

August 11, 2016

The Hon. Carl Hokanson  
Mayor of Roselle Park  
Borough Hall  
110 East Westfield Avenue  
Roselle Park, NJ 07204

Via email: [chokanson@rosellepark.net](mailto:chokanson@rosellepark.net)

**RE: Unconstitutional Cross**

Dear Mayor Hokanson:

A resident of your community has contacted our office seeking assistance in connection with what he correctly perceives as a constitutional violation occurring under your authority. Specifically, he reports that a religious display was erected on public property on or about July 29, 2016, that violates the Establishment Clause of the First Amendment of the United States Constitution.

The display in question (photo below) depicts a soldier kneeling before a Christian cross. Though apparently intended as a recognition of fallen military personnel, the display favors and endorses Christianity by suggesting that the government honors the service and sacrifice of Christian soldiers to the exclusion of others. If your government wishes to recognize fallen military personnel through a display, it must do so in a religiously neutral manner.



It is our understanding that you personally authorized this display on government property, telling some residents that it had been approved by the library trustees. It is also our understanding that there is some uncertainty as to whether the record supports the claim that the trustees knew or approved of the display before it went up. Either way, it appears that there is no dispute that the display was put up with your knowledge and approval, and that borough employees, while in the course of their employment, installed it.

Furthermore, the record is clear that borough residents have seen the display and complained to you about it. These complaints have apparently been dismissed, and there has been no indication that the display will be removed.

This letter demands that the cross display be removed immediately. If not, you are inviting litigation. The American Humanist Association (AHA) is a national nonprofit organization with over 560,000 supporters and members across the country, including many in New Jersey. The mission of AHA's legal center is to protect one of the most fundamental principles of our democracy: the separation of church and state. Our legal center includes a network of cooperating attorneys from around the country, including New Jersey, and we have litigated constitutional cases in state and federal courts from coast to coast, including New Jersey.

The First Amendment's Establishment Clause "commands a separation of church and state." *Cutter v. Wilkinson*, 544 U.S. 709, 719 (2005). It requires the "government [to] remain secular, rather than affiliate itself with religious beliefs or institutions." *Cnty. of Allegheny v. ACLU*, 492 U.S. 573, 610 (1989). Courts "pay particularly close attention to whether the challenged governmental practice either has the purpose or effect of 'endorsing' religion." *Id.* at 592. Not only must the government not advance, promote, affiliate with, or favor any particular religion, it "may not favor religious belief over disbelief." *Id.* at 593 (citation omitted). Further, the Establishment Clause specifically commands that a city "pursue a course of neutrality toward religion" despite a community's "historical acceptance" of a particular religious monument on public property. *ACLU v. Rabun Cnty. Chamber of Commerce, Inc.*, 698 F.2d 1098, 1111 (11th Cir. 1983) (quoting *School District of Abington Township v. Schempp*, 374 U.S. 203 (1963)) (cross placed in a state park violated the Establishment Clause).

To comply with the Establishment Clause, a government practice must pass the *Lemon* test,<sup>1</sup> pursuant to which it must: (1) have a secular purpose; (2) not have the effect of advancing or endorsing religion; and (3) not foster excessive entanglement with religion. *Allegheny*, 492 U.S. at 592. Government action "violates the Establishment Clause if it fails to satisfy any of these prongs." *Edwards v. Aguillard*, 482 U.S. 578, 583 (1987).

The borough's Christian cross prominently displayed on government property violates the Establishment Clause as it strongly affiliates the government with religion and Christianity specifically, while sending a stigmatic message to non-Christians that they are outsiders, unwelcome in their own community. *Allegheny*, 492 U.S. at 606-07 ("the [Establishment] Clause

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<sup>1</sup> The test is derived from *Lemon v. Kurtzman*, 403 U.S. 602, 612 (1971).

forbids a city to permit the permanent erection of a large Latin Cross”); *id.* at 661 (Kennedy, J., concurring and dissenting in part) (same).

