

RECORD NO. 15-2597

In The
United States Court Of Appeals
For The Fourth Circuit

AMERICAN HUMANIST ASSOCIATION; STEVEN LOWE;
FRED EDWARDS; BISHOP McNEILL,
Plaintiffs – Appellants,

v.

MARYLAND-NATIONAL CAPITAL
PARK AND PLANNING COMMISSION,
Defendant – Appellee,

THE AMERICAN LEGION; THE AMERICAN LEGION DEPARTMENT
OF MARYLAND; THE AMERICAN
LEGION COLMAR MANOR POST 131,
Intervenors/Defendants – Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND
AT GREENBELT

REPLY BRIEF OF APPELLANTS

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INTRODUCTION

Bladensburg Cross has the unconstitutional effect of endorsing Christianity. Nothing in Legion/M-NCPPC's brief shows otherwise. Instead, they dedicate the vast majority of their brief arguing that the Cross is a commemorative war memorial. But Appellants (hereafter "Humanists") do not contest this. Rather, they assert it is a *Christian* war memorial that favors Christians and excludes everyone else. Humanists feel personally alienated by this governmental message of Christian favoritism.

Although the Latin cross is a *common* symbol in overseas cemeteries, it remains "a *Christian* symbol of death that signifies or memorializes the death of a *Christian*." *Am. Atheists, Inc. v. Duncan*, 616 F.3d 1145, 1161 (10th Cir. 2010). As such, "a reasonable observer would view a memorial cross as sectarian in nature." *Trunk v. San Diego*, 629 F.3d 1099, 1111-12 (9th Cir. 2011).

Finally, Legion/M-NCPPC's brief is laden with irrelevant information about the Cross's purpose. But purpose is not on appeal. That Humanists dedicated their appeal to the Cross's effect, however, should not be construed, as Legion/M-NCPPC suggest, as conceding purpose. (D.Br.32). Humanists set aside purpose solely to focus the Court's attention sharply on the overwhelming authority holding, as common sense dictates, that a huge Christian cross has the effect of advancing Christianity.

ARGUMENT

I. Legion/M-NCPPC's Statement of Facts mischaracterizes the record.

A. Facts relevant to the Cross's religious effect are undisputed.

Before responding to Legion/M-NCPPC's legal arguments, misleading factual issues must be addressed. Legion/M-NCPPC's inaccurate factual picture is a product of: (1) ignoring the Cross's size and central placement, focusing instead on small details unnoticeable to passersby; (2) devoting substantial space to the Cross's origins and purpose; and (3) assigning tremendous significance to crosses in cemeteries even though such crosses represent Christians.

Notably however, Legion/M-NCPPC concede material facts that overwhelmingly contribute to the Cross's unconstitutional religious effect:

- The Cross stands 40-feet high, with arms 5-feet from the center¹
- It is a Latin cross and a Latin cross is a Christian cross, *ACLU v. City of St. Charles*, 794 F.2d 265, 271 (7th Cir. 1986) (“the Latin cross (a cross whose base stem is longer than the other three arms) is a symbol of Christianity”)²
- It is centrally placed on a traffic island in one of the county's busiest intersections³
- No other monuments are on the island⁴

¹ (J.A.26)(J.A.42)(J.A.68)(J.A.1097-12)(J.A.1155,1159)(J.A.1583)(J.A.1877)(J.A.1919,1921)(J.A.2507-08)

² (J.A.287)(J.A.1023)(J.A.1028)(J.A.1114-15)(J.A.1450-52)(J.A.1457-60)(J.A.1517-36)(J.A.1872)

³ (J.A.1372)(J.A.1583)(J.A.1621)(J.A.1626)(J.A.1639)(J.A.1872)(J.A.1729)(J.A.1919)(J.A.1980)

- The Cross is the tallest, most prominent monument in the region⁵
- Bushes obscured the small plaque and were only cleared in response to this lawsuit⁶
- The plaque is illegible to motorists (J.A.27,33-34)(J.A.1980)
- The “U.S.” star does not mention American Legion (J.A.35)(J.A.1101,1103)
- The government is the sole owner of the Cross and charged with “maintaining, repairing and otherwise caring” for it⁷
- Over \$200,000 of public funds have been allocated to the Cross⁸
- The Cross was the only monument in the area for most of its history and the few newer monuments are substantially smaller, and were placed in a separate area⁹
- Many members of the public perceive Bladensburg Cross as religious¹⁰
- Prayers by Christians are delivered at virtually every event¹¹
- M-NCPPC invited a Catholic priest to deliver prayers at the Cross’s rededication ceremony in 1985, and expressed a desire to “assimilate this relationship again.”(J.A.1271-81)

⁴ (J.A.30,44)(J.A.111)(J.A.1858)(J.A.1872)

⁵ (J.A.33-34,37-40)(J.A.2485)(J.A.2563)(J.A.68-69,72-75)

⁶ (J.A.27,34)(J.A.1097-99)(J.A.1102,1105-06)(J.A.1111-12)(J.A.1367)(J.A.1462)(J.A.1878-79)(J.A.1889-90)(J.A.1930)(J.A.2056)

⁷ (J.A.93)(J.A.2120,2129-30)(J.A.2970)

⁸ (J.A.138)(J.A.574,576-577)(J.A.1278)(J.A.1553-70)(J.A.1571-1616)(J.A.1617-46)(J.A.1647-50)(J.A.1651-64)(J.A.1667-75)(J.A.2133)(J.A.2561)

⁹ (J.A.30)(J.A.650-52,689-91)(J.A.697)(J.A.1973)(J.A.1996)(J.A.2024)

¹⁰ (J.A.1045-46)(J.A.1083-84)(J.A.1386-1435)(J.A.1442-45)(J.A.1449-55)(J.A.3220-3283)

¹¹ (J.A.1282-1353)(J.A.1777-1818)(J.A.1846-50)

Additionally, Legion/M-NCPPC do not dispute historical facts which, although immaterial to effect, *infra* at 14-21, contribute to the Cross's religious purpose:¹²

- The Town authorized the construction of the Cross¹³
- Bladensburg Cross was originally known as the "Calvary cross," signifying the crucifixion of Jesus Christ¹⁴
- Donors signed a contribution pledge referencing "God," "Supreme Ruler" "Faith" "Spirit Lives to Guide Us" "Godliness," "One God"¹⁵
- The Cross's designer was known for religious iconography and Bladensburg Cross was inspired by his work on a Christian Shrine¹⁶
- Christian clergy participated in major events at the Cross, including its dedication, fiftieth anniversary, and re-dedication¹⁷
- Bladensburg Cross was erected in an era when the Cross would be appropriated by the Ku Klux Klan as a sectarian symbol to intimidate Jews and African Americans¹⁸
- The Post regularly participated in "Legion Sunday" at a Methodist Episcopal Church¹⁹

¹² Humanists only present these facts if the Court finds *Van Orden* controlling.

