

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

Brief of the International Municipal Lawyers Association
as *Amicus Curiae* in Support of Appellants and Reversal of the District Court

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Case No. 17-13025

**CERTIFICATE OF INTERESTED PERSONS
AND CORPORATE DISCLOSURE STATEMENT**

Pursuant to Fed. R. App. P. 26.1 and Eleventh Circuit Rules 26.1-26.3, *amicus* the International Municipal Lawyers Association (“IMLA”) states as follows: IMLA has no parent corporations and no publicly held corporation owns 10% or more of its stock. In addition to the persons and entities listed in the petitioners’ and the respondents’ Certificates of Interested Persons, the following persons and entities may have an interest in the outcome of this action:

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Dated October 3, 2017

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STATEMENT OF INTEREST

The International Municipal Lawyers Association (“IMLA”) is a non-profit professional organization of more than 2,500 local government attorneys. Since 1935, IMLA has served as a national, and now international, resource for legal information and cooperation on municipal legal matters. Its mission is to advance the development of just and effective municipal law and to advocate for the legal interests of local governments. It does so in part through extensive amicus briefing before the U.S. Supreme Court, the U.S. Courts of Appeals, and state appellate courts.

This case is of particular concern to local government attorneys practicing in the Eleventh Circuit—and, indeed, nationwide—because deciphering the Supreme Court’s Establishment Clause jurisprudence has for decades been one of the most taxing, confusing, and contentious areas of law for local government attorneys.

The governing legal principles are, however, far clearer than the district court believed. Recent developments in the Supreme Court—especially the watershed decision of *Town of Greece v. Galloway*, 134 S. Ct. 1811 (2014), which the district court did not cite—significantly clarified this area of law and require a much less divisive approach to Establishment Clause challenges. That approach

focuses on the original meaning of the First Amendment and our nation's history and tradition rather than abstract principles of "endorsement," "secular purpose," or "entanglement."

Ensuring that local government attorneys can rely on these developments in advising their clients forms the core of IMLA's interest here. IMLA's concern is emphatically *not* the advancement of any particular religious, sectarian, political, or ideological view. Its members hold a great diversity of beliefs about religion and its role in public life as well as how the Constitution should be interpreted in an ever-changing democracy. What unites IMLA's members is a conviction that doctrinal clarity is preferable to obscurity and that "the United States Constitution does not tell federal judges to hover over each town hall meeting in the country like a helicopter parent, scolding/revising/okaying the content" of all government actions that address religion in some form or another. *Bormuth v. Cty. of Jackson*, No. 15-1869, 2017 WL 3881973, at *20 (6th Cir. Sept. 6, 2017) (Sutton, J., concurring).

IMLA submits this brief to provide the court with a focused overview of the development of the Supreme Court's Establishment Clause jurisprudence and to provide additional historical and legal data relevant to this dispute.

SUMMARY OF THE ARGUMENT

The four plaintiffs in this action—two Canadian residents, an anti-religious activist who has used the monument at issue in this case for his own, self-described “satanic purposes,” and an ostensibly offended Florida resident who does not live in Pensacola—seek the removal or destruction of a memorial that has stood without incident for three-quarters of a century in a remote corner of one of Pensacola’s many public parks. They do so because they believe that the memorial’s shape—a Latin Cross—makes the memorial an “establishment of religion” in violation of the First Amendment to the U.S. Constitution.

In considering this argument, the district court recounted this nation’s long history of government expressions that contain religious content, as well as the long and uncontroversial history of this particular memorial cross. It concluded that the memorial was not an “establishment of religion” under the original meaning of the Constitution and that it fit comfortably within the historic traditions of the United States. However, the court held—reluctantly—that these facts and conclusions were irrelevant as a result of this Court’s thirty-four-year-old decision in *ACLU of Georgia v. Rabun County Chamber of Commerce*, 698 F.2d 1098 (11th Cir. 1983), which held that a Latin Cross erected in a Georgia park ran afoul of the so-called “*Lemon* test” because it lacked a secular purpose.

This conclusion was incorrect.

As ably explained by the City in its brief, *Rabun County* is distinguishable on numerous grounds, and, more importantly, it is no longer good law. The court in *Rabun County* applied the *Lemon* test without any reference to this nation's history and traditions. Such abstract evaluations of the Establishment Clause—removed from the historic understanding of the First Amendment—are now categorically impermissible. As the Supreme Court held in *Town of Greece*, “the Establishment Clause *must* be interpreted ‘by reference to historical practices and understandings,’” and government actions touching on religion that have an established historical tradition are presumptively constitutional. 134 S.Ct. at 1819 (emphasis added) (internal citation omitted). The original meaning of the First Amendment and the nation's history and traditions must inform the applicable test so that, if consistently applied, it would not overturn any practices that are well-established as constitutional. *See id.*

In other words, historical acceptance does not create a “carv[e] out” from otherwise applicable Establishment Clause tests that the Court has at times employed. *Id.* Instead, traditional acceptance is the fixed star in the otherwise shifting constellation of Establishment Clause jurisprudence, as “any test the Court adopts must acknowledge a practice that was accepted by the Framers.” *Id.* at 1819. Thus, as Justice Alito stated in his concurrence, “if there is any inconsistency between any of [the Court's Establishment Clause] tests and the

historic practice [at issue], the inconsistency calls into question the validity of the test, not the historic practice.” *Id.* at 1834 (Alito, J., concurring).

The complete implications of this shift directed by *Town of Greece* will no doubt require additional explanation from the Supreme Court. For now, however, it is clear that courts may not invalidate government practices that have religious content or meaning that fit within this nation’s long-standing traditions.

That is more than enough to resolve this case. An unbroken tradition of government expressions with religious content in public fora stretches back to the founding era. These expressions have been made in written and spoken form, as public pronouncements, invocations, prayers, calls to thanksgiving, and calls to fasting and repentance, and, as here, memorials to the dead. As extensively documented in the appendices of both this brief and the City’s, they have also often been made in concrete form—in architecture and monuments, including Latin Crosses and seasonal displays. These expressions have nearly always served civic as well as religious purposes. But the district court was mistaken in believing that the Latin Cross in general, and the Bayview Cross in particular, are somehow purely religious. For centuries, the Latin Cross has communicated a complex array of historical, political, patriotic, and commemorative meanings in addition to its religious message. As the record demonstrates, the Bayview

Cross has served many secular purposes throughout its three-quarters of a century of existence, including as a site for memorializing the dead, especially fallen soldiers, and a gathering place for Pensacola residents. *See* DE 30-4 at 1; DE 30-7 at 54; DE 41 at 16 n. 4.