The courts have been virtually unanimous in holding that a government cross display, *in any context*, is unconstitutional. *See id.* at 606-07; *Trunk v. San Diego*, 629 F.3d 1099 (9th Cir. 2011), *cert. denied*, 132 S.Ct. 2535 (2012) (longstanding war memorial cross); *Am. Atheists, Inc. v. Duncan*, 616 F.3d 1145 (10th Cir. 2010), *cert. denied*, 132 S.Ct. 12 (2011) (individualized roadside memorial crosses for troopers); *Buono v. Norton*, 371 F.3d 543 (9th Cir. 2004) (seven-foot war memorial cross), *rev'd on other grounds*, *Salazar v. Buono*, 559 U.S. 700 (2010) (plurality) (questioning need for injunction after transfer to private entity); *Carpenter v. San Francisco*, 93 F.3d 627 (9th Cir. 1996) (concrete landmark cross); *Separation of Church & State Comm. v. City of Eugene*, 93 F.3d 617 (9th Cir. 1996) (war memorial); *Robinson v. City of Edmond*, 68 F.3d 1226 (10th Cir. 1995) (cross on insignia); *Ellis v. La Mesa*, 990 F.2d 1518 (9th Cir. 1993) (war memorial cross, private memorial cross, and insignia cross); *Gonzales v. North Twp. Lake Cnty.*, 4 F.3d 1412 (7th Cir. 1993) (war memorial); *Harris v. City of Zion*, 927 F.2d 1401 (7th Cir. 1991) (insignia); *ACLU v. St. Charles*, 794 F.2d 265 (7th Cir. 1986) (cross on building); *Friedman v. Bd. of Cnty. Comm'rs*, 781 F.2d 777 (10th Cir. 1985) (en banc) (insignia); *ACLU v. Rabun Cnty. Chamber of Commerce, Inc.*, 698 F.2d 1098 (11th Cir. 1983) (memorial cross); *Gilfillan v. Philadelphia*, 637 F.2d 924 (3d Cir. 1980) (platform containing cross); *Am. Humanist Ass'n v. Lake Elsinore*, 2014 U.S. Dist. LEXIS 25180 (C.D. Cal. 2014) (war memorial tombstone depicting cross headstones); *Cabral v. City of Evansville*, 958 F. Supp. 2d 1018 (S.D. Ind. 2013), *app. dism.*, 759 F.3d 639 (7th Cir. 2014) (six-foot crosses within “Veterans Memorial Parkway”); *Summers v. Adams*, 669 F. Supp. 2d 637 (D.S.C. 2009) (license plate cross); *Am. Atheists, Inc. v. City of Starke*, 2007 U.S. Dist. LEXIS 19512 (M.D. Fla. 2007) (water tower); *ACLU v. City of Stow*, 29 F. Supp. 2d 845 (N.D. Ohio 1998) (insignia); *Granzeier v. Middleton*, 955 F. Supp. 741 (E.D. Ky. 1997), *aff'd*, 173 F.3d 568 (6th Cir. 1999) (temporary sign with 4-inch cross); *Mendelson v. St. Cloud*, 719 F. Supp. 1065 (M.D. Fla. 1989) (water tower); *Jewish War Veterans v. United States*, 695 F. Supp. 3 (D.D.C. 1988) (war memorial cross on military base); *ACLU v. Miss. Gen. Servs. Admin.*, 652 F. Supp. 380 (S.D. Miss. 1987) (cross on building); *Libin v. Greenwich*, 625 F. Supp. 393 (D. Conn. 1985) (3-by-5 cross on firehouse); *Greater Houston Chapter ACLU v. Eckels*, 589 F. Supp. 222 (S.D. Tex. 1984), *reh'g denied*, 763 F.2d 180 (5th Cir. 1985) (war memorial); *Fox v. Los Angeles*, 22 Cal.3d 792 (1978) (cross on building); *see also Joki v. Bd. of Educ.*, 745 F. Supp. 823, 829-30 (N.D. N.Y. 1990) (“There is abundant case law holding unconstitutional the prominent display of a cross”).