¹³ (J.A.1086-1087)(J.A.1206-1207)(J.A.1919)(J.A.3427-29)

¹⁴ (J.A.211)(J.A.288-89)(J.A.1114-15)(Doc.83-1 at 15)

¹⁵ (J.A.36)(J.A.1939)(J.A.3446)

¹⁶ (J.A.2486)(J.A.3310-13)

¹⁷ (J.A.28)(J.A.211)(J.A.288)(J.A.1129-34)(J.A.1176)(J.A.1486)(J.A.1876)

(J.A.1891)(J.A.1936)(J.A.2727)(J.A.3430)

¹⁸ (J.A.188)(J.A.211-13)(J.A.1241-48)(J.A.1249-55)

¹⁹ (J.A.1205)(J.A.2072)(J.A.2080,2088-89)(J.A.2104)

- A week after the groundbreaking for the Cross, the county unveiled a secular WWI memorial dedicated to the same men²⁰

Legion/M-NCPPC devote most of their factual section to the Cross's origins and purpose. (D.Br.6-20). But their historical account is misleading. For instance, they selectively quote a single mother (Mrs. Redman) as evidence of the Cross's purpose (D.Br.1,12), yet conspicuously neglect any discussion of:

- The Cross's designer
- The "Calvary Cross Memorial" committee
- Newspaper accounts referring to "the Cross of Calvary, as described in the Bible"(J.A.1114-15)
- The Cross's fiftieth anniversary, where prayers were delivered by a Reverend of St. Luke's Episcopal Church and the guest speaker was a Christian chaplain²¹
- The Cross's rededication ceremony in 1985, where M-NCPPC invited a Catholic priest to deliver prayers²²

They dedicate an equally significant portion of their factual section discussing crosses in war cemeteries and Bladensburg Cross's war memorial designation. (D.Br.7-15,18-20). Humanists do not dispute Christian crosses marked Christian graves, just as Stars of David marked Jewish graves. Nor do they dispute the Cross's memorial status. But the fact the Cross is a government war memorial magnifies, rather than mitigates, its stigmatizing religious message: Christians are

²⁰ (J.A.206-08)(J.A.1186)(J.A.1992)(P.Br.10)

²¹(J.A.150)(J.A.331,351)(J.A.1263)(J.A.1922)(J.A.1963)(J.A.1998)(J.A.2549-52)

²²(J.A.137-38)(J.A.1271-81)

worth venerating while the rest may be forgotten. (P.Br.30-34).

B. Bladensburg Cross was not built on private property.

Legion/M-NCPPC repeatedly claim the Cross was “constructed on private land.” (D.Br.1,17,32). This is false.²³ Construction initiated in 1919 on Town property, with its authorization,²⁴ sharply contradicting their argument the government’s “only purpose for owning the Memorial” was for “highway expansion.”²⁵

M-NCPPC even admitted it acquired the Cross from the State Roads Commission in 1960 after the “Legion reportedly voiced concerns over the future repair and maintenance of the monument,” and that traffic concerns were no longer an issue. (J.A.2970-71)(J.A.3219)(Doc.84-1 at 5).

Attending to the Legion would not be a secular purpose. *See Doe v. Cnty. of Montgomery*, 915 F. Supp. 32, 36 (C.D. Ill. 1996). Further, to argue the government’s purpose is to preserve “history” ignores the original motivation for placing it on public property. *Id. See Harris v. City of Zion*, 927 F.2d 1401, 1404, 1414 (7th Cir. 1991)(seal’s religious purpose when adopted in 1902 was not diminished by a more recent decision to retain it for historical purposes).

Legion may claim to be “inclusive” and “non-sectarian” (D.Br.14), but the

²³ (J.A.1085-96)(J.A.1874)(J.A.1925)

²⁴ (J.A.1873-77)(J.A.1925)(J.A.2503-04)(J.A.3426-28)

²⁵ (Doc.83-1 at 32)(J.A.2503-04)(J.A.3216-19)(D.Br.1,32)

undisputed facts paint a different picture.²⁶ As noted, the Post was actively involved with a Christian church.²⁷ Post 131 chaplains are Christian and there are no known Atheist or Muslim members. (J.A.2018-19).

“The Four Pillars of American Legion” states: “The American Legion is dedicated to combating the secular cleansing of our American heritage, performed by lawsuits that attack...symbols of America’s religious history.” (J.A.1470). It adds: “The institution of marriage is under siege.” (J.A.1469). In 2013, Post 134 reportedly withheld financial support for a park district because an Atheist commissioner refused to recite “under God.” (J.A.1500-05).

II. Controlling caselaw supports the conclusion that intrinsically Christian symbols are almost always unconstitutional.

Legion/M-NCPPC accused Humanists of urging the Court to adopt a “per se” rule.²⁸ But Humanists simply pointed out that *the courts* have been *virtually* unanimous in holding crosses unconstitutional. (P.Br.23-25). They cited at least twenty-five cases finding crosses unconstitutional, even when the display was:

- Purely commemorative
- An accurate replication of a World War II tombstone
- Roadside memorials for individual fallen troopers

²⁶ (J.A.1201-13)(J.A.2068,2082)

²⁷(J.A.1129-34)(J.A.1135-36)(J.A.1202-13)(J.A.2020-21,2033-34,2047,2054)
(J.A.2072,2080,2088-89,2092,2095-96,2104)(J.A.2536-40)

²⁸(Doc.83-1 at 2,25,52-55,57)(Doc.84-1 at 18)(D.Br.2,23,43)

- A memorial its entire history (P.Br.28)
- Longstanding (P.Br.68)
- Outnumbered by secular symbols (P.Br.29)
- Independently historically significant (P.Br.28-29)
- Remote and avoidable (P.Br.36,54-55)
- Artwork²⁹

“[C]ase law shows that exclusively religious symbols, such as a cross, will *almost always* render a governmental [display] unconstitutional.” *King v. Richmond Cnty.*, 331 F.3d 1271, 1285 (11th Cir. 2003)(emphasis added). A court within the Fourth Circuit reiterated: “most of the current jurisprudence analyzing the Latin cross, in light of asserted Establishment Clause violations, is all but decidedly against the [government].”³⁰ Another court recently observed: “even when a cross occupies only one part of a larger [sic] display, courts have almost unanimously held that its effect is to communicate that the display as a whole endorses religion.”³¹

