

Page 1

January 1, 2008

Hon. Nancy Decker, Mayor  
P.O. Box 258  
Rainier, WA 98576

*Re: Defense of Veterans' Memorials*

Dear Mayor Decker:

By way of introduction, the Alliance Defense Fund ("ADF") is a not-for-profit public interest law and education group. Our organization exists to educate the public and government about important constitutional rights and protections. When necessary, we litigate these issues, including defending government entities from purported Establishment Clause violations.

This letter is also being sent to you on behalf of the American Legion leadership for the State of Washington. As you may know, The American Legion is the nation's largest veterans' organization with 2.7 million members nationwide.

ADF and The American Legion are working together to help defend and preserve veterans' memorials from lawsuits that have targeted these monuments for destruction. You are receiving this letter because a local American Legion Post has identified a veterans' memorial on property under your control as one that may be vulnerable to a threat from one of the groups bringing these lawsuits. Specifically, groups like the ACLU have filed cases seeking to dismantle or destroy memorials that contain some religious symbol, such as a cross or Star of David. As you might imagine, many veterans' memorials throughout the nation contain some type of religious symbol. A legion member in your state notified us of a war memorial in Rainier Veterans Memorial Park, displaying our armed service flags and a soldier in combat gear kneeling at a cross marking a grave site.

Despite strong public opinion and constitutional legal principles which support the preservation of these memorials, they have been targeted by individuals and groups who object to the public display of religious symbols. In the view of The American Legion and most citizens, these lawsuits dishonor the memory of veterans; on behalf of all veterans living in your jurisdiction, The American Legion urges you to carefully consider the legal analysis provided by ADF in this letter and to further take a stand that respects the memory of those who faithfully served this nation.

As part of the effort to preserve these memorials, ADF is pleased to offer you our assistance and support in defending this monument and to advise you of your legal rights to maintain this memorial. This letter is intended to provide information and a general overview of legal principles surrounding these issues, and should not be taken as legal advice without speaking to an ADF attorney. If you desire, we would be happy to meet with Rainier city representatives to offer a more complete analysis of the memorial(s) that prompted this letter.

### Legal Overview

The United States Supreme Court has never ruled that municipal seals or displays must be sanitized of all religious symbolism. To do so would ignore the important and unique contribution of religion to American culture and society: “If we focus exclusively on the inclusion of the religious symbol, display, or practice, then every use of religious symbolism – and prayer- would fail. The plain wording of the First Amendment does not require this; nor does the Supreme Court.” *Murray v. City of Austin, Texas*, 947 F.2d 147, 154 (5th Cir. 1991)<sup>1</sup>.

Thus the Ninth Circuit upheld the use of the phrase “In God We Trust” on coinage, currency, official documents and publications, in accordance with this principle. *Aronow v. United States*, 432 F.2d 242 (9th Cir. 1970). The court recognized that this motto “has nothing whatsoever to do with the establishment of religion. Its use is of a patriotic or ceremonial character and bears no true resemblance to a governmental sponsorship of a religious exercise.” *Id.* at 243. Similarly, the use of the cross or other religious symbol depicted on a memorial to veterans has nothing to do with an establishment of religion.

There are countless illustrations of the “Government’s acknowledgment of our religious heritage and governmental sponsorship of graphic manifestations of that heritage.”<sup>2</sup> For example, the Supreme Court pointed out that its chamber “is decorated with a notable and permanent—not seasonal—symbol of religion: Moses with Ten Commandments. Congress has long provided chapels in the Capitol for religious worship and meditation.”<sup>3</sup>

The Supreme Court recently reaffirmed that

[w]hen the state encourages religious instruction or cooperates with religious authorities by adjusting the schedule of public events to sectarian needs, it follows the best of our traditions. For it then respects the religious nature of our people and accommodates the public service to their spiritual needs. To hold that it may not would be to find in the Constitution a requirement that the government show a callous indifference to religious groups .... [W]e find no constitutional requirement which makes it necessary for government to be hostile to religion and to throw its weight against efforts to widen the effective scope of religious influence.<sup>4</sup>

In *Van Orden v. Perry*, the Supreme Court found that a display of the Ten Commandments on the grounds of the Texas state capitol did not violate the Establishment Clause of the First Amendment because the display was part of the political and legal history of the state.<sup>5</sup> However, in a sister case,

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<sup>1</sup> In *Murray*, the Fifth Circuit upheld the use of a cross displayed prominently in the City of Austin’s seal, stating definitively that “we decline to hold that any time a municipality incorporates a religious symbol within its seal, insignia, or logo – regardless of the history, purpose, or context- the Establishment Clause is violated.” *Id.* at 156. To order the City to remove the cross from its seal would have “evinced[d] not neutrality, but instead, hostility, to religion.” *Id.* at 158.

