



December 1, 2011

Project Leader Derek Milner  
Tally Lake Ranger District  
650 Wolfpack Way  
Kalispell, MT 59901

**RE: Comments of the American Center for Law & Justice and over 70,000 concerned individuals on the Knights of Columbus Special Use Permit Reauthorization Project**

The American Center for Law and Justice (ACLJ), on behalf of over 70,000 concerned individuals respectfully provides the following Comments on the Knights of Columbus Special Use Permit Reauthorization Project. By way of introduction, the ACLJ is a nonprofit, public interest law firm and educational organization specializing in First Amendment litigation. ACLJ attorneys have argued or participated as amicus curiae in numerous cases involving the Establishment Clause. *See, e.g., Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290 (2000) (counsel of record); *Van Orden v. Perry*, 545 U.S. 677 (2005) (amicus curiae).

The ACLJ has represented nearly two dozen governmental entities in cases involving the defense of public displays of religious symbols, including the following reported cases: *City of Elkhart v. Books*, 532 U.S. 1058 (2001) (Rehnquist, C. J., with whom Scalia and Thomas, J. J., join, dissenting from denial of cert.) (Fraternal Order of Eagles Ten Commandments Monument in front of city hall); *ACLU of Ohio Found., Inc. v. Ashbrook*, 375 F. 3d 484 (6th Cir. 2004) (Ten Commandments poster in courtroom display); *ACLU Neb. Found. v. City of Plattsmouth*, 358 F. 3d 1020, rehearing granted, 2004 U.S. App. LEXIS 6636 (8th Cir. Neb., Apr. 6, 2004) (Fraternal Order of Eagles monument in city park); *Freedom From Religion Foundation, Inc. v. City of Marshfield*, 203 F. 3d 487 (7th Cir. 2000) (statue of Jesus Christ in city park); *ACLU v. Mercer County*, 240 F. Supp. 2d 623 (E. D. Ky. 2003) (Decalogue included in Foundations of American Law and Government courthouse display); *Schmidt v. Cline*, 127 F. Supp. 2d 1169 (D. Kan. 2000) (In God We Trust poster in county treasurer's office). The ACLJ has developed a special expertise in this area which would be of benefit to resolving the issues concerning the Knights of Columbus statue of Jesus in the Flathead National Forest.

***Factual Background:***

In 1953, the Knights of Columbus obtained a special use permit from the National Forest Service to erect a statue of Jesus Christ in the Flathead National Forest, near the Big Mountain Ski Resort outside Whitefish, Montana.<sup>1</sup> Shortly thereafter, members of the Knights of Columbus in the Whitefish community erected a statue, a six-foot tall Jesus Christ with outstretched arms, placed on a six foot-high pedestal to keep it above the winter snows.<sup>2</sup> The statue was built, and remains today, on a twenty five by twenty five foot plot owned and administered by the Forest Service.<sup>3</sup>

The local Knights of Columbus chapter, many of whom were World War II veterans, built the statue to “perpetually remind themselves and others what it was that sustained them through the horrors of war” because they had been “deeply moved by the many statues such as this that they observed in the ravaged towns and villages of Europe.”<sup>4</sup> A Forest Service archaeologist noted that “the statue has integrity of location, setting, materials, workmanship, feeling, and association and is a part of the ski area and would be considered a contributing element of such a historic district” if it were considered for listing in the National Registry of Historic Places.<sup>5</sup> The Montana Historical Society agreed:

We think that it has long been a part of the historic identity of the area. It is not considered to be a religious site because . . . people do not go there to pray, but it is a local land mark that skiers recognize, and it is a historic part of the resort.<sup>6</sup>

The Forest Service has continually renewed the permit until recently, when Forest Supervisor Chip Weber decided that “the statue is an inappropriate use of NFS lands and must be removed,” apparently because of Establishment Clause concerns.<sup>7</sup> After public outcry, the Forest Service decided to withdraw its decision and open the renewal to public comment.<sup>8</sup> Notably, according to the current list of active special use permits<sup>9</sup>, the Forest Service has issued literally hundreds of special use permits for a variety of uses and occupants including but not limited to recreational residences, movie locations, livestock areas, power plants, resorts, education centers, roads, grazing livestock, logging, and mining.

