RECORD NO. 17-13025

In The

United States Court Of Appeals
For The Eleventh Circuit

AMANDA KONDRAT'YEV; ANDREIY KONDRAT'YEV; ANDRE RYLAND; DAVID SUHOR,

Plaintiffs-Appellees,

v.

CITY OF PENSACOLA, FLORIDA; ASHTON HAYWARD, Mayor; BRIAN COOPER,

Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF FLORIDA

BRIEF OF APPELLEES

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CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 and Eleventh Circuit Rule 26.1, Appellees certify that the following entities and persons have an interest in the outcome of this appeal:

Allen, Norton & Blue, PA (law firm for the Appellants)

American Humanist Association (law firm for the Appellees)

Becket Fund for Religious Liberty (law firm for Appellants)

Beggs & Lane, RLLP (law firm for Appellants)

City of Pensacola, Florida (Appellant)

Cooper, Brian (Appellant)

Daniel, James Nixon (Counsel for Appellants)

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Hayward, Ashton (Appellant)

Kahn, Charles J. (Magistrate Judge)

Kondrat'yev, Amanda (Appellee)

Kondrat'yev, Andreiy (Appellee)

Markert, Rebecca (Counsel for Appellees)

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Niose, David A. (Counsel for Appellees)

Ryland, Andre (Appellee)

Suhor, David (Appellee)

Vinson, C. Roger (District Court Judge)

Windham, Lori (Counsel for Appellants)

Ziegler, Madeline (Counsel for Appellees)

Appellees, Amanda Kondrat'yev, Andreiy Kondrat'yev, Andre Ryland, and David Suhor, are individuals, and private parties. There are no publicly-traded corporations or parties to the appeal that have a financial interest in the outcome.

Respectfully submitted,

November 16, 2017

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STATEMENT REGARDING ORAL ARGUMENT

This appeal involves the straightforward issue of whether a city's massive, freestanding Christian cross — prominently displayed on city property — violates the Establishment Clause. This Court has already ruled that a cross displayed in a government park violates the Establishment Clause. Indeed, numerous courts have considered the constitutionality of crosses and have been virtually unanimous in finding them unconstitutional, irrespective of how old they are, whether they are accompanied by other symbols or secular monuments, or have independent historical or practical significance. Even the District Court judge, who was the president of the organization that installed the cross, agreed this case does not present a "difficult question[] —legally speaking—because there is controlling precedent directly on point." (DE-41, 10). Thus, oral argument is unwarranted.

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REFERENCES TO THE RECORD

In this brief, references to the initial brief of Defendant-Appellant, the City of Pensacola ("the City"), will be designated "Br."[1] Citations to the District Court record are cited by the Docket Entry ("DE-") followed by the page number designated on the CM/ECF heading at the top of each page, with the exception of Plaintiffs-Appellees' (hereafter "Plaintiffs") Summary Judgment exhibits. Citations to Plaintiffs' exhibits are to the paginated record Plaintiffs submitted in District Court pursuant to Local Rue 56.1, and cited herein as ("R.__"). Plaintiffs' Summary Judgment Record consists of 426 pages split into eighteen CM/ECF entries under DE-31 to meet that court's filing-size requirements. The corresponding docket entries for said record pages are as follows:

R.	Docket Entry
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213-259	31-15
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Plaintiffs also filed two summary judgment exhibits to their reply brief (DE-39-1) and (DE-39-2).

STATEMENT REGARDING ADOPTION

Plaintiffs adopt the City's Jurisdictional Statement (Br.1) except for the final sentence regarding standing. As discussed in the Argument, the District Court correctly found that Plaintiffs meet the requirements of Article III. (DE-41, 2).

Plaintiffs adopt the City's "standard of review" in full (Br.26), and its "procedural background" as to all referenced dates and court filings (Br.25-26), but not as to any legal conclusions, or characterizations of Plaintiffs' arguments and the summary judgment opinion.

STATEMENT OF THE ISSUES

This Court has held that when the government permanently displays a Latin cross in a park for Easter services, the cross violates the Establishment Clause. The City owns and displays a 30-foot Latin cross in a popular city park for Easter services. The Christian cross is one of only two monuments in the entire park and is the only religious symbol. The issue is simply: Does a city's large, freestanding Christian cross permanently displayed in a government park for Easter services violate the Establishment Clause?

STATEMENT OF THE CASE

1. Nature of the case

The City owns, funds, maintains, and displays a massive freestanding Christian cross, to the exclusion of other religious symbols, in a popular city park. In 1969, the City approved the installation of this permanent, 30-foot Latin cross in Bayview Park (the "Cross" or "Bayview Cross"), for Easter Sunrise Services.[2]

In *ACLU v. Rabun Cnty. Chamber of Commerce, Inc.*, this Court held a cross unconstitutional in virtually identical circumstances. 698 F.2d 1098 (11th Cir. 1983). The District Court's decision was therefore neither remarkable nor surprising. What is surprising, however, is that the City has continued with this appeal knowing "there is controlling precedent directly on point." (DE-41, 10). Tellingly, the presiding judge did not want Plaintiffs to win. (DE-41, 6, 22). Not only was he personally fond of the Cross (walking by it several times a week), but he was also the president of the organization that installed the Cross around the time it was installed. (Tr. 3:9-16)(DE-30-1, 2). Yet he recognized that the "law is the law" and ordered its removal. (DE-41, 21).

2. Statement of facts

The Christian monolith at issue is a freestanding, unadorned, white Latin cross, standing approximately 30-feet tall with a crossbar approximately 10-feet wide.[3]

[2] (R.3-11)(R.13)(R.53)(R.397)(R.406-407)(R.422-426)(DE-22, 8-9)(DE-41, 1-2).
[3] (R.3-11)(R.53)(R.206)(R.397)(R.422-23)(DE-22, 8).

The Cross is the only religious monument in Bayview Park.[4] In fact, it is only one of only *two* monuments in the entire park, the other being a modestly-sized memorial to Tim Bonifay, installed in 1979.[5] The City owns the Cross and is responsible for its maintenance and upkeep.[6] Since 2009, the City has expended approximately $2,000 of taxpayer funds on the Cross and its maintenance.[7]

Bayview Cross has consistently been used for religious purposes, serving as the centerpiece for annual Easter Sunrise Services.[8] Easter Sunrise is a Christian worship service that includes prayers, hymns, and sermons.[9] Bayview Cross was permanently installed in 1969 for these services.[10]

In 1941, the National Youth Administration placed a wooden cross in the park for the inaugural Easter service. [11] The service commenced with a call to worship followed by an opening prayer, the address ("The Risen Christ"), and the dedication.[12] Songs included "Holy, Holy, Holy," "Christ Arose," and "The Old

[4] (R.374-375)(DE-22, 9).
[5] (R.8-11)(R.18)(R.50-52)(R.375).
[6] (R.53)(R.316-344)(R.371)(R.397-98)(DE-22, 9).
[7] (R.15-16)(R.315-344)(R.371)(R.397-98)(DE-22, 9).
[8] (R.18)(R.50)(R.53-54)(R.57-249)(R.254-288)(R.398)(DE-22, 10-11) (DE-30-1, 50-51, 56, 73, 111).
[9] (R.57-249)(R.415-417)(DE-22, 11).
[10] (R.53)(R.206)(R.371-74)(R.416)(DE-22, 9).
[11](R.57-69)(R.374)(DE-30-1, 50-51)(R.415-417)(DE-22, 9-11).
[12] (R.57-58)(R.415).

Rugged Cross." [13] The service was sponsored by the Pensacola Ministerial Association and the Pensacola Junior Chamber of Commerce ("Jaycees").[14]

In 1949, a small amphitheater was installed near the Cross to serve as a permanent home for the Easter services.[15] The amphitheater was dedicated at the 1949 Easter service, the theme of which was "Christ's Triumph Over Death."[16] In 1951, the City resolved "that a plaque be furnished by the City, with dedication services to be held on next Easter at sunrise." [17] The plaque states that the amphitheater is dedicated to the "Chm. Of Easter Sunrise Com. 1941."[18]

At the February 1969 Parks and Recreation meeting, the Jaycees sought approval to erect a "new cross at Bayview for their Easter Sunrise Services."[19] The minutes reflect the City noting: "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." (R.53). The City emphatically approved: "[Board] Members felt that this would be a *very* worthwhile project." (R.53)(emphasis added). The Cross was dedicated at the 29th Easter Sunrise Service.[20]

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[13] (R.59)(R.63)(R.415).
[14](R.57-58)(DE-22, 5).
[15] (R.18)(R.50)(DE-30-1, 51)(R.374-375)(DE-22, 9).
[16] (R.130-131)(R.415).
[17] (R.52). *See also* (R.145-147)(DE-30-1, 50)(R.375).
[18] (R.18)(R.350).
[19] (R.53)(R.374).
[20] (R.206)(R.212-13)(R.416)(DE-41, 1).

While the City claims it has "never sponsored or financially supported these events," and "there is no record of any city official attending any event at the cross," (Br.22), the City was an official "co-sponsor" of the 2008, 2009, and 2010 Easter services.[21] "The City of Pensacola" and "City of Pensacola personnel" were listed as "participating in the service" in 1974 and 1975, respectively.[22] The City helped arrange bus transportation for the first service in 1941,[23] and erected "a stand for speakers and singers" for the 1944 service.[24] In 1945, the Jaycees' president "expressed appreciation of the excellent job done by city officials" in clearing grass and installing foot bridges for the Easter services.[25]

The services held at the Cross have been hostile to non-Christians.[26] 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," and the pastor's sermon characterized a disciple doubtful of Jesus'

[21] (R.258-65)(R.278)(R.284)(R.366)(R.380).
[22] (R.225)(R.227).
[23] (DE-22, 3)(R.60).
[24] (R.92)(R.415).
[25] (R.103)(R.415).
[26] (R.153)(R.210-213)(R.416)(R.419)(R.422).

resurrection as a "cringing coward."[27] In August 2015, Christians organized a rally, emphasizing:

> "This gathering is not just about the removal of some 50+ year old cross, but is about Christians coming together, outside the church walls, making a stand for Christ and their faith. Our nation is in need of a revival."[28]

The City has received numerous complaints about the Cross including one nearly 20 years ago.[29] In July 2015, the American Humanist Association (AHA) and Freedom From Religion Foundation (FFRF) separately sent the City cease-and-desist letters to no avail.[30]

SUMMARY OF THE ARGUMENT

This is an easy case. The City's Cross readily contravenes Eleventh Circuit and Supreme Court precedent, including *Rabun* and *Allegheny*, and fails all three prongs of the controlling *Lemon* test. Numerous courts, including the Third, Fourth, Seventh, Ninth, and Tenth Circuits, have found crosses unconstitutional, irrespective of how old they were, whether they were displayed among other symbols or monuments, or had independent historical or practical significance.

