

**No. 17-13025**

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**In the United States Court of Appeals  
For the Eleventh Circuit**

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AMANDA KONDRAT'YEV, *ET AL.*,

*Plaintiffs – Appellees,*

v.

CITY OF PENSACOLA, FLORIDA, *ET AL.*,

*Defendants – Appellants.*

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

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**BRIEF OF AMICUS CURIAE  
JUNIOR CHAMBER INTERNATIONAL (JCI) FLORIDA  
IN SUPPORT OF APPELLANTS AND REVERSAL**

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

Pursuant to Eleventh Circuit Rule 26.1, counsel for Junior Chamber International (JCI) Florida (“JCI Florida”) represents that JCI Florida does not have any parent entities and does not issue stock. Counsel further certifies, to the best of his knowledge, that, in addition to the persons and entities listed in the disclosure statement filed by Appellants, the following persons and entities have an interest in this appeal:

Haynes and Boone, LLP (*law firm for amicus curiae*)

Junior Chamber International (JCI) Florida (*amicus curiae*)

Paulsen, Ryan (*counsel for amicus curiae*)

/s/ Ryan Paulsen

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### **STATEMENT OF INTEREST**

This case is important to JCI Florida because it directly involves a cross (the “Bayview Cross”) built by Pensacola Jaycees, Inc. (“Pensacola Jaycees”), a closed chapter formerly associated with JCI Florida that engaged in a long history of valuable community service. JCI Florida believes it is important to confirm its status and that of its local chapters as secular civic organizations dedicated to member and community development and to assert its right to support efforts to unify and strengthen local communities, even by means that may have religious as well as civic significance.

JCI Florida is a nonprofit organization established in 1924 as the second state organization of the United States Junior Chamber of Commerce. JCI Florida provides opportunities for young people between the ages of 18 and 40 to develop leadership and business skills through projects designed to address local issues to the benefit of the community. JCI Florida currently has chapters in Avon Park, Deland, Hollywood, Jacksonville, Key West, Keystone Heights, Lake Placid, North Miami, Ocala, Panama City, Silver Springs, SW Orlando, and Tampa.

The parties have consented to the filing of this brief, which is filed in support of Appellants. This brief was not written in whole or in part by counsel for a party, and no person or entity has made a monetary contribution to the preparation and submission of this brief.

### **STATEMENT OF THE ISSUE**

The question addressed in this brief is as follows:

1. Whether Pensacola is violating the Establishment Clause by declining to remove a monument that was erected over 76 years ago and is now one of over 170 expressive displays in Pensacola's parks.

### **SUMMARY OF THE ARGUMENT**

Pensacola Jaycees enriched the Pensacola community for 89 years through a series of charitable and civic improvement programs organized in furtherance of the club's purpose to develop its members through community service. One of the most successful of these efforts was the Bayview Cross and associated Easter sunrise gatherings, first sponsored by the Pensacola Jaycees in 1941. The spirit of dedication and the commitment to honoring the sacrifices of the country's servicemen and women that permeated that first gathering have continued to unite the Pensacola community in both secular and religious gatherings at the cross ever since. To preserve this community landmark, Pensacola Jaycees replaced the existing wooden cross with a more permanent concrete cross in 1969. Until now, no one in the community expressed opposition to the Bayview Cross.

Despite this long, unblemished history, the district court ordered the Bayview Cross to be removed, but there is no basis in the Establishment Clause for such drastic action. No matter what test applies, the historical meaning of the



Bayview Cross as a symbol of military dedication and sacrifice, the donation of the cross by a private secular organization in a secular setting, and the complete absence of complaint for 75 years satisfy constitutional requirements. Accordingly, the judgment should be reversed.

### **ARGUMENT**

#### **I. Pensacola Jaycees built the current Bayview Cross to preserve a community landmark with a long history of civic gatherings.**

Pensacola Jaycees was a civic improvement organization that served the Pensacola community for 89 years until it ceased operation in 2011. Among the most popular of its many community enrichment programs was the Bayview Cross and related Easter sunrise gatherings, which Pensacola Jaycees began sponsoring in 1941. Both the original wooden cross and the current concrete cross built by Pensacola Jaycees in 1969 have been the site of countless religious and secular community gatherings. As a result, the Bayview Cross has become a Pensacola landmark with a history and tradition of dedication and commemoration of past sacrifices made to preserve the country's freedoms.

