



July 5, 2011

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USDI Office of the Solicitor
Mail Stop 5311
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Dear Mr. Eaton:

Thank you for your email of June 15, 2011, inviting input from our clients, the Evangelical Sisterhood of Mary, regarding the plaques displayed at three concessionaire locations in the Grand Canyon National Park.

Each plaque briefly quotes a verse from the Book of Psalms; they were originally placed by the Sisters in the summer of 1970. So they resided peacefully for over 30 years, until the combination of an email from an ACLU paralegal (Exhibit A) and saber-rattling by the “Public Employees for Environmental Responsibility” (Exhibit B, December 22, 2003, press release) created a conflict that exploded on the global media stage in 2003.

PEER bills itself as an organization of public employees who serve as watchdogs against agency abuse to protect the environment (<http://www.peer.org/about/how.php>). Its environmental interests somehow extend to Establishment Clause issues, which spawned a now-defunct campaign against then-President George Bush under the theory that the President had created “faith based parks” (<http://www.peer.org/campaigns/earlier/faith-based/index.php>). PEER grossly overstated its case which led to broad criticism of its truthfulness. As one of our ADF clients was on the receiving end of PEER’s ire, we brought PEER’s behavior to the attention of the Department of Interior (see Exhibit C).

Once Bush left office, PEER let the matter drop until its recent missive. Now, just as they argued eight years ago, PEER claims that the government somehow improperly establishes religion by not censoring the Sisters’ plaques. Yet whatever angst the folks at PEER are feeling, their feelings do not amount to a cognizable legal injury—they thus lack standing to challenge the plaques in court. Even were they able to do so, the plaques are entirely constitutional under extant Establishment Clause jurisprudence.

But before we talk about the law, it helps to know a little history, starting not at the wind-whispered edge of the Canyon abyss, but on a hellish dark night in Germany.

Specifically, we begin on September 11, 1944, in Darmstadt, a quiet university town virtually devoid of heavy industry—but nonetheless targeted that night by 240 British bombers. In what amounted to a “beta test” for the subsequent horrific firebombing of Dresden, twelve thousand Germans—mostly civilians—died in an eighteen-minute air raid. Twelve thousand people, dead.

But some survived, including a handful of young Christian women who had met for some years to study the Bible—women who through the preceding decade had aligned with the “Confessing Church,” a Christian movement which rejected Nazi efforts to suborn Christianity to serve evil. Simply put, the Confessing Church was one of the few moral bright spots in the early Nazi era, where orthodox Christians risked (and some lost) their lives by opposing Hitler.

These were the young women who, led by their teacher, Basilea Schlink, founded the Evangelical Sisterhood of Mary as a ministry of prayer, repentance, and reconciliation for the sins of Nazi Germany. By 1949, the order amounted to two dozen sisters and a chapel constructed from materials scavenged from burned-out Nazi barracks. Yet they persevered, laboring in a world decimated by global conflict, overflowing with refugees, and already threatened by the emerging cold war. As time passed, their message of peace and charity spread from Germany to many nations. Eventually, they even established a guest house in Jerusalem where the Sisters host Holocaust survivors, seeking to sooth the unspeakable wounds visited upon the Jews by the Germans.

The Sisterhood serves in several ways—modeling sustainable community as a religious order; opening their chapels and prayer gardens to the surrounding communities; practicing acts of charity and hospitality; and engaging in communal acts of repentance and reconciliation. And they serve by sharing their understanding of the world—which was the genesis of their international plaque project.

The project came into focus in 1960, when Mother Basilea visited Bavaria’s Obersalzberg, noted for its striking mountain scenery—but known also for Hitler’s “Eagle’s Nest” redoubt and retreat. Spiritually moved as she contemplated such physical beauty juxtaposed with its recent history of horror, she resolved to honor the Creator by placing small “praise plaques” throughout the world.

The idea took root. Today there are approximately 1000 plaques in Germany, 450 in Switzerland, 300 in Austria, 22 in Israel, and smaller numbers in, Angola, Australia, Brazil, Canada, Denmark, England, Finland France, Ghana, Greece, Holland, India, Indonesia, Italy, Japan, Jordan, Korea, Norway, Sweden, Singapore, Tanzania, and Uruguay.

The Grand Canyon plaques were placed by the Sisters in 1970 at Fred Harvey concessions located at Hermit’s Rest, the Lookout Studio, and the Desert View tower. The story is recounted by the Sisters, and two of the plaques illustrated, in the excerpt from *Realities in the Desert* (Exhibit D).

For over thirty years, the plaques were unobtrusively displayed outside the concession buildings, without known complaint. When the ACLU and PEER provoked the 2003 confrontation, they were briefly removed and returned to the Sisters (who, I note, spoke kindly of then-Superintendent Joe Alston's courtesy in discharging his distasteful task). In the wake of the Sister's prayers, ADF intervention, and international media coverage, the plaques were restored to their location a few weeks after they were removed. And there they reside today—again without known complaint until PEER decided to complain again.