Simply put, the Bayview Cross fits comfortably within the American tradition. It is but one of nearly 200 expressive displays in the Pensacola parks system, and it in no way compels citizens to engage in religious exercise or to support or participate in any religion. The Constitution therefore does not require its removal. On the contrary, the removal or demolition of this long-standing monument would “exhibit a hostility toward religion that has no place in our Establishment Clause traditions.” *Van Orden*, 545 U.S. at 704 (2005) (Breyer, J., concurring in judgment)). The judgment of the district court should therefore be reversed.

ARGUMENT

I. The Establishment Clause at the Supreme Court

The Establishment Clause of the First Amendment commands that “Congress shall make no law respecting an establishment of religion.” U.S. Const. amend. I, cl. 1. From these ten words has sprung a vast and complicated jurisprudence about how much religion is too much in public life.

For more than four decades, courts have struggled with how to decide Establishment Clause cases, as the governing framework has profoundly changed several times. As Justice Scalia—perhaps tongue-in-cheek, but absolutely accurately—observed in his concurrence in *Van Orden v. Perry*, 545 U.S. 677 (2005), “I join the [principal opinion] because I think it accurately reflects our current Establishment Clause jurisprudence—or at least the Establishment Clause jurisprudence we currently apply some of the time.”

Smith v. Jefferson Cty. Bd. of Sch. Comm’rs, 788 F.3d 580, 596 (6th Cir. 2015) (Batchelder, J., concurring in part and concurring in the result) (brackets in original).

This confusion caused the district court to grudgingly accept what it perceived as the nearest circuit precedent. But this was a mistake. The following, brief overview of the evolution of the Court’s Establishment Clause jurisprudence shows how recent developments culminating in *Town of Greece* have provided the principles and guidance needed to resolve this case.

The fountainhead of confusion is found in the Supreme Court’s decision in *Everson v. Board of Education of Ewing Township*, 330 U.S. 1 (1947). That case, which considered and affirmed the constitutionality of using public buses to transport students to religious schools, rested largely on a selective examination of founding-era attitudes toward public support of religion. The Court’s analysis

focused almost entirely on Virginia’s 1785 rejection of Patrick Henry’s Assessment Bill, its contemporaneous adoption of Thomas Jefferson’s Bill for Establishing Religious Freedom, and Jefferson’s description of the First Amendment as “building a wall of separation between Church & State.” *Id.* at 11-16.¹ But *Everson*’s was a “truncated” and, indeed, “careless description of history.” Michael W. McConnell, *Establishment and Disestablishment at the Founding, Part I: Establishment of Religion*, 44 Wm. and Mary L. Rev. 2105, 2108 (2003). In fact, the Court did not even discuss what the founding generation understood an “establishment of religion” to be. Despite these failings, *Everson*’s discussion of the Virginia debate became the guiding leitmotif in the subsequent quarter-century of Establishment Clause cases.²

This changed with the Court’s opinion in *Lemon v. Kurtzman*. At the heart of Chief Justice Burger’s majority opinion was his confession that: “Candor

¹ As Professor Hamburger has demonstrated, the “separation of church and state” principle has much deeper roots in the anti-Catholicism of 19th century know-nothing nativists and Klansmen than in the original meaning of the First Amendment. Philip Hamburger, *Separation of Church and State* 399-422 (2002).

² See, e.g., *Ill. ex rel. McCollum v. Board of Ed. of Sch. Dist. No. 71*, 333 U.S. 203, 210–12 (1948); *Zorach v. Clauson*, 343 U.S. 306, 312 (1952); *Torcaso v. Watkins*, 367 U.S. 488, 492–94 (1961); *Engel v. Vitale*, 370 U.S. 421, 428 n.11 (1962); *Sch. Dist. of Abington Twp. v. Schempp*, 374 U.S. 203, 216–17 (1963); *Walz v. Tax Comm’n*, 397 U.S. 664, 667–68 (1970) (all relying on *Everson*’s historical analysis).

compels acknowledgment . . . that we can only dimly perceive the lines of demarcation in this extraordinarily sensitive area of constitutional law.” 403 U.S. 602, 612 (1971). Instead of trying to assemble a coherent account of the original meaning of the First Amendment’s Establishment Clause and applying that meaning to the dispute at hand, the Court relied on the “cumulative criteria developed by the court” since *Everson*. *Id.* From these criteria, the Court “gleaned” the three characteristics of impermissible “establishment[s] of religion” that comprise *Lemon*’s now-famous three-pronged test: (1) Does the government practice have a secular purpose? (2) Is its principal or primary effect either the advancement or inhibition of religion? And (3) Does the practice foster an excessive entanglement with religion? *Id.* “Thus . . . was born [the *Lemon* test:] an *ipse dixit* derived from a patently impressionistic survey of just 24 years of precedent.” Eric Rassbach, *Town of Greece v. Galloway: The Establishment Clause and the Rediscovery of History*, 13 Cato S. Ct. Rev. 71, 77 (2014).

The Court soon departed from *Lemon*, however. Just a dozen years later it considered the constitutionality of legislative prayer in *Marsh v. Chambers*, 463 U.S. 783 (1983), and held that such prayers were not establishments of religion. The majority opinion—again written by Chief Justice Burger—reached this conclusion not as an application of the *Lemon* test, but because legislative prayer was a broadly accepted practice at the time of the founding. However, the court

did not overrule *Lemon*, leading the dissenters to complain that “[t]he Court . . . carv[es] out an exception to the Establishment Clause, rather than [following *Lemon* or] reshaping Establishment Clause doctrine to accommodate legislative prayer.” *Marsh*, 463 U.S. at 796 (Brennan, J., dissenting).