Many of these courts, including but not limited to the Seventh, Ninth, Tenth, and Eleventh Circuits, have specifically ruled that a government memorial cross is unconstitutional. (*Id.*) A government cross has been found unconstitutional even when it:

- consists of grave markers for individual fallen troopers, *Duncan*, 616 F.3d at 1162;
- accurately replicates a World War II tombstone<sup>2</sup>
- includes other secular and patriotic symbols or Stars of David<sup>3</sup>
- is longstanding<sup>4</sup>

<sup>2</sup> *Am. Humanist Ass'n v. City of Lake Elsinore*, 2014 U.S. Dist. LEXIS 25180 (C.D. Cal. Feb. 25, 2014)

<sup>3</sup> *Id.*; *ACLU v. Eckels*, 589 F. Supp. 222 (S.D. Tex. 1984)

<sup>4</sup> *Trunk*, 629 F.3d at 1110, *Gonzales v. North Twp. of Lake Cnty.*, 4 F.3d 1412 (7th Cir. 1993)

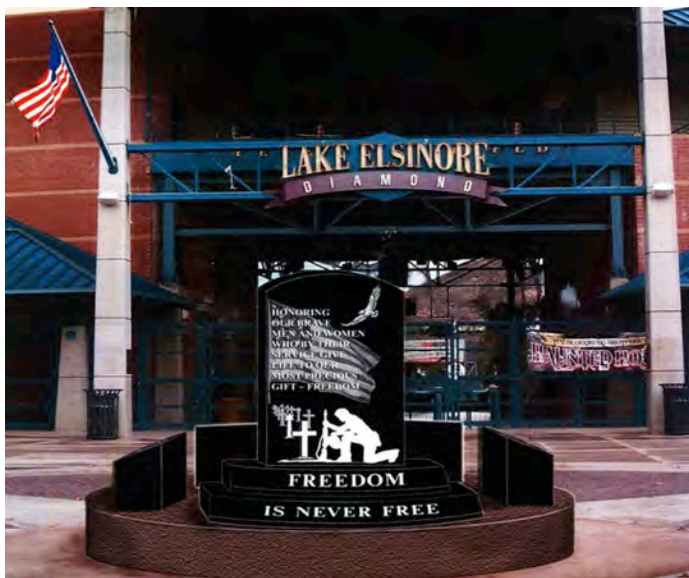
- promotes tourism<sup>5</sup>
- serves as a historical landmark<sup>6</sup> and
- has independent historical significance<sup>7</sup>

Justice Kennedy also observed:

I doubt not, for example, that the [Establishment] Clause forbids a city to permit the permanent erection of a large Latin cross on the roof of city hall. . . . [S]uch an obtrusive year-round religious display would place the government's weight behind an obvious effort to proselytize on behalf of a particular religion.<sup>8</sup>

“[C]ase law shows that exclusively religious symbols, such as a cross, will almost always render a governmental [display] unconstitutional.” *King v. Richmond Cnty.*, 331 F.3d 1271, 1285 (11th Cir. 2003). Indeed, “[b]ecause of the Latin cross’s strong ties to Christianity, even when a cross occupies only one part of a la[r]ger display, courts have almost unanimously held that its effect is to communicate that the display as a whole endorses religion.” *Lake Elsinore*, 2014 U.S. Dist. LEXIS 25180, at \*39-40 (citations omitted).

More importantly, *Lake Elsinore* specifically held that a war memorial display featuring a soldier kneeling to a World War II cemetery cross – virtually identical to the soldier in your borough’s display – violated the Establishment Clause and was thus permanently enjoined:



<sup>5</sup> *Rabun*, 698 F.2d 1098; *Gilfillan v. City of Philadelphia*, 637 F.2d 924 (3d Cir. 1980)

<sup>6</sup> *Sep. of Church & State Comm. v. City of Eugene*, 93 F.3d 617, 620 (9th Cir. 1996); *Ellis*, 990 F.2d at 1525; *Mendelson*, 719 F. Supp. 1065

<sup>7</sup> *Carpenter*, 93 F.3d at 630; *Harris v. City of Zion*, 927 F.2d 1401, 1414 (7th Cir. 1991)

<sup>8</sup> *Allegheny*, 492 U.S. at 661

Turning to the facts here, the borough’s Latin cross unquestionably violates the Establishment Clause pursuant to *each* prong of the *Lemon* test. “There is no question that the Latin cross is a symbol of Christianity, and that its placement on public land . . . violates the Establishment Clause.” *Eugene*, 93 F.3d at 620. *See also Mendelson*, 719 F. Supp. at 1069 (“[A] cross has always been a symbol of Christianity, and it has never had any secular purpose.”).