To my knowledge, no country has suppressed or censored the plaques once placed. And America—branded as the “land of liberty”—should not become the first, for the reasons to which we now turn.

LEGAL ANALYSIS

PEER has no grounds for a legal complaint based upon its assumption that the plaques violate the “separation of church and state.”

Briefly, Article III of the Constitution requires that an actual case or controversy exist as a condition of suing in federal court; a plaintiff must have Article III standing to sue. *Hein v. Freedom From Religion Foundation, Inc.*, 551 U.S. 587, 597 (2007). At a minimum, that “requires the [plaintiff] to show that he personally has suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant.” *Valley Forge Christian College v. Americans United for the Separation of Church and State, Inc.*, 454 U.S. 464, 472 (1982).

While the intangible psychic damage caused by a violation of the Establishment Clause *may* be a sufficient basis for standing, that possibility does not convert the Establishment Clause into a “search and destroy” clause entitling activists to remotely scour the nation and sue at will. *See Doe v. Tangipahoa Parish School Board*, 494 F.3d 494, 496 (5th Cir. 2007) (no standing to sue school board which prayed before meetings where plaintiffs were not present at meetings).

Given that PEER never asserted that it or its members have ever even seen the plaques, there are no grounds for it to advance a claim. And sending someone now to see the plaques and be “offended” wouldn't suffice. *See ACLU-NJ v. Township of Wall*, 246 F.3d 258, 266 (3rd Cir. 2001) (no standing for plaintiff who sought out a religious display to serve the purposes of ongoing litigation).

Of course, PEER could rely upon *Buono v. Norton*, 371 F.3d 543 (9th Cir. 2004) which found standing for a federal employee who was offended by a cross surmounting a small hill in the Mojave National Preserve; the cross served as a war memorial. *Id.* at 547. But that case is factually distinct from ours, as Mr. Buono was dissuaded from fully using the Preserve as the primary access ran directly by the cross. In contrast, the Grand Canyon plaques are unobtrusively mounted at only three locations along several miles of the Canyon's South Rim, and at that are located on concessionaires' property, and even then are visible only from select locations and limited angles. To argue that the few square feet directly impacted by the plaques somehow inhibits the ability of anyone to enjoy the 1904 square mile park would just be silly.

Nor may PEER tip the balance by arguing that while the impact is obviously less, their opposition to religion is more ardent (which would be a dubious proposition anyway, given the group's eight year nap on the issue): "[S]tanding is not measured by the intensity of the litigant's interest or the fervor of his advocacy." *Valley Forge Christian Coll. v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 485, 486 (1982).

So to the extent that "offended observer" standing has vitality, PEER has utterly failed—despite having almost a decade to do so—to assert any factual basis sufficient to cross this threshold requirement, and any effort to do so now would border on the ludicrous.

Of course, PEER may try to wedge a complaint in under taxpayer standing theory, but that would fail as well. As the Supreme Court recognized in *Hein*, "the interest of a federal taxpayer . . . does not give rise to the kind of redressable 'personal injury' required for Article III standing." 551 U.S. at 599. The narrow exception to this general rule only applies in situations where Congress enacts a law explicitly authorizing the use of federal funds in ways that allegedly violates the Establishment Clause. *Id.* at 593.

Again, there is no evidence whatsoever that public funds are expended to promote or maintain the plaques. Indeed, even PEER recognizes that the plaques are owned by the Sisters, not the government (See Exhibit B, PEER March 31, 2011, news release). And while it may be inferred that some public resources were used in 2003 to remove and remount the plaques, it would be impossible to trace those incidental expenditures to the type of Congressional appropriation that *Hein* accepts for standing. Moreover, if such expenditures are material to any legal issue, it would be what ADF sees as an unconstitutional act of censorship and the necessary corrective measure to restore the plaques after their temporary absence.

Even if PEER persuaded some judge that they could bring a claim, it would fail for the reasons previously set forth¹ by ADF, and the two most relevant cases decided since then only make that more clear.

First, the Texas Ten Commandments case which was on appeal when PEER erupted in 2003 was decided favorably to our position; see *Van Orden v. Perry*, 545 U.S. 677 (2005). Like our plaques, the Ten Commandments are quintessential religious speech, *id.* at 690. And as the controlling opinion² of Justice Breyer pointed out, even unequivocally religious speech can also communicate secular messages of moral or historical significance. *Id.* at 701. That dovetails neatly with the situation here, where the plaques convey a sense of wonder and awe at the

¹ In its letter of December 11, 2003, ADF demonstrated that the plaques would be constitutional under the "endorsement test." The Court eschewed use of the test for a passive religious display in *Van Orden v. Perry*, 545 U.S. 677 (2005), although the assessment remains a helpful "guidepost" to show that our plaques do not violate the Establishment Clause. See *id.* at 700 (various Establishment Clause tests are guideposts informing judicial judgment) (Breyer, J., concurring).

