

DRAFT COMMISSION ORDER RE: DESERT STORM MEMORIAL:

Now on this day the County Commission of the County of Boone does hereby receive and accept the legal opinion of B. Daniel Simon dated July 22, 2015. A copy of that opinion, with exhibits, is attached hereto, and the County Commission incorporates the same herein. Based on said legal opinion, the County Commission orders the relocation of the Desert Storm Memorial, with the ichthus exposed, from the Boone County courthouse plaza to the Columbia Cemetery Association at the earliest time that is mutually convenient.

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July 22, 2015

Boone County Commission
Attn: Daniel K. Atwill, Presiding Commissioner
Karen M. Miller, District I Commissioner
Janet M. Thompson, District II Commissioner
Boone County Government Center
801 East Walnut
Columbia, MO 65201

Re: Opinion as to propriety of a continued placement on County Courthouse Grounds of the Operation Desert Storm Memorial ("the Monument"), with the location thereon of the ichthys or ichthus symbol, which currently appears thereon

Dear Commissioners:

We have been asked to provide you with a legal opinion, and legal advice, which addresses the following question:

QUESTION/ISSUE

Should the County Commission of Boone County, Missouri continue to allow the location and placement on the grounds of the Boone County Courthouse (and for the maintenance by the County of) of a memorial (hereinafter referred to as "the Memorial") sometimes referred to as the "Operation Desert Storm Memorial," a copy of a photograph of which is attached to this letter as **Exhibit A** and is incorporated into this letter by reference, and which contains thereon the language and words which appear thereon, as shown on **Exhibit A**, and which displays, at the bottom thereof, a fish symbol, which is known as an "ichthys" or "ichthus" symbol?

OPINION AND ADVICE

Based upon our understanding of the facts, and upon our review of relevant federal and state constitutional provisions and the appellate court decisions which have construed and applied the

relevant federal and Missouri provisions (all as more fully discussed below), our opinion and advice are as follows:

1. Opinion. If this matter is presented to a court of competent jurisdiction, in a properly tried lawsuit, it is more likely than not that such court will come to the conclusion that the continued location and maintenance of the Memorial, on the grounds of the Boone County Courthouse, with the Memorial being kept in its current form, containing the ichthys symbol (hereinafter "the Symbol"), represents and constitutes, or can reasonably be construed by citizens who view the Memorial, as being a governmental endorsement of the Christian faith, as opposed to other religious faiths or as opposed to those who "have no faith at all," and that, therefore, the Memorial, in its current form, would be found by such court to violate the requirement of religious neutrality as imposed by federal courts, which have construed the so-called "Establishment Clause" of the First Amendment of the Constitution of the United States, and to be a breach of Missouri's traditional "high wall" between church and state as announced by Missouri courts which have, in very limited appellate court decisions, construed and enforced the provisions of Article I, Section 7, and Article IX, Section 8, of the Constitution of the State of Missouri.

2. Advice. The Commission should either alter the Memorial to remove the Symbol or, at its expense, move the Memorial to a non-public land location.

NATURE OF OPINION

While we strongly believe our opinion to be an accurate one, and we strongly believe our advice given to the Commission to be the appropriate advice, we recognize that others can assert arguments to the contrary. The case law (both federal and state) dealing with the issue at hand provides no true "bright line" test which can be applied to determine issues relating to the propriety of the Memorial, as placed and maintained on public land. We do not shirk from our belief that our opinion and advice are accurate and appropriate. We will stand by our opinion and advice, and will stand behind them in any judicial arguments. That said, however, we are not judges. We render opinions, but not judicial decisions. We cannot render what is known as a "more probable than not" opinion, which is an opinion that if the matter at hand is presented to a court of competent jurisdiction, in a properly tried lawsuit, the probabilities would be at least 75% that a court would come to a certain conclusion. We can render what is known as a "more likely than not" opinion, which is the opinion we express herein. A more likely than not opinion is one to the effect that, if the matter at hand is presented to a court of competent jurisdiction in a properly tried lawsuit, then there is a 51% or greater certainty that the court will come to the conclusion set forth in paragraph 1 above. It is our opinion that is more likely than not that if the issues at hand are presented to a court of competent jurisdiction, in a properly tried lawsuit, then the court (at trial or appeal) will conclude that this Memorial must be altered to remove the Symbol or that the Memorial must be removed from the courthouse grounds.

SUMMARY OF CONCLUSIONS

An outline of our conclusions, which we believe to be required by an analysis of the Facts, as hereinafter set forth in this letter, and the constitutional provisions (both of the Constitution of the United States and the Constitution of the State of Missouri) and the opinions of the appellate courts which have construed and applied such constitutional provisions (all as set forth in the Discussion portion of this letter, which appears below), is as follows:

1. The decisions of the U.S. Supreme Court, and other appellate court decisions which have construed and applied the so-called "Establishment Clause" of Article I of the Amendments of the federal constitution to public displays of religious icons or symbols, such as the Ten Commandments, have turned on the questions:

a. Does the display satisfy a requirement of governmental religious neutrality, in that it does not demonstrate any favoritism of the government of one religion over another, or religion over irreligion; and

b. Is there a clearly non-religious, non-secular purpose for the display, such as an historical purpose, perhaps an ethical purpose, or perhaps an honoring of historical traditions?

2. The Memorial, as it stands, with the language which appears thereon (as described below in this opinion), and with the ichthys Symbol appearing below such language, does not meet the requirements of such principle of neutrality or the requirement that there be a clear historic or secular purpose for the Memorial, as opposed to a religious or sectarian purpose.

3. Therefore, the Memorial, as it now stands, with the language and Symbol thereon, would, in our opinion, be found to violate the requirements of the Establishment Clause.

4. Missouri has traditionally imposed an even higher wall (that is, higher than the wall imposed by the Establishment Clause) between government and religion, or church and state and, while there are no Missouri appellate court decisions which apply the provisions of the Missouri Constitution (those provisions referred to below) to religious displays, it is our opinion that if the issues related to the Memorial were presented to a Missouri court, such traditionally higher wall would cause the Court to conclude that the Memorial, in its present form, with the present language thereon and the Symbol appearing below such language, violates the constitutional provisions of the Missouri Constitution.

A discussion of our opinion appears below.

STATEMENT OF FACTS

Operation Desert Storm, or the "Persian Gulf War," occurred in 1990-1991. Two Boone County citizens, Patrick Kelly Connor and Steven Paul Farnen, gave their lives in this conflict. In 1992, several private Donors proposed to the County Commission of Boone County that such citizens would pay for the construction of, and the placement on the grounds of the Boone County Courthouse (adjacent to memorials honoring citizens of Boone County who had given their lives in the Civil War, World War I, World War II and the Korean War), the Memorial in question in this opinion, which would honor Patrick Kelly Connor and Steven Paul Farnen. On February 13, 1992, the County Commission adopted an Order of the Commission, approving the construction of this so-called "Desert Storm Memorial," and the placement of that Memorial on the Courthouse lawn "In recognition of the two Boone Countians who gave their lives in the service of our Country and recommend(ing) the Memorial Weekend Salute to Veterans Corporation proceed with plans for the Memorial Day ceremony." Apparently, the Memorial (that Memorial shown on **Exhibit A**) was constructed and placed on the Courthouse grounds in 1992. It has been in place since 1992. It is located immediately adjacent to, and is a part of a display of memorials, honoring the citizens of Boone County who gave their lives in the Civil War, World War I, World War II and the Korean War, none of which display any religious or sectarian symbols.

At some point in time, and it is believed in 2014, the so-called "Americans United for Separation of Church and State" made a "Public-Records Request," and by the letter containing such request, alerted the Commission to the presence of the Symbol on the Memorial. Members of the Commission candidly concede that they had simply previously missed noticing the Symbol, as it appears on the Memorial. The then-Commission concluded, in 2014, that to observe what the Commission believed to be its required religious neutrality, ordered the placement on the Memorial of a plaque "Dedicated in 1992," which covered and concealed the ichthys Symbol, all as shown on the photograph which is attached to this letter as **Exhibit B**. Contentions have been made that the Memorial, with the ichthys Symbol thereon, as constructed on the Boone County Courthouse grounds, does not constitute a violation of the so-called "Establishment Clause" of Article I to the First Amendment to the Constitution of United States, and that removing the Symbol constitutes an abridgment of the Freedom of Speech Clause of such First Amendment. These arguments have been primarily asserted by a letter of June 26, 2015, from the "Alliance Defending Freedom" ("**ADF**") to the Commission and Mr. Charles J. Dykhouse, Boone County Counselor. A copy of that letter is annexed to this letter as **Exhibit C**, and it may be referred to herein as "the ADF Letter."

We disagree with the conclusions reached in the ADF Letter, and it is our opinion that the continued location of the Memorial, in its current form, on Boone County Courthouse grounds, and the maintenance of such Memorial and its surrounding landscaping, through the use of public funds of Boone County, violates the provisions of both the Establishment Clause of Article I of the First Amendment to the Constitution of the United States and the provisions of Article I, Section 7, and Article IX, Section 8, of the Constitution of the State of Missouri.

A discussion of our opinion appears below.

DISCUSSION

I. Relevant Provisions of Constitution of the United States.

Amendment I, of the Amendments to the United States Constitution (appearing in the so-called "Bill of Rights"), provides as follows:

"Amendment I

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or the press, or the right of the people peaceably to assemble, and to petition the government for a redress of grievances."

This Amendment I contains the so-called "Establishment Clause," dealing with "establishment of religion," as well as the so-called "Free Speech Clause." The requirements of this Amendment are made applicable to all states by Amendment XIV of the Constitution of the United States.

II. Relevant Missouri Constitution Provisions. Relevant Missouri Constitutional provisions are as follows:

A. Article I of the Missouri Constitution. Article I of the Missouri Constitution provides the following sections on religion:

Section 5. Religious freedom-liberty of conscience and belief-limitations. That all men have a natural and indefeasible right to worship Almighty God according to the dictates of their own conscience; that no human authority can control or interfere with the rights of conscience; that no person shall, on account of his religious persuasion or belief, be rendered ineligible to any public office or trust or profit in this state, be disqualified from testifying or serving as a juror, or be molested in his person or estate; but this section shall not be construed to excuse acts of licentiousness, nor to justify practices inconsistent with the good order, peace or safety of the state, or with the rights of others.

Section 6. Practice and support of religion not compulsory-contracts therefor enforceable. That no person can be compelled to erect, support or attend any place or system of worship, or to maintain or support any priest, minister, preacher or teacher of any sect, church, creed or denomination of religion; but if any person shall

voluntarily make a contract for any such object, he shall be held to the performance of same.

Section 7. Public aid for religion purposes-preferences and discriminations on religious grounds. That no money shall ever be taken from the public treasury, directly or indirectly, in aid of any church, sect or denomination of religion, or in aid of any priest, preacher, minister or teacher thereof, as such; and that no preference shall be given to nor any discrimination made against any church, sect or creed of religion, or any form of religious faith or worship. [Emphasis added by us]

B. Article IX. Article IX of the Missouri Constitution, which is entitled "Education," and which ostensibly applies to public education, and most of the sections of which seem to clearly deal solely with education, provides in Section 8 as follows:

Section 8. Prohibition of public aid for religious purposes and institutions. Neither the general assembly, nor any county, city, town, township, school district or any other municipal corporation, shall ever make an appropriation or pay from any public fund whatever, anything in aid of any religious creed, church or sectarian purpose, or to help to support or sustain any private or public school, academy, seminary, college, university, or other institution of learning, controlled by any religious creed, church or sectarian denomination whatever; nor shall any grant or donation of personal property or real estate ever be made by the state, or any county, city, town, or other municipal corporation, for any religious creed, church, or sectarian purpose whatever. [Emphasis added by us]

III. Discussion Related to Application of Establishment Clause of US Constitution to Issue at Hand.

We have reviewed, and carefully studied, the ADF Letter, and the conclusions reached therein with respect to the various federal court opinions dealing with the Establishment Clause. We have reviewed the court opinions cited in such ADF Letter. We won't spend too much time discussing all of the cases cited by the ADF, as we generally find their analysis to be sound, as far as it goes. However, we do not believe it goes far enough in analyzing the effects of the Establishment Clause with respect to the questions at hand, as they relate to the Memorial with the ichthys Symbol thereon.