Where, as here, the government promotes an “intrinsically religious” display, such as a cross, it “cannot meet the secular purpose prong” of the *Lemon* test. *Jager v. Douglas County School Dist.*, 862 F. 2d 824, 829-30 (11th Cir. 1989). *See also Stone v. Graham*, 449 U.S. 39, 41 (1980) (holding that “[t]he Ten Commandments are undeniably a sacred text in the Jewish and Christian faiths, and no legislative recitation of a supposed secular purpose can blind us to that fact.”); *N.C. Civil Liberties Union v. Constangy*, 947 F.2d 1145, 1150 (4th Cir. 1991). When the government utilizes “religious symbols . . . its ability to articulate a secular purpose becomes the crucial focus under the Establishment Clause.” *Rabun*, 698 F.2d at 1110 (Latin cross in public park held unconstitutional under *Lemon*) (internal footnote omitted). “Several courts—including the Supreme Court—have noted that the presence of patently religious symbols, such as the Latin cross, suggest that the purpose of erecting a monument is religious motivated.” *Lake Elsinore*, 2013 U.S. Dist. LEXIS 188202, \*36.

Federal courts have uniformly ruled that the “cross is a universally recognized symbol of Christianity.” *Rabun*, 698 F.2d at 1103; *Trunk*, 629 F.3d at 1110-11 (citing *Buono v. Norton*, 371 F.3d 543, 544-45 (9th Cir. 2004); *Eugene*, 93 F.3d at 620; *Carpenter*, 93 F.3d at 630; *Ellis*, 990 F.2d at 1525-27).<sup>9</sup> As such, the courts have made it clear that the government has no secular purpose in displaying the cross on its property. *See Rabun*, 698 F.2d at 1110-11 (“even if the . . . purpose for constructing the cross was to promote tourism, this . . . would not have provided a sufficient basis for avoiding conflict with the Establishment clause” as secular means were available); *Gonzales*, 4 F.3d at 1421 (the court could find “no secular purpose served by a crucifix”); *Harris*, 927 F.2d at 1414 (small cross on city logo); *City of Lake Elsinore*, 2014 U.S. Dist. LEXIS 25180, at \*23-24; *City of Starke*, 2007 U.S. Dist. LEXIS 19512, at \*14; *Eckels*, 589 F. Supp. 222 (war memorial cross); *Gilfillan*, 637 F.2d at 930 (platform containing a 36-foot-tall cross); *Mendelson*, 719 F. Supp. at 1069 (the cross is “unmistakably a universal symbol of Christianity, and it [therefore] has no secular purpose.”); *Mississippi State*, 652 F. Supp. at 382 (“it is clear that the overriding and motivating purpose of the display is to convey a message of endorsement of the Christian religion.”); *Libin*, 625 F. Supp. at 399 (explaining that “[b]ecause the cross has no meaning in the context of the celebration of Christmas except as religious symbol, there can be no secular purpose for including it in a Christmas display.”); *Fox v. City of Los Angeles*, 22 Cal.3d 792 (1979) (cross on city hall had religious purpose).

Here, as in the many cases cited above, there is no secular purpose “for the display of the cross.” *Mississippi State*, 652 F. Supp. at 383. Indeed, the “only purpose which can be ascribed

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<sup>9</sup> *See also Robinson*, 68 F.3d at 1232 (“The religious significance and meaning of the Latin or Christian cross are unmistakable.”); *Gonzales*, 4 F.3d at 1418 (“we are masters of the obvious, and we know that the crucifix is a Christian symbol . . . In fact, the crucifix is arguably the quintessential Christian symbol.”); *City of St. Charles*, 794 F.2d at 271 (“It is, indeed, the principal symbol of Christianity . . . When prominently displayed on a [government property] . . . the cross dramatically conveys a message of governmental support for Christianity, whatever the intentions of those responsible for the display may be.”); *Friedman*, 781 F.2d at 782 (government’s prominent use of seal bearing Latin cross “conveys a strong impression to the average observer that Christianity is being endorsed”).

to the display of the cross is to either advance or endorse the Christian religion.” *Id.* And, if the government “intended by their official activity to create a display of singularly religious significance, then their action was illegal.” *Id.*

The government “cannot overcome the first *Lemon* prong merely by articulating” some secular purpose. *Church of Scientology Flag Serv. v. City of Clearwater*, 2 F.3d 1514, 1527 (11th Cir. 1993). A display “in which an impermissible purpose predominates is invalid even if the legislative body was motivated in part by legitimate secular objectives.” *Id.* See *Hall*, 630 F.2d at 1020-21. “[A]ttempting to further an ostensibly secular purpose through avowedly religious means is considered to have a constitutionally impermissible purpose.” *Holloman v. Harland*, 370 F.3d 1252, 1286 (11th Cir. 2004).

