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February 25, 2021

By U.S. Mail & Email

Andy Richey, Town Attorney
Town of Monument
645 Beacon Lite Road
Monument, CO 80132
arichey@tomgov.org

Re: *Religious monument on town property*

Dear Mr. Richey:

We have received a complaint from our colleagues at the Military Religious Freedom Foundation regarding a new veterans monument that stands in the Town of Monument's cemetery. We understand that the monument, which was gifted to the town by a local Eagle Scout, contains religious language and imagery, including a "combat cross" and the words, "Only two defining forces have ever offered to die for you, Jesus Christ and the American soldier. One died for your soul, the other died for your freedom. We honor those who made freedom a reality." See Benn Farrell, *Monument teen gifts his Eagle Scout project, a veterans memorial, to the town*, The Tribune, Oct. 14, 2020, <https://tinyurl.com/yp4bpmfp>.

The Scout's desire to honor veterans by creating a memorial is admirable. His efforts, however, have been poorly served by adults—both in the Scouts and in the Town—who should have been aware that the monument would be unconstitutional for the government to own and display. The Town of Monument and its cemetery serve citizens of many faiths and none. Displaying a message that indicates that the Town is affiliated with a Christian belief unmistakably sends the message that the Town favors those who follow its preferred religion and that members of other faiths and nonbelievers will be treated differently. It is also profoundly disrespectful to the Town's fallen non-Christian veterans and a violation of the Establishment Clause of the First Amendment to the U.S. Constitution. Please either remove the religious language from the monument or return the monument to the Scout and allow him and those who helped him create the monument to move it to private property where it can be displayed with the religious language the Scout intended.

The cardinal rule of the Establishment Clause is that government must not take any action that communicates “endorsement of religion.” *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 305 (2000). Instead, it must maintain “governmental neutrality . . . between religion and nonreligion.” *McCreary Cty. v. ACLU of Ky.*, 545 U.S. 844, 860 (2005) (internal quotation mark omitted) (quoting *Epperson v. Arkansas*, 393 U.S. 94, 104 (1968)). When government officials endorse religion—whether religion in general or one religion in particular—their action “sends the ancillary message to . . . nonadherents ‘that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the community.’” *Santa Fe*, 530 U.S. at 309–10 (quoting *Lynch v. Donnelly*, 465 U.S. 668, 688 (1984) (O’Connor, J., concurring)).

Even though the monument was created by a private citizen and with private funds, there is no way the monument can be characterized as anything other than government speech. Items permanently displayed on government property are deemed to be there with the government’s approval and sponsorship, even when they are donated or erected by private parties. *See Pleasant Grove City, Utah v. Sumnum*, 555 U.S. 460, 468-76 (2009); *see also Cty. of Allegheny v. ACLU*, 492 U.S. 573, 598-602, 600 n.50 (1989) (long-term display of crèche in government building sends message that government endorses display even when display identified as privately sponsored); *Trunk v. City of San Diego*, 629 F.3d 1099, 1103 (9th Cir. 2011) (treating as government speech cross originally erected and mostly maintained by private party and private donations). Moreover, the doctrine that government can allow private speech on public property by setting up a “public forum” is generally inapplicable to permanent monuments. *Pleasant Grove*, 555 U.S. at 480; *see also Dawson v. City of Grand Haven*, 2016 WL 7611556, at *3-5 (Mich. App. 2016) (privately built fixture on city property was government speech as a matter of law and not a limited public forum even though different messages could be raised on fixture at request of private citizens). The permanent nature of the monument and its location on government property means that it is government speech that must comport with the Establishment Clause.

Governmental bodies and public employees must not communicate religious messages to members of the public verbally or by displaying religious signs or symbols. *See, e.g., Cooper v. U.S. Postal Serv.*, 577 F.3d 479, 493 (2d Cir. 2009) (Establishment Clause prohibited religious displays in post-office space); *Berry v. Dep’t of Soc. Servs.*, 447 F.3d 642, 657 (9th Cir. 2006) (public employer’s interest in avoiding Establishment Clause violation justified prohibiting employee who had regular in-person contact with the public from displaying religious items in plain view in his cubicle); *ACLU of Ohio Found., Inc. v. Ashbrook*, 375 F.3d 484, 490–92 (6th Cir. 2004) (display of Ten Commandments poster in courtroom violated Establishment Clause); *Knight v. Conn. Dep’t of Pub. Health*, 275 F.3d 156, 164–66 (2d Cir. 2001) (Establishment Clause concerns justified reprimand of sign-language interpreter and home-healthcare worker who promoted religious messages to clients receiving state services); *Asselin v. Santa Clara Cty.*, No. 98-15356, 1999 WL

390984, at *1 (9th Cir. May 25, 1999) (firing probation officer who incorporated religious messages into his work with minors was justified because his conduct would have violated Establishment Clause); *N.C. Civil Liberties Union v. Constangy*, 947 F.2d 1145, 1151–53 (4th Cir. 1991) (judge violated Establishment Clause by opening court sessions with prayer); *Roberts v. Madigan*, 921 F.2d 1047, 1057 (10th Cir. 1990) (public-school teacher violated Establishment Clause by displaying religious poster and keeping Bible on his desk where it would be visible to students); *Hall v. Bradshaw*, 630 F.2d 1018, 1019–22 (4th Cir. 1980) (state violated Establishment Clause by issuing maps with “Motorist’s Prayer”).

Nor does this display find any refuge in *American Legion v. American Humanist Association*, 139 S. Ct. 2067 (2019). The Supreme Court held that “retaining established, religiously expressive monuments . . . is quite different from erecting or adopting new ones.” *Id.* at 2085. Because the Town’s display is newly erected, it cannot claim any presumption of constitutionality, and we must apply the established prohibitions on governmental communication of religious messages, whether through monuments or other means. The inclusion of proselytizing religious language and imagery on the monument is unconstitutional.

Please take steps to end this violation. If the Town wishes to continue to display the monument on its property, then it must remove the religious language and imagery. Alternatively, the Town can return the monument to the Scout or another private owner and it can be moved to private property where there would be no legal issue with its religious message. We would appreciate a response to this letter within thirty days. If you have any questions, you may contact Ian Smith at (202) 466-3234 or ismith@au.org.

Sincerely,



Richard B. Katskee, Vice President & Legal Director
Alex J. Luchenitser, Associate Vice President & Associate Legal Director
Ian Smith, Staff Attorney