Other cases strongly support the conclusion that government crosses are presumptively unconstitutional:

²⁹ *Gonzales v. North Twp. Lake Cnty.*, 4 F.3d 1412, 1421 (7th Cir. 1993); *Carpenter v. San Francisco*, 93 F.3d 627, 631-32 (9th Cir. 1996)

³⁰ *Hewett v. City of King*, 29 F. Supp. 3d 584, 619 (M.D.N.C. 2014)

³¹ *Am. Humanist Ass’n v. Lake Elsinore*, 2014 U.S. Dist. LEXIS 25180, at *39-40 (C.D. Cal. 2014)

- A “sectarian war memorial carries an inherently religious message[.]”³²
- The cross cannot “be divorced from its religious significance.”³³
- “When prominently displayed on a public building...the cross dramatically conveys a message of governmental support for Christianity[.]”³⁴
- “[T]he only purpose which can be ascribed to the display of the cross is to either advance or endorse the Christian religion.”³⁵

Justice Kennedy even observed:

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.

Cnty. of Allegheny v. ACLU, 492 U.S. 573, 661 (1989)(concurring and dissenting).³⁶

Legion/M-NCPPC argue that Humanists attempt to reduce the case to a “simple syllogism.”(D.Br.43). But it starts with a premise Humanists never asserted. (P.Br.45-58). And Humanists clearly do not rely upon this syllogism, evidenced by their 13,982-word brief detailing facts about the Cross’s features,

³² *Trunk*, 629 F.3d at 1101 (quoting *Ellis*)

³³ *Duncan*, 616 F.3d at 1161-62

³⁴ *St. Charles*, 794 F.2d at 271

³⁵ *ACLU v. Miss. State Gen. Servs. Admin.*, 652 F. Supp. 380, 383-85 (S.D. Miss. 1987)

³⁶ Humanists quoted this passage, as above, in summary judgment. (Doc.80-1 at 13). “City hall” was omitted from their appellate brief only because it is immaterial. (D.Br.49)(P.Br.54-55).

physical setting, history, usage, and public perception. (P.Br.3-17). This highly detailed analysis was beyond necessary though, especially under *Lemon* effect.

For instance, in *Sep. of Church & State Comm. v. Eugene*, the Ninth Circuit concluded it was “simple” and “straightforward” that a large concrete war memorial cross, erected by American Legion in 1964 in a remote location, without the city’s permission, “clearly” unconstitutionally advanced religion. 93 F.3d 617, 617-20 n.5 (9th Cir. 1996). Without conducting a detailed analysis, the court held: “There is no question that the Latin cross is a symbol of Christianity, and that its placement on public land by the City of Eugene violates the Establishment Clause.” *Id.*

At least four Fourth Circuit cases lend support for this straightforward analysis. In *Hall v. Bradshaw*, this Court held that a prayer on a state map failed the purpose and effect prongs, because prayer “is undeniably religious and has, by its nature, both a religious purpose and effect.” 630 F.2d 1018, 1020-21 (4th Cir. 1980). The effect analysis – a single paragraph– rested on such logic: “A prayer, because it is religious, does advance religion, and the limited nature of the encroachment does not free the state from the limitations of the Establishment Clause.” *Id.*

In *Smith v. Cnty. of Albermarle*, the Court held a crèche unconstitutionally endorsed religion because it was “indisputably religious.” 895 F.2d 953, 957-58

(4th Cir. 1990).

In *N.C. Civil Liberties Union Legal Found. v. Constangy*, the Court observed: “controlling caselaw suggests that an act so intrinsically religious as prayer cannot meet, or at least would have difficulty meeting, the secular purpose prong of the *Lemon test*.” 947 F.2d 1145, 1150 (4th Cir. 1991).

And in *Mellen v. Bunting*, this Court explained: “When a state-sponsored activity has an overtly religious character, courts have consistently rejected efforts to assert a secular purpose for that activity.” 327 F.3d 355, 373-74 (4th Cir. 2003). *See also Summers v. Adams*, 669 F. Supp. 2d 637, 658, 663 (D.S.C. 2009)(“the overtly Christian design...is, alone, sufficient[.]”)(citing *Lambeth v. Bd. of Commrs*, 407 F.3d 266, 270 (4th Cir. 2005)).

III. A commemorative Christian cross is still a Christian cross.

Ironically, Legion/M-NCPPC – which spends the bulk of their arguments attempting to prove the Cross is commemorative – are the ones hoping to prevail by a simplistic syllogism: (1) a government’s prominent display of the Latin cross is constitutional if it is a commemorative war memorial; (2) Bladensburg Cross is a commemorative war memorial; (3) therefore, Bladensburg Cross is constitutional.

Legion/M-NCPPC’s argument must fail because commemoration does not equal secularization. In fact, it magnifies the cross’s stigmatic religious message. (P.Br.26-34,61-63). Such a use of a:

Christian symbol to honor all veterans sends a strong message of endorsement and exclusion. It suggests that the government is so connected to a particular religion that it treats that religion's symbolism as its own, as universal. To many non-Christian veterans, this claim of universality is alienating.

Trunk, 629 F.3d at 1124-25.

Thus, the question is not whether the Cross is understood as a war memorial. The proper question is whether the Cross war memorial may reasonably be perceived as a tribute to *Christian* war dead. To ask the question would appear to provide the answer.

Accordingly, Legion/M-NCPPC's reliance on crosses in cemeteries, overseas and locally, to justify the monolithic freestanding Latin cross situated in a traffic island in Bladensburg, is misplaced. (D.Br.7-11,19,36,38,40,47,50). They even dedicate two pages to "In Flanders Field." (D.Br.7-9). But they offer no evidence that the cross has been widely embraced as a *secular* symbol. The "mere fact that the cross is a *common* symbol used in...memorials does not mean it is a *secular* symbol." *Duncan*, 616 F.3d at 1162. The "Latin cross can, as in Flanders fields, serve as a powerful symbol of death and memorialization, but it remains a sectarian, Christian symbol." *Trunk*, 629 F.3d at 1116.(J.A.309).

The centrality and prominence of the Cross further distinguishes it "from other war memorials containing crosses." *Id.* at 1124 (distinguishing the "Argonne Cross and the Canadian Cross of Sacrifice at Arlington"). "Nor do those few

examples fairly lead to the conclusion that the cross has become a secularized representation of war memory. Overwhelming evidence shows that the *cross remains a Christian symbol*, not a military symbol.” *Id.* at 1114 (emphasis added).

