No. 17-13025

In the United States Court of Appeals for the Eleventh Circuit

AMANDA KONDRAT'YEV, *et al.*

Plaintiffs-Appellees,

v.

CITY OF PENSACOLA, FLORIDA, *et al.*

Defendants-Appellants.

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

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CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

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

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American Civil Liberties Union (*amicus curiae*)

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

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Dated December 14, 2017

Respectfully submitted,

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INTRODUCTION

Plaintiffs do not dispute that the Bayview cross was first erected 76 years ago as Pensacolians grappled with a national crisis. They do not dispute that it sits in a recreational setting far from any government building, with a plaque on the bandstand saying it was privately sponsored, donated, and dedicated. And they do not dispute that it is one of over 170 local displays commemorating Pensacola's history and culture—and one of many similar displays across the country. Given these facts, Pensacola's decision to treat the cross no differently than any other monument is fully consistent with *Van Orden* and *Town of Greece*.

Lacking good arguments under these cases, Plaintiffs ask the Court to disregard them—and instead apply the discredited *Lemon* test. Even then, they mischaracterize *Lemon*, claiming that crosses are "exclusively religious" and "presumptively" unconstitutional, and that courts are "virtually unanimous" in banning them. Resp. 11-12, 25. But that is incorrect. The Supreme Court and multiple circuits have held that crosses are *not* exclusively religious or presumptively unconstitutional, and most

courts since *Van Orden* and *Town of Greece* have upheld them. Here, Pensacola's actions satisfy *Lemon* because they communicate that Pensacola values its history and culture—not that it endorses Christianity.

In any event, Plaintiffs lack standing. This Court has never found standing to challenge a religious display unless plaintiffs incurred costs to avoid the display or could not avoid it during normal interactions with the government. Plaintiffs admit that neither circumstance is present here. Thus, they lack standing.

* * *

The broader question raised by this case is fundamental: How can our society remember its history and culture? May it acknowledge the complete picture, including the religious? Or must it "stifle[] any but the most generic reference to the sacred"? *Town of Greece v. Galloway*, 134 S. Ct. 1811, 1822 (2014). The Supreme Court has already answered that question: acknowledging religion is permissible. Plaintiffs' arguments to the contrary would "lead the law to exhibit a hostility toward religion that has no place in our Establishment Clause traditions." *Van Orden v. Perry*, 545 U.S. 677, 704 (2005) (Breyer, J., concurring).

FACTUAL BACKGROUND

Plaintiffs distort several facts. First, trying to minimize the age of the cross, they claim for the first time on appeal that the Jaycees erected a "temporary" cross "each year" from 1941 to 1969. Resp. 17. But Plaintiffs cite no evidence for this claim; they cite only their attorneys' summary of newspaper articles. *Id.* (citing "R.415"). No article says that the cross was temporary. Multiple articles refer to "the cross," assuming a longstanding structure. *See* Dkt. 30-6 at 1; Dkt. 31-3 at 3-4; Dkt. 31-6 at 3-4; Dkt. 31-7 at 9-11; Dkt. 31-8 at 3-4, 9-10. And Pensacola's records state that the Jaycees erected the 1969 cross in the "same location as the present one"—meaning an older cross was already "present." Dkt. 31-2 at 1. Thus, the district court rightly concluded that a cross "has stood on public property in one form or another for approximately 75 years." Dkt. 41 at 2.

Second, Plaintiffs claim that "the City was an official 'co-sponsor' of [three] Easter services." Resp. 5 & nn. 21-25. But that is false. The supposed "co-sponsorship" is actually Pensacola's viewpoint-neutral policy of waiving "special event" fees for *all qualified nonprofit events*. Dkt. 36-1 at 2, 6-7. As explained (Br. 12-13), Pensacola's Code deems any gathering of 30+ people a "special event" subject to a "user fee." Dkt. 31-16 at 43,

46. But the user fee can be waived "for nonprofit organizations" that provide other services to the City. *Id.* at 46; Dkt. 36-1 at 2. Under this policy, Pensacola has waived user fees for a diverse array of nonprofits, Dkt. 36-1 at 6-7, including the Jaycees in 2008-10. *Id.* at 2. Far from making Pensacola a "co-sponsor," this policy keeps Pensacola neutral. Indeed, if Pensacola denied waivers based on religious content, that would violate the Free Speech Clause. *See Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 828 (1995) ("the government offends the First Amendment when it imposes financial burdens on certain speakers based on [religious] content").[1]

Third, Plaintiffs claim that Pensacola received "numerous complaints about the Cross including one nearly 20 years ago." Resp. 6. But Plaintiffs cite only three complaints. Two are demand letters *drafted by Plaintiffs' attorneys* shortly before filing suit. *Id.* (citing "R.25–37" and "R.39–40").

[1] Plaintiffs also claim that Pensacola "arrange[d] bus transportation," provided "a stand for speakers," and "clear[ed] grass" in the 1940s. Resp. 5. But Pensacola does this for all events, as needed, on a "religion neutral" basis. Dkt. 36-1 ¶¶ 6-7, 12-13. Plaintiffs also claim that Pensacola personnel "participat[ed]" in services in 1974 and 1975. Resp. 5. But Pensacola has no record of this, and no Pensacola personnel "ever participat[ed] in a religious event in an official capacity." Dkt. 36-1 ¶14; Dkt. 31-18 at 16-17.

The other is a declaration in this case claiming that an individual "voiced [an] objection" "[a]round" 1999 or 2000. Dkt. 39-2 at 2. The City has no record of this objection. But even if it were made, it was not a "legal" objection (*e.g.*, lawsuit) as required under *Van Orden*. 545 U.S. at 702 (Breyer, J., concurring) (the "determinative" factor is that "legally speaking" the monument "went unchallenged…until the single legal objection raised by petitioner"). And it came almost sixty years after the cross was erected.

