

**IN THE UNITED STATES DISTRICT COURT FOR  
THE NORTHERN DISTRICT OF FLORIDA  
PENSACOLA DIVISION**

AMANDA KONDRAT'YEV, )  
ANDREIY KONDRAT'YEV, )  
ANDRE RYLAND, and )  
DAVID SUHOR, )

*Plaintiffs,* )

v. )

CASE NO. 3:16-cv-00195-RV-CJK

CITY OF PENSACOLA, FLORIDA, )  
ASHTON HAYWARD, in his official )  
capacity as Mayor of the City of )  
Pensacola, and BRIAN COOPER, in )  
his official capacity as Director of the )  
City of Pensacola Parks & )  
Recreation Department, )

*Defendants.* )

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**Plaintiffs' Motion for Summary Judgment**

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Pursuant to Federal Rule of Civil Procedure 56, Plaintiffs move for summary judgment on their claims that the City of Pensacola's ("City") ownership, maintenance, funding, and display of a large Christian cross ("Bayview Cross") on public property constitutes a violation of the Establishment Clause of the First Amendment.

In support of this motion, Plaintiffs submit the attached Memorandum of

Law and Record of evidence pursuant to Local Rule 56.1. The Record is split into eighteen volumes based on file size (under 10mb each) to meet this Court's CM-ECF filing requirements.

The grounds for this motion are: (1) no facts material to Plaintiffs' claims remain in dispute; and (2) based on the undisputed facts, Plaintiffs are entitled to judgment as a matter of law. Accordingly, Plaintiffs respectfully request that this Court grant them summary judgment and award them the following relief:

1. A declaratory judgment that the City's ownership, maintenance, funding and display of a Christian cross on public property violates the Establishment Clause of the First Amendment and is a violation of the Plaintiffs' constitutional rights under 42 U.S.C. § 1983;

2. Order the City to remove Bayview Cross from government property immediately;

3. Permanently enjoin Defendants (and any successors or assigns) from owning, funding, displaying, or maintaining a Christian cross on public property, including Bayview Cross;

4. Award Plaintiffs nominal damages in the amount of \$1 each;

5. Award Plaintiff attorneys' fees and costs pursuant to 42 U.S.C. § 1988;

and

6. Grant Plaintiffs such further relief as the Court deems proper.

Respectfully submitted,

April 21, 2017

/s/ Monica L. Miller

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**Plaintiffs' Memorandum in Support of their  
Motion for Summary Judgment**

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## **I. Statement of Undisputed Facts**

### **A. Overview**

The City of Pensacola (“City”) owns, displays, maintains, and funds an enormous Christian cross—the quintessential symbol of Christianity—on City property (the “Cross” or “Bayview Cross”). The Cross was erected for Christian worship services and has been used for such religious purposes ever since, *infra*.

Four local residents challenge the Cross as violative of the Establishment Clause. Plaintiffs are atheists and humanists and members of the American Humanist Association (“AHA”) and the Freedom From Religion Foundation (“FFRF”).<sup>1</sup> Each plaintiff has repeatedly had direct, unwelcome contact with the Cross.<sup>2</sup> The Cross impedes their use and enjoyment of the local park. (R.418-423). Plaintiffs perceive the City’s Cross as a clear indication that the City prefers Christians over others. (R.418-423). As non-Christians, Plaintiffs feel excluded by this governmental message. (R.418-423).

### **B. The Cross**

#### **1. Attributes/Setting/Ownership**

Bayview Cross is a towering Christian symbol prominently displayed on

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<sup>1</sup> (R.418)(R.422)(Compl.¶¶6-16).

<sup>2</sup> (R.419)(R.422)(Compl.¶¶6-16). Suhor lives about 1.5 miles from the Cross and encounters it on his regular bike rides, as often as twice a week. (R.419). Ryland lives about 7.5 miles from the Cross and encounters it while walking the trail and attending events in Bayview Park. (R.418-423). The Kondrat’yevs had frequent unwelcome contact with the Cross but have moved to Canada. (Compl.¶¶6-16).

government property, specifically, Bayview Park.<sup>3</sup> It is a freestanding, unadorned, white Latin cross, standing approximately thirty-feet tall with a crossbar approximately ten-feet wide.<sup>4</sup> The shaft is approximately one-foot thick, tapering upwards.<sup>5</sup> The Latin cross is the symbol of Christianity, representing the crucifixion of Jesus, according to Christian dogma.<sup>6</sup>

The Cross stands alone as the only religious display in Bayview Park.<sup>7</sup> It is located in the northeast section between the tennis courts and the Bayou Texar shore.<sup>8</sup> There are only two other permanent monuments in the park: an amphitheater adjacent to the Cross erected in 1949 for Easter Sunrise Services, and a monument dedicated to Tim Bonifay erected in 1979.<sup>9</sup>

The City owns the Cross and is responsible for its maintenance and upkeep.<sup>10</sup> Since 2009, the City has expended approximately \$2,000 on repairs and renovations, \$1,258.00 of which was spent in 2009 to pressure wash, scrape, and repaint the Cross.<sup>11</sup> The City also installed light fixtures for the Cross in 2015 and

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<sup>3</sup> (R.3-11)(R.13)(R.397)(R.406-407)(R.422-426)(Ans. ¶¶22, ¶29, ¶¶37-38).

<sup>4</sup> (R.3-11)(R.53)(R.206)(R.397)(R.422-23)(Ans. ¶¶23-25, ¶¶27-28).

<sup>5</sup> (R.3-11)(R.422-426)(Ans. ¶25).

<sup>6</sup> (R.397)(Ans. ¶24)(R.211)(R.242).

<sup>7</sup> (R.374-375)(Ans. ¶¶28-31).

<sup>8</sup> (R.13)(Ans. ¶29)(R.406-407).

<sup>9</sup> (R.8-11)(R.18)(R.50-52)(R.375).

<sup>10</sup> (R.53)(R.316-344)(R.371)(R.397-98)(Ans. ¶¶37-40).

<sup>11</sup> (R.315-344)(R.318)(R.371)(R.397-98).

2016 and pays the electric bills.<sup>12</sup>

## 2. Religious Purpose/History/Usage

Bayview Cross has been the site for religious services, namely, Easter Sunrise Services, since its inception.<sup>13</sup> Easter Sunrise Service is a Christian worship service that includes prayers, hymns, and sermons.<sup>14</sup>

The Cross was installed for these annual Christian services.<sup>15</sup> The first service was held in 1941 where the Cross currently stands.<sup>16</sup> Before the service, a wooden cross was installed in the park.<sup>17</sup> A 1941 article reported: “Focal point of the ceremony will be a large native pine cross recently erected by NYA [National Youth Association] workers,” and “[t]he public is being asked to bring flowers and place them at the foot of the cross as a symbol of dedication.” (R.57).

The 1941 service commenced with a call to worship at 6:00 a.m. by a First Methodist Church reverend, followed by an opening prayer by an East Hill Baptist Church reverend.<sup>18</sup> The address, “The Risen Christ,” was delivered by a chaplain, a benediction was given by a First Christian Church reverend, and the dedication

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<sup>12</sup> (R.15-16)(R.329-332)(R.343)(R.397)(Ans.¶¶35-36).

<sup>13</sup> (R.18)(R.50)(R.53-54)(R.57-249)(R.254-288)(R.349-355)(R.398)(Ans.¶¶49,¶54, ¶¶59-60).

<sup>14</sup> (R.57-249)(R.415-417)(Ans.¶¶57-58).