In addition to Arlington, Legion/M-NCPPC mention two smaller crosses in Maryland: Wayside, which has not been challenged, and Victory, located on *private property*.³⁷ These are the only crosses they cite for their assertion: “communities throughout America also began erecting cross-shaped memorials to commemorate those lost in WWI.” (D.Br.10). Yet even their own exhibit refers to Wayside Cross as a “rare example.” (J.A.2660). *See also id.* at 1112. Nor does the record support the notion these are *secular* crosses. To the contrary, Victory Cross is located on the Episcopal Cathedral. (J.A.2675).

Legion/M-NCPPC’s argument that Bladensburg Cross “mirror[s]” cross headstones simply furthers the conclusion it is a Christian tribute. (D.Br.12,38). Their own evidence confirms these headstones represent Christianity. (J.A.1877)(J.A.2297)(J.A.2256)(“...designs that incorporated Christian symbolism, most notably the use of the Latin Cross.”).

While Legion/M-NCPPC seize upon Piehler’s observation “the Cross became the principal grave marker” (D.Br.8,38), they conveniently omit language from this passage elucidating that the cross remained religious:

³⁷ (D.Br.10)(Doc.83-1 at 10)(J.A.2660,2675)

The World War I memorials...witnessed an increased use of *religious* imagery - for instance, chapels were built in each of the overseas cemeteries and the Cross became the principal grave marker in them (*with a Star of David gravestone used for Jewish soldiers*).

(J.A.2239)(emphasis added). The “doughboy” became *the universal* WWI tribute.

(J.A.3291). They similarly ignored a critical sentence from *Remembering War the American Way* (D.Br.11): “But it also showed a lack of sensitivity to non-Christian Americans[.]” (J.A.2270).

Moreover, even if commemoration might be considered a secular purpose, Legion/M-NCPPC’s argument fails to recognize that such a “use of means that are inherently religious makes a message of endorsement likely if not unavoidable.” *Jewish War Veterans v. U.S.*, 695 F. Supp. 3, 14 (D.D.C. 1988). *See Hall*, 630 F.2d at 1020-21 (Even if prayer “promoted safety, which is a legitimate secular purpose” it failed *Lemon* because “the state has chosen a clearly religious means to promote its secular end.”)(citation omitted).

IV. Bladensburg Cross is unconstitutional under the *Lemon* effect prong.

A. Bladensburg Cross is a Christian tribute.

The “effect prong asks whether, irrespective of government’s actual purpose,” *Wallace v. Jaffree*, 472 U.S. 38, 56 n.42 (1985), the “symbolic union of church and state...is sufficiently likely to be perceived by adherents of the controlling denominations as an endorsement, and by the nonadherents as a disapproval, of their individual religious choices.” *School Dist. v. Ball*, 473 U.S.

373, 390 (1985).

Bladensburg Cross fails the effect test because “a reasonable observer would perceive [the cross] as projecting a message of religious endorsement.” *Trunk*, 629 F.3d at 1118. *See Allegheny*, 492 U.S. at 599 (a cross on a government building would convey “endorsement of Christianity”). And this message is even more stigmatizing *because* the Cross is a war memorial. *Trunk*, 629 F.3d at 1109, 1125. (J.A.63-68). The “principal symbol of Christianity...is too laden with religious meaning to be appropriate for a government memorial assertedly free of any religious message.” *Jewish War Veterans*, 695 F. Supp. at 15.

B. Legion/M-NCPPC devote the majority of their effect analysis to the Cross’s purpose, origins, and *Van Orden* factors.

Bladensburg Cross violates the effect prong, independent of its purpose. *See Trunk*, 629 F.3d at 1109-10. (P.Br.27-37,59). Yet Legion/M-NCPPC dedicate most of their effect analysis to purpose and origins. (D.Br.32-38). They even argue, based on a Tenth Circuit case, this Court must evaluate “purpose” and “history” in determining *effect*. (D.Br.33). But the Tenth Circuit applied a test adopted for its circuit: “the hybrid *Lemon*/endorsement test.” *Weinbaum v. City of Las Cruces*, 541 F.3d 1017, 1030 (10th Cir. 2008).³⁸

This Court, in contrast, has made clear that: “Prong two thus looks to the

³⁸ This Court applied its own version of an “endorsement test” in *Mellen* and held that neither “purpose” nor “history” were factors. 327 F.3d at 369-70, 374.

effect of the display itself, not to the display's origin." *Lambeth*, 407 F.3d at 272. In *Lambeth*, a case Legion/M-NCPPC rely heavily upon (D.Br.22-23,31-34,36-37,44-46), this Court rejected the argument the reasonable observer would be "aware of the religious comments made in favor of the display at the Board meeting where [the display] was authorized." *Id.* The Court reasoned: "the Board's intent [is] inapplicable to the *Lemon* test's second prong." *Id.* "The first and second prongs of the *Lemon* test are intended to assess different aspects of a challenged government action." *Id.*

Not surprisingly, Legion/M-NCPPC want the Court to repackage *Van Orden* into *Lemon*, and collapse purpose into effect (D.Br.34-38), to avoid the inevitable: a giant cross on government property unconstitutionally endorses religion. (P.Br.19).

C. Bladensburg Cross's overwhelming religious message is not negated by a few small, subordinate elements.

1. Bladensburg Cross appears unadorned and does not incorporate "commemorative symbols."

While "exclusively religious symbols, such as a cross," will almost always render a government display unconstitutional, "[s]ize and placement are, however, factors to consider in the overall effect-prong analysis." *King*, 331 F.3d at 1285. (P.Br.45-48)(D.Br.34). The inherently Christian design of Bladensburg Cross, together with its massive size, prominence, and central placement within the

median, unmistakably endorses religion and “evokes a message of aggrandizement.” *Trunk*, 629 F.3d at 1116 n.18.

In the few sections Legion/M-NCPPC actually discuss facts germane to the effect prong, they exaggerate its subordinate physical features. Indeed, they spend more time discussing the Cross’s pedestal and the 2-foot tall plaque—often obscured by bushes—than the Cross itself. (D.Br.4,21,35,51-52). The pedestal of course, elevates the Cross, giving it “a symbolic value that intensifies the Memorial’s sectarian message.” *Id.* at 1123-24.

Like the District Court, they argue that the Cross “includes many secular, commemorative symbols.”(D.Br.3,35). But there is only *one* non-religious *symbol*: the small “U.S.” star. (P.Br.6,46,50). Four *words* are inscribed on the base. (P.Br.47,50). The only other feature is the oft-obscured 2-foot high plaque, illegible to most passersby. (J.A.27,33-34)(J.A.1367)(J.A.2056)(J.A.2764).

