No. 17-13025

In the United States Court of Appeals for the Eleventh Circuit

AMANDA KONDRAT'YEV, *et al.*

Plaintiffs-Appellees,

v.

CITY OF PENSACOLA, FLORIDA, *et al.*

Defendants-Appellants.

On Appeal from the United States District Court
for the Northern District of Florida
No. 3:16-cv-00195-RV-CJK

APPELLANTS' SUPPLEMENTAL BRIEF

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CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Pursuant to Eleventh Circuit Rules 26.1-1, 26.1-2, and 26.1-3, counsel for the City of Pensacola, Florida, Ashton Hayward, and Brian Cooper (collectively, the city) represents that the city does not have any parent entities and does not issue stock. Counsel further certifies, to the best of his knowledge, that the following persons and entities have an interest in this appeal:

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American Civil Liberties Union (*amicus curiae*)

American Civil Liberties Union of Florida (*amicus curiae*)

American Humanist Association (law firm for Appellees)

Americans United for Separation of Church and State (*amicus curiae*)

Anti-Defamation League (*amicus curiae*)

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Dated August 23, 2019

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INTRODUCTION

The Supreme Court's decision in *American Legion v. American Humanist Association*, 139 S. Ct. 2067 (2019), abrogates this Court's decision in *ACLU of Georgia v. Rabun County Chamber of Commerce, Inc.*, 698 F.2d 1098 (11th Cir. 1983), and fully resolves this case. In *American Legion*, the Court rejected application of the *Lemon* test to religious displays, adopted a "strong presumption of constitutionality" for longstanding displays, and upheld a 32-foot tall Latin cross on government property. 139 S. Ct. at 2085. In *Rabun*, by contrast, this Court applied the *Lemon* test, disregarded the longstanding nature of the display, and struck down a cross. When faced with two on-point but conflicting decisions, one from the Supreme Court and one from a previous panel, this Court must follow Supreme Court precedent. Accordingly, *American Legion* controls, and the City's decision to retain a 78-year-old cross is constitutional.

ARGUMENT

I. *American Legion* abrogates *Rabun*.

The Court previously held the cross unconstitutional for one reason: its "hands [we]re tied" by *Rabun*. Op. 10. Not any more: *Rabun* has been abrogated by *American Legion*.

Under the prior-panel-precedent rule, "a prior panel's holding is binding on all subsequent panels unless and until it is overruled or undermined to the point of abrogation by the Supreme Court or by this court

sitting *en banc*." *United States v. Archer*, 531 F.3d 1347, 1352 (11th Cir. 2008). Under this rule, a Supreme Court decision abrogates prior panel precedent when it is "clearly on point" and "clearly inconsistent" with the prior panel precedent. *Garrett v. Univ. of Ala. at Birmingham Bd. of Trustees*, 344 F.3d 1288, 1292 (11th Cir. 2003). If so, the panel is "bound to follow [the] Supreme Court." *Overlook Gardens Props., LLC v. Orix USA, L.P.*, 927 F.3d 1194, 1201 (11th Cir. 2019); *accord Smith v. Comm'r, Ala. Dep't of Corrs.*, 924 F.3d 1330, 1339 n.5 (11th Cir. 2019); *Tobinick v. Novella*, 884 F.3d 1110, 1118 (11th Cir. 2018).

Applying this analysis here, *American Legion* abrogates *Rabun*. Both cases considered whether the government violated the Establishment Clause by maintaining a large Latin cross on public property. In *Rabun*, the Eleventh Circuit struck down the cross based on the three-part test "announced in *Lemon v. Kurtzman*." 698 F.2d at 1109. It also held that the cross's longevity was irrelevant, because "historical acceptance without more" couldn't make it constitutional. *Id.* at 1111. In *American Legion*, by contrast, the Supreme Court upheld the cross and rejected the *Lemon* test. 139 S. Ct. at 2081-82 & n.16 (plurality; Alito, J., joined by Roberts, C.J., Breyer, J., and Kavanaugh, J.); *id.* at 2097 (Thomas, J., concurring in judgment); *id.* at 2101-02 (Gorsuch, J., concurring in judgment). It also held that the cross's longevity was paramount, giving rise to a "strong presumption of constitutionality." *Id.* at 2085, 2090.