<sup>15</sup> (R.53)(R.206)(R.374)(Ans.¶38,¶45).

<sup>16</sup> (R.57-69)(R.349-50)(R.415-417)(Ans.¶49,¶60).

<sup>17</sup> (R.57-58)(R.61)(R.374)(Ans.¶43).

<sup>18</sup> (R.57-58)(R.415).

was given by a First Presbyterian Church reverend.<sup>19</sup> Songs included “Holy, Holy, Holy,” “Christ Arose,” and “The Old Rugged Cross.”<sup>20</sup> The service was sponsored the Pensacola Ministerial Association and the Pensacola Junior Chamber of Commerce (later known as the “Jaycees”), both faith-based organizations.<sup>21</sup>

The cross was central to subsequent Easter services.<sup>22</sup> For instance, a 1943 article announced: “Persons who wish to bring flowers will be given an opportunity to lay them at the foot of a natural wood cross as a quartette [sic] sings, ‘The Old Rugged Cross.’” (R.84-85). A 1950 article recounted that the President of the Pensacola Ministerial association “presided during the dedication service when several brought flowers and placed them at the foot of the cross....”(R.138).

The amphitheater adjacent to the Cross was also erected for Easter services.<sup>23</sup> The theme of the 1949 service was “Christ’s Triumph Over Death,” during which the amphitheater was dedicated.<sup>24</sup> At the January 9, 1951 meeting, the City Council unanimously resolved “that a plaque be furnished by the City, with dedication services to be held on next Easter at sunrise.”<sup>25</sup> The plaque states

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<sup>19</sup> (R.57-58)(R.415).

<sup>20</sup> (R.59)(R.63)(R.415).

<sup>21</sup> (R.57-58)(Ans.¶3). The first line of Jaycees’ “Creed” avows: “We believe that faith in God gives meaning and purpose to human life...” (R.347)(R.399). *See also* (R.356)(R.382-384)(R.399).

<sup>22</sup> (R.70-139)(R.415-417)(Ans.3).

<sup>23</sup> (R.18)(R.50)(R.350)(R.374-375)(Ans.¶¶41-42).

<sup>24</sup> (R.130-131)(R.415).

<sup>25</sup> (R.52). *See also* (R.145-147)(R.349)(R.375).



in part: “Dedicated to C. Frasier Phelps...Pres. Jr. Chamber of Commerce 1942; Chm. Of Easter Sunrise Com. 1941.” (R.18)(R.350).

In 1969, the current Cross was installed with the City’s express approval.<sup>26</sup> At the February 1969 Parks and Recreation meeting, the Jaycees requested permission to erect a “new cross at Bayview for their Easter Sunrise Services” to be placed “in same location as present one.” (R.53)(R.374). “It would be concrete with a wooden face, 30’ tall.” The City noted: “They will put it up and our department will maintain it after that time. They would like to keep it lighted at all times just like the street lights work. It would be on a time clock.” The City resoundingly approved: “[Board] Members felt that this would be a *very* worthwhile project.” (R.53)(emphasis added).

The Cross was dedicated at the 29<sup>th</sup> Easter Sunrise Service.<sup>27</sup> A 1969 article pronounced: “A 34-foot, lighted cross...will be dedicated during the services.”<sup>28</sup> Coverage of the 1970 Easter service recalled: “about 800 persons gathered around the new cross, dedicated at last year’s service.” (R.212-13).

The Easter services have been sponsored or co-sponsored by various entities including:

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<sup>26</sup> (R.53)(R.206)(R.371-374)(R.416)(Ans. ¶38, ¶45).

<sup>27</sup> (R.206)(R.416).

<sup>28</sup> (R.206)(R.416).

- Pensacola Jaycees (est. 1941-2010)<sup>29</sup>
- Pensacola Ministerial Association (1941, 1944, 1947, 1957-58, 1962)<sup>30</sup>
- McIlwain Presbyterian Church (2011-2016)<sup>31</sup>
- The City (2008, 2009, 2010)<sup>32</sup>

The City has played an integral role in the annual worship services.<sup>33</sup> “City, Army and Navy officials cooperated with the Junior Chamber of Commerce to arrange bus transportation for Army and Navy personnel to attend the [first] service” in 1941. (Ans.3). A 1944 article reported: “The wooden cross has been erected and the city has provided a stand for speakers and singers.” (R.92)(R.415). In 1945, the Jaycees’ president reportedly “expressed appreciation of the excellent job done by city officials in having the grounds [of Bayview Park] cleared of all brambles and high grass. ‘Everything is perfect, even to foot bridges having been put across the concrete open drains...’”<sup>34</sup>

The City and its officials have also actively participated in the services.<sup>35</sup> “The City of Pensacola” and “City of Pensacola personnel” were listed as “participating in the service” in 1974 and 1974, respectively. (R.225)(R.227). The

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<sup>29</sup> (R.57-234)(R.254-288)(R.354-355)(R.368-39)(R.379)(R.382-384).

<sup>30</sup> (R.57)(R.94)(R.107)(R.188)(R.192)(R.195)(R.200).

<sup>31</sup> (R.241)(R.243)(R.245)(R.360)(R.365)(R.370)(R.379)(Ans.¶66).

<sup>32</sup> (R.258-65)(R.278)(R.284)(R.366)(R.380).

<sup>33</sup> (R.225)(R.227)(R.380)(Ans.¶69).

<sup>34</sup> (R.103)(R.415).

<sup>35</sup> (Ans.¶69)(R.225)(R.227)(R.380).

City even co-sponsored the Easter services in 2008, 2009, and 2010.<sup>36</sup>

In addition to the annual Easter service, the Bethel Baptist Church conducted an “Outdoor Worship Service” at the “Cross Area” on April 11, 2010.<sup>37</sup>

The events held at the Cross have been hostile to atheists, humanists, and other non-Christians. (R.419)(R.422). According to media accounts, the chaplain’s address at the 1952 service decreed: “Cynicism, doubts of the faithless, ridicule of those wise in materialistic ways and things, and the quarrelling of those who try to confuse beginners in Christian living all strive to defeat ‘our faith.’” (R.153). The object of the 1970 service was to transform “doubters” “into believers.” (R.210-213)(416). A headline announced: “Doubters Transformed Into Joyous Believers.” (R.210). The pastor’s sermon characterized a disciple doubtful of Jesus’ resurrection as a “cringing coward,” and declared that “A tidal wave of immorality is sweeping our land...” (R.210-13). The pastor then attributed the climbing suicide rate to having a disbelief in God. (R.211-212).

After AHA and FFRF sent letters to the City asking for removal of the Cross, on August 15, 2015, a religious rally was held at Bayview Park in support of keeping the Cross on City property.<sup>38</sup> Organizers emphasized: “This gathering is not just about the removal of some 50+ year old cross, but is about Christians

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<sup>36</sup> (R.258-65)(R.278)(R.284)(R.366)(R.380).

<sup>37</sup> (R.290)(R.365)(R.379)(R.383).

<sup>38</sup> (R.250-252)(R.291-294)(Ans.¶80).

coming together, outside the church walls, making a stand for Christ and their faith. Our nation is in need of a revival.” (R.45).

Plaintiffs feel marginalized by the support the City “has given to the Easter Sunrise Services.” (R.422)(R.419). According to Suhor and Ryland, the “Bayview Cross, and the City support of Easter Sunrise Services it represents, are a constant reminder that I, as a non-Christian, am an outsider and unwelcome in the community.” (R.419)(R.422-23).