The City cannot cite a single binding case upholding the constitutionality of a freestanding Latin cross on government property, let alone one as flagrantly

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[27] (R.210-213)(R.416).
[28](R.45)(R.250-252)(R.291-294)(DE-22, 12).
[29] (R.25-37)(R.39-40)(R.247-252)(DE-22, 12)(DE-39-2).
[30] (R.25-37)(R.39-40)(DE-22, 12).

sectarian as Bayview Cross. Instead, the City argues that *Rabun* and the *Lemon* test have been overruled, relying upon: (1) the legislative-prayer exception; (2) Justice Breyer's concurrence in *Van Orden*; and (3) *dicta* from *Buono*. This case does not challenge legislative prayer, Ten Commandments dominated by an array of secular monuments in a museum-like setting (*Van Orden*), or a statute conveying land to a private entity (*Buono*). Nor do these cases remotely support the City's argument that *Lemon* has been overruled. Indeed, every cross case decided after *Buono*, *Van Orden*, and *Galloway* applied *Lemon*.

The Supreme Court has never overruled *Lemon.* On the very same day *Van Orden* was decided, the Supreme Court in *McCreary* held that *Lemon* applied to a Ten Commandments display. Justice Breyer's concurring opinion in *Van Orden* is only relevant to difficult borderline Ten Commandment cases. *Van Orden* involved a nondenominational Ten Commandments that (i) had a secular purpose, (ii) was displayed among numerous secular monuments, (iii) the secular legal and historical aspects of the tablets' message predominated, and (iv) had no religious usage.

Every *cross* case decided after *Van Orden* adhered to *Lemon*, including decisions by the Second, Fourth, Ninth, and Tenth Circuits. *Van Orden* is also readily distinguishable. The cross is an exclusively religious symbol lacking an "undeniable" secular historic meaning. The massive Christian cross stands alone

in a popular city park, was installed for Christian religious services, and has consistently been used for such religious purposes.

ARGUMENT

I. Plaintiffs have standing to challenge the massive Christian cross in their own community.

Plaintiffs, four local residents who are atheist and humanist members of AHA and FFRF, have had repeated direct, unwelcome contact with the Cross.[31] David Suhor lives 1.5 miles from the Cross and encounters it on his regular bike rides, as often as twice a week. (R.419). Andre Ryland lives about 7.5 miles from the Cross and often encounters it while walking the trail around the park and attending events in park including "meetings at the Senior Center."[32] The District Court found it "undisputed" Ryland "has standing in this action, and that is sufficient." (DE-41, 2). The City disputes this merely because: (1) despite repeatedly encountering the Cross and having a Pensacola address (R.421), he is technically a county rather than city resident; and (2) he has "not even tried to avoid the cross, much less borne any burden." (Br.30, 32).

Establishment Clause standing is predicated simply upon direct, unwelcome contact with the display. *Saladin v. City of Milledgeville*, 812 F.2d 687, 691 (11th Cir. 1987). In *Saladin*, even though some of the plaintiffs lived outside the city, they

[31] (R.418-19)(R.422)(DE-1, 3-6).
[32] (R.418-423)(Br.24).

had standing to challenge the city's seal because they directly encountered it. *Id*. at 693. Similarly, in *Rabun*, plaintiffs had standing to challenge a cross in a park even though each resided in Atlanta, which was "more than 100 miles" away. 698 F.2d at 1107-08. It was enough that one plaintiff had standing based on the fact the cross was visible from "the porch of his summer cabin" and from the roadway he used to reach the cabin. *Id.* The Fourth Circuit recently ruled that three plaintiffs had standing to challenge a cross in a town even though none were town residents and none assumed special burdens to avoid the cross. *Am. Humanist Ass'n v. Md.-National Capital Park & Planning Comm'n*, 874 F.3d 195, 202 (4th Cir. 2017), *petition for reh'g en banc filed* (hereafter "*AHA*"). Notably, the City's Director of Parks recently admitted that Bayview is "a regional park that serves just about our entire community," and "[p]eople come from all over the county and the adjoining county."[33]

The City's second contention, that plaintiffs "must show they have been 'forced to assume special burdens' to avoid the offensive display" (Br.30), is wrong. Plaintiffs have standing if they have been "subjected to unwelcome religious exercises *or* were forced to assume special burdens to avoid them." *Valley Forge Christian Coll. v. Am. United for Separation of Church & State, Inc*., 454 U.S. 464,

[33] *http://www.pnj.com/story/news/2017/10/28/bayview-community-center-track-2019-completion-despite-complaints-over-design/798527001/* (last viewed October 30, 2017); *https://perma.cc/U27K-AXY5* (permalink).

487 n.22 (1982) (emphasis added). The City concedes Ryland has directly contacted the Cross and is "offended" and "excluded" when he sees it, but retorts: "that is merely a 'psychological consequence' insufficient to confer standing." (Br.30). However, the two cases the City relies upon, *Valley Forge*, and *Freedom from Religion Found., Inc. v. Obama*, 641 F.3d 803 (7th Cir. 2011), are "inapposite because, in both, the plaintiffs had no direct contact with the challenged conduct but, instead, merely heard of the conduct from others." *Mullin v. Sussex Cnty.*, 861 F. Supp. 2d 411, 420 n.4 (D. Del. 2012). Just like in *Saladin*, 812 F.2d at 692, Ryland's "direct contact with the offensive conduct" distinguishes him from the plaintiffs in *Valley Forge*, and *Obama*, as well as *ACLU-NJ ex rel. Miller v. Twp. of Wall*, 246 F.3d 258, 265-66 (3d Cir. 2001) (Br.32). As the Third Circuit recently declared, a plaintiff "may establish standing by showing direct, unwelcome contact with the allegedly offending object or event, regardless of whether such contact is infrequent or *she does not alter her behavior to avoid it*." *Freedom from Religion Found. Inc. v. New Kensington Arnold Sch. Dist.*, 832 F.3d 469, 479 (3d Cir. 2016) (emphasis added).

Furthermore, Suhor *is* a City resident. The City claims his standing is defeated because he staged a protest against the Cross by holding a Satanic service on Easter. (Br.33). A plaintiff need not avoid the display to maintain standing. This Court in *Pelphrey v. Cobb County* held that a plaintiff had standing to challenge legislative

prayers even though he *chose* to subject himself to the prayers on the internet and easily could have avoided them. 547 F.3d 1263, 1279-80 (11th Cir. 2008).[34]

II. The City's Christian Cross violates the Establishment Clause pursuant to controlling precedent.

A. Overview

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). To pass muster under the Establishment Clause, a display must satisfy each prong of the *Lemon* test, meaning 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)). *See McCreary Cnty. v. ACLU of Ky.*, 545 U.S. 844, 864 (2005) (religious displays subject to *Lemon*).

Binding "caselaw 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 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

[34] *See also Hewett v. City of King*, 29 F. Supp. 3d 584, 603-04 (M.D.N.C. 2014) (plaintiff had standing to challenge a prayer event even though he attended to protest).

on public land . . . violates the Establishment Clause.") (emphasis added)). Every cross challenged within the Eleventh Circuit has been found unconstitutional. *Rabun*, 698 F.2d at 1111; *Am. Atheists, Inc. v. City of Starke*, 2007 U.S. Dist. LEXIS 19512 (M.D. Fla. 2007); *Mendelson v. St. Cloud*, 719 F. Supp. 1065 (M.D. Fla. 1989).

Other federal courts have been virtually unanimous in holding that a government cross display violates the Establishment Clause. *See AHA*, 874 F.3d 195 (historic 90-year-old war memorial cross); *Trunk v. San Diego*, 629 F.3d 1099 (9th Cir. 2011), *cert. denied*, 132 S.Ct. 2535 (2012) (historic 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 for state troopers); *Buono v. Norton*, 371 F.3d 543 (9th Cir. 2004) (7-foot war memorial cross); *Carpenter v. San Francisco*, 93 F.3d 627 (9th Cir. 1996) (landmark cross in remote park); *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) (holiday cross); *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); *Freedom from Religion Found. v. County of Lehigh*, 2017 U.S.

Dist. LEXIS 160234 (E.D. Pa. Sep. 28, 2017) (insignia cross); *Davies v. County of Los Angeles*, 177 F.Supp.3d 1194 (C.D. Cal. 2016) (insignia cross); *Am. Humanist Ass'n v. Lake Elsinore*, 2014 U.S. Dist. LEXIS 25180 (C.D. Cal. 2014) (multifaceted war memorial); *Cabral v. City of Evansville*, 958 F. Supp. 2d 1018 (S.D. Ind. 2013), *app. dism.*, 759 F.3d 639 (7th Cir. 2014) (temporary 6-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 4-inch cross); *Jewish War Veterans v. United States*, 695 F. Supp. 3 (D.D.C. 1988) (war memorial on military base); *ACLU v. Mississippi State Gen. Servs. Admin.*, 652 F. Supp. 380 (S.D. Miss. 1987) (temporary holiday cross); *Libin v. Greenwich*, 625 F. Supp. 393 (D. Conn. 1985) (temporary 5-foot 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 in local park).

