

No. 13-1668-cv

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

AMERICAN ATHEISTS, INC., DENNIS HORVITZ,
KENNETH BRONSTEIN, JANE EVERHART,
Plaintiffs-Appellants,

MARK PANZARINO,
Plaintiff,

v.

PORT AUTHORITY OF NEW YORK AND NEW JERSEY, WORLD TRADE
CENTER MEMORIAL FOUNDATION/NATIONAL SEPTEMBER 11
MEMORIAL AND MUSEUM,
Defendants-Appellees,

STATE OF NEW JERSEY, GOVERNOR CHRIS CHRISTIE, SILVERSTEIN
PROPERTIES, INC., LOWER MANHATTAN DEVELOPMENT
CORPORATION, CHURCH OF THE HOLY NAME OF JESUS, BRIAN
JORDAN, WORLD TRADE CENTER PROPERTIES, LLC,
Defendants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR
THE SOUTHERN DISTRICT OF NEW YORK

**BRIEF *AMICI CURIAE* OF WALLBUILDERS, INC., AND
THE NATIONAL LEGAL FOUNDATION,**
in support of DEFENDANTS-APPELLEES,
supporting affirmance.

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FRAP RULE 26.1 DISCLOSURE STATEMENT

Amici Curiae WallBuilders, Inc. and the National Legal Foundation have not issued shares to the public, and they have no parent companies, subsidiaries, or affiliates that have issued shares to the public. Thus, no publicly held company can own more than 10% of stock.

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INTEREST OF *AMICI CURIAE*¹

WallBuilders, Inc., is a non-profit organization that is dedicated to the restoration of the moral and religious foundation on which America was built. WallBuilders' President, David Barton, is a recognized authority on American history and on the role of religion in public life. As a result of his expertise in these areas, he works as a consultant to national history textbook publishers. He has been appointed by the State Boards of Education in states such as California and Texas to help write the American history and government standards for students in those states. Mr. Barton also consults with Governors and State Boards of Education in several states, and he has testified in numerous state legislatures on American history. Much of his knowledge is gained through WallBuilders' vast collection of rare, primary documents of American history, including more than 70,000 documents predating 1812.

Furthermore, WallBuilders encourages citizens all across America to continue the tradition of bringing religious perspectives to bear in public life. WallBuilders and its constituents desire to see religion treated as the Framers of the First Amendment intended and seek to clarify what the establishment of religion

¹ No party's counsel authored this brief in whole or in part. No party or party's counsel contributed any money intended to fund the preparing or submitting of this brief. No person, other than *Amici*, their members, or their counsel contributed money that was intended to fund the preparing or submitting of this brief. Because all parties did not consent to the filing of this brief, *Amici* have filed a Motion for Leave to File this Brief along with the Brief, pursuant to Fed. R. App. P. 29(a).

really means.

The National Legal Foundation (NLF) is a public interest law firm dedicated to the defense of First Amendment liberties and the restoration of the moral and religious foundation on which America was built. The NLF and its donors and supporters, in particular those in New York, are vitally concerned with the outcome of this case because of the impact a case such as this one will have on religious liberty and interpretation of the Establishment Clause.

SUMMARY OF THE ARGUMENT

This Brief expands upon one argument made by the Appellees (herein “the Foundation and the Port Authority” or “the Museum”). As the Foundation and the Port Authority correctly note, the cross at issue in this case is government speech. Your *Amici* will explain why this is so and why the inclusion of the cross and the refusal to display an atheist symbol are constitutional under the governmental speech doctrine. In so doing, your *Amici* will explain why the government speech doctrine controls the federal and state Establishment Clause and Equal Protection Clause claims. The primary vehicle for these arguments will be a canvassing of the majority and concurring opinions in *Pleasant Grove City v. Summum*, 555 U.S. 460 (2009).

ARGUMENT

I. THE CROSS AT ISSUE IN THIS CASE IS GOVERNMENT SPEECH, AND ITS INCLUSION IN—AND THE EXCLUSION OF AN ATHEIST SYMBOL FROM—THE MUSEUM DO NOT VIOLATE THE STATE OR FEDERAL ESTABLISHMENT OR EQUAL PROTECTION CLAUSES.

