No. 18-17046

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

THE LIONS CLUB OF ALBANY, CALIFORNIA,

Plaintiff and Counter-Defendant/Appellee,

v.

THE CITY OF ALBANY, CALIFORNIA, and ROCHELLE NASON,

Defendants and Counterclaimants/Appellants.

On appeal from the United States District Court
for the Northern District of California
No. 3:17-cv-05326, U.S. District Judge William Alsup

BRIEF *AMICUS CURIAE* OF THE FREEDOM FROM RELIGION FOUNDATION IN SUPPORT OF APPELLANTS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

CONSTITUTIONAL PROVISIONS

OTHER AUTHORITIES

CORPORATE DISCLOSURE STATEMENT

The Freedom From Religion Foundation is a non-profit corporation. It has no parent corporation, and no publicly held corporation owns 10% or more of its stock.

STATEMENT PURSUANT TO RULE 29

Counsel for either party has not authored this brief, in whole or in part. No monetary contribution has been made to the preparation or submission of this brief other than by the amicus curiae, its members or its counsel.

STATEMENT OF INTEREST OF AMICUS CURIAE

The Freedom From Religion Foundation ("Foundation"), a national non-profit based in Madison, Wisconsin, is currently the largest national association of freethinkers, representing atheists, agnostics, and others who form their opinions about religion based on reason, rather than faith, tradition, or authority. The Foundation currently has 31,900 members, including nearly 4,000 members in California. The Foundation's purposes are twofold: to educate the public about nontheism, and to defend the constitutional principle of separation between state and church.

The Foundation's interest in this case arises from that second purpose and because the Establishment Clause of the First Amendment to the United States Constitution prohibits the government from hosting inherently religious symbols on government property.

SUMMARY OF THE ARGUMENT

All parties involved in this case agree that the 20-foot steel and plexiglass cross on government property at the center of this dispute is unconstitutional. The sole question is whether an easement to maintain that unconstitutional display is enforceable. It is not. The District Court erred in concluding otherwise. This Court should reverse that erroneous decision, rule that the easement is unenforceable, and allow the City of Albany to cure the constitutional violation by removing a pervasively Christian symbol from its property.

It is beyond dispute that easements must comply with applicable laws, including the federal and state constitutions, in order to be enforceable. It is also settled law that religious displays on government property that are used for religious purposes are unconstitutional. Therefore, an easement devised to facilitate a religious purpose is unlawful and, thus, unenforceable.

Enforcing the easement would be an end run around the Constitution. It will exacerbate Establishment Clause violations and encourage elected officials who are intent on imposing their own

personal religion on the populace or pandering to a religious constituency to use easements as a way to flout the First Amendment.

ARGUMENT

The easement given to the Lions Club of Albany is invalid and unenforceable because it exists to maintain and illuminate a cross in a city-owned park. Under both the U.S. Constitution and the California state constitution, a government entity cannot permanently display massive religious iconography on government property. Thus, this easement is unlawful and may not be enforced.

I. Easements that violate the federal and state constitutions are illegal and thus unenforceable.

Basic principles of servitudes recognize the applicability of constitutional provisions to the question of enforceability. *See* RESTATEMENT (THIRD) OF PROP.: SERVITUDES §3.1. Servitudes created by a governmental entity must be reviewed under constitutional law and if determined to violate fundamental constitutional rights, are subject to invalidation. *See id.* at §3.1 cmt. d. For instance, in *First Unitarian Church of Salt Lake City v. Salt Lake City Corp.*, the Tenth Circuit held that a deed does not free the government from constitutional analysis when it is a party to an easement. 308 F.3d 1114, 1125–27 (10th Cir.

2002) (holding that a portion of Main Street sold to church and converted into pedestrian plaza is a traditional public forum because by retaining easement for public passage, city intended to "encourage pedestrian traffic" and to "preserve and enhance the [downtown] pedestrian grid"). The court "reject[ed] the contention that the City's express intention not to create a public forum control[led the] analysis" and stated that "the government cannot simply declare the First Amendment status of property regardless of its nature and its public use." *Id.*

In other words, establishing an easement for a religious display on government property must still be analyzed under the Constitution. Here, the analysis is simple: an easement was created for the sole purpose of maintaining and illuminating a Christian cross in a city-owned park, and celebrating Christian holidays. This is a government endorsement of Christianity that runs afoul of the Establishment Clause of the U.S. Constitution and articles 1, § 4 and 16, § 5 of the California Constitution.

Just as the government cannot enter into an easement that would violate the Constitution, a court cannot force a government entity to maintain an unconstitutional easement.

A. Cross displays on public property violate the Establishment Clause.

It is unconstitutional for a government body to display an inherently religious symbol on government property. Courts across the country have marched in virtual lockstep regarding cross displays. Not a single Circuit, including this one, has upheld a solitary Latin cross, let alone one motivated by a purely and openly religious purpose.