These three “minor features hardly secularize what is clearly a sectarian Christian symbol.”(J.A.287). *See Books v. City of Elkhart*, 235 F.3d 292, 307 (7th Cir. 2000)(“the placement of the American Eagle gripping the national colors at the top of the monument hardly detracts from the message of endorsement; rather, it specifically links religion...and civil government.”).

Most “passing motorists would not even notice the...inscriptions on the base.”(J.A.287). An M-NCPPC report recognizes: “as they negotiate the intricate

traffic pattern, the riders catch at least a *fleeting glimpse* of the Peace Cross[.]” (J.A.1980)(emphasis added). And the 1925 *Washington Post* article described it as “an unadorned cross.” (J.A.2508). Legion/M-NCPPC fail to establish how the “observer would also see the list of the 49 local men” driving through the intersection. (D.Br.35,40).³⁹ Nor do they address the fact that prior to litigation, the plaque was obscured by bushes.⁴⁰

Legion/M-NCPPC go on to claim that the observer “would notice that the Memorial is styled like a Celtic cross,” apparently arguing a “Celtic” cross is understood by the public as a non-Christian symbol. (D.Br.35). This argument has four major flaws. First, Bladensburg Cross is undisputedly a *Latin* cross, and Christian cross.⁴¹ Nevertheless, Celtic crosses are generally “Christian, not secular, symbols.”(J.A.287-88). Second, it contradicts their principal argument that Bladensburg Cross “mirror[s]” Latin crosses in WWI cemeteries, which marked Christian graves. Third and relatedly, there is no evidence the Christian sponsors intended to create a non-Christian, ethnic Irish cross. (J.A.1206). By contrast, the Irish Brigade Monument includes “the seal of Ireland, as well as an image of an

³⁹ They suggest in passing, for the first time, it is a “low speed zone,” but do not identify the speed limit or offer any evidence, other than their own subjective opinion, that a driver can readily observe the plaque. (D.Br.52)

⁴⁰ (J.A.27)(J.A.33-34)(J.A.457-58)(J.A.861)(J.A.1098-99)(J.A.1367)(J.A.1889-90)(J.A.2056)(J.A.2764)

⁴¹(J.A.287-88)(J.A.1023,1027-28)(J.A.1107)(J.A.1450-51,1458)(J.A.1935)
(Doc.83-1 at 38)

Irish bloodhound.”(J.A.193). Fourth, it imputes too much on the reasonable observer. They only offer their *expert’s* report, which merely states the brackets “suggest a Celtic cross, an ancient form marking a gravesite.”(J.A.1890). Cf. *Alvarado v. San Jose*, 94 F.3d 1223, 1232 (9th Cir. 1996)(“[t]he reasonable observer is not an expert on esoteric religions”).

2. The Cross’s memorial status does not negate its religious meaning.

Legion/M-NCPPC’s final effect-related argument is that, “in addition to its religious connotations, the cross-shape is also an internationally recognized symbol for the human toll of WWI.” (D.Br.36). This is unpersuasive for two reasons.

First, it relies upon the assumption observers are aware it is a war memorial, which rests on two additional false assumptions: (1) the plaque has not been obscured by bushes; and (2) an average motorist can read the plaque.⁴²

The average observer is a motorist. A May 2015 M-NCPPC report concedes the median is a “difficult place to occupy as a pedestrian.” (J.A.2485). A 1997 report states the Cross “is located in the middle of a busy traffic intersection. No public access is possible.” (J.A.1159). “There are no specific pedestrian rights-of-way.”(J.A.140). For “these drivers, the Cross does not so much present itself as a war memorial, but rather as a solitary symbol[.]” *Trunk*, 629 F.3d at 1123.

Second and importantly, even if reasonable observers are aware of the war

⁴²(P.Br.5,46-47,49)(J.A.287)(J.A.833)(J.A.955,957,969-71,1002,1013)(J.A.1980)

memorial status, they will still see it as a tribute to Christian soldiers. *See id.* at 1111-12. *E.g., Allegheny*, 492 U.S. at 615 n.61 (noting that a “war memorial containing crosses and a Star of David unconstitutionally favored Christianity and Judaism”)(citing *ACLU v. Eckels*, 589 F. Supp. 222 (S.D. Tex. 1984)).

Legion/M-NCPPC’s only counterargument is that AHA “misunderstands the nature of the Memorial” because an observer would know it does not honor “all” WWI veterans but “49 particular men” and is therefore more like “cemetery crosses.”(D.Br.40). Yet again, this rests upon erroneous assumptions: (1) an average motorist can read the plaque; and (2) “cemetery crosses” for individual Christians are somehow more secular than a universal government monument.

In *Duncan*, the Tenth Circuit ruled that individualized privately-funded roadside memorial crosses – with biographical information about each trooper and a photograph – unconstitutionally advanced religion. 616 F.3d at 1160-62. Just like Legion/M-NCPPC argues here that crosses are common symbols of WWI cemeteries, Legion offered a publication “that roadside crosses are common, recognizable symbols of highway fatalities.” *Id.* But the Tenth Circuit soundly concluded: “the fact that all of the fallen...troopers are memorialized with a Christian symbol conveys a message that there is some connection between [the state] and Christianity...[T]he significant size of the cross...would only heighten this concern.” *Id.*

The court in *Trunk* similarly held: “The fact that individual veterans can purchase plaques representing their own beliefs does not cure the constitutional problem with the Memorial. The Memorial appears to represent Christian veterans generally, even if non-Christian veterans can take steps to be honored specifically.” 629 F.3d at 1125 n.25.

Legion/M-NCPPC devote the next sub-section of their effect analysis to the Cross’s “setting,” but only cite *Van Orden*, which did not apply *Lemon*. (D.Br.37). Although inapplicable, Humanists rebut these arguments under *Van Orden*, *infra* at 26-31. Their final sub-section, “History,” is not a factor under this Court’s *effect* analysis, *supra*. Humanists thus address it under *Van Orden*, but note it would be anomalous and unprecedented to find the Cross unconstitutional under *Lemon* but constitutional under a concurring justice’s “legal judgment test” in a Ten Commandments case.

D. The cases Legion/M-NCPPC rely upon do not support their conclusion Bladensburg Cross does not endorse Christianity.

Legion/M-NCPPC’s selective discussion of caselaw in their effect analysis conspicuously lacks cases determining the constitutionality of war memorials. (D.Br.22-23,32-38). And they fail to even mention *Smith*, let alone distinguish it, even though it is one of two Fourth Circuit cases involving a religious display. (P.Br.30,43,54). Instead they resort to nonbinding, inapplicable cases, most involving small nonsectarian displays, and *Van Orden*, even though it did not

apply *Lemon*. (D.Br.24-30).