Although not a key part of its Establishment Clause analysis, the district court did note that the Appellees made the government speech argument below. (Special Appendix (hereinafter, “S.A.”) 21 n.14.) Further, all parties have treated the display of the cross as government speech in their briefing to this Court. (Appellants’ Br. 31; Appellee Port Authority, et al.’s Br. 17-18; Appellee Foundation’s Br. 37-40.) The district court also noted the government speech doctrine in a footnote in its Equal Protection analysis. (S.A. 34 n.19.) However, your *Amici* believe that the government speech doctrine ought to be front and center in this Court’s analysis. It is true that government speech is subject to Establishment Clause and Equal Protection challenges. However, examining this case through a government speech lens rather than proceeding directly to the tests for those claims brings certain aspects of the case into sharper relief.²

To set the stage, your *Amici* note that this is not a typical government speech

² Although your *Amici* will only address the federal Establishment Clause and Equal Protection Clause challenges, for the reasons explained by the Foundation and the Port Authority, since the government speech doctrine controls these federal claims, it also controls the counterpart state claims.

case. In the most pertinent government speech cases,³ the plaintiffs allege that a governmental entity has allowed other speech in a forum, but disallowed their speech. As a defense in such cases, the government will assert that the speech that has been allowed is government speech, not private speech. The court must decide this threshold question. Then, if it determines the speech is private, it will conduct a forum analysis. *See, e.g., Satawa v. Bd. of Cnty. Rd. Comm'rs*, 689 F.3d 506 (6th Cir. 2012) (holding that prior speech was private speech in a traditional public forum and that government could not exclude nativity scene). If on the other hand, the court determines the speech is government speech, and thus not subject to Free Speech analysis, it will determine whether it may otherwise be unconstitutional by violating, for example, the Equal Protection Clause or the Establishment Clauses.⁴ *See, e.g., Pleasant Grove City v. Summum*, 555 U.S. 460 (2009) (holding that donated Ten Commandments monument was government speech and government's refusal to display another religious monument was not subject to Free Speech challenge); *Freedom From Religion Foundation, Inc. v. City of Warren, Michigan*, 707 F.3d 686 (6th Cir. 2013) (holding that a holiday display that included a nativity scene was government speech and that government's

³ Government speech cases arise in numerous contexts. The most pertinent ones are those that involve the display of a monument or other object with religious (and non-religious) significance.

⁴ Such cases may also include separate Equal Protection or Establishment Clause claims.

refusal to allow anti-religious sign nearby did not violate the Establishment Clause or Equal Protection Clause).

Nor is this case like a second category of cases: those in which plaintiffs allege an Establishment Clause violation and the government defendants argue that the monument or display is private speech, not government speech. *See, e.g., American Atheists, Inc. v. Davenport*, 637 F.3d 1095, (10th Cir. 2010) (rejecting argument that privately owned memorial crosses displayed on public property were private speech); *Green v. Haskell County Board Of Com'rs*, 568 F.3d 784 (10th Cir. 2009); (rejecting argument that donated Ten Commandments monument was private speech); *ACLU of Florida Inc. v. Dixie County Fla.*, 797 F. Supp. 2d 1280 (2011), *vacated*, 690 F.3d 1244 (2012) (rejecting argument that donated Ten Commandments monument was private speech).⁵

Rather, in this case, the Foundation and the Port Authority defend the cross's inclusion and the atheist symbol's exclusion by correctly arguing that the cross *is* government speech. Given this posture, your *Amici* will note why the principles of *Summum* apply here and will then explain how those principles demonstrate that

⁵ In each of these cases, the court also determined that the speech violated the Establishment Clause. Assuming *arguendo* that these cases were decided correctly—and your *Amici* do not believe this is the case—they are easily distinguishable from the instant case. In *Davenport*, 637 F.3d at 1111, and *Dixie County*, 797 F. Supp. 2d at 1282, the displays with religious content constituted 100% of the challenged speech; and in *Haskell County*, the case turned on the circumstances of the monument's installation and actions of the county board members with no counterpart in this case, 568 F.3d at 796-809.

the inclusion of the cross and the exclusion of an atheist symbol are constitutional.

Applying the principles will greatly simplify this case. While your *Amici* agree with the *Lemon* analyses offered by the Foundation and the Port Authority, application of *Summum* is a much easier matter than application of *Lemon*. As this Court noted in *Skoros v. City of New York*, 437 F.3d 1 (2d Cir. 2006), before *Summum* was decided:

The passage of time has not produced greater consensus on the Court in resolving First Amendment challenges to public displays of religious symbols. Last term, ten separate opinions were filed in two cases, one of which held that the Establishment Clause was not violated by a long-standing public display of the Ten Commandments and the other of which ruled that the Clause was violated by a different Ten Commandments display with a background of endorsement.