Finally, Plaintiffs ask the Court to disregard undisputed, publicly available evidence of over 170 displays in Pensacola parks and dozens of crosses on public land nationwide. Resp. 23, 36. But this Court routinely takes judicial notice of facts "not subject to reasonable dispute" when they are based on "sources whose accuracy cannot reasonably be questioned." Fed. R. Evid. 201(b), (d). All the information cited by Pensacola comes from unquestioned sources. Addendum 1 is a report issued by Pensacola's Parks & Recreation Department; Addendum 2 includes information from agencies like the National Park Service, the Smithsonian Institution, and the American Battle Monuments Commission. This Court "ha[s] not hesitated to take judicial notice of agency records and reports." *Terrebonne*

v. Blackburn, 646 F.2d 997, 1000 n.4 (5th Cir. June 1, 1981) (en banc); *see also Dimanche v. Brown*, 783 F.3d 1204, 1213 n.1 (11th Cir. 2015) (agency report on agency website); *Rich v. Sec'y*, 716 F.3d 525, 533-34 (11th Cir. 2013) (government reports "referred to by [the appellant] on appeal"); *Hope v. Pelzer*, 240 F.3d 975, 979 n.8 (11th Cir. 2001) (DOJ report). Nor have other courts.[2] Given that these reports are undisputed, there is no reason to disregard them.[3]

ARGUMENT

I. Plaintiffs lack standing.

All four Plaintiffs lack standing. Br. 28-34. Plaintiffs do not claim taxpayer standing. Resp. 8-11. They admit that no Plaintiff took any steps

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[2] *See, e.g.*, *O'Toole v. Northrop Grumman Corp.*, 499 F.3d 1218, 1224–25 (10th Cir. 2007) ("It is not uncommon for courts to take judicial notice of factual information found on the world wide web."); *City of Sausalito v. O'Neill*, 386 F.3d 1186, 1223 n.2 (9th Cir. 2004) ("We may take judicial notice of a record of a state agency not subject to reasonable dispute."); *Maxberry v. Univ. of Ky. Med. Ctr.*, 39 F. Supp. 3d 872, 875 n.5 (E.D. Ky. 2014) ("records and information located on government websites…are self-authenticating") (collecting cases).

[3] This Court also has equitable authority to supplement the record to "aid [the Court in] making an informed decision," *Schwartz v. Millon Air, Inc.*, 341 F.3d 1220, 1225 n.4 (11th Cir. 2003), serve "the interests of justice," *id.*, or promote "judicial economy," *Cabalceta v. Standard Fruit Co.*, 883 F.2d 1553, 1555 (11th Cir. 1989). Here, the evidence does all three.

to avoid the cross and that Suhor even reserved the cross for his own ideological purposes. *Id.* Instead, they claim standing simply because they viewed the display and (years later) claimed to be offended. Resp. 8-9. But "[t]his theory of standing—I came, I saw, I was offended—does not satisfy the dictates of Article III." *Amici* Brief of Jews for Religious Liberty at 5. Rather, under *Rabun*, *Glassroth*, and *Valley Forge*, Plaintiffs must show that they assumed a burden to avoid a display or cannot avoid it during normal interactions with the government.

Plaintiffs have no answer for *Rabun* or *Glassroth*. This Court found standing in *Rabun* for only two plaintiffs—those who "testif[ied] as to their unwillingness to camp in the park because of the cross" and thus assumed a burden to avoid it. *ACLU of Ga. v. Rabun Cty. Chamber of Commerce, Inc.*, 698 F.2d 1098, 1108 (11th Cir. 1983). The Court did the same in *Glassroth*, finding standing only for "the two plaintiffs who have altered their behavior as a result of the monument." *Glassroth v. Moore*, 335 F.3d 1282, 1292 (11th Cir. 2003). Both decisions declined to address standing for plaintiffs "who ha[ve] not altered [their] behavior." *Id.* at 1293; 698 F.2d at 1108-09. Plaintiffs make no attempt to distinguish them.

Plaintiffs try to distinguish *Valley Forge* and *Obama* by saying that plaintiffs there read about the offensive conduct rather than having "direct contact" with it. Resp. 10. But neither case drew a line between *reading* about offensive conduct and *viewing* it; they drew a line between "psychological" offense and a concrete injury required by Article III—the same line drawn by *Rabun* and *Glassroth*.

Unable to distinguish these cases, Plaintiffs cite *Pelphrey* and *Saladin*, arguing that plaintiffs have standing even if they "*chose* to subject [themselves]" to a display they "easily could have avoided." Resp. 10-11. But neither case supports that proposition. Plaintiffs in *Pelphrey* were exposed to "invocations" during "Planning Commission meetings." *Pelphrey v. Cobb County*, 547 F.3d 1263, 1268, 1279-80 (11th Cir. 2008). The prayers were unavoidable if plaintiffs wanted to "satisfy[] a civic obligation" or fully participate in local government. *ACLU-NJ v. Twp. of Wall*, 246 F.3d 258, 266 (3d Cir. 2001) (Alito, J.). The same was true in *Saladin*, where plaintiffs had to view the city seal to pay their bills or

receive a commendation from the mayor. *Saladin v. City of Milledgeville*, 812 F.2d 687, 692 (11th Cir. 1987). Not so here.[4]

II. The Constitution is not presumptively hostile to crosses.

Even assuming the Court reaches the merits, Pensacola's actions are constitutional. The cross stood without controversy for 75 years and is one of over 170 displays commemorating Pensacola's history and culture. Far from endorsing Christianity, the cross memorializes how Pensacolians came together during World War II and acknowledges "the role of religion in American life." *Van Orden*, 545 U.S. at 686. This is expressly permitted under *Van Orden* and fully consistent with "historical practices and understandings" under the Establishment Clause. *Town of Greece*, 134 S. Ct. at 1819.

Plaintiffs' contrary argument rests primarily on the claim that crosses are an "exclusively religious symbol," Resp. 7, 11, 19, 29, 44, 45, 46, and therefore "almost always…unconstitutional"—"irrespective of how old

[4] Plaintiffs invoke *FFRF v. New Kensington Arnold School District*, 832 F.3d 469 (3d Cir. 2016). Resp. 10. But that plaintiff assumed a burden by removing her child from the school. *Id.* at 480-81. Plaintiffs also cite *AHA v. Maryland-National Capital Park & Planning Comm'n*, 874 F.3d 195, 200 (4th Cir. 2017). But the analysis there was cursory and it is unclear whether plaintiffs could avoid a display "in the center of one of the busiest intersections in Prince George's County." *Id.*

they [a]re, whether they [a]re displayed among other symbols or monuments, or [whether they] ha[ve] independent historical or practical significance." Resp. 11, 6-7.