Courts have found crosses unconstitutional irrespective of whether it was a:

- war memorial (*AHA*, *Trunk*, *Buono*, *Eugene*, *Gonzales*, *Lake Elsinore*, *Jewish War Veterans*, *Eckels*)
- tourist attraction (*Rabun*, *Gilfillan*)
- roadside memorial for highway troopers (*Davenport*)
- navigational aid to pilots or fishermen (*Mendelson*, *Ellis*)
- work of art (*AHA*, *Gonzales*, *Carpenter*)

- historically or culturally significant landmark (*Rabun*, *Trunk*, *Carpenter*, *Robinson*, *Gonzales*, *Ellis*, *Harris*, *Friedman*, *Mendelson*)

- small or decentralized part of a larger display (*Harris*, *Friedman*, *Robinson*, *Lehigh*, *Lake Elsinore*, *Stow*)

- multifaceted display or outnumbered by surrounding secular symbols, monuments, or text (*AHA*, *Davenport*, *Trunk*, *Harris*, *Friedman*, *Robinson*, *St. Charles*, *Lehigh*, *Lake Elsinore*, *Stow*)

B. Bayview Cross contravenes Eleventh Circuit precedent.

This Court in *Rabun* held that the "maintenance of the cross in a state park violates the Establishment Clause." 698 F.2d at 1111. *Rabun* specifically requires a city to remove a Latin cross installed in a public park despite its "'historical acceptance.'" *Id.* (citation omitted). The District Court correctly found *Rabun* "controlling," as it involved "this exact issue on virtually identical facts." (DE-41, 10). "[C]onsistent with that directly-on-point and binding case law," the court concluded, "Bayview Cross fails the first prong of the *Lemon* test and, thus, runs afoul of the First Amendment as currently interpreted by the Supreme Court." (DE-41, 21).

The parallels to *Rabun* are uncanny. The *Rabun* cross was erected in a park by a private entity to replace an older cross. *Id.* at 1101-02. Easter Sunrise Services were held at the site. *Id.* In early 1979, the Chamber of Commerce sought approval from Georgia Department of Natural Resources to replace the old cross. *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.* The Department "approved the Chamber's request." *Id.*

Almost identically, in early 1969, the Pensacola Junior Chamber of Commerce sought permission from the Parks and Recreation Department to erect a "new cross at Bayview for their Easter Sunrise Services."[35] Like *Rabun*, the Jaycees told the City "[t]hey will put it up." But here, *the City* would "maintain it after that time." And like *Rabun*, the City approved. (R.53).

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.[36] 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 citizens and AHA and FFRF.[37] But in *Rabun*, the government actually heeded the warnings and ordered "the Chamber to remove the cross." *Id.* The Chamber refused. *Id.* Here, the City eschewed multiple legal warnings and issued a press release boasting: "The City is making no plans to remove the cross." (R.252). The Mayor also told the press: "I hope there is

[35] (R.373)(R.53).
[36] (R.206)(R.416).
[37] (R.25-37)(R.39-40)(R.247-49)(DE-22, 12)(DE-1, 14-15)(DE-39-2).

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). This Court 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.* In fact, Bayview Cross enmeshes state and church to a much greater degree than *Rabun* for four reasons. First, as the District Court noted, the mayor's proclamation was "essentially an admission that the cross has been sustained for a religious purpose." (DE-41, 11). Second, whereas the Department in *Rabun* 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.[38] It was sufficient that the *Rabun* Department "failed to take any affirmative action." *Id.* at 1109 n.19. Third, unlike *Rabun*, the City is responsible for the maintenance and upkeep of the Cross.[39] *Id.* at 1101. Fourth, the City has endorsed and supported the Easter services held at the Cross.[40] *See McCreary*, 545 U.S. at 869 (government involvement in religious event at display increased its religious meaning).

[38] (R.248)(R.398)(DE-22, 12).
[39] (R.52)(R.315-344)(R.371)(R.397-98)(DE-22, 9).
[40] (R.92)(R.103)(R.225)(R.227)(R.258-65)(R.278)(R.284)(R.366)(R.380).

C. The City cannot meaningfully distinguish *Rabun*.

Astonishingly, despite being duty-bound to address directly adverse precedent, the City failed to even mention *Rabun* in its summary judgment brief. (DE-30). When asked at the hearing, "how do you distinguish *Rabun*," the City's primary response was that *Rabun* is old and predates *Van Orden v. Perry*, 545 U.S. 677 (2005) (Tr.32:1-4). But as the court pointed out, the case's age does not *distinguish* it and *Van Orden* is inapplicable to crosses. (Tr.33:22-35:3) (DE-41, 12-20).

On appeal, the City argues that *Rabun* is distinguishable because "*Rabun* involved a brand-new cross." (Br.49). But in *Rabun*, a cross had been displayed since 1957, and no objections were made to the earlier crosses. 698 F.2d at 1101. The District Court even informed the City of this fact. (Tr.34:23-35:3). The City's argument also smacks of hypocrisy, as it counts the temporary crosses preceding Bayview Cross in claiming it is "76" years old. (Br.2-3, 50, 63, 67). But the challenged cross was not erected until 1969, making it 48. (Br.20-21). Newspaper reports indicate that a temporary cross was erected anew each year for the first decades of the Easter services. (R.415).

Regardless, the age of the Cross is immaterial. This Court in *Rabun* made clear that even though a cross stood in the park "[f]or many years," it could not be saved by "'historical acceptance.'" *Id.* at 1111. Many crosses have been held unconstitutional despite going unchallenged for decades. *See AHA*, 874 F.3d at 208

(90 years); *Trunk*, 629 F.3d at 1102-03 (76 years); *Gonzales*, 4 F.3d at 1415 (30 years); *Harris*, 927 F.2d 1401 (89 years); *Friedman*, 781 F.2d 777 (60 years); *Ellis*, 990 F.2d 1518 (61 years); *Carpenter*, 93 F.3d at 631-32 (60 years); *Lehigh*, 2017 U.S. Dist. LEXIS 160234, at *7 (73 years).

The City's remaining attempts at distinguishing *Rabun* are equally unavailing. The City first argues that Bayview Cross is accompanied "with a large plaque saying it was 'Sponsored' by, 'Donated' by, and 'Dedicated' to a private nonreligious group." (Br.50). The Cross, however, has no plaque. The plaque appears on the *amphitheater*. And the City dedicated the plaque on the amphitheater to the man who started the Easter services, not to a "nonreligious group."[41]

More importantly, the fact that Bayview Cross stands near a plaque that explicitly refers to religious services only makes it more imbued with religious meaning than the *Rabun* cross. *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. 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.").

[41] (R.52)(DE-30-1, 51). Moreover, the Jaycees' "Creed" avows: "We believe that faith in God gives meaning and purpose to human life[.]" (DE-30-1, 18)(R.399).

Next, the City argues *Rabun* is distinguishable because the "cross stood on an 85-foot-tall structure that was 'visible for several miles from the major highways.'" (Br.49-50). The cross itself, however, was "35 feet," 698 F.2d at 1101 n.1, and Bayview Cross is almost identical in size. Nor has the City explained why this matters. This Court has held that "*exclusively religious symbols, such as a cross*, will almost always render a governmental seal unconstitutional, *no matter how small the religious symbol is*." *King*, 331 F.3d at 1285 (emphasis added) (citations omitted); *see Davenport*, 637 F.3d at 1124 (12-feet crosses); *Buono*, 371 F.3d at 550 (7-feet cross); *Gonzales*, 4 F.3d at 1414 (16-feet); *Lake Elsinore*, 2014 U.S. Dist. LEXIS 25180, at *44-45 (6-feet); *Cabral*, 958 F. Supp. 2d at 1021 (6-feet); *Summers*, 669 F. Supp. 2d at 645 (small cross on license plate); *Granzeier*, 955 F. Supp. at 743 (4-inches); *Mendelson*, 719 F. Supp. at 1066 (12-feet); *Robinson*, 68 F.3d at 1228 (small cross in seal); *accord Harris*, 927 F.2d at 1401; *Friedman*, 781 F.2d at 778; *Lehigh*, 2017 U.S. Dist. LEXIS 160234 at *1-2; *Davies*, 177 F. Supp. 3d at 1227; *Stow*, 29 F. Supp. 2d at 847.

Moreover, the visibility of the Cross is completely irrelevant under *Lemon*'s purpose prong, which focuses on *intent*. And it is only minimally relevant to the effect prong, which "focuses on whether the religious display creates an appearance of governmental endorsement of religion. Thus, how few or how many people view the display does not advance the analysis." *Eugene*, 93 F.3d at 625 n.11 (O'Scannlain,

J., concurring). In *Eugene*, the Ninth Circuit concluded it was "simple" and "straightforward" that a war memorial cross erected by American Legion in a remote of location of a park "clearly" unconstitutionally advanced religion. *Id.* at 617-20 n.5. In *Buono*, the court ruled that a small cross in the Mojave desert unconstitutionally endorsed religion and that its "remote location" does not "make a difference." 371 F.3d at 549-50. *See also Eckels*, 589 F. Supp. at 223 (cross in local park). Besides, Bayview Cross is likely seen by far more individuals than the *Rabun* cross, which was on a mountain in a state park rather than a popular city park. The City claims that "[t]ens of thousands of Pensacolians have used the site," excluding the regular passersby. (Br.23).

The City then argues that in *Rabun*, the "stated purpose was 'promoting tourism'—*i.e.*, attracting people to see and use the cross." (Br.49). Of course, the City is also "attracting people to see and use the cross." The City initially claimed its secular purpose for the Cross is "to make the park a welcoming and beautiful place for the public to enjoy." (R.373). The City continues to argue that the Cross serves the purpose of "bringing Pensacolians together for a wide variety of community events." (Br.62).