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<sup>1</sup> Letter from Chip Weber, Forest Supervisor, U.S. Dep’t of Agric., to Bill Glidden, Grand Knight, Knights of Columbus, Kalispell Council (Aug. 24, 2011).

<sup>2</sup> Letter from Timothy Light, Forest Archaeologist, U.S. Dep’t of Agric., to Dr. Mark H. Baumler, Archaeologist, State Historic Preservation Office (Sept. 1, 2011).

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

<sup>4</sup> Letter from Charles Harball, City Attorney writing on behalf of the Knights of Columbus, to Chip Weber, Forest Supervisor, U.S. Dep’t of Agric. (undated).

<sup>5</sup> Letter from Timothy Light, Forest Archaeologist, U.S. Dep’t of Agric., to Dr. Mark H. Baumler, Archaeologist, State Historic Preservation Office (Sept. 1, 2011).

<sup>6</sup> Letter from Josef J. Warhank, Review & Compliance Officer, Montana Historical Society, to Timothy Light, Forest Archaeologist, U.S. Dep’t of Agric. (Sept. 19, 2011).

<sup>7</sup> Letter from Chip Weber, Forest Supervisor, U.S. Dep’t of Agric., to Bill Glidden, Grand Knight, Knights of Columbus, Kalispell Council (Aug. 24, 2011).

<sup>8</sup> Letter from Annie Laurie Gaylor, Co-President, Freedom From Religion Foundation, to Tom Tidwell, Chief, U.S. Forest Serv. (Oct. 26, 2011).

<sup>9</sup> See Flathead National Forest Special Use Permits Active As Of 09/30/2011.

## ***Legal Analysis***

### **A. Introduction**

The Establishment Clause of the First Amendment provides that “Congress shall make no law respecting an establishment of religion.” U.S. Const. amend. I. It is clear from the Supreme Court’s Establishment Clause jurisprudence that the Constitution is not to be interpreted in a manner that would purge religion or religious reference from society. In 1892, the Supreme Court stated that “this is a religious nation.” *Church of the Holy Trinity v. United States*.<sup>10</sup> The Court has discussed the historical role of religion in our society and concluded that “[t]here 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*.<sup>11</sup> In *School District of Abington Township v. Schempp*,<sup>12</sup> the Court recognized that “religion has been closely identified with our history and government.” Such recognition of the importance of religion in the Nation’s heritage is nowhere more affirmatively expressed than in *Zorach v. Clauston*:

We are a religious people whose institutions presuppose a Supreme Being. We guarantee the freedom to worship as one chooses. We make room for as wide a variety of beliefs and creeds as the spiritual needs of man deem necessary. We sponsor an attitude on the part of government that shows no partiality to any one group and that lets each flourish according to the zeal of its adherents and the appeal of its dogma. When 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. *That would be preferring those who believe in no religion over those who do believe*.<sup>13</sup>

Thus, as the United States Court of Appeals for the Ninth Circuit recognized this year,<sup>14</sup> “the touchstone of Establishment Clause jurisprudence is the requirement of governmental neutrality” toward religion,<sup>15</sup> though “‘neutrality’ . . . is not so narrow a channel that the slightest deviation from an absolutely straight course leads to condemnation” by the First Amendment.”<sup>16</sup> *See also School Dist. of Abington Twp. v. Schempp*,<sup>17</sup> (cautioning that an “untutored devotion to . . . neutrality” can lead to “a brooding and pervasive devotion to the secular and a passive, or even active, hostility to the religious”).