But the Supreme Court has unanimously rejected the claim that a religious symbol "can convey only one 'message.'" *Pleasant Grove City v. Summum*, 555 U.S. 460, 474 (2009). Instead, "[t]he 'message' conveyed by a monument may change over time," and "it frequently is not possible to identify a single 'message.'" *Id.* at 476-77. The Court applied this reasoning to a cross in *Buono*, stating that the cross "evoke[d] far more than religion" and had a "complex meaning beyond the expression of religious views," including a "historical meaning." *Salazar v. Buono*, 559 U.S. 700, 721, 717 (2010) (plurality); *see also Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 770 (1995) (Thomas, J., concurring) (KKK cross display was "political act, not a Christian one"). Plaintiffs are wrong that a cross is an "exclusively religious symbol."[5]

[5] In support, Plaintiffs quote out-of-context dictum from *King v. Richmond County*, 331 F.3d 1271, 1285 (11th Cir. 2003). But *King upheld* a seal displaying the Ten Commandments, *id.* at 1273, and the Court did not yet have the benefit of *Summum* and *Buono*.

Plaintiffs' argument has also been rejected in their own cases. For example, *American Atheists v. Davenport* "reject[ed] Plaintiffs' argument that any time government conduct involves the use of a Latin cross, there is an Establishment Clause violation." 637 F.3d 1095, 1117 n.9 (10th Cir. 2010). And *Trunk v. City of San Diego* acknowledged that a cross "can acquire an alternate, non-religious meaning," including "localized secular meanings." 629 F.3d 1099, 1111 (9th Cir. 2011).

Plaintiffs try to bolster their claim by arguing that federal courts are "virtually unanimous" in striking down crosses. Resp. 12. But even assuming an artificial category of "cross cases" is the right frame of reference—and it is not—this is false. Plaintiffs omit decisions by the Second, Third, Fifth, and Tenth Circuits upholding crosses. *Am. Atheists, Inc. v. Port Auth.*, 760 F.3d 227 (2d Cir. 2014) (Ground Zero cross); *Tearpock-Martini v. Borough*, 674 F. App'x 138 (3d Cir. 2017) (sign with cross); *Briggs v. Mississippi*, 331 F.3d 499 (5th Cir. 2003) (flag with cross); *Murray v. City of Austin*, 947 F.2d 147 (5th Cir. 1991) (seal with cross); *Weinbaum v. City of Las Cruces*, 541 F.3d 1017 (10th Cir. 2008) (seal, sculpture, and mural with crosses). They ignore a recent Ninth Circuit decision upholding a large statue of Jesus with arms outstretched in blessing.

FFRF v. Weber, 628 F. App'x 952 (9th Cir. 2015). And they disregard two Supreme Court cases upholding crosses. *Pinette*, 515 U.S. 753 (cross in public forum); *Buono*, 559 U.S. at 706 (land transfer to preserve cross).

Plaintiffs also fail to mention that the vast majority of decisions striking down crosses came *before Van Orden*, *Buono*, and *Town of Greece*—all of which rejected *Lemon*. Indeed, since *Van Orden*, only three circuits have struck down crosses. *AHA*, 874 F.3d 195; *Trunk*, 629 F.3d at 1125; *Davenport*, 637 F.3d 1095. But three circuits have upheld them, *Am. Atheists*, 760 F.3d at 233; *Tearpock-Martini*, 674 F. App'x at 142; *Weinbaum*, 541 F.3d at 1022, and one has upheld a statue of Jesus, *Weber*, 628 F. App'x. at 953—meaning that, since *Van Orden*, circuits are split 4–3 in *favor* of displays of Jesus or a cross. Since *Town of Greece*, the split is 3–1 in favor of displays of Jesus or a cross. *Am. Atheists*, 760 F.3d at 233 (in favor); *Tearpock-Martini*, 674 F. App'x at 142 (same); *Weber*, 628 F. App'x. at 953 (same); *AHA*, 874 F.3d at 200 (against).

Plaintiffs also gloss over the fact that the three post-*Van Orden* decisions striking down crosses were sharply divided. In *Davenport*, four Tenth Circuit judges (including then-Judge Gorsuch) dissented from denial of rehearing. 637 F.3d at 1101-1111. In *Trunk*, five Ninth Circuit

judges did the same. *Trunk v. City of San Diego*, 660 F.3d 1091 (9th Cir. 2011). And in *AHA*, Chief Judge Gregory dissented, and a rehearing petition is pending. 874 F.3d at 215-222. By contrast, in the four circuit decisions upholding displays of Jesus or a cross (*Am. Atheists*, *Tearpock-Martini*, *Weinbaum*, and *Weber*), eleven of the twelve circuit judges voted to uphold the displays, and no circuit judge dissented from denial of rehearing. Thus, since *Van Orden*, the total vote count in circuit courts is 21–9 *in favor* of displays of Jesus or a cross.

Van Orden also marks a clear turning point when considering all votes in all cross cases. Before *Van Orden*, judges cast 54 votes to uphold crosses and 75 votes to strike them down—meaning 42% of votes were to uphold crosses. Since *Van Orden*, judges cast 47 votes to uphold crosses and 21 votes to strike them down—meaning 69% of votes were to uphold crosses. *See* Addendum 3 to this brief.

Of course, cases aren't decided by counting judicial noses. But even if one accepts Plaintiffs' invitation to do so, they are wrong that courts are "virtually unanimous" in striking down crosses.

III. Pensacola's actions are constitutional.

The parties disagree on two key issues—the controlling legal standard, and whether Pensacola satisfies it. We address each in turn.

A. This case is controlled by *Van Orden* and *Town of Greece*, not *Lemon*.

As we explained (Br. 36-50), the controlling legal standard comes from *Van Orden* and *Town of Greece*. Reading Plaintiffs' brief, however, is like entering a time machine. The only relevant "Supreme Court precedent[s]" are *Lemon* (1971) and *Allegheny* (1989). Resp. 24-25. The only "controlling" decision is *Rabun* (1983). Resp. 41. It's as if the last thirty years of jurisprudence never happened.

But this Court need not play Rip Van Winkle. Much has changed. After decades of criticism, the Supreme Court has taken three steps away from the *Lemon* test: *Van Orden*, *Buono*, and *Town of Greece*. Br. 36-42. Plaintiffs try to minimize these cases, without success.

First, they claim *Van Orden* has no effect on *Lemon*, because "on the very same day…the Court in *McCreary* applied *Lemon* to a different Ten Commandments display." Resp. 39. But since *McCreary*, the Supreme Court has rejected *Lemon* in *Buono* and *Town of Greece*. This Court, too, has rejected the argument that *Lemon* still controls because of *McCreary*.