"Here, where the Supreme Court has clearly set forth a new standard"

to evaluate whether longstanding cross monuments violate the Establishment Clause, this Court's prior answer to that question in *Rabun* "has been undermined to the point of abrogation." *Archer*, 531 F.3d at 1352. The panel is thus "bound to follow th[e] new rule of law" articulated in *American Legion*. *Id.*

Indeed, to hold otherwise would create a circuit split. Just days ago, a Third Circuit panel upheld the use of a Latin cross on a county seal. *Freedom From Religion Found., Inc. v. County of Lehigh*, ___ F.3d ____, 2019 WL 3720709 (3d Cir. Aug. 8, 2019). In doing so, the panel held that "*American Legion* abrogates the reasoning (*i.e.*, application of *Lemon*)" in decisions that, like *Rabun*, applied *Lemon* and refused to accord a presumption of constitutionality to longstanding religious displays. *Id.* at *3 n.5. This Court should do the same. *See United States v. DiFalco*, 837 F.3d 1207, 1219 (11th Cir. 2016) ("In holding that our prior opinions on this point have been undermined to the point of abrogation, we join at least one of our sister circuits[.]"); *United States v. Madden*, 733 F.3d 1314, 1320 (11th Cir. 2013) (abrogating prior precedent after observing that "the Fifth Circuit has reached the same conclusion").

This is particularly true given that *American Legion*, like *Rabun* and this case, involved the government's display of a large Latin cross. 139 S. Ct. at 2077. Before *American Legion*, the main Supreme Court decisions undermining *Rabun* were *Town of Greece v. Galloway*, 572 U.S. 565 (2014), which involved legislative prayer, and *Van Orden v. Perry*, 545

U.S. 677 (2005), which involved a Ten Commandments monument. Like *American Legion*, those decisions declined to apply *Lemon* and instead focused on history and the longevity of the challenged practice or display. *See Town of Greece*, 572 U.S. at 576; *Van Orden*, 545 U.S. at 702 (Breyer, J., concurring). But because they involved different kinds of practices and symbols, some lower courts, including the trial court here, held that they were still bound to "continue to apply the *Lemon* test to cross cases." Dkt. 41 at 19. Indeed, Plaintiffs' primary argument in this case was that federal courts "uniformly adhered to *Lemon* in *cross cases*." Resp. 34-50 (collecting cases) (emphasis added).

But after *American Legion*, that position is untenable. Even under the narrowest conception of the relevant precedent—Plaintiffs' own "cross cases" category—*American Legion* is squarely on point. Thus, this Court is "required to heed" it. *Smith*, 924 F.3d at 1339 n.5 (quotation marks omitted).

II. The City's actions are permissible under *American Legion*.

Applying *American Legion* here, the City's actions are permissible. Having stood for 78 years, the cross enjoys a "strong presumption of constitutionality" that Plaintiffs cannot rebut. 139 S. Ct. at 2085. And even without the presumption, the cross "fit[s] within the tradition" of religious acknowledgments long followed in this country. *Id.* at 2088-89 (plurality) (quoting *Town of Greece*, 572 U.S. at 577).