1. Legion/M-NCPPC rely on out-of-context *dicta* from *Salazar* and *Lambeth*.

Legion/M-NCPPC harvested quotes from Justice Kennedy's *dicta* in *Salazar v. Buono*, 559 U.S. 700, 721 (2010), while ignoring its factual context. (D.Br.33-34,35,44). Because they insist each cross case must be distinguished from the next (D.Br.2,24,33,46-54), it would behoove them to try and compare Bladensburg Cross to the cross in *Salazar*, as that *specific cross* reminded Justice Kennedy of overseas cemeteries. *Id.* But they do nothing of the sort. Perhaps because any factual comparison between the gigantic Bladensburg Cross, towering over a busy government traffic island, and the small white, isolated desert cross in *Salazar* would fall flat. (P.Br.42)(J.A.2485)(J.A.2562-63).

Legion/M-NCPPC also fail to explain why *Salazar's dicta* is any more applicable here than in the numerous cross cases finding it unpersuasive, especially since those cases involved white Latin crosses far more resembling of WWI graves. (P.Br.30-40).

Supreme Court *dicta* can be helpful (D.Br.36), but only in cases like *Lambeth* where it "strongly indicated on several occasions, albeit in *dicta*, that governmental use of the motto 'In God We Trust,'" would not violate the Establishment Clause. 407 F.3d at 271 (citations omitted). Unlike the national motto, the Supreme Court strongly acknowledged that a large permanent Cross

would “no doubt” violate the Establishment Clause. 492 U.S. at 606-07 & 661 (Kennedy, J., concurring and dissenting). And it did so in *Allegheny*, which was determinative in *Lambeth*.

Legion/M-NCPPC rely extensively on *Lambeth* (D.Br.22-23,31-34,36-37,44-46), where this Court cited *Allegheny* for the notion that “displays with religious content - but also with a legitimate secular use - may be permissible under the Establishment Clause.” 407 F.3d at 271. In *Allegheny*, the Court held the crèche unconstitutional but the menorah was upheld because, unlike a Christian cross or crèche, “the menorah’s message is not exclusively religious.” 492 U.S. at 580, 598, 613-14. *See id.* at 606-607 (“surrounding the cross with traditional flowers [would not] negate the endorsement of Christianity”).

2. The three exceptions to the overwhelming body of federal caselaw cannot be compared to Bladensburg Cross.

Of the twenty-five federal cases finding crosses unconstitutional, Legion/M-NCPPC can only point to three outliers: *Am. Atheists, Inc. v. Port Auth.*, 760 F.3d 227 (2d Cir. 2014), *Murray v. Austin*, 947 F.2d 147 (5th Cir. 1991), and *Weinbaum*.(D.Br.33-34,36-37,44,48).⁴³ But they utterly fail to convince the Court that Bladensburg Cross is more like a museum artifact or the two “unique” government seals than the numerous crosses held unconstitutional. Their failure to

⁴³ *Briggs v. Mississippi*, 331 F.3d 499, 503-06 (5th Cir. 2003) involved the Confederate flag and did not concern “any religious symbolism.”

point to remotely relevant precedent supporting their position underscores the fact that *they* have “no comprehensive counternarrative of the facts in this case.”(D.Br.2).

Port Authority is plainly distinguishable. The Second Circuit held that “a particular artifact recovered from World Trade Center debris, a column and cross-beam” in a public museum was not unconstitutional. 760 F.3d at 232. The 17-foot “column and cross-beam” along with “more than 10,000 artifacts” were given to the “September 11 Memorial and Museum Foundation.” *Id.* at 234-36. The court concluded a reasonable observer would view the effect of it, “amid hundreds of other (mostly secular) artifacts, to be ensuring historical completeness,” akin to “religious paintings in governmentally supported museums.” *Id.* at 236, 243-44.

Bladensburg Cross is not an *artifact*. It was purposefully designed as a Christian cross.

Weinbaum and *Murray*, are equally distinguishable. Even Legion/M-NCPPC argued that seal cases “involve very different factual circumstances, and are thus of limited use.” (D.Br.53). Humanists agree insofar as *Weinbaum* and *Murray* hinge on such exceptionally “unique” facts that are irrelevant here. *Weinbaum*, 541 F.3d at 1035 (because Las Cruces means “The Crosses,” “it is hardly startling that [the city] would be represented by a seal containing crosses.”); *Murray*, 947 F.2d at 155 (upholding part of Stephen Austin’s coat of arms in City of Austin insignia).

Indeed, *Trunk* found *Weinbaum* and *Murray* outliers and unpersuasive, but found *Robinson* and *Harris* persuasive. 629 F.3d at 1111 & n.11 (noting that even a city with “a unique history” may “not honor its history by retaining [a] blatantly sectarian seal”).

3. *Weber* and *Demmon* did not involve government displays.

Legion/M-NCPPC misstate *Weber*'s holding. (D.Br.49). The Ninth Circuit was not deciding the constitutionality of a *government* display on *government* property. *Weber* involved a comparably small *privately*-owned and *privately*-maintained statue on a *private ski resort* visible only to paying ski resort patrons. *Freedom from Religion Found., Inc. v. Weber*, 951 F. Supp. 2d 1123, 1134-36 (D. Mont. 2013), *aff'd* 628 F. App'x 952, 954 (9th Cir. 2015). In upholding the display, the court emphasized: “it is privately owned and maintained ‘...and was not funded from [the government’s] coffers.’” *Id.*

Likewise, *Demmon v. Loudoun Cnty. Pub. Schs*, 342 F. Supp. 2d 474, 482, 489-91 (E.D. Va. 2004) involved *private* speech in a “public forum,” not a government monument.

By contrast, Bladensburg Cross is owned, maintained, and funded by the *government* and sits prominently on quintessential *government* property. The government was also heavily involved with the Cross's groundbreaking,

dedication, anniversary, and re-dedication ceremonies.⁴⁴

V. *Lemon* is controlling, not *Van Orden*.

A. This Court is not free to abandon *Lemon*.

Legion/M-NCPPC urge the Court to abandon *Lemon*, claiming Justice Breyer's concurrence in *Van Orden v. Perry*, 545 U.S. 677 (2005), is "controlling," "materially indistinguishable," and "easily resolves this case." (D.Br.24,27,30). They argue that if the Cross survives *Van Orden*, "the Court need go no further." (D.Br.30). But this Court is not free to abandon *Lemon*. The Supreme Court has never overruled it, and in fact applied it the same day as *Van Orden*. See *McCreary Cnty. v. ACLU*, 545 U.S. 844, 859-64 (2005).

