



August 9, 2006

Henry "Junior" Rodriguez
St. Bernard Parish President
8201 W. Judge Perez Dr.
Chalmette, LA 70043

Re: The Right of Private Citizens to Build a Hurricane Katrina Memorial

Dear President Rodriguez:

The American Center for Law and Justice (ACLJ) applauds your efforts to stand up to the Louisiana ACLU's attempt to force St. Bernard Parish to prevent private individuals from constructing a privately-funded Hurricane Katrina memorial on private property. It is ironic that the ACLU has repeatedly claimed that it supports the right of private individuals to have a cross placed on an individual gravestone in a public cemetery, yet it now seeks to prevent private citizens from building a memorial which includes a cross on private land. Given the Louisiana ACLU's request that you "honor your oath of office to uphold the Constitution," this informational letter explains why the First Amendment of the Constitution is fully on your side in this situation and neither requires nor allows government suppression of private speech.

By way of introduction, the ACLJ is a non-profit, public interest law firm. Our organization exists to educate the public and the government about the constitutional rights of citizens, particularly in the context of the expression of religious sentiments. ACLJ attorneys have argued and submitted briefs before the Supreme Court of the United States in a number of significant cases, including *McConnell v. FEC*, 540 U.S. 93 (2003); *Santa Fe Independent School District v. Doe*, 530 U.S. 290 (2000); *Hill v. Colorado*, 530 U.S. 703 (2000); *Schenck v. Pro-Choice Network of Western New York*, 519 U.S. 357 (1997); *Lamb's Chapel v. Center Moriches School District*, 508 U.S. 384 (1993); *Board of Education v. Mergens*, 496 U.S. 226 (1990); and *Board of Airport Commissioners v. Jews for Jesus*, 482 U.S. 569 (1987).

The ACLJ has a particular interest in ensuring that crosses and other commemorative symbols are not stripped from our nation's memorials by overzealous interest groups. We have been heavily involved in the ongoing battle to preserve the Mount Soledad Veterans Memorial in

San Diego, California. We have submitted amicus curiae briefs in the past few months in defense of that Memorial to the Supreme Court of the United States, the United States Court of Appeals for the Ninth Circuit, and the California Court of Appeals. As with the Mount Soledad Veterans Memorial, the Hurricane Katrina memorial at issue here poses no constitutional crisis.

I. Under the Establishment Clause, There is a Major Difference Between Government Religious Speech and Private Religious Speech.

The Louisiana ACLU's attempt to impose the requirements of the Establishment Clause upon the private individuals who are planning the memorial's construction and dedication is unsupported by the facts and the law. It is our understanding that the memorial will be located on private property near the shoreline of the Mississippi River-Gulf Outlet, the commemorative cross and stone monument are being paid for by donations from private citizens and businesses, and no public officials are participating in planning the construction or dedication of the memorial in their official capacities. In this circumstance, the First Amendment's prohibition on the establishment of an official religion is simply not implicated because there is no official government action by St. Bernard Parish.

The Establishment Clause only limits the power of government; it does not restrict the rights of individuals acting on their own behalf. As the Supreme Court has acknowledged, "there is a crucial difference between *government* speech endorsing religion, which the Establishment Clause forbids, and *private* speech endorsing religion, which the Free Speech and Free Exercise Clauses protect." *Mergens*, 496 U.S. at 215-16 (emphasis in original). In other words, there is a critical difference between official government sponsorship of a sectarian religious message and a privately funded, privately constructed memorial containing a cross built on private land. The actions of the private citizens responsible for organizing the Hurricane Katrina memorial do not in any manner implicate the Establishment Clause.

Moreover, the Establishment Clause imposes no affirmative duty upon the government to suppress private religious expression. The Supreme Court has noted that "attribut[ing] to a neutrally behaving government private religious expression has no antecedent in our jurisprudence." *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 764 (1995) (plurality opinion). The Constitution "requires the state to be a neutral in its relations with groups of religious believers and non-believers; *it does not require the state to be their adversary.*" *Everson v. Board of Educ.*, 330 U.S. 1, 18 (1947) (emphasis added).

The Supreme Court has repeatedly held that the Establishment Clause neither requires nor allows government hostility toward religion. *See, e.g., Rosenberger v. Rector and Visitors of the Univ. of Virginia*, 515 U.S. 819 (1995); *Lamb's Chapel*, 508 U.S. at 395; *Widmar v. Vincent*, 454 U.S. 263 (1981). The Constitution "affirmatively mandates accommodation, not merely tolerance, of all religions, and forbids hostility toward any." *Lynch v. Donnelly*, 465 U.S. 668, 673 (1984). As former Supreme Court Justice O'Connor recently explained:

It 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). Since the government itself may often include "references to divinity in its symbols, songs, mottoes, and oaths" without violating the Establishment Clause, a suggestion that the government must actively suppress the use of crosses as symbols of remembrance at private memorials is quite bizarre.

