ACLJ
American Center
for Law & Justice
Jay Alan Sekulow, J.D., Ph.D.
Chief Counsel

September 5, 2013

Mr. Darren J. Elkind, DeLand City Attorney
[redacted]

Re: Constitutionality of DeLand's City Seal

Dear City Attorney Elkind:

The American Center for Law and Justice (ACLJ) urges the City of DeLand to keep its official seal as is, as the objections to the seal raised in a recent letter from Americans United for Separation of Church and State (AU) are without merit. 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 has been actively involved in defending the constitutionality of memorials and other public displays across the country through the representation of local governments in litigation and the filing of amicus curiae briefs.

As we understand, the City of DeLand recently received a letter from AU stating that an anonymous resident complained to AU about the City's official seal. The seal was adopted when the City was incorporated in 1882 and includes the City's name, its founding date, and an anchor, heart, and cross. AU's letter states that the anchor, heart, and cross represent faith, hope, and charity and also asserts that the City of DeLand has endorsed Christianity for the past 131 years by displaying it. As far as the City is aware, this is the first complaint it has ever received about the seal, which reflects the City's heritage and is not intended to endorse or discourage any religious practices or beliefs.

The City of DeLand's seal is similar in relevant respects to other seals, insignias, and displays that have been upheld against an Establishment Clause challenge. In *Murray v. City of Austin*, 947 F.2d 147 (5th Cir. 1991), for example, the court of appeals upheld Austin, Texas's

[1] *See, e.g., Pleasant Grove v. Summum*, 555 U.S. 460 (2009) (holding that the government is not required to accept counter-monuments when it displays a war memorial or 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's 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).

city insignia, established in 1916, which included the city's name and founding date, a lamp of knowledge, and a Latin cross with a pair of wings. *Id.* at 155-58. The insignia was modeled after Stephen F. Austin's family coat of arms. Similarly, in *Weinbaum v. City of Las Cruces*, 541 F.3d 1017 (10th Cir. 2008), the court of appeals upheld the City of Las Cruces, New Mexico's use of a city symbol that included three Latin crosses, which had gone unchallenged for roughly forty years, in light of the seal's relationship to the city's history. *Id.* at 1033-35.

In light of the longstanding history and use of the City of DeLand's seal, there is no principled reason for viewing it differently than the images upheld in *Murray* and *Weinbaum*.[2] Here, the seal harkens back to the City's founding in the 19th Century. A reasonable observer, viewing the seal in light of the City's history, would conclude that the City has not endorsed Christianity. The seal does not compel anyone to take any religious action or indicate a preference for any religion. It may irk a small percentage of people who would prefer a different design, but as with many government actions that someone may not like, that is the nature of government decision-making. Such offense does not violate the Establishment Clause.

There is no room in the Establishment Clause analysis for the kind of absolutist view espoused by AU. As one court explained, in rejecting a claim brought by AU:

> [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).

A long line of cases recognize that the Constitution does not require the eradication of all things with some arguable or tangential connection to religion from the public arena. As one Supreme Court Justice explained, "[i]t 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). Another court has observed, "the 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." *ACLU of Ohio v. Capitol Square Rev. & Advisory Bd.*, 243 F.3d 289, 299-300 (6th Cir. 2001) (en banc) (citations omitted).

If AU's position were correct, the public arena would be stripped of all items with actual or perceived religious connotations, but that extreme position is not supported by law. The

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[2] Other cases that invalidated the use of particular seals or insignias are distinguishable and/or of questionable vitality. *See, e.g., Robinson v. City of Edmond*, 68 F.3d 1226 (10th Cir. 1995); *Harris v. Zion*, 927 F.2d 1401 (7th Cir. 1991); *Friedman v. Bd. of County Comm'rs*, 781 F.2d 777 (10th Cir. 1985).

Supreme Court itself has a large "great lawgivers of history" frieze that depicts, among other historical figures, Moses holding the Ten Commandments, Hammurabi receiving his Code from the Babylonian Sun God, and Muhammad holding the Qur'an.[3] Various cases have upheld historical displays that include a Ten Commandments monument that features a Star of David. *Van Orden v. Perry*, 545 U.S. 677 (2005); *ACLU Nebr. Found. v. City of Plattsmouth*, 419 F.3d 772 (8th Cir. 2005) (en banc); *see also King v. Richmond Cnty.*, 331 F.3d 1271 (11th Cir. 2003) (upholding a court seal that depicted the Ten Commandments with a sword); *ACLU of Ohio*, 243 F.3d 289 (upholding Ohio's state motto, "With God, All Things Are Possible"); *Am. Atheists, Inc. v. Port Auth.*, 2013 U.S. Dist. LEXIS 45496 (S.D.N.Y. 2013) (upholding the inclusion of World Trade Center steel beams in the shape of a cross in a September 11 museum).

In addition, that the DeLand seal has gone without challenge for 131 years is strong evidence of its constitutionality. In *Marsh v. Chambers*, 463 U.S. 783 (1983), the Court stated:

> Standing alone, historical patterns cannot justify contemporary violations of constitutional guarantees, but there is far more here than simply historical patterns. In this context, historical evidence sheds light not only on what the draftsmen intended the Establishment Clause to mean, but also on how they thought that Clause applied to the practice authorized by the First Congress -- their actions reveal their intent. . . .
>
> It is obviously correct that no one acquires a vested or protected right in violation of the Constitution by long use, even when that span of time covers our entire national existence and indeed predates it. Yet an unbroken practice . . . is not something to be lightly cast aside.