In *Van Orden*, the plurality and Justice Breyer eschewed *Lemon*. 545 U.S. at 686 (plurality). Justice Breyer declared that in difficult "borderline cases" there is "no test-related substitute for the exercise of legal judgment." *Id.* at 699-701 (concurring). See John E. Nowak, CONSTITUTIONAL LAW 1570 (8th ed. 2010) ("it is difficult to understand how anyone other than Justice Breyer could apply his analysis").

This Court found that *Van Orden* is only applicable in "borderline" cases in *Myers v. Loudon Cnty. Pub. Schs.*, 418 F.3d 395, 402 (4th Cir. 2005). But it has not applied *Van Orden* since. (J.A.3441).

⁴⁴ (J.A.1171-74)(J.A.1282-1353)(J.A.1777-1818)(J.A.1846-50)(J.A.2092)

Even appellate courts confronted with Ten Commandments have held *Lemon* remains controlling. *E.g.*, *ACLU v. Mercer Cnty.*, 432 F.3d 624, 636 & n.11 (6th Cir. 2005)(court was required to apply *Lemon*); *Green v. Haskell Cnty. Bd. of Comm'rs*, 568 F.3d 784, 797 n.8 (10th Cir. 2009). The Tenth Circuit reasoned: ““While the Supreme Court may be free to ignore *Lemon*, this court is not.”” *Id.* (citation omitted). ““Most courts of appeals have concluded that the *Lemon* tripartite test...still stands after *Van Orden*[.]”” *Id.* (citation omitted). Therefore, this Court should conclude that it “cannot do as [Legion/M-NCPPC] wishes...and be guided...by the *Van Orden* plurality’s disregard of the *Lemon* test.” *Id.*

Contrary to Legion/M-NCPPC’s argument, the cases strongly support the conclusion *Van Orden* can be disregarded. (D.Br.29). In fact, *ACLU v. McCreary Cnty.*, 607 F.3d 439, 445 (6th Cir. 2010), a challenge to Ten Commandments displays, held “the governing standard...remains *Lemon*.” The court did not mention *Van Orden* once, disregarding it entirely.

More importantly, the majority of cross cases since *Van Orden* have disregarded or distinguished it (P.Br.65), including *Port Authority*, and *Weinbaum*. (J.A.3439-41).

B. This is not a “difficult borderline case.”

Van Orden is inapplicable where, as here, the religious aspect of the display “predominates” over secular components. *Duncan*, 616 F.3d at 1162. (P.Br.64). In

Myers, this Court deemed the Pledge a difficult “borderline” case because its religious aspect did not predominate, and because the “history of our nation” and “repeated *dicta* from the [Supreme] Court respecting the constitutionality of the Pledge.” 418 F.3d at 402. The Court did not believe the “limited reference to God” converted the otherwise patriotic activity to a religious one. *Id.* at 405-08.

The situation here is reversed. The “wide recognition of the Cross as a religious symbol” distinguishes it from *Myers* and *Van Orden*. *Trunk*, 629 F.3d at 1120. In *Allegheny*, the Court took pains to distinguish “a specifically Christian symbol” from “more general religious reference.” 492 U.S. at 602-03, 606-07.

C. Bladensburg Cross is even unconstitutional under *Van Orden*.

1. The cross is inherently and exclusively religious.

While *Van Orden* does not apply, Bladensburg Cross plainly cannot survive it either. *Van Orden* begins “by considering the potential meanings of the Latin cross[.]” *Trunk*, 629 F.3d at 1110. There is no question the cross is a “Christian symbol.” *Id.* at 1111-12. It “does not possess an ancillary meaning as a secular or non-sectarian war memorial.” *Id.* at 1116.

2. Bladensburg Cross stands alone in the traffic median, dominating the visual landscape.

The Cross’s setting and placement further contributes to its religious meaning. (J.A.68-69)(P.Br.4-6,48-55). The “way in which the Cross overshadows the Memorial’s secular aspects presents a strongly sectarian picture.” *Id.* at 1123.

The Cross is also the most “prominent and dominant feature.” *Id.* at 1123 n.22.

The several, much smaller, distant memorials erected in a separate area decades after the Cross, do not detract from the Cross’s overpowering religious message. Instead, Bladensburg “Cross’s central position...gives it a symbolic value that intensifies the Memorial’s sectarian message.” *Trunk*, 629 F.3d at 1123-24. A 2015 M-NCPPC report concedes Bladensburg Cross is “clearly towering over the space” and is “the centerpiece.” (J.A.2485).

In *Green*, the Tenth Circuit held that an 8-foot Ten Commandments monument was unconstitutional even though it was surrounded by numerous equal-sized and even larger monuments and war memorials, and had a disclaimer at its base. 568 F.3d at 789-91. The display was positioned “in line” with other monuments and only “five feet over from the unmarked graves monument.” *Id.* The court recognized that “a reasonable observer would have noticed that the Monument was one of numerous other monuments and displays on the courthouse lawn” but held that even under *Van Orden*, “this point hardly wins the day for the Board.” *Id.* at 804-805 n.14.

Notably, Legion filed an amicus brief in *Green*, urging the Tenth Circuit to uphold the Ten Commandments as a “public acknowledgement of religion[.]” (J.A.1760). Rather than refute its religious meaning, Legion admitted: “Religious imagery serves to acknowledge that most people served by the memorial rest their

eternal hopes on God or some religious sentiment.” (*Id.*). If Legion acknowledged that a nonsectarian monument constituted “religious imagery” for “most people” to find “religious sentiment,” it must surely feel the same way about Bladensburg Cross, which is an exclusively Christian monument.

3. History and usage reinforce the Cross’s religious message.

Bladensburg Cross “has a long history of religious use and symbolism that is inextricably intertwined with its commemorative message.” *Trunk*, 629 F.3d at 1118. (P.Br.8-14,59-62). Legion/M-NCPPC seek to discount this historical record by asserting such evidence is merely “reflective of the times[.]” (D.Br.42). But “Calvary Cross” was not some non-religious “soundbite,” considering:

- In 1919 the “committee on the Calvary Cross Memorial” formed (J.A.1118)
- *The Washington Times* reported in 1919: “A mammoth cross, a likeness of the Cross of Calvary, as described in the Bible, will be built[.]” (J.A.1114-15)
- The keynote speaker declared Bladensburg Cross “symbolic of Calvary.”⁴⁵
- Funders signed a religious contribution pledge⁴⁶
- The Committee selected a designer known for Christian iconography
- The dedication ceremony included prayers by Christian clergy⁴⁷

⁴⁵ (J.A.1876)(J.A.1891)(J.A.1936)(J.A.2508)

⁴⁶ (J.A.1167-1170)(J.A.2305)

Further, unlike in *Van Orden*, Bladensburg Cross is a site for “religious activity” and “meditation.” 545 U.S. at 702. (P.Br.13-14,61). Legion/M-NCPPC admit it is at least used for commemoration. (D.Br.28).

