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Via Email and U.S. Mail

Loudoun County Board of Supervisors
P.O. Box 7000
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Leesburg, VA 20177-7000

Dear Board of Supervisors:

The Rutherford Institute, a non-profit civil liberties organization headquartered in Charlottesville, Virginia, has been contacted by several of your constituents expressing their concerns over a proposal to do away with holiday season displays at the Loudoun County Courthouse.

The face of America is changing rapidly to reflect a population with diverse backgrounds and belief systems. Tasked with determining how best to abide by the law while also respecting the varied religious and secular beliefs of the residents of their communities, government officials such as yourselves must walk a fine line, especially during the holiday season.

That said, as you prepare to deliberate about how best to balance these seemingly conflicting interests during the upcoming holiday season, particularly in regards to holiday season displays at the Loudoun County Courthouse, I urge you to keep in mind that the U.S. Constitution and jurisprudence make it possible for you to celebrate the diversity within your community by establishing a thriving marketplace of ideas rather than adopting a sanitized, politically correct government message. Indeed, Loudoun County should lead the way in adopting a model protocol for holiday displays that embodies the spirit of the First Amendment.

It is unfortunate that Americans are increasingly being pressured to avoid anything related to the religious holiday in public. Indeed, in recent years, corporations and government officials have gone to outrageous lengths in order to not offend those who do not celebrate the holiday. In the process, they've trampled all over the First Amendment. For example, many schools across the country now avoid anything that alludes to the religious celebration of

Christmas—such as angels, the baby Jesus, stables and shepherds. In many of the nation's schools, Christmas carols, Christmas trees, wreaths and candy canes have also been banned as part of the effort to avoid any reference to Christmas, Christ or God. One school even outlawed the colors red and green, saying they were Christmas colors and, thus, illegal.

This antiseptic, colorless course does not have to be your chosen path, however. The law clearly falls on the side of allowing holiday displays. Moreover, The Rutherford Institute is available to answer any questions you might have about how best to navigate these oftentimes murky waters.

Specifically, regarding the proposal to eliminate *all* holiday displays on courthouse grounds, while it may appear to be the most expedient option, it will neither promote neutrality nor lesson conflict. In fact, it could do just the opposite, by heightening community tensions and reflecting a hostility toward religion on the part of the Board of Supervisors, as well an intolerance for the diverse makeup of the residents of Loudoun County.

It is our understanding that the proposal to prohibit holiday displays initially targeted only displays with religious themes or elements. Once it became apparent that the ban on religious displays constituted clear viewpoint discrimination in violation of the First Amendment, the proposal was later expanded to prohibit all seasonal celebratory displays. While the Establishment Clause is frequently cited as grounds for prohibiting religious displays, those who rely on it as justification for acts of censorship clearly have a dim and partial understanding of the First Amendment, which equally prohibits hostility toward religion. Government action fostering a pervasive bias or hostility to religion undermines the very neutrality the Establishment Clause requires. *Rosenberger v. Rector and Visitors of University of Virginia*, 515 U.S. 819, 846 (1995). In light of the origins of the movement to prohibit displays, the message of hostility toward religion in a vote to close the courthouse grounds is unmistakable and would itself implicate the County in an Establishment Clause violation.

It is critical that you, as the Board of Supervisors, be mindful of other relevant principles of constitutional law as you consider the important decision implicating the rights of citizens to expression. While it is true that not all government property is available for the exercise of constitutionally-protected speech, depending upon the nature of the property at issue, government authority to foreclose free speech activities is subject to limitations. *See Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 761 (1995). Public places such as streets, sidewalks and parks are historically associated with expressive activities, and therefore are generally considered to be "traditional public forums." *United States v. Grace*, 461 U.S. 171, 177 (1983). In such places, government officials may only enforce reasonable time, place and manner regulations that are content-neutral, narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication. *Id.* Any absolute prohibition on a particular type of expressive activity will be upheld only if narrowly drawn to accomplish a compelling governmental interest. *Id.*

The Board should carefully consider whether the public property in question might appropriately be characterized as a “traditional public forum.” In its letter to the Board dated August 31, 2010, for instance, the Twentieth Judicial Circuit of Virginia stated:

The courthouse grounds in Loudoun are unique. ... We know from written records and a treasure trove of artifacts found at the site that here local legislators and courts met, political campaigns were launched, battles were fought, commerce was conducted, and religious services were celebrated. Here, too, are monuments to those who made the supreme sacrifice on behalf of their country, set in an area that invites remembrance and contemplation.

