STATEMENT OF
REES LLOYD, COMMANDER
DISTRICT 21, DEPARTMENT OF CALIFORNIA
THE AMERICAN LEGION
BEFORE THE
SUBCOMMITTEE ON THE CONSTITUTION, CIVIL RIGHTS, AND PROPERTY RIGHTS
COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE
ON
S. 3696, VETERANS MEMORIALS, BOY SCOUTS, PUBLIC SEALS AND OTHER PUBLIC EXPRESSIONS OF RELIGION ACT OF 2006 ("PERA')

AUGUST 2, 2006

Mr. Chairman and Honorable Members of the Subcommittee:

It is my great honor to appear before you today to offer testimony in support of passage of S. 3696, Veterans Memorials, Boy Scouts, Public Seals and Other Public Expressions of Religion Act of 2006 ("PERA"), on behalf of The American Legion, the largest wartime veterans' organization in the world with 2.7 million members.

I preface my testimony by stating that I do not appear before you as an inveterate hater of the American Civil Liberties Union (ACLU) or related organizations bringing Establishment Clause litigation and seeking and receiving taxpayer-paid attorney fees therefore, although I believe that PERA must be passed to stop the exploitation of the law for attorney fee profits in such cases.

I have been a civil rights attorney for some 25 years. I was an ACLU of Southern California staff attorney for approximately two years immediately after graduating from law school and passing the California Bar, and had been on a fellowship with the ACLU while in law school. I have devoted my professional career to the defense of civil and workers rights. Among other things, I was for some two decades, and until the day of his death and beyond, a volunteer attorney for the late Cesar Chavez, the founder and president of the United Farm Workers of America, AFL-CIO, whom we honor in California today for his great contributions to civil rights. Cesar Chavez was, indeed, a great American. He mentored me when I was an independent trucker engaged in a nationwide strike during the so-called Arab Oil Embargo. It was Cesar Chavez who urged me to go to law school and his recommendation that secured my admission. It is a little known fact that Cesar Chavez was also a veteran, serving four years in the U.S. Navy

when his country called. He was, in his humility and self-sacrifice, the greatest man I ever knew, or will know, and I will always walk in his shadow.

I state this not for self-aggrandizement, but, rather, to indicate to you that I speak to you from the heart, and based on a lifelong commitment to the defense of civil rights, from participation in Resurrection City in the Poor People's Campaign of Dr. Martin Luther King in 1968, to the present moment, in which I am privileged to participate in a great cause, the cause of veterans, the cause of the defense of American values by The American Legion Family of Legion, Auxiliary, and Sons of the American Legion, altogether involving some 4 million members.

Neither The American Legion, nor I as its representative in these proceedings, believe that passage of PERA is a partisan issue, a conservative or liberal issue, a Republican or Democrat issue, or an ideological one. The American Legion believes it is an American issue, a civil rights issue that transcends all partisan, party, or ideological allegiances.

PERA is narrowly drawn to impact only on Establishment Clause cases, and no other civil rights claims. Arguments have been raised that this, somehow, creates an Equal Protection violation. It is respectfully suggested that this is an argument without merit; the law makes distinctions in myriad instances, including as to what kind of civil wrongs can result in attorney fee transfers by court orders.

Further, Establishment Clause cases are the only claims of which I am aware that are allowed to proceed without any showing that the plaintiff has suffered any economic, physical, or mental damage, or been deprived of the exercise of any right, but is merely offended at the sight of a symbol which has a religious aspect. In all other categories of claims of which I am aware, mere "taking offense" is not even cognizable for a claim or cause or action. Thus, the distinction made in PERA is a rational one, and preserves attorney fee transfers in cases in which an actual economic, physical, or mental injury, or deprivation of right, other than mere offense, is suffered.

Concisely stated: The American Legion believes that passage of the S. 3696, PERA, is essential for the protection of civil rights for all Americans and not limited to special interests, and for the preservation of the purpose and integrity of the attorney fee provisions of the Civil Rights Act, 42 U.S. Code Section 1988, the Equal Access to Justice Act (EAJA), and all other Federal statutes which were benevolently intended to benefit the poor and advance civil rights,

but are now resulting in the opposite; are resulting in unintended financial enrichment; and are trammeling and throttling the exercise of First Amendment rights to freedom of speech, to petition for redress of grievances to the judicial and legislative branches.

