



**CITIZENS FOR
COMMUNITY VALUES**

Josh Brown, Esq.
Legal Counsel & Director of Policy
(614) 284-4394
joshbrown@ccv.org

March 15, 2018

TO: Mayor Lydia Mahalik
City of Findlay
318 Dorney Plz.
Findlay, OH 45840-3346

RE: Support for Mayor in the Mural Controversy

Dear Mayor Mahalik,

My name is Josh Brown and I am Legal Counsel and Director of Policy for Citizens for Community Values (CCV), a non-partisan, non-profit organization that represents people throughout Ohio. As part of our mission, we seek to educate Ohio's public representatives about the history and law related to Freedom of Speech, Free Exercise rights, and Establishment Clause limits, including the tradition of public institutions in America and Ohio invoking faith and God in displays and public pronouncements.

It has come to our attention that an attorney named Rebecca S. Markert representing an activist group from outside Ohio called Freedom From Religion Foundation (FFRF) sent a cease-and-desist letter to Flag City USA on February 1, 2018 which maintains a mural referencing a Bible verse for the City of Findlay. We have read that letter and are writing today to let you know that this letter does not accurately reflect the legal precedent. The cases and quotes referred to are given out of context and are misleading. It is clearly intended to intimidate and cause the people of the City of Findlay trepidation in exercising their authority.

THE DISHONESTY OF THE FFRF LETTER

The letter you received from the FFRF greatly exaggerates the meaning of the anti-preference doctrine and the Establishment Clause, which is strict but not as abusive as they would suggest. To demonstrate this point, consider this. The letter references *McCreary Cty. Ky. v. American Civil Liberties Union of Ky.*¹ They presented this case because it held, under circumstances peculiar to that case, that a particular Ten Commandments display was unconstitutional.

¹ *McCreary County v. ACLU*, 545 U.S. 844 (2005).

However, at the very same time, in *Van Orden v. Perry*, the Court issued another opinion about a Ten Commandments display ruling that the *Van Orden* display was constitutionally permissible.² Also, the U.S. Court of Appeals for the Sixth Circuit have clarified in *ACLU v. Mercer County*,³ that the actual display in *McCreary* did not violate the Establishment Clause. Rather it was impermissible motives behind the display that caused the Constitutional concern. The fact that the FFRF letter didn't cite to these other cases as well, which would have laid out the context for when such displays are permissible, shows the disingenuous nature of their letter.

This lack of candor was also apparent in their reference to *Cty. of Allegheny v. American Civil Liberties Union Greater Pittsburgh Chapter*.⁴ In that case the Court specifically said that not all religious displays violate the constitution. They reviewed two displays in that case. One was unconstitutional because of its unique contextual setting, while the other religious display was constitutional because of its "particular physical setting."

Next, the letter cites *Wallace v. Jaffree*,⁵ a case that limits certain religious ceremonies and prayers by public school authorities in school classrooms. The letter then cites *Epperson v. Arkansas*,⁶ which addresses what can be taught as part of a science class in a public school. Finally, the letter cited *Everson v. Bd. Of Educ. of Ewing*,⁷ a case that ruled that it is constitutional for the government to reimburse parents for transportation costs accumulated when sending their children to parochial schools. Each of these cases is irrelevant to the Findlay display. These cases focus on unique factors at play in a school setting and they simply do not provide constitutional analysis of passive municipal displays that incorporate a religious object or reference.

The letter then cites *Lemon v. Kurtzman*,⁸ which is the case that created the three-part test for government religious displays. The letter just cites the case and fails to provide any analysis, probably because they know that applying the analysis would not favor their argument. Below, we show you what the analysis looks like.

² *Van Orden v. Perry*, 545 U.S. 677 (2005).

³ *ACLU of Ky. v. Mercer County, Ky.*, 432 F.3d 624 (6th Cir.2005).

⁴ *Cty. of Allegheny v. American Civil Liberties Union Greater Pittsburgh Chapter*, 492 U.S. 573, 593-594 (1989).

⁵ *Wallace v. Jaffree*, 472 U.S. 38, 53 (1985).

⁶ *Epperson v. Arkansas*, 393 U.S. 97, 104 (1968).

⁷ *Everson v. Bd. Of Educ. of Ewing*, 330 U.S. 1, 15-16 (1947).

⁸ *Lemon v. Kurtzman*, 403 U.S. 602 (1971).