Subsequent cases, especially in the lower courts, continued to apply the *Lemon* test without considering whether the practice at issue fit within the nation’s history or tradition. Indeed, courts were often skeptical of historical arguments. However, with increasing frequency, the Supreme Court either ignored *Lemon* or “gleaned” new “criteria” deemed relevant to whether a government practice violated the Establishment Clause. That occurred most notably in the form of Justice O’Conner’s “endorsement test,” which asks whether a reasonable observer aware of all the relevant facts would view the government action in question as “endorsing” religion. *See, e.g., Wallace v. Jaffree*, 472 U.S. 38, 59–60 (1985); *Edwards v. Aguillard*, 482 U.S. 578, 593 (1987).³

While many justices criticized *Lemon*, the Court never quite overruled it, either. As Justice Scalia famously explained

Like some ghoul in a late-night horror movie that repeatedly sits up in its grave and shuffles abroad, after

³ The endorsement test has been folded into the *Lemon* test by the lower courts as part of the second prong. *See, e.g., Am. Atheists, Inc.*, 2014 WL 3702452 at *9.

being repeatedly killed and buried, *Lemon* stalks our Establishment Clause jurisprudence again, frightening the little children and school attorneys of Center Moriches Union Free School District. . . . Over the years, however, no fewer than five of the currently sitting Justices have, in their own opinions, personally driven pencils through the creature's heart . . . and a sixth has joined an opinion doing so.

Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist., 508 U.S. 384, 398 (1993) (Scalia, J., concurring in the judgment).

This equivocation led to rampant confusion and dissatisfaction in the lower courts. As Judge Easterbrook dryly remarked: “When everything matters, when nothing is dispositive, when we must juggle incommensurable factors, a judge can do little but announce his gestalt.” *Am. Jewish Cong. v. City of Chicago*, 827 F.2d 120, 129 (7th Cir. 1987) (Easterbrook, J., dissenting); *see also Doe ex rel. Doe v. Elmbrook School Dist.*, 687 F.3d 840, 872 (7th Cir. 2012) (Posner, J., dissenting) (“The case law that the Supreme Court has heaped on the defenseless text of the establishment clause is widely acknowledged, even by some Supreme Court Justices, to be formless, unanchored, subjective and provide no guidance.”).

Despite these and many other criticisms, and despite the Court's description of the three prongs of *Lemon* as “no more than helpful signposts,” *Hunt v. McNair*, 413 U.S. 734, 741 (1973), lower courts largely attempted to apply “the

Supreme Court’s dark materials” in deciding Establishment Clause cases, *Card v. City of Everett*, 520 F.3d 1009, 1023–24 (9th Cir. 2008) (Fernandez, J., concurring). Supreme Court decisions that did not use the *Lemon* test were often read narrowly. And the reluctant return to *Lemon* became something of a judicial habit.

The Supreme Court’s decision in *Van Orden* went some way towards clarifying matters, at least in the context of “passive monuments” like the cross at issue in this case. 545 U.S. at 677 (2005). And this court in particular has correctly abandoned the *Lemon* test, focusing instead on history, tradition, and Justice Breyer’s “legal judgment” approach to Establishment Clause challenges. See *Pelphrey v. Cobb Cty., Ga.*, 547 F.3d 1263 (11th Cir. 2008); *Atheists of Florida, Inc. v. City of Lakeland*, 713 F.3d 577 (11th Cir. 2013).

Even so, the legal framework remained uncertain. As Justice Breyer observed in his concurrence in *Van Orden*, none of the Court’s prevailing frameworks could “readily explain the Establishment Clause’s tolerance, for example, of the prayers that open legislative meetings . . . certain references to, and invocations of, the Deity in the public words of public officials; the public references to God on coins, decrees, and buildings; or the attention paid to the religious objectives of certain holidays, including Thanksgiving.” *Van Orden*, 545 U.S. 677, 699 (2005) (Breyer, J., concurring in the judgment).

The impact of this uncertainty fell most heavily on municipalities (and their lawyers) when, in the years following *Van Orden*, the ACLU and Americans United for Separation of Church and State initiated a campaign of test cases to challenge municipal legislative prayer. The legal question concerned the underlying framework and was much broader than simply whether municipal legislative prayer was covered by *Marsh*. Instead, it was how to reconcile the historical approach employed by *Marsh* and by the plurality in *Van Orden* with the abstract legal standards embodied in *Lemon*, the endorsement test, and to a lesser extent Justice Breyer's "legal judgment" framework.

The Supreme Court took up and resolved this issue in *Town of Greece*. The Court affirmed the town's practice of legislative prayer, including prayers with substantial sectarian and doctrinal content, such as prayers "in Jesus' name," prayers that made reference to the Trinity, and prayers that referred to the incarnation, the crucifixion, and the resurrection of Jesus. The Court rejected the notion that *Marsh* simply grandfathered in practices that had an extensive historical pedigree. 134 S. Ct. at 1819. Rather, "*Marsh* stands for the proposition that it is not necessary to define the precise boundary of the Establishment Clause where history shows that the specific practice is permitted." *Id.*

This conclusion marked "a major doctrinal shift regarding the Establishment Clause." *Smith*, 788 F.3d at 602 (Batchelder, J., concurring in part and

concurring in the result). Now, it is the history that guides the tests, not *vice versa*.

The relevant history is also broader than the practices of the First Congress. Rather, the analysis must look to American history as a whole to determine whether the practice at issue is

part of our heritage and tradition, 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” at the opening of this Court’s sessions.

134 S. Ct. at 1825. As the Court was aware, the recitation of “God save the United States and this honorable court” did not begin until 1827 at the earliest. *See Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 29 (2004). And the Pledge of Allegiance did not include any reference to God until 1954. *Id.* at 7.

The plurality in *Town of Greece* also explained that the prayers were constitutional because they did not coerce those present to participate in any religious practice: those who objected were free to leave without fear of negative consequences. *Town of Greece*, 134 S. Ct. at 1825 (plurality opinion) (quoting *Allegheny*, 492 U.S. at 659 (Kennedy, J. concurring in part and dissenting in part)); *see also Lee v. Weisman*, 505 U.S. 577 (1992); *Santa Fe Independent School District*

v. Doe, 530 U.S. 290 (2000). The Court also did not overrule its prior statements that religious content in government expression was suspect if not accompanied by a secular purpose, noting that legislative prayer had always served a number of important civic purposes.