A. The City's decision to retain a 78-year-old display receives "a strong presumption of constitutionality."

First, under *American Legion*, the cross receives a "strong presumption of constitutionality." 139 S. Ct. at 2085. As the Third Circuit has explained, the *American Legion* presumption applies to "*all* 'established, religiously expressive monuments, symbols, and practices.'" *County of Lehigh*, 2019 WL 3720709, at *4 (emphasis added; quoting *American Legion*, 139 S. Ct. at 2085). If a monument "[s]atisf[ies] these three conditions"—being "established," "religiously expressive," and a "monument"—it "triggers the 'strong presumption of constitutionality.'" *Id.* Here, the presumption is triggered because the cross is a religiously expressive monument that stood on public land for 75 years before this lawsuit. *Cf. American Legion*, 139 S. Ct. at 2078 (suit filed "nearly 90 years after the Cross was dedicated and more than 50 years after" it became publicly owned).[1]

"Moreover, although none is required for the presumption to apply," *County of Lehigh*, 2019 WL 3720709, at *4, this case implicates all four of the "considerations" identified by the *American Legion* Court as motivating the presumption. 139 S. Ct. at 2085.

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[1] Plaintiffs previously claimed—without support—that there was no permanent cross at the site until 1969. *See* Reply 3. Even if this were true, at 50 years old, the cross would still be sufficiently "established" for the *American Legion* presumption to apply. *See Van Orden*, 545 U.S. at 679 (Breyer, J., concurring) ("40 years" before legal challenge sufficient to make passage of time "determinative").

First, here, as is "often" the case with longstanding monuments, "identifying [the cross's] original purpose or purposes [is] especially difficult." *Id.* at 2082. Plaintiffs offer *no* evidence of the City's (as opposed to the Jaycees') purpose, either for allowing the wooden cross to be erected in 1941 or allowing the replacement cross to be erected in 1969. (1969 Parks and Recreation Board Members concluded it was a "very worthwhile project" to allow the Jaycees to erect the replacement cross for *the Jaycees*' purpose of hosting Easter services, Dkt. 31-1, but that's not the same as evidence that the purpose was *shared*, *see Am. Legion*, 139 S. Ct. at 2083.) "Yet it would be inappropriate for courts to compel the [cross's] removal or termination based on supposition." *Id.* at 2082.

Second, as is typical of "longstanding monuments," there are "multiple purposes" at play. Whatever the Jaycees' purposes (in 1941 or 1969), there was an obvious secular purpose for the City to allow the cross to be erected: to allow private citizens to gather as they saw fit during a time of national crisis. As time has gone by, the City's purposes for maintaining the cross have also "multiplied" and "evolve[d]." *Id.* at 2082-84. Today, the City aims simply to preserve part of the City's history and culture—which is expressly permitted under *American Legion* "*even if* the original purpose of a monument was infused with religion." *Id.* at 2083 (emphasis added); *see id.* at 2083-84 ("[A] community may preserve such monuments . . . for the sake of their historical significance or their place in a common cultural heritage. . . . Familiarity itself can become a reason for

preservation.").

Third, as with many monuments, "the 'message' conveyed [by the cross] [has] change[d] over time," as the cross has become an "embedded feature[]" of the City's "landscape and identity." *Id.* at 2084; *accord* Op. 79 (Royal, J., concurring in judgment) ("The Bayview Cross is embedded in the fabric of the Pensacola community."). While the cross was initially erected at an Easter service on the eve of World War II, Dkt. 30-4, the cross, bandstand, and surrounding area have hosted many other community gatherings over the decades—from Veterans and Memorial Day events, to outdoor movie nights, weddings, boat festivals, and fundraising walks. Dkt. 31-18 at 11, 14-16; Br. 22. It has even hosted Plaintiff Suhor's Satanic rituals. *See* Dkt. 30-2 ¶ 15; Oral Argument Tr. 43:9-17. Thus, the cross both memorializes a unique moment in the City's history and serves as a modern gathering place for a wide variety of events and messages. *See Am. Legion*, 139 S. Ct. at 2089-90 (cross represents what many in the community "felt at the time and how they chose to express their sentiments," and serves as "a place for the community to gather and honor all veterans and their sacrifices for our Nation").

Fourth, because "time's passage" has "imbue[d the cross] with this kind of familiarity and historical significance," removing it may "strike many as aggressively hostile to religion." *Id.* at 2084-85. Particularly since the cross is just one of over 170 expressive displays in Pensacola's parks, Addendum 1, the message sent by removal would be clear: the City

is free to celebrate all aspects of its history and culture, except any that "partakes of the religious." *Van Orden*, 545 U.S. at 699 (Breyer, J., concurring).