### **C. Refusal to remove**

The City has received repeated warnings over the years that Bayview Cross is unconstitutional and sends an exclusionary message to non-Christians in the community.<sup>39</sup> In addition to complaints from local citizens, on July 29, 2015, AHA and FFRF separately sent the City cease-and-desist letters, informing it of the overwhelming precedent against the Cross.<sup>40</sup> Both organizations requested a formal response but the City refused to respond.<sup>41</sup>

## **II. Summary Judgment Standard**

Summary judgment must be granted when, as here, “there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(a).

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<sup>39</sup> (R.25-37)(R.39-40)(R.247-252)(Ans. ¶¶70, ¶72).

<sup>40</sup> (R.25-37)(R.39-40)(Ans. ¶¶74-75, ¶77).

<sup>41</sup> (R.37)(R.40)(Ans. ¶76, ¶78).

### **III. The City’s Christian Cross violates the Establishment Clause.**

The “Establishment Clause, at the very least, prohibits government from appearing to take a position on questions of religious belief.” *Cnty. of Allegheny v. ACLU*, 492 U.S. 573, 593-94 (1989). The government must “remain secular” and must “not favor religious belief over disbelief.” *Id.* at 610.

To pass muster under the Establishment Clause, a practice must satisfy the *Lemon* test, pursuant to which it must: (1) have a valid secular purpose; (2) not have the effect of advancing, endorsing, or inhibiting religion; and (3) not foster excessive entanglement with religion. *Id.* at 592 (citing *Lemon v. Kurtzman*, 403 U.S. 602 (1971)). Government action “violates the Establishment Clause if it fails to satisfy any of these prongs.” *Edwards v. Aguillard*, 482 U.S. 578, 583 (1987).

#### **A. The City’s Cross contravenes binding precedent.**

“[C]ase law shows that exclusively religious symbols, such as a cross, will almost always render a governmental [display] unconstitutional.” *King v. Richmond Cnty.*, 331 F.3d 1271, 1285 (11th Cir. 2003); *see also Mendelson v. St. Cloud*, 719 F. Supp. 1065, 1069 (M.D. Fla. 1989) (“no federal case has ever found the display of a Latin cross on public land by a state or state subdivision to be constitutional.”); *Separation of Church & State Comm. v. City of Eugene*, 93 F.3d 617, 620 (9th Cir. 1996) (“There is *no question* that the Latin cross is a symbol of Christianity, and that its placement on public land...violates the Establishment

Clause.” (emphasis added)).

Bayview Cross cannot survive Eleventh Circuit precedent. Controlling case law requires a city to remove a Latin cross installed in a public park, even notwithstanding any ““historical acceptance.”” *ACLU v. Rabun Cnty. Chamber of Commerce, Inc.*, 698 F.2d 1098, 1111 (11th Cir. 1983)(citation omitted). The Eleventh Circuit in *Rabun* unequivocally held that the “maintenance of the cross in a state park violates the Establishment Clause.” *Id.*

The parallels to *Rabun* are uncanny. And the few factual differences only make Bayview Cross more flagrantly unconstitutional, not less. Just like Bayview Cross, the *Rabun* cross was erected in a public park by a private entity to replace an older cross. *Id.* at 1101-02. Easter Sunrise Services were held at the site before the cross was installed and thereafter. *Id.*

In early 1979, the Rabun County Chamber of Commerce made plans for a new cross to replace the old structure and sought approval from Georgia Department of Natural Resources. *Id.* The request “indicated that the Chamber would take full responsibility for the fund-raising of both the construction and maintenance costs, [and] stated that the Chamber hoped to have the cross ready for dedication on Easter Sunday.” *Id.* In March 1979, the Department “approved the Chamber’s request.” *Id.*

Almost identically, in early 1969, the Pensacola Junior Chamber of

Commerce (a.k.a. Jaycees) sought permission from the Pensacola Parks and Recreation Department to erect a “new cross at Bayview for their Easter Sunrise Services” to be placed “in same location as present one.” (R.373)(R.53). Like *Rabun*, the Jaycees told the City “[t]hey will put it up.” (*Id.*) But here, *the City* would “maintain it after that time.” (R.53). And like *Rabun*, the City approved, but further pronounced that it “would be a *very* worthwhile project.” (R.53)(emphasis added).

The *Rabun* cross was dedicated at the “21st Annual Easter Sunrise Service.” 698 F.2d. at 1101. Bayview Cross was dedicated at the 29th Easter Sunrise Service. (R.206)(R.416). The *Rabun* cross was 35-feet-tall and lighted. *Id.* at 1101 n.1. The Bayview Cross is reportedly a “34-foot, lighted cross.” (R.206).

In *Rabun*, the Department received an objection from ACLU of Georgia. *Id.* at 1102. The City received objections from not one but two national civil rights organizations: AHA and FFRF.<sup>42</sup> The only difference is that in *Rabun*, the government actually heeded the warnings and ordered “the Chamber to remove the cross from state property.” *Id.* The Chamber “refused to remove the cross, however, and the state failed to take any affirmative action requiring it to do so.” *Id.*

Here, by contrast, the City eschewed legal warnings without even bothering to respond to the organizations. (Ans.¶¶76,¶78)(R.398). Instead, it issued a press

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<sup>42</sup> (R.25-37)(R.39-40)(R.247-249)(Ans.¶¶74-75,¶77).

release boasting: “The City is making no plans to remove the cross or to lease the piece of the park the cross is on.” (R.252). The Mayor also told the press: “I hope there is always a place for religion in the public square. I surely don’t want to remove it.” (R.248).

The *Rabun* cross was found unconstitutional under each *Lemon* prong. 510 F. Supp. 886, 891-92 (N.D. Ga. 1981). The court declared that the “cross on state parkland impermissibly enmeshes state and church by creating the appearance of official backing for Christianity.” *Id.* The Eleventh Circuit affirmed, finding that the government so patently “failed to establish a secular purpose” that it was unnecessary to even discuss the other prongs. 698 F.2d at 1109, 1111.

As *Rabun* is controlling and indistinguishable, Bayview Cross also “must be removed.” *Id.* Indeed, Bayview Cross impermissibly enmeshes state and church to a much greater degree for at least four reasons:

1. The City, rather than a private party, is responsible for the maintenance and upkeep of the Cross.<sup>43</sup>
2. The City has expended thousands of taxpayer dollars on the Cross.<sup>44</sup>
3. The City refused to remove the Cross when warned of its unconstitutionality.<sup>45</sup>
4. The City has been actively involved in the Easter Sunrise Services since the inaugural service in 1941 until present.<sup>46</sup>

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<sup>43</sup> (R.52)(R.315-344)(R.371)(R.397)(Ans.¶39).

<sup>44</sup> (R.315-344)(R.371)(R.398).

<sup>45</sup> (R.24-42)(R.247-249)(R.398).



Beyond transgressing *Rabun*, the Supreme Court in *Allegheny* made clear that “the [Establishment] Clause forbids a city to permit the permanent erection of a large Latin cross.” 492 U.S. at 606-07. Writing separately, Justice Kennedy agreed that a permanent cross on government property would invariably violate the Establishment Clause:

I doubt not, for example, that the Clause forbids a city to permit the permanent erection of a large Latin cross on the roof of city hall.... [S]uch an obtrusive year-round religious display would place the government’s weight behind an obvious effort to proselytize on behalf of a particular religion.

*Id.* at 661 (concurring and dissenting).