The Supreme Court will doubtless need to resolve many questions, but this should not obscure what the Court *did* resolve, and those resulting principles are more than sufficient to resolve this case. Three principles are especially important:

First, practices that have a rich historical tradition come into court with a strong presumption of constitutionality, regardless of what any “test” considered in the abstract might suggest.

Second, practices that are not within an established historical tradition must nevertheless be evaluated with that history in view. No version of any of the Court’s tests can stand if, consistently applied, it would reject those practices that are well-established.

Third, the fact that the government practice contains sectarian content or proceeds from sincere belief in a particular creed or faith is not disqualifying so long as the practice also has some secular purpose and does not coerce or proselytize those who do not agree with the religious aspect of the practice.

II. The Latin Cross and The American Tradition of Public Expressions Containing Religious Meaning

The founding generation did not view the Establishment Clause as demanding “a total separation of religion and government—religion was not being banished from the public sphere.” Richard H. Jones, *One Nation Under God?* at 15 (2012); see also Arlin M. Adams & Charles J. Emmerich, *A Nation Dedicated to Religious Liberty* 31 (1990); A. James Reichley, *Religion in American Public Life* 158 (1985). Indeed, “[i]t is difficult to imagine an allegedly eighteenth-century constitutional doctrine that has as little eighteenth-century foundation as separation of church and state.” Philip Hamburger, *Against Separation*, 20 *The Public Interest* 177, 178 (2004).

Thus, from the very beginning, American history reflects a wide variety of well-tolerated, indeed celebrated, public expressions of religion. For example, in 1775, the Continental Congress adopted a resolution designating July 20, 1775 as a national day of “humiliation, fasting, and prayer,” and in 1789, Congress unanimously passed a resolution requesting that President George Washington proclaim a National Day of Thanksgiving, “a day of public thanksgiving and prayer, to be observed by acknowledging, with grateful hearts, the many significant favors of Almighty God.” Richard H. Jones, *One Nation Under God?* at 13 (2012); see also *Lynch v. Donnelly*, 465 U.S. 668, 675 & nn. 2–3 (1984) (describing the religious history of America’s Thanksgiving Day tradition). All

states have exempted churches from property taxes, and since the institution of a federal income tax, church income has always been exempt. A. James Reichley, *Religion in American Public Life* 152 (1985). Opening legislative sessions with prayer has occurred since the founding, as the Court noted in *Town of Greece*.

As set forth in great detail in the City's brief, the public sphere is also filled with symbols associated with religion, reflecting a continued refusal to purge the American public arena of all symbols connected to religion. *See also Van Orden*, 545 U.S. at 699 (Breyer, J., concurring). For example, the seal of the United States bears the epigram "Annuat Copetis," or "God has favored our undertakings." Derek H. Davis, *Religion and the Continental Congress 1774–1789* at 144 (2000). "In God We Trust" is this nation's motto, and it is inscribed on our currency. *See Arnow v. United States*, 432 F.2d 242 (9th Cir. 1970) (rejecting Establishment Clause challenge). The National Gallery regularly shows hundreds of paintings with religious messages, including paintings depicting the birth of Jesus Christ and the Last Supper. *See, e.g., Lynch*, 465 U.S. at 677 & n.4. Moses, bearing the Ten Commandments, decorates the walls of the Supreme Court. *Id.* at 677.

Religious expressions in parks are inextricably linked to our nation's history and constitute a particularly strong tradition. *Cf. Am. Atheists, Inc. v. Port Auth. of New York & New Jersey*, 760 F.3d 227, 239 (2d Cir. 2014). For example:

The National Park Service manages and funds numerous historic parks and sites that bear religious symbols, including the Cape Henry Memorial Cross in Virginia; the World War II Memorial in Washington, D.C., which bears a large image of the Greek Goddess Nike; the church at the Blue Heron coal mining town in Tennessee; the Mt. Chapel Missionary Baptist Church in Ansted, West Virginia; multiple old Spanish missions in San Antonio; Ebenezer Baptist Church in Atlanta, Georgia; Salem Church in Fredericksburg, Virginia; St. Paul's Church in Mount Vernon, New York; Bethesda Church in Elverson, Pennsylvania; churches in the historical colony of Jamestown, Virginia; and Gloria Dei Church in Philadelphia, Pennsylvania.⁴ The City of Santa Clara maintains a statue of the Catholic Saint Clare and a statue dedicated to Mary, Our Lady of Peace.⁵ A cross (donated by a private civic group) commemorates Civil War deaths of fraternity members.⁶ The citizens of Lake Acworth installed

⁴ See National Park Service, Find a Park, <https://www.nps.gov/index.htm> (last visited September 25, 2017).

⁵ City of Santa Clara, Arts & Statues, <http://santaclaraca.gov/about/art-in-santa-clara-story-map/art-statues> (last visited September 25, 2017).

⁶ William H. Wilkerson, The Creation of the Constantine Chapter Memorial, Remarks at Dedication of Constantine Chapter Memorial Park (Sept. 16, 1979), *available at* https://history.sigmachi.org/files_resources/Constantine-Chapter-Memorial_McGill_1939.pdf.

a public cross in a park near a veterans memorial.⁷ Citizens of Missouri, Illinois, and Kentucky erected a cross at the confluence of the Ohio and Mississippi Rivers, on land purchased by a local city council.⁸ A cross in a park in Huntsville, Alabama stands as “a multi-racial, ecumenical effort” to reflect the city’s peace and unity in the racially charged time of the early 1960s.⁹ A city plaza in Taos, New Mexico, has a veterans memorial that contains a cross.¹⁰ In front of the federal district courthouse in the District of Columbia stands a monument to the First Amendment freedoms; on this monument stands a man worshipping before a cross.¹¹

⁷ See Waymarking, Cross at Patriot’s Point-Lake Acworth-Acworth, Georgia, http://www.waymarking.com/waymarks/WM3YC7_Cross_at_Patriots_Point_Lake_Acworth_Acworth_Georgia (last visited October 1, 2017).