In this respect, we note the ADF's strong reliance on the plurality opinion of the U.S. Supreme Court in *Van Orden v. Perry*, 545 U.S. 677 (2005) [hereafter "*Van Orden*"]. The plurality opinion, which is cited in the ADF Letter, was joined by four justices. Justice Breyer, who agreed with the court's judgment and provided the fifth vote, filed a separate concurring opinion, in which he explicitly rejected the reasoning behind the plurality opinion. See *Van Orden, supra* at 704. "When there is no majority opinion in a Supreme Court case, 'the holding of the court may be

viewed as that position taken by those Members who concurred in the judgment on the narrowest grounds.” *United States v. Rubashkin*, 655 F.3d 849, 865 (8th Cir. 2011); see also *Green v. Haskell Cnty. Bd. Of Comm'rs*, 568 F.3d 784, 807 (10th Cir. 2009) (Given that *Van Orden* was decided by a plurality, the separate opinion of Justice Breyer, who supplied the “decisive fifth vote” is controlling under the rule of *Marks v. United States*, 430 U.S. 188, 193.)

In his concurring opinion, Justice Breyer generally agreed with the principles set forth in earlier Supreme Court opinions dealing with the Establishment Clause, to the effect that the government cannot engage in, nor compel religious practices, and that there can be no favoritism among sects or between the religious and the non-religious, and that "government must avoid excessive interference with, or promotion of, religion." *Id.* at 698-99. Justice Breyer went on to state as follows:

"But the Establishment Clause does not compel the government to purge from the public sphere all that in any way partakes of the religious."

Id. at 699.

"Absolutism" of that kind, says Justice Breyer, is inconsistent with national traditions and would promote the type of social conflict the clause intends to avoid. *Id.*

So Justice Breyer would agree that the complete purging of religious symbols from public property is not required. So, when are such symbols allowed and when are they not allowed?

Justice Breyer argued that “The Court has found no single mechanical formula that can accurately draw the constitutional line in every case.” *Id.* He concluded that although tests outlined in prior decisions are helpful guideposts, "no exact formula can dictate a resolution to such fact-intensive cases." *Id.* at 700.

The *Van Orden* court dealt with the placement on the grounds of the Texas State Capitol of a six foot by three foot memorial, depicting the Ten Commandments (along with an eagle grasping the American flag, an eye inside of a pyramid, two small tablets with ancient script, and two Stars of David, with superimposed Greek letters chi and rho, which represent Christ). Such memorial was located on the public property surrounding the Texas state capitol. It was presented to the people of Texas by the Fraternal Order of Eagles and was placed among seventeen monuments and twenty-one historical markers located on the Texas state capitol grounds. The Court concluded that the purpose of the monuments and markers was to commemorate the "people, ideals, and events that compose Texas identity." Justice Breyer concluded that the case before the *Van Orden* court was "borderline," *Id.*, and that "[T]o determine the message that the [text of the Ten Commandments] here conveys, we must examine how the text is *used*. And that inquiry requires us to consider the context of the display." *Id.* at 701. (emphasis in original). Justice Breyer begins his inquiry by noting that the Ten Commandments can display (i) a religious message, and (ii) a secular moral message,

and (iii) an historical message (showing the relation between the Ten Commandment standards and the law). *Id.* He felt that the monument was part of a display that conveyed both a religious and secular message. *Id.* [Note: We believe this to be a highly important, essential conclusion when we look at the Memorial in question in this opinion.] As evidence of that fact, he mentioned that the monument was donated by the Fraternal Order of Eagles “to highlight the Commandments’ role in shaping civic morality as part of that organization’s efforts to combat juvenile delinquency.” *Id.* The tablets “prominently” acknowledge that the Eagles had donated the display, further separating the State from the religious connotations. *Id.* at 701-02. Furthermore, the monument was in a large park with 17 other monuments and 21 historical markers which “illustrate the ‘ideals’ of those who settled in Texas and of those who have lived there since that time.” *Id.* at 702. Justice Breyer also highlights the fact that the monument has been at its location for 40 years without being challenged. *Id.* 702. “Those 40 years suggest that the public visiting the capital grounds has considered the religious aspect of the tablets’ message as part of what is a broader moral historical message reflective of a cultural heritage.” *Id.* at 702-03. Justice Breyer concludes from these facts that “the Texas display – serving a mixed but primarily nonreligious purpose, not primarily ‘advancing’ or ‘inhibiting religion,’ and not creating an ‘excessive government entanglement with religion’ – might satisfy this Court’s more formal Establishment Clause tests.” *Id.* at 703 [and that] To reach a contrary conclusion, based on the religious nature of the Ten Commandment’s text, would “lead the law to exhibit a hostility toward religion that has no place in our Establishment Clause traditions.” *Id.* at 704. [Emphasis added.]

McCreary Cnty., Ky. v. Am. Civil Liberties Union of Ky., 545 U.S. 844, (2005), is the U.S. Supreme Court's twin decision with *Van Orden*. *McCreary Cnty., Ky. v. Am. Civil Liberties Union of Ky.* (“*McCreary*”) serves as a clear demonstration of the context in which the Court will find the display of a monument (at least of the Ten Commandments) to be a violation of the First Amendment. The *McCreary* decision, again, dealt with copies of the Ten Commandments. The decision deals with two Kentucky counties which posted large copies of the Ten Commandments inside their courthouses. *Id.* at 851. In *McCreary County*, the Commandments were explicitly intended to be posted in a “high traffic” area. *Id.* The Commandments “were hung in a ceremony presided over by the county Judge–Executive, who called them ‘good rules to live by’ and who recounted the story of an astronaut who became convinced ‘there must be a divine God’ after viewing the Earth from the moon,” and a pastor of the judge’s church attended the ceremony, calling the Commandments “a creed of ethics” and calling the decision to post them as “one of the greatest things the judge could have done to close out the millennium.” *Id.* In both counties, the displays were readily viewable to citizens conducting business inside the courthouses. *Id.* at 852. Within a month of these displays being challenged in court, “the legislative body of each County authorized a second, expanded display, by nearly identical resolutions reciting that the Ten Commandments are ‘the precedent legal code upon which the civil and criminal codes of ... Kentucky are founded,’ and stating several grounds for taking that position.” *Id.* at 852-53. The second display contained eight other smaller documents either having a religious theme or edited to highlight a religious aspect. *Id.* 853-54.

In *McCreary* court's majority opinion, the majority stated, at the outset, an understanding that the "First Amendment mandates governmental neutrality between religion and religion, and between religion and nonreligion." *Id.* at 860 (emphasis added by us, as we believe this to be an important, controlling principle). If the government shows a purpose to favor religion, then it sends a message to nonadherents that they are political outsiders, and to adherents that they are the political insiders. *Id.* The Court refused to accept the proposition that any claim of secular purpose satisfies the "purpose" inquiry: "As we said, the Court often does accept governmental statements of purpose, in keeping with the respect owed in the first instance to such official claims. But in those unusual cases where the claim was an apparent sham, or the secular purpose secondary, the unsurprising results have been findings of no adequate secular object, as against a predominantly religious one." *Id.* at 865.

The Court's majority in *McCreary*, reasoned that the display "set out a text of the Commandments as distinct from any traditionally symbolic representation," and standing alone was "not part of an arguably secular display." *Id.* at 868. It also noted that the "text is thus different from a symbolic depiction, like tablets with 10 roman numerals, which could be seen as alluding to a general notion of law, not a sectarian conception of faith." *Id.* And as to the second display itself:

The display's unstinting focus was on religious passages, showing that the Counties were posting the Commandments precisely because of their sectarian content. That demonstration of the government's objective was enhanced by serial religious references and the accompanying resolution's claim about the embodiment of ethics in Christ. Together, the display and resolution presented an indisputable, and undisputed, showing of an impermissible purpose.

The opinion in *McCreary* then goes on to address religious "neutrality." It is stated that "[g]iven the variety of interpretative problems, the principle of neutrality has provided a good sense of direction: the government may not favor one religion over another, or religion over irreligion, religious choice being the prerogative of individuals under the Free Exercise Clause." *Id.* at 875-76. "This is no time to deny the prudence of understanding the Establishment Clause to require the Government to stay neutral on religious belief, which is reserved for the conscience of the individual." *Id.* at 881. Ultimately, the Supreme Court in *McCreary* held against the counties, finding that there was a "predominantly religious purpose behind the Counties' third display." *Id.* at 881.

At issue in this matter is the ichthys Symbol, which is featured on the Operation Desert Storm Memorial in front of the Boone County Courthouse. At least one court in Missouri has confronted a First Amendment issue where an ichthus symbol was involved. *Webb v. City of Republic, Mo.*, 55 F. Supp. 2d 994 (W.D. Mo. 1999). Specifically at issue was the use of that symbol in the city of Republic's seal. *Id.* at 995. The court readily accepted the fact that the ichthys is linked to Christianity: "Historically, the symbolic representation of a fish has been used as a Christian symbol. The fish symbol has become particularly prevalent in contemporary American culture." *Id.* at 995-96 (internal citations omitted). Republic argued that there was a factual dispute as to whether

the symbol had religious connotations, but the District Court was not persuaded. The court found examples showing the Christian nature of the symbol. The Court found, upon a Motion for Summary Judgment, that there was no genuine issue of a material fact as to whether the ichthys symbol was or was not religious, concluding that it was clearly religious. *Id.*¹ Without that historical distinctiveness, the case law is well settled on the issue of whether a religious symbol on a city seal passes constitutional muster.” *Id.* According to the court, even though the purpose may not have been to endorse Christianity, it had the effect of doing so. *Id.* Republic was “permanently enjoined from displaying the symbol of a fish on its seal because the inclusion of the fish symbol violates the First Amendment of the United States Constitution.” *Id.* at 1001. In referring to the inclusion of the ichthys on the city seal of Republic, the District Court, in *Webb v. City of Republic, supra*, stated that: “. . . the case law is well settled on the issue of whether a religious symbol on a city seal passes constitutional muster.” *Id.* It went on to conclude that even though the purpose of inclusion of the ichthys on the city seal may not have been to endorse Christianity, such inclusion certainly had the effect of doing so.

In seeking to apply the Establishment Clause to the issue as to whether the inclusion of a religious symbol on a monument or memorial placed in a public location violates that clause, one might conclude that some light is shed by the decision of the Middle District Federal Court of North Carolina in *Hewett v. City of King*, 29 F. Supp. 3d 584 (M.D.N.C. 2014) [*"Hewett"*]. It is respectfully submitted that the court's decision in *Hewett* emphasizes the fact that the inclusion of any otherwise religious symbol, on a public monument, must have a clearly demonstrated and predominant historical or secular purpose, and not simply a religious purpose. The religious purpose cannot be the predominant purpose. The need to find a strong historical or secular purpose for the inclusion of a religious symbol or icon on public grounds was clearly demonstrated by the Supreme Court's decision in *Van Orden, supra*, and particularly by Justice Breyer's concurring opinion. The need to find an historic or secular purpose, as opposed to a non-religious or non-sectarian purpose, was also clearly announced by the Supreme Court in its decision in *McCreary, supra*, and less clearly by the Federal District Court of the Eastern District of Missouri in *Webb v. City of Republic, supra*. The need for the demonstration of such non-sectarian, non-religious purpose seems to have been the Court's guiding light in *Hewett, supra*. In *Hewett*, the Federal District Court dealt with the situation presented by a cross statue, which was located at a city's Veterans Memorial, in a city park, *Hewett, supra* at 610. The statue depicted a soldier kneeling in front of the Latin Cross. The statue was created pursuant to city council approval and was actually paid for by the city. The city argued that the statue did not have an entirely religious purpose, but rather had an historical implication, and presented testimony from individuals to the effect that the cross statue was meant pay tribute to fallen soldiers, and that the religious aspect was simply not a part of the "overall though process." *Id.* at 612.

¹See also *Paul v. Dade Cnty.*, 202 So. 2d 833, 835 (Fla. Dist. Ct. App. 1967) (“For example, the dove, the star, **the fish**, and three intertwined rings have all had, or presently may have, some religious symbolism attached thereto.”)(emphasis added)

As to whether the cross would have the effect of endorsing religion, the Court stated as follows:

"The reasonable observer would know that the Latin cross, which is a feature included in the Cross Statue, is a religious symbol of Christian faith. The reasonable observer would also be aware that the City Council decided to place the Cross Statue within the vicinity of the larger Veterans Memorial display, a memorial designed to honor veterans, but also within the vicinity of the Christian flag, which was flown by the City when the Cross Statue was originally erected and still flies in the same position for most of the year. The reasonable observer would also know the history of the Latin cross at issue with respect to this nation's history. However, the Court notes that several material issues regarding the Latin cross and its history are disputed, which preclude the granting of summary judgment as it relates to the Cross Statue in this case."