Additionally, the U.S. District Court of Florida has twice held that a permanent cross on public property violates the Establishment Clause. *See Am. Atheists, Inc. v. City of Starke*, 2007 U.S. Dist. LEXIS 19512 (M.D. Fla. 2007); *Mendelson*, 719 F. Supp. 1065. *Rabun* was instructive in both cases despite being less analogous than the case *sub judice*. In *Mendelson*, private entities placed a cross atop a city water tower. *Id.* at 1066-67. No religious services were held at the site, distinguishing it from *Rabun*. *Id.* After receiving a warning from ACLU, the city attempted “to divorce itself from the cross [by] rent[ing] the tower’s roof to gain revenue.” *Id.* The city’s only continued involvement with the cross was its failure to cut off the electrical power when the private party defaulted on the lease

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<sup>46</sup> (R.92)(R.103)(R.225)(R.227)(R.258-65)(R.278)(R.284)(R.366)(R.380).

before trial. *Id.* Nonetheless, the cross failed each prong of *Lemon. Id.* at 1069-71. In *Starke*, the court again held that a lighted metal structure on a water tower in the shape of a cross failed “each prong of the *Lemon* test.” 2007 U.S. Dist. LEXIS 19512, at \*5, \*15-\*21.

Significantly, there is not *a single* binding case upholding the constitutionality of a cross on government property. Moreover, other federal courts have been virtually unanimous in holding that a government cross display violates the Establishment Clause. *See Trunk v. San Diego*, 629 F.3d 1099 (9th Cir. 2011), *cert. denied*, 132 S.Ct. 2535 (2012)(longstanding war memorial cross); *Am. Atheists, Inc. v. Davenport*, 637 F.3d 1095 (10th Cir. 2010), *cert. denied*, 132 S.Ct. 12 (2011)(individualized roadside memorial crosses); *Buono v. Norton*, 371 F.3d 543 (9th Cir. 2004)(seven-foot war memorial), *rev'd on other grounds*; *Salazar v. Buono*, 559 U.S. 700 (2010)(plurality)(questioning need for injunction after transfer to private entity); *Carpenter v. San Francisco*, 93 F.3d 627 (9th Cir. 1996)(concrete landmark cross); *Eugene*, 93 F.3d 617 (war memorial cross); *Robinson v. City of Edmond*, 68 F.3d 1226 (10th Cir. 1995)(cross on insignia); *Ellis v. La Mesa*, 990 F.2d 1518 (9th Cir. 1993)(memorial crosses and insignia cross); *Gonzales v. North Twp. Lake Cnty.*, 4 F.3d 1412 (7th Cir. 1993)(war memorial); *Harris v. City of Zion*, 927 F.2d 1401 (7th Cir. 1991)(insignia); *ACLU v. St. Charles*, 794 F.2d 265 (7th Cir. 1986)(seasonal lighted cross on government

building); *Friedman v. Bd. of Cnty. Comm'rs*, 781 F.2d 777 (10th Cir. 1985)(en banc)(insignia); *Gilfillan v. Philadelphia*, 637 F.2d 924 (3d Cir. 1980)(platform containing cross); *Am. Humanist Ass'n v. Lake Elsinore*, 2014 U.S. Dist. LEXIS 25180 (C.D. Cal. 2014)(war memorial); *Cabral v. City of Evansville*, 958 F. Supp. 2d 1018 (S.D. Ind. 2013), *app. disp.*, 759 F.3d 639 (7th Cir. 2014)(temporary six-foot crosses); *Summers v. Adams*, 669 F. Supp. 2d 637 (D.S.C. 2009)(license plate cross); *ACLU v. City of Stow*, 29 F. Supp. 2d 845 (N.D. Ohio 1998)(insignia); *Granzeier v. Middleton*, 955 F. Supp. 741 (E.D. Ky. 1997), *aff'd*, 173 F.3d 568 (6th Cir. 1999)(temporary sign with four-inch cross); *Jewish War Veterans v. United States*, 695 F. Supp. 3 (D.D.C. 1988)(war memorial cross on military base); *ACLU v. Mississippi State Gen. Servs. Admin.*, 652 F. Supp. 380 (S.D. Miss. 1987)(seasonal lighted cross); *Libin v. Greenwich*, 625 F. Supp. 393 (D. Conn. 1985)(seasonal 3-by-5 lighted cross on firehouse); *Greater Houston Chapter ACLU v. Eckels*, 589 F. Supp. 222 (S.D. Tex. 1984), *reh'g denied*, 763 F.2d 180 (5th Cir. 1985)(war memorial).

As a court within the Fourth Circuit recently observed, the “current jurisprudence analyzing the Latin cross, in light of asserted Establishment Clause violations, is all but decidedly against the [government].” *Hewett v. City of King*, 29 F. Supp. 3d 584, 619 (M.D.N.C. 2014).

Having shown that Bayview Cross violates the Establishment Clause under

*Rabun*, further analysis is unwarranted. But for the sake of argument, Plaintiffs demonstrate that the Cross fails each prong of *Lemon*.

**B. The Cross lacks a secular purpose.**

At the core of the “Establishment Clause is the requirement that a government justify in secular terms its purpose for engaging in activities which may appear to endorse the beliefs of a particular religion.” *Rabun*, 698 F.2d at 1110. When “a government permits religious symbols to be constructed on public property, its ability to articulate a secular purpose becomes the crucial focus under the Establishment Clause.” *Id.* (internal footnote omitted). This secular purpose must be the “pre-eminent” and “primary” force driving the government’s action, and “has to be genuine, not a sham, and not merely secondary to a religious objective.” *McCreary Cnty. v. ACLU of Ky.*, 545 U.S. 844, 864 (2005).

Where, as here, the government places “an instrument of religion” on its property, its purpose can “presumptively be understood as meant to advance religion.” *Id.* at 867 (citation omitted). A religious purpose is thus presumed here because the Latin cross is “patently religious.” *Id.* at 862-63.<sup>47</sup> The “cross is a universally recognized symbol of Christianity.” *Rabun*, 698 F.2d at 1103. As *Mendelson* recognized, the “cross has always been a symbol of Christianity, and *it*

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<sup>47</sup> See also *Stone v. Graham*, 449 U.S. 39, 41 (1980) (“The pre-eminent purpose for posting the Ten Commandments on schoolroom walls is plainly religious in nature. The Ten Commandments are undeniably a sacred text in the Jewish and Christian faiths.”).

*has never had* any secular purpose.” 719 F. Supp. at 1069 (emphasis added).

Many federal courts have found that “the presence of patently religious symbols, such as the Latin cross, suggest that the purpose of erecting a monument is religious motivated.” *Lake Elsinore*, 2013 U.S. Dist. LEXIS 188202, at \*36 (citations omitted). *E.g.*, *Rabun*, 698 F.2d at 1110-11; *Starke*, 2007 U.S. Dist. LEXIS 19512, at \*14; *Mendelson*, 719 F. Supp. at 1069 (the cross is “unmistakably a universal symbol of Christianity, and it [therefore] has no secular purpose.”); *Gonzales*, 4 F.3d at 1421; *Harris*, 927 F.2d at 1414; *Lake Elsinore*, 2014 U.S. Dist. LEXIS 25180, at \*23-24; *Eckels*, 589 F. Supp. 222; *Gilfillan*, 637 F.2d at 930; *Libin*, 625 F. Supp. at 399; *Mississippi State*, 652 F. Supp. at 382.

