

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**

BRIEF OF APPELLANTS

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UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT
DISCLOSURE OF CORPORATE AFFILIATIONS AND OTHER INTERESTS

Disclosures must be filed on behalf of all parties to a civil, agency, bankruptcy or mandamus case, except that a disclosure statement is **not** required from the United States, from an indigent party, or from a state or local government in a pro se case. In mandamus cases arising from a civil or bankruptcy action, all parties to the action in the district court are considered parties to the mandamus case.

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No. 15-2597 Caption: American Humanist Association et al., v. Maryland-National Capital Park and Planning Commission

Pursuant to FRAP 26.1 and Local Rule 26.1,

American Humanist Association
(name of party/amicus)

who is appellant, makes the following disclosure:
(appellant/appellee/petitioner/respondent/amicus/intervenor)

1. Is party/amicus a publicly held corporation or other publicly held entity? YES NO

2. Does party/amicus have any parent corporations? YES NO
If yes, identify all parent corporations, including all generations of parent corporations:

3. Is 10% or more of the stock of a party/amicus owned by a publicly held corporation or other publicly held entity? YES NO
If yes, identify all such owners:

4. Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation (Local Rule 26.1(b))? YES NO
If yes, identify entity and nature of interest:

5. Is party a trade association? (amici curiae do not complete this question) YES NO
If yes, identify any publicly held member whose stock or equity value could be affected substantially by the outcome of the proceeding or whose claims the trade association is pursuing in a representative capacity, or state that there is no such member:

6. Does this case arise out of a bankruptcy proceeding? YES NO
If yes, identify any trustee and the members of any creditors' committee:

Signature: s/ Monica Miller

Date: 1/5/2016

Counsel for: Appellants

CERTIFICATE OF SERVICE

I certify that on 1/5/2016 the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by serving a true and correct copy at the addresses listed below:

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(signature)

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Pursuant to FRAP 26.1 and Local Rule 26.1,

Steven Lowe
(name of party/amicus)

who is appellant, makes the following disclosure:
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Pursuant to FRAP 26.1 and Local Rule 26.1,

Fred Edwords

(name of party/amicus)

who is appellant, makes the following disclosure:
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Pursuant to FRAP 26.1 and Local Rule 26.1,

Bishop McNeill
(name of party/amicus)

who is appellant, makes the following disclosure:
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JURISDICTIONAL STATEMENT

The District Court had jurisdiction pursuant to 28 U.S.C. §§ 1331 and 1343 because this action involves constitutional claims brought under 42 U.S.C. § 1983. On November 30, 2015, the court granted Appellees' Cross-Motion for Summary Judgment and denied Appellants' Motion for Summary Judgment on all claims. (J.A.3460). Appellants timely appealed. (J.A.3462). This Court has jurisdiction pursuant to 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

1. Did the District Court err in holding that an enormous Christian cross that stands alone on a government median does not violate the Establishment Clause, contrary to every other federal case involving a cross war memorial?
2. In applying the *Lemon* "effect" prong, did the court err in concluding that Bladensburg Cross does not have the effect of endorsing Christianity?
3. In applying the *Lemon* "entanglement" prong, did the court err in concluding that the government's persistent monitoring, maintenance, and funding of the Christian cross do not foster excessive entanglement with religion?
4. Did the court err in applying the *Van Orden* concurrence?

STATEMENT OF THE CASE

The Bladensburg Cross (or “Cross”) is an enormous, unadorned, freestanding concrete Christian cross prominently displayed on a small government traffic island in the middle of a busy thoroughfare in Bladensburg, Maryland. (J.A.26-27¶¶12-24;33-35;37;42¶¶12-18;288;734;1097-1112;1131;1134;1218).

Parties

Appellants are non-Christian residents who have had unwelcome contact with Bladensburg Cross and feel it affiliates the government with Christianity. (J.A.24-26¶¶5-10;445;448;451-52;454-59;474;483;491;511;520-25;529-31;545-47;553). American Humanist Association (AHA) brings this action on behalf of its members.(J.A.24¶5).

The government, Maryland-National Capital Park and Planning Commission (“M-NCPPC”), is the sole owner of the Cross and traffic island. (J.A.30¶44;44¶44;110¶44;175¶3;566-67;587;596-97;1085-96;1126-28;1149-66;2120;2129-30). M-NCPPC does not own any structures featuring a non-Christian religious symbol, such as a Star of David.(J.A.607-608).

Intervenors are the American Legion, Legion Department of Maryland, and Post 131 (J.A.47;105;766)(Doc.15,p.1)(collectively “Legion” unless otherwise noted). Legion is centered on theism and more specifically, Christianity.(J.A.870-71;1464-1512;1785-86;1788;1793-94;1796;1799-1802;1804-09;1811-12;1814-

17;1821). It is an “organization dedicated to God.” (J.A.1047;1073;1469). Its preamble begins with “For God and Country,” which is also its motto. (J.A.776;794;819-20;1203;1205-1206;1456-60;1459-1460;1466;1481;1786;1793-94;1796;1800;1807;1817;1821;2068)(Doc.15,p.1).

Legion and Post 131 have Christian chaplains, and prayers are delivered in their meetings and services, including at the Cross. (J.A.29¶41;110¶41;158¶3;160-61¶6;776-777;802-03;806-807;815-16;829-30;834-37;839-41;853;870-91;1034-35;1038-39;1777-1818;1846-1850). None of the prayers delivered at the Cross are polytheistic or refer to Allah, and none have been delivered by a rabbi, imam, or non-theist.(J.A.844;859;1846-50).

Intervenors are represented by Liberty Institute, a Christian organization whose mission is to “defend and restore religious liberty across America.” (J.A.1488;1518). Its job “Qualifications/Requirements” include “Committed, Authentic Christian.”(J.A.1841). It launched a campaign, “Don’t Tear Me Down,” to “stop...anti-religious freedom groups from denying Americans their constitutional rights to religious expression[.]”(J.A.1844).

Bladensburg Cross is a Religious Symbol

Bladensburg Cross is a Christian symbol that exalts Christians and excludes non-Christians.(J.A.26¶15;33-35;42¶15;144-45¶2;188-89;287-88;586;904-05;1045-46¶¶6-10;1083-84¶¶4-6;1097-1112;1442-45). It is a Latin cross (an equal-

armed cross with a longer foot), standing 40-feet high, arms extended 5-feet from the center. (J.A.26¶15;33-34;42¶15;287;586;1097-1112;1134;1155;1159;1187;1578;1854-55;1858;1877). The Latin cross is the quintessential symbol of Christianity. (J.A.144-45¶2;175¶1-2;188-90;904-05).

Appellees admitted this Cross is a religious symbol. A June 2014 Legion article states that the Bladensburg “monument is undeniably in the shape of a Latin cross[.]”(J.A.1450).A May 2014 article states: “What could be so offensive about a local monument to war dead? The fact that it is in the shape of a Latin cross, of course.”(J.A.1107;1458).

In an email to subscribers, Liberty Institute wrote: “[The] American Humanist Association and the Freedom From Religion Foundation have sued to tear down veterans’ memorials that contain *religious images*.” (J.A.1528)(emphasis added).

Setting and Attributes

The imposing Christian cross stands on a small traffic island about a third of an acre in size, which serves as a median between three principal commercial/commuter roadways. (J.A.26¶13;33-34;37;42¶13;107¶13;709;734;832;1130-31;1134;1159;1583;1728-33;1871-72;1968;1980;2196-97). It is “one of the county’s busiest intersections.”(J.A.1372). “There are no specific pedestrian

rights-of-way,” and for most of its history, “[n]o public access [wa]s possible.” (J.A.140;1155). There is no designated parking lot. (J.A.27¶19;37;140¶14;148¶25).

The Cross is the only monument on the traffic island, exclusively dominating the visual field of passersby.(J.A.30-31¶¶47-53;33-34;37;44¶¶47-51;111¶¶47-48;734;1855;1858;1871-72). Affixed to its rectangular base is a plaque listing Prince George’s County men who died in World War I. (J.A.26¶¶15-16;42¶¶15-16;295;1749-51;1394;1486;1857;1878;1891). Most are buried in U.S. cemeteries.(J.A.294-95;1749-51).

The plaque has been obscured by bushes for much of its history. (J.A.27¶21;33-34;394;400;406;413;861;1097-99;1102-1112;1462;1878-79;1889-90;1930). Post 131 conceded M-NCPPC allows bushes to “get wild and block the view.” (J.A.861). After this lawsuit commenced, the bushes were at least temporarily cleared, as a direct “response to the American Humanist Association’s claim[.]” (J.A.1367).

Even when cleared, the plaque is not legible to passing motorists. (J.A.27¶20;33-34;287;1104;1106;1109;1980). Consequently, motorists have no way of knowing the Cross is a memorial by observation. This is borne out by the evidence; for example, Renee Green, a Catholic resident and staunch supporter of the Cross who created a documentary, “Save the Peace Cross,” candidly admitted in that documentary: “The Peace Cross has always been a part of my life. I have to

admit, before doing this documentary, I did not know that much about the Peace Cross. I just knew it was known as the Peace Cross and thought it was to promote world peace.”(J.A.969-71;1001-02;1830-39).¹ Even regular visitors could not recall any names on the plaque.(J.A.833;1012-1013).

In the center of the Cross is a small star inscribed with “U.S.” in the likeness of a governmental seal.(J.A.27¶22;34-35;43¶22;1097-1104). Appellants, and no doubt anyone else passing by, perceived this as further evidence of governmental endorsement.(J.A.27¶23;287). Legion disputed this inference because it uses a similar emblem that, in contrast to the “U.S.” star on the Cross, prominently names “American Legion.”(J.A.1054-55;1080). Legion’s name does not appear *anywhere* on the monument.(J.A.27¶22;34-35;43¶22;1097-99;1101-04).

The Cross was the only monument in the area for most of its history. (J.A.30-31¶¶47-53;44¶¶47-51;111¶¶47-48,51;734;1830-39). Decades later (1960, 1983, and 2006, respectively), three small displays were placed in a separate area in a park across the street but not on the traffic island where the Cross stands. (J.A.30¶¶47-48;37-40;44¶¶47-48;111¶¶47-48;734). During litigation, a fourth was added to a separate area approximately half a mile away.(J.A.707-08;1866;2024). None of these displays remotely resemble the size and prominence of the Cross. (J.A.30¶48;33;37-40;44¶48;111¶48;706-09;734;1011;1013;1018). A May 2015 M-

¹ See:https://www.youtube.com/watch?v=_wFtnoCrqMY&feature=youtu.be(viewed 2/26/16).

NCPPC report concedes the Cross is “clearly towering over the space[.]” (J.A.2485).

Tellingly, veteran’s ceremonies are held at the Cross and *not* at any of the other displays, even though they are more accessible.(J.A.37;734;839). Further, the Cross is featured on most of the Post’s programs. (J.A.1282-1353). The November 2012 flyer declared: “COME OUT AND SHOW HOW IMPORTANT OUR CROSS IS FOR OUR MILITARY.”(J.A.394).

War Memorials and Religious Symbols

According to expert witness Dr. Piehler, thousands of war memorials have been dedicated since the American Revolution, and most do not use *any* religious iconography, let alone something as blatantly sectarian as the cross. (J.A.188-190;198;206-10;920-21;934). The majority of World War I memorials consist of the secular “doughboy.”(J.A.206-10;309;934). Piehler testified: “For instance, the first war memorial erected in Prince George’s County, Maryland, to memorialize World War I did not contain any religious iconography.”(J.A.206).

Though crosses are found in overseas cemeteries, they are *individual graves* for Christians and retain their religious meaning. (J.A.205-06;300-01;305;908;910-11;920;931). “The Cross was never the default marker for all graves as evidenced by the use of the Star of David on Jewish Graves.”(J.A.305). When a freestanding

Latin cross has been used, it is usually in a cemetery and seldom a dominant feature. (J.A.188;190;192-93;206;308-09).