Government officials attempting to parse these sharply divided public display decisions might be forgiven for occasionally thinking, as do some of the justices, that they confront a “jurisprudence of minutiae” that leaves them to rely on “little more than intuition and a tape measure” to ensure the constitutionality of public holiday displays.

Id. at 14-15 (citations omitted). By contrast, eight of the justices signed onto the majority opinion in *Summum*, there was no dissent, and each of the concurrences provided added insight without contradicting anything in the majority opinion.

We start by noting that even though there was no Establishment Clause or Equal Protection Clause claim in *Summum*, its principles clearly apply in such cases. In addition to the majority’s blunt statement that “government speech must comport with the Establishment Clause,” 555 U.S. at 468, Justice Scalia noted that

Summum was “litigated in the shadow of the First Amendment’s *Establishment Clause* . . . [but] the city ought not fear that today’s victory propelled it from the Free Speech Clause frying pan into the Establishment Clause fire,” *id.* at 482 (Scalia, J., concurring) (emphasis original). Justice Scalia then explicated why Pleasant Grove’s speech did not violate the Establishment Clause. Justice Souter was even more explicit in connecting the government speech doctrine (in cases involving displays with religious content) to the Establishment Clause):

Addressing the newness of the government speech doctrine, he noted that it is “unclear how the relatively new category of government speech will relate to the more traditional categories of Establishment Clause analysis.” *Id.* at 487 (Souter, J., concurring).

And Justice Stevens noted that government speech cases involving displays with religious content implicate *both* the Establishment Clause *and* the Equal Protection Clause. *Id.* at 482 (Stevens, J., concurring). Furthermore, Justice Alito’s majority opinion noted that governments that accept some monuments cannot be forced to provide “equal treatment for [all] donated monument[s].” *Id.* at 480.

Simply put, under the facts presented in *Summum* and in this case, the government speech doctrine *is* an Establishment Clause doctrine and an Equal Protection doctrine and can be applied directly, despite the lack of a Free Speech

claim or defense.

We turn now to the first step—determining whether the cross is government speech or private speech. First, as noted earlier, all parties agree that the cross is government speech. (Appellants’ Br. 31; Appellee Port Authority, et al.’s Br. 17-18; Appellee Foundation’s Br. 37-40.) Second, the parties’ beliefs are clearly correct under *Summum*. The Court’s conclusion was that a government’s act of accepting and displaying a donated monument, while rejecting someone else’s monument “is best viewed as a form of government speech.” 555 U.S. at 481. Similarly, in his concurrence, Justice Souter opined that “[a]fter today’s decision, whenever a government maintains a monument it will presumably be understood to be engaging in government speech.” *Id.* at 486 (Souter, J., concurring). And there are no factual differences here that render *Summum* inapplicable. In fact, the Court used museums to illustrate some of the principles relied upon in its analysis. *Id.* at 476 n.5.

Thus, the only remaining question is whether the cross violates the Equal Protection Clause or the Establishment Clause. *Summum* teaches that the cross does not.

Here, it is important to remember that Pleasant Grove’s Pioneer Park contained only fifteen permanent displays, one of which—the Ten Commandments monument—had religious content. *Id.* at 464-65. By contrast, in the instant case,

the Museum contains approximately 1,000 objects, only a handful of which have religious significance. (*See, e.g.*, S.A. 10.) These facts are implicated in several ways. First, if one religious display out of fifteen does not violate the Establishment Clause, how much less does (the) one (complained of or a handful of) artifact(s) out of 1,000 violate the Establishment Clause. Second, if a government displaying fifteen monuments cannot be forced to treat all monument donors equally, how much less can a government actor be forced to treat all artifact donors equally. Finally, these facts should be kept in mind as one considers the additional teachings of the *Summum* concurring opinions.