Accordingly, religious symbols on public property are not, *per se*, unconstitutional. Although the United States Supreme Court has held that there is “no single mechanical formula

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<sup>10</sup> 143 U.S. 457, 470 (1892).

<sup>11</sup> 465 U.S. 668, 674 (1984).

<sup>12</sup> 374 U.S. 203, 212 (1963).

<sup>13</sup> 343 U.S. 306 (1952).

<sup>14</sup> *Trunk v. City of San Diego*, 629 F.3d 1099 (9<sup>th</sup> Cir. 2011).

<sup>15</sup> *Id.* at 1105-06 (citations omitted).

<sup>16</sup> *Id.* at 1106 (citation omitted).

<sup>17</sup> 374 U.S. 203, 306 (1963) (Goldberg, J., concurring).

that can accurately draw the constitutional line in every Establishment Clause case,”<sup>18</sup> two of the Supreme Court’s most recent cases involving permanent displays provide substantial guidance on whether the statue of Jesus Christ in Flathead National Forest (hereinafter “FNF statue”) violates the Establishment Clause.

### ***B. Van Orden v. Perry***

In *Van Orden v. Perry*, the Supreme Court upheld the constitutionality of a ten commandments monument and established that whether permanent religious displays on government property violate the Establishment Clause requires a detailed analysis of the facts surrounding the display’s history, setting, and use.<sup>19</sup> *Van Orden* established further that where a permanent display with both religious and secular meanings has been in place for decades, it is unlikely to be perceived as an unconstitutional endorsement of religion.

In *Van Orden*, the Ten Commandments monument had gone unchallenged for 40 years. Justice Breyer’s concurring opinion, which controlled the *Van Orden* decision,<sup>20</sup> concluded that

those 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.” *Schempp*, 374 U.S., at 305 (Goldberg, J., concurring). 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.<sup>21</sup>

Also central to Justice Breyer’s opinion in *Van Orden* was the “mixed, but not primarily religious purpose” purpose of the display. He distinguished the display from other Ten Commandments displays in which the primary purpose was religious.

The display is not on the grounds of a public school, where, given the impressionability of the young, government must exercise particular care in separating church and state. See, e.g., *Weisman*, 505 U.S., at 592; *Stone v. Graham*, 449 U.S. 39, (1980) (*per curiam*). This case also differs from *McCreary County*, where the short (and stormy) history of the courthouse Commandments’ displays demonstrates the substantially religious objectives of those who mounted them, and the effect of this readily apparent objective upon those who view them. That history there indicates a governmental effort substantially to promote religion, not simply an effort primarily to reflect, historically, the secular impact of a religiously inspired document. And, in today’s world, in a Nation of so many

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<sup>18</sup> *Van Orden*, 545 U.S. 677, 699 (2005) (Breyer, J., concurring)

<sup>19</sup> *Id.* at 686 (Breyer, J., concurring).

<sup>20</sup> Justice Breyer’s concurring opinion is the controlling opinion in *Van Orden* because it upheld the constitutionality of the Ten Commandments display but on narrower grounds than the plurality opinion.

<sup>21</sup> *Id.* at 702–03.

different religious and comparable nonreligious fundamental beliefs, *a more contemporary state effort to focus attention upon a religious text is certainly likely to prove divisive in a way that this longstanding, pre-existing monument has not.*<sup>22</sup>

Finally, Justice Breyer concluded that to hold monument unconstitutional would promote religious divisiveness.

In reaching the conclusion that the Texas display falls on the permissible side of the constitutional line, I rely less upon a literal application of any particular test than upon consideration of the basic purposes of the First Amendment's Religion Clauses themselves. This display has stood apparently uncontested for nearly two generations. That experience helps us understand that as a practical matter of *degree* this display is unlikely to prove divisive. And this matter of degree is, I believe, critical in a borderline case such as this one.

