

January 7, 2020

Mayor and City Council
City of Effingham
201 E. Jefferson Ave.
Effingham, IL 62401

Sent via email and U.S. Mail

Re: Cross in Mural Located on Raney Street Overpass

Dear Mayor and City Council:

First Liberty Institute is the nation's largest law firm dedicated exclusively to defending and restoring religious liberty for all Americans. Just last year we represented The American Legion in a victory at the U.S. Supreme Court that upheld a government owned 32-foot cross on public property. *See Am. Legion v. Am. Humanist Ass'n*, 139 S. Ct. 2067, 2090 (2019). We were notified that the City of Effingham recently received a letter from an anti-religion advocacy group that requested removal of the depiction of the Cross at the Crossroads monument from the mural on the Raney Street overpass. We reviewed the letter and conducted some initial investigation of the mural. We consider the depiction of the cross on the mural well within constitutional parameters.

Facts

On September 16, 2001—just five days after the tragic events of September 11—the Cross Foundation dedicated the Cross at the Crossroads (“the Cross”), an effort by a private religious organization to serve as a beacon of hope and unity to the citizens of Effingham after a dark time.¹ Since its erection almost two decades ago, the Cross has become a landmark of the city. Members of Effingham have referred to the Cross as “a symbol of the city”² and “a strong representation of our town and culture.”³ Even the City of Effingham’s Wikipedia page includes a section referring to the Cross as a local “Monument.”⁴

A recently commissioned mural on the Raney Street overpass depicts images of importance to Effingham. It is visible to anyone walking from the parking area on or next to the Effingham High School campus to the athletic fields on the other side of Raney Street. The mural includes images of an American flag, a football field, and the Cross at the Crossroads. The Cross at the Crossroads is part of the skyline visible from these same athletic fields, and it appears the Cross would be visible from the location of the mural itself if the overpass were not present.

¹ The Cross Foundation, Information, <http://www.crossusa.org/information.html>.

² Jarret Jones, Let the Cross stay, https://www.change.org/p/effingham-city-council-let-the-cross-stay?source_location=topic_page.

³ *Id.* Comment by Misty Mapes.

⁴ Effingham, Illinois, Wikipedia, (November 29, 2019) https://en.wikipedia.org/wiki/Effingham,_Illinois.

Legal Analysis

The complaint letter you received was markedly light on law. Tellingly, it used a single quote allegedly from a U.S. Court of Appeals for the Seventh Circuit case to justify its argument against the cross in the mural. No such quote appears in that opinion.⁵

Even if it did, much has changed in Establishment Clause jurisprudence in the 30 years since it was decided. At least two federal appellate courts have upheld a cross as a lawful part of official government seals. *See Freedom from Religion Found., Inc. v. Cty. of Lehigh*, 933 F.3d 275, 285 (3d Cir. 2019); *Weinbaum v. City of Las Cruces*, 541 F.3d 1017 (10th Cir. 2008). In one of those same cases the court also upheld a cross symbol in a public school mural. *Weinbaum*, 541 F.3d 1017. The U.S. Supreme Court has upheld a multi-ton granite Ten Commandments monument on the Texas Capitol grounds that begins “I AM The LORD Thy God.”⁶ *Van Orden v. Perry*, 545 U.S. 677 (2005). It has upheld sectarian religious prayer as part of the official opening of city council meetings and other legislative sessions. *Town of Greece v. Galloway*, 572 U.S. 565 (2014). And last year it upheld a 32-foot government owned Latin cross monument standing on a large pedestal in the public median of a busy intersection just outside Washington, D.C. *Am. Legion*, 139 S. Ct. 2067.

American Legion governs established public displays with religious content. *See City of Pensacola v. Kondrat'yev*, 139 S. Ct. 2772 (2019) (vacating and remanding an Eleventh Circuit decision striking down a cross monument in public park “for further consideration in light of [*American Legion*.]”); *Cty. of Lehigh*, 933 F.3d at 285 (“*American Legion* confirms that *Lemon* does not apply to ‘religious references or imagery in public monuments, symbols, mottos, displays, and ceremonies. Instead, . . . the Court adopted a strong presumption of constitutionality for established, religiously expressive monuments, symbols, and practices.”) (quotations and internal citations omitted).

