

**UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK**

AMERICAN ATHEISTS, INC. *et al.*,

Plaintiffs,

v.

PORT AUTHORITY OF NEW YORK AND
NEW JERSEY, *et al.*

Defendants.

Docket No. 1:11-cv-06026 (DAB)

ECF CASE

**AMICUS CURIAE BRIEF OF
THE AMERICAN CENTER FOR LAW AND JUSTICE
AND THE COMMITTEE TO PROTECT THE
GROUND ZERO CROSS IN SUPPORT OF
DEFENDANTS' MOTIONS FOR SUMMARY JUDGMENT**

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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 v. Summum*, 129 S. Ct. 1125 (2009).

The Committee to Protect the Ground Zero Cross consists of more than 190,000 Americans who seek to preserve history and honor the actual experience of survivors and First Responders at Ground Zero.

Plaintiffs' 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. It is entirely appropriate and lawful for the 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*, 129 S.Ct. 1125 (2009). In fact, the constitutionality of religious displays in museums has long been presumed by the Court. Simply put, historically significant religious artifacts can be displayed in taxpayer-supported museums, and any contrary ruling would lead to absurd results. Can the federal government not display the Declaration of Independence? Must it not display the Lincoln Bible

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.

(upon which President Obama swore the Oath of Office)? Is it required to conceal the original text of the Star Spangled Banner?

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' lawsuit is without merit.

STATEMENT OF FACTS

On September 13, 2001, two days after the worst terrorist attacks in American history, New York City firefighter Frank Silecchia discovered two steel beams in the shape of a cross just after recovering three bodies from the rubble of the collapsed World Trade Center. Silecchia told ABC News of his immediate reaction: "I was overwhelmed with the image of my faith . . . it brought me to tears and to my knees." Reshma Kirpalani, *American Atheists Sue Over World Trade Center Cross*, ABC News (July 27, 2011), <http://abcnews.go.com/US/atheists-sue-cross-world-trade-center-museum/story?id=14169830#.UC0OUqM6KM8>.

Silecchia was not alone in his reaction. Contemporaneous reports are unanimous in recording the immediate and profound effect that the Cross had on First Responders and rescue workers. On September 23, 2001, the New York Post's Rod Dreher wrote:

As word of the find has spread at ground zero, exhausted and emotionally overwhelmed rescue workers have been flocking to the site to pray and meditate.

"People have a very emotional reaction when they see it," says the Rev. Carl Bassett, an FBI chaplain. "They are amazed to see something like that in all the disarray. There's no symmetry to anything down there, except those crosses."

Rod Dreher, *Holy Symbols of Hope Amid Rubble*, The New York Post (Sept. 23, 2001), http://www.nypost.com/p/news/item_Iygp1LxwHFH1BZ70YFOepO.

On October 5, 2001, the New York Daily News covered the Cross's emotional dedication ceremony and its elevation to a place of prominence at Ground Zero:

When the World Trade Center collapsed, a section of the steel girders that supported the mighty north tower landed in the rubble in the shape of a cross. Since that terrible day, the cross has become an inspiration to many of the firefighters and workers at Ground Zero.

At noon yesterday, rescuers put down their tools, took off their helmets and gathered at the base of their 20-foot-tall icon for a blessing ceremony.

...

Before the Ceremony, a welder fused a base to the cross and melted onto it several commemorative state quarters – each representing the home states of the rescuers.

Then the cross was lifted by a crane onto a concrete beam over a fallen crosswalk on West St. As a bagpiper played “Amazing Grace,” many were overcome by emotion.

Greg Gittrich & Corky Siemasko, *In Rubble A Sacred Find: Ceremony At Cross*, The New York Daily News, Oct. 5, 2001. The Cross soon became a destination spot, not just for the First Responders and rescuers, but also for prominent guests:

In subsequent days, Silecchia, a born-again Christian, led his fellow rescue workers and others - many of whom were grieving the loss of loved ones - to the crosses.

A veteran firefighter who had been digging through the twisted metal for his lost firefighter son. An angry cop who lost someone in the collapse. A Vatican representative, who photographed the crosses for the pope. And ABC's Barbara Walters.

He says they all left in peace.

“Barbara Walters’ niece lost her son in the building,” he said. “Barbara told me she wanted people to see the House of God, so people who needed healing could find it.”

Dreher, *supra*.

On Saturday, July 23, 2011, the Cross was moved to the “historical exhibition” of the September 11 Memorial Museum. First Amended Complaint at ¶ 44, American Atheists, Inc. v.

Port Auth. of N.Y. & N.J. (N.Y. Sup. Ct. 2011) (Index No. 108670-2011). The Museum's website shows how the cross is to be exhibited:



The Museum Exhibition Design, 9/11 Memorial, <http://www.911memorial.org/museum-exhibition-design-1> (last visited Aug. 14, 2012).