Because the presumption applies, the burden shifts to Plaintiffs to rebut it. And as the Third Circuit noted, *American Legion* identified "only" two ways that challengers might overcome the "strong presumption of constitutionality": demonstrating "'discriminatory intent'" in the government's decision to maintain the monument, or "'deliberate[] disrespect[]'" in the monument's design. *County of Lehigh*, 2019 WL 3720709, at *3, 6 (quoting *Am. Legion*, 139 S. Ct. at 2074, 2089).

Plaintiffs have shown neither here. They may claim this case is different from *American Legion* because the cross was erected and used at Easter services. But that is not evidence of "discriminatory intent"—particularly since the City was constitutionally required to allow equal access to its parks, including for religious services. *Niemotko v. Maryland*, 340 U.S. 268 (1951). The *American Legion* cross, too, was erected at a ceremony with prayers from clergy, and later events "typically included an invocation . . . and a benediction." 139 S. Ct. at 2077-78. So *American Legion* itself demonstrates that "direct evidence of religious motivation" in "dedicating" and using the monument doesn't rebut the presumption. *County of Lehigh*, 2019 WL 3720709, at *4, 6 (statement by Commissioner that "Christianity and the God-fearing people . . . are the foundation and backbone of our County" did not rebut presumption). And the

cross in *Salazar v. Buono* also served as "a gathering place for Easter services since it was first put in place," 559 U.S. 700, 707 (2010)—yet *Buono* was one of the main cases *American Legion* invoked in explaining the need for the presumption in the first place, *see* 139 S. Ct. at 2081-82.

Plaintiffs have also claimed that "services held at the Cross have been hostile to non-Christians," citing three statements by private speakers in 63 years. Resp. 5-6. But not only were these statements not hostile, they weren't attributable to the City, which, of course, cannot dictate the content of private speech. Moreover, that Pensacolians in 2015 interpreted this lawsuit as an attack on religion (Resp. 6) only proves the City's (and Supreme Court's) point—that the cross's "removal or radical alteration at this date would be seen by many not as a neutral act but as the manifestation of 'a hostility toward religion that has no place in our Establishment Clause traditions.'" *Am. Legion*, 139 S. Ct. at 2074 (quoting *Van Orden*, 545 U.S. at 704 (Breyer, J., concurring in judgment)).

Plaintiffs may also claim that *American Legion* is distinct because the cross there was a World War I memorial, or because there were other monuments nearby. But while these factors might have made *American Legion* an easy case under the *Lemon* test, the Supreme Court rejected *Lemon* in favor of a presumption of constitutionality based on the longevity of the display. In fact, the Court conceded that it was "impossible to tell" whether the "cross's association with the war was the sole or dominant motivation" for the monument, and noted that "the closest" other

monument was "about 200 feet away in a park across the road." *Id.* at 2085, 2078; *see also id.* at 2076 ("we do not know precisely why the committee chose the cross"). At most, these factors simply "illustrat[ed]" some of the reasons why a presumption for longstanding symbols makes sense—namely, that symbols, including crosses, "may express many purposes and convey many different messages, both secular and religious." *Id.* at 2085-87. Those considerations are, again, equally implicated here.

Far from maintaining the cross out of discrimination or deliberate disrespect, the record shows that the City's actions are fully consistent with "the spirit of practical accommodation" of religion that characterizes the Nation's best traditions. *Buono*, 559 U.S. at 723 (Alito, J., concurring in part and concurring in judgment). Seventy-eight years ago, the City permitted private citizens to erect the cross, allowing them to organize a gathering and bring the community together as they saw fit during a time of national crisis. Since then, the City has made the park and the cross available to the public on a neutral basis, Dkt. 30-2 ¶¶ 19, 22-25; Dkt. 31-18 at 12-16, 19-20—including to Plaintiff Suhor, who used the cross for his Satanic rituals. Today, the City allows the cross to remain standing, along with over 170 other displays in Pensacola's parks, not only to commemorate the City's history and culture but also to avoid sending a message of "hostility toward religion." *Am. Legion*, 139 S. Ct. at 2074. Under *American Legion*'s strong presumption of constitutionality for longstanding monuments, the City's actions are constitutional.