The religious significance of the Latin cross is unambiguous and indisputable. "The Latin cross . . . is the principal symbol of Christianity around the world, and display of the cross alone could not reasonably be taken to have any secular point." *Capitol Square Review and Advisory Bd. v. Pinette*, 515 U.S. 753, 792 (1995) (Souter, J., concurring).

This Court has stated, "There is no question that the Latin cross is a symbol of Christianity, and that its placement on public land . . . violates the Establishment Clause." *Separation of Church and State Comm. v. City of Eugene*, 93 F.3d 617, 620 (9th Cir. 1996). *See also, Trunk v. San Diego,* 629 F. 3d 1099, 1110 (9th Cir. 2011)("We have repeatedly recognized that '[t]he Latin cross is the preeminent symbol

of Christianity'"(citing *Buono v. Norton*, 371 F. 3d 543, 544–45 (9th Cir. 2004)).

An overwhelming majority of federal courts agree that the Latin cross universally represents the Christian religion, and only the Christian religion. *See, e.g., Harris v. City of Zion*, 927 F.2d 1401, 1412 (7th Cir. 1991) ("A Latin cross . . . endorses or promotes a particular religious faith. It expresses an unambiguous choice in favor of Christianity."), *cert. denied*, 505 U.S. 1218 (1992); *ACLU of Ill. v. City of St. Charles*, 794 F.2d 265, 271 (7th Cir. 1986) ("When prominently displayed . . . the cross dramatically conveys a message of governmental support for Christianity, whatever the intentions of those responsible for the display may be. Such a display is not only religious but sectarian."), *cert. denied*, 479 U.S. 961 (1986).

This Court has also found displays of Christian crosses on public property to be an unconstitutional endorsement of religion. *See, e.g., Trunk*, 629 F.3d 1099; *Buono v. Norton*, 371 F.3d 543, 550 (9th Cir. 2004); *Carpenter v. City and Cty. of San Diego*, 93 F.3d 627, 632 (9th Cir. 1996). Indeed, a majority of federal courts have held displays of Latin crosses on public property to be unconstitutional. *See, e.g.,*

Friedman v. Bd. of Cty. Comm'rs, 781 F.2d 777, 778 (10th Cir. 1985) (en banc); *ACLU v. Rabun Cty. Chamber of Commerce,* 698 F.2d 1098, 1111 (11th Cir. 1983); *ACLU v. Eckels*, 589 F. Supp. 222, 241 (S.D. Tex. 1984). Although most of these cases involved the display of a Latin cross in a public park, the display of a cross on any government property would also violate the Establishment Clause. As Justice Kennedy has stated, "I doubt not, for example, that the Clause forbids a city to permit a permanent erection of a large Latin cross on the roof of city hall . . . ." *Cty. of Allegheny v. ACLU of Pittsburgh*, 492 U.S. 573, 661 (1989) (Kennedy, J., concurring in part, dissenting in part). Such a religious display "would place the government weight behind an obvious effort to proselytize on behalf of a particular religion." *Id.*

The inherent religious significance of the Latin cross is undeniable and cannot be masked. Accordingly, the government's permanent display of a Latin cross on public land is unconstitutional.

The easement given to the Lions Club of Albany guarantees the permanent display of a Christian cross on public property. In short, the easement exists solely to maintain a violation of the First Amendment.

That the cross is illuminated during the Christmas holiday season and the Easter holiday only exacerbates the constitutional violation. Lighting a religious icon during religious holy days suggests that the City is celebrating the religious aspects of those holidays, which is impermissible under the First Amendment. As to Christmas, the Supreme Court has stated: "The government may acknowledge Christmas as a cultural phenomenon, but under the First Amendment it may not observe it as a Christian holy day by suggesting people praise God for the birth of Jesus." *Allegheny*, 492 U.S. at 601. *See also, ACLU v. St. Charles*, 794 F. 2d 265 (7th Cir. 1986), *cert. denied*, 479 U.S. 961 (1986) (prohibiting a city from displaying an illuminated Latin cross on the top of the city's fire department as part of its annual Christmas display.).

The crucial aspect of this case is that all parties[1], and the District Court, agree that at present the Albany Hill cross violates the Constitution. It is undisputed. The only real question is whether a court may enforce an illegal easement upon a government body. It cannot.

[1] Interestingly, the Lions Club International's stated purposes exclude religious activities and discussions. *See* https://www.lionsclubs.org/en/discover-our-clubs/purpose-and-ethics. Why the Lions Club of Albany insists on maintaining a Christian cross for the purposes of celebrating Christmas and Easter, and holding annual Sunrise Services there given these secular purposes is a mystery.

II. Creating a rule that allows easements to be valid and enforceable despite a known Establishment Clause violation will only serve to incentivize government actors to circumvent the First Amendment.