##### **A. Pensacola Jaycees was a secular civic organization that served the Pensacola community for nearly a century.**

To blot out the historical meaning of the Bayview Cross in the Pensacola community, Plaintiffs suggested below that Pensacola Jaycees was a “faith-based organization[.]” (Dkt. 31 at 4.) While Pensacola Jaycees’ creed affirmed a belief

in God, it did so with the proviso that “[e]ach Jaycee is free to interpret the creed in the light of his own conscience.” (Dkt. 30-1 at 19.) And Pensacola Jaycees bore none of the indicia of a faith-based organization, such as association with a specific denomination, church membership and conduct requirements, or proclamation of a religious message.<sup>1</sup>

Instead, as both its purposes and its activities show, Pensacola Jaycees was a secular civic service organization. (See Dkt. 41 at 1 (district court described the club as “a civic group”).) For much of its existence, including at the time the current Bayview Cross was built, Pensacola Jaycees was “a young man’s organization” dedicated to providing opportunities “for a young man to unleash the energy and intelligence within himself.” (Dkt. 30-1 at 4-5.) Pensacola Jaycees created those opportunities by (1) encouraging “civic interest,” (2) providing opportunities for the personal development of its members, and (3) engaging in community participation to “build better communities, states, and nations.” (Dkt. 30-1 at 5, 23.) This happened at regular meetings, in which members could network and socialize, develop public speaking skills, and listen to community members speak on issues of local interest. (Dkt. 30-1 at 9-10.) It also happened

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<sup>1</sup> If the statement affirming belief in God alone is enough to qualify Pensacola Jaycees as a faith-based organization, then the federal government and each of the fifty state governments likewise qualify as such. See *Van Orden v. Perry*, 545 U.S. 677, 683 (2005) (“[o]ur institutions presuppose a Supreme Being”); Alexandra Sandstrom, *God or the divine is referenced in every state constitution*, Pew Research Center (Aug. 17, 2017), <http://www.pewresearch.org/fact-tank/2017/08/17/god-or-the-divine-is-referenced-in-every-state-constitution/> (last visited Oct. 3, 2017).

through participation in club- and member-initiated community programs and service efforts. (See Dkt. 30-1 at 13, 107-13 (listing diverse community improvement programs).)

During the course of its 89-year history, Pensacola Jaycees had a track record of successful community involvement and improvement. (Dkt. 30-1 at 107-13.) The chapter was first organized in 1922, just two years after the United States Junior Chamber of Commerce was founded. (Dkt. 30-1 at 27; 30-3 at 2.) From that time until the chapter closed in 2011, its members were involved in countless charitable, community improvement, and governmental reform efforts in the Pensacola community. These included toy drives,<sup>2</sup> fundraisers,<sup>3</sup> children's and community sports events,<sup>4</sup> city cleanup and environmental programs,<sup>5</sup> community education, health, and safety efforts,<sup>6</sup> cultural events,<sup>7</sup> voter education and registration drives,<sup>8</sup> and city reform initiatives.<sup>9</sup> They also entailed larger-scale projects such as founding the municipal airport and a local park and spearheading the drive to create a nearby state park and a center for troubled teens. (Dkt. 30-1 at

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<sup>2</sup> Dkt. 30-2 at 3; 36-1 at 2.

<sup>3</sup> Dkt. 30-1 at 74, 63; 30-3 at 2.

<sup>4</sup> Dkt. 30-1 at 41-42, 56, 62, 65; 30-2 at 3; 30-7 at 42; 36-1 at 2.

<sup>5</sup> Dkt. 30-1 at 48-49, 64, 67; 30-8 at 37.

<sup>6</sup> Dkt. 30-1 at 40-41, 48, 53-54, 56, 62, 65.

<sup>7</sup> Dkt. 30-1 at 49-50, 55-56, 58, 61, 68.