<sup>2</sup> *Lynch v. Donnelly*, 465 U.S. 668, 679 (1984) (citing *Lemon*, 403 U.S. at 612–613).

<sup>3</sup> *Id.*

<sup>4</sup> *Van Orden v. Perry*, 125 S.Ct. 2854, 2859 (2005).

<sup>5</sup> *Id.* at 2864.

*McCreary County v. A.C.L.U.*,<sup>6</sup> the Supreme Court found that a county's display of the Ten Commandments was unconstitutional because the county did not have a secular purpose in erecting the display. The county intended to celebrate the religious significance of the Ten Commandments, which when "viewed in its entirety is an unmistakably religious statement dealing with religious obligations and with morality subject to religious sanction."<sup>7</sup>

*Van Orden* and *McCreary* added some clarity to the constitutionality of government's sponsoring religious displays on public property. Courts look to the Supreme Court's three-prong *Lemon* test and the endorsement test to determine whether there has been an impermissible establishment of religion. An additional factor that courts may consider is whether the government's religious display is permanent or temporary.

In the context of religious displays in governmental buildings, the length of time the symbol has been in use or the length of time the display has been exhibited often weighs in favor of the government. In *King v. Richmond County, Georgia*, the Eleventh Circuit Court of Appeals noted that the clerk's seal, which included an outline of stone tablets, had been in use for at least 130 years.<sup>8</sup> The court noted that this fact arguably supported the county under the effect prong of the so-called "*Lemon* test".<sup>9</sup> Under the *Lemon* test, courts will inquire "whether the challenged law or conduct has a secular purpose, whether its principal or primary effect is to advance or inhibit religion, and whether it creates an excessive entanglement of government with religion." *Lynch v. Donnelly*, 465 U.S. 668, 679 (1984). In addition to the *Lemon* test, courts often look to the endorsement test, which asks whether a reasonable observer would believe that the municipal display constitutes an endorsement of religion by the government.

Relying on the *King* decision, the Third Circuit Court held in another case that the age and history of a Ten Commandments plaque, which was displayed by itself, "provide[d] a context which changes the effect of an otherwise religious plaque."<sup>10</sup> In reaching its decision, the Third Circuit Court looked to the Supreme Court decision in *County of Allegheny v. ACLU*, in which Justice O'Connor in her concurrence stated:

The "history and ubiquity" of a practice is relevant because it provides part of the context in which a reasonable observer evaluates whether a challenged governmental practice conveys a message of endorsement of religion.<sup>11</sup>

The veterans' memorial in your jurisdiction reflects the city of Rainier's diverse values and its recognition of the sacrificial service of military men and women. The honoring of war veterans and the contributions of military men and women has a clear secular purpose. Citizens are aware that the religious symbols depicted in the memorial are not an attempt by the city of Rainier to establish religion,

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<sup>6</sup> 125 S.Ct. 2722 (2005).

<sup>7</sup> *Id.* at 2739.

<sup>8</sup> 331 F.3d 1271, 1286 (11th Cir. 2003).

<sup>9</sup> *Lemon v. Kurtzman*, 43 U.S. 602 (1971).

<sup>10</sup> *Freethought Soc'y of Greater Phila.*, 334 F.3d at 264.

<sup>11</sup> *Id.* (citing *County of Allegheny v. A.C.L.U.*, 492 U.S. 573, 630 (1989)).

but instead, the memorial is the result of a citizen or organization who has desired to honor these veterans and their families.

To conclude, I have been authorized to extend to you ADF's invitation to defend the city of Rainier if the veterans' memorial is challenged in state or federal court, so long as such representation is not precluded by law. Because ADF is a not-for-profit organization, we do not charge any fee for services rendered or routine litigation costs associated with our representation. You should note, however, that you would be liable for any claims, costs, opposing attorney's fees, or expenses awarded by a court as a result of, or in connection with the litigation of this case. Such fees and expenses would remain the liability of the city of Rainier.

### **Conclusion**

We believe that the memorial falls squarely within the boundaries set by the Supreme Court for public acknowledgment of religion. Indeed, challenging this respected monument solely because it contains religious references smacks of anti-religious bias. You have our commitment to vigorously defend the memorial should its constitutionality come under attack in a court of law.

Please let me know if we can be of assistance.

Sincerely,

Joe Infranco, Sr. Counsel

Department of Washington, American Legion

Alliance Defense Fund