The City's final basis for distinguishing *Rabun* is that "the cross was not part of any broader effort to commemorate the area's history and culture." (Br.50). This argument suffers five flaws. First, promoting "tourism" is tantamount to

commemorating "the area's history and culture." Second, this Court made clear that 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." *Rabun*, 698 F.2d at 1111. The Court reasoned: "a government may not 'employ religious means to reach a secular goal unless secular means are wholly unavailing.'" *Id.* (citations omitted). The City similarly cannot employ religious means to "commemorate the area's history and culture."

Third, this Court specifically rejected the argument that retaining a cross for "historical" purposes satisfies *Lemon*. *Id*. Relying on *Rabun*'s logic, the court in *Mendelson* refused to accept as a legitimate 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. *See also Robinson*, 68 F.3d at 1230; *Gonzales*, 4 F.3d at 1421 (cross failed purpose test despite claim "the monument is intended to honor our history"); *id.* ("fact that [the cross] is also a 'work of art' designed by a noted architect . . . does not change its purpose. It simply is an attempt to create an aesthetically pleasing religious symbol; it does not obviate its religious purpose."); *Harris*, 927 F.2d at 1414-15 (even a city with "a unique history" may "not honor its history by retaining [a] blatantly sectarian seal"); *Lehigh*, 2017 U.S. Dist. LEXIS 160234, at *30 ("[h]onoring the settlers by retaining a cross on the Seal is the equivalent of honoring

the fact that the settlers were Christian."); *Davies*, 177 F. Supp. 3d at 1222 (cross failed purpose test despite "artistic or historical accuracy"). This also ignores the Cross's original purpose. In *Harris*, the Seventh Circuit held that the seal's religious purpose when it was originally adopted in 1902 was not diminished by a more recent decision to retain it for historical purposes. 927 F.2d at 1414.

Furthermore, under *Lemon*'s effect prong, intent is irrelevant. 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. The Fourth, Seventh, Ninth, and Tenth Circuits have all found historical crosses unconstitutional under this prong. *See AHA*, 874 F.3d 195; *Trunk*, 629 F.3d at 1111 n.11; *Robinson*, 68 F.3d at 1230; *Harris*, 927 F.2d at 1403-04, 1414-15.

Fourth, the City's only evidence that Bayview Cross is even part of a "broader effort" is its claim that the Cross is "one of over 170 displays" within Pensacola. (Br.50). *See also* (Br.9, 61, 68). But none of these other "displays" (save for Tim Bonifay) are actually in Bayview Park.[42] The courts "have not looked beyond the immediate area of the display." *Ellis*, 990 F.2d at 1526. *See Allegheny*, 492 U.S. at 581. For instance, the Fourth Circuit in *AHA* confined its analysis to veterans' park rather than Prince George's County or even the Town of Bladensburg. 874 F.3d at 209-210. And within veterans' park, most of the other war memorials were with

[42] (DE-41, 16)(R.374-75).

"200 feet" of the cross. *Id.* The Ninth Circuit in *Carpenter* also found no merit to the government's contention that the cross 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).

The City also tries, for the first time on appeal, to count several park features as "memorials" including the tennis courts and a plaque near the dog beach. (Br.14, 16). The evidence of these so-called "memorials" is not in the record and should be disregarded by the Court, as Appellants have not made the requisite request under Fed. R. App. P. 10(e). *See Jones v. White*, 992 F.2d 1548, 1567 (11th Cir. 1993) ("We have not allowed supplementation when a party has failed to request leave of this court to supplement a record on appeal or has appended to an appellate brief without filing a motion requesting supplementation."); *Shahar v. Bowers,* 120 F.3d 211, 212 (11th Cir. 1997). Even if this Court were to accept the City's two Addendums into the record, these "memorials" are irrelevant. To an objective observer, the Cross does not appear to be part of any "array" of memorials to passersby. *See Rabun*, 510 F. Supp. at 889 n.5 ("A great deal of evidence . . . was presented at trial but is of no relevance. This includes . . . secular structures (such as street signs and telephone poles) which are similar in design, and Rabun County's tourist attractions.").

D. The Cross is unconstitutional pursuant to Supreme Court precedent.

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. Justice Kennedy agreed:

> 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). The Court held that a privately-donated, temporary crèche had the unconstitutional "effect of endorsing a patently Christian message." *Id.* at 597-98, 601-02. This was so despite a disclaimer and other secular decorations in the courthouse. *Id.*

Bayview Cross is far more flagrantly unconstitutional than the small symbol of a secularized holiday in *Allegheny*. *Id.* at 599, 603 (distinguishing "a specifically Christian symbol" from "more general religious references"). Unlike a crèche, the cross cannot be "divorced from its religious significance." *Davenport*, 637 F.3d at 1122. Christmas is celebrated by "many non-Christians" but "the Latin cross has not lost its Christian identity." *St. Charles*, 794 F.2d at 271. And as a permanent display, Bayview Cross "brings together church and state . . . even more ardently than the unconstitutional crèche." *Harris*, 927 F.2d at 1412. *See also 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."). The City makes no attempt to distinguish *Allegheny*.

III. The Cross is unconstitutional pursuant to the *Lemon* test.

Because Bayview Cross violates the Establishment Clause under controlling precedent, a full *Lemon* analysis is unnecessary. Nonetheless, Bayview Cross readily fails all three prongs of *Lemon.*

A. The City lacks a primary secular purpose for owning, maintaining, funding, and displaying a massive Christian cross.

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." *Rabun*, 698 F.2d at 1110 (internal footnote omitted). The "defendant [must] show by a preponderance of the evidence" that the display has a secular purpose. *Church of Scientology Flag Serv. v. City of Clearwater*, 2 F.3d 1514, 1530 (11th Cir. 1993). This secular purpose must be the "pre-eminent" and "primary" force, and "has to be genuine, not a sham, and not merely secondary to a religious objective." *McCreary*, 545 U.S. at 864.

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 "cross is a universally recognized symbol of Christianity." *Rabun*, 698

F.2d at 1103. Indeed, many federal courts have found that the government's display of the cross, as a patently religious symbol, fails the purpose test. *E.g.*, *id.* at 1110-11; *Gonzales*, 4 F.3d at 1421; *Harris*, 927 F.2d at 1414; *Lehigh*, 2017 U.S. Dist. LEXIS 160234, at *1-2; *Davies*, 177 F. Supp. 3d at 1217-18; *Lake Elsinore*, 2014 U.S. Dist. LEXIS 25180, at *23-24; *Starke*, 2007 U.S. Dist. LEXIS 19512, at *14; *Mendelson*, 719 F. Supp. at 1069; *Eckels*, 589 F. Supp. 222; *Gilfillan*, 637 F.2d at 930; *Libin*, 625 F. Supp. at 399; *Mississippi State*, 652 F. Supp. at 382. *See also Glassroth v. Moore*, 335 F.3d 1282, 1296-87 (11th Cir. 2003) (finding it "'self-evident' that Chief Justice Moore's purpose in displaying the [religious] monument was non-secular.").

Apart from being "patently religious," Bayview Cross was also "erected 'out of religious stirrings.'" *Rabun*, 698 F.2d at 1110-11. Just like *Rabun*, Bayview Cross was dedicated on Easter for the purposes of Easter Sunrise Services.[43] In *Rabun*, this Court held that the dedication of a cross for Easter Sunrise blatantly reflects "a religious purpose." *Id*.

The City tendered no evidence to overcome this overwhelming religious purpose. On the contrary, the City concedes the Cross was erected for the primary purpose of "Easter Sunrise Services." (R.387). The City merely proclaims it had "an obvious secular purpose for allowing the cross to be erected in 1941: to allow private

[43] (R.53)(R.206)(R.374)(R.387)(DE-22, 9).

citizens to gather as they saw fit during a time of national crisis," and has "an obvious secular purpose for allowing the cross to remain today: to preserve part of the city's history and culture." (Br.63). These avowals do not negate the primary Cross's primary religious purpose.

Plaintiffs already demonstrated that preservation of "history and culture" cannot satisfy *Lemon*, *supra* at 20-22. *See Rabun*, 698 F.2d at 1111. Again, attempting "to further an ostensibly secular purpose through avowedly religious means is considered to have a constitutionally impermissible purpose." *Holloman v. Harland*, 370 F.3d 1252, 1286 (11th Cir. 2004). If anything, the "history of this Cross," as a holy object for Easter, "only deepens its religious meaning." *Trunk*, 629 F.3d at 1118-19, 1124.

Allowing citizens to gather for an event cannot justify the City's permanent maintenance of an enormous Christian cross either. For one, the event (Easter) was itself religious. This belies, rather than supports, any argument that the Cross has a secular purpose. *See Rabun*, 698 F.2d at 1110-11; *see also Allegheny*, 492 U.S. at 599 ("Nor does the fact that the crèche was the setting for the county's annual Christmas-carol program diminish its religious meaning . . . [T]hose carols were more likely to augment the religious quality of the scene than to secularize it."); *Gilfilan*, 637 F.2d at 927-31 (cross for pope's visit).

Moreover, if the "stated purpose is not actually furthered" by the challenged activity, "then that purpose is disregarded as being insincere or a sham." *Clearwater*, 2 F.3d at 1527. Private citizens can gather for Easter services without the City displaying a permanent Christian symbol; indeed, they used a temporary cross in 1941 and may continue to use a temporary cross today.

The Court's inquiry could end here because the lack of secular purpose is dispositive. *Glassroth*, 335 F.3d at 1297.

B. Bayview Cross has the effect of endorsing Christianity.

Independent of its religious purpose, the Cross fails *Lemon*'s effect prong. *See Allegheny*, 492 U.S. at 599 (government cross would convey "endorsement of Christianity"). The "effect prong asks whether, irrespective of government's actual purposes, the practice under review in fact would convey a message of endorsement or disapproval to an informed, reasonable observer." *King*, 331 F.3d at 1279.