Just as in the above cases, “it is clear that the overriding and motivating purpose of the display is to convey a message of endorsement of the Christian religion.” *Id.* The “only purpose which can be ascribed to the display of the cross is to either advance or endorse the Christian religion.” *Id.* at 383. *See also Glassroth v. Moore*, 335 F.3d 1282, 1297 (11th Cir. 2003)(finding it “‘self-evident’ that Chief Justice Moore’s purpose in displaying the [religious] monument was non-secular.”).

**1. Bayview Cross’s religious usage and history underscores its religious purpose.**

Apart from being “patently religious,” *supra*, Bayview Cross was “erected ‘out of religious stirrings and for a religious purpose.’” *Rabun*, 698 F.2d at 1110-

11. Just like *Rabun*, Bayview Cross was dedicated on Easter for the purposes of Easter Sunrise Services.<sup>48</sup> The Eleventh Circuit held that the dedication of a cross for Easter Sunrise Services blatantly reflects “a religious purpose.” *Id.* The City’s religious purpose is even more pronounced in three ways.

First, whereas the Department ordered the “Chamber to remove the cross,” albeit ineffectively, *id.* at 1101-02, the City did the opposite, publicly declaring its intent to keep the Cross.<sup>49</sup> The Mayor even proclaimed his desire to keep the Cross “for religion in the public square.” (R.248). It was sufficient in *Rabun* that the Department “initially approved the Chamber’s project and later failed to require the Chamber to remove the cross.” *Id.* at 1109 n.19. Here, the City didn’t merely approve; its officials publicly expressed “that this would be a *very* worthwhile project.” (R.53)(emphasis added). “Public comments of [a display’s] sponsors’ is important evidence to consider in assessing government purpose.” *Lake Elsinore*, 2014 U.S. Dist. LEXIS 25180, at \*24; *see also McCreary*, 545 U.S. at 866 n.14; *Rabun*, 698 F.2d at 1111; *Starke*, 2007 U.S. Dist. LEXIS 19512, at \*14.

Second, whereas the Department in *Rabun* had no role in funding or maintaining the cross, 698 F.2d. at 1101, the City maintains and funds Bayview Cross, with about \$2,000 taxpayer dollars expended on it since 2009 alone.<sup>50</sup>

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<sup>48</sup> (R.53)(R.206)(R.374)(R.387)(Ans.¶38,¶45).

<sup>49</sup> (R.398)(Ans.¶76,¶78).

<sup>50</sup> (R.315-344)(R.371).

Third, the City has sponsored and endorsed the Christian services at the Cross, including the inaugural Easter service in 1941.<sup>51</sup> *See McCreary*, 545 U.S. at 869 (in finding a secular purpose lacking, the Court found it relevant that “at the ceremony for posting the framed Commandments in Pulaski County, the county executive was accompanied by his pastor, who testified to the certainty of the existence of God. The reasonable observer could only think that the Counties meant to emphasize and celebrate the Commandments’ religious message.”).

The foregoing religious history of Bayview Cross casts “serious doubt on any argument that it was intended as a generic symbol, and not a sectarian one.” *Trunk*, 629 F.3d at 1124.

**2. The City cannot shoulder its burden of establishing a legitimate secular purpose.**

The Eleventh Circuit and “Supreme Court ha[ve] placed the burden on the government to articulate a predominantly secular purpose,” *Lake Elsinore*, 2014 U.S. Dist. LEXIS 25180, at \*21. *See Church of Scientology Flag Serv. v. City of Clearwater*, 2 F.3d 1514, 1527, 1530 (11th Cir. 1993).<sup>52</sup> A display “in which an impermissible purpose predominates is invalid even if the legislative body was motivated in part by legitimate secular objectives.” *Id.* Although “heightened deference to legislatures is appropriate for the review of economic legislation,” it is

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<sup>51</sup> (Ans.3,¶69)(R.225)(R.227)(R.380).

<sup>52</sup> *See also McCreary*, 545 U.S. at 870-72; *Stone*, 449 U.S. at 41-42; *Rabun*, 698 F.2d at 1110.

not appropriate for “government action that implicates establishment.” *McCreary*, 545 U.S. at 865 n.13.

In no way can the City show that the massive Christian Cross has a valid secular purpose. The City even concedes the Cross was erected for the purpose of “Easter Sunrise Services.” (R.387). This is unquestionably a religious purpose. *Rabun*, 698 F.2d at 1111.<sup>53</sup> And this primary religious purpose is buttressed by the Mayor’s recent statement that the Cross should remain on City property as a “place for religion.” (R.248). *See, e.g., Glassroth*, 335 F.3d at 1296 (“no psychoanalysis or dissection is required here, where there is abundant evidence, including his own words, of the Chief Justice’s purpose.”).

While acknowledging that Bayview Cross’s primary purpose is for Easter Sunrise Services, the City avers that another purpose for owning and maintaining an enormous Christian symbol is “to make the park a welcoming and beautiful place for the public to enjoy.” (R.373). “The beauty of the Cross, however, has little bearing on its validity.” *Carpenter*, 93 F.3d at 631-32. The Eleventh Circuit has repeatedly made clear that “attempting to further an ostensibly secular purpose through avowedly religious means is considered to have a constitutionally

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<sup>53</sup> *See also Fox v. Los Angeles*, 22 Cal. 3d 792, 798 (Cal. 1978)(“We cannot conclude here that the City, particularly as to Easter holidays, did not ‘promote...such spiritual content.’ Easter crosses differ from Easter bunnies, just as Christmas crosses differ from Christmas trees and Santa Claus.”).



impermissible purpose.” *Holloman v. Harland*, 370 F.3d 1252, 1286 (11th Cir. 2004).

In *Rabun*, the Eleventh Circuit rejected the government’s proffered purpose based on the same rationale, declaring: “even if the...purpose for constructing the cross was to promote tourism, this alleged secular purpose would not have provided a sufficient basis for avoiding conflict with the Establishment Clause.” 698 F.2d at 1111 (citations omitted). The court reiterated that the “government may not ‘employ religious means to reach a secular goal.’” *Id.* (citation omitted). It also refused to accept the government’s alleged purpose of maintaining the cross for historical reasons, noting that

‘historical acceptance without more’ does not provide a rational basis for ignoring the command of the Establishment Clause that a state ‘pursue a course of ‘neutrality’ toward religion.’

*Id.* (internal citations omitted). The district court agreed that “an appeal to a single religious group in an effort to promote tourism is in any case constitutionally questionable.” 510 F. Supp. at 891 n.7.

The Seventh Circuit in *Gonzales* expressly rejected the government’s avowed purpose that a cross served to beautify public property, noting that “the fact that [the cross] is also a ‘work of art’ designed by a noted architect and approved by an art commission does not change its purpose. It simply is an attempt to create an aesthetically pleasing religious symbol; it does not obviate its

religious purpose.” 4 F.3d at 1421. The Ninth Circuit in *Carpenter* also found no merit to the government’s contention that the cross’s religious meaning was negated by the fact that it could “be properly viewed as one of the works of art in [San Francisco’s] public art collection.” 93 F.3d at 631-32 (citation omitted).<sup>54</sup>

Similarly, the court in *Mendelson* refused to accept as a valid secular purpose the assertion that the “cross has historical value to the community” and “has secular and historical value as a guidepost for fishermen and pilots and as a landmark.” 719 F. Supp. at 1069-70. The court properly held: “Even if the court found the City’s purpose to be truly secular, a government may not ‘employ religious means to reach a secular goal unless secular means are wholly unavailing.’” *Id.* (citation omitted). *See also Gonzales*, 4 F.3d at 1421 (despite claim that “the monument is intended to honor our history,” government failed to meet burden of proving secular purpose); *Harris*, 927 F.2d at 1414-15 (“the City may not honor its history by retaining the blatantly sectarian seal.”); *Lake Elsinore*, 2014 U.S. Dist. LEXIS 25180, at \*22-23; *Eckels*, 589 F. Supp. at 234.