While the letter suggests a desire for the Board to restrict expressive activity on the property, this description of the grounds suggests that this area may indeed be a traditional public forum. If this is the case, the Board should be careful to avoid any attempt to proscribe free expression therein. “[W]hen property is a protected public forum the State may not by fiat assert broad control over speech or expressive activities; it must alter the objective physical character or uses of the property, and bear the attendant costs, to change the property's forum status.” *International Society for Krishna Consciousness v. Lee*, 505 U.S. 672, 700 (1992)(Kennedy, J., concurring).

It is understandable that the judges who conduct their courtrooms on the site would wish to preserve a quiet, peaceful setting. However, the United States Supreme Court has held that even the sidewalks surrounding its own grounds are not immune from free expression, however divisive or distasteful. In *Grace*, 461 U.S. at 183-84, the High Court held that laws prohibiting “carrying signs, banners, or devices” on the public sidewalks surrounding the Supreme Court building violated the First Amendment by unduly restricting expression in a traditional public forum. *Id.* While the government asserted, as do the judges of the Twentieth Judicial Circuit, the importance of precluding the appearance that the Court is subject to outside influence as a justification for the restriction, the Court rejected this argument. *Id.* at 183.

Because the individuals who challenged the law in *Grace* had only engaged in expressive activities on the sidewalks, the Court did not have occasion to consider the law as applied to the remainder of the Court grounds. However, this decision is a clear indicator that the proximity of a traditional public forum to a courthouse does not confer immunity from the rigorous First Amendment requirements that apply to such forums.

If it is determined that the public grounds in question do not fall within that category of public property considered to be traditional public forums, then the Board would be legally justified in closing the forum to expressive activity and reserving it for official government purposes. *See Perry, supra*, at 46 (noting that a State is not required to indefinitely retain the open character of a designated public forum). While this choice might be legally available to the Board (depending upon the characterization of the grounds in question), I urge the Board to consider whether it would truly be in the public's best interest.

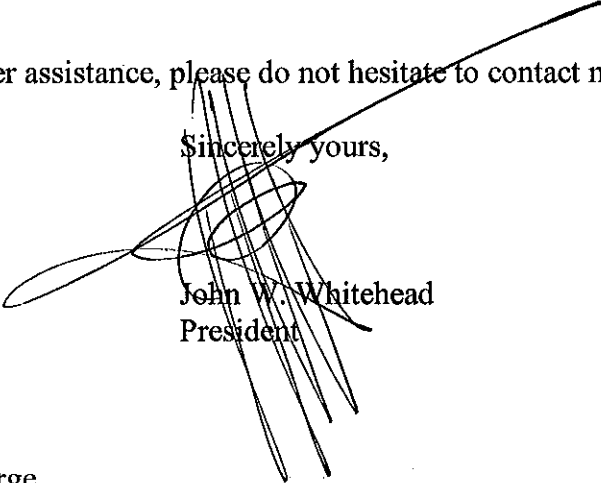
To some, however, it may simply appear easier for the Board to close the designated public forum altogether. But I submit that it is far healthier for the community to be exposed to these ideas than to be subjected instead to a sterilized, plain vanilla environment where messages are distilled to the lowest common denominator of public approval. Indeed, I submit that there can be great educational value, and even incredible beauty in the rich diversity of ideas inherent in a true public forum. I urge you to keep in mind that the goal of the First Amendment is “to preserve an uninhibited marketplace of ideas *in which truth will ultimately prevail...*” *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 390 (1969)(emphasis added).

Furthermore, any risk of endorsing religion in this context is eliminated by the fact that the holiday display forum is open to many different viewpoints, secular and religious. Holiday displays containing both religious and secular elements have been upheld against challenges that they violate the so-called “separation of church and state.” *Lynch v. Donnelly*, 465 U.S. 668, 680-81 (1984). Simply having religious content or promoting a message consistent with a religious doctrine does not run afoul of the Establishment Clause. *Van Orden v. Perry*, 545 U.S. 677, 690 (2005).

It is our hope that the Board of Supervisors of Loudoun County—situated as it is within the Commonwealth of Virginia, the birthplace of many legendary champions of freedom of thought and expression—will act in accordance with the principles of liberty that make our nation and our Commonwealth great.

If I can provide you with further assistance, please do not hesitate to contact me.

Sincerely yours,



John W. Whitehead
President

cc: Scott K. York, Chairman at Large
Susan Klimek Buckley
Jim Burton
Lori Waters
Sally Kurtz
Stevens Miller
Kelly Burke
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