⁸ Visitors Guide to the Fort Jefferson Memorial Cross Fort Jefferson Memorial Cross Park, <http://greatriverroad.com/meetohio/fortjeffcross.htm> (last visited October 1, 2017).

⁹ Kay Campbell, *50th anniversary for Huntsville’s Monte Sano Cross at Burritt on the Mountain, Alabama*, available at http://www.al.com/living/index.ssf/2013/09/monte_sano_cross_50th.html.

¹⁰ Waymarking, Veterans Memorial - Taos, NM, http://www.waymarking.com/waymarks/WMTHJF_Veterans_Memorial_Taos_NM (last visited October 1, 2017).

¹¹ Trylon of Freedom at the U.S. Courthouse in Washington, D.C., D.C. Memorials, http://www.dcmemorials.com/index_indiv0000342.htm (last visited October 1, 2017).

Virtually all of these expressions serve many purposes—patriotic, commemorative, communal, historical, and, indeed, religious. As the Supreme Court has explained, “[t]he meaning conveyed by a monument is generally not a simple one,” and a monument may be “interpreted by different observers, in a variety of ways.” *Pleasant Grove Cty. v. Summum*, 555 U.S. 460 (2009).

This is equally true of the dozens of Latin Crosses on public land. Without question, the Latin Cross has religious significance. As the District Court put it, “[i]t is a widely recognized symbol of Christianity.” DE 41 at 1. But the court’s belief that “the Latin cross . . . has never had any secular purpose,” is simply not true. *Id.* at 8.¹²

For centuries, the Latin Cross has conveyed a diverse mix of religious, political, patriotic, and historic meanings. In *Salazar v. Buono*, the Court examined the public display of a large Latin Cross designed as a World War I memorial atop the Mojave National Preserve. 559 U.S. 700 (2010). In the plurality opinion authored by Justice Kennedy, and joined in full by Chief Justice Roberts and in part by Justice Alito, the Court faulted the lower courts in that case for

¹² Nor is it true that “no federal case has ever found the display of a Latin cross on public land . . . to be constitutional.” DE 41 at 1; see *Am. Humanist Ass’n v. Md.-Nat’l Capital Park*, 147 F. Supp. 3d 373, 376 (D. Md.), *appeal docketed*, No. 15-2597 (4th Cir. Dec. 30, 2015); *Am. Atheists, Inc.*, 2014 WL 3702452.

“concentrat[ing] solely on the religious aspects of the cross, divorced from its background and context.” *Id.* at 702. Had the district court considered the cross in “the context of all relevant factors,” it would have seen that

a Latin cross is not merely a reaffirmation of Christian beliefs. It is a symbol often used to honor and respect those whose heroic acts, noble contributions, and patient striving help secure an honored place in history for this Nation and its people. Here, one Latin cross in the desert evokes far more than religion. It evokes thousands of small crosses in foreign fields marking the graves of Americans who fell in battles, battles whose tragedies are compounded if the fallen are forgotten.

Id. at 721.

Architectural historians have confirmed the Supreme Court’s claim in *Buono* that the Latin Cross can convey “at least two significantly different messages.” 559 U.S. at 725. Theresa Lachin, in *War and Remembrance: The War Memorial As Cultural Artifact*, has charted the trends in memorializing the dead in the United States between the Civil War and World War I and identifies the period between 1880 and 1915 as one in which veterans groups increasingly turned to the Latin Cross as the preeminent symbol of the commemoration of the war dead. “Religious images and Christian symbols were . . . commonly used to express the ideals of ‘sacrifice,’ collective heroism, and the ‘sacred vocation’ of military service, themes which had emerged in Europe and America in the early twentieth century,” and sponsoring veterans groups strongly embraced

these spiritual dimensions of military service. *See* Lachin, *supra*, at 32; *cf.* Alex King, *Memorials of the Great War in Britain: The Symbolism and Politics of Remembrance*, ch. 6 (1998).

Beyond commemorating the valor and sacrifice of the war dead, the Latin Cross has historically conveyed a variety of other civic meanings as well. Consider the following three examples.

The Trylon of Freedom. Since 1954, a large tower called the “Trylon of Freedom” has prominently stood directly in front of the E. Barrett Prettyman Federal Court Building in Washington, D.C., which houses the U.S. Court of Appeals for the D.C. Circuit. At the top of this tower is an image of a man praying before a Latin Cross, with the Ten Commandments directly below and to the right of the cross. As one of several images depicting distinct rights under the Constitution, the cross is clearly intended as a depiction of religious liberty. *See* Trylon of Freedom, *supra*, n.11.

The Jamestowne Cross. In Historic Jamestowne in Virginia, a large, solitary wooden Latin Cross stands between the recently rediscovered 1607 James Fort and the historic Jamestown Statehouse and Archaearium.¹³ Though it functions as the centerpiece of Easter Sunday services, the cross in historic Jamestowne

¹³ *See* Monuments at Historic Jamestowne, Jamestown Rediscovery, <http://historicjamestowne.org/visit/plan-your-visit/monuments/> (last visited Oct. 3, 2017).

also commemorates the historic first landing of the Virginia Company and the trials of the early settlers. The plaque of this wooden cross nicely summarizes its significance: “To the Glory of God and in grateful memory of those early settlers, the founders of this nation who died at Jamestown during the first perilous years of the colony.” *Id.* The cross was placed there in 1957 but is reminiscent of the first historic cross the colonists actually planted on Virginia soil in 1607. *Id.* As tourists visit Historic Jamestowne, that Latin Cross invites them to reflect upon those ancient beginnings and the individuals who founded that colony more than four hundred years ago.

The Ground Zero Cross. Finally, the cross at Ground Zero in New York City, which now resides permanently in the National September 11 Memorial and Museum, similarly conveys multiple meanings to visitors. Since it was first discovered on September 13, 2001, among the ruins of the World Trade Center, that cross has had a powerful religious significance to many. But it also has conveyed a potent civic message of hope, endurance, and recovery. As the U.S. Court of Appeals for the Second Circuit explained, “The Cross at Ground Zero thus came to be viewed not simply as a Christian symbol, but also as a symbol of hope and healing for all persons.” *Am. Atheists, Inc.*, 760 F.3d at 234.