Pelphrey, 547 F.3d at 1275-77; *id.* at 1282-83 (Middlebrooks, J., dissenting) (citing *McCreary*).

Second, Plaintiffs try to limit *Van Orden* to "borderline Ten Commandments cases." Resp. 39. But *Van Orden* was not so limited. Rather, the plurality emphasized that "[m]any of our recent cases simply have not applied the *Lemon* test," and *Lemon* is "not useful" in dealing with a "passive monument." 545 U.S. at 686. Justice Breyer cited extensive criticism of *Lemon*, urging the Court to stop using a "single mechanical formula" and instead consider the "underlying purposes of the [Religion] Clauses." *Id.* at 699-700.

Third, Plaintiffs cherry-pick lower-court decisions, claiming that "every single *cross* case decided since *Van Orden* found *Lemon* controlling." Resp. 40. But most of these are district court decisions that followed older circuit precedent without considering *Van Orden*.[6] The three circuit decisions were sharply divided over the effect of *Van Orden*. *See Trunk*, 660 F.3d at 1093 ("panel applied the wrong test"); *Davenport*, 637 F.3d at

[6] *See FFRF v. County of Lehigh,* 2017 WL 4310247 (E.D. Pa. Sept. 28, 2017); *AHA v. City of Lake Elsinore*, 2014 WL 791800 (C.D. Cal. Feb. 25, 2014); *Cabral v. City of Evansville*, 958 F. Supp. 2d 1018 (S.D. Ind. 2013); *Summers v. Adams*, 669 F. Supp. 2d 637 (D.S.C. 2009); *Am. Atheists, Inc. v. City of Starke*, 2007 WL 842673 (M.D. Fla. Mar. 20, 2007).

1110 (Gorsuch, J., dissenting) ("majority of the Supreme Court in *Van Orden* declined to employ the [*Lemon*] test"); *AHA*, 874 F.3d at 217-18 ("majority misapplies *Lemon* and *Van Orden*"). More importantly, Plaintiffs disregard decisions from this Court and other circuits holding that *Van Orden* displaced *Lemon*. Br. 42-45 (collecting cases).

Fourth, Plaintiffs claim *Buono* is irrelevant because "anything Justice Kennedy said about crosses…failed to garner a majority." Resp. 51. But that misses *Buono*'s significance. *Buono* was the Court's first Establishment Clause case since *Van Orden*, and the first since a leading proponent of *Lemon* (Justice O'Connor) was replaced by a critic (Justice Alito). Justices Scalia and Thomas have long rejected *Lemon*. So when Justices Kennedy, Alito, and Roberts went out of their way to criticize "the so-called *Lemon* test" and indicate it is no longer "appropriate," 559 U.S. at 708, 720-21, they confirmed that a majority of the Court has rejected *Lemon*—and in the context of a so-called "cross case" no less.

Four years later, the same majority rejected *Lemon* in *Town of Greece*. Plaintiffs dismiss *Town of Greece* as a "legislative-prayer exception." Resp. 35. But *Town of Greece* itself rejected that argument. The Court noted that "*Marsh* is sometimes described as *'carving out a [legislative-*

prayer] exception' to the Court's Establishment Clause jurisprudence, because it sustained legislative prayer without subjecting the practice to [the *Lemon* test]." 134 S. Ct. at 1818 (emphasis added). "Yet *Marsh must not be understood [this way]*." *Id.* at 1819 (emphasis added). Instead, *Marsh* teaches that "the Establishment Clause must be interpreted 'by reference to historical practices and understandings.'" *Id.* In other words, *Marsh* and *Town of Greece* are now the norm; *Lemon* is the exception.

Alternatively, Plaintiffs claim that "not a single cross case decided after [*Town of Greece*] applied the legislative-prayer exception." Resp. 35. But they cite only two circuit court decisions, neither of which considered the effect of *Town of Greece*. *AHA*, 874 F.3d 195; *Am. Atheists*, 760 F.3d 227. Several courts that *have* considered this question outside the context of legislative prayer have relied on *Town of Greece*, not *Lemon*.[7]

[7] *See*:

- *Ctr. for Inquiry, Inc. v. Marion Circuit Court Clerk*, 758 F.3d 869, 875 (7th Cir. 2014) (ignoring *Lemon* and noting that under *Town of Greece* "the meaning of the Constitution's religion clauses depends in part on historical practices");
- *Barber v. Bryant*, 193 F. Supp. 3d 677, 719 (S.D. Miss. 2016) (relying on *Town of Greece* and saying "[t]he *Lemon* test need not be applied"), *rev'd on other grounds*, 860 F.3d 345 (5th Cir. 2017);

Plaintiffs' argument is also inconsistent with the Justices' views. As two Justices explained, *Town of Greece* "abandon[ed *Lemon*'s] antiquated 'endorsement test'" not only for legislative prayer, but for cases involving "religious displays." *Elmbrook Sch. Dist. v. Doe*, 134 S. Ct. 2283, 2283-84 (2014) (Scalia, J., dissenting from denial of certiorari). Thus, "[a]fter *Town of Greece*, [Plaintiffs' argument] that the endorsement test remains part of the prevailing analytical tool for assessing Establishment Clause challenges misstates the law." *Id.* at 2284.

Plaintiffs' argument is also inconsistent with this Court's cases. Since *Van Orden*, this Court has addressed the merits of an Establishment Clause claim in only two published decisions; both recognized that *Lemon* was not controlling. Br. 42-43. Plaintiffs claim that *Smith v. Governor for Ala.*, 562 F. App'x 806 (11th Cir. 2014) applied *Lemon*. Resp. 41. But that was an unpublished *pro se* prisoner decision decided before *Town of Greece* where neither party briefed *Van Orden*. Plaintiffs also say the Court "implicitly" affirmed a "district court's application of *Lemon*" in *Selman v. Cobb County School District*, 449 F.3d 1320 (11th Cir. 2006). But

- *Harrington v. Hall Cty. Bd. of Supervisors*, 2016 WL 1274534, at *15-16 (D. Neb. Mar. 31, 2016) (applying *Town of Greece*, not *Lemon*).

there this Court merely remanded for further factual finding, explicitly *refusing* "to make any implicit rulings on any of the legal issues." *Id.* at 1338. The bottom line is that in twelve years since *Van Orden*, no published decision of this Court has ever applied *Lemon*. Rather, *Town of Greece* is controlling.