The historical exhibition has three parts. In part 1, the exhibition explores the events of 9/11 itself and presents the events of the day as they unfolded. *Id.* In part 2, visitors explore the “antecedents to 9/11,” including the rise of al Qaeda and the first World Trade Center bombing in 1993. *Id.* The final part “take(s) visitors from the immediate aftermath of 9/11 to the present moment” and chronicles not only the recovery and rescue efforts but also how we understand “collective grief.” *Id.* The Cross, as an artifact of the attack itself, is contained in part 3 of the Museum. *See id.*

Officials at the September 11 Memorial Museum have acknowledged the Cross's unique role in the September 11 story. Joe Daniels, President of the Memorial Foundation noted, “It's powerful because it provided comfort to so many people - it is a part of the history of the space.”

Out of the Ashes: World Trade Center Cross Moved to Permanent Home at 9/11 Memorial Museum, The Daily Mail (July 25, 2011, 1:55 PM), available at <http://www.dailymail.co.uk/news/article-2018270/World-Trade-Center-cross-moved-permanent-home-9-11-Memorial-Museum.html>. The September 11 Memorial Museum considers the Cross one of the “authentic physical reminders” that tell the story of the attacks and their aftermath. *President Joe Daniels: WTC Cross is 'Part of History'*, 9/11 Memorial (July 28, 2011, 12:26 PM), <http://www.911memorial.org/blog/911-memorial-president-joe-daniels-wtc-cross-part-history-updated>.

Religious artifacts and explicit religious references are extraordinarily common in our nation’s public museums. 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. 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>. The National Archives contain the Declaration of Independence, which not only declares the existence of our “Creator” but also identifies Him as the source of our rights. *The Charters of Freedom*, The National Archives, <http://www.archives.gov/exhibits/charters/declaration.html> (last visited Aug. 10, 2011). 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. See, e.g., *The Star-Spangled Banner: The Flag That Inspired the National Anthem*, The Smithsonian, <http://americanhistory.si.edu/starspangledbanner/the-lyrics.aspx> (last visited Aug. 10, 2011); *Through Feb. 28: Exhibit Marks Anniversary of Martin Luther King Jr. Day*, The UDaily (Jan.

14, 2011, 2:24 PM),

<http://www.udel.edu/udaily/2011/jan/MartinLutherKingAnniversary011411.html>.

In short, Plaintiffs cannot dispute that the Cross is an historical artifact of the September 11 attacks, they cannot dispute that it had significance to many First Responders and others at Ground Zero, and they cannot dispute that historical artifacts – even religious artifacts – have long been placed in America’s public museums.

ARGUMENT

I. THE DECISION BY THE MUSEUM TO DISPLAY THE GROUND ZERO CROSS IS A PERMISSIBLE EXERCISE OF GOVERNMENT SPEECH

While *amici* concur with the Defendants’ argument 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. 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.

Pleasant Grove City v. Summum, 129 S.Ct. 1125 (2009) is directly applicable. 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 1129. *Summum*, a religious society, repeatedly wrote the city requesting permission to erect its own monument in the park. *Id.* at 1129-30. The proposed monument contained the “Seven Aporisms 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. Sumnum sued. *Id.* at 1130.

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 1131 (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 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 1133-34 (emphasis added). 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 1136. 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 1136 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.

There are fundamental similarities between *Summum*’s case against Pleasant Grove and the Plaintiffs’ claims in this case. Like in *Summum*, Plaintiffs have based their claims in large part on the Defendants’ refusal to allow Plaintiffs 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 in this case have demanded either removal of the Cross or permission to supplement it with other religious (or anti-religious) symbols. (*See, e.g.*, First Amended Compl., ¶¶ 39, 42, 47, 53). Yet the Court in *Summum* clearly indicated that accepting one monument or artifact does not create a government obligation to accept all monuments or artifacts.

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

Plaintiffs have placed great emphasis on the religious meaning of the Cross to possible patrons. Yet the *Summum* 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 *Summum*), 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.”

As noted above in the Statement of Facts, the National September 11 Memorial Museum’s website clearly indicates that the Cross resides in the Museum section of the grounds and not the separate Memorial. The mockup of the gallery, depicted in the photograph attached in the Statement of Facts, shows the Cross displayed with a large variety of objects from the World Trade Centers. No reasonable observer could look at such a display of historical artifacts and believe that the government was “establishing” the Christian religion.

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 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 – public or private – has the academic freedom to display religiously-themed artifacts of historical or artistic significance. The Defendants’ motions for summary judgment should be granted.

Respectfully submitted,

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