At the same time, to reach a contrary conclusion here, based primarily on the religious nature of the tablets' text would, I fear, lead the law to exhibit a hostility toward religion that has no place in our Establishment Clause traditions. 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.*<sup>23</sup>

### **C. *Salazar v. Buono***

The Supreme Court's recent decision in *Salazar v. Buono* stated that a government's efforts to preserve a religious symbol with a specific, secular, historical meaning, especially one involving military sacrifice—in that case, a Latin cross erected as a war memorial—should not be viewed as a government endorsement of religion.<sup>24</sup> Moreover, the plurality opinion echoed Justice Breyer's holding in *Van Orden* that when calculating the constitutionality of a permanent monument with religious meaning, courts should consider how the "reasonable observer" would interpret a forced removal of a religious symbol that has been in place for decades.<sup>25</sup> Justice Alito agreed in his concurring opinion: "[T]his removal would have been viewed by many as a sign of disrespect for the brave soldiers whom the cross was meant to honor . . . [and] interpreted by some as an arresting symbol of a Government that is not neutral but hostile on matters of religion . . . ."<sup>26</sup>

In *Buono*, the display at issue was a large Latin cross permanently located on Sunrise Rock—a prominent location within the Mojave National Preserve.<sup>27</sup> It was originally erected with private funds by the VFW in 1934 as a memorial to those who died in World War I. The

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<sup>22</sup> *Id.* at 703 (emphasis added).

<sup>23</sup> *Id.* at 703–04 (emphasis added).

<sup>24</sup> 130 S. Ct. 1803, 1818 (2010), *rev'g Buono v. Kempthorne*, 527 F.3d 758 (9th Cir. 2008) and *Buono v. Kempthorne*, 502 F.3d 1069, 1086 (9th Cir. 2007).

<sup>25</sup> *Id.* at 1817.

<sup>26</sup> *Id.* at 1823 (Alito, J., concurring).

<sup>27</sup> *Id.* at 1811.

cross had been replaced several times by private parties, although a plaque that was originally next to it stating its purpose had not been replaced; the cross now stands alone with nothing to indicate its purpose. Although veterans have gathered at the cross to celebrate Easter sunrise services since 1935, there was no evidence that veterans, or any other persons, have gathered at the cross for any type of veterans memorial services.<sup>28</sup>

The central issue in *Buono* was whether a federal law that authorized the transfer to a private party of the portion of federal land on which the cross stood violated the Establishment Clause. Justice Kennedy wrote a plurality opinion, joined by Chief Justice Roberts and Justice Alito, holding that the court of appeals failed to conduct a thorough inquiry into the purpose and effect of Congress's land transfer enactment. Although the Court remanded the case back to the district court for proper analysis, the plurality indicated its views on the underlying Establishment Clause issue:

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.<sup>29</sup>

The plurality further noted that the original 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.”<sup>30</sup>

Finally, relying on Justice Breyer's concurring opinion in *Van Orden*, the *Buono* plurality reiterated the key role that time plays in the Establishment Clause analysis of a permanent display.

Time also has played its role. 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. Members of the public gathered regularly at Sunrise Rock to pay their respects. Rather than let the cross deteriorate, community members repeatedly took it upon themselves to replace it. Congress ultimately designated the cross as a national memorial, ranking it among those monuments honoring the noble sacrifices that constitute our national heritage. It is reasonable to interpret the congressional designation as *giving recognition to the historical meaning that the cross had attained*.<sup>31</sup>

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<sup>28</sup> *Id.* at 1838 (Stevens, J., dissenting).

<sup>29</sup> *Id.* at 1818.

<sup>30</sup> *Id.* at 1816–17.

<sup>31</sup> *Id.* at 1817 (emphasis added).