B. The City's actions are consistent with the longstanding tradition of recognizing the role of religion in public life.

Even apart from *American Legion*'s presumption of constitutionality, the City's actions in this case are still constitutional, because the cross "comfortably 'fits within the tradition'" of religious acknowledgments "'long followed' in this country." Op. 22 (Newsom, J., concurring) (quoting *Town of Greece*, 572 U.S. at 577).

In *Town of Greece*, the Supreme Court refused to apply *Lemon* in evaluating the constitutionality of a town's legislative-prayer practice, instead holding that "the Establishment Clause must be interpreted 'by reference to historical practices and understandings.'" 572 U.S. at 576 (quoting *County of Allegheny v. ACLU, Greater Pittsburgh Chapter*, 492 U.S. 573, 670 (1989) (op. of Kennedy, J.)). Under this historical approach, the prayer practice—which began only nine years before plaintiffs filed suit—was constitutional so long as it "fit[] within the tradition long followed in Congress and the state legislatures." *Id.* at 570, 577.

Town of Greece was clear that this historical approach did not constitute "an exception to the Court's Establishment Clause jurisprudence," but flowed from the meaning of the Establishment Clause itself. *Id.* at 575-76 (cleaned up). Nonetheless, some—Plaintiffs here included—interpreted it as "simply" an application of a "legislative-prayer exception to *Lemon*," that "is categorically inapplicable to display cases." Resp. 35-37.

That (mis)reading of *Town of Greece* was put to rest in *American Legion*. There, six Justices agreed that, even when a case is not governed by the "strong presumption of constitutionality" for longstanding symbols, the guiding analysis is not *Lemon* but *Town of Greece*. *Am. Legion*, 139 S. Ct. at 2087-2089 (plurality) (*Town of Greece* an "example" of the Court's modern approach of "look[ing] to history for guidance" in resolving Establishment Clause cases); *see also id.* at 2101-02 (Gorsuch, J., joined by Thomas, J., concurring in judgment) ("In place of *Lemon*, Part II-D of the plurality opinion relies on a more modest, historically sensitive approach, recognizing that 'the Establishment Clause must be interpreted by reference to historical practices and understandings.' . . . I agree with all this[.]" (quoting *Town of Greece*)). Explicitly applying the *Town of Greece* approach to "monuments, symbols, and practices," the Justices explained that the question is whether the challenged display fits within a "categor[y]" of such displays that have long been used in respectful, tolerant, and nondiscriminatory ways to "recogniz[e] the important role that religion plays in the lives of many Americans." *Id.* at 2088-89 (plurality). If so, it is "constitutional." *Id.*

Under that approach, even if the cross here were not entitled to the strong presumption of constitutionality, it would still be constitutional as "consistent with historical practices." *New Doe Child #1 v. United States*, 901 F.3d 1015, 1021-23 (8th Cir. 2018); *see also Gaylor v. Mnuchin*, 919

F.3d 420, 435-36 & n.11 (7th Cir. 2019) (upholding tax exemption for ministerial housing because of "lengthy tradition of tax exemptions for religion"). Acknowledgments of religion through passive monuments like the cross have been common since the founding. *See* Br. 53-54. And as Judge Newsom explained, this tradition extends specifically to the display of crosses on public land. "There is, put simply, lots of history underlying the practice of placing and maintaining crosses on public land," such that "that practice, in *Greece*'s words, comfortably 'fits within the tradition long followed' in this country." Op. 22 (Newsom, J., concurring) (quoting 572 U.S. at 577); *see also id.* at 23-26 (collecting examples); Addendum 2 (collecting more).