In particular, but without limitation, The American Legion believes this reform legislation is absolutely necessary if we are to be able to preserve and protect our veterans' memorials, and, indeed, all public displays of symbols of our American heritage which have a religious aspect, from litigative attacks under the Establishment of Religion Clause of the First Amendment by special interests, epitomized by, but not limited to, the ACLU, the primary source of such Establishment Clause litigation, and the primary recipient of literally millions of dollars of court-ordered, taxpayer-paid attorney fees from such litigation – even though the ACLU in fact has no actual attorney fees.

As a former ACLU attorney, I know to a certainty that the ACLU's litigation is carried out by staff attorneys, or by pro bono attorneys who are in fact precluded from receiving fees under the ACLU's own policies. Notwithstanding, the ACLU regularly seeks, and receives, attorney fees in Establishment Clause cases at market rate, usually $350 an hour in California. Although the courts know that ACLU clients in fact incur no attorney fee obligation, and that ACLU incurs no fee obligation to volunteer cooperating attorneys, as far as is known, no judge has simply said "no" to ACLU attorney fee requests, even though there is no evidence that any attorney fees were incurred. Thus, benevolently intended fee provisions are being used as a bludgeon against public entities to surrender to ACLU's demands, and being used to obtain profits in the millions. (See, examples cited below, and in **The American Legion Magazine** reports submitted as attachments hereto.)

Further, it must be emphasized that there is nothing in the law today to bar declared enemies of America, including without limitation terrorists who we are warned are in fact in our midst, from following the precedents being set by the ACLU and others to bring lawsuits to destroy or desecrate our veterans' memorials, or other public displays of symbols of our American history and heritage if they contain a religious aspect, and then to exploit Federal law, including the Civil Rights Attorney Fees Act, 42 U.S. Code Section 1988, and the Equal Access to Justice Act (EAJA), to demand that the courts award them taxpayer-paid attorney fees for such Establishment Clause litigation attacks.

Frankly stated, if S. 3696, PERA, is not passed there is nothing in the law to prevent such an abuse and exploitation by terrorists or their sympathizers.

The American Legion urges this reality to be considered in acting on PERA.

The threat of imposition of such fees is having other, and very real, consequences: Benevolently intended attorney fee statutes designed to advance First Amendment rights, including the right to petition for redress, are now being exploited for financial profit in Establishment Clause litigation, to effectively prevent The American Legion and others from meaningful participation in such Establishment Clause litigation in the exercise of the right to petition. Simply stated, as an attorney, acting under the Code of Professional Responsibility, I must advise The American Legion and others I represent based on what the law is, not what I would like it to be. Without PERA, I necessarily have to advise The American Legion that if the organization does seek to intervene in lawsuits against veterans' memorials as a party, it risks having a court order it to pay the attorney fees of the ACLU.

Thus, the very threat of imposition of attorney fees is having a chilling affect on the exercise of fundamental First Amendment rights to petition for redress in the Judicial Branch.

Further, the threat of imposition of attorney fees in Establishment Clause controversies is effectively depriving Americans of the right of speech and to petition elected bodies for redress because those elected bodies at the local level cannot in fact consider contrary views and deliberate because they so fear imposition of attorney fees in such matters by the courts that they believe they have no deliberative choice as they must protect taxpayer funds which are needed for essential local services. In short, their minds are made up before the first objection of a citizen is heard, nullifying effective exercise of the freedom of speech and to petition for redress before local elected bodies.

Thus, the citizen's right to petition for redress, the right to be heard, and the very deliberative process of our representative democracy, are being distorted and denied by the threat of, and actual imposition of, attorney fees on taxpayers in Establishment Clause litigation.

The threat of imposition of attorney fees is very real, and manifestly is being used as a bludgeon by the ACLU and others to compel states and local subdivisions to surrender to their demands to secularly cleanse the public sphere, including at veterans memorials.

Although most Americans remain unaware of it – and are outraged when they learn of it – Courts are awarding taxpayer-paid attorney fees to the ACLU and others literally in the millions

of dollars annually, against towns, school boards, cities, counties, states, which extorts surrender by those elected agencies in Establishment Clause *in terrorem* litigation. It is *in terrorem* litigation because the very threat of judge-ordered taxpayer-paid attorney fees intimidates elected bodies into submission to ACLU demands, and chills the exercise of the First Amendment right of third parties, like The American Legion, who desire to intervene in such cases as parties in order to fully participate and apprise the judiciary of their views on the importance of protecting our veterans' memorials or other public display of symbols of our American heritage.

All across the nation, lawsuits are being brought under the Establishment Clause to remove or destroy symbols of our American heritage from the public sphere if they have a religious aspect, principally the Christian Cross, but also the Star of David, both of which are present in the hundreds of thousands in our 22 National Cemeteries, from Arlington in the East to Riverside National Cemetery in California, and across the sea at American cemeteries in Europe, including Normandy Beach, where there are more than 9,000 raised Crosses and Stars of David.

