



August 29, 2013

Sent via Federal Express and Facsimile

The Honorable Liz Lempert, Mayor
400 Witherspoon Street
Princeton, NJ 08540

Dear Mayor Lempert:

The American Center for Law and Justice (ACLJ) urges Princeton to move forward with Deputy Fire Chief Roy James's proposed September 11 memorial as a fitting tribute to all of the victims of the terrorist attacks. As explained herein, objections to the proposed memorial based upon the "separation of church and state" that were raised in a letter that Princeton received from American Atheists are without merit and should not deter Princeton from providing property and/or funds to support the proposed memorial.

By way of introduction, the 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 The ACLJ has been actively involved in defending the constitutionality of memorials and other public displays across the country through the representation of local governments in litigation and the filing of amicus curiae briefs.

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).



Background

As we understand, Princeton lost several residents during the terrorist attacks of September 11. Deputy Fire Chief Roy James has expended significant time, energy, and resources on a proposal to create a memorial in Princeton for the victims of the attacks. Last year, he acquired a piece of a steel beam salvaged from the World Trade Center site that has a cross cut out of one of its sides. The cross was likely carved by Ground Zero rescue and recovery workers to honor the memory of the victims found there; symbols such as a cross or Star of David were often cut out of the beams and given to the family members of victims.

Deputy Fire Chief James has proposed that the memorial, including the steel beam, be placed on public land near a Revolutionary War memorial, and the memorial may include a plaque to explain the historical significance of the beam and cross. The total cost of the memorial, as designed by an architecture firm, would be about \$75,000, which may be paid for through donations and/or a loan from Princeton that would be repaid with private funds.

Princeton received a letter from American Atheists, who threatened to sue Princeton if the proposed memorial was displayed on public property or financed with public money. The group claimed that the proposed memorial would violate the “separation of church and state” due to the cross. The group also suggested that Princeton instead create a designated free speech zone that would allow various private groups and individuals to display memorials and plaques of their choosing on public property, including American Atheists’ own memorial plaque.

In light of the American Atheists letter, Deputy Fire Chief James has reiterated that the steel beam and cross are historically significant. James has explained, “I’m a Jew. Ironically, I’m fighting to have this cross there because I believe that someone’s story is behind that. That story needs to be told. It has nothing to do with religious faith. It has something to do with telling history. . . . We got a historic piece. . . . If we do not show the cross, we are leaving out someone’s story. We are basically saying someone’s emotions that day didn’t matter.”

Discussion

The proposed Princeton 9-11 memorial is constitutionally sound. Earlier this year, a federal judge rejected a similar lawsuit brought by American Atheists. *Am. Atheists, Inc. v. Port Auth. of NY & NJ*, 2013 U.S. Dist. LEXIS 45496 (S.D.N.Y. Mar. 28, 2013). That lawsuit sought to keep World Trade Center steel beams in the shape of a cross, which became a source of solace and significance for many rescue workers and the victims’ families, out of a September 11 museum. Although American Atheists claimed that inclusion of the cross “constitutes an endorsement of Christianity” and “diminishes non-Christian rescuers,” *id.* at *23, the court explained that “[b]y incorporating the artifact . . . part of the September 11 historical narrative is told more fully, as the cross and its accompanying textual panels help[] demonstrate how those at Ground Zero coped with the devastation they witnessed during the rescue and recovery effort.” *Id.* at *27. The court also concluded, “[b]ecause a reasonable observer would be aware of the history and context of the cross and the Museum . . . no reasonable observer would view the artifact as endorsing Christianity.” *Id.* at *33. There is no meaningful difference for purposes of the Establishment Clause between that case and the present situation in Princeton.