For instance, in *Gilfillan*, the Third Circuit held that a city violated the Establishment Clause under the purpose prong of *Lemon* by funding and constructing a platform featuring a cross. 637 F.2d at 929. This was so, even though the platform “favorably enhanced the image of the City.” *Id.* at 927. The court reasoned that “if some peripheral public relations benefit can constitute a sufficient secular purpose, then the purpose test is destroyed[.]” *Id.* at 930.

The Eleventh Circuit in *Rabun* adopted this reasoning in holding that a memorial cross failed the purpose prong, explaining: “even if the . . . purpose for constructing the cross was to promote tourism, this alleged secular purpose would not have provided a sufficient basis for avoiding conflict with the Establishment Clause.” 698 F.2d at 1111 (citations omitted). Similarly, in *Mendelson*, a cross was given as a gift to a Florida city and was placed on the city’s water tower. 719 F. Supp. at 1067. The city contended “that the cross has secular and historical value as a guidepost for fishermen and pilots and as a landmark.” *Id.* at 1069-70. Yet the district court in Florida declared: “Even if the court found the City’s purpose to be truly secular, a government may not ‘employ religious means to reach a secular goal unless secular means are wholly unavailing.’” *Id.* (citation omitted). For the foregoing reasons, it is clear that the City’s cross violates the Establishment Clause under the first prong of the *Lemon* test, without more.

But, regardless of the borough’s purpose for displaying the cross, it clearly fails *Lemon*’s effect prong. See *Trunk*, 629 F.3d at 1109-10 (memorial unconstitutional under effect prong, despite secular purpose); *Duncan*, 616 F.3d at 1154 (same); *Jewish War Veterans*, 695 F. Supp. 3 (same). The “effect prong asks whether, irrespective of government’s actual purpose, the practice under review in fact conveys a message of endorsement or disapproval [of religion].” *Wallace v. Jaffree*, 472 U.S. 38, 56 n.42 (1985) (quotation marks omitted). The “prohibition against governmental endorsement of religion ‘preclude[s] government from conveying or attempting to convey a message that religion or a particular religious belief is favored or preferred.’” *Allegheny*, 492 U.S. at 593 (citation omitted). Whether “the key word is ‘endorsement’ ‘favoritism,’ or ‘promotion,’ the essential principle remains the same. The Establishment Clause, at the very least, prohibits government from appearing to take a position on questions of religious belief[.]” *Id.* at 593-94.

The “advancement need not be material or tangible.” *Friedman*, 781 F.2d at 781. An important concern of the effects test is “whether the symbolic union of church and state...is sufficiently likely to be perceived by adherents...as an endorsement, and by the nonadherents as

a disapproval[.]” *Grand Rapids Sch. Dist. v. Ball*, 473 U.S. 373, 390 (1985). Even the “mere appearance of a joint exercise of authority by Church and State provides a significant symbolic benefit to religion,” and, therefore, has the impermissible effect of advancing religion. *Larkin v. Grendel’s Den*, 459 U.S. 116, 126-27 (1982). By way of example, in *Granzeier v. Middleton*, the court held that a government sign depicting a small (4-inch) “clip art” cross violated the Establishment Clause reasoning, “the sign could be, and was in fact, perceived by reasonably informed observers, to be a government endorsement of the Christian religion. 955 F. Supp. 741, 746-47 (E.D. Ky. 1997), *aff’d*, 173 F.3d 568 (6th Cir. 1999). The court accepts that this apparent endorsement was not intended, but this made no difference in the observer’s perception.”