THE ESTABLISHMENT CLAUSE GENERALLY

The First Amendment to the U.S. Constitution reads, “Congress shall make no law respecting an establishment of religion.” The case-law has made the overriding principle clear: these laws *protect* people from religious discrimination—they do not *mandate* religious discrimination. The Establishment Clause is merely forbids government from coercing people into participating in or financially supporting a religious act or entity. The primary motivating factor for the founders was their resistance to the creation of an official state sponsored and supported church, not a prohibition of general government references to religion.⁹

In cases involving government references to religion, the Court will apply the so-called “Lemon Test” which arises from *Lemon v. Kurtzman*.¹⁰ This test says that a governmental display involving religion is valid as long as: 1) it has a secular purpose, 2) its primary effect does not advance or inhibit religion, and 3) it does not result in excessive entanglement between the government and religion. The Court will also question “whether a reasonable person would view the government action as an endorsement of religion.”¹¹

Over the course of the history of the United States and Ohio, case law has developed under this standard that draws the boundary lines for religious references, general acknowledgements of God,¹² public displays of the Ten Commandments,¹³ prayer in schools,¹⁴ prayer at council meetings,¹⁵ and religious holiday displays such as nativity scenes.¹⁶

It is clear from the entire line of cases that mere government references to “God” or religion are not tantamount to establishment of religion. There is a deep and long tradition of government

⁹ *ACLU v. Capital Square Review and Advisory Bd.*, 243 F.3d 289, 293-99 (6th Cir. 2001)(en banc)(“ACLU III”).

¹⁰ *Lemon v. Kurtzman*, 403 U.S. 602 (1971).

¹¹ *Lynch v. Donnelly*, 465 U.S. 668 (1984) (holding that a Christmas display, which included a crèche as well as more secular symbols of Christmas, such as a Santa Claus and reindeer, was constitutionally permissible).

¹² Although, admittedly, the law has been somewhat confusing on this topic. For a thorough review of this issue, we recommend: “Essay: The Ohio Motto Survives the Establishment Clause” by The Honorable Richard F. Suhrheinrich and T. Melindah Bush. Last accessed August 14, 2017: <http://moritzlaw.osu.edu/students/groups/oslj/files/2012/03/64.2.suhrheinrich.pdf>.

¹³ Compare: *Van Orden v. Perry*, 545 U.S. 677 (2005) (holding that Ten Commandments displays a monument at a state capitol is allowable) and *McCreary Count v. ACLU*, 545 U.S. 844 (2005) (holding that Ten Commandments displays at a court were not permissible).

¹⁴ *Engel v. Vitale*, 370 U.S. 421 (1962), *Wallace v. Jaffree*, 472 U.S. 38 (1985), *Lee v. Weisman*, 505 U.S. 577 (1992), and *Santa Fe Independent School District v. Jane Doe*, 530 U.S. 290 (2000).

¹⁵ *Town of Greece v. Galloway*, 681 F.3d 20 (2014). *Marsh v. Chambers*, 463 U.S. 783 (1983).

¹⁶ See: *Lynch v. Donnelly*, 465 U.S. 668 (1984) (finding a city government's display of a nativity scene was constitutional). Multiple cases have dealt with this issue. For a thorough review, see: “Religious Displays and the Courts” The Pew Forum on Religion & Public Life. Last accessed August 14, 2017: <http://www.pewforum.org/files/2007/06/religious-displays.pdf>.

references to religion in America.¹⁷ And it is perfectly acceptable for the government to acknowledge the religious heritage of the American and Ohioan people and accommodate religious expression in public.¹⁸

APPLYING THE ESTABLISHMENT CLAUSE TO THE FINDLAY MURAL

Ohio was a central battle ground for this issue, in a case that both gave us some guidance on what is constitutional and what is not, and showed us the degree of hostility to the American Judeo-Christian heritage that a small minority of people hold.¹⁹ The official motto of Ohio is, “With God All Things are Possible.” Our motto is a reference to the Bible verse Matthew 19:26.

This motto is embedded on the ground of the Ohio Statehouse on the west side of Capital Square. The American Civil Liberties Union (ACLU) challenged this, saying that it violated the Establishment Clause of the U.S. and Ohio Constitutions to have this motto displayed on public property. In *ACLU v. Capitol Square Advisory Review & Advisory Board*,²⁰ U.S. Sixth Circuit Court of Appeals ruled against the ACLU in this challenge.