In light of all of this, the District Court was quite wrong in stating that the Latin Cross “has never had any secular purpose.” DE 41 at 8. From commemorating the war dead, symbolizing religious freedom, teaching American history, and inspiring hope and mutual reliance amidst disaster, the Latin Cross has often borne the message of multiple secular and civic meanings.

III. The Bayview Cross Conveys Both Civic and Religious Meanings and Fits Comfortably Within the American Tradition

The Bayview Cross, too, conveys various meanings that extend beyond religious expression. To assess whether a monument communicates just one exclusively religious meaning or multiple meanings, the Supreme Court has indicated that courts should consider four contextual factors:

1. The story and original purpose of its creation;
2. The uses to which it has been put;
3. The physical context in which it sits; and
4. The length of time in which it has stood without objection or controversy.

See, e.g., Van Orden, 545 U.S. at 698-705. As discussed below and in the City’s brief, these factors confirm that the Bayview Cross does not offend the Establishment Clause.

Creation of the Bayview Cross. In support of the conclusion that the Bayview Cross has only religious significance, the District Court pointed to the fact that

the Bayview Cross was created in time for, and dedicated at, an Easter Sunday Service. Other facts in this creation story, however, tell a more complex picture in which both religious and secular purposes were at play.

The Pensacola Jaycees—who were responsible for putting up the original wooden cross in Bayview Park in 1941 and, in 1969, for erecting the concrete cross that is at issue in this case—have always been a primarily secular and civic organization. DE 30-1 at 50. According to their manual, “The Jaycees is a young men’s organization, encouraging in its members a spirit of genuine Americanism and civic interest.” *Id.* at 5.

A review of the history of the Pensacola Jaycees’ activities reveals the overwhelmingly civic focus of the group. For example, in 1941, the first year that the Jaycees helped to coordinate the Easter Sunday Service, the organization’s other two main projects were supporting area life guards with a Lifeguards Benefits Dance and locating a home for the Florida Highway Patrol. *Id.* at 50.

Eight years later, the Pensacola Jaycees added a platform or bandstand for the area near the cross. *Id.* at 50-51. At an Easter Sunday Service that year, a layman named Austin O. Long said that the service that year had a “twofold purpose.” DE 30-7 at 54. “First, it was to pay tribute to those who have departed. The second purpose was to dedicate the new platform which the Jaycees

have constructed at Bayview Park. It is being turned over to the municipal recreation department in order that it can be used for the good of the general public.” *Id.* at 54-55. The bandstand has since been used for a variety of events on that site.

The primarily secular and civic-minded nature of the builders of the Bayview Cross, the Pensacola Jaycees, indicate that secular motivations were a key part of its creation.

The Uses of the Bayview Cross. The District Court focused exclusively on the use of the Bayview Cross during Easter Sunday Services as evidence of what the court believed to be its primarily religious significance. But throughout its history, the Bayview Cross has also functioned as a war memorial, honoring the fallen. And from the outset of even the Easter services, in 1941, the Bayview sunrise service sought as one of its primary purposes to honor those who served overseas in defense of their country, to reflect the Pensacola community’s hope for peace in time of war, and to memorialize the fallen. DE 30-4 at 1.

Of course the service also had religious significance to its participants. It was, after all, an Easter sunrise service. But as the District Court aptly put it, the key question under *Salazar* and *Van Orden* is whether the monument has a “single purpose” or a “dual purpose.” DE 41 at 20. As this rich and unique

history indicates, from its beginning, the Bayview Cross has had just this sort of dual purpose or significance and thus fits within the American tradition.

The Physical Context of the Bayview Cross. The Bayview Cross, like most other similar monuments, stands in a park—here, the southeastern corner of 28-acre Bayview Park, which is advertised as a recreational attraction. The park has a kayak rental outfit, boat launch, senior center, walking paths, tennis courts, dog park, and Pensacola’s only dog beach. See *Pensacola: The Upside of Florida*, <http://cityofpensacola.com/Facilities/Facility/Details/Bayview-Park-21> (last visited October 3, 2017). It is far removed from any school or government building. And the cross itself stands between tennis courts, a series of pavilions used for picnics and barbeques, and a boat ramp. This fits comfortably within the American tradition of raising monuments—including monuments with meanings that include, but are not limited to, religious expression—in public parks.

The Period of Time During Which The Bayview Cross Stood Without Controversy. The Bayview Cross stood for seventy-five years without controversy. A careful review of news coverage of the cross for seventy five years in the *Pensacola News Journal*, *Pensacola News*, and *Pensacola Journal* reveals no record of any prior controversy. And no evidence exists of any climate of intimidation in Pensacola

that might have otherwise suppressed such an objection. If forty years of controversy-free history confirms the absence of state establishment of religion, *Van Orden*, 545 U.S. at 702-03, seventy-five years must serve equally well.

And at seventy-five years old, the Bayview Cross itself now enjoys a certain historic status. It thus conveys to observers yet another meaning beyond religious values, civic adornment, or the memorialization of the war dead. It is itself a memorial and integral landmark of Pensacola and serves as a relic of a particular moment in the history of the city, and a memorial to the now-departed individuals and community groups who made Pensacola what it is today.

Especially given the cross's historical meaning and context, should the city be required to take down the Bayview Cross, the result is likely to be the kind of rancor and divisiveness along religious lines that the Establishment Clause was designed to prevent. *See id.* at 699 (Breyer, J., concurring in the judgment)

Considering all four factors together, the Bayview Cross has long had and continues to have many levels of meaning and types of social significance. The Bayview Cross was installed by the Pensacola Jaycees, a historically secular and civic-oriented organization. It has been used in religious and secular events alike; and religious services associated with it have been completely voluntary and oriented principally to honoring those who died in service to the country. It stands far removed from any official state buildings or public schools, lodged in

between the tennis courts and boat ramps of a sprawling recreational park, and it is marked with a plaque that indicates its secular origins in the civic work of the Jaycees. Finally, it has stood for seventy-five years without controversy or objection and has thus acquired its own unique historic status as a familiar and widely accepted part of the landscape and history of the City of Pensacola.

In other words, the Bayview Cross is a lot like the dozens of other crosses and memorials in municipalities throughout the country that fall comfortably within this nation's history and tradition. It is therefore not an establishment of religion.