Given the clear difference between public and private speech under the Establishment Clause, it is troubling that the Louisiana ACLU has continued to pressure St. Bernard Parish to suppress private expression on private property. Even the ACLU has acknowledged that there are no Establishment Clause problems posed by memorials built on private property. While the Louisiana ACLU mistakenly believed that the memorial was being built on public property, its open letter to you suggested that "the cross presently planned be moved to private property, where there will be no Establishment Clause concern."

The fact that the private property at issue here is located near a "public waterway" is wholly irrelevant. The Constitution's protection of the freedom of private expression applies to all citizens, regardless of whether their private property happens to be adjacent to a public waterway. Additionally, in the unlikely event that the planned location of the memorial is determined to be publicly owned, any conceivable Establishment Clause issues would be rendered irrelevant by merely finding a privately-owned location for the memorial.

Finally, the idea that the Establishment Clause prevents public employees from participating in the planning of this memorial in their capacities as private citizens is absurd. The First Amendment protects the right of all citizens—including public employees—to join and lead civic, religious and other organizations in their private capacities. Given that public officials have a constitutional right to be a priest, rabbi, or other member of the clergy during the time they are in office, *McDaniel v. Paty*, 435 U.S. 618 (1978), it is beyond the pale for the Louisiana ACLU to suggest that St. Bernard Parish has somehow violated the Establishment Clause by failing to prevent public officials from supporting the Hurricane Katrina memorial in their private capacities.

II. A Privately Funded Memorial on Private Land Is Protected By the First Amendment from Government Censorship.

The kind of censorship of private speech that the Louisiana ACLU has advocated for would itself violate the First Amendment. The speech activities of the private citizens responsible for funding, planning, and building this memorial are fully protected by the First Amendment,

which forbids the government from prohibiting the free exercise of religion or abridging the freedom of speech.

The First Amendment also protects the right of private citizens to organize for a common purpose and to express a collective message through the placement of signs and other symbols on private property. See *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982). For example, in *City of Ladue v. Gilleo*, 512 U.S. 43 (1994), the Supreme Court of the United States unanimously held that a city ordinance which prohibited homeowners from displaying signs on their property violated the First Amendment. The Court declared that “signs are a form of expression protected by the Free Speech Clause” and added, “[d]isplaying a sign from one’s own residence often carries a message quite distinct from placing the same sign someplace else, or conveying the same text or picture by other means.” *Id.* at 48, 56. Likewise, the kind of governmental effort to prevent the owners of private property from conveying a message of remembrance and respect for the victims of Hurricane Katrina suggested by the Louisiana ACLU would run afoul of the First Amendment.

This same principle applies to private religious expression. It is a fundamental proposition of constitutional law that the government may not suppress or exclude the speech of private parties for the sole reason that the speech is religious. See, e.g., *Good News Club v. Milford Central School*, 533 U.S. 98 (2001); *Rosenberger*, 515 U.S. at 819; *Pinette*, 515 U.S. at 753; *Lamb’s Chapel*, 508 U.S. at 384; *Widmar*, 454 U.S. at 263. To deny this bedrock principle would be to eviscerate the essential guarantees of the First Amendment. As the Supreme Court has explained,

private religious speech, far from being a First Amendment orphan, is as fully protected under the Free Speech Clause as secular private expression. . . . Indeed, in Anglo-American history, at least, government suppression of speech has so commonly been directed precisely at religious speech that a free-speech clause without religion would be Hamlet without the prince.

Pinette, 515 U.S. at 760 (plurality opinion).

Moreover, a government effort to prevent private landowners from including crosses in privately-owned memorials would undoubtedly violate the Religious Land Use and Institutionalized Persons Act (RLUIPA), 42 U.S.C. § 2000cc. The statute prohibits the government from using land use regulations in a manner that imposes a substantial burden upon the landowner’s religious exercise unless it can prove that doing so was the least restrictive means of furthering a compelling state interest. 42 U.S.C. § 2000cc(a)(1). Singling out crosses for exclusion from private land because of a perceived religious message would certainly fit this definition.

In sum, given the clarity of First Amendment law with regard to the free speech rights of private citizens, only a fundamental misunderstanding of the facts (i.e. the private ownership

of the location of the memorial) can explain the Louisiana ACLU's insistence on having the Hurricane Katrina memorial moved or changed. The Establishment Clause neither requires nor allows government suppression of private religious expression. We admire your commitment to honoring the freedom of speech of the memorial's organizers and your willingness to stand up to the Louisiana ACLU on this issue.

Sincerely,

Jay Sekulow
Chief Counsel
**AMERICAN CENTER FOR
LAW AND JUSTICE**