Id. at 613 (internal quotations omitted). The *Hewett* court, therefore, concluded that there was a reasonable dispute as to whether the cross represented only Christian soldiers or represented an important symbol of nationalism of 20th century wars, as conflicting testimony had been given regarding whether the cross had significant, historic presence during World War I, II, and the Korean War, or whether the cross was only used temporarily for Christian soldiers, such as in World War II. *Id.* at 613-14. The *Hewett* opinion also notes that the court should not "focus exclusively on the inclusion of [a] religious symbol" without considering the symbol's historical significance and its position as monument within a larger display." *Id.* at 616 (Emphasis added). It was also unclear to the North Carolina district court how the monument would be associated with the Veterans Memorial display. *Id.* at 618.² The court ordered the issue to proceed to trial. *Id.* at 644.

A mere Wikipedia search on the internet, a copy of which is annexed hereto as **Exhibit D**, discloses that the ichthys or ichthus, however it is spelled, is a symbol of the Christian faith. It is clearly a Christian symbol.

In *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971), which is sometimes viewed as being the United States Supreme Court's decision which sets forth the test to be applied to Establishment Clause issues, the Court stated a legal standard as follows:

"First, the statute [or government practice or custom] must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion ...; finally, the statute must not foster 'an excessive government entanglement with religion.'"

² A "Christian Flag" was flown at the site most weeks of the year, and the court refused to grant summary judgment for the defendant even though a flag policy was in effect which allowed "private parties to fly the flag of their choice on the eleventh flagpole in the City's Veterans Memorial." *Id.* at 620.

Id. at 997. The opinion notes that the Supreme Court has analyzed the question as to whether an action or practice in question has the purpose or effect of endorsing religion. *Id.* It states that "the prohibition against governmental endorsement of religion preclude[s] government from conveying or attempting to convey a message that religion or a particular religious belief is favored or preferred." *Id.* A court will look at a religious symbol's impact on a reasonable observer and determine whether it sends a message to nonadherents that they are outsiders, and a message to adherents that they are insiders. *Id.*

While we must concede that these opinions are not beyond argument or doubt, it is our opinion that the ADF Letter does not go sufficiently far in its analysis of the federal court decisions with respect to the Establishment Clause, as those decisions would impact the continued maintenance of the ichthys symbol on the Memorial, or the continued location of that Memorial on the Boone County Courthouse grounds or the use of Boone County public funds to maintain that Memorial or its surrounding landscaping. We conclude that:

1. The ichthys symbol is, beyond argument, a Christian symbol;
2. There is no historical basis for associating this Christian symbol with Operation Desert Storm or the Gulf War;
3. There is no basis for argument that the ichthys symbol somehow has an historical or secular, or non-religious, importance or implication, for soldiers or anyone;
4. As will be more fully stated below, the language on the Memorial which appears above the name of the two men who lost their lives, when coupled with the ichthys symbol, seems to clearly indicate, or strongly imply, that men and women who served but whose lives were not lost were all somehow Christian;
5. In the eyes of a reasonable beholder, one could conclude, reasonably, that the Symbol on the Memorial demonstrates a preference of Boone County for the Christian faith over non-Christian faiths, or faith over no faith;
6. The inclusion of this Christian symbol on the Memorial, in our judgment, is not "religiously neutral" and violates the requirement of religious neutrality.

For the reasons set forth above, we believe that if this matter was presented to a court of competent jurisdiction, in a properly tried lawsuit, it would be more likely than not that such court would conclude that continued maintenance of the Memorial on the grounds of the Boone County Courthouse, with the ichthys symbol thereon, violates the Establishment Clause of Article I of the Amendments to the United States Constitution.

IV. Discussion of Missouri Constitutional Cases. While our research does not reveal any Missouri court cases relating to the maintenance on public ground of passive monuments, with religious symbols thereon, we do believe that Missouri has a clearly demonstrated, even higher, bar (even higher than that erected by the Establishment Clause) against any demonstration of religious preference by a governmental body, and that if the issue relating to this Memorial is presented to a Missouri court, it is even more likely than not that such court would conclude that the continued maintenance by the County of the Memorial, as it now stands, on the courthouse grounds, is a violation of Section 7 of Article I of the Missouri Constitution, and possibly of Section 8 of Article 9 of the Missouri Constitution and, specifically, that it would constitute a violation of those provisions of Section 7 of Article I which read as follows:

"No preference shall be given to, nor any discrimination made against any church, sect or creed of religion, or any form of religious faith or worship."

The few relevant Missouri decisions relating to the Missouri constitutional provisions show that Missouri has a very high wall between church and state. Some of the history is cited by the United States District Court for the Western District of Missouri in *Luetkemeyer v. Kaufmann*, 364 F.Supp. 376, 383 (W.D. Mo. 1973) aff'd, 419 U.S. 888, 95 S. Ct. 167, 42 L. Ed. 2d 134 (1974), where the Court states:

Missouri has a long history of maintaining a very high wall between church and state. Much of that history is reviewed in *Harfst v. Hoegen*, 349 Mo. 808, 163 S.W.2d 609 (en banc, 1942), a case cited in footnote 7 in one of the concurring opinions in *Lemon v. Kurtzman*, 411 U.S. 192, 93 S.Ct. 1463, 36 L.Ed.2d 151 (1973). That case reviewed the numerous constitutional provisions relating to the separation of church and state and pointed out that Missouri's Constitution "goes even farther than those of some other states." That case concluded: The constitutional policy of our State has decreed the absolute separation of church and state, not only in governmental matters, but in educational ones as well. Public money, coming from taxpayers of every denomination, may not be used for the help of any religious sect in education or otherwise. [163 S.W.2d at 614]

"Two provisions [Article I, Section 7 and Article IX, Section 8] in the Missouri Constitution declaring that there shall be a separation of church and state are not only more explicit but more restrictive than the Establishment Clause of the United States Constitution." *Trinity Lutheran Church of Columbia, Inc. v. Pauley*, No. 14-1382, 2015 WL 3429427, at *2 (8th Cir. May 29, 2015) (holding that Article I, Section 7 of the Missouri Constitution does not conflict with the First Amendment or Equal Protection Clause of the United States Constitution.)

It should be noted, however, that most – if not all – of the Missouri state cases dealing with the separation of church and state embodied in the Missouri constitution do so in the context of public expenditures or resources. See *Qandah v. Lombardi*, No. 12-04213-CV-C-HFS, 2013 WL

684189, at *1 (W.D. Mo. Feb. 25, 2013)(“Missouri's restrictions traditionally tend to solidify the “wall” between church and state, particularly in connection with the use of public funds in a manner assisting sectarian activities.”).

As stated above, there do not appear to be any Missouri court cases which apply the Missouri constitutional provisions to religious displays or monuments. In a 1999 Federal Eighth Circuit Court of Appeals opinion, that court remanded the issues as to religious holiday displays on public property to the district court, after noting that the Missouri Supreme Court had not yet addressed the application of Article I, Section 7 to religious displays. *Am. Civil Liberties Union v. City of Florissant*, 186 F.3d 1095, 1098 (8th Cir. 1999) [*"Florissant"*]. In *Florissant*, the district court had granted a broad injunction against Florissant's and the mayor's "erecting any display containing a crèche or other religious symbols at the Florissant Civic Center or any other public property." The court of appeals noted that the district court relied upon three Missouri cases for its ruling: *Paster v. Tussey*, 512 S.W.2d 97 (Mo.1974), *Americans United v. Rogers*, 538 S.W.2d 711 (Mo.1976), and *Harfst v. Hoegen*, 349 Mo. 808, 163 S.W.2d 609 (1941). *Id.* at fn. 4. *Paster* dealt with the mandatory providing of textbooks to students in private non-profit schools, including religious ones; *Americans United* involved tuition grants to students at certain public and private colleges; and *Harfst* dealt with allegations that a school board was maintaining a parochial school at public expense. These cases, which had nothing to do with religious displays on public property, were relied upon by the district court in *Florissant*, in concluding that there was no Missouri court decision on the religious issue. Our own research reveals no cases which deal with facts and situations similar to the ones facing Boone County. As such, because the caselaw on separation of church and state in Missouri is developed more on the issues of funding, and not on the issue of general discrimination or preference demonstrated by the presence on a monument display of a religious symbol, one might argue that it is difficult to say how much these Missouri court pronouncements of Missouri's "high wall between church and state" are relevant here. However, it can obviously be said that if the monument has or is requiring public funding of any kind, then Missouri's "higher wall" definitely comes into play. In our judgment, providing public land (of some value) for the display of a monument, and providing public funds for the maintenance of the monument and for landscaping the monument and for maintaining that landscaping, do constitute the use of public funding (or public property of substantial value, which involves at least, indirectly, public funding) for the support of the monument.

One more recent Missouri opinion holds some relevance to the topic at hand, even though it is not factually on point, and that is *Oliver v. State Tax Comm'n of Missouri*, 37 S.W.3d 243 (Mo. 2001) [hereafter "*Oliver*"]. As a part of its analysis, the Missouri Supreme Court, in *Oliver*, looked to the United States Supreme Court case in *Widmar v. Vincent*, 454 U.S. 263 (1981), in order to analyze the relationship between the Establishment Clause of the First Amendment to the U.S. Constitution, and Section 7 of Article I of the Missouri Constitution, stating as follows:

The relationship of the Missouri constitutional provisions to religious freedom and religious discrimination was explored in *Widmar v. Vincent*, 454 U.S. 263, 102 S.Ct.

269, 70 L.Ed.2d 440 (1981), which may provide First Amendment guidance to interpreting the Missouri Constitution. *Widmar* involved a regulation of the University of Missouri Kansas City that denied access to public facilities at a state university for a religious group that wished to conduct meetings, which included religious worship and religious teaching. In support of the university's regulation, the state cited a "compelling interest in complying with the applicable provisions of the Missouri Constitution" quoted above. *Id.* The Supreme Court found it "unnecessary ... to decide whether, under the Supremacy Clause, a state interest, derived from its own constitution could ever outweigh free speech interest protected *252 by the First Amendment." The Court went on to hold that the university's regulation violated the principle that such regulation must be "content-neutral." *Id.* at 275–76, 102 S.Ct. 269.

In *Widmar* there unquestionably was the use of state facilities by a religious organization, which might violate a literal reading of the first clause of article I, section 7, of the Missouri Constitution. But the overriding requirement of the federal constitution is that the religious organization not be discriminated against on the basis of the content of its activities, and in this case the Missouri Constitution is consistent with this principle.

Oliver, supra at 251-52.

The above-referenced *Trinity Lutheran Church* opinion is also a fairly instructive primer on the Missouri constitutional jurisprudence regarding funding of religion. At issue was a claim that the Director of the Missouri Department of Natural Resources ("DNR") violated Trinity Church's federal and state constitutional rights by denying the church's application for a grant of solid waste management funds for the resurfacing of a playground located on church grounds. *Trinity Lutheran Church of Columbia, Inc.*, 2015 WL 3429427 at *1. The Trinity Church contained a daycare and preschool "that teaches a Christian world view and incorporates daily religious instruction in its programs." *Id.* The DNR offers Playground Scrap Tire Surface Material Grants, which "provide DNR funds to qualifying organizations for the purchase of recycled tires to resurface playgrounds, a beneficial reuse of this solid waste." *Id.* The application for these funds by Trinity Church was denied pursuant to the "no aid" of public funds clause in Article I, Sec. 7 of the Missouri Constitution. *Id.* The church made various federal Constitution claims under the First Amendment, a claim under the Equal Protection Clause, and a claim under Article I, Section 7. *Id.* at *2. The district court granted the city's motion to dismiss the complaint, and Trinity Church challenged the ruling in all respects except as to the Free Speech claim. *Id.*

The opinion's legal analysis begins by noting the "very high wall" between church and state that exists in Missouri, *Id.*, by finding that two provisions in the Missouri Constitution [Art. I, Sec. 7 and Art. IX, Sec. 8] "declaring that there shall be a separation of church and state are not only more explicit but more restrictive than the Establishment Clause of the United States Constitution." *Id.*

(citing *Paster v. Tussey*, 512 S.W.2d 97, 101–02 (Mo. banc 1974)). The 8th Circuit interpreted the Trinity Church’s argument that the DNR targeted the church for disparate treatment as a religion, as being an argument that the state was acting in a manner hostile toward religion, which violated the Equal Protection Clause, by denying funds for a religious learning center and daycare without there being a compelling public interest, as being an attack upon the constitutionality of Art. I, Sec. 7. *Id.* at *3. Although the legal reasoning is not too important, it should be noted, as it already has been above, that the 8th Circuit rejected this argument, and held that the Missouri constitutional provision does not violate the First Amendment. *Id.* at *5.