Furthermore, in *Salazar v. Buono*, 130 S. Ct. 1803 (2010), the Supreme Court of the United States considered whether a federal law that authorized the transfer of federal land on which a memorial cross stood to a private party violated the Establishment Clause. The cross was originally built in 1934 by members of the Veterans of Foreign Wars to memorialize service members who died in World War I, and had subsequently been replaced after the original cross eventually deteriorated. The Ninth Circuit held that the government had improperly promoted religion by attempting to keep the cross in place by transferring the land to private parties.

The Supreme Court held that the lower court decisions were incorrect. Justice Kennedy wrote a plurality opinion rejecting the claim that a cross is a religious symbol in all settings:

[A] Latin cross is not merely a reaffirmation of Christian beliefs. It is a symbol often used to honor and respect those whose heroic acts, noble contributions, and patient striving help secure an honored place in history for this Nation and its people. Here, one Latin cross in the desert evokes far more than religion. It evokes thousands of small crosses in foreign fields marking the graves of Americans who fell in battles, battles whose tragedies are compounded if the fallen are forgotten.

Id. at 1820 (Kennedy, J., plurality).

Justice Kennedy distinguished the case from one in which a Latin cross is displayed for the purpose of promoting a Christian message:

Private citizens put the cross on Sunrise Rock to commemorate American servicemen who had died in World War I. Although certainly a Christian symbol, the cross was not emplaced on Sunrise Rock to promote a Christian message. . . . Placement of the cross on Government-owned land was not an attempt to set the *imprimatur* of the state on a particular creed. Rather, those who erected the cross intended simply to honor our Nation's fallen soldiers. . . .

The cross had stood on Sunrise Rock for nearly seven decades before the statute was enacted. By then, the cross and the cause it commemorated had become entwined in the public consciousness.

Id. at 1816-17.

Moreover, the plurality strongly suggested that maintaining the cross on public property, rather than transferring it into private hands, would be consistent with the Establishment Clause:

The goal of avoiding governmental endorsement does not require eradication of all religious symbols in the public realm. A cross by the side of a public highway marking, for instance, the place where a state trooper perished need not be taken as a statement of governmental support for sectarian beliefs. The Constitution does not oblige government to avoid any public acknowledgment of religion's

role in society. . . . Rather, it leaves room to accommodate divergent values within a constitutionally permissible framework.

Id. at 1818-19.

Justice Alito wrote a concurring opinion in which he stated:

The cross is of course the preeminent symbol of Christianity, and Easter services have long been held on Sunrise Rock. But, as noted, the original reason for the placement of the cross was to commemorate American war dead and, particularly for those with searing memories of The Great War, the symbol that was selected, a plain unadorned white cross, no doubt evoked the unforgettable image of the white crosses, row on row, that marked the final resting places of so many American soldiers who fell in that conflict.

Id. at 1822 (Alito, J., concurring) (citation omitted).

Justice Alito also noted that Congress's action was necessary to avoid showing hostility toward religion and disrespect for the servicemen the cross honors:

If Congress had done nothing, the Government would have been required [by an injunction] to take down the cross, which had stood on Sunrise Rock for nearly 70 years, and this removal would have been viewed by many as a sign of disrespect for the brave soldiers whom the cross was meant to honor. The demolition of this venerable, if unsophisticated, monument would also have been interpreted by some as an arresting symbol of a Government that is not neutral but hostile on matters of religion and is bent on eliminating from all public places and symbols any trace of our country's religious heritage.

Id. at 1822-23.²

These decisions stem from a long line of cases recognizing that the Constitution does not require the eradication of all things with some arguable or tangential connection to religion from the public arena. As one Supreme Court Justice explained, “[i]t is unsurprising that a Nation founded by religious refugees and dedicated to religious freedom should find references to divinity in its symbols, songs, mottoes, and oaths. Eradicating such references would sever ties to a history that sustains this Nation even today.” *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 35-36 (2004) (O’Connor, J., concurring). Another court has observed, “the people of the United States did not adopt the Bill of Rights in order to strip the public square of every last shred of public piety. The notion that the First Amendment commands a brooding and pervasive devotion to the secular . . . is a notion that simply perverts our history.” *ACLU of Ohio v. Capitol*

² Furthermore, although Justices Scalia and Thomas concluded that the plaintiff lacked standing to obtain the injunction he sought, *id.* at 1824 (Scalia, J., concurring), their prior jurisprudence clearly indicates their rejection of the kind of expansive view of the Establishment Clause set forth in the American Atheists letter. *See, e.g., McCreary County v. ACLU*, 545 U.S. 844 (2005) (Scalia, J., dissenting, joined by Justice Thomas).

