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MEMORANDUM

TO: State Capitol Building Advisory Committee

FROM: Debbie Haskins

DATE: August 2, 2012

SUBJECT: Constitutionality of the Armenian khachkar donation¹

Issue: Is the display on Capitol grounds of a khachkar with an Armenian cross constitutionally permissible?

Conclusion: Under federal and state case law, the display of a religious symbol on state property is permissible if the display has a secular purpose, does not advance or endorse religion, and does not foster an excessive entanglement with religion. While the state can not prevent a law suit from being filed against the display based on establishment clause grounds, there are some steps that the state can take to make a stronger case to defend against such an action. Such steps include: Making a clear statement about the secular purpose of the display; and placing an interpretive sign near the khachkar that explains the purpose and reason for its display.

Background

The Armenians of Colorado have filed an application with the Capitol Building Advisory

¹ This legal memorandum results from a request made to the Office of Legislative Legal Services (OLLS), a staff agency of the General Assembly, in its capacity as in-house counsel for the General Assembly. OLLS legal memorandums do not represent an official legal position of the General Assembly or the state of Colorado and do not bind the members of the General Assembly. They are intended for use in the legislative process and as information to assist the members in the performance of their legislative duties.

Committee (Committee) to make a permanent gift of a memorial for the Capitol grounds. The proposed memorial is a replica of a destroyed khachkar that would be added to the existing Armenian memorial garden and whose purpose would be to memorialize the victims of the Armenian genocide. The Armenian memorial garden currently includes a large spruce tree planted in 1982 and a plaque memorializing the victims of the 1915 Armenian genocide. The site is in the northeast quadrant of the Capitol grounds.

According to the documents submitted with the application, the replica is based on a khachkar dating to 1583 from the medieval Djulfa cemetery, which was deliberately destroyed in December 2005 by the government of Azerbaijan, which denies that the Armenian genocide occurred. The cemetery and its khachkars, which are grave-stone markers, were destroyed to erase proof that, in medieval times, Armenians lived in what is now Azerbaijan. UNESCO has added the symbolism and craftsmanship of khachkars to the World Intangible Heritage List.

Colorado's ties to the Armenian genocide include that, at the time of its occurrence, the Armenian genocide was widely reported in Colorado; that many Coloradans fund-raised to help the survivors of the Armenian genocide, known as "the starving Armenians"; that some of the survivors settled in Colorado; and that the Colorado General Assembly has passed several resolutions memorializing the victims of the Armenian genocide.

The particular khachkar that would be donated to the state is carved with Armenian decorative symbols, a mystic two-bodied creature with Pagan roots surrounded by two angels, and an Armenian cross inserted within an Islamic/Gothic pointed arch. An Armenian cross similar to one on the khachkar is on the plaque in the Armenian memorial garden. The Armenians of Colorado is a 501(c)3 organization. Its web site states that its purpose is "to create a cohesive Armenian community and to further the understanding of Armenian history, culture, language, customs, and heritage".

Because the khachkar includes a cross associated with the Christian faith, the Committee was concerned about the potential of legal challenges being brought against the state for establishing or promoting religion under the First Amendment of the United States constitution or under Article II, Section 4, of the Colorado constitution. This memo focuses on the federal and state cases that involve either nativity scenes, menorahs, or statues or monoliths of the Ten Commandments displayed on government property.

U.S. Supreme Court Cases

The establishment clause states that: "Congress shall make no law respecting an establishment of religion". The establishment clause is made applicable to the states by the Fourteenth Amendment. See *Cantwell v. Connecticut*, 310 U.S. 296 (1940). The U.S. Supreme Court's decisions on establishment cases are not entirely clear and have been

inconsistently applied as acknowledged by members of the court in several opinions. *Lemon v. Kurtzman*, 403 U.S. 602 (1971), was the gold standard for establishment clause cases, but it is used somewhat inconsistently now by the courts. The case establishes the "Lemon test", as follows:

If a practice/statute/monument touches on religion, it is permissible under the establishment clause if:

- 1) It has a secular purpose;
- 2) It neither advances nor inhibits religion in its principal or primary effect; and
- 3) It does not foster an "excessive entanglement" with religion.