The first additional insight comes from Justice Stevens' concurrence. Justice Stevens—joined by Justice Ginsburg, the only justice not to join the majority opinion—opined that the “the reasons justifying the city’s refusal would have been equally valid if its acceptance of the monument, instead of being characterized as ‘government speech,’ had merely been deemed an implicit endorsement of the donor’s message.” *Id.* at 481 (Stevens, J., concurring). Significantly, in support of this proposition, Justice Stevens cited his dissent in *Capitol Square Review and Advisory Board v. Pinette*, 515 U.S. 753, 801-02 (1985). Presumably, Justice Stevens meant that—for unstated reasons—the Ten Commandments monument was permissible (remember his comments quoted above about the Establishment Clause and remember that he did not dissent), but

that forcing Pleasant Grove to accept *Summum*'s monument would force Pleasant Grove to problematically endorse *Summum*'s religious sentiments. Similarly here, the display of the cross is permissible because of its historical significance. But forcing the Foundation to display an atheist symbol would cause it to problematically display American Atheists' anti-religious sentiments. Or Justice Steven's point might have been that Pleasant Grove *qua* property owner could refuse to allow passive displays (as distinct from other free speech activities) that it disagreed with, regardless of the type of forum involved. If that was his point, it applies with more force here. American Atheists have not argued that the Museum is any kind of a forum to which they have a right of access nor even brought a free speech claim. Nor can they bootstrap this argument to their Equal Protection argument: They simply cannot compel the Museum to passively display their artifact. While this issue was not controlling in *Summum*, it was very much in the background of that case; and it is very much in the background of this case. And it points in the same direction as everything else—American Atheists cannot compel the government to speak its message.

Justice Breyer's concurrence also adds to the picture. He noted that had Pleasant Grove "discriminate[d] in the selection of permanent monuments on grounds unrelated to the display's theme, say solely on political grounds, its action might well [have] violate[d] the First Amendment." *Id.* at 484 (Breyer, J.,

concurring). While this point most naturally sounds in free speech jurisprudence, it is not without application to American Atheists' Establishment Clause and (especially their) Equal Protection claims.

Pleasant Grove's "theme" was, after all, open to manipulation, yet no justice accused the city of manipulation. Its "theme"—articulated after Sumnum's request to place its monument—was to limit displays to items that "either (1) directly relate to the history of Pleasant Grove, or (2) were donated by groups with longstanding ties to the Pleasant Grove community." *Id.* at 465 (internal quotation marks and citation omitted). At least the second criterion is subjective and open to manipulation.

By comparison here, the Museum's theme is uncompromisingly historic and the cross is unarguably part of that history. However, the Museum's theme is not a platform for out-of-place anti-religious proselytizing. Simultaneously, the cross's historical significance forecloses the possibility that its inclusion is a pretext for religious proselytizing: It is an Establishment Clause commonplace that not everything religious proselytizes. *See, e.g., Marsh v. Chambers*, 463 U.S. 783, 794-95 (1983) ("The content of the prayer is not of concern to judges where, as here, there is no indication that the prayer opportunity has been exploited to proselytize or advance any one, or to disparage any other, faith or belief."). Thus, American Atheists cannot claim they have been discriminated against.

Finally—and counterfactually—even were the Museum seeking to make some sort of religious statement, that would not render the display of the cross or the refusal to display an atheist symbol unconstitutional. As Justice Souter noted, the Ten Commandments monument in *Sumnum* “an expression of a government’s position on the moral and religious issues raised by the subject of the monument,” yet its display and the simultaneous refusal to display Sumnum’s monument were constitutional. Once again—given the cross’s muted message as just one of 1,000 artifacts—the display of the cross is on even firmer constitutional ground.

CONCLUSION

For the foregoing reasons and for other reasons stated in the Appellees’ Briefs, the judgment of the District Court should be affirmed.

Respectfully submitted,
this 15th day of November 2013

s/ Steven W. Fitschen

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CERTIFICATE OF COMPLIANCE

I hereby certify that, pursuant to Fed. R. App. P. 32(a)(7)(C), the attached Brief *Amicus Curiae* has been produced using 14 point Times New Roman font which is proportionately spaced. This brief contains 2,830 words as calculated by Microsoft Word 2007.

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CERTIFICATE OF SERVICE

I hereby certify that on November 15, 2013, I electronically filed the foregoing Brief *Amici Curiae* of WallBuilders, Inc., and the National Legal Foundation in the case of *American Atheists, Inc., et al. v. Port Authority of New York and New Jersey, et al.*, No. 13-1668, with the Clerk of the Court for the United States Court of Appeals for the Second Circuit by using the appellate CM/ECF system.

All participants in the case are registered CM/ECF users and will be served by the appellate CM/ECF system.

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