Square Rev. & Advisory Bd., 243 F.3d 289, 299-300 (6th Cir. 2001) (en banc) (citations omitted) (upholding the use and display of Ohio’s motto, “With God, All Things Are Possible.”).

There is no room in the Establishment Clause analysis for the kind of absolutist view espoused by American Atheists:

[T]he reasonable observer does not look upon religion with a jaundiced eye, and religious speech need not yield to those who do. . . . [T]he plaintiffs’ argument presents a new threat to religious speech in the concept of the “Ignoramus’s Veto.” The Ignoramus’s Veto lies in the hands of those determined to see an endorsement of religion, even though a reasonable person, and any minimally informed person, knows that no endorsement is intended, or conveyed.

Americans United For Separation of Church & State v. City of Grand Rapids, 980 F.2d 1538, 1553 (6th Cir. 1992).

Here, the proposed Memorial recognizes a historically significant event through the display of historically relevant items. The steel beam and cross are intended to honor the thousands of victims of the 9-11 attacks belonging to all faiths or none. The proposed Memorial would not compel anyone to take any religious action or indicate a preference for any religion. It does not, in any way, suggest that Princeton has endorsed Christianity or disrespected the memory of 9-11 victims who were not Christians. It may conceivably irk an incalculably small percentage of individuals who would prefer a different design, but as with scores of other government actions that someone may not like, that is the nature of government decision-making.³ Such offense does not violate the Establishment Clause.

If American Atheists’ position were correct, the public arena would be stripped bare of any and all items with actual or perceived religious connotations—Ten Commandments monuments, crosses, Stars of David, etc.—but that extreme position is not supported by law or practice. The Supreme Court itself has a large “great lawgivers of history” frieze that depicts, among other historical figures, Moses holding the Ten Commandments, Hammurabi receiving his Code from the Babylonian Sun God, and Muhammad holding the Qur’an.⁴ Various cases have upheld public historical displays that include a Ten Commandments monument that features a Star of David. *Van Orden v. Perry*, 545 U.S. 677 (2005) (upholding a display on the Texas State Capitol grounds that included a Ten Commandments monument that featured two Stars of David among other historically relevant items); *ACLU Nebraska Found. v. City of Plattsmouth*, 419 F.3d 772 (8th Cir. 2005) (en banc) (upholding a similar display).

³ American Atheists’ proposed alternative—allowing private groups or individuals to display plaques and other items of their choosing on public property—while legally permissible, has the unavoidable consequence of opening public property up for the display of items conveying inflammatory messages that denigrate the 9-11 victims or honor their killers, as the government cannot discriminate against private speakers on the basis of their viewpoints.

⁴ U.S. Supreme Court, *Courtroom Friezes: South and North Walls*, <http://www.supremecourt.gov/about/north&southwalls.pdf>.

Conclusion

The ACLJ encourages Princeton to move forward with the proposed memorial design as a secular commemoration of the thousands of individuals who perished on September 11. We are available to discuss how we may be of assistance to Princeton in this matter at your convenience, and to aid in the defense of the proposed design in the event that a lawsuit is filed challenging it on Establishment Clause grounds.

Sincerely,

A handwritten signature in black ink that reads "Jay Alan Sekulow". The signature is written in a cursive, flowing style.

Jay Alan Sekulow
Chief Counsel

cc: Princeton Deputy Fire Chief Roy James