The 8th Circuit then turned to the Missouri Constitution claims. *Id.* Turning to the merits, the Court of Appeals agreed with the district court that the two clauses of Article I, § 7, must be interpreted in harmony. Therefore, if granting Trinity Church's application would have constituted “aid” to a church prohibited by the first clause of Article I, § 7, then denying the grant was not a discriminatory action prohibited by the second clause. So the district court properly focused on Trinity Church's contention that a Scrap Tire Program grant is not “aid” within the meaning of the first clause of Article I, § 7, because it involves a quid pro quo, with the applicant undertaking obligations under the Scrap Tire Program in exchange for the granted funds. *Id.*³ The church relied on two opinions, which the court then summarized:

In *Kintzele*, plaintiffs alleged that a subsidized sale of land by the State to St. Louis University constituted an unconstitutional use of public funds in aid of a private sectarian school. The Court declined to invalidate the sale, concluding that, because Missouri law authorized “sale by negotiation at fair value,” and the State tried competitive bidding and thereafter sold the land to SLU at nearly twice the highest bid, “plaintiffs' contention of illegal ... subsidy from public funds cannot be sustained.” 347 S.W.2d at 700–701. This decision in no way supports Trinity Church's claim that a Scrap Tire Program grant is not “aid.”

In *Americans United*, the Supreme Court of Missouri upheld a statute providing tuition grants to students at approved public and private colleges. The statute was invalidated by the trial court, applying Article I, § 7, and Article IX, § 8. The State appealed. Noting that “[a]n act of the legislature is presumed to be valid and will not be declared unconstitutional unless it clearly and undoubtedly contravenes some constitutional provision,” 538 S.W.2d at 716, the Court concluded it could not “with

³ The opinion provides a quick summary of caselaw regarding challenges to public funding of religion or religious institutions in Missouri: *Paster*, 512 S.W.2d at 104–105 (invalidating statute requiring public school boards to provide textbooks to private school students); *Berghorn v. Reorg. Sch. Dist. No. 8*, 364 Mo. 121, 260 S.W.2d 573, 582–83 (1953); *McVey v. Hawkins*, 364 Mo. 44, 258 S.W.2d 927, 933–34 (1953) (enjoining use of public school buses to transport students to religious schools); *Harfst v. Hoegen*, 349 Mo. 808, 163 S.W.2d 609, 613–14 (1941) (enjoining use of public school funds for the teaching of religion and faith at a parochial school that was taken into the public school system); accord *Luetskemeyer*, 364 F.Supp. at 383–84 (upholding the State's refusal to provide transportation to church-sponsored schools); *Brusca*, 332 F.Supp. at 279–80 (the State may deny funds to sectarian schools for religious instruction).

confidence declare that the statutory program” clearly contravened these constitutional provisions because “the parochial school cases with which the court has dealt in the past involved completely different types of educational entities than the colleges and universities herein involved.” *Id.* at 721–22. The defendants' quid pro quo argument was noted but not adopted. *Id.* at 721.

Id. The opinion summarizes the reasoning behind *Americans United*'s final holding as focusing on the fact that the grant program went to and was for the benefit of students, and not institutions. *Id.* at *7.

The district court opinions in the *Trinity Church* case also summarizes *Americans United* and *Saint Louis Univ. v. Masonic Temple Ass'n of St. Louis*, 220 S.W.3d 721 (Mo. 2007), in order to refute an argument that the Missouri Supreme Court has begun to erode Missouri's “high wall,” stating:

“The Missouri Supreme Court's decisions in *Americans United* and *St. Louis University* are not examples of public aid to religious institutions with the “blessing of the state,” as characterized by Trinity's counsel. Rather, these cases can be distinguished from Missouri jurisprudence regarding the high wall of separation between church and state in two distinct ways. First, the Missouri Supreme Court in both cases makes clear that the religious institutions receiving aid, indirectly through the students in *Americans United* and through the developer in *St. Louis University*, were not controlled by a church or religious creed. This stands in contrast to the facts in *Harfst*, *McVey*, and *Paster*, in which the institutions receiving aid were parochial or former parochial schools under the control of the church. Second, the schools in *Americans United* and *St. Louis University* were institutions of higher education. Although the Missouri Constitution makes no explicit distinction between institutions of higher education and primary or secondary schools in Article I, Section 7, the Missouri Supreme Court has, on several occasions, considered it to be a relevant factor. In *Americans United*, for example, it emphasized the differences between parochial elementary and secondary schools on the one hand and universities on the other, based on the fact that the latter had greater academic freedom, mature students, and secular curriculum. See also *Menorah Med. Ctr. v. Health & Educ. Facilities Auth.*, 584 S.W.2d 73, 87 (Mo.1979) (considering recipient universities' status as institutions of higher education, “as opposed to elementary or secondary level,” to be a factor in finding no excessive entanglement in a financing program authorized by state law and operated by a non-state entity). This distinction between institutions of higher education and primary or secondary schools emphasizes the Missouri Supreme Court's concern with the degree of control a church, creed, or religious domination may have over the administration, management, and curriculum development at a school. When that degree of control was so great that the school was, in essence, serving as a proxy or branch of the church, the Missouri Supreme

Court has consistently held that public aid, direct or indirect, would be impermissible."

See *Trinity Lutheran Church of Columbia, Inc. v. Pauley*, 976 F. Supp. 2d 1137, 1144-45 (W.D. Mo. 2013) aff'd, No. 14-1382, 2015 WL 3429427 (8th Cir. May 29, 2015).

Ultimately the 8th Circuit Court held that the state was not compelled to give money directly to a church, and the denial of benefits to a church did not violate the state constitutional prohibition on discrimination against a church. *Trinity Lutheran Church of Columbia, Inc.*, 2015 WL 3429427 at #3-7.

The Missouri "high wall" between church and state, therefore, clearly appears to be intact. It is obviously intact with respect to the use of public funds or public property, but arguably, the effects of that "high wall" have not been shown to be in effect as to issues raised by monuments, with religious symbols appearing thereon, which are located on public property or which are maintained on public property. We would note, however, that public property has value, and that monuments and their landscaping require maintenance, and that the use of public property for the display of a monument involves a use of valuable public property, and that the use of public funds to maintain, or protect, or insure, a monument, or to landscape it, or to maintain that landscaping, involves the use of public funds.

One might also look to the language of Section 8 of Article IX of the Missouri Constitution, and specifically that language which reads as follows:

". . . nor shall any grant or donation of personal property or real estate ever be made by the state, or any county, city, town, or other municipal corporation, for any religious creed, church, or sectarian purpose whatever."

This Section 8 appears in that Article of the Missouri Constitution, Article IX, which deals with "Education." In *Oliver, supra*, the appellants attempted to invoke the provisions of this Section 8. The *Oliver* court concluded that, while such Section 8 does not expressly limit itself to education, it is an Article of the Missouri Constitution which relates to public education. The *Oliver* court concluded that to the extent the language of Section 8 of Article IX covers areas other than education, it is redundant to the language of Section 7 of Article I, and that Section 8 of Article IX, therefore, did not appear to add anything to support the appellant's claims. *Oliver, supra*, at Ftn. 19.

We have found no cases which apply Section 8 of Article IX of the Missouri Constitution outside of the public school or educational context. However, the statement in *Oliver* to the effect that Section 8 of Article IX of the Missouri Constitution is redundant with respect to Section 7 of Article I of that Constitution (to the extent that Section 7 does not cover schools) is of substantial interest. Section 7 of Article I does not contain any explicit language regarding the donation or grant of property. If the Missouri Supreme Court, as it stated in *Oliver*, believes that a "grant or donation

of...real estate...for any religious creed, church, or sectarian purpose whatever” is somehow implicitly covered in Section 7 of Article I, then the use of Boone County property for the placement of the Memorial would clearly fall within such prohibition against a "grant or donation...(of) real estate...by a county."

If Section 7 of Article I of the Missouri Constitution stands for the proposition that no county can grant or donate property for any “religious creed, church, or **sectarian purpose whatever**” (emphasis added), as seems to be strongly implied by the Missouri Supreme Court's decision in *Oliver, supra*, then Boone County would clearly have to clear the Missouri very “high wall” which separates church and state in convincing any court that the display of the Memorial, with the Christian fish Symbol thereon, is not a grant or donation of property and/or not for a “sectarian purpose whatever.”

While no Missouri court decision dealing with religious displays on public monuments or religious displays on public land have been found, we do believe that the high bar, the high wall, between church and state erected by Missouri (as noted by Missouri courts and federal courts), when applied to the issue as to the Memorial in question, would provide a hurdle that cannot be overcome by arguments that the Memorial should be maintained, in its current form, at its current location.

V. Discussion of Other Jurisdictions.

The Oklahoma constitution provides:

§ 5. Public money or property-Use for sectarian purposes. No public money or property shall ever be appropriated, applied, donated, or used, directly or indirectly, for the use, benefit, or support of any sect, church, denomination, or system of religion, or for the use, benefit, or support of any priest, preacher, minister, or other religious teacher or dignitary, or sectarian institution as such.

Prescott v. Oklahoma Capitol Pres. Comm'n, 2015 OK 54, ¶ 4. At issue in *Prescott* was a Ten Commandments monument placed on Oklahoma Capitol grounds pursuant to legislation signed by the governor. *Id.* at ¶1. The Oklahoma Supreme Court decided that the plain intent of this constitutional provision was “to ban State Government, its officials, and its subdivisions from using public money or property for the benefit of any religions purpose. *Id.* at ¶ 4. It reasoned that words such as “no,” “ever,” and “any” reflects the broad reach of the ban. *Id.* This broad reach is further bolstered, according to the court, by banning uses “indirectly” benefitting religion. *Id.* at ¶5. “Prohibiting uses of public property that ‘indirectly’ benefit a system of religion was clearly done to protect the ban from circumvention based upon mere form and technical distinction.” *Id.* The Oklahoma Supreme Court distinguished its holding from that of the U.S. Supreme Court in *Van Orden v. Perry, supra*, by relying on the Oklahoma constitution “with no regard for federal jurisprudence.” *Id.* at ¶6. The opinion dismisses the “historic purpose” argument, determining that the Ten Commandments are obviously religious in nature, and holds that “[b]ecause the monument

at issue operates for the use, benefit or support of a sect or system of religion, it violates Article 2, Section 5 of the Oklahoma Constitution and is enjoined and shall be removed.” *Id.* at ¶6-7.⁴

Article II, section 4, of the Colorado Constitution provides:

The free exercise and enjoyment of religious profession and worship, without discrimination, shall forever hereafter be guaranteed; and no person shall be denied any civil or political right, privilege or capacity, on account of his opinions concerning religion; but the liberty of conscience hereby secured shall not be construed to dispense with oaths or affirmations, excuse acts of licentiousness or justify practices inconsistent with the good order, peace or safety of the state. No person shall be required to attend or support any ministry or place of worship, religious sect or denomination against his consent. Nor shall any preference be given by law to any religious denomination or mode of worship.

State v. Freedom From Religion Found., Inc., 898 P.2d 1013, 1019 (Colo. 1995). “In interpreting our Preference Clause we have looked to the Establishment Clause of the First Amendment to the United States Constitution and the body of federal cases that have construed it.” At issue in this case was a Ten Commandments monument on state property. *Id.* at 1014. After summarizing the robust caselaw that came before it on the issue, the opinion seems to settle on the question of whether the suspect act has the purpose or effect of endorsing religion. *Id.* at 1021. The Colorado Supreme Court decided the Ten Commandments monument was not erected with the purpose of endorsing religion, as the text includes symbols of at least Christianity and Judaism, contains the “all-seeing eye” which has secular and non-secular significance, was donated by the National Youth Guidance Program with a secular purpose, a purpose in line with the Ten Commandments’ position as a basis of national law, and the purpose of the state, as testified to by state employees, in accepting the monument was to open the park up to various groups to use. *Id.* at 1023-1024. And because the monument is not conspicuous and is surrounded by numerous other secular displays, the Colorado Supreme Court determined that “objective viewers would not perceive the monument in its Lincoln Park setting as government endorsing religious belief or suggesting that religion in general is relevant to their standing in the political community.” *Id.* at 1025-1026.