In *Gilfillan*, the Third Circuit held that a city failed to establish a secular purpose for funding a platform (with a cross on it) for the Pope’s visit. 637 F.2d at 927-30. It was irrelevant that the service “favorably enhanced the image of the City.” *Id.* The court reasoned that “if some peripheral public relations benefit can

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<sup>54</sup> *See also Washegesic v. Bloomingdale Pub. Sch.*, 33 F.3d 679, 684 (6th Cir. 1994)(portrait of Jesus by noted artist unconstitutional).

constitute a sufficient secular purpose, then the purpose test is destroyed.” *Id.*

Finally, if the “stated purpose is not actually furthered...then that purpose is disregarded as being insincere or a sham.” *Clearwater*, 2 F.3d at 1527. A large Christian cross does not make the public park “welcoming.”<sup>55</sup> On the contrary, the City’s use of a Christian symbol “sends a strong message of endorsement and exclusion.” *Trunk*, 629 F.3d at 1124-25. It “suggests that the government is so connected to a particular religion that it treats that religion’s symbolism as its own, as universal. To many non-Christian [citizens], this claim of universality is alienating.” *Id.* (R.418-423). *See also Friedman*, 781 F.2d at 781-82 (cross on seal does not “memorialize [Native Americans] ‘Christian heritage’ but rather that of those who sought to extinguish their culture and religion.”); *Washegesic*, 33 F.3d at 684 (“Christ is central only to Christianity, and his portrait has a proselytizing, affirming effect that some non-believers find deeply offensive.”). Christians would not feel “welcome” by a city’s monolith to Islam featuring the Muslim Star and Crescent just as much as Jews and Atheists do not feel “welcome” by the City’s Christian Cross.

The Court’s inquiry could end here because the lack of secular purpose “is dispositive.” *Wallace v. Jaffree*, 472 U.S. 38, 56 (1985); *see, e.g., McCreary*, 545 U.S. at 873-74; *Glassroth*, 335 F.3d at 1297.

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<sup>55</sup> (R.373)(R.419)(R.422).

**C. The City's Christian Cross has the effect of endorsing Christianity.**

**1. The Cross inherently endorses Christianity.**

Regardless of the purposes motivating it, the Cross separately fails *Lemon's* effect test. *See Allegheny*, 492 U.S. at 599 (display of cross in government building would convey "endorsement of Christianity"); *e.g.*, *Trunk*, 629 F.3d at 1109-10 (cross unconstitutional under effect prong, despite accepting secular purpose of cross as war memorial).

The "effect prong asks whether, irrespective of government's actual purpose," *Wallace*, 472 U.S. at 56 n.42, the "symbolic union of church and state...is sufficiently likely to be perceived by adherents of the controlling denominations as an endorsement, and by the nonadherents as a disapproval, of their individual religious choices." *School Dist. v. Ball*, 473 U.S. 373, 390 (1985); *see also Larkin v. Grendel's Den*, 459 U.S. 116, 126-27 (1982)(even the "mere appearance" of religious endorsement is prohibited).

There is no question that "a reasonable observer would perceive [the cross] as projecting a message of religious endorsement." *Trunk*, 629 F.3d at 1118. The Latin "cross is the preeminent symbol of Christianity." *Id.* at 1110-11 (citations omitted). It carries an "*inherently religious message.*" *Id.* at 1101 (citation omitted, emphasis added). "[E]very single court of appeals that has considered challenges to Latin crosses has concluded that the Latin cross is a Christian

symbol.” *Lake Elsinore*, 2013 U.S. Dist. LEXIS 188202, at \*40 (collecting cases). The Tenth Circuit also recently held the Latin cross cannot “be divorced from its religious significance.” *Davenport*, 637 F.3d at 1122; *see also Allegheny*, 492 U.S. at 603 (distinguishing “a specifically Christian symbol” such as the cross from “more general religious references”). Thus, when displayed on government property, “the cross dramatically conveys a message of governmental support for Christianity, whatever the intentions of those responsible for the display may be.” *St. Charles*, 794 F.2d at 271; *see also Granzeier*, 955 F. Supp. at 746-47.

Nearly every cross that has been evaluated under *Lemon*’s effect prong has failed on the (obvious) grounds that it endorses Christianity. *See Trunk*, 629 F.3d at 1110-11; *Davenport*, 637 F.3d at 1119-24; *Eugene*, 93 F.3d at 619-20; *Robinson*, 68 F.3d at 1231-32; *Gonzales*, 4 F.3d at 1421-23; *St. Charles*, 794 F.2d at 271; *Friedman*, 781 F.2d at 782; *Cabral*, 958 F. Supp. 2d at 1029; *Lake Elsinore*, 2014 U.S. Dist. LEXIS 25180, at \*23-24; *Starke*, 2007 U.S. Dist. LEXIS 19512, at \*14; *Stow*, 29 F. Supp. 2d at 851; *Granzeier*, 955 F. Supp. at 746; *Mendelson*, 719 F. Supp. at 1070-71; *Jewish War Veterans*, 695 F. Supp. at 12-14; *Mississippi State*, 652 F. Supp. at 382; *Libin*, 625 F. Supp. at 399; *Eckels*, 589 F. Supp. at 234-35.

More importantly, *every* cross challenged within the Eleventh Circuit has failed *Lemon*’s effect prong. *See Rabun*, 510 F. Supp. at 886; *Starke*, 2007 U.S. Dis. LEXIS 19512 at \*14; *Mendelson*, 719 F. Supp. at 1070-71. In *Rabun*, for instance,

the court held that the cross was “an obviously Christian emblem...[that] can have no other...effect but to further the cause of the religion it symbolizes.” 510 F. Supp. at 886.

**2. The Cross’s size, setting, usage, and history deepens its inherently religious meaning.**

The conclusion that the “cross is a Christian religious symbol...does not, of course, end the matter.” *Lake Elsinore*, 2013 U.S. Dist. LEXIS 188202, at \*43 (citing *Trunk*). “It does, however, form a considerable obstacle to [the City].” *Id.* at n.9. Even the Supreme Court in *Allegheny* found “that erection of a cross on government property would *clearly* violate the Establishment Clause.” *Id.* (citing *Allegheny*)(emphasis added).

The government’s display of “exclusively religious symbols, such as a cross” will almost always render the display unconstitutional. *King*, 331 F.3d at 1285. “Size and placement are, however, factors to consider in the overall effect-prong analysis.” *Id.* The “size and prominence of the Cross,” towering over Bayview Park, “evokes a message of aggrandizement” and “presents a strongly sectarian picture.” *Trunk*, 629 F.3d at 1116 n.18, 1123; *see also Davenport*, 637 F.3d at 1123 (“[t]he massive size of the crosses [12-foot-tall]...unmistakably conveys a message of endorsement”). Additionally, the Cross stands in a busy location within the park

and “is visible to virtually anyone” passing by. *Gonzales*, 4 F.3d at 1414.<sup>56</sup>

Because “of the Latin cross’s strong ties to Christianity, even when a cross occupies only one part of a la[r]ger display, courts have almost unanimously held that its effect is to communicate that the display as a whole endorses religion.” *Lake Elsinore*, 2014 U.S. Dist. LEXIS 25180, at \*39-40 (citations omitted). *E.g.*, *Harris*, 927 F.2d 1401 (cross was dominated by secular features); *Robinson*, 68 F.3d at 1228 (same); *Friedman*, 781 F.2d at 779 (same); *St. Charles*, 794 F.2d at 267 (cross merely one part of “a six-acre area,” accompanied by numerous secular holiday symbols); *Lake Elsinore*, 2013 U.S. Dist. LEXIS 188202, \*52-54 (crosses occupied only 1/3 of display); *Stow*, 29 F. Supp. 2d 845.

