



July 26, 2013

The Honorable John Kasich
Governor of Ohio
Riffe Center, 30th Floor
77 South High Street
Columbus, OH 43215-6117

Sent via Facsimile and Federal Express

Re: Constitutionality of proposed Holocaust Memorial

Dear Governor Kasich,

The American Center for Law and Justice (ACLJ) applauds the recent decision of the Capitol Square Review and Advisory Board to approve a design proposal for a Holocaust Memorial at Capitol Square. We are writing to address issues and inaccuracies that were included in a letter that the Board received from the Freedom From Religion Foundation (FFRF), which claimed that the State of Ohio's involvement in the Memorial's creation could violate the Establishment Clause of the First Amendment to the United States Constitution due to the design proposal's inclusion of a Star of David. As explained herein, FFRF's claim is meritless and should not deter the State from proceeding to implement the approved design proposal.

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 submits this letter on behalf of over 25,000 Americans who have expressed their support for the decision to move forward with the proposed Memorial design.

¹ See, e.g., *Pleasant Grove v. Summum*, 555 U.S. 460 (2009) (holding that the First Amendment does not require the government to display counter-monuments when it displays a 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 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, last year the Ohio General Assembly enacted legislation that required the Board to designate “a prominent place on the lawn or other outside grounds of Capitol Square for the erection of a permanent memorial to victims of The Holocaust (1933-1945) and to those Ohioans who participated in the liberation of the death camps during World War II.” Ohio Sen. Bill No. 312, § 701.10 (2012). The legislation stated that “[p]lanning for and designing and erecting the memorial shall be paid for with only private contributions.” *Id.*

Recently, the Board approved a design proposal for the Memorial that was submitted by renowned architect Daniel Libeskind. The design includes:

- The story of an Auschwitz survivor.
- A pathway leading to two pillars that are separated by a Star of David-shaped opening.
- The statement, “If you save one life, it is as if you have saved the world.”
- The statement, “In remembrance of the six million Jews who perished in the Holocaust and millions more including prisoners of war, ethnic and religious minorities, homosexuals, the mentally ill, the disabled and political dissidents who suffered under Nazi Germany.”
- A statement that the Memorial was “inspired by the Ohio soldiers who were part of the American liberation and survivors who made Ohio their home.”

The Board approved this design despite receiving a threatening, baseless letter from FFRF opposing the design. The letter includes a flawed legal argument that the State of Ohio’s involvement in the Memorial’s creation could violate the Establishment Clause. The letter claimed that “[s]ince the Star of David is a readily identifiable Jewish symbol, it is likely that the effect of its inclusion in the planned memorial could be seen as a government endorsement specific to the Jewish community, as opposed to all other groups affected by the Holocaust.” It also stated that the proposed design “gives the impression that only the Jewish victims of the Holocaust are being honored by the state,” and alleged that “[a] reasonable observer could conclude that the government only cares about the Jewish victims of the Holocaust, not Christian, nonreligious, or other non-Jewish victims.”

FFRF’s letter continued with a bizarre rewriting of history, critiquing what it called “the sinister role Christian union with the state played during the Holocaust,” and citing “the long, dark history of religion aligned with the power of the state that has resulted in more people being killed in the name of religion than for any other reason.” The letter then ventured into the absurd, stating that proceeding with the current Memorial design would

dishonor the truest protection our country has against a similar Holocaust on our shores: the precious constitutional principle separating religion from government. Had there been a separation between religion and state honored and enforced in Germany, ensuring the government could not favor the dominant religion and persecute and scapegoat minority religion and other “dissidents,” there would not have been a Holocaust.

Discussion

FFRF's letter is inaccurate, and should not deter the State from moving forward with the proposed Memorial design, for two reasons. First, the letter ignores the historical significance of the Star of David in light of its systematic use by the Nazis as a tool to identify, segregate, and ultimately aid in the murder of, six million Jews. Second, the letter disregards and distorts Establishment Clause cases to suggest that government actors are categorically forbidden from including a Star of David on public property in all circumstances when, in reality, such symbols may be displayed in a secular context, such as the proposed Memorial design.