B. Pensacola's actions are constitutional under the historical approach of *Van Orden* and *Town of Greece*.

Pensacola's actions easily pass muster under the historical approach of the *Van Orden* plurality and *Town of Greece*. Under these cases, the question is whether Pensacola's conduct "fits within the tradition long followed" in our nation's history. *Town of Greece*, 134 S. Ct. at 1819. As we have explained (Br. 53-57), Pensacola's actions fit easily within that history. Acknowledgements of religion were common at the founding, including monuments with explicitly religious content. Br. 53-54. Crosses were erected both at the founding and when the Establishment Clause was incorporated against the States in 1868. Br. 54-55. And crosses remain common nationwide. Br. 55-56. As the district court said, the founders "would have most likely found this lawsuit absurd." Dkt. 41 at 6.

In response, Plaintiffs offer little. First, they claim "there is a complete lack of evidence that our founding fathers were aware of the practice of

placing crosses…in public parks." Resp. 36 (quoting *ACLU v. Eckels*, 589 F. Supp. 222, 237 (S.D. Tex. 1984)). But that is wrong and mischaracterizes *Van Orden* and *Town of Greece*. Both cases considered the "evidence" at a higher level of generality. In *Town of Greece*, the Court cited no evidence of founding-era *municipal* prayers. The earliest municipal prayer it cited was from 1910. 134 S. Ct. at 1819. It nevertheless upheld municipal prayers because they were "part of our expressive idiom, similar to the Pledge of Allegiance, inaugural prayer, or the recitation of 'God save the United States and this honorable Court.'" 134 S. Ct. at 1825. Similarly, the *Van Orden* plurality pointed to no Ten Commandments monuments erected at the founding; it pointed to a 1789 Thanksgiving Day Proclamation, an 1804 sailors' monument, an 1897 Moses statue, the Washington, Lincoln, and Jefferson Memorials (1888, 1922, and 1943), and a handful of Ten Commandments monuments from the 1900s. 545 U.S. at 686-89 & n.9. Here, the evidence includes many more, and older, crosses. Br. 55, Addendum 2; *Amicus* Brief of Int'l Mun. Lawyers' Assoc. at 16-24.

Second, Plaintiffs say "most" of these historic crosses "are in cemeteries such as Arlington, and are 'parts of much larger secular or multi-faith

complexes.'" Resp. 36. Not true. Plaintiffs cite only two examples—the Argonne Cross and Canadian Cross of Sacrifice—while omitting all others. *Id.* They also claim that the Jaycees' cross has greater "size and prominence," Resp. 37, but no evidence supports this.

Finally, in a moment of candor, Plaintiffs argue that all of these other historic crosses "might well be unconstitutional" too. Resp. 37. But that is precisely why *Town of Greece* rejected *Lemon*: because it would "condemn a host of traditional practices that recognize the role religion plays in our society." 134 S. Ct. 1821; *Amici* Brief of Fourteen States at 7.[8]

C. Pensacola's actions are constitutional under *Van Orden*'s "legal judgment" approach.

Pensacola's actions are also consistent with *Van Orden*. There, despite the "undeniabl[e]…religious message" of the monument—which prominently stated, "I AM the LORD thy God" and "Thou shalt have no other gods before me" (545 U.S. at 700, 707-08)—Justice Breyer upheld the

[8] Plaintiffs' *amici* claim that a historical analysis favors Plaintiffs. But they show only that the founders opposed establishments of religion, not that they viewed passive monuments to *be* an establishment. As we explained (Br. 57 n.42), an "establishment" at the founding had a well-understood meaning, which did not include "limited government displays of a religious nature." *Felix v. City of Bloomfield*, 847 F.3d 1214, 1220 (10th Cir. 2017) (Kelly, J., dissenting from denial of rehearing *en banc*) (examining original meaning of the Establishment Clause).

monument based on "the context of the display" and its longevity. *Id.* at 700-02. Here, unlike *Van Orden*, the only text near the monument is secular—stating that it was sponsored and donated by a private group. The context is not the seat of government but one park among many with over 170 commemorative displays. And the display went unchallenged for not just 40 but 75 years. Br. 59-62.

Plaintiffs try to distinguish *Van Orden* on several grounds. First, they claim *Van Orden* applies only to monuments with a "dual secular meaning," and a cross "does not have a dual 'secular meaning.'" Resp. 43-44. But the Supreme Court rejected this argument in *Buono*, 559 U.S. at 715, 716, and other circuits have too. *Am. Atheists,* 760 F.3d at 239 (Ground Zero Cross is "a religious symbol or artifact with genuine historical significance"); *Weinbaum,* 541 F.3d at 1036 (city's "name and history eclipse the [crosses'] Christian symbolism").

Second, they argue that the monument in *Van Orden* was part of a larger "historical and legal presentation," while the monument here was "installed in isolation." Resp. 46. But that ignores the full context. The monument here is one of over 170 mostly nonreligious displays. And courts routinely consider not just the immediate physical vicinity of a

monument, but the larger "context of the community" and "the general history of the place." *Pinette*, 515 U.S. at 780–81 (1995) (O'Connor, J., concurring). For example, in upholding a sculpture and mural of crosses, the Tenth Circuit considered "the widespread use of multiple crosses *throughout the community*," including by "many secular businesses." *Weinbaum*, 541 F.3d at 1034 (emphasis added). And in upholding the Ground Zero Cross, the Second Circuit considered the entire context of the museum. *Am. Atheists*, 760 F.3d at 243-44. Here, the "context of the community" includes over 170 displays in Pensacola's parks.

Third, Plaintiffs say the cross is different because it was "installed" and "used" for the Jaycees' Easter events. Resp. 47-48. But again, this ignores the full context. The Jaycees were a "secular civic organization" trying to unite the community during a national crisis. *Amicus* Brief of Junior Chamber Int'l at 3-5. The cross has also been used for a variety of secular purposes, like Veterans Day and Memorial Day events, outdoor movie nights, and fundraising walks. Br. 22. Most importantly, "the thoughts or sentiments expressed by a government entity that accepts and displays [a monument] may be quite different from those of either its creator or its donor." *Summum*, 555 U.S. at 476. Here, Pensacola allows

the cross not because Pensacola endorses Christianity, but because it is part of a broader commemoration of Pensacola's history and culture.

Finally, Plaintiffs ask the Court to disregard the unchallenged, 75-year history of the monument. Resp. 48-50. But that is simply a repudiation of *Van Orden*.