<sup>8</sup> Dkt. 30-1 at 56, 61, 67, 68.

<sup>9</sup> Dkt. 30-1 at 60-61, 64.

46, 54-57, 62.) These and numerous other efforts garnered Pensacola Jaycees state and national awards. (Dkt. 30-1 at 65, 68.)

**B. The Bayview Cross has been a Pensacola landmark for over seven decades without controversy.**

Consistent with its other efforts to enrich the Pensacola community, Pensacola Jaycees sponsored a nondenominational community Easter gathering at the site of a wooden cross erected in a corner of Bayview Park beginning in 1941. (Dkt. 30-2 at 2; 30-7 at 42, 46, 49.) The gathering was intended as a “symbol of dedication” and unity as the country faced the challenges of imminent war. (Dkt. 30-7 at 47.) Planned with the cooperation of the local military installation, it also provided an opportunity to support military personnel serving in Pensacola. (Dkt. 31-10 at 6.) The event was so successful that organizers immediately began plans “to make it an annual feature in Pensacola.” (Dkt. 30-7 at 49-50.)

The Pensacola community responded enthusiastically. Thousands attended the “annually popular” gathering. (*See, e.g.*, Dkt. 30-7 at 40; 30-8 at 3.) And numerous other Pensacola organizations, including the Boy Scouts, the Salvation Army, other civic clubs, and the local military installations, assisted Pensacola Jaycees in putting on the gathering. (Dkt. 30-7 at 41-42, 45, 55-57; 30-8 at 5-6, 18.) While the gathering involved a religious element, they were also seen as a time of remembrance “in commemoration of those who are away from home”

serving the country in war and “those who have gone,” having given the ultimate sacrifice for their country. (Dkt. 30-3 at 2; 30-7 at 55; 30-8 at 6, 33.)

This spirit of dedication and remembrance extended beyond the annual Easter gathering. In harmony with the long running history of civic gatherings at Bayview Park, the cross became the site of community events to honor, and mourn the loss of, President Franklin Delano Roosevelt and to observe regular Memorial Day and Veterans’ Day commemorations. (Dkt. 30-3 at 2; 30-7 at 5; 30-8 at 39-41.)

In light of the community’s embrace of the Bayview Cross as a place of remembrance, and consistent with the club’s purpose of neighborhood enhancement, Pensacola Jaycees built and donated a bandstand to the City in 1949 to facilitate community gatherings at the site. (Dkt. 30-1 at 50-51; 30-2 at 2; 30-3 at 2; 30-8 at 53, 55-56.) Twenty years later in 1969, Pensacola Jaycees built and donated a concrete cross to replace the pine cross that had stood for almost 30 years. (Dkt. 30-1 at 51; 30-2 at 2; 30-3 at 2; 30-8 at 13.) The City of Pensacola did not pay for either the bandstand or the cross. (Dkt. 30-2 at 2.) The City’s only involvement is to maintain the park and the various structures within it, an activity the City would undertake without regard to the nature or purpose of those structures and which results in de minimus costs related to the Bayview Cross of .03% of the City’s annual budget. (Dkt. 30-2 at 3; 36-1 at 2-3; 41 at 2.)

Not everything Pensacola Jaycees sponsored during its 89-year history was successful, but the Bayview Cross and related sunrise gatherings quickly became part of the fabric of the Pensacola community. (*See* Dkt. 30-1 at 62 (tourist information center closed and “nobody except the Jaycees mourned the closing”).) The Easter sunrise gathering was seen as a “traditional” event that became a seasonal “highlight[.]” (Dkt. 30-7 at 30, 38, 45; 30-8 at 13.) And the Bayview Cross was regularly used by community members for a variety of purposes, both secular and religious. (Dkt. 30-2 at 2-3; 30-3 at 2.) Thus, for 75 years, no objections were voiced regarding either the cross or the gatherings—until this lawsuit. (Dkt. 30-2 at 4.)