Their argument that there “is no evidence of any religious exercise,” is erroneous and irrelevant.⁴⁸ Prayer at annual Legion events is a “religious exercise.”⁴⁹ *Lee v. Weisman* held that a nonsectarian “invocation” and “benediction,” lasting no more than two minutes, delivered by a rabbi at an otherwise secular annual event constituted a “religious exercise.” 505 U.S. 577, 583-84, 594, 599 (1992).

Finally, “the silence of religious minorities may signal something quite different from disinterest.” *Hewitt v. Joyner*, 940 F.2d 1561, 1567 (9th Cir. 1991)(citation omitted). The “reality is that challenges to religious symbols are expensive, and often there is no one...with the courage to bring a long, drawn-out suit.” Erwin Chemerinsky, *Why Justice Breyer Was Wrong in Van Orden v. Perry*, 14 WM. & MARY BILL RTS. J. 14 (2005).(P.Br.68). Moreover, many crosses found unconstitutional had “been declared historical landmarks.” *Carpenter*, 93 F.3d at 629-32.(P.Br.29).

⁴⁷ (J.A.28)(J.A.149)(J.A.178)(J.A.211)(J.A.288)(J.A.1129-34)(J.A.1135-36)
(J.A.1174,1176)

⁴⁸ (D.Br.46)(J.A.291-92)(P.Br.11-14,63)

⁴⁹ (P.Br.62)(Doc.83-1 at 21-22&n.6)(J.A.2536-40)

VI. Legion/M-NCPPC fail to distinguish Bladensburg Cross from the numerous cases finding crosses unconstitutional.

Legion/M-NCPPC allocated a mere four pages to address the many cases stacked against them. (D.Br.50-54).

Their attempt at distinguishing *Trunk* falls short. (D.Br.42,50-51)(P.Br.8-14). They merely note Mt. Soledad did not have any physical indication as a war memorial until the 1990s. (D.Br.51). But in fact, the Ninth Circuit repeatedly emphasized that its war memorial status made the cross *more* problematic. *Trunk*, 629 F.3d at 1112, 1124. Regardless, Bladensburg Cross's only physical indication as a war memorial was concealed by bushes for most of its history and is still not legible to motorists.

Their attempt at *Duncan* fares no better. First, they noted the crosses bore UHP's official "beehive" symbol. (D.Br.51). But this was only material because the crosses were privately-owned and privately-funded, and at least "one, and perhaps several, of these memorials are located on private land." 616 F.3d at 1154, 1160 n.14. The court in no way suggested the outcome would have been different if the emblem were removed from the crosses on public land.

Here, the government owns, funds, and maintains the Cross, and the "U.S." star can readily be interpreted as a government emblem. (J.A.27). Further, under controlling precedent, it would be immaterial if observers interpreted it as Legion's symbol. *See Allegheny*, 492 U.S. at 600; *Smith*, 895 F.2d at 958.

Second, they argue, without any evidentiary support, “all passersby” would see Bladensburg Cross as a “display involving other symbols.” (D.Br.52). But *Duncan* did not rest on this fact, mentioning it only parenthetically after reaching its conclusion. 616 F.3d at 1160. Furthermore, *Duncan* relied upon *Green*, which held that the presence of numerous surrounding monuments “hardly wins the day” for the government, *supra* at 29-30.

Legion/M-NCPPC relegate the remaining cases to footnotes. They argue *Harris*, *Friedman*, *Robinson* and *Stow* are distinguishable because they involved seals. (D.Br.53). But *Trunk* found these cases persuasive, as did *Gonzales*, 4 F.3d at 1422, and *Lake Elsinore*, 2014 U.S. Dist. LEXIS 25180, *40. As in these cases, Bladensburg Cross “pervades the daily lives of county residents,” *Friedman v. Bd. of Cnty. Comm’rs*, 781 F.2d 777, 782 (10th Cir. 1985), being “the town’s most prominent symbol.” (J.A.2563).

They dismiss *St. Charles*, *Eugene*, *Jewish War Veterans*, *Mississippi State*, *Libin*, and *Fox*, averring these “sustained challenges *due* to a lack of the type of close historical association with a cross[.]” (D.Br.53)(emphasis added). None of these *turned* on this fact. Besides, this “distinction” rests on the erroneous assumption that the “historical association” here is a *secular* association. Yet the crosses in WWI cemeteries are Christian crosses.

Finally, they dismiss *Rabun*, *Gonzales*, *Gilfillan*, *Eckels* and *Lake Elsinore*

on the single ground these were erected “for explicitly religious purposes.” (D.Br.53-54). Even if true, they do not explain how these cases are distinguishable under the *effect* prong, where “intent is irrelevant.” *Constangy*, 947 F.2d at 1151. 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.

VII. Removing the Cross will restore governmental neutrality with religion.

Legion/M-NCPPC argued that “mutilating the Memorial” would excessively “entangle the Commission in religion” and exhibit “hostility” toward “religion.”⁵⁰ This is nothing less than an admission Bladensburg Cross *is religious* to begin with.⁵¹ Of course, “removal of the cross” will “restore their neutrality” with religion. *Vasquez v. L.A. Cnty.*, 487 F.3d 1246, 1249-53 (9th Cir. 2007).

CONCLUSION

Because Bladensburg Cross unconstitutionally endorses Christianity and Legion/M-NCPPC failed to show otherwise, Humanists request the Court to reverse with instructions to enter judgment in favor of Humanists, and remand to determine the appropriate amount of attorney’s fees and costs.

Respectfully submitted,

⁵⁰ (Doc.83-1 at 1,29,31,50,52)(Doc. 84-1 at 17,20)(D.Br.2,28,45)

⁵¹ *Accord* (J.A.857-58)(J.A.1023)(J.A.1113-25)(J.A.1450-52)(J.A.1457-60)(J.A.1516-1536)

April 18, 2016

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CERTIFICATE OF COMPLIANCE

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I certify that on April 18, 2016, the foregoing document was served on all parties or their counsel of record through the CM/ECF system.

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