D. Pensacola's actions are constitutional under *Lemon*.

Pensacola's actions are also permissible under *Lemon*.

Purpose. First, Pensacola's actions have a secular purpose: commemorating Pensacola's history and culture. Plaintiffs resist this conclusion in several ways.

First, they try to flip the burden of proof, claiming that the "defendant [must] show by a preponderance of the evidence that the display has a secular purpose." Resp. 25 (internal quotation omitted). Not so. "Plaintiffs bear the burden of proving that the [government] ha[s] violated the Establishment Clause." *Davenport*, 637 F.3d at 1118 n.10. Thus, "once the government proposes a possible secular purpose," Plaintiffs must "rebut the stated secular purpose with evidence showing that the articulated purpose is insincere or a sham." *King*, 331 F.3d at 1277 (11th Cir. 2003). Plaintiffs offer no such evidence here.

Instead, they ask the Court to "presume[]" an illicit purpose because the cross is a "symbol of Christianity." Resp. 25-26. But no court has adopted that presumption; many have rejected it—including the Second, Third, Fourth, Fifth, Seventh, Ninth, and Tenth Circuits, which all found cross displays to have a secular purpose.[9]

Finally, lacking any evidence of an illicit *government* purpose, Plaintiffs criticize the supposedly "religious stirrings" of the Jaycees. Resp. 26. But "the focus of this first *Lemon* test is on the government's purpose, and not that of a private actor." *Davenport*, 637 F.3d at 1118. Thus, courts have "reject[ed] [the] assertion that the presence of clergy at [a] dedication ceremony" "suggests a religious motive on the [government's] part." *Card v. City of Everett*, 520 F.3d 1009, 1020 (9th Cir. 2008). And courts have held that "the subjective motivation of [a private actor], in the purpose inquiry, is essentially irrelevant." *Green v. Haskell Cty. Bd. of Comm'rs*, 568 F.3d 784, 800 n.10 (10th Cir. 2009) (collecting cases); *Weinbaum*, 541 F.3d at 1036 ("[T]he artist's beliefs and intent are irrelevant").

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[9] *Weber*, 628 F. App'x at 953-54; *AHA*, 874 F.3d at 206; *Trunk*, 629 F.3d at 1108; *Davenport*, 637 F.3d at 1118; *Harris v. City of Zion*, 927 F.2d 1401, 1411 (7th Cir. 1991); *Tearpock-Martini,* 674 F. App'x at 142; *Weinbaum*, 541 F.3d at 1033; *Briggs*, 331 F.3d at 505-06; *Am. Atheists*, 760 F.3d at 242.

Here, Pensacola's purpose is to commemorate its history and culture—a plainly permissible purpose. *See Am. Atheists*, 760 F.3d at 239 (cross commemorated "the role faith played" at a time a national crisis); *Weber*, 628 F. App'x at 953 (statue of Jesus had "cultural and historical significance").[10]

Effect. Pensacola's actions are also permissible under *Lemon*'s second, "effect" prong. Plaintiffs claim an unconstitutional "effect" because the cross is an "exclusively religious symbol[]," is tall and "freestanding," contains "nothing…to deemphasize its religious nature," and has "been used for religious services." Resp. 28-33. But that is a blinkered view of the evidence. As this Court warned, "it is improper to '[f]ocus exclusively on the religious component of any activity,' as doing so 'would inevitably lead to its invalidation under the Establishment Clause.'" *King*, 331 F.3d at 1282 (quoting *Lynch v. Donnelly*, 465 U.S. 668, 680 (1984)). Instead, courts must consider the perspective of a "reasonable observer" who is

[10] *Rabun*, which rested solely on *Lemon*'s purpose prong, is no longer good law. Br. 49. It's also distinguishable. That cross was designed to promote "tourism"—*i.e.*, attract people. *Id.* It was new, 85 feet in the air, visible for miles, and touted as "a symbol of Christianity"—not a commemoration of history and culture. *Id.* Plaintiffs say none of these differences matter. Resp. 17-23. But under *Lemon*, these differences are crucial.

familiar with the entire context of the government's actions—including the "context of the community" and "the general history of the place." *Pinette*, 515 U.S. at 780–81 (O'Connor, J., concurring).

Here, considered in context, the primary effect of Pensacola's actions is to communicate that Pensacola values its history and culture. The reasonable observer would know that Pensacola's parks have over 170 commemorative displays and that Pensacola treats the cross no differently. The observer would also know that there is a plaque near the cross stating that it was sponsored and donated by the Jaycees, and that Pensacola treated the Jaycees' events no differently than any other private event. And the observer would know that the cross is smaller than other monuments in Pensacola's parks; that it is far from any government building; that it went unchallenged for 75 years; and that it is like other historic displays of religious symbols throughout the country. Based on this context, the reasonable observer would see a message of respect for Pensacola's history and culture—not an endorsement of Christianity.

That conclusion is also consistent with this Court's (pre-*Van Orden*) application of *Lemon*. In 2003, this Court considered two different Ten Commandments displays—striking down a monument erected by Roy

Moore in the state judicial building, *Glassroth*, 335 F.3d 1282, and upholding a county seal containing the Ten Commandments and a sword. *King*, 331 F.3d 1271. Both cases involved "a predominantly religious symbol." 335 F.3d at 1298-99. But the Court distinguished them. Moore's display was struck down because it was new rather than historic; it was erected for a "self-evident" religious purpose; it was the "focal point" in "an important public building"; and it included "text from the King James version of the Bible." *Id.* The seal was upheld because it "had been in use for more than one hundred thirty years"; was supported by "a plausible secular purpose"; included a secular symbol; and "did not include the text of the Ten Commandments." *Id.*

The cross here is more like the seal: It has stood for over 75 years; it furthers a secular purpose; it is far from any government building; it is one of over 170 mostly secular displays; and the text makes clear that it is privately sponsored, funded, and dedicated.

This conclusion is also supported by other circuits. In *American Atheists*, the Second Circuit upheld the Ground Zero Cross even though it was "an inherently religious symbol," was used extensively in "religious devotions," and was recently formed. 760 F.3d at 240. Its "primary effect" was

nonreligious, because it was a symbol of how people sought "hope and comfort in the aftermath of the September 11 attacks" and was part of a broader effort to commemorate history. *Id.* at 243-44. So too here.