I. The proposed Memorial design has an obvious secular, historical basis.

FFRF's letter takes a head-in-the-sand approach, emphasizing the perceived religious significance of the Star of David while ignoring both the surrounding context of the Memorial's other features and the Star of David's historical relevance. It is an indisputable fact that the Holocaust, the Star of David, Judaism, and the formation of the State of Israel are inextricably connected; a comprehensive discussion of one will soon include a reference to one or more of the others. Indeed, the Star of David is not merely a symbol that is *associated with* the Holocaust but, rather, the Holocaust served to rebrand the Star of David as an enduring and painful reminder of the horrible plight suffered by millions of Jews at the hands of the Nazis.

By the late 1800s, the Star of David had come to symbolize Zionism, a movement of Jewish communities and individuals throughout the world to reestablish a homeland in the Middle East. At that time, the symbol was more of a means of self-identification and political unity than an inherently religious symbol. At the outset of World War II, the Nazis required Germany's Jews to wear yellow Star of David badges that stated "Jude" (meaning Jew) for purposes of identification. using severe punishment or death for non-compliance. The Nazis imposed similar requirements in many territories that they occupied during the course of the war, which helped them to relocate. isolate, deport, and murder six million Jews.

Due to the Nazis' systematic use of the Star of David to discriminate against, mistreat, and ultimately murder six million Jews, the Holocaust forever altered the historical, emotional, and psychological connotations of the Star of David. As one author has explained,

[t]he Star of David is an outstanding example of the variable significance of symbols. The power of the message they convey stems less from the original use in history. At first the Star of David had no religious, political, or social connotations whatsoever. *It gained a very powerful connotation precisely as a result of its terrible abuse by the Nazis.*²

FFRF's claim that "[h]ad there been a separation between religion and state honored and enforced in Germany . . . there would not have been a Holocaust" is, quite frankly, absurd. The Holocaust was born out of violent anti-Semitism, fueled by notions of racial superiority and a desire for world conquest. It was a systematic assault on *the most fundamental and universal of human*

² Alec Mishory, *Israeli National Symbols: The Official Flag*, <http://www.jewishvirtuallibrary.org/jsourcel/History/isflag.html> (emphasis added).

rights, such as the rights to life and liberty, and an appalling failure to abide by the most basic standards of human decency. The notion that, if only FFRF’s extreme view of the “separation of church and state” had been implemented in Germany’s court system, the Nazis would have left Europe’s Jewish population alone, is ridiculous.³

By the time that the State of Israel was founded in 1948, countless Jewish Holocaust survivors had moved there. A statement announcing the formation of the State of Israel stated, “The Nazi Holocaust, which engulfed millions of Jews in Europe, proved anew the urgency of the reestablishment of the Jewish State, which would solve the problem of Jewish homelessness by opening the gates to all Jews and lifting the Jewish people to equality in the family of nations.” In light of the historical events that led to the creation of Israel, it is unsurprising that Israel’s national flag prominently features a Star of David.

The proposed Memorial recognizes the historical significance of the Star of David. It does not, in any way, suggest that the State of Ohio has endorsed Judaism or disrespected the memory of Holocaust victims who were not Jewish. Rather, the Star of David—displayed in the context of a Holocaust memorial—has become an enduring symbol of past invidious discrimination, just as a sign found in an American history museum stating “No Irish Need Apply” or “Whites Only” would recount examples of past discrimination. The government does not endorse any sectarian or discriminatory message by displaying this type of item for historical purposes. *See generally Salazar v. Buono*, 130 S. Ct. 1803, 1820 (2010) (plurality) (noting, concerning a veterans memorial, that “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.”).

II. The State of Ohio’s involvement in facilitating the creation of the proposed Memorial is fully consistent with the First Amendment.

The proposed Memorial would not impermissibly endorse a religious viewpoint or require anyone to do something religious. In cases like this one, courts often consider whether a hypothetical “reasonable observer” would consider the primary effect of government action to be religious endorsement. As the United States Court of Appeals for the Sixth Circuit has explained, however, there is no room in this analysis for the kind of absolutist view espoused by FFRF:

[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).

³ And, FFRF’s absurd theory, which inaccurately paints the Holocaust as a religious crusade, does not account for the millions of non-Jewish individuals who were murdered for reasons having nothing to do with religion.