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). Even the Supreme Court in *Allegheny* found "that erection of a cross on government property would *clearly* violate the Establishment Clause." *Lake Elsinore*, 2013 U.S. Dist. LEXIS 188202, at *43 n.9 (citing *Allegheny*) (emphasis

added). Every cross challenged within the Eleventh Circuit has failed *Lemon*'s effect prong.[44] Nearly every cross that has *ever* been challenged failed muster on the obvious grounds that it endorses Christianity.[45]

Not only does a city-owned cross convey a "government endorsement of religion," it "does not convey any secular message, whether remote, indirect, or incidental." *Gonzales*, 4 F.3d at 1423. *Accord Davenport*, 637 F.3d at 1122. As this Court explained in *King*, a government's display of "exclusively religious symbols, such as a cross" will almost always render the display unconstitutional. 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," as a freestanding 30-foot monolith, "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. A "reasonable observer 'would find nothing on the monument to de-emphasize its religious nature.'" *Glassroth*, 335 F.3d at 1297 (citation omitted).

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[44] *See Rabun*, 510 F. Supp. at 886; *Starke*, 2007 U.S. Dis. LEXIS 19512 at *14; *Mendelson*, 719 F. Supp. at 1070-71.

[45] *See AHA*, 874 F.3d at 207; *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; *Lehigh*, 2017 U.S. Dist. LEXIS 160234, at *32-33; *Davies*, 177 F. Supp. 3d 1194, 1224-25; *Lake Elsinore*, 2014 U.S. Dist. LEXIS 25180, at *23-24; *Cabral*, 958 F. Supp. 2d at 1029; *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.

Notably, however, because "of the Latin cross's strong ties to Christianity, even when a cross occupies only one part of a larger 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) (crosses occupied 1/3 of display). *E.g.*, *Harris*, 927 F.2d at 1412-13 (cross no more prominent than several secular images "of the community"); *accord Robinson*, 68 F.3d at 1228; *Friedman*, 781 F.2d at 779; *St. Charles*, 794 F.2d at 267; *Lehigh*, 2017 U.S. Dist. LEXIS 160234, at *32; *Stow*, 29 F. Supp. 2d 845. Bayview Cross *is the entire display*, not just a small part of it, making this an easy case.

In a single sentence buried in a footnote, the City argues that Bayview Cross survives *Lemon*'s effect prong simply because it "is over 76 years old, is tucked away in the corner of a nondescript park, and is one of over 170 expressive displays commemorating Pensacola's history and culture." (Br.67-68). Plaintiffs already demonstrated that neither the age of the Cross (technically 48), nor its setting — a massive Christian display in a popular city park, and one of only *two* monuments in the entire park — negate its tremendous religious purpose and effect.

In *Trunk*, the Ninth Circuit held that a "'historically significant war memorial'" cross, surrounded by *thousands* of "secular elements," unconstitutionally projected "a message of religious endorsement." 629 F.3d at

1104-06, 1117-18. In *Davenport*, the Tenth Circuit held that thirteen 12-foot roadside memorial crosses for highway troopers sent a "governmental message endorsing Christianity" despite a number of "contextualizing facts." 637 F.3d at 1121-22. The crosses were privately owned and funded and included the trooper's name in large text, his picture, a plaque, and biographical information. *Id.* at 1111-12, 1121. In *AHA*, the Fourth Circuit held that a 90-year-old World War I memorial cross donated by the American Legion that was "part of a memorial park honoring veterans" failed *Lemon*'s effect prong. 874 F.3d at 202, 209-11. The park included four other war memorials and the cross featured a "U.S." star symbol reflecting the American Legion logo, a plaque containing the names of 49 soldiers, and the words "valor," "endurance," "courage," and "devotion." *Id.* The Fourth Circuit concluded that a reasonable observer "could not help but note that the Cross is the most prominent monument in the Park and the only one displaying a religious symbol." *Id.*

Bayview Cross 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 marker. It is a freestanding, unadorned Christian symbol, intended exclusively for Christian services. Furthermore, the Cross "is not displayed once a year for a brief

period," *Friedman*, 781 F.2d at 782, making the City's endorsement more entrenched than cases finding temporary crosses unconstitutional.[46]

Several additional factors compound this already immense message of Christian endorsement. First, the Cross has consistently been used for religious services. *See Trunk*, 629 F.3d 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]."). Second, the Cross stands near a plaque that explicitly refers to the Easter services.[47] *See Allegheny*, 492 U.S. at 600. Third, the City's involvement in the Easter services contributes to the overall impression it is endorsing Christianity. [48] *Id.* 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."); *McCreary*, 545 U.S. at 869; *Gilfillan*, 637 F.2d at 931. "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). Fourth, the "Cross's importance as a religious symbol has been a rallying cry." *Trunk*, 629 F.3d at 1119-20 & n.19.[49] The

[46] *See St. Charles*, 794 F.2d 265 (one-month); *Gilfillan*, 637 F.2d at 930 (single event); *Cabral*, 958 F. Supp. 2d at 1022-27 (only "a two-week period"); *Granzeier*, 955 F. Supp. at 746; *Libin*, 625 F. Supp. at 399.
[47] (R.18)(R.52)(R.145-147)(DE-30-1, 50)(R.375).
[48] (R.92)(R.258-65)(R.278)(R.284)(R.366)(R.380)(DE-22, 3).
[49] (R.43-47)(R.250-252).

"starkly religious message of the Cross's supporters would not escape the notice of the reasonable observer." *Id*.

C. The Cross fosters excessive entanglement with religion.

The City's monitoring, maintenance, illumination, and funding of an enormous Christian cross fosters excessive entanglement with religion, contravening *Lemon*'s third prong. Every cross challenged within the Eleventh Circuit failed this prong. In *Mendelson*, the court held that the city "is entangled with religion because it funded the illumination of the cross." 719 F. Supp. at 1071. In *Starke*, the court likewise found entanglement where, "the Cross has been maintained through City work orders and illuminated by the City." 2007 U.S. Dist. LEXIS 19512, at *18-19. The court pronounced: "If ever there were a clear case of 'excessive governmental entanglement' with religion, this is it." *Id. See also Rabun*, 510 F. Supp. at 891-92. The Fourth Circuit in *AHA* also held that a cross failed this prong both because of government funding and because it was "displaying the hallmark symbol of Christianity in a manner that dominates its surroundings and not only overwhelms all other monuments at the park, but also excludes all other religious tenets." 874 F.3d at 212 (citation omitted).

As in the above cases, Bayview Cross is maintained through City work orders, is illuminated by the City, and dominates its surroundings.[50] The City offers no

[50] (R.316-344)(R.371)(R.385)(R.397)(DE-22, 13).

contrary authority but simply contends the Cross satisfies *Lemon*'s third prong because it "was donated to the city by a private organization, and Pensacola allows anyone to hold activities at the park on a religion-neutral basis." (Br.68). The crosses found unconstitutional above were also donated by private entities, and the city's event-use policy is entirely irrelevant to whether its Christian cross fosters excessive entanglement. In fact, because the City has co-sponsored Easter services with religious entities, its entanglement exceeds that of other cross cases. *See Gilfillan*, 637 F.2d at 931 (the "relationship between the City and the Archdiocese constituted entanglement").

IV. The *Lemon* test and *Rabun* are controlling in cross cases and have not been overruled.

Apparently unconvinced by its own argument that Bayview Cross survives *Rabun* and *Lemon*, the City resorts to arguing that the "Supreme Court has abandoned the *Lemon* test" and that *Rabun* is therefore overruled. (Br.36). In support, the City relies on:

1. *Town of Greece v. Galloway*, 134 S. Ct. 1811 (2014) (Br.25, 35-36, 41-42, 45-46, 49-53, 57)
2. Justice Breyer's concurrence in *Van Orden* (Br.40-44, 47-48, 58-62)
3. *Salazar v. Buono*, 559 U.S. 700 (2010) (plurality) (Br.5, 40, 46-48, 56, 60, 64)

To be sure, the *Lemon* test has not been overruled.

A. *Galloway* did not overrule *Lemon* and is inapt.

The City argues that *Galloway* overruled *Lemon* and this "case is controlled by" *Galloway*. (Br.36, 45). These contentions are beyond meritless, to the point of being frivolous.

Galloway simply applied the longstanding legislative-prayer exception to *Lemon* carved out in *Marsh v. Chambers*, 463 U.S. 783 (1983). 134 S.Ct. at 1818. As Justice Alito summarized: "All that the Court does today is to allow a town to follow a practice that we have previously held is permissible for Congress and state legislatures." *Id.* at 1834 (concurring). Just as *Marsh* did not overrule *Lemon*'s application to religious displays in creating the exception, neither did *Galloway* in applying it to towns. Instructively, not a single cross case decided after *Galloway* applied the legislative-prayer exception. *See AHA*, 874 F.3d 195; *Am. Atheists, Inc. v. Port Auth.*, 760 F.3d 227, 238 (2d Cir. 2014); *Lehigh*, 2017 U.S. Dist. LEXIS 160234; *Davies*, 177 F. Supp. 3d at 1215; *Hewett*, 29 F. Supp. 3d at 629-30.

The legislative-prayer exception is categorically inapplicable to display cases. *See McCreary*, 545 U.S. at 860 n.10; *Allegheny*, 492 U.S. at 604 n.53. This Court in *Glassroth* expressly refused to extend the exception to displays, admonishing: "That there were some government acknowledgments of God at the time of this country's founding" does "not justify under the Establishment Clause a 5280-pound granite monument placed in the central place of honor in a state's judicial building."

335 F.3d at 1297-98. And in *Pelphrey*, this Court reiterated that, like the Supreme Court, "we too have distinguished between legislative prayers and religious monuments." 547 F.3d at 1276.