#### D. Ninth Circuit Cases

Since *Buono* was decided in 2010, the Court of Appeals for the Ninth Circuit<sup>32</sup> has decided just one case involving a permanent religious display, *Trunk v. City of San Diego*.<sup>33</sup> In *Trunk*, the court held that a “towering forty-three foot cross” atop Mt. Soledad violated the Establishment Clause.<sup>34</sup> The cross had been erected in 1913, replaced in the 1920s, and dedicated in 1954 “as a reminder of God’s promise to man of everlasting life and of those persons who gave their lives for our freedom.”<sup>35</sup> In the 1980s, a plaque was added designating the cross as a war memorial.<sup>36</sup> The government action in question was a Congressional act in 2006 in which Congress took ownership of the memorial.<sup>37</sup>

Heeding *Van Orden*’s instruction to evaluate the facts and history surrounding the Mt. Soledad cross, the *Trunk* court held that although Congress’s purpose in acquiring the land on which the cross stood was unquestionably secular,<sup>38</sup> the primary effect of Congress’s action was to convey an endorsement of religion.<sup>39</sup> In support of this conclusion, the court found a number of facts relevant: the city had a history of anti-Semitism;<sup>40</sup> the cross had a long history of religious use because religious services were frequently held at the base of the cross;<sup>41</sup> the cross was dedicated as a war memorial only in 1989; and the cross was the dominant figure in the area.<sup>42</sup> Finally, the court found that crosses are not generally used as war memorials.<sup>43</sup> Taking these factors into account, the court held that “the Memorial, presently configured as a whole, primarily conveys a message of government endorsement of religion that violates the Establishment Clause.”<sup>44</sup> In conclusion, however, the court noted that, “[t]his result does not mean that the Memorial could not be modified to pass constitutional muster nor does it mean that no cross can be part of this veterans’ memorial.”<sup>45</sup>

The Ninth Circuit has upheld at least one religious display on public property. In *Card v. City of Everett*, the court upheld the constitutionality of a Ten Commandments monument outside an old city hall.<sup>46</sup> In *Card*, the court considered a six foot-tall Ten Commandments monument placed near several secular memorials, including a September 11 memorial, a Medal of Honor memorial, a county war memorial, an Armed Forces monument and a “monument to the common worker.”<sup>47</sup> The monument was built and funded by the Fraternal Order of Eagles in 1959 in an effort to “provide youngsters with a common set of values and a common code of

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<sup>32</sup> Montana lies within the Ninth Circuit’s jurisdiction.

<sup>33</sup> 629 F.3d 1099 (9th Cir. 2011).

<sup>34</sup> *Id.* at 1125.

<sup>35</sup> *Id.* at 1101.

<sup>36</sup> *Id.*

<sup>37</sup> *Id.*

<sup>38</sup> *Id.*

<sup>39</sup> *Id.* at 1124.

<sup>40</sup> *Id.* at 1121–22.

<sup>41</sup> *Id.* at 1122.

<sup>42</sup> *Id.* at 1116.

<sup>43</sup> *Id.* at 1123–24.

<sup>44</sup> *Id.* at 1125.

<sup>45</sup> *Id.* at 1125.

<sup>46</sup> 520 F.3d 1009, 1010, 1021 (9th Cir. 2008).

<sup>47</sup> *Id.* at 1011.

conduct.”<sup>48</sup> The monument went unchallenged for over thirty years, the first complaints being filed in the 1990s.<sup>49</sup> The court held that under *Van Orden*, the monument was constitutional.<sup>50</sup>

Evaluating the history and circumstances surrounding the monument, the court concluded that: 1) “nothing apart from the monument’s text suggests a religious motive on the City’s part;”<sup>51</sup> 2) the Eagles had funded and erected the monument and the City accepted the monument as a “testament to the Eagles’ lengthy relationship with, and contributions to, the City;”<sup>52</sup> 3) the monument included “a prominent inscription showing that it was donated to the City by a private organization;”<sup>53</sup> 4) the monuments setting “suggest[ed] little or nothing of the sacred;”<sup>54</sup> 5) the monument was the “only facially religious monument” among several others and was surrounded by “trees and shrubs” that “impaired most views” of it; and 6) it lacked any lighting or benches which might “lend itself to meditation or any other religious activity.”<sup>55</sup>