Each of the three parts to the "Lemon test" can lead to excessive debate and have been litigated many times since the *Lemon* case. Although the three-part test in *Lemon* has never been overruled, the U.S. Supreme Court has further fleshed out the second prong -- that the principal government action neither advances or inhibits religion. In *County of Allegheny v. ACLU*, 492 U.S. 573 (1989), the U.S. Supreme Court modified the "Lemon test" to focus on whether the suspect government act "has the purpose or effect of 'endorsing' religion."² *Id.* at 592.

In *Allegheny*, the ACLU brought a challenge to two separate displays, both on city property. One was a nativity scene donated by a religious organization that was displayed in a grand staircase of a public building. The other was an outdoor display on public property containing a menorah. The menorah was next to a live tree decorated with Christmas lights along with a sign from the mayor saluting liberty that stated: "During this holiday season, the city of Pittsburgh salutes liberty. Let these festive lights remind us that we are the keepers of the flame of liberty and our legacy of freedom". In *Allegheny*, the Court stated that a government entity must not convey through its actions that one religion or religious practice or belief is favored over any other. The Court held that the creche was unconstitutional because the government "sends an unmistakable message that it supports and promotes the Christian praise to God that is the creche's religious message". However, the Court held that the display of the menorah along with a Christmas tree and the salute to liberty sign was permissible because of the context of the display. *Allegheny* brings to the forefront the critical concept of the "context" of the display -- how, when, and where a monument or display is used. The *Allegheny* court notes that the effect of a governmental entity's use of religious symbols depends on the context in which it is placed. In *Allegheny*, the overall display helped put a symbol of a particular faith (Judaism) into a more secular context, while the opposite held true for the creche.

² *County of Allegheny v. ACLU*, 492 U.S. 573, 592 (1989).

In discussing the test to be derived from prior establishment cases, the court in *Allegheny* stated:

The effect of the display depends upon the message that the government's practice communicates: the question is 'what viewers may fairly understand to be the purpose of the display.' ... That inquiry, of necessity, turns upon the context in which the contested object appears: '[A] typical museum setting, though not neutralizing the religious content of a religious painting, negates any message of endorsement of that content.' ... The concurrence thus emphasizes that the constitutionality of the creche in that case depended upon its 'particular physical setting,' *ibid.*, and further observes: 'Every government practice must be judged in its unique circumstances to determine whether it [endorses] religion.'³

Moreover, in *Allegheny* the court noted that the menorah is a religious symbol of Judaism but also is the "primary visual symbol of a holiday that, like Christmas, has both religious and secular dimensions".⁴ In *Allegheny*, the *overall display* and the fact that the menorah is a symbol that has both religious and secular dimensions helped put the menorah into a more secular context.

The other important aspect of the *Allegheny* case is the presence of the sign. The court stated:

The mayor's sign further diminishes the possibility that the tree and the menorah will be interpreted as a dual endorsement of Christianity and Judaism. The sign states that during the holiday season the city salutes liberty. Moreover, the sign draws upon the theme of light, common to both Chanukah and Christmas as winter festivals, and links that theme with this Nation's legacy of freedom, which allows an American to celebrate the holiday season in whatever way he wishes, religiously or otherwise. While no sign can disclaim an overwhelming message of endorsement, see *Stone v. Graham*, 449 U.S., at 41, an "explanatory plaque" may confirm that in particular contexts the government's association with a religious symbol does not represent the government's sponsorship of religious beliefs. See *Lynch*, 465 U.S., at 707 (Brennan, J., dissenting). Here, the mayor's sign serves to confirm what the context already reveals: that the display of the menorah is not an endorsement of religious faith but simply a recognition of cultural diversity.⁵

³ *Id.* at 695.

⁴ *Id.* at 614.

⁵ *Id.* at 619.