Religious Motive, History, and Usage

- **“Calvary Cross”**

The Cross was originally erected on government property, owned by the Town of Bladensburg (“Town”), with the consent of its commissioners (J.A.27¶24;1085-96;1126-28;1171-84;1202-13;1873-74;1920;1966-76;1990-91;1994-95;2503-04;3216-3219). A Christian symbol was deliberately chosen, and its Christian character was stressed at the dedication ceremony, *infra* (J.A.213;288;928).

In 1918, plans were made to construct a massive “Calvary” cross. (J.A.288;312-13;1171-74)(Doc.83-1,p.15). Prior to being locally known as “Peace Cross,” it was known as “Calvary Cross” or “Sacrifice cross.”(J.A.28¶28;145-46¶¶4-9;149¶29;178¶17;1113-25;1129-34;1171-84;1202-22;1282-1353;1876).

Fundraising was led by the “Calvary Cross Memorial” Committee.(J.A.1117-18). The reference to “Calvary” is Christian; as Piehler testified, it signifies the crucifixion of Jesus Christ as described in the Bible. (J.A.211;288-89;1113-15).

On May 25, 1919, *The Washington Times* reported: “A **mammoth cross**, a likeness of the **Cross of Calvary, as described in the Bible**, will be built[.]”

(J.A.1113-15)(emphasis added). On June 3, the *Washington Herald* reported on the “committee on the Calvary Cross Memorial.” (J.A.1117-18).

- **Fundraising and Religious Intent**

As part of the fundraising, contributors signed a religious pledge, proclaiming:

TRUSTING IN GOD, THE SUPREME RULER OF THE UNIVERSE, PLEDGE FAITH IN OUR BROTHERS...THEIR SPIRIT LIVES TO GUIDE US THROUGH LIFE IN THE WAY OF GODLINESS, JUSTICE AND LIBERTY. WITH OUR MOTTO, “ONE GOD, ONE COUNTRY AND ONE FLAG,” WE CONTRIBUTE TO THIS MEMORIAL CROSS.

(J.A.27¶26;36;291;611;632;1167-70).

By 1922, the Cross was erected but unfinished, and the Committee was “without funds to complete” it. (J.A.77-78;2503-04). The Town resolved to temporarily give the Synder-Farmer Post the “care” of the land for “completion” of the Cross, without legally deeding the property.(J.A.78;1873-74;2095;2503-04).²

On April 18, 1922, the Post launched its first fundraising drive. (J.A.1199;2092). Rev. Chastain, pastor of Methodist Episcopal Church gave the invocation. (J.A.1199). The next month, the Post held memorial services near the Cross, which consisted of a “Church call,” prayers by a Christian chaplain, and the performance of “Nearer My God to Thee.”(J.A.2095-96).

² The evidence shows the Cross was always owned by the government. (J.A.218-232;2503-2504).

As further evidence of the intent to erect a religious symbol, the county already had a secular World War I memorial with which Bladensburg Cross faced “keen competition.”(J.A.206-07;997;1185-86;1992;2095). Government records disclose:

In January 1919 it had been proposed that an appropriate war memorial be erected in Upper Marlboro...[A] little over a week after the ground-breaking for the Peace Cross, a bronze plaque, bearing the names of forty-seven war dead was unveiled...**[M]any citizens, aware the county already had a war memorial, deemed it unnecessary to support further attempts to complete the Peace Cross.**

(J.A.1186;1992)(emphasis added). The same names appear on both plaques.

(J.A.206-08;295).³

Additionally, the designer, John Earley, was known for religious iconography. (J.A.2483;2486;3310-13). In 1919, Earley finished the interior of the Shrine of the Sacred Heart, a Roman Catholic parish, “with figurative religious iconography[.]”(J.A.2486). The “Cross borrowed from...the Shrine...[c]onstructed concurrently with their string of church commissions.” (J.A.2487).

- **Religious Activities of Snyder-Farmer Post**

The Post that completed the Cross was named in “memorial to their [Snyder and Farmer’s] supreme sacrifice for God[.]” (J.A.1178;2070;2082). “Early activities of this Post consisted of...‘Legion Sunday,’ when all members of the

³ http://dcmemorials.com/index_indiv0002991.htm(viewed 4/27/15).

Post were to meet and march in a body to the Episcopal Church to attend services.” (J.A.1202-13). On “Sunday November 9th [1919] the Snyder-Farmer Post...marched to church in regular formation. The Rev. Charles E. McAllister received them.” (J.A.2072). In January 1922, Rev. Chastain was elected Post Chaplain. (J.A.2080;2088-89). On Armistice night in 1922, the Post “attended the M E Church in a body” and Rev. Chastain delivered a sermon.(J.A.2104).

- **Dedication Ceremony**

The Cross was dedicated July 12, 1925. (J.A.27;43;108;134;157;1171-76). Representative Stephen Gambrill of the Fifth Maryland District delivered the keynote address: “You men of Prince Georges county fought for the *sacred* right of all to live in peace and security and by the token of this cross, *symbolic of Calvary*, let us keep fresh the memory of our boys who died for a righteous cause.” (J.A.28¶28;149¶29;178¶17;211;288;1129-34;1174;1176)(emphasis added).

Both a Roman Catholic and a Baptist minister took part in the ceremony, which also included prayers.(J.A.28¶30-32;212;1129-36;1225;2508). No rabbi or Jewish leader was included, despite the close proximity to D.C. and Baltimore’s substantial Jewish communities.(J.A.212).

- **Religious Rites and Exercises**

After its dedication, the Cross became the site for religious “rites,” “exercises,” and “services.” (J.A.28-29¶¶33-34,41;110¶41;149-50¶¶34-35,37-

38;292;1223-32). For instance, on May 31, 1928, the *Washington Post* reported: “exercises at the foot of the Memorial Cross in Bladensburg” in which an “Invocation” was given by Rev. Carey of St. Jerome’s Catholic Church and a benediction by Rev. Robertson of the First Baptist Church.(J.A.1224).

In May 1929, the county held memorial “exercises” at the Cross; “Prayers” were delivered by the Rector of St. Luke’s Episcopal Parish.(J.A.149-50¶¶34-35;1225).

Frank Mountford, lauded as a leading evangelist, held at least three “Sunday services” at the Cross in August 1931; the *Washington Post* reported: “The special preacher at the Peace Cross services for the first three Sundays in August will be...one of the outstanding lay evangelists in this country.” (J.A.28¶24;150¶38;1228).

- **Ku Klux Klan**

The 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 Americans. (J.A.188;211-13). “For most Jews...it would be surprising if they did not view the Bladensburg Peace Cross as an overtly hostile Christian symbol.”(J.A.213). In July 1925, the Klan marched from “the peace cross at Bladensburg to the firey [sic] cross at Lanham.”(J.A.1241-48).

- **Services Imbued with Religious Activity**

On July 12, 1975, a fiftieth anniversary “of the dedication of the Memorial Cross was held” at the Cross. The Rector of St. Luke’s Episcopal Church delivered a prayer.(J.A.66;1174;1261-70;1922). The guest speaker was a Christian chaplain, who also delivered the closing prayer.(J.A.1261-70;1998).

On July 4, 1984, the Town held a ceremony at the Cross; prayers were delivered by Father Chimiak of St. Matthias Catholic Church.(J.A.377-78;1347-53).

On November 11, 1985, M-NCPPC and the Town held a “Rededication” ceremony for the Cross after M-NCPPC spent \$100,000 on renovations. (J.A.137-38;360-65;374-75). Prayers were delivered by Father Chimiak. (J.A.364-65). On November 19, M-NCPPC sent a letter thanking Father Chimiak “for his contributions to our programs and trust we may assimilate this relationship again.” (J.A.362).

Since at least 1984, the Town and Post 131 have co-sponsored annual services at the Cross for Veteran’s Day and Memorial Day, which are imbued with religious activity.(J.A.137¶7;158¶3;160-61¶6;291-92;710;714-15;740;834-40;849-51;864-69;1039;1846-50;1282-1353;1803-1811). These services include prayers by Christians.(J.A.29¶41;110¶41;853;870-91;1034-35;1803-11;1846-50;2536-40). The prayers are Christian and make references to “Heavenly Father,” “Lord” and

“Almighty God.” (J.A.859;1780-1821;2536-40). For instance, the May 2004 service included an “Opening Prayer” and “Closing Prayer” by “Pastor Curtis Robinson” of the “Faith-Deliverance-Soul Saving Station.”(J.A.1334-36). The May 2010 and 2011 services included prayers by a Catholic.(J.A.53-57;416-19;829-30;840-41;1324-27).

Public Perception

The Cross has been perceived as a Christian symbol throughout its history. (J.A.1233-40). In March 1935, the governor asked the “roads commission to take action to prevent the ‘*deseccration*’ of the Memorial Cross” by preventing the construction of a gas station.(J.A.1233-35). The Cross was also described by newspapers as a “Shrine” and “Salvation.”(J.A.145-46¶9;1113-1125;1236-40).

The record is replete with evidence that the public perceives Bladensburg Cross as a religious symbol.(J.A.1045-46¶6-10;1083-84¶4-5;1386-1445;1449-55;3220-3283). As Rev. Adams wrote: “The Peace Cross is there as a Christian symbol.”(J.A.1445).

Non-Christian service members see Bladensburg Cross as not only Christian, but as alienating and exclusionary. (J.A.1045-46¶¶6-10;1083-84¶¶4-5;1449-55). Michael Weinstein, veteran and founder and president of Military Religious Freedom Foundation (MRFF), testified: “it sends a message to all of our non-Christian MRFF clients that they are outsiders.”(J.A.1082-84¶¶1-5). Jason Torpy,

Iraq War veteran and then-president of Military Association of Atheists & Freethinkers (MAAF) testified: “My military service, as well as the service of other non-Christians...is excluded and disrespected when a Christian cross is presented as a public memorial.”(J.A.1045-46¶¶6-9).

Members of the public voiced similar objections.(J.A.1386-1441;3220-83). For instance, “I’m a veteran with a purple heart...and an atheist. Guess I’m not included in those honored...” and “My son was a soldier. He was not a [C]hristian. Why was his contribution any less valuable than anyone else’s?”(J.A.3261;3269).

Many avowed Christians wrote that the Cross should remain *because* of its religious meaning.(J.A.719;723-27;750-53;1386-1435;1449-55). As Nathan S. wrote: “It represents death of Jesus Christ and the after-life...It is simply a symbol of a faith.”(J.A.752).

Legion and M-NCPPC

The evidence shows Appellees perceive Bladensburg Cross as a religious symbol.(J.A.620-21;771;782;858;975-77;993-96;1015-17;1019-20;1022-28;1449-60;1464-84;1506-11;1516-36;1543-52;1777-1822;1846-50)(Doc.11-2,pp.7-8).

According to “The Four Pillars of American Legion,” “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.1075;1470). In a May 2014 article, Legion wrote in regards to Bladensburg Cross, and “God

and country are better understood as intimately linked and inseparable,” while referring to Appellants as “secular extremists.”(J.A.1107;1456-60).

The programs for its services at the Cross use the Christian symbol in connection with religious language.(J.A.1282-1353). For instance, the May 2011 program features a clip-art Latin cross with “BLESS THEM ALL” inscribed across the arms.(J.A.1327). Several flyers feature illustration of rows of crosses, but no Stars of David.(J.A.1306;1310;1326;3179).

The Legion has inserted itself into other cross litigation (J.A.815-16;1506-15), yet could not produce a single “example of where [it] supported such a monument to atheist veterans or to Jewish veterans.”(J.A.771;782). It also filed an *amicus* brief in a 2009 case, writing: “[r]eligious imagery [on veterans’ memorials] serves to acknowledge that most people served by the memorial rest their eternal hopes *on God or some religious sentiment.*”(J.A.1771)(emphasis added).