The Utah constitution contains the following:

⁴ But see *Meyer v. Oklahoma City*, 1972 OK 45, 496 P.2d 789 (“held that where cross was located in a distinctly secular environment in midst of persons in pursuit of distinctly secular entertainment, and where cross, the erection of which was sponsored by city council of churches, could not be said to display, articulate or portray, except in a most evanescent form, any ideas that were alleged to pertain to any of sectarian institutions or systems named in constitutional provision prohibiting use of public money or property for use, benefit, or support of any church or system of religion, maintenance of cross with city money was not violative of constitutional provision.”)

The rights of conscience shall never be infringed. The State shall make no law respecting an establishment of religion or prohibiting the free exercise thereof; no religious test shall be required as a qualification for any office of public trust or for any vote at any election; nor shall any person be incompetent as a witness or juror on account of religious belief or the absence thereof. There shall be no union of Church and State, nor shall any church dominate the State or interfere with its functions. No public money or property shall be appropriated for or applied to any religious worship, exercise or instruction, or for the support of any ecclesiastical establishment.

Utah Const. art. I, § 4. “The provision of money or property to religious exercise is indirect, and therefore constitutional, if (1) the money or property [is] provided on a nondiscriminatory basis” and (2) the public money or property [is] equally accessible to all.” *Summum v. Pleasant Grove City*, 345 P.3d 1188, 1190 (Utah 2015). At issue in this case was whether Pleasant Grove had violated the religious liberty clause of the Utah Constitution by not allowing a “Seven Aphorisms” monument on public grounds where a Ten Commandments monument was erected. *Id.* at 1189-1190.

The court’s analysis begins by noting that allowing the Seven Aphorisms monument would not be neutral because [d]isplaying monuments that communicate the beliefs of only two of these viewpoints would not amount to an impartial distribution of public property among the spectrum of religious views held by Utah citizens.” *Id.* at 1191. The Utah Supreme Court noted that, in regards to whether the Utah Constitution required an absolute bar of religious expression by private citizens on public property:

We rejected such an absolutist interpretation because it “would evidence an affirmative hostility toward religion,” which would contradict other provisions of the federal and Utah Constitutions that protect religious expression and free speech. Instead, we adopted a neutrality test that permitted the use of public property in support of private religious expression so long as government benefits are “provided on a nondiscriminatory basis” and are “equally accessible to all.”

Id. at 1191-1192.

When Pleasant Grove accepted the donated monument, it adopted the message conveyed by the monument as its own...The only relevant question under article I, section 4's prohibition against the use of public money or property for religious purposes is whether a monument constitutes “religious worship, exercise or instruction.” We do not reach that question, however, because *Summum* seeks a remedy that we may not constitutionally grant.

Id. at 1192. The opinion does state that the Utah religious liberty clause differs greatly from the federal Establishment Clause, but declines to reach any conclusion on what that means for the Ten Commandments monument. *Id.* at 1193.

As of November 5, 1974 (and currently), the California constitution provides the following:

Sec. 4. Free exercise and enjoyment of religion without discrimination or preference are guaranteed. This liberty of conscience does not excuse acts that are licentious or inconsistent with the peace or safety of the State. The Legislature shall make no law respecting an establishment of religion. A person is not incompetent to be a witness or juror because of his or her opinions on religious beliefs.

Cal. Const. art. I, § 4. In a case decided a few years later, the Supreme Court of California was presented with a challenge to the illumination on the city hall of a huge cross at first to honor the Christmas holidays and then also, during the 1970s, to honor Easter Sundays, both Latin and Eastern Orthodox. *Fox v. City of Los Angeles*, 587 P.2d 663, 663-64 (1978).

The California Constitution, like the United States Constitution, does not merely proscribe an establishment of religion. Rather, all laws “Respecting an establishment of religion” are forbidden. (*Italics added.*) The California Constitution also guarantees that religion shall be freely exercised and enjoyed “**without discrimination or preference.**” Preference thus is forbidden even when there is no discrimination. The current interpretations of the United States Constitution may not be that comprehensive.

Id. at 665 (emphasis added). The court reasoned that city hall is not a “bulletin board” for symbols of all faiths to be displayed. *Id.* “Would it be justifiable, say, to allow only a Star of Bethlehem, a Star of David, and a Star and Crescent?” The opinion admits that the California constitution does not require every religion to always be accommodated, but that to “illuminate only the Latin cross, however, does seem preferential when comparable recognition of other religious symbols is impracticable.” *Id.* The court rejected an argument from the city that 30-years of disinterest in the display somehow militates a decision that the custom truly conferred a benefit to a religion, concluding that there may be complex reasons why members of the citizenry may have chosen not to speak out. *Id.* at 666. The court also concluded that the display of the Latin cross was not an “interfaith” recognition, and that although mere display of the cross is not a religious service, “[b]y no means, though, should we infer that it is not action respecting an establishment of religion. Governments must commit themselves to ‘a position of neutrality whenever ‘the relationship between man and religion’ is affected.” *Id.* The Supreme Court of California thus upheld the preliminary injunction against the city’s display. *Id.*

We will note that the California constitution has a similar section to the Missouri constitution.

Sec. 5. Neither the Legislature, nor any county, city and county, township, school district, or other municipal corporation, shall ever make an appropriation, or pay from any public fund whatever, or grant anything to or in aid of any religious sect, church, creed, or sectarian purpose, or help to support or sustain any school, college, university, hospital, or other institution controlled by any religious creed, church, or sectarian denomination whatever; nor shall any grant or donation of personal property or real estate ever be made by the state, or any city, city and county, town, or other municipal corporation for any religious creed, church, or sectarian purpose whatever; provided, that nothing in this section shall prevent the Legislature granting aid pursuant to Section 3 of Article XVI.

Cal. Const. art. XVI, §5; compare with Mo Const. Art. IX , §8. The concurring judge in one California Supreme Court decision interpreted the section broadly: “Those who argue that the amount of taxpayer funds expended to light the cross is so minimal as to be beneath this court’s notice, overlook two important considerations. First, article XVI, section 5 admits of no de minimis exception. The language is explicit: No “city . . . shall ever. . . pay from any public fund whatever, or grant anything to or in aid of a religious sect” Secondly, the prohibitions of article XVI, section 5 would come into play even if no funds were expended. The ban is on aid to religion in any form.” *Fox v. City of Los Angeles*, 22 Cal. 3d 792, 806, 587 P.2d 663, 671-72 (1978); but see *Carpenter v. City & Cnty. of San Francisco*, 803 F. Supp. 337, 345 (N.D. Cal. 1992) rev’d on other grounds, 93 F.3d 627 (9th Cir. 1996) (“In the case sub judice, however, there is no expenditure of taxpayers funds in support of or in aid of religion in violation of Article XVI, Section 5. The challenge in this case is to S.F.’s ownership of the Mount Davidson Cross, and to the display of the Mount Davidson Cross on public lands. In this case, unlike in *Hewitt*, S.F. does not spend any money to maintain the Mount Davidson Cross. Nor does it advertise the Mount Davidson Cross, or print brochures, or spend any money to support the Mount Davidson Cross at the taxpayers expense.” Held: Article XVI, Section 5 not violated by)⁵

In the case of leased property, a 9th Circuit opinion held the following:

As explained above, the Reading Room received only an indirect or incidental benefit from the Airport’s rental policy, and the policy had a solely secular purpose. Furthermore, the Attorney General of California has held that it is proper under article XVI, section 5 for an airport to lease space in one of its buildings to a religious organization as long as the rental transaction is at arm’s length. 25 Cal.Op.Att’y Gen. 309 (1955). Thus, we conclude that the Airport’s policy of allowing religious

⁵ It should be noted that in these cases, and in the *Hewitt* case alluded to, the focus is on the first clause of the section, not necessarily the clause referring to grant or donation of property. In *Hewitt*, at issue was a park owned by a county which contained numerous religious statutes, a brochure noting the park was established by a reverend, was designated by the county as Desert Christ Park after acceptance of it, and advertised it as a “World Famous Theme Park ... depicting life of Christ.” *Hewitt v. Joyner*, 940 F.2d 1561, 1563 (9th Cir. 1991). “We hold that the County has violated article XVI, section 5, by its ownership and maintenance of the Antone Martin Memorial Park.” *Id.* at 1571.

organizations to rent space at the Airport did not violate article XVI, section 5 of the California Constitution.

Christian Sci. Reading Room Jointly Maintained v. City & Cnty. of San Francisco, 784 F.2d 1010, 1016 (9th Cir.) amended, 792 F.2d 124 (9th Cir. 1986).

One 9th Circuit opinion summarized the factors involved in interpreting actions under the section as follows: “In summary, the California appellate cases make clear that article XVI, section 5, prohibits the government from (1) granting a benefit in any form (2) to any sectarian purpose (3) regardless of the government's secular purpose (4) unless the benefit is properly characterized as indirect, remote, or incidental.” *Paulson v. City of San Diego*, 294 F.3d 1124, 1131 (9th Cir. 2002)

No money shall be drawn from the Treasury for the benefit of any religious (sic), or theological institution, nor shall any money be appropriated for the payment of any religious (sic) services in either house of the Legislative Assembly.

Or. Const. art. I, § 5.

In discussing the constitutional principle of separation of church and state, this court was not engaged in word-matching between other constitutions and the Oregon Constitution. While neither a specific ‘establishment’ clause nor a ‘credal preference’ clause appears in our state constitution, it is obvious that the founders of this state did not intend to permit the state to sponsor any particular religion. When the draftsmen of the Oregon Constitution provided for the free exercise of religion, they also prohibited the use of public funds to support any preferred religious institution

Lowe v. City of Eugene, 463 P.2d 360, 364 (1969)(citing to Or. Const. art. I, § 5). This case dealt with the issuance of building permits for the erection of a cross on city property. *Id.* at 361. The court found that, in addition to the building and electrical permits issued for this purpose, “the city also turned over to private parties the city-maintained public land in which the cross was imbedded in concrete so that it would last, as one of the defendants testified, ‘forever.’” *Id.* at 362. The petitioners also argued that the cross should be allowed because the public park at issue is a “War Memorial Park” and is fit for such a cross. *Id.* The supreme court agreed with the trial court’s decision that “the secular purpose of the park dedication had no relevance to the city council's action then under review.” *Id.* “The war-memorial argument was never passed upon by the city council. The city's action in this case was taken, and defended during the trial below, primarily as an action taken by the city in response to the political power of the majority of the townspeople.” *Id.* The record, according to the Supreme Court of Oregon, tended to show that a majority of the community approved of the display because it reinforced their religious preference. *Id.* “The principal purpose which motivated the city council was its desire to conform to the desires of a majority of the citizens of the community, who conscientiously believed that their preferred religious symbol was entitled to preferential public display simply because the majority wished it so.” *Id.* The majority opinion

concludes that this is exactly the type of religious pressure the federal and Oregon constitutions are designed to prevent. *Id.* at 362-63.

Public land cannot be set apart for the permanent display of an essentially religious symbol when the display connotes government sponsorship. The employment of publicly owned and publicly maintained property for a highly visible display of the character of the cross in this case necessarily permits an inference of official endorsement of the general religious beliefs which underlie that symbol. Accordingly, persons who do not share those beliefs may feel that their own beliefs are stigmatized or officially deemed less worthy than those awarded the appearance of the city's endorsement. While government can foster education in the history and cultural contributions of religions generally, and can act to protect the individual's right to his own personal expressions of religious opinion, the government has no business placing its power, prestige, or property at the disposal of private persons or groups either to aid or oppose any religion. *Epperson v. Arkansas*, 393 U.S. 97, 89 S.Ct. 266, 21 L.Ed.2d 228 (1968); *School Dist. of Abington Tp., Pa. v. Schempp*, 374 U.S. 203, 222-223, 83 S.Ct. 1560, 10 L.Ed.2d 844 (1963); *Engel v. Vitale*, 370 U.S. 421, 82 S.Ct. 1261, 8 L.Ed.2d 601, 86 A.L.R.2d 1285 (1962); *People of State of Illinois ex rel. McCollum v. Board of Education*, 333 U.S. 203, 68 S.Ct. 461, 92 L.Ed. 649, 2 A.L.R.2d 1338 (1948).