There are countless veterans' memorials which have stood for years, decades, even longer, erected by grateful Americans in small towns, cities, counties, states, and considered by most Americans as sacred places as their manifest purpose is to honor, and call to the remembrance of succeeding generations, those Americans who served and sacrificed in defense of our American freedom.

Today, all of these veterans' memorials are threatened by dangerous precedents being set in Establishment Clause lawsuits brought by individuals and special interest organizations, epitomized by the ACLU, who are offended by veterans memorials because they contain a Cross or other religious symbol, or a prayer, as in the Mojave Desert Veterans Memorial case *(Buono vs. Norton)*, and the Mt. Soledad National War Memorial litigation in San Diego, which has become a focus of national controversy in light of the fact that, on the one hand, a Federal judge has ordered the City of San Diego to tear down the cross which has stood at the memorial for more than half a century or he will fine the taxpayers $5,000 a day; and, on the other hand, a California Superior Court Judge overturned a special election in which 76 per cent of the voters voted to transfer the Mt. Soledad National War Memorial to the Federal government.

On July 3, 2006, the U.S. Supreme Court, by Justice Kennedy, issued a stay order against enforcement of the lower court order, followed by a stay order *pendent elite* issued on July 7, 2006, shielding the Mt. Soledad National War Memorial until final decision on appeals in the

Ninth Circuit Court of Appeal. But for the stay order issued by the Supreme Court by Justice Kennedy as Circuit Justice on emergency petition filed first by the San Diegans for the Mt. Soledad National War Memorial, joined by The American Legion as amicus curiae, and second by the City of San Diego, the Mt. Soledad Memorial would have already suffered desecration by amputation because the Ninth Circuit itself had issued an expedited appeal hearing – but had denied a stay order. Thus, the Cross-at the site would have been destroyed on August 1, before the expedited hearing, which the Ninth Circuit set for October.

In the Mojave Desert Veterans Memorial Case, a solitary cross, erected on a rock outcrop 11 miles off the road in the desert by veterans in 1934 to honor World War I veterans, has been declared to be an unconstitutional violation of the Establishment Clause because in 1994 it was incorporated into the Mojave Desert Preserve. Although Congress passed legislation originally sponsored by Rep. Jerry Lewis, my Representative in California, to transfer the one-acre Mojave Desert Veterans Memorial to private parties, veterans, in exchange for five acres of private land, the Federal judge, on motion of the ACLU, nullified the act of Congress, finding its action violates the Establishment Clause, and ordered the Executive Branch to tear down the Cross. That case is on appeal. So far, the ACLU has reaped $63,000 in attorney fees to destroy that veterans' memorial.

These veterans' memorials – and all veterans' memorials -- deserve to be defended, and The American Legion is ready and able to do so. But the threat of imposition of attorney fees creates a bar to intervention in these cases with full party status. Private non-profit organizations, like The American Legion that have fiduciary obligations to their members, cannot effectively exercise the right to petition for redress in Establishment Clause cases because of the risk that devastating attorney fees may be imposed on them.

The enormity of the threat of imposition of fees by courts should not be discounted. For but a few examples:

- In its Establishment Clause lawsuit against San Diego to drive the Boy Scouts out of Balboa Park, the ACLU received some $950,000 in attorney fees when the City settled rather than risk even more attorney fees being awarded in the litigation.
- In the Ten Commandments Case in Alabama, the ACLU and sister organizations received $500,000 in attorney fees.