Id. at 790.

Moreover, in a case in which the Court upheld a public display that included a Ten Commandments monument, Justice Breyer explained in his concurring opinion:

> 40 years passed in which the presence of this monument, legally speaking, went unchallenged. . . . [T]hose 40 years suggest more strongly than can any set of formulaic tests that few individuals, whatever their system of beliefs, are likely to have understood the monument as amounting, in any significantly detrimental way, to a government effort to favor a particular religious sect, primarily to promote religion over nonreligion, to "engage in" any "religious practic[e]," to "compel" any "religious practic[e]," or to "work deterrence" of any "religious belief." . . . Those 40 years suggest that the public visiting the capitol grounds has considered the religious aspect of the tablets' message as part of what is a broader moral and historical message reflective of a cultural heritage. . . .
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> [T]o reach a contrary conclusion here . . . would, I fear, lead the law to exhibit a hostility toward religion that has no place in our Establishment Clause traditions.

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[3] U.S. Supreme Court, *Courtroom Friezes: South and North Walls*, http://www.supremecourt.gov/about/north&southwalls.pdf.

> Such a holding might well encourage disputes concerning the removal of longstanding depictions of the Ten Commandments from public buildings across the Nation. And it could thereby create the very kind of religiously based divisiveness that the Establishment Clause seeks to avoid.

Van Orden, 545 U.S. at 702-04 (Breyer, J., concurring).

Furthermore, the Court has noted that Latin crosses often have a secular meaning in secular contexts (such as the City's seal here). In *Salazar v. Buono*, 130 S. Ct. 1803 (2010), the Court considered whether a law that authorized the transfer of federal land on which a veterans memorial cross stood to a private party violated the Establishment Clause. Justice Kennedy wrote a plurality opinion rejecting the claim that a cross is a religious symbol in all settings:

> [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. Here, one Latin cross in the desert evokes far more than religion. It evokes thousands of small crosses in foreign fields marking the graves of Americans who fell in battles, battles whose tragedies are compounded if the fallen are forgotten.

Id. at 1820 (Kennedy, J., plurality).

Justice Kennedy distinguished the case from one in which a Latin cross is displayed for the purpose of promoting a Christian message:

> Private citizens put the cross on Sunrise Rock to commemorate American servicemen who had died in World War I. . . . [T]he cross was not emplaced on Sunrise Rock to promote a Christian message. . . . Placement of the cross on Government-owned land was not an attempt to set the *imprimatur* of the state on a particular creed. Rather, those who erected the cross intended simply to honor our Nation's fallen soldiers. . . . The cross had stood on Sunrise Rock for nearly seven decades before the statute was enacted. By then, the cross and the cause it commemorated had become entwined in the public consciousness.

Id. at 1816-17.

Moreover, the plurality strongly suggested that maintaining the cross on public property, rather than transferring it into private hands, would be consistent with the Establishment Clause:

> The goal of avoiding governmental endorsement does not require eradication of all religious symbols in the public realm. A cross by the side of a public highway marking, for instance, the place where a state trooper perished need not be taken as a statement of governmental support for sectarian beliefs. The Constitution does not oblige government to avoid any public acknowledgment of religion's

> role in society. . . . Rather, it leaves room to accommodate divergent values within a constitutionally permissible framework.

Id. at 1818-19.

> Justice Alito wrote a concurring opinion in which he stated:
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> [T]he original reason for the placement of the cross was to commemorate American war dead and, particularly for those with searing memories of The Great War, the symbol that was selected, a plain unadorned white cross, no doubt evoked the unforgettable image of the white crosses, row on row, that marked the final resting places of so many American soldiers who fell in that conflict.

Id. at 1822 (Alito, J., concurring) (citation omitted). He also noted that Congress's action was necessary to avoid showing disrespect for the servicemen the cross honors:

> If Congress had done nothing, the Government would have been required [by an injunction] to take down the cross, which had stood on Sunrise Rock for nearly 70 years, and this removal would have been viewed by many as a sign of disrespect for the brave soldiers whom the cross was meant to honor. The demolition of this venerable, if unsophisticated, monument would also have been interpreted by some as an arresting symbol of a Government that is not neutral but hostile on matters of religion and is bent on eliminating from all public places and symbols any trace of our country's religious heritage.

Id. at 1822-23.[4]

Conclusion

The ACLJ encourages the City of DeLand to maintain its official seal as is. We are available to discuss how we may be of assistance to the City in this matter at your convenience, and to aid in the defense of the City's seal in the event that a lawsuit is filed challenging it on Establishment Clause grounds.

Sincerely,

Jay Alan Sekulow

Jay Alan Sekulow
Chief Counsel

cc: Mr. Michael Pleus, City Manager (via U.S. mail)

[4] Furthermore, although Justices Scalia and Thomas concluded that the plaintiff lacked standing to obtain the injunction he sought, *id.* at 1824 (Scalia, J., concurring), their prior jurisprudence clearly indicates their rejection of the kind of expansive view of the Establishment Clause set forth in the AU letter. *See, e.g., McCreary County v. ACLU*, 545 U.S. 844 (2005) (Scalia, J., dissenting, joined by Justice Thomas).