In the *ACLU v. Capitol Square* case, the Court applied the “Lemon Test” to determine whether the motto was a “law respecting an establishment of religion” under the Establishment Clause of the U.S. Constitution. The Court ruled that none of the three factors were met. The Court said the history of the Establishment Clause gives no indication that such a motto is unconstitutional. Meanwhile, the Court acknowledged that the motto may be an “irritation” to some observers, but they are better suited going to the legislative branch to relieve their irritation.

Here, Findlay is displaying a mural that shows a dramatic picture of a bald eagle, the national bird of the United States and a very common representation of the United States. The bird has his wings widespread over a shoreline. A caption reads, “Under his wings shall you find refuge Psalms 91.”

This mural is clearly inspirationally analogizing the way God provides refuge to the way the United States aspires to provide refuge. This type of analogy in government displays is

¹⁷ *Id.* at 299-301. Also, see the addendum to this letter at the end.

¹⁸ *Id.* at 299.

¹⁹ See (showing overwhelming support for public displays of Ohio’s motto). See: “Religious Displays and the Courts” The Pew Forum on Religion & Public Life. Last accessed August 14, 2017: <http://www.pewforum.org/files/2007/06/religious-displays.pdf>.

²⁰ 243 F.3d 289 (6th Cir. 2001)(en banc).

common. When Ohio says “With God all things are possible,” it is referring to the role our forefathers’ faith played in the founding of our nation and state. They faced extraordinary challenges and their faith in God provided a foundation for their aspirations, which led them to found a nation and a state on principles of freedom and liberty.

We have inherited this legacy and benefit immensely from it. Many Americans and Ohioans are deeply inspired by it, which is what this mural speaks to. It is truly sad that there are those who are hostile to paying tribute to those who gave us our inheritance, but it is also true to say that our forbearers fought so that these people could have the right to freely express their frustration at whatever displays they dislike. That being said, public officials need not feel bullied or pressured to cave due to the fear and misinformation provided by those who would purge the public spaces of any reference to God. We urge you to get a full understanding of the freedoms and liberties protected and permitted under the First Amendment. The mural is clearly an inspiring analogy referencing principles underpinning and setting the foundation for American and Ohioan law.

If the government can display a Bible quote saying, “With God All Things Are Possible,” surely a political subdivision can say, “Under his wings shall you find refuge.” As the 6th District said, the fact that a member of a ferociously anti-religious organization felt irritated by the mural is a matter for the ballot box, not the courts.

I have also attached an addendum to this letter that goes over just a small fraction of the facts which helps establish the American and Ohioan tradition of acknowledging the role of God in our founding. I would welcome the opportunity to discuss this further with you, city staff, or the attorney representing the city.

Respectfully Submitted,

Josh Brown, Esq.
Legal Counsel & Director of Policy
Citizens for Community Values

**ADDENDUM:
HISTORY OF JUDEO-CHRISTIAN VALUES
MANIFESTATED IN U.S. AND OHIO LAW**

Our governmental system recognizes God as the source of our rights. Let's start with federal governance. Although the U.S. Constitution does not explicitly recognize God as the source of rights, this is also acknowledged in multiple other documents and traditions. First, the U.S. Declaration of Independence acknowledges this and is part of the federal code.²¹ Secondly, the concept of natural rights is embedded in the style of the Bill of Rights, as it refers to rights as preexisting the law. Third, the U.S. official motto is "In God We Trust." Federal law also recognizes that the United States is "One Nation under God" in the official Pledge of Allegiance.²²

Now let's talk about Ohio. Significantly, every state Constitution in the United States explicitly recognizes God as the source of rights including Ohio's. Arguably, the state constitutions are more significant than the federal constitution, because the states created the federal government and are the source of the federal government's authority. The Ohio Constitution specifically states, "We, the people of the State of Ohio, [are] grateful to Almighty God for our freedom." Article I, Section 1 of the Ohio Constitution describes "all men" as being endowed with rights "by nature."