- In Washington State, the ACLU received $108,000 from the Portland School board in a case brought for an atheist to prevent the Boy Scouts from recruiting in the schools on non-class time.
- In Illinois, the ACLU brought suit against the Chicago Schools to drive the Boy Scouts out of the schools, and the Department of Defense to drive the Boy Scouts off military bases as sponsored troops. The Chicago schools quickly kicked out the Boy Scouts and settled $90,000 on the ACLU to avoid even larger court-awarded fees. The DoD entered a partial settlement, and the case continued, resulting in a Federal judge finding that the DoD aid to the Boy Scout Jamboree, supported by every U.S. President since its inception, is in fact a violation of the Establishment of Religion Clause. ACLU is seeking attorney fees under the Equal Access to Justice Act in that case.
- In Nebraska, a Federal judge overturned a referendum in which 70 percent of the voters voted to define marriage as a union of a human male and female, and imposed attorney fees of some $156,000.
- In Los Angeles County, the Board of Supervisors voted 3-to-2 to remove a tiny cross from the County Seal when the ACLU threatened to sue over it (but not over the Roman Goddess Pomona whose figure dominated the Seal). The County will spend approximately $1 million to remove the cross from all flags, seals, badges, etc. The rationale for the three who voted to surrender to the ACLU: The threat of an even greater amount ordered in attorney fees to the ACLU if the County fought and lost.
- The City Council of Redlands voted, unwillingly, to remove the cross from its City Seal when the ACLU threatened lawsuit. The sole reason given for the vote: The fear of a court-awarded attorney fees to the ACLU being imposed on limited taxpayer-funds needed for city services. Redlands cannot afford to change all of the seals as L.A. County is doing. Therefore, among other things, Redlands is calling in all employees who have badges, police, fire, emergency services, et al., and drilling a hole through the Cross-on the badges to comply with ACLU's demands.
- In the Mojave Desert WWI Veterans Memorials case, the ACLU pleaded for fees under both the Civil Rights Act, 42 U.S.C. Section 1988, and EAJA, and ultimately received some $63,000 in attorney fees under the EAJA.

A recent case exemplifies, I believe, the abuse and exploitation of the Civil Rights Act attorney fee provisions for pure profit by the ACLU, and the ACLU's use of the Civil Rights Act to terrorize local elected bodies.

That case is the now famous "Dover Intelligent Design Case." There, the ACLU sued the Dover school board after it voted to include information pertaining to the Intelligent Design theory along with Darwinian theory in science classes.

The ACLU was represented by a cooperating, pro bono law firm.

Whatever one thinks of the intelligent design theory or the merits of the case, the attorney fee outcome should be carefully considered. The judge ruled that the teaching of Intelligent Design theory violates the Establishment Clause. The court then awarded the ACLU $2-million in attorney fees to be paid by the school board from taxpayer-funds needed for the schools.

The court imposed this massive attorney fee award on the taxpayers and schools even though the pro bono law firm representing the ACLU declared that in fact it waived all attorney fees. Thus, the $2 million is pure profit for the ACLU, and pure punishment upon the School Board that dared to defy the ACLU's demands.

The ACLU added to this set of facts the following: The ACLU announced to the media after its victory over the school board that it was only going to demand that the school board pay it $1 million instead of $2 million. The ACLU stated it was doing so because the school board members who had voted for the teaching of Intelligent Design theory had been removed from the school board in elections and replaced by school board members acceptable to the ACLU.

Thus, the ACLU announced it would not "punish" the school board by demanding the full $2 million.

However, it publicly warned that it would not be so benevolent in the future if any other school board did not comply with ACLU's demands.

I respectfully suggest there could not be better evidence of the need for S. 3696 PERA, nor better evidence that the ACLU is exploiting the Civil Rights Act for profit and using its attorney fee provisions as a club to "punish," in ACLU's own words, elected local agencies, than the very public statements of the ACLU in the Dover Intelligent Design Case.

As one who was active in what was once called the Civil Rights Movement, and one who in that movement supported and fought for the attorney fee provisions of the Civil Rights Act and EAJA, and as a former ACLU attorney, I am personally appalled and ashamed of such

disgraceful abuse of the Civil Rights Act for political and economic gain. People fought, and some died, in the Civil Rights Movement for these laws to benefit the poor and make real the promise of our American freedoms. What is happening today is a shameful.

The Legislative branch should end this abuse.

The American Legion is strongly in support of passage of PERA, S. 3696, as an absolutely necessary reform of the law to preserve and protect our civil and constitutional rights, and to protect the integrity of the Civil Rights Act, EAJA, and all related acts.

At The American Legion National Convention in 2004, more than 4,000 delegates voted unanimously for Resolution 326, Preservation of Mojave Desert Memorial, which I wrote and which calls on Congress to amend the Civil Rights Act, 42 USC Section 1988 to eliminate the authority of judges to award attorney fees to the ACLU, or anyone else, in Establishment Clause cases. (See attachment.) At that time, Past National Commander Thomas P. Cadmus of Michigan called on "all Legionnaires, and all Americans, to stand up to the ACLU and defend our American values."

At The American Legion National Convention in 2005, delegates unanimously voted to adopt Resolution 139, to amend the Equal Access to Justice Act, and all related Federal statutes, in the same way as the Civil Rights Act to eliminate the courts' power to impose attorney fees in Establishment Clause cases when Federal entities are the defendants, as in the Boy Scouts Jamboree case. (See, Attachments.)