Flouting decades of controlling precedent, the City still insists Bayview Cross is constitutional under the legislative-prayer exception because other crosses exist in various parts of the country. (Br.51-57). Of course, the "mere fact that the cross is a *common* symbol used in . . . memorials does not mean it is a *secular* symbol." *Davenport*, 616 F.3d at 1162. Even if the legislative-prayer exception could theoretically extend beyond non-prayer practices, "there is a complete lack of evidence that our founding fathers were aware of the practice of placing crosses . . . in public parks." *Eckels*, 589 F. Supp. at 237.

Additionally, most of the crosses in the City's "Addendum 2" (improperly filed without leave of Court, *supra*) are in cemeteries such as Arlington, and are "parts of much larger secular or multi-faith complexes." *Trunk*, 629 F.3d at 1114, 1124 (distinguishing the "Argonne Cross and the Canadian Cross of Sacrifice"); *Hewett*, 29 F. Supp. 3d at 625, n.24 ("in Arlington National Cemetery, the faith emblems (speech) would be readily attributable to the individual graves and not necessarily the Government."). Arlington "is a designated area for commemorating and memorializing veterans who have passed away." *AHA*, 874 F.3d at 211. Bayview Cross is a not even a memorial, much less a war memorial.

The size and prominence of Bayview Cross further distinguishes it from these other crosses. The crosses in Arlington "are much smaller than the [3]0-foot tall monolith at issue here." *Id*. "And, significantly, Arlington National Cemetery displays diverse religious symbols, both as monuments and on individual headstones. Contrast that with the Cross here. There are no other religious symbols present on the Cross or in the entirety of the . . . Park. Christianity is singularly — and overwhelmingly — represented." *Id.*[51]

One of the crosses in the City's "Addendum 2" has already been struck down. *Id*. The City also mentions four crosses within Georgia and Florida, erected in the early and late 1900s, to support its conclusion that Bayview Cross is constitutional under *Galloway*'s legislative-prayer exception. (Br.56). None of these crosses have been challenged, however, and might well be unconstitutional. But affirmance by this Court does not thereby render them so. In *AHA*, the government also equated the challenged cross to crosses in "similar locations," arguing that a ruling against it "would jeopardize other memorials across the Nation." *Id.* at 211. The Fourth Circuit found "[a]ny such concern is misplaced. Establishment Clause cases are fact-specific." *Id.*[52]

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[51] *Accord Trunk*, 629 F.3d at 1124.

[52] Notably, the Augusta cross is approximately 2-feet tall, and the other two referenced Georgia monuments are ethnic Irish Celtic symbols rather than Latin crosses, and stand approximately 10-feet tall. (Addendum 2, at 18, 20, 32).

B. *Van Orden* did not overrule *Lemon*, and is irrelevant to the constitutionality of a freestanding Christian cross used for religious worship.

1. This Court cannot disregard *Lemon.*

The City implores this Court to abandon *Lemon* and apply the "legal judgment test" formulated by Justice Breyer's *Van Orden* concurrence. (Br.58). According to the City, *Van Orden* overruled *Lemon* at least with respect to "displays." (Br.48-49). But the Supreme Court never overruled *Lemon* and has consistently applied it in display cases including *McCreary*, *supra*, *Allegheny*, *supra*, *Lynch v. Donnelly*, 465 U.S. 668, 683 (1984), and *Stone v. Graham*, 449 U.S. 39 (1980).

In his concurring opinion in *Van Orden*, Justice Breyer declared that in difficult "borderline cases" involving longstanding Ten Commandments monuments placed among an array of secular displays in a museum-like setting, and where the secular aspects clearly "predominate," there is "no test-related substitute for the exercise of legal judgment." 545 U.S. at 699-702. However, Justice Breyer essentially applied *Lemon* anyway, finding that "the Texas display--serving a mixed but primarily nonreligious purpose, not primarily 'advanc[ing]' or 'inhibit[ing] religion,' and not creating an 'excessive government entanglement with religion'" could survive *Lemon*. *Id.* at 700, 703-04. Moreover, Justice Rehnquist's plurality relied in part on *Lemon*'s purpose prong. *Id.* at 686.

Although Justice Breyer described a legal-judgment test for borderline Ten Commandments cases, the Supreme Court never overruled *Lemon*. Much to the contrary, on the very same day *Van Orden* was decided, the Court in *McCreary* applied *Lemon* to a different Ten Commandments display and found it unconstitutional. 545 U.S. at 859-64. The Court even specifically rejected the county's request to abandon the test. *Id.* Furthermore, Justice Breyer joined the majority in *McCreary*, and went out of his way in *Van Orden*, at 704, to express his disagreement with Justice Scalia's dissent in *McCreary*, at 902-03, which argued *Lemon* should be "abandoned."

"The controlling *Van Orden* decision thus did not overrule *Lemon*" and *Lemon* must still be applied in "religious display cases." *AHA*, 874 F.3d at 205. While "'the Supreme Court may be free to ignore *Lemon*, this court is not.'" *Green v. Haskell Cnty. Bd. of Comm'rs*, 568 F.3d 784, 797 n.8 (10th Cir. 2009) (citation omitted). Unlike *McCreary*, *Van Orden* is not binding on any court because a majority could not be reached on the applicable standard.[53] Even in *Ten Commandments* cases, "'[m]ost courts of appeals have concluded that the *Lemon* tripartite test" still applies. *Id.* (citations omitted).[54]

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[53] *See ACLU v. Mercer Cnty.*, 432 F.3d 624, 636 & n.11 (6th Cir. 2005); *see also* John E. Nowak, *CONSTITUTIONAL LAW* 1570 (8th ed. 2010) ("it is difficult to understand how anyone other than Justice Breyer could apply his analysis").

[54] *E.g.*, *Felix v. City of Bloomfield*, 841 F.3d 848, 856-57 (10th Cir. 2016), *reh'g denied*, 847 F.3d 1214 (10th Cir. 2017), *petition for cert. filed* (July 6, 2017) (No.

More importantly, every single *cross* case decided since *Van Orden* found *Lemon* controlling. In other words, *every* court that has considered a cross case after *Van Orden* applied *Lemon*, including the Second, Fourth, Ninth, and Tenth Circuits, and district courts in California, Florida, Indiana, North Carolina, South Carolina, and Pennsylvania:

- *AHA*, *supra*
- *Davenport*, 637 F.3d 1095
- *Am. Atheists, Inc. v. Port Auth.*, 760 F.3d 227, 238 (2d Cir. 2014)
- *Weinbaum v. City of Las Cruces*, 541 F.3d 1017 (10th Cir. 2008)
- *Lehigh*, 2017 U.S. Dist. LEXIS 160234, at *27-28
- *Davies*, 177 F. Supp. 3d at 1215
- *Starke*, 2007 U.S. Dist. LEXIS 19512
- *Lake Elsinore*, 2014 U.S. Dist. LEXIS 25180
- *Hewett*, 29 F. Supp. 3d at 611
- *Cabral*, 958 F. Supp. 2d 1018
- *Summers*, 669 F. Supp. 2d at 658

14-2149); *ACLU of Ohio Found. v. Deweese*, 633 F.3d 424, 430-35 (6th Cir. 2011); *accord ACLU of Fla. Inc. v. Dixie Cty.*, 797 F. Supp. 2d 1280, 1287-88 (N.D. Fla. 2011), *vacated on standing grounds*, 690 F.3d 1244 (11th Cir. 2012).

Thus, the City's argument crosses are "controlled by *Van Orden*" rather than *Lemon* is farcical. (Br.36). If *Lemon* is not the test, then every single court in the country that has decided a cross case since *Van Orden* was wrong.

2. *Rabun* remains binding in this circuit.

Because *Lemon* has not been overruled, *Rabun* remains controlling. This Court has not adopted *Van Orden*'s disregard of *Lemon* and the only time it even mentioned *Van Orden* was in *Pelphrey* where it *reiterated* that "religious monuments" are *not* exempt from *Lemon*. 547 F.3d at 1276.

The City nonetheless argues that this Court abrogated *Lemon*, asserting that since "*Van Orden*, this Court has issued only two published decisions addressing the merits of an Establishment Clause claim; both recognized that *Lemon* is not controlling." (Br.42). The City cites *Pelphrey* and *Atheists of Fla., Inc. v. City of Lakeland*, 713 F.3d 577 (11th Cir. 2013), which involved the legislative-prayer exception. "The Eleventh Circuit has consistently applied the *Lemon* test outside of cases involving legislative prayer." *Hunter v. Corr. Corp. of Am.*, 2016 U.S. Dist. LEXIS 105035, at *13 (S.D. Ga. Aug. 9, 2016).

The City also conspicuously omits *Smith v. Governor for Ala.*, 562 F. App'x 806, 816 (11th Cir. 2014), which applied *Lemon.* Likewise, this Court in *Selman v. Cobb Co. Sch. Dist.*, 449 F. 3d 1320 (11th Cir. 2006), implicitly (if not explicitly) affirmed the district court's application of *Lemon* in a display case after *Van Orden.*

The district court declared that "Supreme Court and Eleventh Circuit precedent direct the Court to apply the three-prong test articulated in *Lemon*." 390 F. Supp. 2d 1286, 1289 (N.D. Ga. 2005) (citations omitted). The court then held that the challenged sticker failed *Lemon*'s effect prong. *Id.* at 1311-12. This Court reversed —*not because the court applied the incorrect legal standard* — but merely because of "unfilled gaps in the record" and issues with the court's "factfindings." 449 F.3d at 1322. The Court remanded "to conduct new evidentiary proceedings and enter a new set of findings," but not to abandon *Lemon*. *Id.* at 1322, 1338.