M-NCPPC perceives Bladensburg Cross as a religious symbol, with its designee contending in an email that the case implicates “religious liberty.” (J.A.1543-45). He testified the “commission would not support...any modification to the form of that *cruciform* because...[t]hat is an integral part of what that is.” (J.A.620-21)(emphasis add). The Post’s adjutant agreed, “[i]t would not be a cross.”

(J.A.858). M-NCPPC sought contractors who had worked on other *crosses*, regardless of the medium.(J.A.1546-52).

Government Funding and Maintenance

Since 1960, M-NCPPC has spent at least \$117,000 to maintain and renovate the Cross. (J.A.138;576-77;1149-1166;1271-81;1553-1616). It remains in need of “urgent” repairs. (J.A.624;1704). It is hollow, cracking and “rapidly deteriorating.” (J.A.1687). Large chunks have fallen off over the years, posing a safety hazard. (J.A.148¶23;586;597-99;624;857-58;956-57;1149-1166;1553-1616;1647-64;1667-75;1680-1712). The Cross is also discoloring.(J.A.1587,1593,1622;1627).

In 2008, M-NCPPC allocated an additional \$100,000 for renovation and structural work.(J.A.562-64;576;3434-35). In 2009, M-NCPPC reported: “There are two cracks that are getting worse which potentially will cause a face...to fall off.” (J.A.1655). In 2010, M-NCPPC sought “Requests for Proposals”, but none were within budget. (J.A.569-71;574-575;578-79;1617-64). An M-NCPPC official wrote in 2012: “it may come down on it’s [sic] own!!!”(J.A.1668). A year later, another wrote: “At what point does one stop making repairs[.]”(J.A.1672). In 2015, M-NCPPC commissioned a “crack survey” proving extensive work is urgently needed. (J.A.2479-2502).

Procedural History

Appellants commenced this action on February 25, 2014. (J.A.23-40). Appellants filed for summary judgment May 5, 2015. (J.A.130-132). On June 10 and 11, Legion and M-NCPPC filed cross-motions and responses to Appellants' motion, respectively. (J.A.1851;2960). Appellants filed a response in opposition to both, and Appellees replied (Doc.90;92).

On October 1, 2015, Council on American-Islamic Relations and Center for Inquiry filed motions for leave to submit memoranda as *Amici* in support of Appellants. (J.A.3408;3411).

On November 30, the court denied Appellants' motion, granted Appellees' cross-motions, and denied the motions to file *amici* memoranda. (J.A.3424;3460). On December 28, Appellants filed a timely notice of appeal. (J.A.3462).

SUMMARY OF THE ARGUMENT

An enormous Christian cross that is owned, maintained, and funded by the government stands prominently and alone in the middle of a busy government highway median. It clearly has the effect of advancing and endorsing religion, thus violating the Establishment Clause, irrespective of its purpose. When the government displays an iconic religious symbol – *the* symbol of Christianity – on its property, it sends a strong message of endorsement and exclusion.

This message of religious favoritism is even more problematic *because* the Cross is *a government memorial purporting to honor war dead*. No such monument should honor just one religious group, but Bladensburg Cross does exactly that: it exalts Christian veterans and excludes everyone else.

Because the Christian cross carries an inherently religious message, every case involving a war memorial featuring it has held it unconstitutional, even when found to have independent historical significance, accompanied by an express disclaimer or plaque with biographical information about the deceased, or featured alongside numerous secular military symbols. Virtually every court to consider a government cross *in any context* has held it unconstitutional.

The District Court therefore erred in concluding – contrary to every other decision involving a cross war memorial – that the cross at issue does not have the effect of endorsing Christianity. In reaching its erroneous conclusion, the court: (1)

ignored numerous highly persuasive cross cases; (2) relied on small individual crosses in overseas cemeteries to justify the monolithic freestanding Christian cross in a traffic island; (3) failed to consider facts that contribute to the Cross's sectarian message, such as its size, prominence, and central placement in the middle of a busy public location, and focused instead on several small elements that a passing motorist would not even notice, and which do not diminish the religious message sent by the imposing Cross; and (4) ignored the starkly religious messages of the Cross's supporters and statements from non-Christians evidencing feelings of exclusion.

Eschewing numerous federal cases to the contrary, the court concluded the Cross does not endorse Christianity almost exclusively because crosses were a *common* symbol in overseas cemeteries. But courts have consistently made clear that the fact that the cross was a *common* symbol does not thereby make it a *secular* symbol.

The court also failed to meaningfully distinguish the few cross cases it mentioned parenthetically. Instead, it rested its decision on meaningless *dicta* about overseas crosses that have properly been disregarded by other appellate courts ruling on cross memorials. Regardless, the courts have uniformly distinguished overseas cemetery crosses – which mark the graves of Christians

(Stars of David were used for Jewish soldiers) – from freestanding crosses that are intended to serve as universal war memorials.

Thus, even assuming, *arguendo*, a reasonable observer is aware that the Bladensburg Cross is a war memorial – which is dubious given the obscurity of the plaque to passersby – she would still perceive the Cross as a religious symbol because a war memorial cross carries an *intrinsically sectarian* message of only honoring Christian veterans.

Indeed, the record is replete with statements from members of the public indicating they perceive Bladensburg Cross as a Christian symbol. Despite numerous federal cases finding such statements probative of a cross's unconstitutional effect, the court disregarded this evidence as irrelevant.

Moreover, though more directly relevant to the purpose prong, the Cross's religious history and usage deepen its religious message. It is uncontroverted the Cross serves as the backdrop for religious activity, and that Christian prayers, services, and clergy were central to its history, including fundraising and dedication events, as well as later anniversary and re-dedication ceremonies. Today, it is used for annual services that include prayer by Christians. But the court ignored this evidence, reaching the unprecedented conclusion that prayers are not “religious activity.”

In addition, the court erred in holding that the government's persistent monitoring, significant renovations, and funding of the Cross do not foster excessive entanglement with religion.

Finally, the court erred by applying Justice Breyer's *Van Orden* "legal judgment" test to the enormous Christian cross because this is not a "difficult borderline cases" where the secular aspects of a display "predominate" over any religious component.

ARGUMENT

I. STANDARD OF REVIEW

The District Court granted summary judgment because it erroneously concluded that an enormous Christian Cross on public land does not violate the Establishment Clause of the United States Constitution. The Court reviews “the district court’s grant of summary judgment *de novo*, drawing all reasonable inferences in favor of Appellants, the nonmoving party.” *David v. Alphin*, 704 F.3d 327, 339 (4th Cir. 2013). The Establishment Clause “mandates that the government remain secular,” and prohibits it from favoring “religious belief over disbelief.” *Cnty. of Allegheny v. ACLU*, 492 U.S. 573, 593, 610 (1989)(citation omitted).

II. THE DISTRICT COURT’S HOLDING CONTRAVENES EVERY OTHER FEDERAL DECISION INVOLVING A CHRISTIAN CROSS WAR MEMORIAL, AND CROSS DISPLAYS GENERALLY.

Precedent is overwhelmingly in Appellants’ favor. Every single court to rule on the final merits of a war memorial cross held it unconstitutional. The courts have been virtually unanimous in holding that a government cross display, *in any context*, is unconstitutional. *See id.* at 606-07 (“the [Establishment] Clause forbids a city to permit the permanent erection of a large Latin cross”); *Trunk v. San Diego*, 629 F.3d 1099 (9th Cir. 2011), *cert. denied*, 132 S.Ct. 2535 (2012)(longstanding war memorial cross); *Am. Atheists, Inc. v. Duncan*, 616 F.3d 1145 (10th Cir. 2010), *cert. denied*, 132 S.Ct. 12 (2011)(individualized roadside memorial crosses for

troopers); *Buono v. Norton*, 371 F.3d 543 (9th Cir. 2004)(seven-foot war memorial cross), *rev'd on other grounds*, *Salazar v. Buono*, 559 U.S. 700 (2010)(plurality)(questioning need for injunction after transfer to private entity); *Carpenter v. San Francisco*, 93 F.3d 627 (9th Cir. 1996)(concrete landmark cross); *Separation of Church & State Comm. v. City of Eugene*, 93 F.3d 617 (9th Cir. 1996)(war memorial); *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)(war memorial cross, private memorial cross, 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)(cross on building); *Friedman v. Bd. of Cnty. Comm'rs*, 781 F.2d 777 (10th Cir. 1985)(en banc)(insignia); *ACLU v. Rabun Cnty. Chamber of Commerce, Inc.*, 698 F.2d 1098 (11th Cir. 1983)(memorial cross); *Gilfillan v. Philadelphia*, 637 F.2d 924 (3d Cir. 1980)(platform containing cross); *Am. Humanist Ass'n v. Lake Elsinore*, 2014 U.S. Dist. LEXIS 25180 (C.D. Cal. 2014)(war memorial tombstone depicting cross headstones); *Cabral v. City of Evansville*, 958 F. Supp. 2d 1018 (S.D. Ind. 2013), *app. disp.*, 759 F.3d 639 (7th Cir. 2014)(six-foot crosses within “Veterans Memorial Parkway”); *Summers v. Adams*, 669 F. Supp. 2d 637 (D.S.C. 2009)(license plate cross); *Am. Atheists, Inc. v. City of Starke*, 2007 U.S. Dist. LEXIS 19512 (M.D. Fla. 2007)(water tower);

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); *Mendelson v. St. Cloud*, 719 F. Supp. 1065 (M.D. Fla. 1989)(water tower); *Jewish War Veterans v. United States*, 695 F. Supp. 3 (D.D.C. 1988)(war memorial cross on military base); *ACLU v. Miss. Gen. Servs. Admin.*, 652 F. Supp. 380 (S.D. Miss. 1987)(cross on building); *Libin v. Greenwich*, 625 F. Supp. 393 (D. Conn. 1985)(3-by-5 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); *Fox v. Los Angeles*, 22 Cal.3d 792 (1978)(cross on building); *see also Joki v. Bd. of Educ.*, 745 F. Supp. 823, 829-30 (N.D. N.Y. 1990)(“There is abundant case law holding unconstitutional the prominent display of a cross”).

III. THE COURT ERRED IN CONCLUDING THAT THE ENORMOUS CHRISTIAN CROSS DOES NOT HAVE THE EFFECT OF ENDORSING CHRISTIANITY.

To comply with the Establishment Clause, a “publicly displayed religious symbol” must pass the *Lemon* test, pursuant to which it must: (1) “have a secular purpose;” (2) not have the “effect” of advancing or endorsing religion; and (3) “not foster an excessive entanglement with religion.” *Gonzales*, 4 F.3d at 1418. The display “violates the Establishment Clause if it fails to satisfy any of these prongs.” *Edwards v. Aguillard*, 482 U.S. 578, 583 (1987).

Regardless of the purposes motivating it, Bladensburg Cross violates the Establishment Clause under the effect prong. *See Trunk*, 629 F.3d at 1109-10 (memorial unconstitutional under effect prong, despite secular purpose); *Duncan*, 616 F.3d at 1154 (same); *Jewish War Veterans*, 695 F. Supp. 3 (same).⁴

The “effect prong asks whether, irrespective of government’s actual purpose,” *N.C. Civ. Liberties Union Leg. Found. v. Constangy*, 947 F.2d 1145, 1151 (4th Cir. 1991), the government action “has the appearance or effect of endorsing religion.” *Smith v. Cnty. of Albemarle*, 895 F.2d 953, 956 (4th Cir. 1990). The “advancement need not be material or tangible.” *Friedman*, 781 F.2d at 781. An important concern of the effects test is “whether the symbolic union of church and state...is sufficiently likely to be perceived by adherents...as an endorsement, and by the nonadherents as a disapproval[.]” *Grand Rapids Sch. Dist. v. Ball*, 473 U.S. 373, 390 (1985).