## **II. Appellants’ refusal to remove the Bayview Cross does not violate the Establishment Clause.**

Given the history of and the purposes behind the Bayview Cross and its related gatherings, the district court’s judgment ordering removal of the Cross is not required by the Establishment Clause, regardless of the test applied. As the understandably frustrated district court recognized, there is a “hodgepodge” of different tests for determining whether “displays of religious imagery” contravene the Establishment Clause. (Dkt. 41 at 9 (quoting *Utah Highway Patrol Ass’n v. Am. Atheists, Inc.*, 565 U.S. 994 (2011) (Thomas, J., dissenting from denial of certiorari)). But none of the tests applied by the Supreme Court supports, much less requires, the district court’s decision.

**A. The Bayview Cross satisfies the “historical test” as a longstanding symbol memorializing the sacrifice of the nation’s soldiers.**

Appellants’ actions meet the historical test set out in the Supreme Court’s most recent Establishment Clause jurisprudence because the use of crosses as passive memorials is “deeply embedded in the history and tradition of this country.” *Van Orden v. Perry*, 545 U.S. 677, 688 (2005) (quoting *Marsh v. Chambers*, 463 U.S. 783, 786 (1983)); *see generally* *Salazar v. Buono*, 559 U.S. 700, 715-16, 718-19, 721 (2010) (recognizing the “historical meaning” attributable to publicly displayed crosses in our nation). In *Van Orden*, for example, the plurality upheld a Ten Commandments monument based on “the nature of the monument and . . . our Nation’s history.” *Id.* at 686. The monument was constitutional because it was consistent with “the rich American tradition of religious acknowledgments” and had a historical significance consistent with other local monuments. *Id.* at 690-92. Three years ago, the court applied a similar test to uphold a New York town’s practice of opening council meetings with prayer. *Town of Greece v. Galloway*, 134 S. Ct. 1811, 1825 (2014) (the practice of legislative prayer “has become part of our heritage and tradition” and was not used in a context that would show government coercion or intimidation).

The Appellants’ decision not to remove the Bayview Cross is no different. Like Ten Commandments displays and legislative prayer, the practice of using crosses as a public memorial is “part of our heritage and tradition.” *Id.* That

tradition includes the use of crosses “to honor our Nation’s fallen soldiers” and to commemorate “heroic acts, noble contributions, and patient striving.” *Buono*, 559 U.S. at 715, 721. Crosses fill this historic, memorial role not just in Bayview Park, but in parks throughout this nation and overseas. (App. Br. Addendum 2 (describing crosses memorializing those who served in the nation’s wars from the Revolutionary War onward).) Like these crosses, the Bayview Cross is a passive monument that has historic significance to the Pensacola community as a “site of remembrance services” for those who have served in the nation’s wars. (Dkt. 30-3 at 2; *see* 30-7 at 41-42, 47, 55; 30-8 at 6, 33.) Moreover, the long, unchallenged history of the Bayview Cross as a gathering spot for the community demonstrates that the cross has no coercive purpose. *See Van Orden*, 545 U.S. at 702.

**B. The Bayview Cross satisfies the “legal judgment test” as a passive monument erected by a secular group that has stood unchallenged for 75 years.**

Similarly, the Appellants’ refusal to tear down the cross is acceptable under the legal judgment test described by Justice Breyer in his *Van Orden* concurrence because the message, context, and community reaction to the Bayview Cross are consistent with the purposes of the Establishment Clause. *Van Orden*, 545 U.S. at 700-02. As with the Ten Commandments monument in *Van Orden*, the Bayview Cross conveys a dual religious and historical message. Specifically, while the cross is a recognized symbol of Christianity, it is also a symbol of commemoration,



and the only text associated with the Bayview Cross confirms that message. (Dkt. 30 at 12 (dedicating bandstand to former Pensacola Jaycees president and noting the sponsorship and donation by Pensacola Jaycees)).