3. This is not a difficult borderline case.

Justice Breyer's legal judgment test would only be relevant, *if at all*, if this were a difficult borderline case. To be such a case, at least two elements must be present: (1) the display must possess a dual secular meaning; and (2) the secular meaning must predominate. 545 U.S. at 701; *Davenport*, 637 F.3d at 1123. As the District Court summarized, *Van Orden* "applies to 'borderline' dual purpose (and arguably *only Ten Commandment*) cases." (DE-41, 20) (emphasis added). [55]

The Courts of Appeals have uniformly adhered to *Lemon* in cross cases post-*Van Orden*, even in museum-like contexts. The Second Circuit in *Port Authority*, for

[55] Contrary to the City's argument that Justice Breyer did not intend to create a separate standard for borderline cases (Br.47), the courts have understood his concurrence as intending to create an "'exception' to the *Lemon* test in certain borderline cases." *Trunk*, 629 F.3d at 1107. *See also Myers v. Loudoun Cty. Pub. Sch.*, 418 F.3d 395, 402 (4th Cir. 2005).

instance, held that *Lemon* alone governed an "artifact recovered from World Trade Center debris" shaped as a cross in an actual museum (the "September 11 Memorial and Museum") placed amid "hundreds of other (mostly secular) artifacts." 760 F.3d at 238, 232-36, 243-44. In *Davenport*, the Tenth Circuit held that *Lemon* alone applied to memorial crosses adorned with secular features, finding that they "cannot be meaningfully compared to the Ten Commandments display . . . in *Van Orden*." 637 F.3d at 1123.

The Ninth Circuit in *Trunk* refused to replace *Lemon* with *Van Orden,* reasoning that "the Supreme Court has never overruled" *Lemon* and the "wide recognition of the Cross as a religious symbol" distinguished *Van Orden*. 629 F.3d at 1106, 1120. Significantly, the court concluded that the result would be the same under *Lemon*'s effect prong *and* Justice Breyer's concurrence and considered both to illustrate this point. *Id.* at 1107. The Fourth Circuit also held that *Lemon* was controlling to a 90-year-old cross, and found that *Van Orden* did not change the outcome. 874 F.3d at 205.

The City made no attempt to distinguish *Davenport* and completely ignored *Port Authority* and *Trunk.* As shown in more detail below, *Van Orden* is inapplicable and otherwise distinguishable.

a) A Christian cross does not possess a dual secular meaning.

In *Van Orden*, the plurality found that "the Ten Commandments have an undeniable historical meaning" tied to the foundations of lawmaking. 545 U.S. at

688-90. It reasoned: "Moses was a lawgiver as well as a religious leader." *Id*. Justice Breyer agreed that the Commandments can convey "a secular moral message" about "standards of social conduct" or a message "about a historic relation between those standards and the law." *Id*. at 701. He then concluded that because the display was one small part of a historical presentation of legal and cultural displays on the state capitol grounds, the "nonreligious aspects of the tablets' message [] predominate[d]." *Id.*

Unlike the Ten Commandments, the cross does not have a dual "secular meaning that can be divorced from its religious significance." *Davenport*, 637 F.3d at 1122 (finding *Van Orden* irrelevant). In *AHA*, the Fourth Circuit emphasized that "a Latin cross differs from other religious monuments, such as the Ten Commandments or the motto 'In God We Trust.' Those symbols are well known as being tied to our Nation's history and government," but the cross has no "similar connection." 874 F.3d at 208. The Supreme Court in *Allegheny* also distinguished "a specifically Christian symbol" such as a cross from "more general religious references." 492 U.S. at 602-03, 606-07.

This Court in *King* likewise recognized that "*exclusively religious symbols, such as a cross*, will almost always render a governmental seal unconstitutional." 331 F.3d at 1285-86 (emphasis added) (citations omitted). But it found that a small Ten Commandments tablet on a seal, without any religious text, displayed in a legal

historical context, did not endorse religion. *Id.* The absence of "religious aspects" coupled with the tablets' placement adjacent to a symbol of law made it such that a reasonable observer would "infer that the government is using the Ten Commandments to symbolize the force of law." *Id*.

Conversely, in *Glassroth*, this Court held a freestanding Ten Commandments display unconstitutional where it contained text from the King James Bible and was unaccompanied by "another symbol of law." 335 F.3d at 1298-99. The Court added that unlike in *King*, "[this] monument sits prominently and alone in the rotunda of the Judicial Building." *Id.*

A large Christian cross does not "simply" have "religious content" or promote a secular message "consistent with a religious doctrine." (Br.50). It is an "exclusively religious symbol." *King*, 331 F.3d at 1285; *Trunk*, 629 F.3d at 1111. To "hold that the Latin cross symbolizes anything other than Christianity may be deemed offensive to Christians." *AHA*, 874 F.3d at 207 n.9.

b) Bayview Cross is a standalone Christian display, unmitigated by any secular features.

Even if this Court reached the unprecedented conclusion that the Christian cross — particularly one used for Christian worship services — possesses a dual secular meaning, the secular meaning must *predominate*. *Van Orden*, 545 U.S. at 701; *Davenport*, 637 F.3d at 1123. *Van Orden* is not even applicable to freestanding Ten Commandments. *See McCreary*, 545 U.S. at 869 ("When the government

initiates an effort to place this statement *alone in public view, a religious object is unmistakable.*") (emphasis added).

Necessarily then, a freestanding Christian cross does not constitute a "borderline" case either. *See Davenport*, 637 F.3d at 1121, 1123 (*Van Orden* was further inapplicable because "the crosses stand alone."). Since the Latin cross is exclusively religious, the courts have made clear that it need not dominate its surroundings to send an unconstitutional religious message, *supra* at 19, 30-31.

This case involves a 30-foot, standalone, exclusively Christian cross. There is only one other monument in the entire park but it is not connected with the Cross. *See Allegheny*, 492 U.S. at 581 ("[t]he creche, with its fence-and-floral frame, however, was distinct and not connected with any exhibit in the gallery forum [near the staircase]."). Moreover, the Cross is by far the largest and most prominent of the two displays and was proposed, approved, and installed in isolation. *See Trunk*, 629 F.3d at 1103 (*Van Orden* was distinguishable in part because "the Cross stood alone" for much of its history). In *Van Orden*, the reverse was true. The 6-foot-tall display was placed among "17 monuments and 21 historical markers" of similar size and theme on Texas capital grounds as part of a historical and legal presentation. 545 U.S. at 681, 701.

The circuits that evaluated crosses included in larger veterans' memorials found that *Van Orden,* even when considered, did not alter their fate. For instance,

the cross in *Trunk* did "not stand alone. Instead, it [wa]s the overwhelming centerpiece of a memorial that now consists of approximately 2,100 plaques, six concentric stone walls, twenty-three bollards, and an American flag." 629 F.3d at 1117. *See also AHA*, 874 F.3d at 202, 209-210. Bayview Cross is not just one part of a multifaceted veterans' display; it *is the entire display*. Nor does the cross itself bear any secular trappings such as the crosses in *Davenport*, 637 F.3d at 1111. Therefore, not only is *Van Orden* not controlling here, it is also completely irrelevant.

c) Bayview Cross was installed for a religious purpose.

Van Orden also has no bearing on displays motivated by a religious purpose. *See McCreary*, 545 U.S. at 864-67. In *Van Orden*, the display was always intended to depict "the state's political and legal history." 545 U.S. at 701-02. Bayview Cross, by contrast, was always intended to function as a holy object for Easter services, casting "serious doubt on any argument that it was intended as a generic symbol, and not a sectarian one." *Trunk*, 629 F.3d at 1124.

d) Bayview Cross has consistently been used for religious worship.

Finally, Bayview Cross "is not only a preeminent symbol of Christianity, it has been consistently used in a sectarian manner." *Id.* In *Van Orden*, Justice Breyer emphasized: "to determine the message the text conveys, we must examine how the text is *used*." 545 U.S. at 701-02. He deemed it critical that the "setting does not readily lend itself to meditation or any other religious activity." *Id.* Significantly, the

Court in *McCreary* found that display unconstitutional in part because of its religious usage:

> 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.

545 U.S. at 869. To a far greater extent than *McCreary*, the

> wide recognition of the Cross as a religious symbol and its long "and stormy" history of religious usage distinguishes the [Cross] from the displays in *Van Orden* and *Card*. The Ten Commandments monuments at issue in those cases passed muster in part because they were *not* used as religious objects—they simply adorned the grounds of their respective government buildings in the company of other monuments.

Trunk, 629 F.3d at 1120-21. By contrast, a reasonable observer of Bayview Cross would "know that it functioned as a holy object, a symbol of Christianity, and a place of religious observance." *Id.*

While the City argues Bayview Cross survives Justice Breyer's analysis because it has "stood unchallenged for over 75 years" (Br.61) — which is not even true[56] — the argument "that the longevity and permanence of the Cross diminishes its effect has no traction." *Id.* at 1122. *See also AHA*, 874 F.3d at 208 (rejecting argument that longevity "reinforces its secular effect" as "too

[56] The permanent Cross has stood for 48 years, and the City received repeated objections to *this Cross* including one almost 20 years ago. (R.25-37)(R.39-40)(R.247-52)(DE-22, 12)(DE-39-2, 2).

simplistic."). In fact, "the longer a violation persists, the greater the affront to those offended." *Id.*

Justice Breyer merely believed that the fact that the Ten Commandments had gone unchallenged for forty years, *without any religious usage*, bolstered his conclusion that the dual-meaning display was not perceived as religious. 545 U.S. at 701. The City even acknowledged that the "absence of any indication that Texas was making any religious use of it" was a pivotal factor in his reasoning. (DE-30, 30). Such reasoning clearly does not hold here because the Cross has consistently been used for religious Easter services.

And besides, controlling Eleventh Circuit precedent requires a city to remove a Latin cross in a park, notwithstanding "'historical acceptance.'" *Rabun*, 698 F.2d at 1111. The City has not cited a single case in which the passage of time rendered a *cross* constitutional. The cross cases are decidedly against the City's position, *supra* at 17-18. The Supreme Court has also long held that "no one acquires a vested or protected right in violation of the Constitution by long use." *Walz v. Tax Comm'n*, 397 U.S. 664, 678 (1970). "The rights of such citizens do not expire simply because a monument has been comfortably unchallenged for twenty years, or fifty years, or a hundred years." *Pitts v. City of Kankakee*, 267 F.3d 592, 596 (7th Cir. 2001).