As shown below, Bladensburg Cross clearly fails the effect test because the government’s 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.

⁴ Nevertheless, the purpose for erecting the Cross was not secular, failing the first prong too.(Doc.80-1,pp.16-24)(Doc.90,pp.37-47).

IV. BLADENSBURG CROSS SENDS A STRONG MESSAGE OF ENDORSEMENT AND EXCLUSION, HEIGHTENED BY ITS WAR MEMORIAL DESIGNATION.

A. **A Christian cross on government property almost always has the effect of endorsing Christianity.**

The court erred in concluding that an enormous Christian cross prominently situated on government property, impossible for motorists to overlook and clearly dominating the visual space, does not have the effect of endorsing Christianity. Federal courts have uniformly recognized the “cross is the preeminent symbol of Christianity.” *Id.* at 1110-11 (citations omitted). “The religious significance and meaning of the Latin or Christian cross are unmistakable.” *Robinson*, 68 F.3d at 1232.

“There is *no question* that the Latin cross is a symbol of Christianity, and that its placement on public land...violates the Establishment Clause.” *Eugene*, 93 F.3d at 620 (emphasis added). *Accord Allegheny*, 492 U.S. at 599 (cross on government property would convey “endorsement of Christianity”); *id.* at 661 (Kennedy, J., concurring and dissenting)(“the permanent erection of a large Latin cross” on government property would “place the government’s weight behind an obvious effort to proselytize”). The Seventh Circuit held in *St. Charles*: “When prominently displayed on [government property]...the cross dramatically conveys a message of governmental support for Christianity.” 794 F.2d at 271.

“[C]aselaw 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). Indeed, “[b]ecause of the Latin cross’s strong ties to Christianity, even when a cross occupies only one part of a la[r]ger display, courts have almost unanimously held that its effect is to communicate that the display as a whole endorses religion.” *Lake Elsinore*, 2014 U.S. Dist. LEXIS 25180, at *39-40 (citations omitted).

Federal courts have been virtually unanimous in concluding that the government’s display of a cross, including for commemorative purposes, unconstitutionally endorses Christianity. *See Trunk; Duncan; Eugene; Gonzales; Ellis; Lake Elsinore; Jewish War Veterans; Eckels, supra* at 23-25.

Such crosses have been found unconstitutional even when the memorial consisted of grave markers for individual fallen troopers, *Duncan*, accurately replicated a World War II tombstone, *Lake Elsinore*, or functioned expressly and overtly as a memorial for its entire history, *e.g., Duncan; Ellis; Gonzales*, 4 F.3d at 1419 (“crucifix was intended to act as a war memorial”); *Lake Elsinore; Eckels; Jewish War Veterans*.

Crosses are held unconstitutional even when found to have independent historical significance, *e.g., Trunk*, 629 F.3d at 1108 (“historically significant war memorial”); *Carpenter*, 93 F.3d at 629-32 (“cultural landmark”); *Gonzales*

(landmark); *Ellis*, 990 F.2d at 1525 (“historical landmark”); *Harris*, 927 F.2d at 1414; *Friedman*, 781 F.2d 777; *Robinson*, 68 F.3d at 1232; *Rabun*; *Eugene*; *Mendelson*, 719 F. Supp. at 1069.

Crosses are found unconstitutional even when not the dominant or central part of the display, *e.g.*, *Harris* (cross was no more prominent than several secular images); *Robinson*; *Friedman*; *St. Charles*, 794 F.2d at 267 (cross merely one part of “a six-acre area,” accompanied by numerous secular holiday symbols); *Lake Elsinore*, 2013 U.S. Dist. LEXIS 188202, *52-54 (crosses occupied only 1/3 of display); *Stow*, 29 F. Supp. 2d 845; *cf. Green v. Haskell Cnty. Bd. of Comm’rs*, 568 F.3d 784, 800-04 (10th Cir. 2009)(unconstitutional Ten Commandments was “one of numerous other monuments and displays”).

The conclusion that the “cross is a Christian religious symbol...does not, of course, end the matter.” *Am. Humanist Ass’n v. Lake Elsinore*, 2013 U.S. Dist. LEXIS 188202, *43 (C.D. Cal. 2013)(citing *Trunk*). “It does, however, form a considerable obstacle to [Appellees]...[T]he vast majority of cases to have considered the presence of Latin crosses on city monuments, seals, or displays have found them to be unconstitutional.” *Id.* at n.9 (emphasis added). Even the Supreme Court in *Allegheny* found “that erection of a cross on government property would clearly violate the Establishment Clause.” *Id.*

B. A cross memorial exalts Christians while sending a stigmatic message to non-Christians that they are unworthy of remembrance.

A “sectarian war memorial carries an *inherently religious message*[.]” *Trunk*, 629 F.3d at 1101 (citation omitted, emphasis added). Bladensburg Cross fails the effect test because the government, by “claiming to honor all service members with a symbol that is intrinsically connected to a particular religion,” is sending a “stigmatic message to nonadherents ‘that they are outsiders...and an accompanying message to adherents that they are insiders.’” *Id.* at 1109, 1124-25 (citations omitted). This “message violates the Establishment Clause.” *Id.*

This message of religious endorsement is *heightened*, rather than mitigated, by the fact that Bladensburg Cross is a memorial. The use of a “Christian symbol to honor all veterans sends a *strong* message of endorsement and exclusion.” *Id.* (emphasis added). A “sectarian war memorial...honor[s] only those servicemen of that particular religion,” *Ellis*, 990 F.2d at 1528, making “a message of endorsement likely if not unavoidable.” *Jewish War Veterans*, 695 F. Supp. at 14.

Courts have held memorial crosses unconstitutional in analogous circumstances, and with facts less flagrant than presented here, *infra*.

In *Trunk*, the Ninth Circuit concluded that a “historically significant war memorial” cross, surrounded by thousands of “secular elements,” and located far from any government buildings, unconstitutionally projected “a message of religious endorsement,” even though “Congress found that the Memorial has stood

as a tribute to U.S. veterans for over fifty-two years.” 629 F.3d at 1104-06, 1118. The court reasoned that a war memorial cross “creates an appearance of honoring only those servicemen of that particular religion.” *Id.*

In *Duncan*, the Tenth Circuit held that thirteen twelve-foot roadside crosses, functioning expressly as memorials for individual fallen Utah Highway Patrol troopers for their entire history, unconstitutionally endorsed Christianity even though the memorials included the trooper’s name in large text, his picture, a plaque, and biographical information. 616 F.3d at 1150-51, 1161-62. Unlike here, the crosses were privately owned and funded, and the government issued a statement that it “neither approves or disapproves the memorial marker.” *Id.* at 1154. Further, there was no history of religious usage. *Id.* at 1159 n.11.

The Tenth Circuit agreed “a reasonable observer would recognize these memorial crosses as symbols of death,” but concluded they had “the impermissible effect of...endors[ing] Christianity.” *Id.* at 1161. This was so despite four undisputed “contextualizing facts” that the state claimed rendered the “cross memorials sufficiently secular:”

- (1) these displays are clearly intended as memorials; (2) they are located in areas where similar memorials have long been displayed; (3) many of the designers and producers of these displays do not revere the cross as a symbol of their faith; and (4) a majority of Utahns do not revere the cross as a symbol of their faith.

Id.

In *Eugene*, the Ninth Circuit concluded it was “simple” and “straightforward” that a large concrete cross, erected by American Legion in 1964, without the city’s permission, “clearly” unconstitutionally advanced religion. 93 F.3d at 617-20 n.5. “Memorial ceremonies were [] conducted by the American Legion” for years. *Id.* at 625 n.9 (O’Scannlain J., concurring). Additionally, a “plaque on the cross clearly show[ed] its status as a war memorial as d[id] the original City Charter provision.” *Id.* at 625-26. The cross stood “remote from any government buildings.” *Id.* The concurrence agreed, “the City’s use of a cross to memorialize the war dead may lead observers to believe that the City has chosen to honor only Christian veterans.” *Id.*

Likewise, in *Ellis* the Ninth Circuit held Mt. Soledad cross impermissibly endorsed religion even though it was “dedicated to veterans of World Wars I & II.” 990 F.2d at 1527. It also held Mt. Helix Cross, which had been erected by private citizens on private land in the mid-1920s, expressly “as a memorial” to their mother, unconstitutionally endorsed religion. *Id.* at 1520-21.

In *Gonzales*, the Seventh Circuit ruled that a privately donated war memorial crucifix, erected in 1955, unconstitutionally advanced religion, even though it was always a war memorial and had a plaque expressly indicating it was donated by a private organization (though it was later obscured by shrubs). 4 F.3d at 1412-14.

In *Jewish War Veterans*, the court held that a large war memorial cross on a military base failed the effect prong of *Lemon*, even though it had a conceded secular purpose. 695 F. Supp. at 7.

And in *Eckels*, the court held that three privately-funded, privately-constructed crosses and a Star of David war memorial in a Texas park unconstitutionally endorsed religion. 589 F. Supp. at 228-29, 234-35. The VFW proposed the idea of creating a “war memorial” and “sponsored a contest to select a design.” *Id.* The court could “reach no other conclusion but that the symbols’ primary or principal effect” is to “give the impression that only Christians and Jews are being honored[.]” *Id.*

More recently, the court in *Lake Elsinore* held a 6-foot-tall war memorial tombstone depicting “a historic European military cemetery of the World War II era” and specifically, “the image of ‘row upon row of small white crosses,’” alongside numerous secular military symbols far more prominent than the religious symbols, failed the effect test. 2014 U.S. Dist. LEXIS 25180, at *26, *40-42 (citation omitted). It reasoned, “although the cross can be used to pay homage to the deceased, it remains the symbol of only one religion, and thus gives the effect of memorializing only the Christian deceased.” *Id.*

Another recent case, *Cabral*, found that a display of “thirty-one, six-foot-tall Crosses” for only “a two-week period” in “Veterans Memorial Parkway,” would

unconstitutionally endorse Christianity even though it would be temporary, privately funded and constructed, and bear a prominent, express disclaimer “of a size equal.” 958 F. Supp. 2d at 1022-27.

As the above cases demonstrate, contrary to the court’s holding (J.A.3451), the fact that the Cross may be recognized “as a war memorial, [does] not obviate the appearance of [religious] preference.” *Ellis*, 990 F.2d at 1528. The cross “does not possess an ancillary meaning as a secular or non-sectarian war memorial.” *Trunk*, 629 F.3d at 1116. As the Tenth Circuit explained in *Duncan*, 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.” 616 F.3d at 1161-62 (emphasis in original). There is simply “no evidence...that the cross has been widely embraced by”—or even applied to—“non-Christians as a secular symbol.” *Id.*

1. The court erred in ignoring many persuasive cases finding similar government crosses unconstitutional.

In sustaining the mammoth Christian cross, the court ignored many persuasive cases holding crosses unconstitutional, including:

- *Lake Elsinore*
- *Eckels*
- *Jewish War Veterans*
- *Ellis*

- *Cabral*
- *Carpenter*
- *Harris* (cross on insignia; was not dominate feature)
- *Robinson* (same)
- *Friedman* (same)
- *Stow* (same)
- *Starke* (cross on water tower)
- *Mendelson* (same)
- *St. Charles* (temporary cross in multifaceted holiday display)
- *Miss. GSA* (holiday display)
- *Fox* (same)
- *Gilfillan* (temporary platform containing cross)
- *Libin* (temporary 3-by-5 cross on firehouse)
- *Granzeier* (temporary 4-inch cross on sign)

That the court ignored these cases, especially involving war memorials, underscores the notion that it was “simply reaching for any way to keep a religious [display] on [government property].” *McCreary Cnty. v. ACLU*, 545 U.S. 844, 873 (2005). This is evidenced by comparison to other cross cases, which found the foregoing cases persuasive. For instance, in *Gonzales*, the Seventh Circuit relied upon *St. Charles*, which “held that a cross crafted from strings of lights and positioned on top of the local fire station conveyed the message of a Christian

system of belief.” 4 F.3d at 1412-14. And in *St. Charles*, its conclusion was “supported by a number of cases in which displays of the cross...violate[d] the [E]stablishment [C]lause.” *Id.* at 273-74 (citing *Friedman, Rabun, Gilfillan, Libin, Eckels, and Fox*).