The context surrounding the Bayview Cross further demonstrates the secular nature of both Pensacola Jaycees as donor and Bayview Park as the location of the cross. Like the Fraternal Order of Eagles in *Van Orden*, Pensacola Jaycees was “a private civic (and primarily secular) organization” whose donation and sponsorship is prominently acknowledged at the site—distancing the City from any religious message. *See Van Orden*, 545 U.S. at 701-02; *supra* at 3-6. Similarly, Bayview Park, like the Texas Capitol grounds, “suggests little or nothing of the sacred.” *Van Orden*, 545 U.S. at 702. In fact, the Bayview Park has no relation either to the sacred or to the imprimatur of the government, distancing the Bayview Cross from any perception of coercive government involvement. Finally, the Bayview Cross has stood unchallenged for over 75 years, a span of time Justice Breyer considered “determinative.” *Id.* at 702 (assessing 40-year span without challenges).

**C. The Bayview Cross satisfies the *Lemon* test because the City’s limited action of permitting the cross had a secular purpose.**

Finally, to the extent it applies, the Appellants’ actions satisfy the test in *Lemon v. Kurtzman*, 403 U.S. 602 (1971).

The first prong of *Lemon*, the only element reached by the district court, requires a “plausible secular purpose” for the challenged action. *King v. Richmond*

*County*, 331 F.3d 1271, 1277 (11th Cir. 2003). The focus of this element “is on the government’s purpose, and not that of a private actor.” *Am. Atheists, Inc. v. Davenport*, 637 F.3d 1095, 1118 (10th Cir. 2010) (emphasis in original). And yet, in assessing this prong, most of the district court’s focus was on the building and dedication of the Bayview Cross—actions taken by Pensacola Jaycees, not the Appellants. (Dkt. 41 at 19; 30-1 at 51; 30-2 at 2; 30-3 at 2; 30-8 at 13.)

No constitutionally impermissible purpose can be gleaned from Pensacola Jaycees’ actions. The sunrise gatherings sponsored by Pensacola Jaycees qualify as private speech in a “quintessential public forum[.]” *Perry Education Ass’n v. Perry Local Educators’ Ass’n*, 460 U.S. 37, 45 (1983). They were sponsored by a private civic organization (Pensacola Jaycees) and were supported by other private local organizations (the Boy Scouts, the Salvation Army, and other civic groups) for the benefit of the local community. Accordingly, the Appellants were constitutionally prohibited from barring the sunrise gatherings for containing Christian content and could not bar them for containing religious content without showing that prohibition was a “narrowly tailored” response to serve a “compelling government interest.” *Pleasant Grove City v. Summum*, 555 U.S. 460, 469 (2009). There has been no suggestion from Plaintiffs that either prong of this exacting standard could have been met here.

Similarly, at the time Pensacola Jaycees erected the cross at issue in this case, the previous wooden cross had been standing there for 30 years. The cross and surrounding site had obtained historical significance in the community as a place of dedication and remembrance. (Dkt. 30-3 at 2; *see* 30-7 at 41-42, 47, 55; 30-8 at 6, 33.) Pensacola Jaycees' decision to build a more lasting cross at the site preserved the historical value of the Bayview Cross for the community. Appellants' decision to permit Pensacola Jaycees' actions likewise reflect an appropriate purpose to preserve a heritage site for the City of Pensacola.

The other two *Lemon* prongs are also satisfied. The long history of the Bayview Cross as a site for secular as well as religious gatherings, its location in a remote corner of a city park, and its donation by a private secular organization, defuse any risk of either government endorsement of, or entanglement with, religion. *King*, 331 F.3d at 1275, 1282.

#### **CONCLUSION AND PRAYER**

For the foregoing reasons, JCI Florida respectfully requests that, to the extent there is jurisdiction, the Court reverse the district court and enter summary judgment in favor of the Appellants.

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:

■ this Brief contains 3,090 words, excluding the parts of the brief exempted by FED. R. APP. P. 32(f) and 11th Cir. R. 32-4.

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:

■ this Brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in Times New Roman 14-point font.

Dated: October 3, 2017.

/s/ Ryan Paulsen  
Ryan Paulsen  
Attorney for *Amicus Curiae*

**CERTIFICATE OF SERVICE**

The undersigned certifies that on this 3rd day of October, 2017, a copy of the foregoing document was electronically transmitted to the United States Court of Appeals for the Eleventh Circuit using the Court's ECF filing system and was served on all counsel of record via the Court's ECF filing system.

/s/ Ryan Paulsen

Ryan Paulsen

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