² When the Court fragments its opinion, the controlling opinion is the one deciding the case on the narrowest grounds. *Marks v. United States*, 430 U.S. 188, 193 (1977). In *Van Orden*, the narrowest ground was reflected in Justice Breyer's concurrence. *Card v. City of Everett*, 520 F.3d 1009, 1018 (9th Cir. 2008).

predominant Canyon landscape, a message which may be appreciated as readily by the secularist as by the Sisters.

This is all the more evident when we recall the Canyon cartographers' penchant for religious place names, making particularly heavy use of names from Eastern religions to denote the "temples" looming throughout the abyss. And it is entirely consistent with what the National Park Service has itself documented: a long-established American cultural tradition of describing astonishing landscapes through religious language. (See Exhibit E, "*Between Heaven and Hell*" Religious Language in Early Description of Yellowstone, *Yellowstone Science* 16(3) 2008). In this context, the Scripture plaques would be entirely constitutional, even were they construed to be the government's own expression.

But the plaques are better understood as the Sisters' private expression, which leads to the second recent relevant case, *Pleasant Grove City, Utah v. Summum*, 129 S. Ct. 1125 (2009). In *Summum*, the Court held that a privately donated monument on government property may be construed as government speech when it is (1) permanent, see *id.* at 1131; (2) "selected" by the government, *id.* at 1133; (3) "accepted" by the government, *id.* at 1133, 1134; (4) owned by the government, *id.* at 1134; and (5) maintained by the government, *id.* at 1133.

At least four of these five factors are not satisfied in our case. Mr. Alston dramatically illustrated the lack of permanence when he had the plaques removed and returned to the Sisters in 2003. As related in Exhibit D, it was the private concession company's representative—not a government employee—who selected and accepted the plaques.³ And as evidenced by the NPS returning the plaques to the sisters, and admitted by PEER (Exhibit B), the plaques belong to the Sisters. It is not clear in the record whether the government in any way maintains the plaques, but the Sisters do spruce them up upon occasion and the placement of the plaques on concessionaire property suggests little if any government involvement.

Under *Summum*, then, these plaques would likely be seen as private speech and as such are fully protected by the First Amendment:

Our precedent establishes that private religious speech, far from being a First Amendment orphan, is as fully protected under the Free Speech Clause as secular private expression. . . . Indeed, in Anglo-American history, at least, government suppression of speech has so commonly been directed *precisely* at religious speech that a free-speech clause without religion would be *Hamlet* without the prince.

Capitol Square Review and Advisory Bd. v. Pinette, 515 U.S. 753, 760 (1995).

As such, the government must be mindful of the "crucial difference between *government* speech endorsing religion, which the Establishment Clause forbids, and *private* speech endorsing

³ This suggests the solution to how to deal with a newly proposed plaque today. The answer now as then would be a business decision by the concessionaire, consonant with contemporary Park regulations on maintenance of concession premises. The key would be, as always, for the government to assiduously avoid content- and viewpoint-based discrimination.

religion, which the Free Speech and Free Exercise Clauses protect.” *Bd. of Educ. of Westside Community Schools v. Mergens*, 496 U.S. 226, 250 (1990). Were the government to suppress these plaques, which interpret the landscape from a Christian perspective, while permitting myriad examples of interpretation from other secular and religious viewpoints, it would engage in rank viewpoint discrimination. That is an “egregious form of content discrimination” which is forbidden by the First Amendment. *Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U.S. 819, 829, (1995).

Furthermore, selectively censoring these plaques because of their Christian perspective would entangle the NPS with religion as it would have to comprehensively review and investigate any colorably religious expression within its parks and monuments. That is the kind of invasive monitoring and investigation that the Court rejects as impermissible. *Agostini v. Felton*, 521 U.S. 203, 221 (1997).

In sum, ADF believes that these plaques are best seen as private speech which cannot violate the Establishment Clause—and even if they were deemed to be “government speech,” they should withstand challenge under *Van Orden* given the broader cultural context in which they are seen.

We are aware that PEER has also complained about the “stupa” that is now located within the Petroglyph National Monument, but lack sufficient information to assess its constitutional validity. To the extent that it may have a similar factual context to the Sisters’ plaques, we would assert that it is also a constitutional display.

Certainly, in respect to the Sisters’ plaques, the NPS is doing exactly what PEER asked them to do: respect our Constitution, which permits proper accommodation of religious speech, not the kind of exorcism which PEER seems to want.

Please let me know if I may be of further service to you.

With kind regards,



Gary S. McCaleb

cc: Evangelical Sisterhood of Mary