to add all comers to the mix and creating a poison pill for even the most secular displays in the process.

Id. at 692-94.

The Court also held that the plaintiff’s free speech argument was foreclosed by *Summum*:

In rejecting *Summum*’s claim, the Court held that the monuments amounted to government, not private, speech. . . . Why? Pleasant Grove maintained final approval authority over every aspect of the approval process; it was selective in deciding which

monuments to add to the park; and it located all of the monuments on city property. . . . By “effectively controll[ing]” the message being sent in these ways, it was the government, not the donors of the monuments or anyone else, that spoke. . . .

[L]ike the *Summum* monument policy, Warren’s holiday display amounts to government speech. The display occurred on the most governmental of government properties: City Hall. The City erected, maintained, took down and stored the display each year and covered the costs in doing so. The City reserved final approval of all components of the display to itself. . . .

Id. at 695-96.

Particularly relevant here, the Sixth Circuit observed that the city *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 any displays on the Capitol grounds going forward will be selected or created by the government to convey the government’s own secular viewpoints.

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.

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).

We hope that this letter is of use to you as the Commission makes decisions concerning how Capitol grounds are used to celebrate the holiday season.

Sincerely,

AMERICAN CENTER FOR LAW AND JUSTICE



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