The Bayview Cross *is the entire display*, not just a small part of it, making this an easy case. A “reasonable observer ‘would find nothing on the monument to de-emphasize its religious nature.’” *Glassroth*, 335 F.3d at 1297 (citation omitted). Remarkably, there are *no* secularizing factors whatsoever. A comparison to other cases finding crosses unconstitutional underscores this point.

In *Trunk*, for instance, the Ninth Circuit held that a “‘historically significant war memorial’” cross, surrounded by *thousands* of “secular elements,” unconstitutionally projected “a message of religious endorsement,” even though “Congress found that the Memorial has stood as a tribute to U.S. veterans for over

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<sup>56</sup>(R.7)(R.406-407)(R.419)(R.422).

fifty-two years.” 629 F.3d at 1104-06, 1117-18.

In *Davenport*, the Tenth Circuit held that thirteen twelve-foot roadside memorial crosses for individual fallen highway troopers sent a “governmental message endorsing Christianity” despite a number of “contextualizing facts.” 637 F.3d at 1121-22. First, the memorials included the trooper’s name in large text, his picture, a plaque, and biographical information. *Id.* at 1111, 1121. Second, the crosses were privately owned and funded. *Id.* at 1112. The government even issued a statement that it “neither approves or disapproves the memorial marker.” *Id.* Third, unlike here, there was no evidence of any religious history or usage, such as Easter Sunrise Services. *Id.* at 1120 n.11.<sup>57</sup>

The Seventh Circuit in *Harris* found a cross unconstitutional even though it “was no more prominent than several secular images.”<sup>58</sup> Despite the dominating secular “snapshots of the community,” the court held: “To any observer, the...seal expresses the City’s approval of those four pictures of City life—its flora, its schools, its industry and commercial life, and its Christianity.” 927 F.2d at 1412-13.

In *Eugene*, the Ninth Circuit concluded that it was “simple” and “straightforward” that a concrete cross, erected by American Legion in 1964

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<sup>57</sup> See also *Green v. Haskell Cnty. Bd. of Comm’rs*, 568 F.3d 784, 800-04 (10th Cir. 2009)(Ten Commandments display unconstitutionally endorsed religion even though it “was one of numerous [secular] monuments and displays on the courthouse lawn”).

<sup>58</sup> *Murphy v. Bilbray*, 782 F. Supp. 1420, 1436 n.38 (S.D. Cal. 1991), *aff’d sub nom. Ellis v. La Mesa*, 990 F.2d 1518 (citing *Harris*, 927 F.2d 1401).



without the city's permission "clearly" unconstitutionally advanced religion. 93 F.3d at 617-20 n.5. This was so even though a "plaque on the cross clearly show[ed] its status as a war memorial." *Id.* at 625-26. The cross also stood "remote from any government buildings." *Id.* The concurrence agreed that "*Allegheny* nevertheless compels the conclusion that the City's display of the cross is unconstitutional." *Id.* at 626 (O'Scannlain J., concurring).

Similarly, in *Lake Elsinore*, a 6-foot tablet depicting "a historic European military cemetery of the World War II era" — specifically, "the image of 'row upon row of small white crosses'" — alongside Stars of David and military symbols far more numerous than the religious symbols, failed the effect test. 2014 U.S. Dist. LEXIS 25180, at \*26, \*40-42 (citation omitted). And in *Eckels*, three privately-funded crosses in a Texas park unconstitutionally endorsed religion even though they were part of a war memorial and placed alongside a Star of David. 589 F. Supp. at 228-29, 234-35. The court could "reach no other conclusion but that the symbols' primary or principal effect" is to "give the impression that only Christians and Jews are being honored." *Id.*

The Bayview Cross is more overtly unconstitutional than the crosses sampled above. It is not part of an array of other monuments, nor is it a small feature of an otherwise secular display. It is neither a war memorial nor a roadside grave marker. It is a freestanding, unadorned Christian symbol, explicitly intended

for Christian services.

Furthermore, the Cross “pervades the daily lives of county residents. It is not displayed once a year for a brief period.” *Friedman*, 781 F.2d at 782. This makes it more invasive than the temporary crosses found unconstitutional in *St. Charles*,<sup>59</sup> *Gilfillan*,<sup>60</sup> *Cabral*,<sup>61</sup> *Granzeier*,<sup>62</sup> and *Libin*,<sup>63</sup> and crèche displays. *See Allegheny*, 492 U.S. at 606-07; *Harris*, 927 F.2d at 1412 (because the seal is “viewed year-round,” the cross “brings together church and state...even more ardently than the unconstitutional crèche”); *Gonzales*, 4 F.3d at 1423; *Eckels*, 589 F. Supp. at 235 (“There is no danger here that the government’s use of these symbols [the cross and Star of David] will be mistaken as merely a temporary governmental celebration of a religious holiday that has acquired some secular flavor.”).

Not only does Bayview Cross lack any neutralizing factors, four factors *compound* the already overwhelming message of Christian endorsement.

First, the Cross stands adjacent to a platform with a plaque that explicitly refers to the Easter Sunrise Services and the faith-based entity that donated the Cross.<sup>64</sup> *See Allegheny*, 492 U.S. at 600 (“the sign simply demonstrates that the government is endorsing the religious message of that organization”); *Smith v. Cty.*

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<sup>59</sup> 794 F.2d 265.

<sup>60</sup> 637 F.2d at 930.

<sup>61</sup> 958 F. Supp. 2d at 1022-27 (display for only “a two-week period”).

<sup>62</sup> 955 F. Supp. at 746.

<sup>63</sup> 625 F. Supp. at 399.

<sup>64</sup> (R.18)(R.52)(R.145-147)(R.349)(R.375).

*of Albemarle*, 895 F.2d 953, 958 (4th Cir. 1990)(“The endorsement of the religious message proceeds as much from the religious display itself *as from the identification of a religious sponsor.*”)(emphasis added).

Second, though more directly relevant to the purpose analysis, the “history of this Cross only deepens its religious meaning.” *Trunk*, 629 F.3d at 1118-19, 1124. This Cross “is not only a preeminent symbol of Christianity, it has been consistently used in a sectarian manner.” *Id.* at 1124; *see also id.* at 1121 (“[T]hat the effect of the symbols’ presence is religious is evidenced by what the site has been used for since the [cross was] constructed [including Easter sunrise services]. There is nothing remotely secular about church worship.”)(quoting *Eckels*, 589 F. Supp. at 235)); *Allegheny*, 492 U.S. at 599 (“It is as if the county had allowed the Holy Name Society to display a cross on the Grand Staircase at Easter, and the county had surrounded the cross with Easter lilies. The county could not say that surrounding the cross with traditional flowers of the season would negate the endorsement of Christianity conveyed by the cross on the Grand Staircase.”). ““This kind of historical significance *simply exacerbates* the appearance of governmental preference.”” *Carpenter*, 93 F.3d at 631 (citation omitted)(emphasis added).