Under *American Legion*, “[w]ith sufficient time, religiously expressive monuments, symbols, and practices can become embedded features of a community’s landscape and identity.” *Am. Legion*, 139 S. Ct. at 2084. This “gives rise to a strong presumption of constitutionality” for the respective religious monuments and symbols. *Id.* at 2085. To overcome this presumption the Court suggested a “discriminatory intent” on the part of the government in choosing or maintaining the symbol or display must be shown or a “deliberate[] disrespect[]” in its design. *See id.* at 2074, 2089; *see also Cty. of Lehigh*, 933 F.3d at 281-82.

⁵ The quote is from a Ninth Circuit case. It involved particular displays, not cross displays in general. *See Separation of Church & State Comm. v. City of Eugene*, 93 F.3d 617, 620 (9th Cir. 1996).

⁶ The same day *Van Orden* was decided the Court ruled against Ten Commandments displays in two Kentucky courthouses primarily because they were displayed alone and the local governments’ statements and actions indicated they were erected for a religious purpose. *See generally McCreary Cty. v. ACLU*, 545 U.S. 844 (2005). Neither concern is present here, and regardless, the standard used in *American Legion*, not *McCreary County*, should apply here. *See Am. Legion*, 139 S. Ct. 2067; *see also Cty. of Lehigh*, 933 F.3d at 281.

Recognizing and applying *American Legion* as the new standard for religious displays, *Cty. of Lehigh*, 933 F.3d at 285, the Third Circuit upheld a Latin cross as the central part the county's official seal. A religious symbol as part of the primary symbol of a government entity is a far more challenging question than a city mural. Under *American Legion*, however, the Third Circuit made short work of it and found the seal "plainly constitutional." *Id.* at 282. As the court explained, "[r]eligious symbols within such a display 'can become embedded features of a community's landscape and identity,' valued for more than just 'their religious roots.'" *Id.* (quoting *American Legion*, 139 S. Ct. at 2084).

The Cross at the Crossroads' two decades of prominence as part of Effingham surely has established it as just such a symbol and "part of the community." *Am. Legion*, 139 S. Ct. at 2089. It is a recognized symbol in and of the city and an unmistakable community hallmark. Formally dedicated days after the attacks of September 11, the Cross depicts Effingham's tradition of patriotism and unity. There is little wonder it was included in a mural on city property. A community mural commemorating such an established landmark should carry that same "special significance," *id.* at 2089, and presumptive lawfulness. *Id.* ("Where categories of monuments, symbols, and practices with a longstanding history follow in that tradition, they are likewise constitutional.") (plurality); *see also id.* at 2102 ("What matters when it comes to assessing a monument, symbol, or practice isn't its age but its compliance with ageless principles.") (Gorsuch, J., concurring). As the Court explained, such "[f]amiliarity itself can become a reason for preservation." *Id.* at 2084. As far as discriminatory intent or intentional disrespect regarding the Cross depiction on the mural, we are unaware of either.

Inclusion of the Cross on the Raney Street mural is a far simpler question than a multi-ton Ten Commandments monument on a state Capitol grounds, sectarian religious prayer at the start of city council meetings, and an enormous government-owned cross in a public median, all of which were upheld by the Supreme Court. Under the Court's prevailing standard for religious displays the mural appears well within the requirements of the Establishment Clause.

Conclusion

The City should disregard the complaint it received and follow the Supreme Court's guidance. It is worth noting that removal of the cross depiction from the mural could well send the message that the City is, in fact, "aggressively hostile" to such symbols. *Am. Legion*, 139 S. Ct. at 2085. Such hostility flies in the face of the Establishment Clause. *Van Orden*, 545 U.S. at 704. Feel free to contact me with any questions.

Sincerely,



Roger Byron
Senior Counsel