Secondly, Article I, Section 7 says,

"All men have a natural and indefeasible right to worship Almighty God according to the dictates of their own conscience. No person shall be compelled to attend, erect, or support any place of worship, or maintain any place of worship, against his consent; and no preference shall be given, by law, to any religious society; nor shall any interference with the rights of conscience be permitted. No religious test shall be required, as a qualification for office, nor shall any person be incompetent to be a witness on account of his religious belief; but nothing herein shall be construed to dispense with oaths and affirmations. Religion, morality, and knowledge, however, being essential to good government, it shall be the duty of the general assembly to pass suitable laws to protect every religious denomination in the peaceable enjoyment of its own mode of public worship, and to encourage schools and the means of instruction."

²¹ Recognizing that "all men are endowed by their creator with certain unalienable rights." See United States Code, Front Matter, Organic Laws.

²² 4 U.S.C. 4.

U.S. history is full of evidence of the importance of faith in American governance. On November 13, 2002, The United States Congress voted to adopt the following findings²³:

"(1) On November 11, 1620, prior to embarking for the shores of America, the Pilgrims signed the Mayflower Compact that declared: 'Having undertaken, for the Glory of God and the advancement of the Christian Faith and honor of our King and country, a voyage to plant the first colony in the northern parts of Virginia,'

"(2) On July 4, 1776, America's Founding Fathers, after appealing to the 'Laws of Nature, and of Nature's God' to justify their separation from Great Britain, then declared: 'We hold these Truths to be self-evident, that all Men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty, and the Pursuit of Happiness'.

"(3) In 1781, Thomas Jefferson, the author of the Declaration of Independence and later the Nation's third President, in his work titled 'Notes on the State of Virginia' wrote: 'God who gave us life gave us liberty. And can the liberties of a nation be thought secure when we have removed their only firm basis, a conviction in the minds of the people that these liberties are of the Gift of God. That they are not to be violated but with His wrath? Indeed, I tremble for my country when I reflect that God is just; that his justice cannot sleep forever.'

"(4) On May 14, 1787, George Washington, as President of the Constitutional Convention, rose to admonish and exhort the delegates and declared: 'If to please the people we offer what we ourselves disapprove, how can we afterward defend our work? Let us raise a standard to which the wise and the honest can repair; the event is in the hand of God!'

"(5) On July 21, 1789, on the same day that it approved the Establishment Clause concerning religion, the First Congress of the United States also passed the Northwest Ordinance, providing for a territorial government for lands northwest of the Ohio River, which declared: 'Religion, morality, and knowledge, being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged.'

²³ Pub. L. 107-293, §1, Nov. 13, 2002, 116 Stat. 2057.

"(6) On September 25, 1789, the First Congress unanimously approved a resolution calling on President George Washington to proclaim a National Day of Thanksgiving for the people of the United States by declaring, 'a day of public thanksgiving and prayer, to be observed by acknowledging, with grateful hearts, the many signal favors of Almighty God, especially by affording them an opportunity peaceably to establish a constitution of government for their safety and happiness.'

"(7) On November 19, 1863, President Abraham Lincoln delivered his Gettysburg Address on the site of the battle and declared: 'It is rather for us to be here dedicated to the great task remaining before us-that from these honored dead we take increased devotion to that cause for which they gave the last full measure of devotion-that we here highly resolve that these dead shall not have died in vain-that this Nation, under God, shall have a new birth of freedom-and that Government of the people, by the people, for the people, shall not perish from the earth.'

"(8) On April 28, 1952, in the decision of the Supreme Court of the United States in *Zorach v. Clauson*, 343 U.S. 306 (1952), in which school children were allowed to be excused from public schools for religious observances and education, Justice William O. Douglas, in writing for the Court stated: 'The First Amendment, however, does not say that in every and all respects there shall be a separation of Church and State. Rather, it studiously defines the manner, the specific ways, in which there shall be no concern or union or dependency one on the other. That is the common sense of the matter. Otherwise the State and religion would be aliens to each other-hostile, suspicious, and even unfriendly. Churches could not be required to pay even property taxes. Municipalities would not be permitted to render police or fire protection to religious groups. Policemen who helped parishioners into their places of worship would violate the Constitution. Prayers in our legislative halls; the appeals to the Almighty in the messages of the Chief Executive; the proclamations making Thanksgiving Day a holiday; "so help me God" in our courtroom oaths-these and all other references to the Almighty that run through our laws, our public rituals, our ceremonies would be flouting the First Amendment. A fastidious atheist or agnostic could even object to the supplication with which the Court opens each session: "God save the United States and this Honorable Court." '

"(9) On June 15, 1954, Congress passed and President Eisenhower signed into law a statute that was clearly consistent with the text and intent of the Constitution of the United States, that amended the Pledge of Allegiance to read: 'I pledge allegiance to the Flag of the United States of America and to the Republic for which it stands, one Nation under God, indivisible, with liberty and justice for all.'