Most importantly, however, the court stated that the monument had been in place for over thirty years before any complaints were filed against it.<sup>56</sup> In reliance on Justice Breyer’s controlling opinion in *Van Orden*, the court held this factor “determinative.” The removal of long-standing monuments would “exhibit a hostility toward religion” and “create the very kind of religiously based divisiveness that the Establishment Clause seeks to avoid.”<sup>57</sup>

#### **E. The FNF Statue**

Based on the reasoning in the foregoing cases, the FNF statue does not violate the Establishment Clause. The statue’s history and purpose, its longevity, and its setting all support the conclusion that no reasonable observer could think that renewing the Knights of Columbus’ special use permit would be an unconstitutional endorsement of religion.

A private organization, the Knights of Columbus, built and maintained the FNF statue in 1953 to remind the community of the tragedies of war. It was modeled after statues encountered by WWII soldiers in European towns and villages. The Forest Service’s archaeologist recognized the historical importance of the Montana statue and the Montana Historical Society agreed. Thus, the statue’s purpose was “not . . . 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.”<sup>58</sup>

The statue’s setting does not convey any government religious endorsement of religion because it is surrounded by a private ski resort, and thus leaves the strong impression that the statue is owned and controlled by the resort owners. Unlike the cross in *Trunk*, the FNF statue is not prominently placed so as to make it “dominate” the surrounding area. Similarly, the FNF

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<sup>48</sup> *Id.* at 1012.

<sup>49</sup> *Id.*

<sup>50</sup> *Id.* at 1019–21.

<sup>51</sup> *Id.* at 1020.

<sup>52</sup> *Id.*

<sup>53</sup> *Id.*

<sup>54</sup> *Id.* (quoting *Van Orden*, 545 U.S. at 702 (Breyer, J., concurring in the judgment)).

<sup>55</sup> *Id.* at 1021 (quoting *Van Orden*, 545 U.S. at 702 (Breyer, J., concurring)).

<sup>56</sup> *Id.*

<sup>57</sup> *Id.* (quoting *Van Orden*, 545 U.S. at 704)

<sup>58</sup> *Buono*, 130 S. Ct. at 1816-17 (plurality).

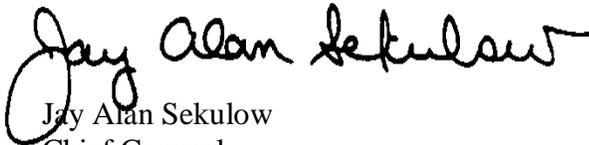
statue is on a mountaintop with a forest of trees at its back, far from any government structures. More significantly, the Flathead Forest Service grants special use permits for a plethora of private uses. Knowing about the variety of special uses to other private entities, a reasonable observer would not likely associate the FNF statue alone with the government.

Also important is the fact that, unlike the cross at issue in *Trunk*, the setting does not lend itself to religious activities, and there is no evidence that the FNF statue has ever been used for religious purposes. Rather, as the Montana Historical society says, “it is not considered to be a religious site because . . . people do not go there to pray, but it is a local landmark that skiers recognize, and it is a historic part of the resort.”

Finally, and most importantly, until this year, the FNF statue has gone unchallenged since its establishment in 1953, almost sixty years ago. Removal of the historic statue could convey “disrespect for the brave soldiers whom the [statue] was meant to honor . . . [and be] interpreted by some as an arresting symbol of a Government that is not neutral but hostile on matters of religion.”<sup>59</sup>

For the foregoing reasons, the ACLJ respectfully requests the National Forest Service to renew the special use permit for the Knights of Columbus and allow the statue to remain in the location it has occupied for almost six decades.

Respectfully Submitted,



Jay Alan Sekulow  
Chief Counsel  
American Center for Law and Justice

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<sup>59</sup>*Id.* at 1823 (Alito, J., concurring).