Colorado cases

Article II, Section 4, of the Colorado constitution has its own more detailed version of the First Amendment, which includes a preference clause that states: "Nor shall any preference be given by law to any religious denomination or mode of worship".

In a series of cases known as *Conrad I*, 656 P. 2d 662 (1983), and *Conrad II*, 724 P. 2d 1309 (1986), the Colorado Supreme Court applied the *Lemon* test and held that the display of a nativity scene as part of the Christmas holiday building decorations at the Denver city and county building did not violate the preference clause of the state constitution.

Another important Colorado case is *State v. Freedom From Religion Foundation*, 898 P. 2d 1013 (Colo. 1995), in which the Colorado Supreme Court upheld the constitutionality of the Ten Commandments monument in Lincoln Park.⁶ The Colorado Supreme Court followed the principles set forth in the *Conrad I and II* cases and the legal standard set in *Lemon* as modified in *Allegheny County*. The court concluded that the Ten Commandments monument was not erected with the purpose of endorsing religion, taking note of the fact that it included symbols of Judaism and Christianity, along with the "all-seeing eye", which has both secular and nonsecular meanings. The court also looked at the stated secular purpose of the donation, which was part of a national effort to show youngsters that there were recognized codes of behavior to guide and help them. The other significance of the case to the situation at hand is the significance the court gave to the fact that the monument is one of many others in Lincoln Park and in the Capitol complex grounds that commemorate or memorialize other people and events. The court wrote:

The various monuments found around the park in fact represent a cornucopia of different cultural events and experiences that make up the history of our nation and reflect upon a history that is also Colorado....This collection of monuments celebrates a history of standing up against oppression, foreign and domestic, and an acknowledgement of the cultural tapestry that is Colorado....While the text of the Ten Commandments affixed to a monument would not be appropriately placed on state property *standing alone*, here the Ten Commandment monument and its countervailing secular text fits within the melange of historical commemorative accounts found in Lincoln Park.

⁶ This decision was based on an interpretation of Colorado's constitution and occurred prior to the U.S. Supreme Court ruling in *McCreary County v. ACLU*, 545 U.S. 844 (2005), in which the placing of the Ten Commandments in a public park was found to constitute a religious purpose. In that case, the Court notes that it is necessary to take the purpose of the government's action seriously and understand the purpose in light of the context in which the monument is displayed. To determine purpose and context the Court introduced the "objective observer" idea and the need to consider what such a person would think the purpose of the government was, how he or she would interpret various external signs of that purpose, as well as whether the government had a sham secular purpose.

Accordingly, we find that the content and context of the monument negate any suggestion that the government is endorsing religion. We conclude on the record before us that the objective viewers would not perceive the monument in its Lincoln park setting as government endorsing religious belief or suggesting that the religion in general is relevant to their standing in the political community.⁷

Analysis

The effect of the state's use of a religious symbol depends on what is the purpose for its display, what message is conveyed by the symbol, and the context in which it is placed.

The first question is whether the display of the khachkar has a *secular* purpose.

The Armenian cross and the khachkar itself are cultural symbols of Armenian identity. The khachkar is a religious symbol, a grave-stone, and a cultural symbol. Its placement in public places around the world is also becoming a symbol of the Armenian genocide that occurred in 1915.⁸ The addition of a khachkar to the existing memorial would bring further attention to the Armenian genocide, memorialize the victims of the Armenian genocide, and would bring attention to the modern-day efforts to deny that the Armenian genocide occurred. Like the Ten Commandments monument in Lincoln Park, the khachkar includes multiple symbols that have both secular and nonsecular meanings. As further explored in this memo, the Committee could articulate the secular purpose of memorializing the victims of the Armenian genocide as the reason for its placement on state property.