Third, the City’s involvement in the Easter Sunrise Services held at the Cross contributes to the reasonable observer’s impression that the City is endorsing

Christianity. *See Green*, 568 F.3d at 801 (“The reasonable observer would know that two of the three commissioners attended the unveiling of the Monument, which had been organized by Mr. Bush and included remarks by local pastors.”). In *Gilfillan*, for instance, the Third Circuit held that a city unconstitutionally endorsed religion by funding part of a platform for the Pope’s visit even though the event itself was organized and sponsored by the Archdiocese. 637 F.2d at 931. The “safety of the expected crowd, for which the City remained primarily responsible, would be endangered if the Pope were not visible to a large percentage of the persons in attendance.” *Id.* at 937 (Aldisert, J., dissenting). Nonetheless, the Third Circuit held that the “religious effect was both plain and primary.” *Id.* at 931. The Pope was “able to celebrate a Mass and deliver a sermon. In so doing, he brought a religious message, with the help of the City, from the Roman Catholic Church.” *Id.*

Just like in *Gilfillan*, the City provided a stand “for speakers and singers” at the 1944 Easter Sunrise Services and bus transportation for the first Easter service in 1941.<sup>65</sup> More significantly, the City officially “co-sponsored” the Easter services in 2008, 2009, and 2010.<sup>66</sup> Such involvement would violate the Establishment Clause independent of the Cross. “A religious service under governmental auspices necessarily conveys the message of approval or endorsement.” *Doe v. Crestwood*, 917 F.2d 1476, 1478-79 (7th Cir. 1990)(citations omitted). In *Crestwood*, a village

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<sup>65</sup> (R.92)(Ans.3).

<sup>66</sup> (R.258-65)(R.278)(R.284)(R.366)(R.380).

sponsored a three-day Italian Festival, which included a privately-sponsored 45-minute mass held simultaneously with other secular events. *Id.* Concluding that the village unconstitutionally endorsed the mass, the Seventh Circuit found it sufficient that the village's paper had a headline: "Italian Mass to be celebrated at our Italian Fest." *Id.* at 1479. The use of the word "our" implied that "the mass and Festival alike are under the Village's sponsorship." *Id.* Thus, the village unconstitutionally endorsed the mass even though the "Women's Club [was] the true sponsor." *Id.*

Likewise, in *Newman v. City of E. Point*, the court, relying on Eleventh Circuit precedent, held that a mayor's "prayer breakfast" violated the Establishment Clause. 181 F. Supp. 2d 1374, 1378-80 (N.D. Ga. 2002). Although not an official sponsor, the city impermissibly endorsed the event because city letterhead was used to promote it and flyers were distributed at the city's holiday party. *Id.* at 1381.

A much stronger link between church and state has been formed by the City's actions here because unlike in *Newman* and *Crestwood*, the City has been an official co-sponsor of the Easter Sunrise Services.<sup>67</sup> It also owns, funds, and maintains the Christian cross at the heart of these worship services.<sup>68</sup>

Fourth, the "Cross's importance as a religious symbol has been a rallying cry for many involved in the litigation surrounding the Memorial." *Trunk*, 629 F.3d at

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<sup>67</sup> (R.258-65)(R.278)(R.284)(R.366)(R.380).

<sup>68</sup> (R.315-344)(R.371)(R.397-98).

1119. In *Trunk*, as here, groups launched petition campaigns to save the cross. *Id.* at 1119-20 & n.19.<sup>69</sup> The court found that the “starkly religious message of the Cross’s supporters would not escape the notice of the reasonable observer.” *Id.* at 1120. *See also Starke*, 2007 U.S. Dist. LEXIS 19512, at \*6-7, \*13-14 (finding “a petition to ‘keep the cross’” relevant to endorsement).

In short, the Cross fails *Lemon*’s effect prong by a landslide.

**D. The Cross fosters excessive entanglement with religion.**

The City’s monitoring, maintenance, and funding of an enormous Christian cross fosters excessive entanglement with religion, contravening *Lemon*’s final prong. Every cross that has been challenged within the Eleventh Circuit has failed this prong. *See Rabun*, 510 F. Supp. at 891-92. In *Mendelson*, the court held that the city “is entangled with religion because it funded the illumination of the cross during the six month period when [the private entity] was in default of its lease.” 719 F. Supp. at 1071.

In *Starke*, the court again held that a “City’s maintenance and illumination of the Cross” fostered ““excessive governmental entanglement.”” 2007 U.S. Dist. LEXIS 19512, at \*18-19. The court observed, as relevant here: “Since its placement on top of the water tower, the Cross has been maintained through City work orders and illuminated by the City.” *Id.* The court proclaimed: “If ever there

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<sup>69</sup> (R.43-47)(R.250-252).

were a clear case of ‘excessive governmental entanglement’ with religion, this is it.”  
*Id.*

Just like in *Starke* and *Mendelson*, Bayview “Cross has been maintained through City work orders and illuminated by the City.” *Id.*<sup>70</sup> Yet again, the entanglement is even more profound in this case for two reasons. First, the City determines which religious groups may use the Cross and for what purposes.<sup>71</sup> *E.g.*, *Coles v. Cleveland Bd. of Educ.*, 171 F.3d 369, 385 (6th Cir. 1999)(finding excessive entanglement where “the school board decided to include prayer” and “chose which member from the local religious community would give those prayers”). Second, the City has been actively involved in the annual Christian services and has co-sponsored recent services with the Jaycees.<sup>72</sup> *See Gilfillan*, 637 F.2d at 931 (the “relationship between the City and the Archdiocese [in connection with the event] constituted entanglement in violation of the third part [of *Lemon*]”).

#### **IV. Plaintiffs are entitled to the relief they seek.**

Because Bayview Cross violates the Establishment Clause, Plaintiffs are entitled to injunctive relief. *See Rabun*, 698 F.2d at 1111 (ordering removal of cross). The Supreme Court declared in *Allegheny*:

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<sup>70</sup> (R.316-344)(R.371)(R.385)(R.397)(Ans¶86).

<sup>71</sup> (R.253-294)(R.297-314)(R.398).

<sup>72</sup> (R.92)(R.103)(R.225)(R.227)(R.380)(Ans.3,¶69).

once the judgment has been made that a particular proclamation of Christian belief, when disseminated from a particular location on government property, has the effect of demonstrating the government's endorsement of Christian faith, then it necessarily follows that the practice must be enjoined to protect the constitutional rights of those citizens who follow some creed other than Christianity.

492 U.S. at 612-13.

Plaintiffs are also entitled to nominal damages because the Supreme Court “obligates a court to award nominal damages when a plaintiff establishes the violation of [a constitutional right].” *Farrar v. Hobby*, 506 U.S. 103, 112 (1992).

## **V. Conclusion**

The undisputed material facts lead to the inescapable conclusion that the City's massive Christian cross violates the Establishment Clause. Plaintiffs therefore respectfully request that the Court grant their Motion for Summary Judgment in its entirety.

Respectfully submitted,

April 21, 2017

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**CERTIFICATE OF COMPLIANCE**

Pursuant to Northern District of Florida Local Rule 7.1(F), the undersigned hereby certifies that the word count for this document, excluding case style, signature block and certificate of service and certificate of compliance, contains 7,998 words.

Dated: April 21, 2017

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**CERTIFICATE OF SERVICE**

I hereby certify that on April 21, 2017, the foregoing Memorandum in Support of Plaintiffs' Motion for Summary Judgment was filed with the Clerk of Court via the CM/ECF Filing System, which will send a notice of electronic filing to:

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