This application of *Town of Greece* also aligns with the "original public understanding" of the Establishment Clause. *County of Lehigh*, 2019 WL 3720709, at *2, *6. At the founding, an "establishment of religion" had a well-defined meaning that included several key elements: government control over church doctrine and personnel, mandatory church attendance, financial support of the established church, penalties for dissenting worship, restrictions on political participation by dissenters, and use of the established church to carry out civil functions. Michael W. McConnell, *Establishment and Disestablishment at the Founding, Part I: Establishment of Religion*, 44 Wm. & Mary L. Rev. 2105, 2131-80 (2003). Because Pensacola's conduct in "displaying a religious symbol on govern-

ment property" shares in none of these "characteristics," it does not violate the Establishment Clause's historical meaning. *Am. Legion*, 139 S. Ct. at 2096 (Thomas, J., concurring in judgment) (citing Br. for Becket Fund for Religious Liberty as *Amicus Curiae* 14-22).

C. *American Legion* suggests that Plaintiffs lack standing.

American Legion also casts doubt on Plaintiffs' standing. Plaintiffs' only alleged injury is that they felt "offen[se]" and "exclu[sion]" from seeing the cross. Op. 7-8. This Court previously held that it was bound by *Rabun* to conclude that this "metaphysical" injury sufficed for purposes of Article III standing. *Id.* 5-8 But as Judges Newsom and Royal pointed out, this result is "utterly irreconcilable with" Supreme Court precedent. Op. 14-16 (Newsom, J., concurring) (citing *Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc.*, 454 U.S. 464 (1982)), 64 (Royal, J., concurring) (same). It also perpetuates a circuit split. En Banc Pet. 8-10.

American Legion confirms that *Rabun*'s standing holding is mistaken. As Justice Gorsuch explained, the "'offended observer' theory of standing" adopted in *Rabun*—and by the Fourth Circuit, citing *Rabun*, in *American Legion* itself, *Am. Humanist Ass'n v. Md.-Nat'l Capital Park & Planning Comm'n*, 874 F.3d 195, 203 (4th Cir. 2017)—"has no basis in law." 139 S. Ct. at 2098-2100 (Gorsuch, J., concurring in judgment) (citing Br. for Becket Fund for Religious Liberty as *Amicus Curiae* 34-35). Under

Lemon, it was at least an understandable mistake; some "reasoned that, if," as *Lemon* provides, "the Establishment Clause forbids anything a reasonable observer would view as an endorsement of religion, then such an observer must be able to sue." *Id.* at 2101. But "with *Lemon* now shelved, little excuse" remains for continuing to entertain it. *Id.* at 2102. Particularly after *American Legion*, then, courts should hold Establishment Clause plaintiffs to "the usual demands of Article III"—and "suits like this one should be dismissed for lack of standing." *Id.* at 2098, 2102-03.

Nevertheless, despite Justice Gorsuch's concurring opinion, the *American Legion* majority never addressed the issue of standing. Accordingly, under the prior-panel-precedent rule, *Rabun* remains binding on the issue of standing, even though it has been abrogated on the merits. *See, e.g., Overlook Gardens*, 927 F.3d at 1202 & n.3 (Supreme Court ruling abrogated "part" of prior panel precedent). The upshot is that the panel appears to be bound to find standing under *Rabun*, but it is also bound to uphold the City's actions under *American Legion*. So the task of "bring[ing this Court's] Establishment Clause standing precedent into line with the Supreme Court's" (Op. 16 (Newsom, J., concurring in judgment)) could be undertaken only by the en banc Court.

CONCLUSION

The decision below should be reversed.

August 23, 2019

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the page limitation imposed by this Court's order of August 5, 2019.

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2016 in 14-point Century Schoolbook font.

Dated August 23, 2019

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CERTIFICATE OF SERVICE

I certify that on August 23, 2019, I caused the foregoing brief to be filed electronically via the Court's electronic filing system, which then served it upon the following registered counsel of record for Plaintiffs-Appellees:

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