Id. at 363. The court distinguished the facts in its case from a situation where a religious symbol can be placed at the grave of a deceased in a public cemetery. *Id.* The presence of a symbol, like a cross, can clearly be viewed as an individual's preference. *Id.* As to the Oregon constitution specifically, the petitioners argued that Article I, Section 5, quoted above, limits its prohibition to the use of public funds on religious matters, and thus by implication approves turning over public land to them. *Id.* at 364. "This mechanistic interpretation of the state constitution is unwarranted. While differences between real and personal property of course have significance in a variety of legal contexts, these differences have no constitutional substance in a religious context." *Id.* The court upheld its previous opinion affirming the trial court's decision to require removal of the cross, reasoning in part that "the language that is in the state constitution shows that the founders of this state did not intend to retreat from the federal position on separation of church and state, but rather intended to emphasize in their own words their own commitment to the doctrine of separation." *Id.*

'Article 1, Section 4, of the Bill of Rights of the Louisiana Constitution of 1921 provides: 'Every person has the natural right to worship God according to the dictates of his own conscience. No law shall be passed respecting an establishment of religion, nor prohibiting the free exercise thereof; nor shall any preference ever be given to, nor any discrimination made against, any church, sect or creed of religion, or any form of religious faith or worship.'

State ex rel. Singelmann v. Morrison, 57 So. 2d 238, 240-41 (La. Ct. App. 1952). At issue in this case was “the removal of a statue or memorial erected on public property to St. Frances Xavier, Mother Cabrini.” *Id.* at 240.⁶ “As stated before, to deny the statue of any hero his rightful place on public property merely because such hero has been honored by his church, whether it be Catholic, Protestant, Jewish or otherwise, would indeed do violence to Section 4 of Article 1, Constitution of 1921 of Louisiana: ‘* * * nor any discrimination made against, any * * * sect or creed * * * or any form of religious faith or worship.’” *Id.* at 243. The Mother Cabrini statute at issue was four feet at its base, six feet in height, and shows her wearing clothes that she wore when providing for the poor and ministering to the sick of all faiths. *Id.*

It is true that, at the present time, the inscription on the statue relates exclusively to her canonization, and to the group that sponsored and paid for it, without any reference to her public charities. While it might be more appropriate to have some inscription of her public charities, since that justifies its erection on public property, the absence of such inscription should hardly be the reason for its removal. The reason for its erection, not its inscription, governs its right to rest on public property. However, the City Ordinance provides for a suitable plaque to recite her public benevolences and benefactions, and I am advised in due time such a plaque will be placed thereon, as it should be.

Id. at 243-44. The monument was placed without cost to the city. *Id.* at 244. It was accepted to honor her services in the field of child care, and for her efforts during the Yellow Fever epidemics, when she visited the sick and established and helped maintain an orphanage in New Orleans. *Id.*

There is not the slightest suggestion that Mother Cabrini's canonization as a saint of the Roman Catholic religion is being used to exploit her local charities and benevolences as a pretext to establish a religious shrine or place of worship, or for the propagation of the Catholic religion; or that the same could readily be used for such purpose. To the contrary, the statue is a modest one of simple proportions, erected in her honor by her proud coreligionists, and accepted by a grateful city in memoriam, all without cost or expense to the City. The monument so erected and dedicated is not for a private or selfish interest, but serves a public purpose and is a public benefit. Such a statue helps deepen within those who see it the consciousness of the obligation they owe the needy and friendless, and encourages them to mould their characters and deeds that their lives, too, may be counted a blessing.

Id. The court determined that the statute did not violate any Louisiana constitutional provision. *Id.*

⁶ Also at issue in this matter was a state constitutional provision regarding the use of funds, property, etc. given to any person, private or public. This issue is not relevant to the focus of this opinion.

VI. Cases factually on point

Other than cases such as *Webb, supra*, which feature a religious logo or symbol as part of a larger design on something official like a city seal, we have not been able to find any cases that involve inclusion of a religious symbol on a specific monument that is otherwise wholly secular, with the exception of a recent district court case out of California. *Am. Humanist Ass'n v. City of Lake Elsinore*, 2014 WL 791800 (C.D. Cal. Feb. 25, 2014). That case involved a single war memorial that was originally designed to feature a kneeling soldier leaning on his rifle at a grave, with the tombstone being a cross. *Id.* at *1⁷. The memorial also featured a flag, an eagle, and text saying “Honoring Brave Men and Women Who By Their Sacrifice Give Life To Our Most Precious Gift—Freedom,” as well as “Freedom Is Never Free.” *Id.* During public comments on the memorial, the city of Lake Elsinore received negative feedback on the use of the cross. *Id.* at *2. Multiple members of the city government made it clear that they did not like that the criticisms were aimed at forcing Christians to “hide” the cross or the fact that the country is a “Christian nation.” *Id.* Later, a design change was proposed to add a row of additional Christian crosses and the Star of David behind the larger cross, in an effort to make the display appear as though it was depicting an accurate World War II soldier. *Id.* at *3. The memorial’s design was eventually approved. *Id.* at *4.

The court determined that *Lemon* framework applies to the California No Preference constitutional clause, and started its analysis with that framework. *Id.* at *6. “When a symbol generally associated with religion is included as part of a larger display, the relevant question is whether the government had a predominantly secular purpose for including the religious symbol within the context of the larger setting.” *Id.* at *7 (emphasis added). The opinion reasons that even if the city did intend to include the symbol for a secular purpose, the court must determine whether that neutrality was abandoned. *Id.* at *8. The district court had no problem determining that the city had a predominantly religious purpose when it examined comments made during the city council meeting for both the original and the modified display. *Id.* It was also concluded that the attempt to change the display into an historical depiction of a World War II cemetery was merely a litigation position. *Id.* at *11.

As to the effect of the monument, the court again cited to the discussions of the city officials, but also referred to the monument itself:

The backdrop of the granite rectangle with the semi-circle top that displays the memorial’s text and images is dark black. (Trial Ex. 5–2). Against this backdrop, a soaring eagle and an American flag appear in a gray color on the top half of the stone. (*Id.*). The text of the memorial appears in front of the flag in white, but is somewhat obscured by the flag. (*Id.*). And in bright white on the bottom half of the black stone, the boldest and most visible elements of the display are the soldier kneeling with his

⁷ It was originally intended to erect a memorial for a single soldier who died serving in Afghanistan, but the city decided to erect a monument for all city veterans. *Id.* at *1.

gun in front of the central cross. (*Id.*). The two rows of additional crosses and Stars of David are smaller, somewhat lighter in color, and in the backdrop to the left of the central cross, and a visitor's eyes are drawn first to the soldier and the central cross. (*Id.*). Although the cross is a component of the imagery of World War II cemeteries such as Normandy, it remains “a marker of an individual grave, not a universal monument to the war dead.” Trunk, 629 F.3d at 1113. Here, the primary emphasis is a Christian grave, which may lead observers to believe that Lake Elsinore is only honoring Christian veterans. (Emphasis added)

Id. at 14. The court concluded that the memorial violated both the Establishment Clause of the First Amendment and the No Preferences clause of the California constitution. *Id.* at *15.

This case is helpful in that it is an individual symbol on a single monument that is not itself religious in nature. However, it is dissimilar in many other ways. The memorial in Boone County was privately donated. It does list two specific individuals in addition to the general text honoring veterans of the Gulf War. The ichthys is far from prominent. There doesn't seem to be any of the language from any government officials indicating the symbol's purpose. And it is unclear how a small ichthys symbol will be analyzed, rather than a large, impossible-to-miss Latin cross. But we believe that knowing how at least one court handled a somewhat similar situation is instructive.

VII. Conclusion of Legal Discussion. The provisions of the Missouri Constitution clearly present a higher hurdle for the keeping of the Memorial, on the courthouse property, with the Symbol displayed on the Memorial. The biggest contextual issue, in our opinion, is the issue as to how the language on the Memorial will be interpreted by a reasonable viewer. In our view, it will not be interpreted as being purely a memorial to the two fallen soldiers, whose names are engraved upon it, but as also being a memorial to all soldiers of Boone County, or even Missouri (or perhaps even the United States and its allies in general) who served during Operation Desert Storm. The words which appear above the engraved names of the two fallen soldiers are as follows:

"To the men who gave their lives, and the men and women who offered but, were spared"

These words cause the Memorial be to more than just a monument for just the two deceased soldiers, but as being a monument for the sacrifice of many other individuals, and it impossible to assume that all of those individuals were or are Christians. The words quoted above are more than just an epitaph honoring the sacrifice of the men whose names are on the monument – it is praise for all of the individuals who served “but, were spared.” One asks “spared by whom?” Were they spared by the act of God or by the Grace of Christ who is symbolized by the Symbol? Note that the Memorial is also part of a display featuring other monuments to soldiers who served and died in past wars. It is thus part of a larger scheme honoring soldiers across generations of American wars. The Memorial is not, then, like the tombstone of an individual soldier. It is a monument, by its own terms, to two men who gave their lives and “the men and women who offered but, were spared.” It

would not be at all unreasonable, therefore, for a viewer of the Memorial to conclude, based on the language of the Memorial in question and the presence of the fish Symbol thereon (with the Memorial being in its place in the Boone County war memorial displays at large), that a preference is being given by Boone County to soldiers of the Christian religion to the exclusion of the soldiers who served while adhering to other faiths – or no faith at all. This Memorial, therefore, seems to violate the requirement or test for "religious neutrality" which is applicable to the Establishment Clause of the federal Constitution (see *McCreary, supra* at 881), and which would likely be more strongly enforced by or required by Missouri's even higher wall requirement for state/religion separation.

There are reasons to believe that the precedents of the United States Supreme Court, as cited in the ADF Letter, are not particularly helpful in resolving the issue before the Boone County Commission. In the first place, it is noted that Missouri has, traditionally, been highly skeptical of any use of public funds (and by implication, public property), in any manner which would demonstrate a governmental preference for, or a governmental discrimination against any church, sect, creed or religion. The only federal cases, decided under the Establishment Clause, which deal with "passive monuments," appear to have involved the Ten Commandments. In fact, the three opinions relied upon by ADF in the ADF Letter (*Van Orden, Sumnum, and Mercer County*) all involve the Commandments. It is respectfully noted that each of the decisions in these cases, to the effect that the display of the Ten Commandments in question did not violate the Establishment Clause, was based upon a conclusion that the Commandments, under the circumstances, could be found to have been exhibited in honor of the American legal tradition or standards of social conduct, or historical traditions. See *Mercer County*, 432 F.3d at 640-41; *Van Orden*, 545 U.S. at 701 (Breyer, J., concurring) ("In certain contexts, a display of the tablets of the Ten Commandments can convey ... a secular moral message (about proper standards of social conduct). And in certain contexts, a display of the tablets can also convey a historical message (about a historic relation between those standards and the law)); and *Sumnum*, 555 U.S. at 483 (Scalia, J., concurring). The ichthys can't be said to have any such historical tradition or statement of societal values, aside from whatever can be implied through its representation of Jesus Christ. In fact, it appears that the use of this symbol has only relatively recently seen a resurgence as a sign of Christianity. See *Webb v. City of Republic, Mo.*, 55 F. Supp. 2d 994, 995-96 (W.D. Mo. 1999)⁸. Also potentially important is the fact that there is no indication on the Memorial itself that it was donated by anyone, much less an indication of who donated it (although the piece covering up the symbol does now state that it was donated in 1992).

So, we are forced to the conclusion that the Constitution of both the United States and Missouri require the Memorial's removal or Symbol removing alterations.

⁸ See also <http://www.biblestudy.org/biblepic/christian-fish-symbol.html> ("For whatever reason, the Ichthus or 'Jesus Fish' fell out of popular use for many years until the early 1970s. It experienced a resurgence in use beginning around 1973 and has since become a worldwide icon of the Christian faith.")