The Ninth Circuit found *Eckels* highly persuasive in *Trunk* and *Ellis*, as did the Seventh Circuit in *Gonzales* and *St. Charles*. Even the Supreme Court cited *Eckels* for the notion that a “war memorial containing crosses and a Star of David unconstitutionally favored Christianity and Judaism.” *Allegheny*, 492 U.S. at 615 n.61. *See also Lake Elsinore*, 2014 U.S. Dist. LEXIS 25180, *21; *Buono v. Norton*, 212 F. Supp. 2d 1202, 1215 n.8 (C.D. Cal. 2002)(citing *Eckels* for proposition that “[m]any other courts have similarly held that a religious symbol’s official designation as a war memorial does not shield it from constitutional scrutiny.”); *Jewish War Veterans*, 695 F. Supp. at 13.

Likewise, *Jewish War Veterans* was deemed persuasive in *Trunk*, *Gonzales*, *Lake Elsinore*, and *Buono*. *Trunk* also relied in part on *Carpenter*, which held that a 60-year-old concrete cross unconstitutionally endorsed religion, even though it was in a remote location and had independent historical significance. 93 F.3d at 629-32.

The court below also ignored *Harris, Friedman, Robinson, and Stow*, which held that a small cross displayed on government insignia unconstitutionally

endorsed religion, even if not a dominant part of the display. Other courts addressing cross monuments, including *Trunk*, *Duncan*, *Gonzales*, *Lake Elsinore*, and *Jewish War Veterans*, found these cases persuasive.

Finally, the court ignored cases involving temporary crosses (*e.g.*, *St. Charles*, *Gilfillan*, *Cabral*, *Granzeier*, *Libin*), which are less egregious than Bladensburg Cross since it “pervades the daily lives of county residents. It is not displayed once a year for a brief period,” as in those cases. *Friedman*, 781 F.2d at 782.

2. The cross does not serve as a secular symbol for war dead.

The court’s conclusion that the massive Christian cross does not endorse Christianity was based almost entirely on the fact that it is a war memorial, and in particular, evokes “foreign graves.” (J.A.3451). However, “[t]he 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.

Courts have uniformly distinguished a freestanding government cross from individual headstones in overseas cemeteries. *See Duncan*, 616 F.3d at 1161; *Ellis*, 990 F.2d at 1525; *Lake Elsinore*, 2014 U.S. Dist. LEXIS 25180, at *42. The Ninth Circuit in *Trunk* made clear:

[W]hile the image of row upon row of small white crosses amongst the poppies remains an exceedingly powerful one, not all soldiers who are memorialized at those foreign battlefields are honored with crosses...*The cross was a marker of an individual grave, not a universal monument to the war dead.*

629 F.3d at 1113 (emphasis added). The court thus concluded, “[t]he fact that *individual* veterans can purchase plaques representing *their own beliefs* does not cure the constitutional problem[.]” *Id.* at 1125 n.25 (emphasis added).

In *Duncan*, as here, the state pointed “to the use of crosses as markers for fallen soldiers as evidence that the cross has become a secular symbol of death.” 616 F.3d at 1161. But the Tenth Circuit rejected the argument, reasoning, “fallen Jewish service members are memorialized instead with a Star of David.” *Id.*

The war memorial in *Lake Elsinore* was “a historic image of a World War II cemetery.” 2014 U.S. Dist. LEXIS 25180, at *40-42. The city argued this made it “distinguishable from other veterans’ memorials that have been found unconstitutional.” *Id.* The court nonetheless ruled, “[a]lthough the cross is a component of the imagery of World War II cemeteries such as Normandy,” it remains a religious symbol. *Id.* (citing *Trunk*).

Consequently, the court’s conclusion that the “evocation of foreign graves is *particularly relevant* here because, *unlike crosses challenged in other cases*, the Monument explicitly memorializes...World War I,” is erroneous. (J.A.3451)(emphasis added). The *Lake Elsinore* display did not merely “evoke foreign graves,” but actually depicted a soldier kneeling to a “foreign grave.” *Id.* at *2-4. Further, the Ninth Circuit in *Eugene* found a memorial cross unconstitutional even though accompanied by a “plaque...dedicating it as a memorial to war

veterans...of all wars,” inclusive of World War I. 93 F.3d at 618-619. It also found Mt. Soledad unconstitutional “even while recognizing that the Cross is ‘dedicated to veterans of World Wars I & II.’” *Trunk*, 629 F.3d at 1111-12 (citing *Ellis*).

Analogously, in *Duncan*, it was undisputed that crosses are a “common symbol used in roadside memorials.” 616 F.3d at 1161-62. The “Legion...[offered a statement]...that roadside crosses are common, recognizable symbols of highway fatalities.” *Id.* Without discrediting this evidence, the Tenth Circuit concluded, “while the cross may be a common symbol used in markers and memorials, there is no evidence that it is widely accepted as a secular symbol.” *Id.*

As in *Duncan*, there is no evidence that the cross has been widely embraced as a *secular* symbol of World War I; the evidence merely shows that it may have been a *common* symbol. “However, the mere fact that the cross is a common symbol...does not mean it is a secular symbol.” *Id.* To the contrary, the evidence presented by Legion *in this case* confirms cross headstones are *religious* symbols. *See* (J.A.2293-97)(“That the rosette at the top carry with it the device of religious faith—a Latin cross for the Christian”).

Nor is the cross the universal symbol of World War I. Rather, the “universal symbol emanating from those foreign wars is *the poppy*, not the cross.” *Trunk*, 629 F.3d at 1112-14 (emphasis added). (J.A.188-89;190-215;309). As Piehler’s reports

show, and the Ninth Circuit agreed, “[t]he cross...has never been used to honor all American soldiers in any military cemetery, and it has never been used as a default gravestone.” *Id.* The “record supports Piehler’s conclusion[.]” *Id.*

3. The court erroneously eschewed Dr. Piehler’s testimony.

The court’s conclusion that Bladensburg Cross does not carry a religious message merely because crosses were used to mark Christian graves indicates that it ignored Dr. Piehler’s reports. In *Trunk*, the Ninth Circuit expressly held that the district court erred in “minimizing the weight” of Piehler’s reports. *Id.* at n.12. The court explained, as relevant here, “[t]he district court simply assumed that the Latin cross has an ancillary meaning as a war memorial and leveraged that assumption to reject Piehler’s declarations and other contrary evidence in the record.” *Id.*

The only reference to Piehler’s work is a passage *Intervenors* quoted out of context in their brief. (J.A.3451;Doc.83-1,p.10). In that passage, Piehler noted that the cross was *a* central symbol in an overseas cemetery, *along with* “*Stars of David.*” (J.A.2270). The court cited this passage, without mention of the *Jewish symbols*, to support its conclusion the cross is a *secular* symbol. But these crosses do not lead to “the conclusion that the cross has become a secularized representation of war memory.” *Id.* at 1114. As Piehler testified: “If such were the case...all American war graves should have been marked with a Cross, even those of Jews.” (J.A.305).

4. The court erroneously relied on *dicta* from *Salazar*.

Instead of relying on the numerous cases finding crosses unconstitutional, the court instead relied almost exclusively on *dicta* from *Salazar v. Buono*, 559 U.S. 700 (2010)(plurality), quoting a particular passage from Kennedy's opinion, which garnered just two votes.

The only issue before the Court was the validity of a land-transfer statute, adopted as a curative measure for a cross *found unconstitutional*. *Id.* at 706. The Court did not reach the merits because the land had been transferred to a private party. *Id.* The plurality did *not* rule on any substantive matters, instead holding that the lower court improperly modified an existing injunction without a hearing as to the changed facts (transfer). *Id.* at 721-22 (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 that the plaintiff lacked standing. *Id.* at 728. Consequently, anything Kennedy said about substantive Establishment Clause issues not only failed to garner a majority, but was clearly *dicta* as well, including his remarks about "small crosses in foreign fields." *Id.* at 720.

Importantly, the Ninth Circuit decided *Trunk* after *Salazar*, quoting it only in passing in reaching a *contrary* conclusion. When it did, the court distinguished the large standalone cross from Kennedy's "small crosses," observing that those

crosses “serve as individual memorials to the lives of the Christian soldiers whose graves they mark, not as generic symbols of death and sacrifice.” 629 F.3d at 1113, 1116 n.18.

Other courts ruling on memorial crosses since *Salazar* similarly disregarded Kennedy’s *dicta*. See *Duncan*, 616 F.3d at 1152 n.5; *Lake Elsinore*, 2014 U.S. Dist. LEXIS 25180, *41 (disregarding Kennedy’s *dicta even though* it was an “image of a World War II cemetery”); *Cabral*, 958 F. Supp. 2d at 1019 (ignoring *Salazar* altogether even though display consisted of rows of crosses).⁵

Regardless, the factual context here is different from *Salazar*. That cross was literally “in the middle of the desert.” 59 U.S. at 759 (Stevens, J., dissenting). As Kennedy acknowledged: “It cannot be seen from the nearest highway, which lies more than 10 miles away.” *Id.* at 707. It was also “less than eight feet tall,” with “4-inch diameter metal pipes painted white.” *Id.* Thus, in contrast to the small “cross in the desert,” “[t]he size and prominence of the Cross evokes a message of aggrandizement and universalization of religion, and not the message of individual memorialization and remembrance that is presented by a field of gravestones.” *Trunk*, 629 F.3d at 1116 n.18.

⁵ Notably, *Buono*, 371 F.3d at 545-46, which held the cross unconstitutional, is still treated as good law. See *Duncan*, 616 F.3d at 1160.

Even Justice Kennedy recognized, “I doubt not, for example, that the Clause forbids a city to permit the permanent erection of a *large* Latin cross.” *Allegheny*, 492 U.S. at 661 (concurring and dissenting, emphasis added).

C. Fourth Circuit precedent requires a finding that Bladensburg Cross unconstitutionally endorses religion.

Contrary to the District Court’s opinion (J.A.3451-52), this Court’s Establishment Clause precedent compels a finding that Bladensburg Cross is unconstitutional. In *Smith*, the Court held that a privately donated crèche, temporarily in front of a government building, sent the “unmistakable message” of religious endorsement. 895 F.2d at 955-58. Unlike here, “the creche involved no expenditure of County funds.” *Id.* It also bore a “disclaimer” sign “reading ‘Sponsored by Charlottesville Jaycees.’” *Id.* The Court acknowledged the “disclaimer...is certainly more unequivocal than those in *Allegheny*.” *Id.*

The massive Cross is obviously more egregiously unconstitutional: it is permanent, has no disclaimer, and sizable government funds have been expended on it. (J.A.138;1553-70). It is also intrinsically sectarian unlike a Christmas display. “Christmas is a national holiday, celebrated by...many non-Christians.” *St. Charles*, 794 F.2d at 271. But “the Latin cross has not lost its Christian identity[.]” *See also Duncan*, 616 F.3d at 1162 (“[u]nlike Christmas,...the cross has [not] been widely embraced by non-Christians.”).