Conclusion

For the reasons set forth above, the judgment of the district court should be reversed.

Dated: October 3, 2017

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 29(a)(5) because, excluding the parts of the brief exempted by Fed. R. App. P. 2(f) and 11th Cir. R. 32-4, this brief contains 6,455 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 Calisto MT font.

Dated: October 3, 2017

Respectfully submitted,


/s/ Richard D. Klingler
Richard D. Klingler


CERTIFICATE OF SERVICE


I hereby certify that on this 3rd day of October, 2017, I caused the foregoing to be electronically filed with the Clerk of the Court using the CM/ECF System, which will send notice of such filing to all registered CM/ECF users.


/s/ Richard D. Klingler
Richard D. Klingler


Appendix


Name	Date Es- tablished in the Na- tional Park Service	Location	Picture and Citation
Cape Henry Memorial Cross	December 30, 1930	Virginia	 <p data-bbox="814 1146 2003 1214"><i>See</i> National Park Service, Find a Park, https://www.nps.gov/index.htm (last visited September 25, 2017); image from https://www.nps.gov/come/index.htm</p>


Name	Date Es- tablished in the Na- tional Park Service	Location	Picture and Citation
World War II Memo- rial - Greek Goddess Nike	May 29, 2004	Washington, D.C.	 <p data-bbox="814 1149 2003 1224"><i>See</i> National Park Service, Find a Park, https://www.nps.gov/index.htm (last visited September 25, 2017); image from https://www.nps.gov/articles/ww2memorialguide.htm</p>


Name	Date Es- tablished in the Na- tional Park Service	Location	Picture and Citation
The church at the Blue Heron	March 7, 1974	Oneida, Tennessee	 <p data-bbox="814 1224 2003 1295">See National Park Service, Find a Park, https://www.nps.gov/index.htm (last visited September 25, 2017); image from https://www.nps.gov/biso/learn/historyculture/church.htm</p>


Name	Date Established in the National Park Service	Location	Picture and Citation
Mt. Chapel Missionary Baptist Church	1978	Ansted, West Virginia	 <p data-bbox="814 1252 2003 1360">See National Park Service, Find a Park, https://www.nps.gov/index.htm (last visited September 25, 2017); image from https://www.nps.gov/neri/planyourvisit/church-and-the-african-american-community-mt-chapel-baptist-church-ansted-wv.htm</p>

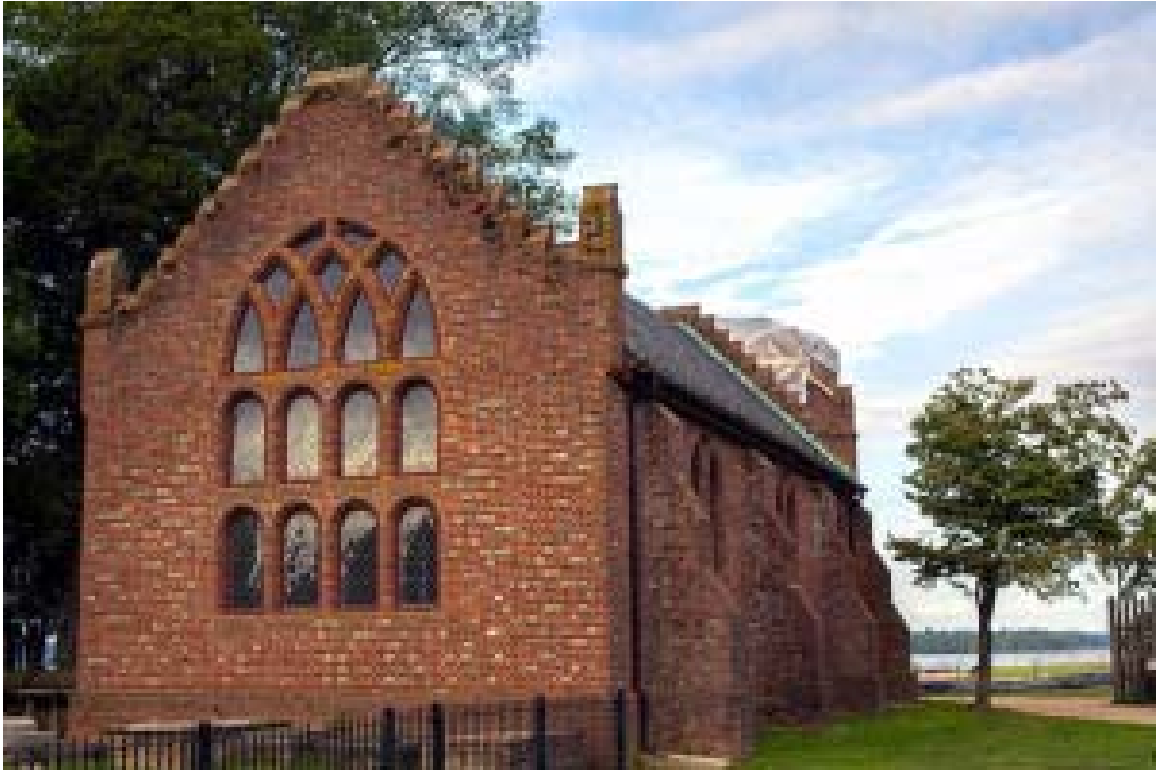
Name	Date Es- tablished in the Na- tional Park Service	Location	Picture and Citation
Spanish missions	April 1, 1983	San Antonio, Texas	 <p data-bbox="816 1084 2003 1153">See National Park Service, Find a Park, https://www.nps.gov/index.htm (last visited September 25, 2017); image from https://www.nps.gov/saan/index.htm</p>


Name	Date Established in the National Park Service	Location	Picture and Citation
Ebenezer Baptist Church	October 10, 1980	Atlanta, Georgia	 <p data-bbox="814 1235 2003 1344">See National Park Service, Find a Park, https://www.nps.gov/index.htm (last visited September 25, 2017); image from https://www.nps.gov/malu/planyourvisit/ebenezer_baptist_church.htm</p>