It is no remedy to allow a government – federal, state, or local – to use an easement to keep a longstanding religious symbol on government property. This Court cannot allow this as a potential "cure" for an Establishment Clause violation. To be sure, the only effective way to divorce the government from the religious symbol is removal. The City of Albany understands this and should be allowed to divest itself of the cross on Albany Hill.

If this Court were to uphold the easement, government actors would have an incentive to violate the Constitution. Specifically, government actors could skirt the mandates of the First Amendment if they carve out portions of valuable public property for groups that will maintain religious displays.

This is worse than the problem of remedying Establishment Clause violations through land sales or land transfers, which is already problematic: "[i]f anything, the sale of the parcel exacerbates the violation because it communicates to nonadherents that not only is the City willing to display a Judeo-Christian symbol on public property, but

it is also willing to carve up a public park to insure that the symbol does not have to be moved or share its space with displays expressing other viewpoints." *Mercier v. City of La Crosse*, 305 F.Supp. 2d 999, 103 (W.D. Wis. 2004), *rev'd sub nom. Mercier v. Fraternal Order of Eagles*, 395 F. 3d 693 (7th Cir. 2005). This approach will make an existing problem worse. As Justice Souter articulated in his concurring opinion in *Capitol Square v. Pinette*, "[b]y allowing government to encourage what it cannot do on its own, the proposed per se rule [of the plurality] would tempt a public body to contract out its establishment of religion, by encouraging the private enterprise of the religious to exhibit what the government could not display itself." 515 U.S. at 792.

Consequently, this remedy is no remedy at all. It allows the government to do precisely what it is prohibited from doing under the Establishment Clause: endorsing and furthering one religion.

The only way for the government to directly and effectively end the Establishment Clause violation is to remove the religious symbol from its property. The "complete physical separation between government and the offending object … addresses the concern at the core of such disputes – nonadherents' ability to use public space without

disaffecting influence of the endorsed religious symbol." Jordan C. Budd, *Cross Purposes: Remedying the Endorsement of Symbolic Religious Speech,* 82 DENV. U. L. REV. 183, 227 (2005).

The appellants are absolutely correct that Hubert Call will not be the last public official giving away "public assets to a private organization for the purpose of perpetuating an unconstitutional religious display on public land." Appellants Br. Pg. 39.

For over forty years, Amicus FFRF has battled countless violations of the constitutional separation between state and church, particularly cross displays. FFRF typically receives approximately 4,000 complaints each year. In the last ten years, FFRF has handled nearly 200 complaints involving crosses on public property. In several of those cross complaints, easements were identified as a reason the government could not cure the unconstitutional display (e.g., the Battle Mountain Cross in San Diego, California, and the De Soto Memorial in Florida).

FFRF has also encountered many politicians who, like Hubert Call, seek to find ways to keep religious displays on government property despite clear constitutional violations. Just last year, Mayor

Rick Gardner of Ozark, Missouri, went to great lengths to keep a large lighted cross in the city's Finley River Park. In December of 2018, after FFRF sent a letter to the City of Ozark requesting it take down the 30-foot cross, which the City also lit annually for Christmas, the mayor told the local media "Everybody wants it up … This is part of Ozark. This is Christian County, for Pete's sake." Gregory J. Holman, *Ozark embroiled in controversy over cross in Finley River Park holiday lights display*, SPRINGFIELD NEWS-LEADER, Dec. 11, 2018, https://www.news-leader.com/story/news/local/ozarks/2018/12/11/ozark-remove-cross-finley-river-park-holiday-lights-display/2279723002/

In other words, this will not be an isolated case or opinion. If the District Court's decision is affirmed, it absolutely will be exploited and religious displays on government property will proliferate. In FFRF's experience, some elected officials will go to great lengths to keep religious symbols and practices as part of their communities, even if they violate the cherished constitutional principle of separation of church and state. This Court cannot give them a tool to violate the First Amendment.

CONCLUSION

Religious symbols do not belong on government property, nor should city parks be carved up through servitudes to promote the religious views of private individuals or groups favored by a particular government entity. To allow an easement to override basic constitutional principles and protections would set a dangerous precedent and open the door to countless sham divestitures of public property in order to aid religion (inevitably, the dominant religion) in the country. Such a ruling would fail to safeguard not only the Establishment Clause, but also public land throughout the United States. Thus, this Court should reverse the decision of the District Court, rule that the easement is unenforceable, and allow the City of Albany to remove the unconstitutional display from its public park.

Respectfully submitted,

By: /s/ Andrew L. Seidel

Counsel of Record

Dated: February 4, 2019

CERTIFICATE OF SERVICE

I hereby certify that on February 4, 2019, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

Dated: February 4, 2019

/s/ *Andrew L. Seidel*

Andrew L. Seidel

UNITED STATES COURT OF APPEALS
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