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July 8, 2019

Honesdale Borough Council
Attention: M. Augello, President
958 Main Street
Honesdale PA 18431

**RE: Gibbons Park Cross
American Legion v. American Humanist Assn.**

Dear Mr. Augello:

I am writing to address the June 20, 2019, U.S. Supreme Court decision in the case of *American Legion v. American Humanist Assn.* (hereinafter, "Bladensburg Case") and its potential impact with respect to the Freedom from Religion Foundation complaint received a year ago. I have included a copy of the decision for your convenience.

This recent Supreme Court decision involved the Bladensburg "Peace Cross" located in Prince George's County, Maryland. The cross was erected in 1925 as a memorial to county residents killed in service to the country during World War I. In 2014, nearly 90 years after it was erected, the American Humanists Association filed suit seeking to have the cross removed from the public land on which it sat as a violation of the Establishment Clause of the Constitution. It was hoped that the Supreme Court's decision in this case might resolve confusion as to the legal standards governing these matters. While the Court's 7-2 opinion upholds the Constitutionality of the Peace Cross, it falls significantly short of resolving the standards applicable to these challenges.

For years legal analysis of these disputes has involved the use of two competing and often conflated legal tests. The first of these tests, "Lemon Test" derived from the 1971 case of *Lemon v. Kurtzman*, consists of a three-pronged analysis of whether a challenged government action (1) has a secular purpose; (2) has a "principal or primary effect" that "neither advances nor inhibits religion"; and (3) does not foster "an excessive government entanglement with religion." The second test was authored in 2005 by Justice Stephen Breyer in the case of *Van Orden v. Perry*. The *Van Orden* test seeks to avoid a mechanical analysis by instead focusing on the exercise of legal judgment according to the basic purposes underlying the Establishment Clause.

Court in the Bladensburg Case noted the limitations of the Lemon Test as a framework for analyzing Establishment Clause cases involving very old memorials. The opinion points to several difficulties with the test including proving the motives of the people involved in erecting memorials long ago; the fact that over time a memorial may take on multiple meanings or purposes for members of the community involved; the fact that the message conveyed by a memorial may evolve over time; and finally, the fact that ordering the removal of a long-established monument may be viewed as more of an aggressively hostile act rather than an attempt to maintain religious neutrality.

The Court in the Bladensburg case examined the historical underpinnings and evolution of the use of crosses as a symbol to commemorate the lives of those lost in World War I. It also examined the history of the cross in question and noted that with the passage of time the Peace Cross had acquired historical

importance by reminding those in the community of the sacrifices and deeds of their predecessors. The Court concluded that while the Peace Cross was undoubtedly a Religious symbol, it had developed meaning and historical significance beyond its religious meaning. The Court expressed concern that the removal of the Peace Cross would be more of a hostile act against religion than an attempt at maintaining a position of neutrality towards religion.

While 4 of the 9 Supreme Court Justices appeared ready to abandon the Lemon Test, only one expressly called for it to be overruled. A second Justice concluded that the Court was adopting a new "history and tradition" test to be applied in Establishment Clause case. A third Justice took the position that in deciding Establishment Clause cases a court must distinguish between real threats of "establishment" and "mere shadow." A fourth Justice was critical of the Lemon Test but wrote separately to emphasize the need to preserve the test's focus on evaluating the "purposes and effects" of government action in these cases. One Justice took issue with the Court's failure to adequately clarify the appropriate standard to be used in Establishment Clause cases.

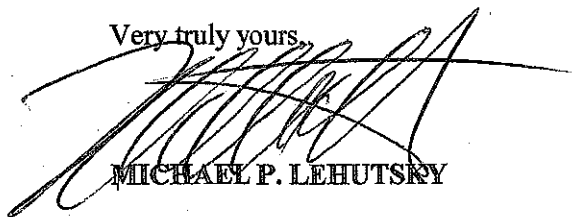
There was also hope that the Bladensburg Cross case might result in the rejection of "offended observer standing" to bring lawsuits challenging monuments. This principle allows people to bring a legal challenge in court with no evidence of actual harm other than their subjective assertion that they are offended by the sight of the monument. Only two Justices in the Bladensburg Cross case addressed the issue of "offended observer standing." These two rejected the concept and therefore would have concluded that the mere allegation of being offended by the cross was inadequate to justify a federal lawsuit. The fact that only two Justices chose to address this issue is disappointing and could signal the reluctance of the majority of the Court to question standing in these cases.

The Bladensburg Cross case is helpful in defending Establishment Clause challenges. It provides strong statements in support of the historical importance of religion in our society. However, it's focus on the particular facts, circumstances and history involved leaves it vulnerable to the claim that it is a "fact specific" ruling. In the absence of a clearly defined analytical framework, it appears that confusion is likely to continue when it comes to analyzing Establishment Clause cases.

With reference to the Gibbons Park Cross its history is somewhat clouded. There may be a question as to whether this cross in Honesdale has evolved in such a manner as to develop a message or purpose beyond its religious symbolism. The Peace Cross had the added gravitas of being a memorial dedicated to specific individuals who had given their lives in service to their country. Further, it was a permanent fixture in the community. It seems clear that those considerations do not apply to the cross in Gibbons Park.

It is not my purpose to provide an opinion as to whether the Gibbons Park Cross would or would not survive an Establishment Clause challenge in the wake of *American Legion v. American Humanist Assn.* Rather, my purpose is to review the opinion; candidly assess the analytical framework used by the Supreme Court; and, to highlight some of the questions that need to be considered by Council as it moves forward in addressing the Gibbons Park cross. I would welcome the opportunity to discuss any particular questions you may have through the borough solicitor if you wish. Thank you for your time and attention in this regard.

Very truly yours,



MICHAEL P. LEHUTSKY

Enc.