Various cases illustrate that a Star of David may appear on public property where, as here, the purpose and context are secular. In *Van Orden v. Perry*, 545 U.S. 677 (2005), the Supreme Court upheld a display on the Texas State Capitol grounds that included a Ten Commandments monument among other historically relevant items. The monument contained an eagle grasping the American flag, an eye inside of a pyramid, two Stars of David, and the Greek letters Chi and Rho which represent Christ. *Id.* at 681. Also, in *ACLU Nebraska Foundation v. City of Plattsmouth*, 419 F.3d 772 (8th Cir. 2005) (en banc), the court rejected a challenge to a public display that included a similar Ten Commandments monument which featured two Stars of David. Additionally, in a case out of Toledo, the court upheld a display of a Ten Commandments monument that included two Stars of David on the grounds of a county courthouse. *ACLU of Ohio Found. v. Bd. of Comm'rs of Lucas County*, 444 F. Supp. 2d 805 (N.D. Ohio 2006).⁴

The case of *ACLU of Ohio v. Capitol Square Review & Advisory Board*, 243 F.3d 289 (6th Cir. 2001) (en banc), further illustrates that the proposed memorial design is consistent with the Establishment Clause. There, the Sixth Circuit rejected the same absolutist view of the Establishment Clause espoused by FFRF in upholding the use and display of Ohio's motto, "With God, All Things Are Possible." The court reiterated the Supreme Court's observations that "we are a religious people whose institutions presuppose a Supreme Being," *Zorach v. Clauson*, 343 U.S. 306, 313 (1952), and that "there is an unbroken history of official acknowledgment by all three branches of government of the role of religion in American life from at least 1789." *Lynch v. Donnelly*, 465 U.S. 668, 674 (1984).

The court also stated:

The motto involves no coercion. It does not purport to compel belief or acquiescence. It does not command participation in any form of religious exercise. It does not assert a preference for one religious denomination or sect over others, and it does not involve the state in the governance of any church. It imposes no tax or other impost for the support of any church or group of churches. Neither does it impose any religious test as a qualification for holding political office, voting in elections, teaching at a university, or exercising any other right or privilege. . . .

"[T]he 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.

Id. at 299-300 (citations omitted).

Additionally, the court noted that the Establishment Clause is not violated every time government action offends or irritates someone due to its perceived religious connotations:

⁴ This situation is distinguishable from *Adland v. Russ*, 307 F.3d 471 (6th Cir. 2002), a case in which there was significant evidence that the government's primary purpose for displaying items on capitol grounds was religious.

[T]he question before us is not whether a reasonable person could be irritated by any or all of this. Much of what government does is irritating to someone. . . . Our level of irritation with a given governmental action is simply not a reliable gauge of the action's constitutionality. The mere fact that something done by the government may offend us philosophically or aesthetically does not mean, ipso facto, that the Constitution is offended.

Id. at 309. Similarly, in this instance, the proposed Memorial would not compel anyone to take any religious action or indicate a preference for any religion. 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. Such offense does not come close to violating the Establishment Clause.

Furthermore, FFRF's radical approach would divorce the Star of David, and any reference to Judaism, from publicly supported Holocaust memorials, signaling an unwarranted hostility toward religion that would produce absurd results. For example, the General Assembly has provided sizeable historical grants to the Center for Holocaust and Humanity Education, which is located at the Hebrew Union College-Jewish Institute of Religion in Cincinnati. *See, e.g.*, Ohio House Bill 562 (2007). FFRF's warped view of the law would prevent such public funding. In addition, FFRF's absolutist view of the law would likely call into question the General Assembly's resolution honoring the State of Israel on the 65th anniversary of its creation. Ohio House Concur. Res. 16 (2013); Ohio Senate Concur. Res. 13 (2013).

Similarly, FFRF's view of the law would prevent federal, state, and local government actors—regardless of the context or purpose—from displaying the flags of countries that include some imagery with religious origins or connotations, such as Israel (Star of David); Algeria, Pakistan, and Turkey (Crescent and Star); or Denmark, Finland, Norway, Sweden, Iceland, Australia, and the United Kingdom (Cross). Fortunately, however, FFRF's extremist position is not supported by the law, and it should be rejected.

Conclusion

The ACLJ encourages the State of Ohio to move forward with the proposed Memorial design, despite FFRF's contrary wishes. We are available to discuss how we may be of assistance to the State in this matter at your convenience, and to aid in the defense of the proposed Memorial design in the event that a lawsuit is filed challenging it on Establishment Clause grounds.

Sincerely,



Jay Alan Sekulow
Chief Counsel

cc: The Honorable Mike DeWine, Ohio Attorney General