VIII. Passing Thoughts. While these thoughts are not particularly "legal" thoughts, we think that they do deserve some mention, at least in passing. The questions before the Boone County Commission, with respect to the Memorial, are not questions of "political correctness" or "political sensitivity." The questions, rather, are those of conformity with the law, by officials who are sworn to uphold the Constitution of the United States and Missouri. When there is substantial cause to believe that the law imposes a requirement on public officials, then, even if there are arguments that such requirement is not so imposed, in our view the officials are required to proceed on the basis of a good faith, well founded belief that the requirement exists. If there are those who disagree with this conclusion, then those who do so disagree can seek redress in the court. Here, it seems to us (and we respectfully conclude that):

1. The Symbol, the fish Symbol, the ichthys Symbol, is clearly, without argument, a Christian symbol;

2. The Symbol appears on the Memorial, which does not simply provide a memorial for the two individuals whose names appear thereon, but as a memorial or monument or expression of gratitude to other men and women who were spared in the Desert Storm operation, many of whom may well not have been Christian, or may have had faiths other than Christianity, or who may have had no faith at all;

3. The display of the Symbol on the Memorial, under these circumstances, could reasonably be found by reasonable persons to show that Boone County demonstrates a preference for Christianity, as opposed to other faiths or no faith at all, and the Memorial, therefore, in our view, violates the requirement for religious neutrality imposed upon governments by the federal Constitution, and more strongly imposed in Missouri by the Missouri Constitution.

Lest it be believed that this opinion is written by non-Christian secularists, let us abuse others of such a belief. The individual who signs this letter, and who has reached these conclusions, is a strong Christian, who even teaches courses in the science and art of Biblical interpretation. However, the issues here are not those of support for, or opposition of, Christianity, but rather are issues of support for the law. We are, in this country, constrained by the law. We must follow it.

It is our opinion and belief that under all of these circumstances, and taking into account all of the arguments, and recognizing that there can be arguments against our position, the County Commission should modify the Memorial to eliminate the ichthys Symbol (as has been done in the past), or move the Memorial so as to remove it from the courthouse grounds. There are other ways, better ways, to memorialize the lives of the two men, Patrick Kelly Connor, and Steven Paul Farnen, not to mention the lives of others who have their lives in the ongoing Iraqi and Afghanistan struggles.

HAPPY TO DISCUSS

We would be happy to discuss these matters at any time in which you desire to engage in such discussions.

Respectfully submitted:
Brown Willbrand, P.C.

By: 
B. Daniel Simon, Shareholder

Exhibit A - Photo of Memorial

Exhibit B - Photo of Memorial with plague covering Symbol

Exhibit C - ADF 6/6/2015 letter

Exhibit D - Wikipedia search results

OPERATION
DESERT STORM
PERSIAN GULF WAR
1990 — 1991

TO THE MEN WHO
GAVE THEIR LIVES,
AND THE MEN AND
WOMEN WHO OFFERED
BUT WERE SPARED

PATRICK KELLY CONNOR
STEVEN PAUL FARNEN



"EXHIBIT

A

OPERATION
DESERT STORM
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AND THE MEN AND
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BUT WERE STARED

PATRICK KELLY CONNOR
STEVEN PAUL EARNEN

DEDICATED

1992

EXHIBIT

B



June 26, 2015

VIA EMAIL: Commission@boonecountymo.org

Mr. Dan Atwill
Ms. Karen Miller
Ms. Janet Thompson
Boone County Commissioners
Boone County Government Center
801 E. Walnut, Room 333
Columbia, MO 65201-7733

VIA EMAIL: cdykhouse@boonecountymo.org

Mr. Charles J. Dykhouse
Boone County Counselor
801 E. Walnut, Suite 211
Columbia, MO 65201

Re: Boone County, Missouri Courthouse Plaza
Operation Desert Storm Memorial

Dear Boone County Commissioners and Mr. Dykhouse:

I am writing on behalf of Alliance Defending Freedom (“ADF”) to express our support for and encouragement of Boone County’s display of the Operation Desert Storm Memorial (the “Memorial”) in the original condition as donated. Our understanding is the original memorial contained a stylistic outline of a fish, sometimes referred to as an ichthus symbol. It is further our understanding that Americans United for Separation of Church and State has advised the County that displaying the Memorial with the ichthus is a violation of the so-called “separation of church and state.” Based upon this inaccurate advice, the County covered up the ichthus on the Memorial, and is now considering moving the Memorial to a private site that is less visible and less accessible to the public. I am writing this letter to correct the advice that was given to you and to offer our assistance to the County—free of charge—to help craft a policy that respects the original design of the Memorial. If the County adopts a policy with ADF assistance, we will also defend the County in any legal challenge to that display with no fees or costs.

By way of introduction, ADF is a not-for-profit legal alliance of more than 2,400 attorneys and like-minded organizations defending the right of people to freely live out their faith. ADF exists to educate the public and the government about important constitutional rights, particularly the freedom of religious expression. We frequently defend these important freedoms in the courts, and through our offices across the country, ADF has been called upon to assist and

“EXHIBIT C ”

successfully defend many public officials and legislative bodies on this and a variety of related issues. Last year, ADF successfully represented the Town of Greece, New York before the United States Supreme Court in a challenge to the Town's practice of opening its legislative sessions with a sectarian prayer. *Town of Greece v. Galloway*, 134 S.Ct. 1811 (2014).

The U.S. Constitution does not require the removal of religious symbols from memorials being displayed on public property. Permanent monuments on public property are typically considered to be government speech, even if they are paid for and donated by private parties.¹ Thus, any such monument must comply with the requirements of the First Amendment's Establishment Clause. In *Van Orden v. Perry*, the United States Supreme Court established the standard to determine whether a monument displayed on public property violates the Establishment Clause.² The monument at issue in *Van Orden* was a 6 foot by 3 foot memorial depicting the Ten Commandments, along with an eagle grasping the American flag, an eye inside of a pyramid, two small tablets with ancient script, and two Stars of David with superimposed Greek letters Chi and Rho, which represent Christ. The monument also contained an inscription noting that it was paid for and presented to the people of Texas by the Fraternal Order of Eagles. The monument was one of 17 monuments and 21 historical markers located on public property surrounding the Texas State Capitol. The purpose of the monuments and markers was to commemorate the "people, ideals, and events that compose Texas identity."³

The *Van Orden* Court held that the standard for applying the Establishment Clause to a passive monument is not the *Lemon*⁴ test that is applied in some other Establishment Clause contexts. Rather, the Court's "analysis is driven both by the nature of the monument and by our Nation's history."⁵ The Court explained 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."⁶ The Court identified numerous other public buildings in which the Ten Commandments are displayed, including the Capitol and the Supreme Court building itself. The Court freely acknowledged that the Ten Commandments are religious and have religious significance. Nevertheless, "[s]imply having religious content or promoting a message consistent with religious doctrine does not run afoul of the Establishment Clause."⁷ Accordingly, the Court held that:

¹ *Pleasant Grove City, Utah v. Sumnum*, 129 S.Ct. 1125, 1138 (2009).

² 545 U.S. 677, 686 (2005).

³ *Id.* at 681.

⁴ *Lemon v. Kurtzman*, 403 U.S. 602, 612-613 (1971) set forth the following three part test for evaluating Establishment Clause claims: (1) whether the challenged law or conduct has a secular purpose; (2) whether its principal or primary effect is to advance or inhibit religion; and (3) whether it creates an excessive entanglement of government with religion.

⁵ *Van Orden*, 545 at 686.

⁶ *Id.*

⁷ *Id.* at 690.

Texas has treated its Capitol grounds monuments as representing the several strands in the State's political and legal history. The inclusion of the Ten Commandments monument in this group has a dual significance, partaking both of religion and government. We cannot say that Texas' display of this monument violates the Establishment Clause of the First Amendment.⁸

Several months after *Van Orden*, the Sixth Circuit was faced with another constitutional challenge to a Ten Commandments display in *ACLU v. Mercer County, Kentucky*.⁹ Applying the *Van Orden* standard, the *Mercer* Court first addressed the ACLU's argument that it was offended by the display:

Were we to focus on the perceptions of individuals, every religious display would be "necessarily precluded so long as some passersby would perceive a governmental endorsement thereof." Thus, we find unavailing the ACLU's own assertions that it finds the display offensive and that the display "diminishes [its] enjoyment of the courthouse." Religion does not become relevant to standing in the political community simply because a particular viewer of a governmental display feels uncomfortable. Our concern is that of the reasonable person. And the ACLU, an organization whose mission is "to ensure that . . . the government [is kept] out of the religion business," does not embody the reasonable person.¹⁰

The Sixth Circuit then addressed the ACLU's mistaken and repeated reference to "the separation of church and state":

This extra-constitutional construct has grown tiresome. The First Amendment does not demand a wall of separation between church and state. Our Nation's history is replete with governmental acknowledgment and in some cases, accommodation of religion. Thus, state recognition of religion that falls short of endorsement is constitutionally permissible.¹¹

In upholding the constitutionality of the Ten Commandments display, the Court concludes:

⁸ *Id.* at 691-692.

⁹ 432 F.3d 624 (6th Cir. 2005).

¹⁰ *Id.* at 638 (internal citations omitted).

¹¹ *Id.* (emphasis added); see also, *Smith v. Jefferson Cnty. Bd. of Sch. Comm'rs*, Case No. 13-5957, at P. 14 (6th Cir. June 11, 2015) (reaffirming *Mercer's* holding that "the First Amendment does not demand a wall of separation between church and state.").

We will not presume endorsement from the mere display of the Ten Commandments. If the reasonable observer perceived all government references to the Deity as endorsements, then many of our Nation's cherished traditions would be unconstitutional, including the Declaration of Independence and the national motto. Fortunately, the reasonable person is not a hyper-sensitive plaintiff. Instead, he appreciates the role religion has played in our governmental institutions, and finds it historically appropriate and traditionally acceptable for a state to include religious influences, even in the form of sacred texts, in honoring American legal traditions.¹²

Several years after *Van Orden*, the Supreme Court, in *Summum*, was asked to determine whether a city's refusal to grant permission to a private party to erect a monument in a public park alongside other monuments, including a Ten Commandments monument, violated such party's freedom of speech.¹³ The Court held that the city did not violate the First Amendment free speech rights of the private party because the monuments constituted government speech, not private party speech.¹⁴ In its analysis, the Court addressed the question of whether a governmental entity necessarily adopts or embraces the message that the private party intends on conveying when the governmental entity accepts a monument to be placed on public property from a private party. The simple answer is no. "The meaning conveyed by a monument is generally not a simple one . . . Even when a monument features the written word, the monument may be intended to be interpreted, and may in fact be interpreted by different observers, in a variety of ways." The effect of monuments that do not contain text is likely to be even more variable.¹⁵ The Court concluded that:

Contrary to respondent's apparent belief, it frequently is not possible to identify a single "message" that is conveyed by an object or structure, and consequently, the thoughts or sentiments expressed by a government entity that accepts and displays such an object may be quite different from those of either its creator or its donor. By accepting a privately donated monument and placing it on city property, a city engages in expressive conduct, but the intended and perceived significance of that conduct may not coincide with the thinking of the monument's donor or creator. Indeed, when a privately donated memorial is funded by many small donations, the donors themselves may differ in their interpretation of the monument's significance. By accepting such a monument, a government entity does not

¹² *Id.* at 640-641 (internal citations omitted).

¹³ *Summum*, 129 S.Ct. at 1130.

¹⁴ *Id.* at 1138.

¹⁵ *Id.* at 1135.

necessarily endorse the specific meaning that any particular donor sees in the monument.¹⁶

Three important principles can be gleaned from *Van Orden* and *Summum*. First, the placement of a monument containing religious symbols or text, even overtly religious text such as the Ten Commandments, on public property along with other non-religious monuments cannot be presumed to violate the Establishment Clause. Second, the message conveyed by a monument varies and the message meant to be conveyed by the government may differ from the message intended to be conveyed by the private party. Third, a governmental entity does not necessarily endorse or accept the message of a private party by displaying a monument from such private party.

Applying these principles in the present matter, there is no reason to believe the Memorial violates the Establishment Clause. The Memorial is located on the Boone County courthouse lawn along with several other monuments honoring war veterans. As in *Van Orden*, the Memorial was commissioned by private individuals, paid for by private funds, and then donated to the County. Although I do not have a complete record surrounding the placement of the monuments, it appears that the monuments were placed on the courthouse lawn for the purpose of honoring the citizens of Boone County that have given their lives in defense of our liberty—not for a sectarian or religious purpose. Further, the inclusion of a religious symbol on a memorial is entirely consistent with America’s history of acknowledging the religious beliefs of the person for whom the memorial is erected. For example, religious symbols are replete throughout the memorials and tombstones in Arlington Cemetery and other military memorials located on federal government property. Accordingly, as with the Ten Commandments monuments in *Van Orden* and *Summum*, the inclusion of the ichthus on the Memorial at the Boone County Courthouse may be entirely consistent with the Establishment Clause. Thus, I would strongly encourage the County not to dishonor the sacrifice that Patrick Kelly Connor and Steven Paul Farnen have made for their country by removing the Memorial from the courthouse lawn, or censoring the Memorial through the covering up of the symbol that motivated their sacrifice.