The second question is whether the display of the khachkar is endorsing a particular religion or would be perceived by others as endorsing the Christian faith. In this instance, the *State v. Freedom From Religion Foundation* case is important. That case set out the importance of looking at the *context* of the location. The court held that the Ten Commandments monument in Lincoln Park was permissible because of the context of its location. It was being added to a series of monuments and memorials in Lincoln Park that celebrates "a history of standing up against oppression, foreign and domestic". That same type of context could be said to exist on the state Capitol grounds. In addition to all of the monuments that are in Lincoln Park, which is part of the Capitol Complex, there currently are other plaques that deal with oppression and mistreatment of other peoples on the state Capitol grounds:

- The Ralph Carr Memorial was placed to remember Governor Ralph Carr and

⁷ *State v. Freedom From Religion Foundation*, 898 P. 2d 1013, 1024 - 26 (Colo. 1995).

⁸ Research on the internet indicates that replicas of khachkars have been displayed in Poland and other places in the U.S. as memorials to commemorate the victims of the Armenian genocide. Almost all of the khachkars in the U.S. are located in cemeteries or on church property.

the Japanese-Americans who were relocated from the West Coast and interned in the Amache internment camp during World War II. One plaque includes a quote from Governor Carr, who was an outspoken advocate for the Japanese-Americans and who spoke out publicly against the forced relocation and internment of Japanese-Americans. A second plaque explains what happened to the Japanese-Americans at Camp Amache, and a third plaque indicates that the memorial was placed by the Colorado Bar Association, the Japanese-American community, and the state of Colorado in 1996.

- The Civil War memorial is dedicated to the memory of Colorado soldiers who died in the Civil War and lists Sand Creek as a battle or engagement. It was erected in 1909. Ninety-years later, an interpretative plaque was added to the base of the Civil War memorial noting that the reference to Sand Creek as a battle of the Civil War mischaracterizes the event rather than recognizing that what happened at Sand Creek was a massacre of innocent Native American elderly men, women, and children by the soldiers.⁹ The plaque was placed as a result of the passage of SJR 99-017 by the Colorado General Assembly.

When the khachkar is viewed in the context of being placed together with other memorials on the Capitol grounds and in Lincoln Park that celebrate Colorado's history of standing up against oppression and mistreatment of people, it is permissible. If the Committee included an explanatory plaque explaining the purpose for displaying the khachkar, it would help show that the state's display of the khachkar does not represent the government's sponsorship of religious beliefs but rather is another example of Colorado's history of supporting oppressed and mistreated peoples.

Finally, does the display of the khachkar foster an excessive entanglement with religion? No. Most of the cases involving excessive entanglement issues deal with government aid to religious organizations or situations where the government is telling a religious group what to do. That element is not present in this instance.

⁹ The plaque includes two paragraphs "The controversy surrounding this Civil War Monument has become a symbol of Coloradans' struggle to understand and take responsibility for our past. On November 29, 1864, Colorado's First and Third Calvary, commanded by Colonel John Chivington, attacked Chief Black Kettle's peaceful camp of Cheyenne and Arapaho Indians on the banks of Sand Creek, about 180 miles southeast of here. In the surprise attack, soldiers killed more than 150 of the village's 500 inhabitants. Most of the victims were elderly men, women and children.

Though some civilians and military personnel immediately denounced the attack as a massacre, others claimed the village was a legitimate target. This Civil War monument, paid for from funds by the Pioneers' Association and State, was erected on July 24, 1909, to honor all Colorado Soldiers who had fought in battles in the Civil War and elsewhere. By designating Sand Creek a battle, the monument's designers mischaracterized the actual events. Protests led by some Sand Creek descendants and others throughout the twentieth century have led to the widespread recognition of the tragedy as the Sand Creek Massacre."

Conclusion

It should be emphasized that there is nothing to prevent a plaintiff from suing the state over the display of the khachkar. However, applying the principles from the case law reviewed in this memo to this situation, the committee can take some steps to make a stronger case for the state to defend against an action, should one ever be filed. Such steps could include: 1) making a clear statement in the record at the meeting approving the application and the display about the secular purpose of displaying the khachkar to memorialize the victims of the Armenian genocide and the significance of the Armenian genocide to Colorado history as outlined in the application; and 2) placing an interpretive sign or plaque near the khachkar that explains the purpose and reason for its display.

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