Indeed, numerous courts have recognized that a cross is even more religiously symbolic than a crèche and thus presumptively unconstitutional, and further, that a crèche is less likely to endorse religion due to its temporary nature. *See id; Allegheny*, 492 U.S. at 606-07 (“such an obtrusive year-round religious display [of the cross] would place the government’s weight behind an obvious effort to proselytize on behalf of a particular religion.”); *Gonzales*, 4 F.3d at 1423 (“[the cross] is not seasonally displayed in conjunction with other holiday symbols”); *Harris*, 927 F.2d at 1412 (because the seal is “viewed year-round,” the cross “brings together church and state...even more ardently than the unconstitutional crèche”); *Eckels*, 589 F. Supp. at 235.

Further, the court erroneously relied on *Lambeth v. Bd. of Commrs*, 407 F.3d 266, 272 (4th Cir. 2005), which upheld a small inscription of the national motto on a building. While recognizing it had “religious overtones,” the Court found “[t]he Complaint alleges no circumstances...to negate the legitimate secular connotations[.]” *Id.* In stark contrast, the cross does not have a “secular meaning that can be divorced from its religious significance.” *Duncan*, 616 F.3d at 1162. *Cf. Allegheny*, 492 U.S. at 603 (distinguishing “a specifically Christian symbol” from “more general religious references”).

V. THE COURT'S CONCLUSION THAT A REASONABLE OBSERVER WOULD NOT PERCEIVE THIS MASSIVE CHRISTIAN CROSS AS RELIGIOUS IS UNSUPPORTED BY THE LAW AND FACTS.

A. The court failed to consider the overall effect of the Cross.

Bladensburg Cross fails the effect test because a “reasonable observer” – a motorist⁶ – “would perceive [the cross] as projecting a message of religious endorsement.” *Trunk*, 629 F.3d at 1118. In applying the effect prong, the court’s most glaring error was its assumption that knowledge of war memorial status (which is doubtful) essentially ends the effect analysis – overlooking the fact that those aware of its war memorial status would see it as *a memorial that endorses Christianity and favors Christians*.

In *Trunk*, the Ninth Circuit stressed, “we must inquire into the overall effect of the Memorial, taking into consideration its entire context, *not simply those elements that suggest a secular message*.” *Id.* (emphasis added). Such facts of which a reasonable observer would be aware, and which contribute to the Cross’s religious message but were ignored by the district court, include:

(1) Its overtly Christian design; *id*; *Eugene*, 93 F.3d at 620; *Lake Elsinore*, 2014 U.S. Dist. LEXIS 25180, *39 (“the physical appearance of the memorial also has the principal effect of advancing religion.”);

⁶ As a 2015 M-NCPPC report concedes, the island is a “difficult place to occupy as a pedestrian.”(J.A.2485).

(2) The “size and prominence of the Cross,” which “evokes a message of aggrandizement;” *Trunk*, 629 F.3d at 1116 n.18; *Duncan*, 616 F.3d at 1162 (“[t]he massive size of the crosses displayed on Utah’s rights-of-way...unmistakably conveys a message of endorsement”); *St. Charles*, 794 F.2d at 267 (the cross was “an overpowering feature” among secular decorations); *Joki*, 745 F. Supp. at 829-31 (“the cross occupies a highly prominent place in the painting”);

(3) The Cross is located centrally on a traffic island with no other accompanying memorials; *e.g.*, *Trunk*, 629 F.3d at 1123-24;

(4) The Cross is in a “busy intersection...[and] is visible to virtually anyone” passing by, *Gonzales*, 4 F.3d at 1414; *e.g.*, *Robinson*, 68 F.3d at 1232 n.11 (“the visibility of the cross was significant.”); *Lake Elsinore*, 2013 U.S. Dist. LEXIS 188202, *54 (“The Latin crosses...are immediately noticeable to even the most casual passer-by...in contrast to the concededly non-sectarian images”);

(5) The Cross has no secular features visible to passersby aside from a small “U.S.” star, which if anything suggests governmental endorsement, *e.g.*, *Duncan*, 616 F.3d at 1160; *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.”). The only other markings are a

small plaque, obscured by bushes, and several words at the base, *e.g.*, *Gonzales*, 4 F.3d at 1414;

(6) The Cross stood alone in the entire area for most of its history (J.A.30;1973;1996), and the few smaller later-added displays, were placed across the roadway in a separate area, “half a mile away” (J.A.650-52;697;689-91;2024); *Green*, 568 F.3d at 800;

(7) These few newer, smaller, displays in a separate area are not regularly used for Legion/Town events; *id.* at 805 n.14 (“a reasonable observer would find that the Board had assigned a place of special prominence to the Monument”);

(8) The “starkly religious message of the Cross’s supporters,” *Trunk*, 629 F.3d at 1119-20 & n.19; including protestors like Ms. Greene, a Catholic who thinks Humanism is a cult (J.A.959-60;969;989;1736-48;3421), petitions and demonstrations (J.A.421-39;819;1322;1354-63;1382-83); *Summers*, 669 F. Supp. 2d at 663 (“The post-injunction actions...including comments at church-sponsored rallies, further demonstrate this impermissible effect”); *Starke*, 2007 U.S. Dist. LEXIS 19512, at *6-7, *13-14 (finding “a petition to ‘keep the cross’” relevant);

(9) Prayers and Christian clergy are included in virtually every event held at the Cross, including M-NCPPC’s “rededication” ceremony; *Green*, 568 F.3d at 801 (“The reasonable observer would know that...the unveiling of the Monument...included remarks by local pastors.”).

B. The overtly Christian design sends an intrinsically religious message.

Most courts have concluded that a government cross fails the effect test because of it is an inherently Christian symbol, *supra*. See also *Summers*, 669 F. Supp. 2d at 663 (“the overtly Christian design of the ‘I Believe’ plate [with the cross]...*is, alone, sufficient*”)(citations omitted, emphasis added).

Indeed, “the Fourth Circuit has consistently applied the *Lemon* test *more stringently* when evaluating...inherently religious acts or symbols.” *Lambeth v. Bd. of Comm'rs*, 321 F. Supp. 2d 688, 705 (M.D.N.C. 2004)(citations omitted, emphasis added). *E.g.*, *Smith*, 895 F.2d at 958 (“The endorsement...proceeds...from the *religious display itself*”); *Hall v. Bradshaw*, 630 F.2d 1018, 1021 (4th Cir. 1980)(“A prayer, because it is religious, does advance religion”).

C. The Cross’s size, prominence, and central placement intensify its Christian message.

Apart from its overtly Christian design, the massive size of the Cross, as well as its prominence, and central placement within the median, “evokes a message of aggrandizement.” *Trunk*, 629 F.3d at 1116 n.18. While “exclusively religious symbols, such as a cross, will almost always render a governmental [display] unconstitutional,” “[s]ize and placement are...factors to consider in the overall effect-prong analysis.” *King*, 331 F.3d at 1285. As Ms. Green

acknowledged: “the Cross is massive. You can’t help but see it.” (J.A.970-71;1830-39).

The “way in which the Cross overshadows [any] secular aspects presents a strongly sectarian picture.” 629 F.3d at 1123. For “these drivers, the Cross does not so much present itself as a war memorial, but rather as a solitary symbol[.]” (J.A.955;957;969-71;1002). In *Trunk*, the Ninth Circuit noted that the cross “does not stand alone. Instead, it...consists of approximately 2,100 *plaques*, six concentric stone walls, twenty-three bollards, and an American flag.” *Id.* at 1117-18 (emphasis added). But these features could not negate the “message of religious endorsement.” *Id.*

Bladensburg Cross is more flagrantly sectarian: it is “an unadorned cross 40 feet high” (J.A.2507-08), and stands alone on the median. The Cross is by far the most “prominent and dominant feature” in the area. *Id.* at 1123 n.22. Although there is a *single* plaque at the base, it has been concealed by bushes for much of its history. Even when cleared, “[i]t is the cross that catches the eye at almost any angle, not the memorial plaque[.]” *Id.*

“[M]ost passing motorists would not even notice” the U.S. star, plaque, or the “inscriptions on the base.” (J.A.287;1935). An M-NCPPC report concedes: “as they negotiate the intricate traffic pattern, the riders catch at least a *fleeting glimpse* of the Peace Cross.” (J.A.1980)(emphasis added).

Inexplicably, the district court found, and based its ruling largely upon, its contention that the “cross itself is adorned with ***prominent*** secular symbols.” (J.A.3452)(emphasis added). However, the Cross is, as described in an article following its dedication, “an ***unadorned*** cross.” (J.A.2508)(emphasis added). Regardless, “the sectarian features of a display need not dominate them to send a religious message.” *Lake Elsinore*, 2013 U.S. Dist. LEXIS 188202, at *52-54.

The court clearly erred, from a factual standpoint, because the *only* non-religious symbol on Bladensburg Cross itself is a small “U.S.” star, making even “*more apparent* to a reasonable observer that the cross is a government-sponsored monument.” (J.A.27¶22;287;1935)(emphasis added). *See Books*, 235 F.3d at 307; *Starke*, 2007 U.S. Dist. LEXIS 19512, at *17-18 (“the combination of the words ‘STARKE’ and the Cross on the water tower clearly communicates the City’s endorsement of Christianity.”).

The only other features (not “symbols”) on the display, rather than the Cross “itself” (J.A.3452), are a plaque and four words on the base. (J.A.34-35;61;66;1855-58). This pales in comparison to *Trunk*, *Duncan*, and *Lake Elsinore*. For instance, the 6-foot *Lake Elsinore* memorial included, *inter alia*, a soldier, flag, eagle, *eight* lines of large text, and “five granite pedestals, each displaying the emblem of one of the five branches of service.” 2014 U.S. Dist. LEXIS 25180, at *2-5. The court here was only able to identify *three* small “elements.” (J.A.3450).

None of these three elements can fairly be described as “prominent” (J.A.3452) either. Given its placement on a busy-highway median, an observer is unlikely to even know it is even a war memorial, *supra* at 5-6. Regardless, these “minor features hardly secularize what is clearly a sectarian Christian symbol.” (J.A.287). In *Duncan*, the Tenth Circuit ruled: “The fact that the cross includes biographical information about the fallen trooper does not diminish the governmental message endorsing Christianity.” 616 F.3d at 1160-61.

1. The Cross would clearly endorse Christianity even if a passing motorist could see the “U.S.” star *and* interpret it as an American Legion symbol.

Beyond the above, the court’s nearly dispositive reliance on the small “U.S.” star was erroneous because, even assuming, *arguendo*, a passing motorist can actually see it, *and* interpret it as a Legion emblem, it does absolutely nothing to diminish the overwhelming Christian message sent by the towering Cross. *See Allegheny*, 492 U.S. at 600 (“the sign simply demonstrates that the government is endorsing the religious message of that organization”); *Smith*, 895 F.2d at 958 (“The endorsement of the religious message proceeds as much from the religious display itself *as from the identification of a religious sponsor.*”)(emphasis added).

In *Harris*, the Seventh Circuit ruled that a city’s seal, which depicted the cross in only one quadrant, along with secular “snapshots of the community” had the effect of endorsing religion. 927 F.2d at 1412-13. The court reasoned: “To any

observer, the...seal expresses the City's approval of those four pictures of City life—its flora, its schools, its industry and commercial life, and its Christianity.” *Id.*

Courts have found crosses unconstitutional even when privately-owned and accompanied by explicit *disclaimers*. See *Duncan*, 616 F.3d at 1154; *Cabral* 958 F. Supp. 2d at 1022-27; see also *Gonzales*, 4 F.3d at 1414. “It remains to be seen whether any disclaimer can eliminate the patent aura of government endorsement of religion.” *Smith*, 895 F.2d at 958. Of course disclaimers are not an option here, because the government owns, maintains, and funds the Cross (over \$217,000 invested) making it vastly more egregious than the above cases.