We would be happy to discuss with you in detail how to best ensure that the public display of the monuments remains permissible and assist in any response to the demands placed upon you. For the sake of brevity, we have set forth here only a short summary of the recognized law. We can provide you with a much more detailed analysis of the controlling law and court opinions that may have an impact upon your courthouse display. Again, all of our legal services would be provided free of charge.

¹⁶ *Id.* at 1136.

Boone County Commissioners and Charles J. Dykhouse
June 26, 2015
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Alliance Defending Freedom and its allies stand ready and willing to defend the right to display religious messages on public property. If we may be of assistance, please do not hesitate to contact us.

Respectfully submitted,

/s/ Tyson C. Langhofer

Tyson C. Langhofer
Senior Counsel

Ichthys

From Wikipedia, the free encyclopedia

The **ichthys** or **ichthus** (/ˈɪkθəs/^[1]), from the Greek *ikhthys* (ἰχθύς, "fish"), is a symbol consisting of two intersecting arcs, the ends of the right side extending beyond the meeting point so as to resemble the profile of a fish. It was used by early Christians as a secret Christian symbol^[2] and now known colloquially as the "**sign of the fish**" or the "**Jesus fish**".^[3]

Contents

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Ichthys as adopted as a Christian symbol.

History

Origins

Greeks, Romans, and many other pagans used the fish symbol before Christians. In pagan beliefs, Ichthys was the offspring of the ancient Sea goddess Atargatis, and was known in various mythic systems as Tirgata, Aphrodite, Pelagia, or Delphine. The word also meant "womb" and "dolphin" in some tongues. Before Christianity adopted the fish symbol, it was known by pagans as "the Great Mother", and "womb". Its link to fertility, birth, and the natural force of women was acknowledged also by the Celts, as well as pagan cultures throughout northern Europe. In certain non-Christian beliefs the fish also has been identified with reincarnation and the life force.^[4]

Symbolic meaning

ΙΧΘΥΣ (Ichthus) is an acronym/acrostic^[5] for "Ἰησοῦς Χριστός, Θεοῦ Υἱός, Σωτήρ", (Iēsous Christos, Theou Yios, Sōtēr), which translates into English as "Jesus Christ, Son of God, Saviour".

- Iota (i) is the first letter of *Iēsous* (Ἰησοῦς), Greek for "Jesus".
- Chi (ch) is the first letter of *Christos* (Χριστός), Greek for "anointed".
- Theta (th) is the first letter of *Theou* (Θεοῦ), Greek for "God's", the genitive case of Θεός, *Theos*, Greek for "God".

“EXHIBIT D ”

- Upsilon (y) is the first letter of *(h)uios*^[6] (Υἰός), Greek for "Son".
- Sigma (s) is the first letter of *sōtēr* (Σωτήρ), Greek for "Savior".



An early circular ichthys symbol, created by combining the Greek letters IXΘΥΣ, Ephesus.

This explanation is given among others by Augustine in his *Civitate Dei*,^[7] where he notes that the generating sentence "Ἰησοῦς Χριστός [sic] Θεοῦ Υἱός Σωτήρ" has 27 letters, i.e. 3 x 3 x 3, which in that age indicated power. (This suggestion is obviously spurious, resulting from Augustine's ignorance of Greek.)^[8] Augustine quotes also an ancient text from the Sibylline oracles^[9] whose verses are an acrostic of the generating sentence.

A fourth century A.D. adaptation of *ichthys* as a wheel contains the letters IXΘΥΣ superimposed such that the result resembles an eight-spoked wheel.^[10]

Fish in the Gospels

Fish are mentioned and given symbolic meaning several times in the Gospels. Several of Jesus' twelve Apostles were fishermen. He commissions them with the words "I will make you fishers of men".

Having resurrected, Jesus is offered some broiled fish and honeycomb in Luke 24:41-43.

At the feeding of the five thousand, a boy is brought to Jesus with "five small loaves and two fish". The question is asked, "But what are they, among so many?" Jesus multiplies the loaves and fish to feed the multitude. In Matthew 13:47-50, the Parable of Drawing in the Net, Jesus compares God's decision on who will go to heaven or to hell ("the fiery furnace") at the end of this world to fishers sorting out their catch, keeping the good fish and throwing the bad fish away. In John 21:11, it is related that the disciples fished all night but caught nothing. Jesus instructed them to cast the nets on the other side of the boat, and they drew in 153 fish. In Matthew 17:24-27, upon being asked if his Teacher pays the temple (or two-drachma) tax, Simon Peter answers yes. Christ tells Peter to go to the water and cast a line, saying that a coin sufficient for both of them will be found in the fish's mouth. Peter does this and finds the coin.

The fish is also used by Jesus to describe "the Sign of Jonah". (Matthew 12:38-45) This is symbolic of the resurrection of Christ upon which the entire Christian faith is based. (1 Corinthians 15:1-58)

Early church

According to tradition, ancient Christians, during their persecution by the Roman Empire in the first few centuries after Christ, used the fish symbol to mark meeting places and tombs, or to distinguish friends from foes:

According to one ancient story, when a Christian met a stranger in the road, the Christian sometimes drew one arc of the simple fish outline in the dirt. If the stranger drew the other arc, both believers knew they were in good company. Current bumper-sticker and business-card uses of the fish hearken back to this practice.

—*Christianity Today*, Elesha Coffman, "Ask The Expert"^[2]



Funerary stele with the inscription IXΘΥC ZΩNTΩN ("fish of the living"), early 3rd century, National Roman Museum

There are several other hypotheses as to why the fish was chosen. Some sources indicate that the earliest literary references came from the recommendation of Clement of Alexandria to his readers (*Paedagogus*, III, xi) to engrave their seals with the dove or fish. However, it can be inferred from Roman monumental sources such as the Cappella Greca and the Sacrament Chapels of the catacomb of St. Callistus that the fish symbol was known to Christians much earlier. Another probable explanation is that it is a reference to the scripture in which Jesus miraculously feeds 5,000 people with fish and bread (Matthew 14:15-21, Mark 6:30-44, Luke 9:12-17, and John 6:4-13). The *ichthys* may also relate to Jesus or his disciples as "fishers of men" (e.g., Mark 1:17).^[11] Tertullian, in his treatise *On Baptism*, makes a pun on the word, writing that "we, little fishes, after the example of our IXΘΥΣ Jesus Christ, are born in water."^[12] Still another explanation could be the reference to the sign of Jonah. Just like he was in the belly of a big fish, so Christ was crucified, entombed for three days, and then rose from the

dead.

Revival and adaptations of the symbol

Popular culture

The "Jesus Fish" was rebirthed in the early 1970s to become an icon of modern Christianity recognized around the world. It was caused through a chain of circumstances. First the Vietnam War caused distrust and peaceful rebellion within the younger generations of Americans and Australians. In 1973 they brought the symbol and message to the Aquarius Rock Festival in Nimbin, Australia. From there it became a household symbol around the world. Today, it can be seen as a decal or emblem on the rear of automobiles or as pendants or necklaces as a sign that the owner is a Christian. It is incorporated into business logos or in business advertisements and listings in telephone books. It is also seen on clothing. Versions of this include an Ichthys with "Jesus" or "IXΘΥΣ" in the center, or simply the Ichthys outline by itself.^[13]

Music festival

Ichthus Music Festival is an annual large outdoor Christian music festival held every year in mid-June in the town of Wilmore, Kentucky.

See also

- Ichthus Christian Fellowship
- Chi Rho and Labarum
- Awareness ribbon
- Variations of the ichthys symbol

References


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2. Elisha Coffman (August 8, 2008). "What is the origin of the Christian fish symbol?" (<http://www.christianitytoday.com/ch/asktheexpert/oct26.html>). Christianity Today.
3. "Evolution of religious bigotry" (<http://www.latimes.com/news/opinion/commentary/la-oe-goldberg1apr01,0,5893988.column>)
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5. Christian H. Bull, Liv Ingeborg Lied, John D. Turner, editors (2012). *Mystery and Secrecy in the Nag Hammadi Collection and Other Ancient Literature: Ideas and Practices* ([http://books.google.com/books?id=qCwaSTk5iEcC&pg=PA327&lpg=PA327&dq=eight-](http://books.google.com/books?id=qCwaSTk5iEcC&pg=PA327&lpg=PA327&dq=eight-spoked+wheel+ichthys&source=bl&ots=Ymy1KLiN9R&sig=HIMFpktTXJM34dIEHfsuOLkJbek&hl=en&sa=X&ei=IAEMUqfHBqLlyAH_mID4BA&ved=0CDoQ6AEwBDge#v=onepage&q=eight-spoked%20wheel%20ichthys&f=false)



The traditional Christian *Jesus fish* (top), with a Christian variation designed to promote evolutionary creationism (bottom)

spoked+wheel+ichthys&source=bl&ots=Ymy1KLiN9R&sig=HIMFpktTXJM34dIEHfsuOLkJbek&hl=en&sa=X&ei=IAEMUqfHBqLlyAH_mID4BA&ved=0CDoQ6AEwBDge#v=onepage&q=eight-spoked%20wheel%20ichthys&f=false). Leiden, The Netherlands: Koninklijke Brill NV. p. 327. ISBN 978-90-04-21207-7.

6. The initial "h" was sometimes pronounced, depending on dialect and period, but in Ionic orthography the sound was written with the rough breathing diacritical mark instead of a full letter, and so would not be used to form an acronym)
7. Augustine. *The City of God*. Wikisource. XVIII, 23.
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9. Sibylline oracles, Book viii, 284-330 (Greek text, 217-250)
10. Christian H. Bull, Liv Ingeborg Lied, John D. Turner, editors (2012). *Mystery and Secrecy in the Nag Hammadi Collection and Other Ancient Literature: Ideas and Practices* ([http://books.google.com/books?id=qCwaSTk5iEcC&pg=PA343&lpg=PA343&dq=eight-](http://books.google.com/books?id=qCwaSTk5iEcC&pg=PA343&lpg=PA343&dq=eight-spoked+wheel+ichthys&source=bl&ots=Ymy1KLiN9R&sig=HIMFpktTXJM34dIEHfsuOLkJbek&hl=en&sa=X&ei=IAEMUqfHBqLlyAH_mID4BA&ved=0CDoQ6AEwBDge#v=onepage&q=eight-spoked%20wheel%20ichthys&f=false)spoked+wheel+ichthys&source=bl&ots=Ymy1KLiN9R&sig=HIMFpktTXJM34dIEHfsuOLkJbek&hl=en&sa=X&ei=IAEMUqfHBqLlyAH_mID4BA&ved=0CDoQ6AEwBDge#v=onepage&q=eight-spoked%20wheel%20ichthys&f=false). Leiden, The Netherlands: Koninklijke Brill NV. pp. 340, 343. ISBN 978-90-04-21207-7.

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13. "Christian symbols: Fish (Ichthus), cross and crucifix" (http://www.religioustolerance.org/chr_symb.htm). *religioustolerance.org*. Retrieved 22 April 2014. "The body of the symbol may be empty, or may contain a name ('Jesus' or 'ICTUS')."

External links

- Coins of the Emperor Augustus (<http://www.usask.ca/antiquities/coins/augustus.html>)
- Coins of the Emperor Domitian (<http://www.usask.ca/antiquities/coins/domitian.html>)
- [earlychristians.org](http://www.earlychristians.org) (<http://www.earlychristians.org>) on early Christians in general including martyrdom
- Ichthus Christian Fellowship (<http://www.ichthus.org.uk/>) A large Christian organisation in the UK led by Roger Forster
- Ichthus Music Festival (<http://www.ichthusfestival.org/>) The longest running Christian music festival in the nation having been started in 1970 as a Christian response to Woodstock.
- Principal Christian Symbols: The Fish (Ichthus), Cross & Crucifix (http://www.religioustolerance.org/chr_symb.htm) Extensive explanations on several popular Christian symbols, including the ichthys
- Symbolism of the Fish (<http://www.newadvent.org/cathen/06083a.htm>) - Catholic Encyclopedia article
- The Harvard Ichthus, Journal of Christian Thought (<http://harvardichthus.org>)



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Look up *ichthys* in Wiktionary, the free dictionary.

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