Name	Date Es- tablished in the Na- tional Park Service	Location	Picture and Citation
Salem Church	February 14, 1927	Fredericksburg, Virginia	 <p data-bbox="816 1166 2003 1235">See National Park Service, Find a Park, https://www.nps.gov/index.htm (last visited September 25, 2017); image from https://www.nps.gov/frsp/learn/photosmultimedia/salem.htm</p>


Name	Date Es- tablished in the Na- tional Park Service	Location	Picture and Citation
St. Paul's Church	1980	Mount Vernon, New York	 <p data-bbox="814 1260 2003 1333">See National Park Service, Find a Park, https://www.nps.gov/index.htm (last visited September 25, 2017); image from https://www.nps.gov/sapa/planyourvisit/index.htm</p>


Name	Date Es- tablished in the Na- tional Park Service	Location	Picture and Citation
Bethesda Church	August 3, 1938	Elverson, Pennsylvania	 <p data-bbox="821 1273 2003 1378">See National Park Service, Find a Park, https://www.nps.gov/index.htm (last visited September 25, 2017); image from https://www.nps.gov/hofu/learn/historyculture/bethesda-church.htm</p>


Name	Date Es- tablished in the Na- tional Park Service	Location	Picture and Citation
Churches	December 30, 1930	Jamestown, Virginia	 <p data-bbox="821 1214 2003 1321">See National Park Service, Find a Park, https://www.nps.gov/index.htm (last visited September 25, 2017); image from http://historicjamestowne.org/visit/plan-your-visit/memorial-church/</p>


Name	Date Es- tablished in the Na- tional Park Service	Location	Picture and Citation
Gloria Dei Church	1942	Philadelphia, Pennsylvania	 <p data-bbox="821 1170 2003 1240"><i>See</i> National Park Service, Find a Park, https://www.nps.gov/index.htm (last visited September 25, 2017); image from https://www.nps.gov/glde/index.htm</p>

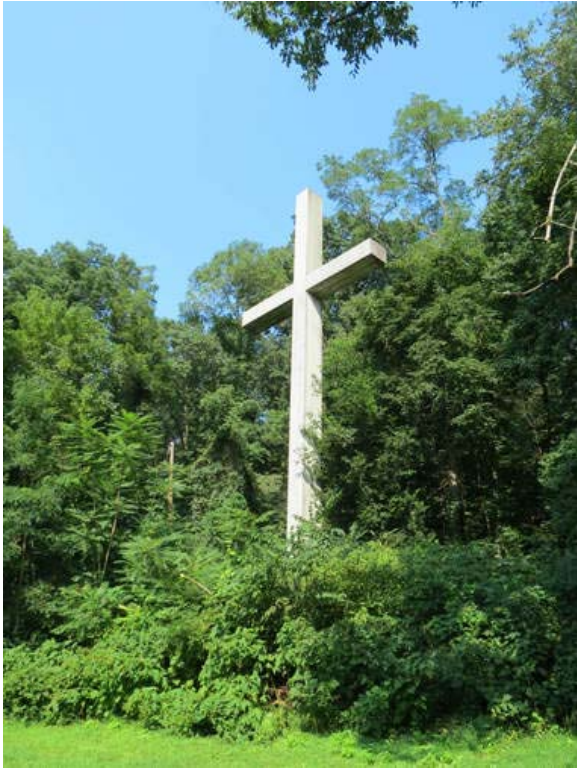
Name	Date Es- tablished	Location	Picture and Citation
Statute of the Catholic Saint Clare	June 1965	Santa Clara, CA	 <p data-bbox="835 1157 2016 1226">http://santaclaraca.gov/about/art-in-santa-clara-story-map/art-statues (last visited September 25, 2017)</p>


Name	Date Established	Location	Picture and Citation
Statute dedicated to Mary, Our Lady of Peace	October 7, 1983	Santa Clara, CA	 <p data-bbox="835 1222 2026 1295">http://santaclaraca.gov/about/art-in-santa-clara-story-map/art-statues (last visited September 25, 2017)</p>


Name	Date Established	Location	Picture and Citation
Constantine Chapter Memorial	1939	Jonesboro, Georgia	 <p>William H. Wilkerson, The Creation of the Constantine Chapter Memorial, Remarks at Dedication of Constantine Chapter Memorial Park (Sept. 16, 1979); image from https://history.sigmachi.org/files_resources/Constantine-Chapter-Memorial_McGill_1939.pdf</p>

Name	Date Established	Location	Picture and Citation
Cross at Patriot's Point-Lake Acworth	1974	Acworth, Georgia	 <p data-bbox="835 1084 1976 1190">Waymarking, Cross at Patriot's Point-Lake Acworth-Acworth, Georgia, http://www.waymarking.com/waymarks/WM3YC7_Cross_at_Patriots_Point_Lake_Acworth_Acworth_Georgia (last visited October 1, 2017)</p>

Name	Date Es- tablished	Location	Picture and Citation
Fort Jefferson Memorial Cross	May 22, 1994	Wickliffe, Kentucky	 <p data-bbox="835 1052 1984 1122">Fort Jefferson Memorial Cross Park, http://greatriverroad.com/meetohio/fortjeffcross.htm (last visited October 1, 2017)</p>

Name	Date Es- tablished	Location	Picture and Citation
Monte Sano Cross at Burritt on the Mountain	August 25, 1938	Huntsville, Al- abama	 <p data-bbox="835 1190 2003 1263">Kay Campbell, 50th anniversary for Huntsville's Monte Sano Cross at Burritt on the Moun- tain, Alabama, http://www.al.com/living/index.ssf/2013/09/monte_sano_cross_50th.html</p>

Name	Date Established	Location	Picture and Citation
Veterans Memorial	1995	Taos, New Mexico	 <p data-bbox="835 1206 1759 1276">http://www.waymarking.com/waymarks/WMTHJF_Veterans_Memorial_Taos_NM (last visited October 1, 2017)</p>

Name	Date Es- tablished	Location	Picture and Citation
Trylon of Freedom at the federal courthouse in Washington, D.C.	1952	Washington, D.C.	 <p data-bbox="835 1179 2007 1247">D.C. Memorials, http://www.dcmemorials.com/index_indiv0000342.htm (last visited October 1, 2017)</p>