The borough’s decision to maintain a cross on its property inevitably has the effect of advancing Christianity. “The religious significance and meaning of the Latin or Christian cross are unmistakable.” *Robinson*, 68 F.3d at 1232. Numerous courts have thus held that the government’s display of a cross unconstitutionally endorses Christianity and thus fails the second prong of *Lemon*.<sup>10</sup>

“There is *no question* that the Latin cross is a symbol of Christianity, and that its placement on public land...violates the Establishment Clause.” *Eugene*, 93 F.3d at 620 (emphasis added). *Accord Allegheny*, 492 U.S. at 599. The Seventh Circuit held in *St. Charles*: “When prominently displayed on [government property]...the cross dramatically conveys a message of governmental support for Christianity.” 794 F.2d at 271. Federal courts have been virtually unanimous in concluding that the government’s display of a cross, including for commemorative purposes, unconstitutionally endorses Christianity. *See Trunk; Duncan; Eugene; Gonzales; Ellis; Lake Elsinore; Jewish War Veterans; Eckels, supra*.

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

The conclusion that the “cross is a Christian religious symbol...does not, of course, end the matter.” *Am. Humanist Ass’n v. Lake Elsinore*, 2013 U.S. Dist. LEXIS 188202, \*43 (C.D.

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<sup>10</sup> *See, e.g., Trunk*, 629 F.3d at 1110-11; *Duncan*, 616 F.3d 1145 (individualized memorial crosses for state troopers on public roadside); *Eugene*, 93 F.3d 617 (war memorial cross erected by private group in public park); *Gonzales*, 4 F.3d 1412 (war memorial crucifix in public park); *City of Lake Elsinore*, 2014 U.S. Dist. LEXIS 25180; *Jewish War Veterans*, 695 F. Supp. 3 (memorial cross on military base); *Eckels*, 589 F. Supp. 222 (three crosses and Star of David war memorial in public park). *See also Allegheny*, 492 U.S. at 599 (using the display of a cross in a government building as the prototypical example of a display that would convey government “endorsement of Christianity”); *Carpenter*, 93 F.3d at 630; *Ellis*, 990 F.2d at 1525- 27; *Mendelson*, 719 F. Supp. at 1069 (“no federal case has ever found the display of a Latin cross on public land by a state or state subdivision to be constitutional.”); *Jewish War Veterans*, 695 F. Supp. at 8 (“defendants are unable to cite a single federal case where a cross . . . has survived Establishment Clause scrutiny.”); *Mississippi State*, 652 F. Supp. at 384-385 (“in no other federal case either before or since *Lynch v. Donnelly* has the public display of a cross by a state or subdivision thereof been found to be constitutional.”).

Cal. 2013) (citing *Trunk*). “It does, however, form a considerable obstacle to [the City]...[T]he vast majority of cases to have considered the presence of Latin crosses on city monuments, seals, or displays have found them to be unconstitutional.” *Id.* at n.9 (emphasis added). Even the Supreme Court in *Allegheny* found “that erection of a cross on government property would clearly violate the Establishment Clause.” *Id.*

That the borough’s cross purports to be a war memorial only makes this message of religious endorsement even more blatant and stigmatizing. The government’s use of a

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

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

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

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

In *Trunk*, the Ninth Circuit concluded that a “historically significant war memorial” cross, surrounded by thousands of “secular elements,” and located far from any government buildings, unconstitutionally projected “a message of religious endorsement,” even though “Congress found that the Memorial has stood as a tribute to U.S. veterans for over fifty-two years.” 629 F.3d at 1104-06, 1118. The court reasoned that a war memorial cross “creates an appearance of honoring only those servicemen of that particular religion.” *Id.*

In *Duncan*, the Tenth Circuit held that thirteen twelve-foot roadside crosses, functioning expressly as memorials for individual fallen Utah Highway Patrol troopers for their entire history, unconstitutionally endorsed Christianity even though the memorials included the trooper’s name in large text, his picture, a plaque, and biographical information. 616 F.3d at 1150-51, 1161-62. Unlike here, the crosses were privately owned and funded, and the government issued a statement that it “neither approves or disapproves the memorial marker.” *Id.* at 1154. The Tenth Circuit agreed “a reasonable observer would recognize these memorial crosses as symbols of death,” but concluded they had “the impermissible effect of...endors[ing] Christianity.” *Id.* at 1161.