Similarly, in *Weber*, the Ninth Circuit upheld a statue of Jesus even though it stood alone, was obviously "a religious figure," and was originally "religiously motivated." 628 F. App'x at 954. The primary effect was nonreligious, because it was "far from any government seat," was "privately" initiated, had no religious text, was located in a recreational setting, had been put to "secular…uses," was an "important aspect of the [area's] history," and had stood unchallenged for 60 years. *Id.* at 954. So too here. *See also Weinbaum*, 541 F.3d 1017 (upholding crosses connected to the city's history and culture); *Murray*, 947 F.2d 147 (same).

Plaintiffs rely mainly on three cases. Resp. 30-31. But they are distinguishable. The cross in *Trunk* was "visible from miles away," was "a flashpoint of secular and religious divisiveness" for two decades, and was marred by a "history of anti-Semitism." 629 F.3d at 1101, 1103, 1121-22. The thirteen crosses in *Davenport* "conspicuously b[ore]" the insignia of the state highway patrol; two were "located immediately outside the

[highway patrol] office"; and the State "would not allow" any "other symbols" except a cross. 637 F.3d at 1121 & n.13, 1112 n.2. And the cross in *AHA* was "prominently displayed in the center of one of the busiest intersection in [the county]" and was supported by over $100,000 in government funds. 874 F.3d at 200-01. Those three decisions also prompted dissents from ten circuit judges, whose reasoning is more persuasive.[11]

Entanglement. Nor do Pensacola's actions cause "excessive entanglement." Entanglement occurs when the government engages in "pervasive monitoring" of religious groups, *Midrash Sephardi, Inc. v. Town of Surfside*, 366 F.3d 1214, 1241 (11th Cir. 2004), "participate[s] in or lead[s]" religious activity, *Bown v. Gwinnett Cty. Sch. Dist.*, 112 F.3d 1464, 1474 (11th Cir. 1997), or "mak[es] religion-based inquiries," *Chabad-Lubavitch of Ga. v. Miller*, 5 F.3d 1383, 1389 (11th Cir. 1993). Plaintiffs allege none of that here.

[11] *Allegheny* is similarly distinguishable: the creche there was recent, not historic; stood in the most significant county building; and had "unmistakably clear" religious text. *County of Allegheny v. ACLU Greater Pittsburgh Chapter*, 492 U.S. 573, 598-600 (1989). *Allegheny* is also questionable given that the Court has now rejected *Lemon* and Justice Kennedy incorporated his *Allegheny* dissent into the *Town of Greece* holding. 134 S. Ct. at 1819, 1821.

Instead, they claim entanglement based on Pensacola's "maintenance" and "illumination" of the display. Resp. 33-34. But neither the Supreme Court nor this Court has ever found excessive entanglement based on maintenance of a religious display. Rather, this argument has been repeatedly rejected. *See, e.g.*, *Lynch*, 465 U.S. at 684 (creche); *Am. Atheists*, 760 F.3d at 244-45 (cross).

CONCLUSION

The decision below should be reversed.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because, excluding the parts of the brief exempted by Fed. R. App. P. 32(f) and 11th Cir. R. 32-4, this brief contains 6,451 words.

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

Dated December 14, 2017

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CERTIFICATE OF SERVICE

I certify that on December 14, 2017, I caused the foregoing brief to be filed electronically via the Court's electronic filing system, which then served it upon the following registered counsel of record for Plaintiffs-Appellees:

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ADDENDUM 3

Pre-*Van Orden* Cases (1966-2005)

Case	Citation(s)	Cross	Votes For	Votes Against
Paul v. Dade Cty.	Dade Cty. Cir. Court Nov. 28, 1966	Holiday Display	1	0
	202 So. 2d 833 (Fl. Ct. App. 1967)		3	0
Meyer v. Oklahoma City	Okla. Cty. Dist. Ct.	Monument	1	0
	496 P.2d 789 (Okla. 1972)		9	0
Eugene Sand & Gravel, Inc. v. City of Eugene	Lane Cty. Cir. Case #76314	Monument	0	1
	552 P.2d 596 (Or. Ct. App. 1976)		0	3
	558 P.2d 338 (Or. 1976)		4	3
Gilfillan v. City of Philadelphia	480 F. Supp. 1161 (E.D. Pa. 1979)	Monument	0	1
	637 F.2d 924 (3d Cir. 1980)		0	3
Am. Civil Liberties Union of Georgia v. Rabun Cty. Chamber of Commerce, Inc.	510 F. Supp. 886 (N.D. Ga. 1981)	Monument	0	1
	698 F.2d 1098 (11th Cir. 1983)		0	3
Greater Houston Chapter of Am. Civil Liberties Union v. Eckels	589 F. Supp. 222 (S.D. Tex. 1984)	Monument	0	1
Libin v. Town of Greenwich	625 F. Supp. 393 (D. Conn. 1985)	Holiday Display	0	1
Friedman v. Bd. of Cty. Comm'rs of Bernalillo Cty.	528 F. Supp. 919 (D.N.M. 1981)	Seal	1	0
	781 F.2d 777 (10th Cir. 1985) (en banc)		2	5

Case	Citation(s)	Cross	Votes For	Votes Against
Am. Civil Liberties Union of Ill. v. City of St. Charles	622 F. Supp. 1542 (N.D. Ill. 1985)	Holiday Display	0	1
	794 F.2d 265 (7th Cir. 1986)		0	3
Am. Civil Liberties Union of Miss. v. Miss. State Gen. Servs. Admin.	652 F. Supp. 380 (S.D. Miss. 1987)	Holiday Display	0	1
Jewish War Veterans of U.S. v. United States	695 F. Supp. 3 (D.D.C. 1988)	Monument	0	1
Mendelson v. City of St. Cloud	719 F. Supp. 1065 (M.D. Fla. 1989)	Monument	0	1
Murray v. City of Austin	744 F. Supp. 771 (W.D. Tex 1990)	Seal	1	0
	947 F.2d 147 (5th Cir. 1991)		2	1
Harris v. City of Zion	729 F. Supp. 1242 (N.D. Ill. 1990)	Seal	1	0
	927 F.2d 1401 (7th Cir. 1991)		1	2
	729 F. Supp. 1242 (N.D. Ill. 1990)	Seal	0	1
	927 F.2d 1401 (7th Cir. 1991)		1	2
Gonzales v. North Twp. of Lake Cty.	800 F. Supp. 676 (N.D. Ind. 1992)	Monument	1	0
	4 F.3d 1412 (7th Cir. 1993)		0	3