Finally, the City erroneously argues that other circuits have "abandoned *Lemon*," citing only *Myers*, 418 F.3d at 402, and *ACLU Nebraska Foundation v.*

City of Plattsmouth, 419 F.3d 772 (8th Cir. 2005). (Br.43-44). *Myers* involved the Pledge of Allegiance, and the Fourth Circuit made clear in *AHA* that *Lemon* controls cross cases, *supra*. Likewise, the Eighth Circuit in *Plattsmouth* evaluated a Ten Commandments display but adhered to *Lemon* in subsequent Establishment Clause challenges. *E.g.*, *Roark v. S. Iron R-1 Sch. Dist.*, 573 F.3d 556, 563 (8th Cir. 2009).

C. *Buono* did not overrule *Lemon*.

The City's reliance on *Buono* to support its argument that *Lemon* has been overruled (Br.40, 46), is seriously misplaced. This is evidenced alone by the sheer fact that *seven* courts found crosses unconstitutional after *Buono* and each adhered to *Lemon*. *E.g.*, *AHA*, 874 F.3d 195; *Trunk*, 629 F.3d 1099; *Davenport*, 637 F.3d 1095; *Lehigh*, 2017 U.S. Dist. LEXIS 160234; *Davies*, 177 F.Supp.3d 1194; *Lake Elsinore*, 2014 U.S. Dist. LEXIS 25180; *Cabral*, 958 F. Supp. 2d 1018.

The City claims that the Supreme Court in *Buono* "considered an Establishment Clause challenge," "upheld" a cross, and "rejected *Lemon*." (Br.40, 46, 56). But the Supreme Court did not *uphold a cross* in *Buono*, nor did it reject *Lemon*. 559 U.S. at 706. The plurality did not even address the merits of an "Establishment Clause challenge," but rather "a later procedural development." *Davenport*, 637 F.3d at 1113 n.5 (describing *Buono*).

Buono initially involved a challenge to a World War I memorial cross on federal land. 559 U.S. at 705-06, 723-24. The Ninth Circuit held that the cross

violated the Establishment Clause,[57] a decision the government did not appeal. *Id.* at 708-09. That decision *is still good law*.[58] As a curative measure, Congress enacted a statute to transfer the property to a private entity. *Id.* at 706. The plaintiff sought to enforce the injunction. The *only* issue before the Supreme Court was whether the court erred in enforcing the injunction.

The plurality merely held that the lower court improperly modified the injunction without a hearing as to the changed facts (the transfer). *Id.* at 721-22 (Kennedy) (remanding for hearing without "making sweeping pronouncements" because "this case is ill suited for announcing categorical rules"). Two other justices concurred in the remand because they concluded the plaintiff lacked standing. *Id.* at 728. Consequently, anything Justice Kennedy said about crosses not only failed to garner a majority, but was clearly *dicta* as well. *Id.* at 718, 716. Indeed, Justice Kennedy expressly admonished that his opinion should not be cited for "sweeping pronouncements" or "categorical rules" in other cases. *Id.* at 722. The City nonetheless relies heavily on such *dicta*. (Br.64). And even as *dicta*, his pronouncements have no *factual* relevance here.

First, Justice Kennedy alluded to the conceivable constitutionality of a congressional land transfer *statute* allowing a *war memorial* to be situated on *private*

[57] 371 F.3d at 545-46.
[58] *See Trunk,* 629 F.3d at 1111; *Davenport*, 637 F.3d at 1120.

property. *Id.* at 706 ("The Court is asked to consider a challenge, *not to the first placement of the cross* . . . but to a statute that would transfer the cross and the land on which it stands to a private party.") (emphasis added). The statute did not even require the continued presence of the cross. *Id*. at 727 (Alito, J., concurring).

Second, Bayview Cross stands 30-feet tall in popular city park whereas the small cross in *Buono* was literally in the middle of the desert. The "cross was seen by more rattlesnakes than humans." *Id.* at 725. Justice Kennedy emphasized that the cross was "less than eight feet tall." *Id.* at 707. In contrast to the small "cross in the desert," the "size and prominence of [Bayview] Cross evokes a message of aggrandizement and universalization of religion." *Trunk*, 629 F.3d at 1116 n.18. *See Allegheny*, 492 U.S. at 661 (Kennedy, J., concurring and dissenting) ("the Clause forbids a city to permit the permanent erection of a *large* Latin cross.") (emphasis added).

Third and critically, *Buono* involved a World War I memorial. Justice Kennedy's quote relied upon by the City refers to the "cross *and the cause it commemorated*." 59 U.S. at 716 (emphasis added). Bayview Cross has no secular commemorative purpose. It has always served as a holy object for Easter services. (DE-41, 1-2). The City asserts *Buono* "recognized that there can be a variety of secular reasons for erecting a cross," but Justice Kennedy only suggested that certain *war memorials* could serve memorialization purposes. (Br.64). Though the City

claims the Cross has also occasionally been the site for "other events, such as Veterans Day and Memorial Day events" (Br.22), it offers no details about these events including how many have been held, whether they continue, and whether they are even secular. *See Hewett*, 29 F. Supp. 3d at 596, 635-36 (city's participation in veterans' "commemorative" events unconstitutionally endorsed religion because of "the religious activities that are part of the annual ceremonies."). Nor, of course, would secular events near the Cross transform it into a memorial or negate its primary religious purpose and its overwhelming religious effect. *See Glassroth*, 335 F.3d at 1295 ("Use of the Ten Commandments for a secular purpose, however, does not change their inherently religious nature").[59]

The Fourth, Ninth and Tenth Circuits subsequently determined, after due consideration of Justice Kennedy's *dicta* and a more thorough review of the use of crosses as memorials, that the Latin cross possesses no secular meaning as a nonreligious memorial. The Tenth Circuit in *Davenport* delayed issuing its opinion "awaiting the Supreme Court's decision." 637 F.3d at 1113 n.5. It concluded that memorial status does not nullify a cross's "religious sectarian content because a memorial cross is not a generic symbol of death; it is a Christian symbol of death that signifies or memorializes the death of a Christian." *Id.* at 1122. The Ninth Circuit

[59] *See also AHA*, 874 F.3d at 203 (war memorial cross "primarily used for veterans' events"); *Trunk*, 629 F.3d at 1121 (same); *Eugene*, 93 F.3d at 625 n.9 (O'Scannlain J., concurring) (same).

in *Trunk* held that a "historically significant war memorial" unconstitutionally endorsed religion, 629 F.3d at 1108, notwithstanding Justice Kennedy's *dicta* relied upon by the City, that a lone "Latin cross in the desert evokes far more than religion. It evokes thousands of small crosses in foreign fields marking the graves of Americans[.]" 559 U.S. at 721. (Br.48). The court concluded, "the cross remains a Christian symbol, not a military symbol." 629 F.3d at 1113-14. The Fourth Circuit joined the Ninth and Tenth Circuits in ruling that the cross "only holds value as a symbol of death and resurrection because of its affiliation with the crucifixion of Jesus Christ." *AHA*, 874 F.3d at 207.

D. Dissents and concurrences did not overrule *Lemon.*

Undeterred by the lack of precedent, the City rests the balance of its argument on dissents and concurrences criticizing *Lemon*. (Br.38-41). In *King*, however, this Court held that "even though some Justices and commentators have strongly criticized *Lemon*, both the Supreme Court and this circuit continue to use *Lemon*'s three-pronged analysis." 331 F.3d at 1276 (footnote omitted); *accord Glassroth*, 335 F.3d at 1295-96.

The City claims Justice Kennedy is one of *Lemon*'s most "forceful critics," quoting his concurrence in *Allegheny* as its only support (Br.38), while omitting a critical part: "I am content for present purposes to remain within the *Lemon* framework." 492 U.S. at 655. Additionally, Justice Kennedy subsequently joined the

majority in *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 314 (2000), which applied *Lemon*.

The City further contends that in "the last 16 years," the Supreme Court "has applied the *Lemon* test only once" (citing *McCreary*), and "has decided *six* Establishment Clause cases that either ignored the *Lemon* test or expressly declined to apply it." (Br.39). This is misleading. For one, it arbitrarily focuses on the last "16 years," likely because *Santa Fe* was 17 years ago. *Zelman v. Simmons-Harris*, 536 U.S. 639, 648-49 (2002), *did* apply the *Lemon* test, and specifically the effect prong. *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 118 (2001) was not an "Establishment Clause case." Rather, a religious organization sued under the *Free Speech Clause*, arguing that a school's exclusion from an open forum constituted viewpoint discrimination. *Id. Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171 (2012) was not an Establishment Clause case either, but instead hinged on the ministerial exception rooted in the First Amendment generally. In *Cutter v. Wilkinson*, 544 U.S. 709 (2005), plaintiff inmates argued that the state violated RLUIPA by failing to accommodate their religious exercise. *Id.* The Court found RLUIPA "compatible with the Establishment Clause because it alleviates exceptional government-created burdens on private religious exercise." *Id.* at 720. Finally, as discussed above, *Van Orden* essentially applied *Lemon*, and *Galloway* relied on the legislative-prayer exception.

CONCLUSION

Because Bayview Cross has the purpose and "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." *Allegheny* 492 U.S. at 612-13. Contrary to the City's argument (Br.1, 61-62, 67), the District Court's decision "does not represent a hostility or indifference to religion but, instead, the respect for religious diversity that the Constitution requires." *Id*. Plaintiffs therefore respectfully request that the Court affirm the District Court's opinion granting their motion for summary judgment.

Respectfully submitted,

Dated: November 16, 2017

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Dated: November 16, 2017

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CERTIFICATE OF SERVICE

I hereby certify that, on this 16th day of November, 2017, I caused the foregoing to be filed with the Clerk of the Court, via the CM/ECF System, which will send notice of such filing to all registered users.

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