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

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

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

In *Jewish War Veterans*, the court held that a large war memorial cross on a military base failed the effect prong of *Lemon*, even though it had a conceded secular purpose. 695 F. Supp. at 7. And in *Eckels*, the court held that three privately-funded, privately-constructed crosses and a Star of David war memorial in a Texas park unconstitutionally endorsed religion. 589 F. Supp. at 228-29, 234-35. The VFW proposed the idea of creating a “war memorial” and “sponsored a contest to select a design.” *Id.* The court could “reach no other conclusion but that the symbols’ primary or principal effect” is to “give the impression that only Christians and Jews are being honored[.]” *Id.*

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

Another recent case, *Cabral*, found that a display of “thirty-one, six-foot-tall Crosses” for only “a two-week period” in “Veterans Memorial Parkway,” would unconstitutionally endorse Christianity even though it would be temporary, privately funded and constructed, and bear a prominent, express disclaimer “of a size equal.” 958 F. Supp. 2d at 1022-27.

As the above cases demonstrate, the fact that the Cross may be recognized “as a war memorial, [does] not obviate the appearance of [religious] preference.” *Ellis*, 990 F.2d at 1528. The cross “does not possess an ancillary meaning as a secular or non-sectarian war memorial.” *Trunk*, 629 F.3d at 1116. Memorial status does not nullify a cross’s “religious sectarian content because a memorial cross is not a generic symbol of death; it is a Christian symbol of death that

signifies or memorializes the death of a Christian.” 616 F.3d at 1161-62 (emphasis in original). There is simply “no evidence...that the cross has been widely embraced by”—or even applied to—“non-Christians as a secular symbol.” *Id.*

Furthermore, there is a clear understanding amongst the public that this is a Christian symbol, and this has the effect of endorsing or advancing Christianity. Such “the actions and statements of . . . the community at large . . . also contribute to the perception that the memorial [is] viewed as endorsing religion. In analyzing the effect of the memorial, these statements are probative.” *Lake Elsinore*, 2014 U.S. Dist. LEXIS 25180, at \*35-36. *See Trunk*, 629 F.3d at 1119-20 & n.19; *Green*, 568 F.3d at 800 (the reasonable observer would be aware of the “community's response to the Monument”); *Lund*, 2015 U.S. Dist. LEXIS 57840, at \*45; *City of Starke*, 2007 U.S. Dist. LEXIS 19512, at \* 13-14.

The third *Lemon* prong, the question of excessive government entanglement with religion, is also violated here. Like the Establishment Clause generally, the prohibition on excessive government entanglement with religion “rests upon the premise that both religion and government can best work to achieve their lofty aims if each is left free from the other within its respective sphere.” *McCullum v. Bd. of Educ.*, 333 U.S. 203, 212 (1948).<sup>11</sup> Several courts have specifically ruled that government cross displays foster unconstitutional entanglement with religion.<sup>12</sup> In this situation, “where the underlying issue is the deeply emotional one of Church-State relationships, the potential for seriously divisive political consequences needs no elaboration.” *Comm. for Public Educ. & Religious Liberty v. Nyquist*, 413 U.S. 756, 797 (1973).

In view of the aforementioned authorities, it is clear that the borough is in violation of the Establishment Clause. This letter serves as an official notice of the unconstitutional activity and demands that the borough remove the cross from government property immediately. We kindly ask that you notify us in writing within seven (7) days of receipt of this letter setting forth the steps you will take to rectify this constitutional infringement. As the size and nature of the display do not prohibit immediate removal, we expect that it will be taken down forthwith. Thank you for turning your attention to this important matter.

Very truly yours,

Monica Miller, Esq.

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<sup>11</sup> *See also Tenafly Eruv Ass'n v. Borough of Tenafly*, 309 F.3d 144, 175 n.36 (3d Cir. 2002) (“‘Entanglement’ still matters, however, . . . in the rare case where government delegates civic power to a religious group.”) (citing *Grumet and Larkin*).

<sup>12</sup> *See Rabun*, 698 F.2d at 1109-10 (affirming district court ruling that “the presence of the cross created a potential for political divisiveness”); *City of Starke*, 2007 U.S. Dist. LEXIS 19512, at \*19; *Mendelson*, 719 F. Supp. at 1071; *Jewish War Veterans*, 695 F. Supp. at 14 (war memorial cross was unconstitutional because it generated “religion-based political division.”).