2. The Cross does not objectively appear to be part of an array to the constant stream of passing motorists.

The court further erred in concluding the Cross does not endorse religion because of several markedly smaller, much newer, distant displays. (J.A.3455-56)[Other page].⁷ The Cross is “clearly towering over the space,” and is the “centerpiece.” (J.A.2485). It is known as “the town’s most prominent symbol.” (J.A.2562-63).

It was an error for the court to consider these distant displays as: (a) they are not on the same plot of land; (b) passing motorists are unlikely to see them.

⁷ The 2006 display is 1-foot-tall with its text facing *away* from the road. (J.A.30¶51;38;44¶51;111¶51;1863-65). The 1983 display is 4-feet-tall and the 1960 display is 10-feet-tall. (J.A.30¶52-53;63-68;1859-62). The 2015 display is about half a mile away and substantially smaller. (J.A.2024).

(J.A.38-40;1980); and (c) they didn't even exist for much of the Cross's history. Most courts "have not looked beyond the immediate area[.]" *Ellis*, 990 F.2d at 1526. *See Allegheny*, 492 U.S. at 581; *Carpenter*, 93 F.3d at 631; *Miss. GSA*, 652 F. Supp. at 384 ("The addition of the new [secular] symbols does little to change the effect of the cross, because placed one on each side of the building the symbols appear less as one single than as four separate displays.").

If anything, Bladensburg "Cross's central position...gives it a symbolic value that intensifies the Memorial's sectarian message." *Trunk*, 629 F.3d at 1123-24. In *Trunk*, the court observed: "The Cross is placed in a separate, fenced off box, which highlights it." *Id.* Bladensburg Cross occupies an entire traffic circle of its own. As *Amici Eleven Marylanders* counsel put it, comparing the Cross to the few smaller displays is like comparing "apples and oranges." (J.A.1011;1013).

That smaller displays have been erected in a separate area – *not on the traffic island* – intensifies this message even further. *Id.* Together with its massive size, the Cross's location strongly suggests the government sees it as unique and deserving of its own centerpiece of land. This conclusion is reinforced by the fact that *all* the Town/Legion veteran's services occur at the Cross and *not* other monuments (J.A.834-40;1282-1353;1777-1818;1846-50). *See Green*, 568 F.3d at 805 n.14.

3. That the Cross is on a government highway median, rather than a building, does nothing to militate against the strong message of governmental endorsement.

In attempting to distinguish *Smith*, the court erred in finding that the Cross does not endorse Christianity because, “rather than being placed prominently in front of a governmental building, the Monument is on a highway median.” (J.A.3452). In fact, the placement of the government-owned, government-funded Cross on a government highway median, with “U.S.” in its center, and no disclaimer, makes the government’s imprimatur even greater here than in *Smith*, *supra* at 43.

A “cross [that] stands in a park, in relative isolation, and far from any government buildings or other structures” is still unconstitutional. *Carpenter*, 93 F.3d at 625-26, 630-32 (O’Scannlain, J., concurring). No cross monument found unconstitutional was in front of a government building, but rather, a mountain (*Trunk*, *Carpenter*, *Ellis*, *Rabun*), highway (*Duncan*, *Gonzales*), park (*Eugene*, *Cabral*, *Eckels*), desert (*Buono*), stadium (*Lake Elsinore*), or military base (*Jewish War Veterans*).

In *Trunk*, the Ninth Circuit expressly ruled that the district court erred in holding “the distance between the Memorial and government buildings weighed against a finding of endorsement.” 629 F.3d at 1124 n.23. It reached the same

conclusion in *Eugene* and *Buono*, explaining in the latter, “[t]hat the Sunrise Rock cross is not near a government building is insignificant.” 371 F.3d at 549-50.

In sum, neither the physical setting of the Cross nor its surroundings negate the overwhelming religious message conveyed to a reasonable observer. To the contrary, these factors exacerbate the message of governmental endorsement.

D. Statements by the public demonstrate that the Cross is viewed as a religious symbol.

Attitudes and statements expressed on both sides of the aisle (including veterans) reveal that the general public perceives Bladensburg Cross as a religious symbol (J.A.1386-1435;1442-60). Such evidence is more probative of a Cross’s religious effect than extrinsic factors such as history and usage, but the district court erroneously dismissed it, concluding it is not “relevant or helpful for the reasonable person analysis.” (J.A.3448).

But courts have made clear that “actions and statements of...the community at large...contribute to the perception that the memorial [is] viewed as endorsing religion. In analyzing the effect of the memorial, these statements are probative.” *Lake Elsinore*, 2014 U.S. Dist. LEXIS 25180, at *35-36. *See Green*, 568 F.3d at 800 (reasonable observer would be aware of “community’s response to the Monument”); *Summers*, 669 F. Supp. 2d at 663; *Starke*, 2007 U.S. Dist. LEXIS 19512, at *13-14 (“While the City may attempt to deny the fact that it is indeed a

Cross on top of the water tower, the attitudes and comments of the citizens of and an official in the City contradict any such notion.”).

In *Trunk*, groups launched petitions to save the cross and a local law center declared, “Christ won the war on Calvary.” 629 F.3d at 1119-20 & n.19. Others referred to the “history of Christianity in America.” *Id.* In determining the cross failed the effect test, the Ninth Circuit relied in part on these statements, ruling, “[t]he starkly religious message of the Cross’s supporters would not escape the notice of the reasonable observer.” *Id.* This evidence “cannot be ignored.” *Id.* The court also found statements by non-Christian veterans probative, such as, “I don’t know if it is a Christian monument, but it does not speak for me.” *Id.* at 1124-25.

Nearly identical statements from individuals on both sides of the issue are present on this record (J.A.1386-1435;3220-83), yet were rejected by the court as irrelevant. A mere sample includes:

- Jazzelle: “I’m a veteran and an Atheist. How does this show respect [sic] for my service in any way?” (J.A.3262).
- David: “I am a disabled combat Marine. I served with Muslims, Christians, atheists, even a Satanist and a Wiccan. So, why should it only represent [C]hristians?” (J.A.3261).
- Yochanan: “My Great Grand-father, served in WW1, and he was Jewish. My father served in the US Navy WW!!, [sic] and he was

Jewish. I did my time also in the US Navy. Viet-Vet, and I am Jewish. My son has served along-side Buddhists, Hindis, Muslims, Christians, believers, and Atheists, in Iraq. Don't we all deserve respect for our service to our country? Or are only Christian Veterans deserving of our Country's Respect.?" (J.A.1455).

- Travis: "Christians have rights. God rules this country. Not left wing God hating homosexual atheists trying to destroy it like cancer..." (J.A.1406)
- Cheverly American Legion: "Please go to this site (if you want to help save Peace Cross) and sign the petition... For GOD and Country" (J.A.819).
- Jean: "Many non-Christians gave their lives for this country, too - or don't they count?!!!" (J.A.3260)

E. The court failed to meaningfully distinguish this case from the few cross cases it did cite.

In applying the effect prong, the district court attempted to distinguish *Trunk* on the ground that Bladensburg Cross "functioned expressly and overtly as a memorial for its entire history." (J.A.3450-51). But many courts have found crosses unconstitutional despite functioning expressly and overtly as a memorial for their entire history, *infra*. The court of course, ignored most of these cases.

Indeed, the Ninth Circuit explicitly found “unpersuasive the fact that the [Mt. Helix] cross was *built and dedicated as a memorial* to a private individual.” *Ellis*, 990 F.2d at 1520-25 (emphasis added). In *Duncan*, the Tenth Circuit held that roadside crosses unconstitutionally endorsed religion, irrespective of the fact they were “*clearly* intended as memorials,” and functioned overtly as such for their entire history, affixed with plaques *and* biological information making this evident. 616 F.3d at 1150-51 (emphasis added).⁸

The unconstitutional *Lake Elsinore* cross was originally and expressly designed as a war memorial. 2014 U.S. Dist. LEXIS 25180, *2-5, *33. The *Gonzales* crucifix also functioned as a war memorial for its entire history, evidenced by the dedication speech and plaque, even though shrubs later obscured it. 4 F.3d at 1414-19. The unconstitutional concrete cross on a *military base* in *Jewish War Veterans* was dedicated as a war memorial. 695 F. Supp. at 5-7, 13-14.

The memorial crosses and Stars of David in *Eckels* were also erected with the overt and express purpose for “honoring of the county’s war dead,” though the parties disputed when the concept originated. 589 F. Supp. at 231. But the court held that in the “context of a war memorial, their primary effect is to give the impression that only Christians and Jews are being honored by the county.” *Id.* at 235.

⁸ The court only cited *Duncan* to support its conclusion that the Cross satisfied the purpose test. (J.A.3445).

Finally, the privately donated cross in *Eugene* functioned overtly and expressly as a war memorial for its *entire* history of *city* ownership. 93 F.3d at 618-19; *id.* at 625 (O’Scannlain J., concurring).

Beyond failing to distinguish *Trunk* and *Duncan*, the court also summarily dismissed *Rabun*, *Eugene*, and *Gonzales*, parenthetically, on the sole ground that they were “imbued with long-standing and explicit religious histories.” (J.A.3450). But the Cross is indistinguishable, as it has an explicit religious history, *supra* at 8-17. Furthermore, the court failed to explain how these cases are distinguishable under the *effect* prong where “intent is irrelevant.” *Constangy*, 947 F.2d at 1151. This is critical because the Eleventh Circuit in *Rabun* never reached the effect prong, finding it sufficient the cross failed the purpose prong. 698 F.2d at 1109. As to *Eugene*, the cross’s supposed “religious purpose” (J.A.3450) played *no role* in the majority’s conclusion it failed the *effect* test. 93 F.3d at 619-20. The concurrence specifically admonished the court for ignoring the cross’s *purpose and history*. *Id.* at 626. In evaluating *effect* in *Gonzales*, the Seventh Circuit similarly did not focus on religious history or purpose in its analysis. 4 F.3d at 1422.

VI. THE CROSS'S RELIGIOUS HISTORY AND USAGE DEEPENS ITS INTRINSICALLY RELIGIOUS MESSAGE.

The “history of this Cross only deepens its religious meaning.” *Trunk*, 629 F.3d at 1118-19, 1124. (J.A.288;1223-32).⁹ As outlined in detail, *supra* at 8-17, religion played a central role in the Cross’s purpose, planning, and usage.

Bladensburg Cross was known as a “Calvary Cross,” built with sponsors expressing deep religious intent just after the county erected a secular memorial, and it has consistently been used for Christian religious activity, including “Sunday Services.” Further, the dedication and rededication ceremonies included prayers by Christian clergy and the keynote speech declared Bladensburg Cross “symbolic of Calvary.” (J.A.28;211;288;1129-34;1176;1486;1876;1891;1936;2727;3430). *See Green*, 568 F.3d at 801; *Felix v. City of Bloomfield*, 36 F. Supp. 3d 1233, 1252 (D.N.M. 2014)(looking to “statements at the dedication ceremony”). This history casts “serious doubt on any argument that it was intended as a generic symbol, and not a sectarian one.” *Trunk*, 629 F.3d at 1124.

The Cross “is not only a preeminent symbol of Christianity, it has been consistently used in a sectarian manner.” *Id.* Virtually every documented event

⁹ However, the *Lemon* effect analysis does not require a detailed inquiry into a display’s origins, especially where it is intrinsically religious. *E.g.*, *Harris*, 927 F.2d at 1415 (“No appeal to history can abate that [sectarian] message.”). “Prong two...looks to the effect of the display itself, not to the display’s origin.” *Lambeth*, 407 F.3d at 272.

held at the Cross has included religious activity (such as prayers) and has involved the participation of Christian clergy.

Puzzlingly, in the face of this uncontroverted evidence, the court found, and placed substantial weight upon the notion that “[t]he setting does not readily lend itself to meditation or any other religious activity.” (J.A.3456)(quoting *Van Orden v. Perry*, 545 U.S. 677, 702 (2005)(Breyer, J., concurring)). It is undisputed the annual services include prayers by Christians. (J.A. 859-60;2536-40)(Doc.83-1,p.22). A non-Christian veteran testified that these services are a “constant reminder that we...non-Christian veterans, are outsiders and are unwelcome,” particularly because they “include prayers.” (J.A.1046¶10).