Case	Citation(s)	Cross	Votes For	Votes Against
Ellis v. City of La Mesa	782 F. Supp. 1420 (S.D. Cal. 1991)	Monument	0	1
	990 F.2d 1518 (9th Cir. 1993)		0	3
	782 F. Supp. 1420 (S.D. Cal. 1991)	Monument	0	1
	990 F.2d 1518 (9th Cir. 1993)		0	3
	782 F. Supp. 1420 (S.D. Cal. 1991)	Seal	0	1
	990 F.2d 1518 (9th Cir. 1993)		0	3
Capitol Square Review & Advisor Bd. v. Pinette	844 F. Supp. 1182 (S.D. Ohio 1993)	Holiday Display	1	0
	30 F.3d 675 (6th Cir. 1994)		3	0
	515 U.S. 753 (1995)		7	2
Robinson v. City of Edmond	No. 5:93-cv-00153 (W.D. Okla. June 1, 1994)	Seal	1	0
	68 F.3d 1226 (10th Cir. 1995)		0	3
Carpenter v. City & Cty. of San Francisco	803 F. Supp. 337 (N.D. Cal. 1992)	Monument	1	0
	93 F.3d 627 (9th Cir. 1996)		0	3
Separation of Church & State Comm. v. City of Eugene	No. 6:91-cv-06164 (D. Or. Aug. 20, 1996)	Monument	1	0
	93 F.3d 617 (9th Cir. 1996)		0	3
Granzeier v. Middleton	955 F. Supp. 741 (E.D. Ky. 1997)	Sign	0	1
Am. Civil Liberties Union of Ohio, Inc. v. City of Stow	29 F. Supp. 2d 845 (N.D. Ohio 1998)	Seal	0	1

Case	Citation(s)	Cross	Votes For	Votes Against
Paulson v. City of San Diego[1]	262 F.3d 885 (9th Cir. 2001)	Monument	3	0
	294 F.3d 1124 (9th Cir. 2002) (en banc)		4	7
Briggs v. Mississippi	No. 1:01-cv-00267 (S.D. Miss. Aug. 12, 2002)	Flag	1	0
	331 F.3d 499 (5th Cir. 2003)		3	0
Demmon v. Loudoun Cty. Pub. Sch.	342 F. Supp. 2d 474 (E.D. Va. 2004)	Monuments	1	0
Buono v. Norton	212 F. Supp. 2d 1202 (C.D. Cal. 2002)	Monument	0	1
	371 F.3d 543 (9th Cir. 2004)		0	3
Salazar v. Buono	364 F. Supp. 2d 1175 (C.D. Cal. 2005)	Monument	0	1
		Total	**54**	**75**
		Percent	**42%**	**58%**

[1] The district court decision in favor of the cross in this case has been excluded because the court ruled on mootness grounds, not the merits. *See Paulson v. City of San Diego*, No. 3:89-cv-00820 (S.D. Cal. Feb. 3, 2000).

Post-*Van Orden* Cases (2006-Present)

Case	Citation(s)	Cross	Votes For	Votes Against
Weinbaum v. City of Las Cruces	465 F. Supp. 2d 1164 (D.N.M. 2006)	Seal	1	0
	541 F.3d 1017 (10th Cir. 2008)		3	0
	465 F. Supp. 2d 1182 (D.N.M. 2006)	Sculpture	1	0
	541 F.3d 1017 (10th Cir. 2008)		3	0
	465 F. Supp. 2d 1182 (D.N.M. 2006)	Mural	1	0
	541 F.3d 1017 (10th Cir. 2008)		3	0
Am. Atheists, Inc. v. City of Starke	No. 3:05-cv-977, 2007 WL 842673 (M.D. Fla. Mar. 20, 2007)	Monument	0	1
Salazar v. Buono	502 F.3d 1069 (9th Cir. 2007)	Monument	0	3
	527 F.3d 758 (9th Cir. 2008) (denial of rehearing en banc)		5	0
	559 U.S. 700 (2010)		5	4
Am. Atheists, Inc. v. Davenport	528 F. Supp. 2d 1245 (D. Utah 2007)	Monuments	1	0
	616 F.3d 1145 (10th Cir. 2010)		0	3
	637 F.3d 1095 (10th Cir. 2010) (denial of rehearing en banc)		4	0
Trunk v. City of San Diego	568 F. Supp. 2d 1199 (S.D. Cal. 2008)	Monument	1	0
	629 F.3d 1099 (9th Cir. 2011)		0	3
	660 F.3d 1091 (9th Cir. 2011) (denial of rehearing en banc)		5	0
Summers v. Adams	669 F. Supp. 2d 637 (D.S.C. 2009)	License Plates	0	1
Cabral v. City of Evansville	958 F. Supp. 2d 1018 (S.D. Ind. 2013)	Monument	0	1

Case	Citation(s)	Cross	Votes For	Votes Against
Am. Atheists, Inc. v. Port Auth. of N.Y. & N.J.	936 F. Supp. 2d 321 (S.D.N.Y. 2013)	Monument	1	0
	760 F.3d 227 (2d Cir. 2014)		3	0
Freedom from Religion Found., Inc. v. Weber	951 F. Supp. 2d 1123 (D. Mont. 2013)	Jesus Statue	1	0
	628 F. App'x 952 (9th Cir. 2015)		3	0
Am. Humanist Ass'n v. City of Lake Elsinore	No. 5:13-cv-00989, 2014 WL 791800 (C.D. Cal. Feb. 25, 2014)	Monument	0	1
Am. Humanist Ass'n v. Maryland-Nat'l Capital Park & Planning Comm'n	147 F. Supp. 3d 373 (D. Md. 2015)	Monument	1	0
	874 F. 3d 195 (4th Cir. 2017)		1	2
Davies v. L.A. Cty. Bd. of Supervisors	177 F. Supp. 3d 1194 (C.D. Cal. 2016)	Seal	0	1
Tearpock-Martini v. Shickshinny Borough	196 F. Supp. 3d 457 (M.D. Pa. 2016)	Sign	1	0
	674 F. App'x 138 (3d Cir. 2017)		3	0
Freedom from Religion Found., Inc. v. Cty. of Lehigh	No. 16-4504, 2017 WL 4310247 (E.D. Pa. Sept. 28, 2017)	Monument	0	1
		Total	**47**	**21**
		Percent	**69%**	**31%**