"(10) On July 20, 1956, Congress proclaimed that the national motto of the United States is 'In God We Trust', and that motto is inscribed above the main door of the Senate, behind the Chair of the Speaker of the House of Representatives, and on the currency of the United States.

"(11) On June 17, 1963, in the decision of the Supreme Court of the United States in *Abington School District v. Schempp*, 374 U.S. 203 (1963), in which compulsory school prayer was held unconstitutional, Justices Goldberg and Harlan, concurring in the decision, stated: 'But untutored devotion to the concept of neutrality can lead to invocation or approval of results which partake not simply of that noninterference and noninvolvement with the religious which the Constitution commands, but of a brooding and pervasive devotion to the secular and a passive, or even active, hostility to the religious. Such results are not only not compelled by the Constitution, but, it seems to me, are prohibited by it. Neither government nor this Court can or should ignore the significance of the fact that a vast portion of our people believe in and worship God and that many of our legal, political, and personal values derive historically from religious teachings. Government must inevitably take cognizance of the existence of religion and, indeed, under certain circumstances the First Amendment may require that it do so.'

"(12) On March 5, 1984, in the decision of the Supreme Court of the United States in *Lynch v. Donnelly*, 465 U.S. 668 (1984), in which a city government's display of a nativity scene was held to be constitutional, Chief Justice Burger, writing for the Court, stated: '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. . . [E]xamples of reference to our religious heritage are found in the statutorily prescribed national motto "In God We Trust" (36 U.S.C. 186) [now 36 U.S.C. 302], which Congress and the President mandated for our currency, see (31 U.S.C. 5112(d)(1) (1982 ed.)), and in the language "One Nation under God", as part of the Pledge of Allegiance to the American flag. That pledge is recited by

many thousands of public school children-and adults-every year . . . Art galleries supported by public revenues display religious paintings of the 15th and 16th centuries, predominantly inspired by one religious faith. The National Gallery in Washington, maintained with Government support, for example, has long exhibited masterpieces with religious messages, notably the Last Supper, and paintings depicting the Birth of Christ, the Crucifixion, and the Resurrection, among many others with explicit Christian themes and messages. The very chamber in which oral arguments on this case were heard is decorated with a notable and permanent-not seasonal-symbol of religion: Moses with the Ten Commandments. Congress has long provided chapels in the Capitol for religious worship and meditation.'

"(13) On June 4, 1985, in the decision of the Supreme Court of the United States in *Wallace v. Jaffree*, 472 U.S. 38 (1985), in which a mandatory moment of silence to be used for meditation or voluntary prayer was held unconstitutional, Justice O'Connor, concurring in the judgment and addressing the contention that the Court's holding would render the Pledge of Allegiance unconstitutional because Congress amended it in 1954 to add the words 'under God,' stated 'In my view, the words "under God" in the Pledge, as codified at (36 U.S.C. 172) [now 4 U.S.C. 4], serve as an acknowledgment of religion with "the legitimate secular purposes of solemnizing public occasions, [and] expressing confidence in the future."'

"(14) On November 20, 1992, the United States Court of Appeals for the 7th Circuit, in *Sherman v. Community Consolidated School District 21*, 980 F.2d 437 (7th Cir. 1992), held that a school district's policy for voluntary recitation of the Pledge of Allegiance including the words 'under God' was constitutional.

"(15) The 9th Circuit Court of Appeals erroneously held, in *Newdow v. U.S. Congress* (9th Cir. June 26, 2002), that the Pledge of Allegiance's use of the express religious reference 'under God' violates the First Amendment to the Constitution, and that, therefore, a school district's policy and practice of teacher-led voluntary recitations of the Pledge of Allegiance is unconstitutional.

"(16) The erroneous rationale of the 9th Circuit Court of Appeals in *Newdow* would lead to the absurd result that the Constitution's use of the express religious reference 'Year of our Lord' in Article VII violates the First Amendment to the Constitution, and that, therefore, a school district's policy and practice of

teacher-led voluntary recitations of the Constitution itself would be unconstitutional."