The court apparently concluded these prayers are not “religious activity” because they are delivered in a “commemorative” context. But prayer “is the quintessential religious practice[.]” *Jaffree v. Wallace*, 705 F.2d 1526, 1534-35 (11th Cir. 1983), *aff’d* 472 U.S. 38 (1985). It does not lose its religious character because “it occurred in conjunction with secular activities.” *Harris v. Chicago*, 218 F. Supp. 2d 990, 994 (N.D. Ill. 2002). *E.g.*, *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290 (2000)(football games); *Doe v. Crestwood*, 917 F.2d 1476, 1478-79 (7th Cir. 1990)(religious activity endorses religion even when it “takes place in company with secular events[.]”).

Significantly, in *Hewett v. City of King*, 29 F. Supp. 3d 584, 596, 635-36 (M.D.N.C. 2014), the court ruled a city's participation in the Legion's Veteran's Day "commemorative" events unconstitutionally endorsed religion because of "the religious activities that are part of the annual ceremonies."

Indeed, the Cross "has a long history of religious use and symbolism that is inextricably intertwined with its commemorative message." *Trunk*, 629 F.3d at 1118. For its entire history, the "recognition of the Memorial as a tribute to veterans has usually been coupled with Christian ceremonies and statements about the Cross's religious significance." *Id.* at 1121. "The simultaneous invocation of the Cross as a tribute to veterans and a 'gleaming [] symbol of Christianity' lends a distinctly sectarian tone to the Memorial's secular message of commemoration." *Id.*

Relatedly, the court's assertion that prayers "outside of the public school context" generally "do not violate the Establishment Clause" (J.A.3451)(citing legislative prayer cases) is both wrong and irrelevant. *E.g.*, *Mellen v. Bunting*, 327 F.3d 355, 370-71 (4th Cir. 2003)(military institute prayers); *Constangy*, 947 F.2d at 1149 (courtroom); *Hall*, 630 F.2d at 1019-20 (state map). "When the [Supreme] Court held that a state legislature may open with prayer [in *Marsh*], it did so because of the deep roots of the practice, not because prayer in the context of legislation is secular." *Crestwood*, 917 F.2d at 1478-79.

Finally, the court erred by deeming what it believed was an absence of “religious activity” dispositive, apparently accepting Legion’s argument that the absence of “religious use...is fatal.” (Doc.83-1,p.50)(J.A.3451). Appellants are not aware of a single cross case that has proven fatal for absence of religious usage. Rather, “[t]his kind of historical significance *simply exacerbates* the appearance of governmental preference[.]” *Carpenter*, 93 F.3d at 631 (citing *Ellis*, 990 F.2d at 1526)(emphasis added). *See Trunk*, 629 F.3d at 1124.

Cross memorials have been held unconstitutional despite a *complete absence* of religious activity, *unlike here*. *E.g.*, *Duncan*, 616 F.3d at 1159 n.11. *See also Eugene*, 93 F.3d at 617-20 (no mention of non-commemorative religious services). In *Jewish War Veterans*, the court held a war memorial cross, which stood for over twenty-two years, unconstitutional, even though the parties “disagree[d] about whether the cross has served as a backdrop for [religious] services.” 695 F. Supp. at 5-8, 13-14. The court ruled: “The differences cannot be resolved on this record, *but they are not material.*” *Id.* (emphasis added).

VII. BLADENSBURG CROSS FOSTERS EXCESSIVE ENTANGLEMENT WITH RELIGION.

M-NCPPC’s persistent monitoring, maintenance, significant renovations, and funding (over \$117,000 since 1961, with additional \$100,000 allocated in 2008)(J.A.562-64;1149-66)) of an enormous Christian cross fosters excessive entanglement with religion, failing *Lemon*’s third prong. “[P]ervasive monitoring

or other maintenance by public authorities” of a religious monument amounts to excessive entanglement. *Lambeth*, 407 F.3d at 273. “[T]he involvement of government funds is [also] a factor to consider[.]” *Constangy*, 947 F.2d at 1152. Given the rapidly deteriorating state of the Cross, extensive involvement and funding can be expected to continue. (J.A.2479-2502).

It is even sufficient, without evidence of extensive projects, that M-NCPPC “owns, finances, and maintains” the Cross and its lighting system. *Doe v. Cnty. of Montgomery*, 915 F. Supp. 32, 38 (C.D. Ill. 1996).(J.A.587;596-97;1085-96). *See Starke*, 2007 U.S. Dist. LEXIS 19512, at *19; *Mendelson*, 719 F. Supp. at 1071. The court did not disagree but instead found the “the Monument itself is not a governmental endorsement of religion.” (J.A.3454). Having shown conclusively above that the Cross does endorse religion, the court’s conclusion was erroneous.

VIII. THE COURT ERRED IN APPLYING JUSTICE BREYER’S CONCURRENCE IN *VAN ORDEN*.

The court erred in applying the *Van Orden* “legal judgment” test, derived from Justice Breyer’s concurrence in a Ten Commandment decision, because it is limited to a very narrow category of “difficult borderline cases” where the secular aspects of a display clearly “predominate” over any religious component. 545 U.S. at 700-02 (Breyer, J., concurring). Here, the 40-foot Christian cross clearly predominates over any supposed secular components (J.A.34;2485), making it vastly distinguishable from *Van Orden*, which involved a small (6-foot) monument

situated “in a large park containing 17 [secular] monuments and 21 historical markers” of similar size. *Id.*

Importantly, no court has exclusively applied *Van Orden* to a cross case. Most have eschewed *Van Orden*, applying *Lemon* instead, including *Duncan*, *Starke*, and *Cabral*. Of course, *Van Orden* is not binding on any court because a majority could not be reached on the applicable standard. See *ACLU v. Mercer Cnty.*, 432 F.3d 624, 636 & n.11 (6th Cir. 2005). Even courts determining *Ten Commandments* displays have applied *Lemon* exclusively. See *ACLU v. McCreary Cnty.*, 607 F.3d 439, 445 (6th Cir. 2010); *Green*, 568 F.3d at 797-98, & n.8.

Nor is this a difficult borderline case. The Tenth Circuit in *Duncan* properly applied *Lemon* exclusively, holding “the memorial crosses at issue here cannot be meaningfully compared to the Ten Commandments display.” 616 F.3d at 1162. The *Trunk* court seriously doubted it was required to apply *Van Orden*, explaining the “wide recognition of the Cross as a religious symbol...distinguishes the Memorial from...*Van Orden*.” 629 F.3d at 1120.

Although *Van Orden* is inapposite, the Cross fails even if it is considered. The *Trunk* court reluctantly explained that *Van Orden* analysis considers, “the meaning...of the Latin cross,” the “Memorial’s history, its secularizing elements, its physical setting, and the way the Memorial is used.” *Id.* at 1110. As shown

extensively above under *Lemon*, a consideration of these factors results in the same inescapable conclusion that the Cross unconstitutionally endorses Christianity.

Apart from the fact Bladensburg Cross is not surrounded by numerous displays of similar size and has no prominent secular trappings, “the Cross stood alone” for much of its history. *Id.* at 1103. (J.A.30;1973;1996). Conversely, in *Van Orden v. Perry*, 351 F.3d 173, 175-76 (5th Cir. 2003), the first monument placed on the capitol grounds in 1891 was a secular statue. *Sixteen* “additional monuments” had since been erected; the Ten Commandments were not donated until 1961. *Id.*

Nor is the Cross a “passive monument.” (J.A.1271-1353;3440;3455). Unlike a public park that one must take the initiative to visit, Bladensburg Cross is prominently situated in a busy intersection, making it virtually impossible to ignore or overlook. (J.A.34;1980). Finally, without suggesting that purpose, history, and usage are material to *Lemon* effect, Appellants amply demonstrated that such factors *deepen* the Cross’s religious message.

Like its *Lemon* analysis, the court’s *Van Orden* analysis rested on erroneous factual assumptions, including: (1) motorists can see the “U.S.” star *and* interpret it as a Legion emblem; and (2) the Cross’s founders had a “secular purpose.”(J.A.3454-57). But the monument does *not* identify the Legion, in contrast to the Ten Commandments, which “*prominently* acknowledge[d] that the Eagles donated the display.” 545 U.S. at 701 (Breyer, J., concurring)(emphasis added).

Second, the undisputed evidence belies the notion that the Cross's founders were not religiously motivated, *supra* at 8-17, and that their "purpose was to remember and honor Prince George's County's fallen soldiers" (J.A.3455). For one, the county had just erected a *secular* memorial dedicated to that very purpose, *supra. Lake Elsinore*, 2014 U.S. Dist. LEXIS 25180, *22 ("the use of a religious symbol where one is not necessary evidences a religious purpose."). Further, Christian clergy and prayers were an integral part of the fundraising and dedication ceremonies. *Books*, 235 F.3d at 296, 303 ("The participation of these influential members of several religious congregations makes it clear that the purpose for displaying the monument was [religious]"). Of course, "the cross dramatically conveys a message of governmental support for Christianity, whatever the intentions...may be." *St. Charles*, 794 F.2d at 271.

Finally, the court's "suggestion that the longevity and permanence of the Cross diminishes its effect has no traction." *Trunk*, 629 F.3d at 1122 (J.A.3456-57). The Supreme Court has 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). Establishment Clause violations may not be obvious "to those who share a common background."

Id. Consequently, “[e]ach day...brings a new duty on the government’s part, and a corresponding new right to seek vindication[.]” *Id.*

Many crosses found unconstitutional were unchallenged for decades, including Mt. Soledad. 629 F.3d at 1102-03 (**76** years). Mt. Helix stood “unchallenged” for “sixty-one years.” *Murphy v. Bilbray*, 782 F. Supp. 1420, 1432 (S.D. Cal. 1991) *aff’d sub nom.*, 990 F.2d 1518. In *Carpenter*, the Ninth Circuit rejected history as a basis to uphold a 60-year-old cross, finding this view rested “on the mistaken notion that ‘the longer the violation, the less violative it becomes.’” 93 F.3d at 631-32 (citing *Gonzales*). *See also Gonzales*, 4 F.3d at 1415 (unchallenged **30** years); *Harris*, 927 F.2d 1401 (**89**); *Friedman*, 781 F.2d 777 (**60**).

The longstanding nature of a religious display exacerbates the injury because “religious outsiders [must] tolerate these practices...with the awareness that those who share their religious beliefs have endured these practices for generations.” Steven B. Epstein, *Rethinking the Constitutionality of Ceremonial Deism*, 96 COLUM. L. REV. 2083, 2164 (1996). Such “heritage of official discrimination against non-Christians has no place in the jurisprudence of the Establishment Clause.” *Allegheny*, 492 U.S. at 603-05.

CONCLUSION

“The principal symbol of Christianity, this nation’s dominant religion, simply 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.

For the foregoing reasons, the District Court erred in denying Appellants’ Motion for Summary Judgment and granting Appellees’ Cross-Motions. Appellants respectfully request that the Court REVERSE with instructions to enter judgment in favor of Appellants, and REMAND to determine the appropriate amount of attorney’s fees and costs.

REQUEST FOR ORAL ARGUMENT

Pursuant to Local Rule 34(a), Appellants respectfully request that this Court grant them oral argument on the issues presented by this appeal.

Respectfully submitted:

February 29, 2016

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CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 13,982 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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 this brief has been prepared in a proportionally spaced typeface using Microsoft® Word 12.2.8 in 14-point font size in Times New Roman.

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I certify that on February 29, 2016, the foregoing document was served on all parties or their counsel of record through the CM/ECF system.

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