The American Legion's current National Commander, Thomas Bock, the primary spokesman for The American Legion in all matters, including PERA, vowed upon his election at the 2005 National Convention that The American Legion would stand and fight to defend our veterans' memorials, our American values generally, and to support passage of PERA against the terrorizing litigation attacks of the ACLU and others.

In 2006, under National Commander Bock's leadership, The American Legion published **In the Footsteps of the Founders**, explaining why PERA is needed. It was sent to all 15,000 American Legion Posts along with additional material on DVD.

In his recent call for defense of the Mt. Soledad National War Memorial, Commander Bock stated: "*What is next? Will the ACLU target the 9,387 crosses and Stars of David honoring World War II heroes killed during the invasion of Normandy? The Public Expression of Religion Act may be the only way to stop this assault*."

The American Legion does mean to stand and fight to defend our veterans' memorials against Establishment Clause litigation assaults. But we need a level playing field – and that means the end to one-sided risks of attorney fee awards to the ACLU, or others, but not against the ACLU or others, because, under decisional law, the fees do not go to the "prevailing party." That is, when the ACLU loses, it is shielded from fee transfer unless it can be shown the suit was legally frivolous because the filing of a lawsuit against a governmental entity is itself a First Amendment right.

With regard to Commander Bock's reference to the American Cemetery at Normandy Beach, may I close with a personal observation that, I believe, reflects what is really at stake, and how much defense of veteran's memorials means to us.

I am proud to be a member of Memorial Honor Detail, Team 12, Riverside Post 79, at Riverside National Cemetery, the home of the U.S. National Medal of Honor Memorial, and the U.S. National POW/MIA Memorial, the centerpiece of which is a dramatic sculpture of a prisoner of war by artist and Legionnaire Lewis Lee Millett, Jr., a veteran who waived the entire $100,000 artist's commission so the funds could be used to complete the memorial surrounding the sculpture. The entire $700,000 total cost of the U.S. National POW/MIA Memorial was raised by private donations, mostly veterans, and not taxpayer funds.

We fear that that sculpture in the National POW/MIA Memorial may become a target of an Establishment Clause lawsuit because artist, veteran, Legionnaire Lee Millett, Jr., engraved the POW's Prayer at the base: "I look not to the ground, for I have no shame. I look not to the horizon, for they never came. I look to God, I look to God…"

There are more than 80,000 gravesites at Riverside National Cemetery now, almost all with a Cross-or Star of David or other religious symbol. We fear for them, too. The ACLU has said it would not sue the grave markers because that is a matter of "family choice." That, constitutionally, is utterly specious: If the religious symbol is unconstitutional under the Establishment Clause because it is on Federal ground, as the ACLU otherwise insists, no person can "choose" to commit an unconstitutional act. Further, who would have dreamed the ACLU would file a lawsuit against the solitary cross honoring WWI veterans in the middle of the Mojave Desert to which one has to drive to be offended?

MHD Team 12, Riverside Post 79, is the first volunteer team to perform more than 1,200 military honors services for our fallen comrades.

The Captain and founder of Team 12 is Robert Castillo, who is a Native American who has served in many Legion offices in California and has led practically all 1,200 MHD Team 12 services at RNC, carrying the American Flag to lead the processions.

Robert Castillo, as a teenager, participated as a member of the United States Navy in the D-Day landing at Normandy Beach on June 6, 1944. He fought on both Omaha and Utah beaches. His ship was sunk. He was terribly wounded and received a Purple Heart among other medals.

On the anniversary of D-Day, June 6, 2006, Robert Castillo, who is affectionately known as "Uncle Bobby" by Legionnaires throughout California, led MHD Team 12 through six military honors services, in heat that reached 100 degrees. He never wavered in those services; he has never wavered in service to America as a teenager on D-Day, nor any day since, as he continues to serve America in The American Legion.

He asked me to convey to this Committee and Congress, his support for PERA, and his common-sense view that I believe reflects the view of almost all the 2.7 million members of The American Legion:

"*How can they give our tax money to the ACLU to sue our veterans memorials? I don't understand it. It's wrong. They shouldn't be allowed to do this. Are they going to sue our cemetery at Normandy Beach, and then take our money for doing it? We can't let them do that. My buddies are buried there.*"

If you heed no other voice, I would appeal to you to hear the voice of Legionnaire Robert Castillo, and reform the law by passing S. 3696, PERA. Do not allow the law to be exploited for profit in attacks under the Establishment Clause against our veterans' memorials and cemeteries. Give us the level playing field needed to allow us to defend the memorials, and gravesites, of our fallen American heroes.

I thank you for allowing me to testify on behalf of The American Legion.

Attachments